HENRY MCMASTER
ATTORNEY GENERAL

September 22, 2008

Marvin C. Jones, Esquire
Jasper County Attorney
P. O. Box 420
Ridgeland, South Carolina 29936

Dear Mr. Jones:

In a letter to this office you raised questions regarding a proposed Jasper County ordinance prohibiting persons from within the County from wearing their pants more than three inches below their hips. The ordinance states in part in section (3):

> A. It shall be prohibited for any person to appear in a public place wearing his or her pants more than three (3) inches below his or her hips (crest of the ilium) and thereby exposing his or her skin or intimate clothing.[1]
>
> B. It shall be prohibited for any custodial parent or guardian to wilfully allow their minor to appear in a public place wearing his or her pants more than three (3) inches below his or her hips (crest of the ilium) and thereby exposing his or her skin or intimate clothing.

Pursuant to section (5), a violation of the ordinance may be punishable by a fine of not less than twenty-five dollars nor more than five hundred dollars. Also, subsection (B) states

> [v]iolation of this ordinance is hereby declared to be a public nuisance, which may be abated by the County by restraining order, preliminary and permanent injunction,

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[1]The term "crest of the ilium" is defined as "...the upper portion of the dorsal, upper and largest area of the three bones composing either lateral half of the pelvis that is broad and expanded above the greater sciatic notch." The term "intimate clothing" is defined as "...underwear, underpants, slips, girdle, athletic supporter, thongs, or other similar garments ordinarily worn beneath pants."

or other means provided for by law and the County may take action to recover the cost of the nuisance abatement.

Referencing such, you have raised the following questions:

1. Is there any state law which would preempt the County from adopting this ordinance?

2. Is it permissible for the County to impose on custodial parents or guardians the responsibilities set forth in Section 3(B) of the ordinance?

3. Does the County Council have the authority to make the wearing of pants more than three inches below the hips a public nuisance as set forth in paragraph B?

4. Where minors are concerned, may this ordinance be enforced in the magistrate's courts?

As to your first question, as stated in a prior opinion of this office dated July 6, 2007,

[g]enerally, S.C. Code Ann. § 4-9-25 provides police power to counties stating,

> [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.

That opinion further recognized that

> ...counties of this State may exercise police powers...Health, public safety and sanitation are among the functions of a county...which may be regulated by a county. Abatement of a nuisance which affects public health or safety is generally deemed to be within the police power of a political subdivision...Thus, abating a nuisance, such as an unclean lot which poses a health or safety hazard, could very well be deemed a proper county function....See also: Op. Atty. Gen. dated March 3, 1998. The term "nuisance" was defined in Shaw v. Coleman, _ S.C.___, 645 S.E.2d 252

> at 258 (Ct. App. 2007) as "...anything which works hurt, inconvenience, or damages; anything which essentially interferes with the enjoyment of life or property." See also: Op. Nebraska Atty. Gen. dated March 6, 1981 ("A public nuisance is generally defined as something that 'injuriously affects the safety, health, or morals of the public, or works some other substantial annoyance, inconvenience, or injury to the public.'").
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> An opinion of this office dated December 5, 1990, stated that
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> [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...Such political subdivisions may exercise only those powers expressly given by the State Constitution or statutes, or such powers necessarily implied therefrom, of those powers essential to the declared purposes and objects of the political subdivision...In so doing, however, political subdivisions cannot adopt an ordinance repugnant to the State Constitution or laws, which ordinance would be void.

As stated in an opinion of this office dated May 15, 2006:

> [p]ursuant to Article VIII, § 7's requirement that the General Assembly define the powers of counties by "general law," the Legislature enacted the Home Rule Act in the form of Act No. 283 of 1975. Brown v. County of Horry, 308 S.C. 180, 417 S.E.2d 565 (1999)...[H]owever, "Act No. 283 of the 1975 Acts of the General Assembly, the Home Rule Act, which was designed to effectuate the mandate of Article VIII, Section 7 of the South Carolina Constitution, did not transfer absolute authority over all matters of local concern to the counties." Roton v. Sparks, 270 S.C. 637, 639-640, 244 S.E.2d 214, 216 (1978) (Gregory, J., concurring). Accordingly, it is clear that by virtue of Art. VIII, § 7, as well as § 4-9-25, any ordinance adopted by a county must be consistent with the general law of the State, as enacted by the General Assembly. Otherwise, the ordinance is void. Denene, Inc. v. City of Chas., 352 S.C. 208, 574 S.E.2d 196 (2002) (an ordinance which bans a business the State has made legal is unenforceable). Moreover, Art. VIII, § 14 of the Constitution mandates that a local ordinance or regulation may not "set aside" general law provisions applicable to certain specific areas such as criminal laws or the "structure and the administration of any governmental service or function, responsibility for which rests with the state government or which requires statewide uniformity." See, Diamonds v. Greenville County, 325 S.C. 154, 480 S.E.2d 718 (1997) (county ordinance may not set aside general criminal laws of the State, pursuant to Art. VIII, § 14); Hospitality Assn of S.C. v. County of Charleston, et al., supra; (local ordinance invalid if it conflicts with the Constitution or general law); Terpin v. Darlington Co. Council, 286 S.C. 112, 332 S.E.2d 771 (1985) (county fireworks ordinance conflicts

> with state criminal laws and is thus invalid); Riverwoods, LLC v. County of Charleston, 349 S.C. 378, 563 S.E.2d 651 (2002); Martin v. Condon, 324 S.C. 183, 478 S.E.2d 272 (1996) (local option legislation allowing counties to set aside the general criminal laws is invalid); Brashier v. S.C. Dept. of Transp. 327 S.C. 179, 490 S.E.2d 8 (1997), (overruled on other grounds) (Article VIII, § 14 "'precludes the legislature from delegating to counties the responsibility for enacting legislation relating to the subjects encompassed by that section."')

Consistent with such, as stated in an opinion dated May 1, 2007, "...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."

As to municipal ordinances, a comparison useful in reviewing county ordinances, as set forth in Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 361, 660 S.E.2d 264, 267 (2008),

> [a] two-step process is used to determine whether a local ordinance is valid. Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002); Bugsy's v. City of Myrtle Beach, 340 S.C. 87, 93, 530 S.E.2d 890, 893 (2000). First, the Court must consider whether the municipality had the power to enact the ordinance. If the State has preempted a particular area of legislation, a municipality lacks power to regulate the field, and the ordinance is invalid. Id. If, however, the municipality had the power to enact the ordinance, the Court must then determine whether the ordinance is consistent with the Constitution and the general law of the State. Id. To preempt an entire field, "an act must make manifest a legislative intent that no other enactment may touch upon the subject in any way." Bugsy's, 340 S.C. at 94, 530 S.E.2d at 893 (citing Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. 550, 397 S.E.2d 662 (1990)). Furthermore, "for there to be a conflict between a state statute and a municipal ordinance 'both must contain either express or implied conditions which are inconsistent or irreconcilable with each other.... If either is silent where the other speaks, there can be no conflict between them. Where no conflict exists, both laws stand.' " Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. at 553, 397 S.E.2d at 664 (quoting McAbee v. Southern Rwy., Co., 166 S.C. 166, 169-70, 164 S.E. 444, 445 (1932)).

See also: S.C. State Ports Authority v. Jasper County, 368 S.C. 388, 629 S.E.2d 624 (2006); McKeown v. Charleston County Board of Zoning Appeals, 347 S.C. 203, 553 S.E.2d 484 (2001); Op. Atty. Gen. dated March 21, 2003.

Consistent with such, as to your question of whether there is any state law which would preempt the County from adopting the referenced ordinance, there appears to be no such state law preempting the ordinance. In the opinion of this office, the adoption of such an ordinance would be

consistent with the police power of a county and could be upheld consistent with the authority cited above. As noted, abatement of a nuisance is within the police power of a county. Moreover, as referenced previously, a public nuisance is defined as something affecting the "morals of the public". As outlined below in our response to another question raised in your letter, it could be asserted that wearing pants below the hips exposing certain areas of the body or intimate clothing could be argued as affecting public morality.

In your next question, you asked whether it is permissible for the County to impose on custodial parents or guardians the responsibilities set forth in Section 3(B) of the ordinance. Based upon my review, I have not found any cases or opinions of other attorneys general that have dealt with the issue of parental responsibility with regard to objectionable clothing worn by their children such as that raised by your ordinance. However, as to other areas of parental responsibility, such as allowing a child to ignore curfew warnings, as stated in 59 Am. Jur.2d Parent and Child, Section 104, "[a] parent may be criminally responsible for acts of his minor child if they were done at his direction or with his consent...(For instance), []i]t has been held constitutional to punish a parent for allowing his child to violate a curfew ordinance."

As to a curfew ordinance, this office in an opinion dated March 3, 1994 cited the case of City of Panora v. Simmons, 445 N.W.2d 363 (Iowa, 1989) which upheld a curfew aimed at juveniles. As stated in that opinion,

> Simmons...rejected the notion that the juvenile curfew ordinance interfered with a parent's right to raise a child. Citing Bykofsky v. Borough of Middletown, 405 F.Supp. 1242 (M.D.Pa.1975), *aff'd*, 535 F.2d 1245 (3d Cir.1976), *cert. den.* 429 U.S. 964, 97 S.Ct. 394, 50 L.Ed.2d 333 (1976), the Court suggested that the curfew might even reinforce parental responsibility.
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> In the present case, the City has a strong interest in protecting minors from the national epidemic of drugs, and the curfew ordinance is a minimal infringement upon a parent's right to bring up his or her child. In effect, the Panora curfew ordinance acts to make parents the primary agent of enforcement. In addition, it could be said "to promote family life by encouraging children to be at home." ... [citation omitted]. As the Bykofsky court stated:
>
> > [t]he ordinance does not dictate to the parent an over-all plan of discipline for the minor. With its numerous exceptions, including the one that permits the juvenile to be on the streets during the curfew hours if accompanied by a parent, the ordinance constitutes a minimal interference in influencing and controlling the activities of their offspring....It is difficult, when judging Panora's ordinance, to determine if it forces parents to abdicate their authority over their

> children, or to accept such authority. In either case, the City's interference is minimal and its interests significant.

445 N.W.2d at 370.

Consistent with this office's opinion that the referenced ordinance may be upheld, it is also the opinion of this office that it is permissible for the County to impose on custodial parents or guardians the responsibilities set forth in Section 3(B) of the ordinance. As stated in the previously referenced opinion of this office of March 3, 1994,

> [t]he public has "a strong and legitimate interest in the welfare of its young [people]...." Their "immaturity, inexperience and lack of judgment may sometimes impair their ability to exercise their rights [and responsibilities] wisely.

You next questioned whether the County Council has the authority to make the wearing of pants more than three inches below the hips a public nuisance as set forth in the ordinance. As noted previously, this office has concluded that counties may exercise granted police powers. An opinion of this office dated June 11, 1984 stated that

> Section 4-9-30(5) enumerates and bestows upon counties a considerable number of traditional police power functions, such as sewage collection, public health, public safety, etc. While it is true these appear to be dealt with in the context of the power of the county to levy taxes and make appropriations, it should also be emphasized that Section 4-9-30(5) also empowers the county 'to provide for the regulation and enforcement of the above....' Certainly, this portion of the provision could be read as authorizing counties generally to regulate and enforce such regulations in those traditional police powers areas enumerated. Such a reading is consistent with the mandate of Article VIII, § 17 that 'all laws concerning local government shall be liberally construed in their favor.' Accordingly, we believe that general police powers constitute ' powers, duties and responsibilities granted local government subdivisions...by law which can be...fairly implied...' from the Home Rule Act. Id.; see also, Sections 4-9-30(6); 4-9-30(14) power 'to enact ordinances for the implementation and enforcement of the powers granted in this section and provide penalties for violations thereof . . .' ; 4-9(16.1); 4-9(16.2) abate nuisances . This conclusion, again, is in accord with several prior opinions of this office and with the case law interpreting the Home Rule Act....

In an opinion of this office dated May 20, 1998 it was concluded that regulation of clothing, the attire wore by exotic dancers, was within the proper exercise of a county's police power. Similarly, in Citizens for Free Enterprise v. Department of Revenue, State of Colorado, 649 P.2d 1054 (Colo. 1982), the Colorado Supreme Court determined that a regulation prescribing standards for minimum employee attire in certain businesses was within the scope of the police power.

Similarly, while only a court may determine the issue with finality, in the opinion of this office, a prohibition to wearing pants three inches below the hips is a proper exercise of a county's police power.

In examining the ordinance prohibiting the wearing of pants below the hips, it is useful to consider cases that have examined the wearing of clothing in the context of First Amendment rights. In Olesen v. Board of Education, 676 F.Supp. 820, 822 (N.D.Ill. 1987), the court concluded that in order to claim First Amendment protection, an individual

> ...must demonstrate that his conduct intended "to convey a particularized message...and...the likelihood [is] great that the message would be understood by those who viewed it.

676 F.Supp. at 822.

In the decision in Bivens v. Albuquerque Public Schools, 899 F.Supp. 556 (D.N.M. 1995), *aff'd* 131 F.3d 151 (10th Cir. 1997), the Court addressed the constitutionality of a public school dress code prohibiting sagging pants. In that case, the court determined that the student involved failed to provide evidence that his wearing sagging pants was a way "to identify and express his link with his black identity, the black culture and the styles of black urban youth" and was, therefore, constitutionally protected speech or expressive conduct protected by the First Amendment. 899 F.Supp. at 560-561. The student particularly alleged that

> ...the wearing of sagging pants is part of a style known as "hip hop," whose roots are African American, and it represents a fashion statement by blacks and hispanics extensively...(He further asserted that)...if a style can be proven to have had its origins within a particular racial group and if it is extremely prominent among that group, it becomes in large part a group identity. "Such intentional identification clearly must involve freedom of expression."

899 F.Supp. at 561. Defendants responded that

> ...Plaintiff's subjective message supposedly conveyed by wearing sagging pants is by no means apparent to those who view it. For example, sagging is understood by some as associated with street gang activity and as a sign of gang affiliation. Sagging pants and other gang style attire is also understood by some as would-be gang affiliation, because it is often adopted by "wannabees," those who are seeking to become affiliated with a gang. Sagging is not necessarily associated with a single racial or cultural group, and sagging is seen by some merely as a fashion trend followed by many adolescents all over the United States.

Ibid. Consistent with the above, in the opinion of this office, there can be no claim of a First Amendment violation in the exercise of the county of its police power in outlawing the wearing of pants three inches below the hips.

In your last question you asked whether in circumstances where minors are involved may the ordinance be enforced in the magistrate's courts or does the family court have exclusive jurisdiction? The family court's jurisdiction is found at S.C. Code Ann. § 20-7-400 which gives exclusive jurisdiction to the family courts over any child alleged to have violated any state or local law or municipal ordinance except as provided for in S.C. Code Ann. § 20-7-410. This exclusive jurisdiction applies except where, of course, jurisdiction over certain offenders is transferred to general sessions court. See: S.C. Code Ann. § 20-7-7605. Pursuant to S.C. Code Ann. § 20-7-410,

> [t]he magistrate courts and municipal courts of this State have concurrent jurisdiction with the family courts for the trial of persons under seventeen years of age charged with traffic violations or violations of the provisions of Title 50 relating to fish, game, and watercraft when these courts would have jurisdiction of the offense charged if committed by an adult.

Consistent with such, in the opinion of this office, a magistrate's court would not have jurisdiction over violations of the ordinance and, instead, it would be a matter within the jurisdiction of the family court.

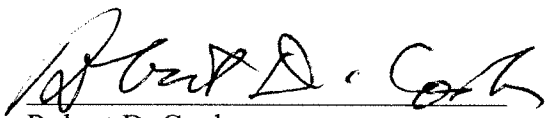
If there are any questions, please advise.

Sincerely,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



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