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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

July 1, 2004

Dale H. Edwards, Chief
Bowman Police Department
P. O. Box 37
Bowman, South Carolina 29018

Dear Chief Edwards:

In a letter to this office you questioned a local ordinance which makes the possession of drug paraphernalia unlawful. By such ordinance, an individual guilty of such offense is subject to the penalty of a fine of not more than two hundred dollars or a term of imprisonment not exceeding thirty days. You have questioned whether the local ordinance is superseded by the State law provision which makes possession of drug paraphernalia subject to a civil fine. Pursuant to S.C. Code Ann. Section 44-53-391 (2002),

> (a) It shall be unlawful for any person to advertise for sale, manufacture, possess, sell or deliver, or to possess with the intent to deliver, or sell...(drug)...paraphernalia..
> (c) Any person found guilty of violating the provisions of this section shall be subject to a civil fine of not more than five hundred dollars except that a corporation shall be subject to a civil fine of not more than fifty thousand dollars. Imposition of such fine shall not give rise to any disability or legal disadvantage based on conviction for a criminal offense.

Prior opinions of this office have construed ordinances in other municipalities which dealt with the possession of drug paraphernalia making such a criminal offense. See: Ops. Atty. Gen. dated September 1, 1988 and April 21, 1998. Therefore, your attempt to deal with the issue by making it a separate criminal municipal ordinance violation is apparently not unique.

A municipal ordinance is presumed to be valid. Scranton v. Willoughby, 306 S.C. 421, 412 S.E.2d 424 (1991). An ordinance will not be declared invalid unless it is clearly inconsistent with general state law. Hospitality Ass'n of S.C. v. County of Charleston, 320 S.C. 219, 464 S.E.2d 113 (1995). Furthermore, any ordinance must be demonstrated to be unconstitutional beyond all reasonable doubt. Southern Bell Telephone and Telegraph Co. v. City of Spartanburg, 285 S.C. 495, 331 S.E.2d 333 (1985). As noted in a prior opinion of this office dated January 3, 2003, "...keeping in mind the presumption of validity and the high standard which must be met before an ordinance

Request Letter

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is declared invalid, while this office may comment upon constitutional problems or a potential conflict with general law, only a court may declare an ordinance void as unconstitutional, or preempted by or in conflict with a state statute. Thus,...an ordinance may continue to be enforced unless and until set aside by a court of competent jurisdiction." As provided in S.C. Code Ann. Section 5-7-30 (2003),

> Each municipality of the State, in addition to the powers conferred to its specific form of government, may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of powers in relation to roads, streets, markets, law enforcement, health, and order in the municipality or respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it.... (emphasis added).

A prior opinion of this office dated February 16, 1988 referenced that

> ...police ordinances in conflict with statutes, unless authorized expressly or by necessary implication, are void. A charter or ordinance cannot lower or be inconsistent with a standard set by state law...Similarly stated, any municipal control or prescribing of offenses must conform to, and not conflict with, the constitution, statutes and public policy of the state...

In Hospitality Association of S.C. v. County of Charleston, 320 S.C. 219, 464 S.E.2d 113, 116 (1995), the State Supreme Court recognized the test for resolving the issue of the validity of a local ordinance vis-a-vis state law. The Court stated that

> Determining if a local ordinance is valid is essentially a two-step process. The first step is to ascertain whether the county or municipality that enacted the ordinance had the power to do so. If no such power existed, the ordinance is invalid and the inquiry ends. However, if the local government had the power to enact the ordinance, the next step is to ascertain whether the ordinance is inconsistent with the Constitution or general law of the State.

320 S.C. at 224.

Clearly, the Town had the authority to enact the ordinance making the possession of drug paraphernalia a criminal offense. However, the question remains as to whether the ordinance is inconsistent with State law.

In Barnhill v. City of North Myrtle Beach, 333 S.C. 482, 485-486, 511 S.E.2d 361, 363 (1999), the Court declared that pursuant to Section 5-7-30, "...municipalities enjoy a broad grant of

power regarding ordinances that promote public safety...The exercise of a municipality's police power is valid if it is not arbitrary and has a reasonable relation to a lawful purpose." The Supreme Court provided guidance when scrutinizing whether local ordinances are consistent with State law in its decision in Wrenn Bail Bond Service, Inc. v. City of Hanahan, 335 S.C. 26, 29, 515 S.E.2d 521, 522 (1999) where it stated:

> Where an ordinance is not preempted by State law, the ordinance is valid if there is no conflict with State law. In order for there to be a conflict between a State law and a municipal ordinance, both must contain either express or implied conditions that are inconsistent and irreconcilable with each other. If either is silent where the other speaks, there is no conflict.

A question to be considered in analyzing whether an ordinance is inconsistent with State law is the authority of the local government to regulate in this area. Therefore, the question is whether the ordinance is preempted by State law. The test for preemption of local government regulation is set forth in Bugsy's Inc. v. City of Myrtle Beach, 340 S.C. 87, 94, 530 S.E.2d 890, 893 (2000) in which the State Supreme Court stated:

> In order to pre-empt an entire field, an act must make manifest a legislative intent that no other enactment may touch upon the subject in any way. Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. 550, 397 S.E.2d 662 (1990). In Fine Liquors, Ltd., the Court held, although the General Assembly gave the Alcoholic Beverage Control Commission the sole and exclusive authority to sell beer, wine and alcohol, it had not preempted the field so as to preclude the Town of Hilton Head from passing a zoning ordinance which prohibited internally illuminated "red dot" signs. 304 S.C. at 92.

Applying the "manifest intention" test, the Court in Bugsy's found that "(w)hile the General Assembly has enacted a comprehensive scheme regulating many aspects of video poker machines, the scheme does not manifest an intent to prohibit any other enactment from touching on video poker machines." Id. at 94.

Similarly, in Denene, Inc. v. City of Charleston, 352 S.C. 208, 574 S.E.2d 196 (2002), the State Supreme Court determined that the City of Charleston was not prevented from restricting the hours of on-site consumption of alcohol even in light of the grant of authority to the Department of Revenue (DOR) to regulate the operation of retailers of alcoholic beverages. As stated by the Court, "(a)s a general rule, 'additional regulation to that of State law does not constitute a conflict therewith." 352 S.C. at 214.

Consistent with such, it is my opinion that the ordinance referenced in your letter providing a criminal penalty for the possession of drug paraphernalia is valid. There is no apparent intent on

the part of the State to preempt the field dealing with the prohibition against possessing such paraphernalia. Moreover, such ordinance does not appear to be in conflict with State law.

Sincerely,

Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General