May 1, 2007

R. Allen Young, Esquire
Mount Pleasant Town Attorney
Post Office Box 745
Mount Pleasant, South Carolina 29465

Dear Mr. Young:

In a letter to this office you requested an opinion regarding the possibility of decriminalizing a proposed smoking ban offense in the Mount Pleasant municipal court. You indicated that the Town is in discussion regarding the passage of a municipal ordinance which would ban smoking in bars and restaurants. Referencing such, you have questioned whether the Town of Mount Pleasant may enact a smoking ordinance which is noncriminal or civil for use in its municipal court. You also asked whether the Town may enact a smoking ordinance which restricts officers to merely writing a summons or citation for court and specifically prohibits an officer from physically arresting an individual. You also questioned whether the Town can enact a smoking ordinance which contains a penalty provision that includes only fines and prohibits a judge from imposing jail time. I assume that you are referencing the imposition of a civil fine, as opposed to a criminal fine.

While you indicated that you are "not writing about the legality" of the issue of decriminalizing a proposed smoking ban in the Town and whether the State preempts municipalities in this area of the law, this office in a prior opinion dated December 5, 1990 referenced the provisions of this State's "Clean Indoor Air Act", S.C. Code Ann. §§ 44-95-10 et seq. where pursuant to Section 44-95-20 it is stated that,

> [i]t is unlawful for a person to smoke or possess lighted smoking material in any form in the following public indoor areas except where a smoking area is designated as provided for in this chapter...

Certain areas were particularly designated as "public indoor areas" where it is unlawful to smoke. A criminal penalty is provided for the violation of such provision. Section 44-95-50 provides that "[a] person who violates Section 44-95-20, 44-95-30 or 44-95-40 of this chapter is guilty of a misdemeanor and, upon conviction, must be fined not less than ten dollars nor more than twenty-five dollars." The referenced 1990 opinion concluded that

> [t]here are numerous indicia that, as a matter of law, the General Assembly intended the Act to have statewide applicability and that <u>local political subdivisions would be</u>

> prohibited, at least implicitly, from further regulation of smoking in public indoor places...Because the Act expressly lists those public indoor areas in which persons may not smoke or possess lighted smoking materials and then lists certain areas in which smoking is to be permitted(i.e., enclosed private offices, teachers lounges, taxicabs, and so forth), it is reasonable to conclude that, on the whole, political subdivisions are not free to vary the terms of the Act...Based on the foregoing, it is the opinion of this office that the Clean Indoor Air Act of 1990 was intended to be of statewide applicability and that...(generally)...local political subdivisions were preempted from further inconsistent regulation of smoking in public indoor areas. (emphasis added).

I am enclosing a copy of that opinion for your full review. This office in an opinion to you dated January 26, 2006 concluded that the Town of Mount Pleasant "...would not be authorized to enact an ordinance requiring smoke free restaurants within the corporate limits as restaurants are not specifically provided as locations in which smoking is prohibited."

Generally, pursuant to S.C. Code Ann. § 5-7-30, municipalities "...may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State...." 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.

Such 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 a 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, which ordinance would be void. 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).
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> A prior opinion of this Office dated September 1, 1988 stated as to municipalities
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> …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. See also: Connor v. Town of Hilton Head Island, 314 S.C. 251, 442 S.E.2d 608 (1994) (a municipality may not prohibit conduct that is not unlawful under State criminal laws governing the same subject).

An opinion of this office dated February 1, 2006 dealt with the question of whether a county was authorized to create an ordinance against speeding that established civil penalties and remedies for that violation. That opinion noted that "...local governments may not enact ordinances that impose greater or lesser penalties than those established by state law." The opinion concluded that

> ...the General Assembly has addressed by State law the subject of speeding, the same matter which would be addressed by the proposed ordinance. Furthermore, it appears that there would be a conflict between the proposed ordinance and the State law prohibiting speeding in that there would be no criminal violation tracked or points assessed against the driver but, instead, there would be a civil penalty imposed.

The opinion concluded that such a speeding ordinance would not be authorized. See also: Op. Atty. Gen. dated September 1, 1988 ("...an ordinance cannot hamper the operation or effect of a general state law but instead must be in harmony with the state law."); Op. Atty. Gen. dated October 25, 1976 (a municipality may not enact an ordinance with a penalty in conflict with State law).

Consistent with the above, in the opinion of this office, the Town of Mount Pleasant would not be authorized to enact a smoking ordinance, which is noncriminal or civil, banning smoking in bars and restaurants for use in its municipal court as restaurants and bars are not specifically provided as locations in which smoking is prohibited by State law. As referenced above, a criminal misdemeanor penalty of a fine of not less than ten dollars nor more than twenty-five dollars is provided for the violation of this State's "Clean Indoor Air Act." The considered ordinance banning

smoking in bars and restaurants and providing a noncriminal or civil penalty would be in conflict with State law and would not be authorized.

You also questioned whether the Town would be authorized to enact a smoking ordinance which restricts officers to merely writing a summons or citation for court and specifically prohibits an officer from physically arresting an individual. Generally, pursuant to S.C. Code Ann. § 56-7-80, municipalities "...are authorized to adopt by ordinance and use an ordinance summons as provided herein for the enforcement of...municipal ordinances." It is also provided that such an ordinance summons may not be used to make a custodial arrest. Subsection (E) of such provision states that "[a]ny law enforcement officer or code enforcement officer who serves an ordinance summons must allow the person served to proceed without first having to post bond or to appear before a magistrate or municipal judge." However, inasmuch as the type ordinance, an ordinance banning smoking in bars and restaurants and providing a noncriminal or civil penalty for such a violation, is not authorized, the utilization of a summons authorized by Section 56-7-80 in such instance would similarly not be authorized.

As to your question of whether the Town may enact a smoking ordinance banning smoking in bars and restaurants which would contain a penalty provision that includes only civil fines and prohibits a judge from imposing jail time, as referenced, Section 44-95-50 provides a criminal fine for a violation of the State "Clean Indoor Air Act". No jail time is provided. However, as referenced, banning smoking in bars and restaurants and providing a noncriminal or civil penalty by a municipality would be in conflict with State law and would not be authorized.

With kind regards, I am,

Very truly yours,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

Enclosure

REVIEWED AND APPROVED BY:

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Robert D. Cook
Assistant Deputy Attorney General