August 16, 2007

Thomas E. Lynn, Esquire
Deputy County Attorney
Charleston County
3505 Pinehaven Drive
Charleston Heights, South Carolina 29405-7789

Dear Mr. Lynn:

In a letter to this office you questioned the authority of a county to enact an ordinance relating to the offense of resisting arrest which would be within the jurisdiction of a magistrate. Generally, S.C. Code Ann. § 16-9-320 provides for the offense of opposing or resisting a law enforcement officer serving or executing process or resisting arrest by one whom the person knows or reasonably should know is a law enforcement officer. The penalty for such violation is a fine of not less than five hundred dollars nor more than one thousand dollars or imprisonment for not more than one year, or both.[1] Such penalty is beyond the jurisdiction of a magistrate. See: S.C. Code Ann. § 22-3-550.

You referenced a prior opinion of this office dated May 15, 1990 which stated that a county or municipality would not be authorized to enact an ordinance making the offense of resisting arrest within the trial jurisdiction of a magistrate or municipal court judge. Such opinion quoting other prior opinions reasoned that

> ...political subdivisions cannot adopt an ordinance repugnant to the State Constitution or laws, which ordinance would be void... Therefore, municipalities and counties are not free to adopt an ordinance which is inconsistent with or repugnant to general laws of the State...[P]olice ordinances in conflict with statutes, unless authorized expressly or by necessary implication, are void. A charter or ordinance cannot lower or be

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[1]Another provision, S.C. Code Ann. § 16-3-625 states that "[a] person who resists the lawful efforts of a law enforcement officer to arrest him or another person with the use or threat of use of a deadly weapon against the officer, and the person is in possession or claims to be in possession of a deadly weapon, is guilty of a felony and, upon conviction, must be punished by imprisonment for not more than ten nor less than two years."

> inconsistent with a standard set by law... Even where the scope of municipal power is concurrent with that of the state and where an ordinance may prohibit under penalty an act already prohibited and punishable by statute, an ordinance may not conflict with or operate to nullify a state law...Ordinances lowering or relaxing statutory standards relative to offenses are void as in conflict with state law and policy...(Also)...municipalities lack the authority to adopt ordinances and provide penalties...that either increase or decrease the penalty provided for the same offense by the general law.

As to the authority of a municipality to adopt an ordinance making the offense of resisting arrest an offense within the jurisdiction of a municipal court, that opinion referenced that the offense of resisting arrest was a statutory offense with a penalty in excess of that of the limits of the municipal court. The opinion further stated that

> [s]ince the possible penalties upon conviction exceed the maximum permitted in the municipal courts, such courts could not lawfully assume trial jurisdiction over the offense...(The municipal ordinance at issue)...attempts to make the matter one of municipal concern and therefore provide an alternative to the general laws of the State regarding resisting arrest...(The ordinance)...is in apparent conflict with the general law of the State and therefore must yield in favor of the general law.

Such is consistent with the statements by the Supreme Court in City of North Charleston v. Harper, 306 S.C. 153, 156-157, 410 S.E.2d 569, 571 (1991) that

> [l]ocal governments derive their police powers from the state. S.C. Const. Art. VIII, §§ 7, 9. The state has granted local governments broad powers to enact ordinances "respecting any subject as shall appear to them necessary and proper for the security, general welfare and convenience of such municipalities." S.C. Code Ann. § 5-7-30(1976)...However, the grant of power is given to local governments with the proviso that the local law not conflict with state law...A city ordinance conflicts with state law when its conditions, express or implied, are inconsistent or irreconcilable with the state law...Where there is a conflict between a state statute and a city ordinance, the ordinance is void.

Another opinion of this office dated February 1, 2006 stated that

> [g]enerally, pursuant to S.C. Code Ann. § 4-9-25,

> [a]ll counties of the State, in addition to the powers conferred to their specific form of government, have authority to enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order and good government in them. The powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties.

Similarly, pursuant to S.C. Code Ann. § 4-9-30 counties "within the authority granted by the Constitution and subject to the general laws of this State" were given a list of enumerated powers. Included among these powers is the authorization

> (14) to enact ordinances for the implementation and enforcement of the powers granted in this section and provide penalties for violations thereof…(However)…(n)o ordinance including penalty provisions shall be enacted with regard to matters provided for by the general law; except as specifically authorized by such general law….

Furthermore, Article VIII, Section 14 of the State Constitution relating to local government states that

> (i)n enacting provisions required or authorized by this article, general law provisions applicable to the following matters shall not be set aside:… (5) criminal laws and the penalties and sanctions for the transgression thereof.

These provisions have been interpreted by the State Supreme Court to provide that local governments may not enact ordinances that impose greater or lesser penalties than those established by state law. City of North Charleston v. Harper, 306 S.C. 153, 410 S.E.2d 569 (1991); Terpin v. Darlington County Council, 286 S.C. 112, 332 S.E.2d 771 (1985). As stated in another prior opinion of this office dated December 5, 1990,

> [c]ounties and municipalities are political subdivisions of the State and have only such powers as have been given to them by the State,

> such as by legislative enactment. Williams v. Wylie, 217 S.C. 247, 60 S.E.2d 586 (1950). Such political subdivisions may exercise only those powers expressly given by the State Constitution or statutes, or such powers necessarily implied therefrom, or those powers essential to the declared purposes and objects of the political subdivision. McKenzie v. City of Florence, 234 S.C. 428, 108 S.E.2d 825 (1959). In so doing, however, political subdivisions cannot adopt an ordinance repugnant to the State Constitution or laws…. Central Realty Corp. v. Allison, 218 S.C. 435, 63 S.E.2d 153 (1951); Law v. City of Spartanburg, 148 S.C. 229, 146 S.E. 12 (1928).

A prior opinion of this Office dated September 1, 1988 stated as to municipalities

> …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 law … Even where the scope of municipal power is concurrent with that of the state and where an ordinance may prohibit under penalty an act already prohibited and punishable by statute, an ordinance may not conflict with or operate to nullify state law … Ordinances lowering or relaxing statutory standards relative to offenses are void as in conflict with state law and policy….

Therefore, political subdivisions are free to adopt an ordinance as long as such ordinance is not inconsistent with or repugnant to general laws of the State. For the reasons stated in the referenced May 15, 1990 opinion and in the other opinions of this office referenced above, this office stands by the conclusions set forth in the 1990 opinion.

As to your question of whether an ordinance that described a lesser form of resistance would be acceptable or would any and all forms of resistance be chargeable only under state law, as indicated in the May 15, 1990 opinion referenced above, "[o]rdinances lowering or relaxing statutory standards relative to offenses are void as in conflict with state law and policy." Another opinion dated May 1, 2007 quoting an earlier opinion stated that "...an ordinance cannot hamper the operation or effect of a general state law but instead must be in harmony with the state law." Consistent with such, an ordinance which provided a criminal penalty for a lesser form of resistance would be an ordinance lowering statutory standards and, therefore, would be in conflict with state law.

You indicated that numerous counties and municipalities have enacted ordinances regarding resisting arrest. As a result of the opinions of this office referenced above that such ordinances are

of doubtful authorization, you may wish to consider seeking a declaratory judgment which would determine the matter with finality.

With kind regards, I am,

Very truly yours,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

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Robert D. Cook
Assistant Deputy Attorney General