ALAN WILSON
ATTORNEY GENERAL

April 18, 2013

The Honorable James Lee Foster
Office of the Sheriff
County of Newberry
P.O. Box 247
Newberry, SC 29108

Dear Sheriff Foster:

We received your letter requesting an opinion of this Office to address "social host" criminal liability as it pertains to the consumption of alcohol by minors. By way of background, you indicate that:

> . . . law enforcement here in Newberry County has come to recognize a loophole in our current laws dealing with contributing to the delinquency of a minor, that does not fully cover issues of adults knowingly providing alcohol to minors outside the bounds of what is legal. When the host has not physically or directly handed the alcohol to a minor, yet has knowingly provided the alcohol and/or premises for underage consumption, those adults are not held responsible under our current system. Additionally, the very name of the statute, "contributing to the delinquency of a minor," does not intuitively make adults cognizant of their responsibilities regarding minors' alcohol consumption.

Law/Analysis

S.C. Code Ann. §16-17-490 states that:

> [i]t shall be unlawful for any person over eighteen years of age to knowingly and wilfully encourage, aid or cause or to do any act which shall cause or influence a minor:
>
> (1) To violate any law or any municipal ordinance;
>
> (2) To become and be incorrigible or ungovernable or habitually disobedient and beyond the control of his or her parent, guardian, custodian or other lawful authority;
>
> (3) To become and be habitually truant;

> (4) To without just cause and without the consent of his or her parent, guardian or other custodian, repeatedly desert his or her home or place of abode;
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> (5) To engage in any occupation which is in violation of law;
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> (6) To associate with immoral or vicious persons;
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> (7) To frequent any place the existence of which is in violation of law;
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> (8) To habitually use obscene or profane language;
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> (9) To beg or solicit alms in any public places under any pretense;
>
> (10) To so deport himself or herself as to wilfully injure or endanger his or her morals or health or the morals or health of others. . . .
>
> This section is intended to be cumulative and shall not be construed so as to defeat prosecutions under any other law which is applicable to unlawful acts embraced herein.

Pursuant to §16-17-490, a person found guilty of violating this section is subject to a fine not to exceed $3,000, or imprisonment up to three years, or both.

We note that while §16-17-490 does not contain specific language addressing beer, wine, or other alcoholic beverages, this statute would appear to encompass the type of conduct involving social hosts and minors as described in your letter,[1] *e.g.*, knowingly and willfully encouraging, aiding or causing or doing any act which causes or influences a minor to violate any law or any municipal ordinance. In fact, we concluded in an opinion of this Office dated July 13, 1987 (1987 WL 342835) that §16-17-490 certainly may be used by law enforcement agencies to enforce laws regarding the giving or providing of alcoholic beverages to minors or encouraging alcoholic use by minors. This remains the opinion of this Office. Cf. State v. Michau, 355 S.C. 73, 583 S.E.2d 756 (2003) [holding that provision prohibiting person over 18 years of age from causing minor to endanger minor's morals or health was not unconstitutionally vague].

With regard to underage alcohol consumption generally, both §61-4-90 and §61-6-4070 begin with a general prohibition on the transfer or giving of alcoholic beverages to persons under the age of 21. Each statute then goes on to provide a number of exceptions to the general rule. For example, these exceptions allow a parent or spouse over the age of 21 to serve their underage child or spouse; permit the giving of alcohol in conjunction with a religious ceremony or purpose; and permit a student to "taste" an alcoholic beverage in conjunction with academic instruction. A conviction for violating these statutes

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[1]Pursuant to §15-1-320, "[a]ll references to minors in the law of this State shall . . . be deemed to mean persons under the age of eighteen years except in laws relating to the sale of alcoholic beverages . . ." [Emphasis added].

subjects the person to the following penalties: for a first offense, a fine of $200-300 or imprisonment up to 30 days, or both; for a second offense, a fine of $400-500 or 30 days imprisonment, or both. See §§61-4-90(A), 61-6-4070(A). In an opinion of this Office dated May 25, 1993 (1993 WL 720113), we observed that while the term "transfer" as used in former §61-13-287 (now §61-4-90) was not expressly defined, the term is defined in Black's Law Dictionary 1497 (6th ed. 1990) as: "to convey or remove from one place, person, etc. to another; pass or hand over from one to another; specifically, to change over the possession or control of ... to sell or give." Accord Op. S.C. Atty. Gen., July 12, 2004 (2004 WL 1683025). We are of the opinion that these statutes would likewise encompass the type of conduct involving social hosts furnishing or serving alcoholic beverages to minors.

Given the law cited above, we again advise that these statutes offer you and prosecutors discretion as to the type of charges to bring against an individual found to be in violation of them. Of course, the day-to-day decisions as to whom to arrest and prosecute are made primarily by law enforcement officials and prosecutors in South Carolina. This being the case, law enforcement officers should evaluate each particular situation as it arises and gauge whether there is a likelihood of a violation of the law. Op. S.C. Atty. Gen., June 28, 2011 (2011 WL 2648713). In addition, this Office further adheres to its long-standing policy that the judgment call as to whether to prosecute a particular individual is warranted or is on sound legal ground in a particular case is a matter within the discretion of the local prosecutor. Id. The prosecutor is the person on the scene who can weigh the strength or weakness of an individual case. Id. Thus, while this office has provided to you the relevant law in this area, we must defer to the ultimate judgment of law enforcement or the prosecutor as to whether or not to prosecute an individual in question in any given case. Id.

You also ask whether Newberry County may adopt a "social host" ordinance to address your particular concerns.[2] We start with the basic proposition that a county ordinance would be entitled to a presumption of validity. Consistent with Article VIII of the South Carolina Constitution, which mandates Home Rule, a county possesses police power to enact ordinances to further the health and welfare of its residents. See §4-9-30. As the Supreme Court of South Carolina cautioned in Rothschild v. Richland County Bd. of Adjustment, 309 S.C. 194, 420 S.E.2d 853, 855 (1992), "it is well settled that ordinances, as with other legislative enactments, are presumed constitutional; their unconstitutionality must be proven beyond a reasonable doubt." A court will not declare an ordinance invalid unless it is clearly in conflict with the general law. Hospitality Assn. of S.C. v. County of Charleston, 320 S.C. 219, 464 S.E.2d 113 (1995). Keeping in mind the presumption of validity and the high standard which must be met before an ordinance is declared invalid, we note that, 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 State law. Accordingly, an ordinance will continue to be enforced unless and until set aside by a court of competent jurisdiction. Op. S.C. Atty. Gen., March 21, 2003 (2003 WL 21043502).

In Hospitality Assn., the Court recognized the test for resolving the issue of the validity of a local ordinance *vis-a-vis* State law. There, the Court stated that:

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[2]No proposed ordinance has been provided for us to review.

> [d]etermining 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 this State.

Id., 464 S.E.2d at 116. The Court referenced §4-9-25, which provides that:

> [a]ll counties of the State . . . have authority to enact regulations, resolutions, and ordinances . . . 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 Court and this Office recognize that §4-9-25 provides general police powers to counties. See, *e.g.*, Greenville County v. Kenwood Enterprises, Inc., 353 S.C. 157, 164, 577 S.E.2d 428, 431 (2003), *overruled on other grounds by* Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (2005); Op. S.C. Atty. Gen., September 22, 2008 (2008 WL 4489051). This broad grant of power, noted the Court, "is limited only by the requirement that the regulation, resolution, or ordinance be consistent with the Constitution and general law of this State." Hospitality Assn., 464 S.E.2d at 116. Moreover, the on Court stressed that §4-9-25 states that "[t]he 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." Id.

Thus, the first question which must be addressed in analyzing whether an ordinance is consistent with State law is the authority of counties to regulate in this area. Put another way, is the ordinance 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, 530 S.E.2d 890 (2000), in which the Court stated that:

> [i]n order 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. 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.

Bugsy's, 530 S.E.2d at 892.

Applying the "manifest intention" test, the Court in Bugsy's found that "while 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. Similarly, in Denene, Inc. v. City of Charleston, 352 S.C. 208, 574 S.E.2d 196 (2002), the

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 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." Id., 574 S.E.2d at 199. In addition, in an opinion of this Office dated August 10, 2011 (2011 WL 3918176), we concluded that a county has the authority pursuant to its police power to pass an ordinance regulating the sale of alcohol during certain hours. See also id. [stating that that §4-9-25 would not afford a county any additional authority over the incorporated areas within its boundary in the absence of an intergovernmental agreement recognizing the enforceability of the county's ordinance].

Consistent with such, in the opinion of this Office the adoption of such an ordinance appears to be consistent with the police power of a county and would likely be upheld under the authority cited above. Of course, as previously stated, only a court may declare an ordinance void as unconstitutional or preempted by or in conflict with State law.

Of further relevance to our discussion is the decision of the South Carolina Supreme Court in Marcum v. Bowden, 372 S.C. 452, 643 S.E.2d 85 (2007), where the Court considered for the first time whether to adopt common law social host civil liability. The Court ruled on two actions that argued in favor of such liability. In the first action, the personal representative of the estate of an intoxicated minor's passenger brought an action against the minor's employer and the minor's estate, asserting that they were civilly liable for the passenger's death in an auto accident that occurred after the minor left an employer-sponsored Christmas party at which he was served alcoholic beverages. The second action related to a different incident, where the personal representative of the estate of a party guest brought a wrongful death action against the party hosts, asserting that they negligently provided alcohol to the guest, who subsequently died in a single-car accident. Id., 643 S.E.2d at 87-88. In both cases, the plaintiffs urged the Court to recognize a new tort establishing social host liability for underage drinkers who proceed to injure themselves and others while under the influence of alcohol. Id. 643 S.E.2d at 90. The Court summarized the issues as follows:

> [i]t is contended that we should impose social host liability for service to underage persons grounded upon [§61-4-90 and §61-6-4070] which impose criminal penalties, under certain circumstances, to persons who transfer or give alcoholic beverages to persons under the age of 21. Conversely, we are urged to treat underage drinkers as we do other adults, placing no liability upon the social host for torts committed by their intoxicated guests. [Citation omitted]. We decline to accept this invitation.

Id., 643 S.E.2d 89.

The Court first recognized that:

> [a]t present, a South Carolina social host incurs no liability to either first or third parties injured by an intoxicated adult guest. . . . In fact, a commercial host is liable only to third parties, and then only when he knowingly sells alcoholic

> beverages to an intoxicated person. . . . In imposing this limited liability upon commercial hosts, [we have previously] relied upon alcohol beverage control statutes to extend liability to third persons, and upon public policy concerns to deny recovery to the intoxicated adult patron.

Id., 643 S.E.2d at 88. Then, as a matter of public policy, the Court determined that underage drinkers should be viewed differently from adult drinkers aged 21 and over. For example, Article XVII, §14 of the State Constitution provides that persons aged 18 to 20 "shall be deemed *sui juris* and endowed with full legal rights and responsibilities, provided, that the General Assembly may restrict the sale of alcoholic beverages to persons until age twenty-one." See also §15-1-320(a) [references to minors in state law deemed to mean persons under the age of 18 years except when laws relate to alcohol sales]. The Court stated that although "underage persons have full social and civil rights, we find the public policy of this State treats these individuals as lacking full adult capacity to make informed decisions concerning the ingestion of alcoholic beverages." Bowden, 643 S.E.2d at 89. Accordingly, the Court concluded that "adult social hosts who knowingly and intentionally serve, or cause to be served, alcoholic beverages to persons they know or should know to be between the ages of 18 and 20 may incur liability where, under the same circumstances, they are immune for service to persons aged at least 21 years old." Id.[3]

Most significant to our discussion regarding the alcoholic beverage control statutes which criminalize such behavior, the Bowden Court stated:

> [w]e next explain why the duty we impose today is founded upon our responsibility to adapt the common law to the realities of the modern world rather than predicated on the alcohol beverage control statutes criminalizing the transfer or gift of alcoholic beverages to persons less than 21 years of age.

Id. [citing §61-4-90 and §61-6-4070]. The Court thus recognized the criminal liability imposed under these statutes for furnishing or serving alcoholic beverages to minors, but it determined that no civil cause of action was likewise created. Id., 643 S.E.2d at 89-90 [citing Whitworth v. Fast Fare Markets of S.C., Inc., 289 S.C. 418, 338 S.E.2d 155 (1985) (stating there was no civil cause of action under contributing to delinquency of minors statute or statute criminalizing sale of tobacco to minors)]. As the Bowden Court explained:

> [a]lthough we find no duty in the statutes, we do find in them support for our decision to extend the common law and impose liability on adult social hosts who knowingly and intentionally serve underage guests. In determining whether to adhere to our current common law rule that a social host owes no duty, we look to the numerous statutes prohibiting the furnishing of alcohol to

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[3]Because the holding that an adult social host who knowingly and intentionally serves an alcoholic beverage to a person between the ages of 18 and 20 created tort liability where formerly there was none, the Court indicated that Bowden was to be applied prospectively. See Carolina Chloride, Inc. v. South Carolina Dept. of Transportation, 706 S.E.2d 501, 391 S.C. 429, 434 (2011).

> persons under 21, and to other legislation governing driving under the influence.

Id., 643 S.E.2d at 90.

Conclusion

Although we are unaware of any statutes specifically addressing "social host" criminal liability in this State, in our opinion §16-17-490 [Contributing to the delinquency of a minor], and §61-4-90 and §61-6-4070 [prohibiting the transfer or giving of alcoholic beverages to persons under the age of 21], offer law enforcement and prosecutors certain discretion as to the type of criminal charges to bring against an individual found to be in violation of these statutes. However, we defer to the ultimate judgment of law enforcement or the prosecutor as to whether or not to prosecute the individual in question. In addition, because the Legislature has afforded general police powers to counties, we believe that a court would likely find Newberry County has authority to adopt a "social host" ordinance consistent with State law. Of course, only a court may declare such an ordinance void as unconstitutional or preempted by or in conflict with State law.

If you have any further questions, please advise.

Very truly yours,

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