8287 Library

HENRY MCMASTER
ATTORNEY GENERAL

December 15, 2006

The Honorable Jeffrey D. Duncan
Member, House of Representatives
Post Office Box 721
Clinton, South Carolina 29325

Dear Representative Duncan:

We received your letter concerning the enforcement of a City of Clinton ordinance. As you explained in your letter, "[t]he city of Clinton has an ordinance, like many small towns in South Carolina, where colleges and universities are located that deals with off campus student housing. The current city ordinance says that no more than three unrelated persons can live in one residence. Currently, the city is struggling with ways to enforce this ordinance." Thus, you request an opinion of this Office as to the "ways that the city can better enforce this ordinance on their books." Furthermore, you add: "A recent article in the Greenville News indicated that the city of Clemson has a similar ordinance and is enforcing it by issuing a warrant allowing an officer to go to the residence to inspect. If that is a viable means of enforcement, the city of Clinton needs to know that."

Law/Analysis

In our research, we located the ordinance to which we believe you refer. Section 3.13 of the Clinton Zoning Ordinance provides:

> With the exception of a family, the number of occupants permitted to reside in a dwelling unit in a particular zoning district shall comply with the following table on the condition that for each occupant, one (1) off-street parking space shall be provided. In any dwelling unit, only one (1) family, as defined by this ordinance, may occupy a unit. Additionally, in a dwelling unit occupied primarily by a family, two (2) occupants may reside within the dwelling unit. No additional occupants may be permitted on any single household residential lot which contains a separate apartment unit.

Request Letter

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District	Number of Occupants
R-1	Three (3)
R-2, R-3, C-2, C-3, A-R	Four (4)
PD	Set by approved plan

Section 2.3 defines "family" as "One or more persons related by blood, marriage, adoption or guardianship, and not more than three persons not so related, except that mentally and physically handicapped person for whom care is provided on a 24-hour basis shall be construed a family, in accord with the provisions of state law." Section 3.13 also sets forth the compliance and permit requirements associated with group occupied dwellings. This section requires the issuance of an occupancy permit prior to the use of a dwelling unit for group occupancy. Additionally, this provision states:

> Where non-compliance with the provisions of this section or an on-going problem has been determined to exist, the Zoning Administrator shall notify the owner in writing of the nature and extent of the problem, together with instructions to correct the problem within a reasonable time frame. Failure of the owner to comply fully with an order to correct the situation shall constitute a violation of this ordinance resulting in (a) revocation of the occupancy permit, and/or (b) fines and penalties as determined by the Court.

Primarily, you request an opinion as to ways the City of Clinton (the "City") may enforce this ordinance. Per the ordinance, the Zoning Administrator is charged with enforcement. To answer your request, we would be required to speculate on a matter specifically placed in the discretion of the Zoning Administrator. Furthermore, in order to undertake such a task, we must evaluate every possible enforcement mechanism. Thus, we decline to undertake such an analysis as we believe it to be beyond the scope of an opinion of this Office. Nonetheless, you also inquired as to whether the City may enforce the ordinance by obtaining a search warrant to inspect residences to determine whether a violation occurred. This question presents a legal issue, which is appropriately addressed in an opinion of this Office, and therefore, we address this issue below.

The Fourth Amendment to the United States Constitution and article I, section 10 of the South Carolina Constitution (1976) protect individuals from unreasonable searches and seizures. Furthermore, the United States Constitution sets forth the requirement that no search warrant shall be issued unless based upon probable cause "supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend IV. South Carolina's Constitution contains similar language stating: "no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be

searched, the person or thing to be seized, and the information to be obtained." S.C. Const. art I, § 10.

South Carolina courts, as well as courts of other jurisdictions, require specific statutory authority for judges and magistrates to issue search warrants. In State v. Baker, 251 S.C. 108, 109, 160 S.E.2d 556, 556-57 (1968), the South Carolina Supreme Court noted: "There is no common law right to issue search warrants. The issuing authority is subject to the constitutional prohibition against unreasonable searches and seizures as set forth in the fourth amendment to the Constitution of the United States, and subject to statutory control." (emphasis added). Other jurisdictions' courts follow the same reasoning. For instance, the Supreme Court of Washington has consistently held "municipal courts have no inherent authority to issue administrative search warrants, they must rely on an authorizing statute or court rule." City of Seattle v. McCready, 877 P.2d 686, 691 (Wash. 1994). See also, City of Seattle v. McCready, 868 P.2d 134, 141 (Wash. 1994) ("There is . . . no general common law right to issue search warrants."). The courts of Delaware, Iowa, and Kentucky also reached this conclusion. Matter of Brookview Assoc. Petition for A Writ of Prohibition, 506 A.2d 569, 570 (Del. Super. Ct. 1986) ("Justice of the Peace Court only has such jurisdiction as is expressly conferred upon it by statute."); Fisher v. Sedgwick In and For Story County, 364 N.W.2d 183 (Iowa 1985) (finding in the absence of statutory authority a court does not have warrant authority); Stovall v. A.O. Smith Corp., 676 S.W.2d 475, 476 (Ky. Ct. .App. 1984) (finding the Commissioner of Labor did not have the right of entry under common law and "the courts had no parallel authority to issue administrative search warrants."); State v. Peterson, 194 P. 342, 351 (Wyo. 1920) ("[T]he powers of a justice of the peace are strictly limited to what is conferred upon him by statute."). Moreover, "when a warrant is signed by someone who lacks the legal authority necessary to issue search warrants, the warrant is void ab initio." U.S. v. Scott, 260 F.3d 512, 515 (6th Cir. 2001). See also, U.S. v. Peltier, 344 F.Supp.2d 539, 548 (E.D. Mich. 2004) ("A search warrant signed by a person who lacks the authority to issue it is void as a matter of law.").

Because a court must have authority to issue a search warrant we look to the South Carolina statutes addressing search warrants to determine whether a court, under these circumstances, may issue a search warrant to detect a violation of the ordinance. First, we look to section 17-13-140 of the South Carolina Code (2003), found in the sections of the Code pertaining to criminal procedure and providing for the issuance of search warrants. This provision states, in relevant part:

> Any magistrate or recorder or city judge having the powers of magistrates, or any judge of any court of record of the State having jurisdiction over the area where the property sought is located, may issue a search warrant to search for and seize (1) stolen or embezzled property; (2) property, the possession of which is unlawful; (3) property which is being used or has been used in the commission of a criminal offense or is possessed with the intent to be used as the means for committing a criminal offense or is concealed to prevent a criminal offense from being discovered; (4) property constituting

> evidence of crime or tending to show that a particular person committed a criminal offense; (5) any narcotic drugs, barbiturates, amphetamines or other drugs restricted to sale, possession, or use on prescription only, which are manufactured, possessed, controlled, sold, prescribed, administered, dispensed or compounded in violation of any of the laws of this State or of the United States.

S.C. Code Ann. § 17-13-140.

In determining whether this statute authorizes a judge to issue a search warrant for purposes of enforcing the ordinance, we turn to the rules of statutory interpretation. As recently stated by our Supreme Court in South Carolina Department of Transportation. v. First Carolina Corp. of South Carolina, 369 S.C. 150, ___, 631 S.E.2d 533, 535 (2006):

> The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citations omitted). All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. McClanahan v. Richland County Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002). Whenever possible, legislative intent should be found in the plain language of the statute itself. Whitner v. State, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges, 341 S.C. at 85, 533 S.E.2d at 581.

Based on a plain reading of section 17-13-140, we believe the Legislature intended to allow magistrates, recorders, and judges to issue warrants to search and seize five specific types of property. In comparing the five situations in which a warrant may be issued to the circumstances presented in your letter, we do not believe the inspection of dwelling units for purposes of enforcement of this ordinance falls under any of the five types of searches listed in section 17-13-140. Furthermore, section 17-13-140 is contained in the provisions of the South Carolina Code dealing with criminal procedures. Per the ordinance, a violation may result in a revocation of the owner's occupancy permit or fines and penalties imposed by a court if the owner of the property fails to rectify the problem. This provision, however, does not appear to impose criminal penalties for a violation. Thus, we deduce that a search warrant issued in connection with the violation of the zoning ordinance is for an administrative, rather than a criminal, search. Thus, we do not believe section 17-13-140 may be employed to authorize a magistrate or judge to issue a search warrant to inspect a dwelling unit for a violation of this zoning ordinance.

Nonetheless, several provisions of the South Carolina Code allow courts to issue administrative search warrants under particular circumstances. For instance, section 41-15-260 of the South Carolina Code (Supp. 2005) establishes procedures by which the Commissioner of Labor and employees of the South Carolina Department of Labor may inspect work sites for compliance with the occupational safety and health provisions contained in title 41 of the South Carolina Code. This provision also allows the Commissioner to seek a warrant from any circuit judge if he or she is denied entry. S.C. Code Ann. § 41-15-260. Several other provisions of the South Carolina Code also allow for the issuance of an administrative search warrant. See, eg. S.C. Code Ann. § 39-9-90 (Supp. 2005) (allowing the Agriculture Commissioner to seek a search warrant if denied entry to commercial premises when enforcing provisions under chapter 9 of title 39 of the South Carolina Code and regulations thereunder); § 44-56-1390 (Supp. 2005) (allowing the Department of Health and Environmental Control to obtain an administrative warrant from a court of competent jurisdiction to enter a dwelling unit or childcare facility in order to investigate a report of lead poisoning). In our research, we were unable to locate a provision of the South Carolina Code affording authority to magistrates or city judges or the like to issue administrative search warrants for the enforcement of zoning ordinances. In finding no such authority, we presume the Legislature did not intend for such authority to exist.

However, we must consider section 14-25-115 of the South Carolina Code (Supp. 2005), addressing the authority of municipal recorders. Under this provision, the Legislature provides ministerial recorders appointed by a city's council with the authority to "set and accept bonds and recognizances and to issue summonses, subpoenas, arrest warrants, and search warrants in all cases arising under the ordinances of the municipality, and in criminal cases as are now conferred by law upon magistrates. Ministerial recorders shall have no other judicial authority." S.C. Code Ann. § 14-25-115 (emphasis added).

In our research, we were unable to locate a court decision clarifying whether this statute gives recorders the general authority to issue administrative search warrants. Based on the language of 14-25-115 emphasized above, one could argue the Legislature provided such authority because a violation of a zoning ordinance would be a case "arising under the ordinance of a municipality." Without a court decision supporting this interpretation, we caution you that a court could arrive at a different interpretation. In addition, should the City employ this provision to obtain a search warrant to inspect a dwelling for compliance with the ordinance, such a search warrant may only be issued upon a finding of probable cause, as is required by the fourth amendment and article I, section 10 of the South Carolina Constitution. Moreover, under the ordinance, the Zoning Administrator is given the authority to determine compliance with the ordinance. Therefore, should a valid warrant be issued under this provision, we believe the Zoning Administrator, not a law enforcement officer, has jurisdiction to execute the warrant. See Commonwealth v. Black, 530 A.2d 423 (Pa. Super. Ct. 1987) (finding a search conducted a municipal police officer under a provision of the Pennsylvania Liquor Code only authorizing employees of the Liquor Board to search and seize liquor and alcohol to be unauthorized).

Conclusion

You ask in your letter for ways in which the City can enforce this ordinance. As we determined, such speculation as to all mechanisms the City may employ would be inappropriately addressed in an opinion of this Office. However, with regard to your specific question of whether the City may enforce the ordinance by obtaining a search warrant for the inspection residences, we opine that such authority must be specifically provided by statute. We found no statutes providing such authority to magistrates and judges. However, although not free from doubt, section 14-25-115 may provide this authority to ministerial recorders. If this section does provide authority to issue a search warrant under the circumstances presented in your letter, we advise you that the federal and state constitutional restrictions on searches and seizure remain applicable to the issuance of the warrant. Thus, the recorder must base his or her decision to issue the warrant upon a finding of probable cause. In addition, we believe under the terms of the ordinance, the Zoning Administrator is the appropriate party to execute the warrant.

We also find it necessary to advise you that a warrant issued without proper authority violates the fourth amendment and is void as a matter of law. Furthermore, a law enforcement officer's execution of an invalid search warrant may subject the officer to liability. See Smoak v. Hal, 460 F.3d 768, 784 (6th Cir. 2006) ("Those present for an unconstitutional seizure can also be held liable for failure to protect.").

Very truly yours,

Cydney M. Milling

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REVIEWED AND APPROVED BY:

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