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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

August 19, 1998

Robert L. McCurdy, Staff Attorney
South Carolina Court Administration
1015 Sumter Street, Suite 200
Columbia, South Carolina 29201

Re: Informal Opinion

Dear Mr. McCurdy:

You note that "[t]he question has arisen concerning the propriety of a municipal traffic court pre-trial program which allows individuals who have been charged with a traffic offense which does not carry a mandatory driver's license suspension and does not carry a point value in excess of four points to have the charge dismissed upon completion of a driver education course." You further state that

> [t]o be eligible for the program, the ticket must not be the result of a traffic accident, the person's driver's license may not have any current points assessed against it, and the person may not have participated in the program in the previous six years. The program is established by municipal ordinance, copy enclosed. Prior to any action on the charge, the offender applies to the traffic court and pays the court a fee of $85. The court then refers the participant to a local technical college where the course, designed by the National Traffic Safety Council, is offered. An enrollment fee is required. Upon satisfactory proof to the court of successful completion of the course, the ticket is dismissed. Apparently law enforcement or the prosecution has no discretion over who enters the program.

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Request Letter

> The program appears similar to the Pre-Trial Intervention. However, Code § 17-22-50 specifically exempts traffic-related charges from PTI. The program might also be compared to a conditional discharge authorized by § 44-53-470, except that appears to be limited to the charge of simple possession of marijuana and requires the conditional entry of a guilty plea. Finally, Code § 56-1-770 allows for the reduction of four points from a driver's license upon completion of the same course. However, the points must have been assessed against the license prior to taking the course and there is no court fee.

Law / Analysis

The Ordinance which you have presented for our review, provides in pertinent part:

> Sec. 42-3 Alternative disposition of violations.
>
> Where, in the discretion of the municipal judge, the interest of the safety of the driving public will be best served, the court may, upon successful completion of a recognized traffic safety education training course, enter a dismissal for any violation of this chapter. The municipal judge shall establish standards for admission into any traffic safety training course, and such standards shall be uniformly administered in all cases.

We start with the proposition that an Ordinance of a municipality will be presumed valid in the same way that a statute of the General Assembly is entitled to a presumption of correctness. As this Office stated in an opinion, dated May 23, 1995,

> [a]ny municipal ordinance adopted pursuant to Section 5-7-30 [of the Code] is presumed to be valid. Town of Scranton v. Willoughby, ___ S.C. ___, 412 S.E.2d 424 (1991). Within the limits of a municipality, an ordinance has the same force as does a statute. McCormick v. Cola. Elec. St. Ry. Light and Power Co., 85 S.C. 455, 67 S.E. 562 (1910). Any ordinance must be demonstrated to be unconstitutional beyond all reasonable doubt. Southern Bell Tel. and Tel. Co. v. City of

> Spartanburg, 285 S.C. 495, 331 S.E.2d 333 (1985). The presumption of validity applies to legislation relating to a city or town's police powers. Town of Hilton Head v. Fine Liquors, Ltd., 302 S.C. 550, 397 S.E.2d 662 (1990).

In Williams v. Town of Hilton Head Island, ___ S.C. ___, 429 S.E.2d 802 (1993), our Supreme Court reaffirmed the considerable degree of autonomy that municipalities now enjoy. The Court held in Williams that the so-called "Dillon's Rule," long-recognized in previous cases to limit substantially the power of municipalities to specific statutory authorization or fair implications therefrom was, in keeping with the Home Rule amendments and their implementing statutory authority, no longer valid. Recognizing that Home Rule meant just that, the Court left no doubt as to the intent of the General Assembly:

> This Court concludes that by enacting the Home Rule Act, S.C. Code Ann. Sec. 5-7-10 et seq. (1976), the legislature intended to abolish the application of Dillon's Rule in South Carolina and restore autonomy to local government. We are persuaded that, taken together, Article VIII and Section 5-7-30, bestow upon municipalities the authority to enact regulations for government services, deemed necessary and proper for the security, general welfare and convenience of the municipality or for preserving health, peace, order and good government, obviating the requirement for further specific statutory authorization so long [as] ... such regulations are not inconsistent with the Constitution and general law of the state.

This same standard was enunciated by the Court in Hospitality Assoc. v. Town of Hilton Head, ___ S.C. ___, 464 S.E.2d 113 (1995). There, the Court said the following:

> [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 ... .

Moreover, as this Office has recognized time and again, although we so advise whenever we identify a constitutional infirmity, it is solely within the province of the courts of this state to actually declare an enactment or ordinance unconstitutional or unenforceable for other reasons.

In light of the foregoing caveats, I am in agreement with your analysis that the ordinance presented is legally problematical. In Ex Parte State of S.C. v. Brittian, 263 S.C. 363, 210 S.E.2d 600 (1974), our Supreme Court recognized that a statutory enactment is necessary to empower a judge to dismiss a criminal case. The Brittian Court concluded that "there is no provision" granting the Family Court the authority to dismiss a prosecution brought against a juvenile prior to a hearing. Said the Court,

> 'A statute may authorize the court, either of its own motion or on the application of the prosecuting officer, to order an indictment or prosecution dismissed. But in the absence of such a statute, a court has no power ... to dismiss a criminal prosecution except at the instance of the prosecutor. ...'
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> In a recent Illinois case, People v. Guido, 11 Ill. App.3d 1067, 297 N.E.2d 18 (1973) the trial court dismissed misdemeanor charges for want of prosecution. On appeal it was held that a trial [court] ... in a criminal case did not have authority to dismiss a case on the ground that the State had failed to appear. The court based its decision, in part, on the fact that the State represents the people and the considerations of public safety and welfare are involved.
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> In State v. Charles, 183 S.C. 188, 190 S.E. 466 (1937), a discussion of a Nolle prosequi (similar to a dismissal) was undertaken. This court said in part: 'In the absence of a statute, the court has no power to enter, or to direct the prosecuting officer to enter, a Nolle prosequi ..." 183 S.C. at 194, 190 S.E. at 468.

210 S.E.2d at 601. See also, State v. Tootle, 330 S.C. 512, 500 S.E.2d 481 (1998) [decision to place an individual in PTI is executive decision and trial court possesses no authority in this regard]. In Tootle, the Court went so far as suggesting that the empowerment of a judge to infringe upon executive prosecutorial decisions might

contravene the Separation of Powers Provision of the State Constitution because "judicial discretion cannot be substituted for that of an executive body." Id. at 482. As you point out in your letter, no State statute appears to authorize a municipal court pre-trial program. Indeed, at the State level, § 17-22-50 specifically exempts traffic related charges from PTI. Thus, the Ordinance appears to contradict state policy with respect to the use of PTI for the disposition of traffic charges.

Notwithstanding the foregoing authorities, it must be asked whether a municipal ordinance might be deemed as serving the same purpose as a state statute, which State v. Brittian indicated was necessary to allow any judge to dismiss a criminal case. The problem with such an approach, however, lies with the fact that the municipal courts are part of the unified judicial system and, therefore, a municipality may not be empowered to assign additional duties to a municipal judge.

Municipal courts in South Carolina possess concurrent criminal jurisdiction with magistrate's courts pursuant to S.C. Code Ann. Sec. 14-25-45. The authority for the establishment of a municipal court is found at Section 14-25-5 of the Code. That section provides as follows:

> (a) The council of each municipality in this State may, by ordinance, establish a municipal court, which shall be a part of the unified judicial system of this State, for the trial and determination of all cases within its jurisdiction. The ordinance shall provide for the appointment of one or more full-time or part-time judges and the appointment of a clerk.
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> (b) Any municipality establishing a municipal court pursuant to the provisions of this chapter shall provide facilities for the use of judicial officers in conducting trials and hearings and shall provide sufficient clerical and nonjudicial support personnel to assist the municipal judge.
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> (c) Any municipality may prosecute any of its cases in any magistrate court in the county in which such municipality is situate upon approval by the governing body of the county.

Pursuant to Section 14-25-15, a municipal judge "shall be appointed by the council to serve for a term set by the council not to exceed four years and until his successor is appointed and qualified." Section 5-7-230 further bestows upon the council the authority to appoint municipal judges of the municipal court whose duties shall be prescribed by law.

Article V, § 4 of the South Carolina Constitution requires that the Chief Justice "shall be the administrative head of the unified judicial system." In City of Pickens v. Schmitz, 297 S.C. 253, 376 S.E.2d 271 (1989), our Supreme Court recognized that the municipal courts of South Carolina are part of the unified judicial system.

In Cort Industries v. Swirl, Inc., 264 S.C. 142, 213 S.E.2d 445, 446 (1975), the Court noted that "[t]he people in approving Article V mandated a uniform system of courts for the administration of justice in South Carolina." And in Douglas v. McLeod, 277 S.C. 76, 282 S.E.2d 604 (1981), the Court emphasized that "[w]e have also held that the establishment of a uniform judiciary is mandatory and that statutes which extend or perpetrate a non-unified system or which operate so as to postpone or defeat the purpose of Article V must be deemed unconstitutional." Likewise, the Court has recognized that the Constitution forbids piecemeal regulation of the court system by local governments. In striking down an act delegating to the counties the authority to fix salaries, the Court reasoned that

> ... the delegation of power brought about by Section 22-2-180, Code, clearly disregards the fundamental principle that such delegations to county authorities are appropriate only for regulation of local matters. 16 C.J.S. Constitutional Law Section 140 (c), p. 663; Sutherland on Statutes and Statutory Construction, 4th Edition, Section 4.07, p. 80; Gaud v. Walker, 214 S.C. 451, 462, 53 S.E.2d 316. Along with the revised Article V of the South Carolina Constitution, the people of this State also adopted an amended Article VIII, concerning local government. Section 14 of this Article provides that, in the enactment of provisions authorized thereunder, the general law provisions applicable to certain matters shall not be set aside. Among those enumerated are the following:
>
> (4) the structure for the administration of the State's judicial system;

> (6) the structure and the administration of any governmental service or function, responsibility for which rests with the State government or which requires statewide uniformity. Paragraph 14 (4 and 6) of Article VIII effectively withdraws administration of the State judicial system from the field of local concern. The conclusion is, therefore, inescapable that Section 22-2-180 works an impermissible delegation to local authorities of a power which now can only be exercised by the General Assembly.

Applying this line of reasoning, this Office, on several occasions, has concluded that a local ordinance which attempts to regulate the judiciary is violative of Article V. See, Op. Atty. Gen., April 18, 1979 [proposed county ordinance seeking to create a magistrate's court contravenes Art. V as "counties are not authorized to enact ordinances which relate to courts included within the unified judicial system."]; Op. Atty. Gen., March 12, 1979 [ordinance establishing a uniform bonding system for Aiken County "appears to be in conflict with the mandate of uniformity inasmuch as certain administrative procedures are required to be performed by Aiken County magistrates which are not required of other magistrates in this State."]; Op. Atty. Gen., Op. No. 83-47 (July 25, 1983) ["any attempt to impose a special fee in Magistrate's Court or General Sessions Court within Marion County would most certainly violate Art. V of the Constitution."]; Op. Atty. Gen., September 15, 1986 [county ordinance taxing certain defendants found guilty in magistrate's court likely unconstitutional]; Op. Atty. Gen., March 31, 1988 [municipal ordinance adding a surcharge to all uniform traffic tickets resolved in municipal court is constitutionally questionable on Art. V grounds].

Other jurisdictions appear to be consistent with the foregoing requirements that a state statute is necessary in order to empower a court to dismiss criminal charges both on grounds that such a function is inherently prosecutorial in nature and on the basis that uniformity in the court structure is required. In Commonwealth v. Kindness, 247 Pa.Super. 99, 371 A.2d 1346 (1977), the Pennsylvania Court stated that "[a]side from situations in which dismissal of a prosecution is the means by which procedural rights are vindicated, ... a Pennsylvania court has the power to dismiss a prosecution over the prosecuting attorney's objection only when the legislature expressly empowers it to do so." The Court added that:

> [t]he prosecutor's authority to veto a proposed diversion stems from his general power, originating at common law and not taken away by the legislature, to decide that a particular case shall proceed to trial. While there are a few situations in which a court possesses legislatively granted authority to terminate a prosecution before trial, regardless of the prosecutor's wishes, this case does not fall within any of those situations ... .
>
> The supervisory powers of the Pennsylvania Supreme Court are limited by Article V, 510(c) of the Pennsylvania Constitution, which grants that Court its procedural rule-making powers but qualifies that grant by stating: '(S)uch rules (must be) consistent with this Constitution and neither abridge, enlarge, nor modify the substantive rights of any litigant.' The Court was thus limited to working within the existing framework of separation of powers, and therefore could not create a diversion program without requiring prosecutorial initiative, as the commonwealth is indisputably a litigant and possesses a substantive right to insist on seeking a conviction. It follows that this court cannot do so either. While there is something to be said for allowing a court to overrule a prosecutor and order diversion, it should be said to the General Assembly.

371 A.2d at 1350.

Likewise, in People v. Tapia, 129 Cal. App.3d Supp. 1, 181 Cal. Reptr. 382 (1982), the Court concluded that "[w]e believe it clear, therefore, that Chapter 2.7 is not a general grant of authority to trial courts to grant diversion to a defendant, outside a diversion program mandated by the state or local government, and over the objection of the prosecuting attorney, but instead is an authorization to local governments to institute diversion programs on an experimental basis." 129 Cal.App.3d Supp. at 7. Relying upon Tapia, the California Attorney General, in Op. No. 83-1105 (December 28, 1984), concluded that local diversion for any felony offense was not authorized by statute and, therefore, "a county may not establish a nonstatutory pretrial diversion program for defendants charged with the sales of small amounts of marijuana."

Similarly, in an Informal Opinion, dated June 3, 1996, relying upon a long line of South Carolina authorities such as State v. Ridge, 269 S.C. 61, 236 S.E.2d 401 (1977), we reasoned that

> ... as a general rule, a prosecutor possesses wide discretion as to whether to proceed with respect to a particular prosecution. Concerning the prosecutor's authority to condition the non-prosecution of a case upon the meeting of certain reasonable conditions such as restitution or good behavior, I agree that, generally speaking, such is within the prosecutor's discretion under existing case law. Such authority apparently applies to any prosecutor, be it a Solicitor or in the municipal court, "in the discretion of the individual acting as the prosecutor." Op. Atty. Gen., April 12, 1979. However, I must advise that, unlike the Solicitor's Pretrial Intervention Program, to my knowledge, no statute has been enacted concerning this authority with respect to a prosecutor at the city level. ... Thus, you should proceed cautiously in this regard. In addition, there are a number of limitations upon the inherent authority of a prosecutor ... such as any directives from the Attorney General as Chief Prosecutor regarding the prosecution of particular cases as well as the general limitation that a case cannot be dismissed through the corrupt or capricious action of a prosecutor.

In short, in that Opinion, we cautioned that a statute might be necessary even if the city prosecutor adopted his own form of pretrial diversion; clearly however, it would seem that such a statute would be necessary to enable a municipal judge to dismiss a criminal case on his own motion or upon the performance of certain conditions.

To summarize, as you point out, no statute appears to directly authorize a pretrial program at the instigation of a municipal judge. While it can be argued that a municipal ordinance serves that same purpose, our Court, in the Brittian case, indicates that the contrary is true, and that **a state statute** is necessary to empower a judge to dismiss a criminal case where such overrides the wishes of the prosecutor. Moreover, state policy, as expressed in the state pretrial statutes, forbids pretrial diversion for traffic offenses. Thus, the present statutory scheme may well preempt further action by a municipal council. Then too, is the requirement in Article V of the State Constitution, requiring a unified judicial system. While a local prosecutor is probably able to divert offenders as

part of his prosecutorial discretion, at the very least, a state statute authorizing the municipal judge to do so is necessary, particularly where the municipal judge generally hears traffic offenses established by **state criminal statutes**. Finally, the Tootle case recognizes that the power to dismiss a case prior to the impanelment of the jury generally lies **with the prosecutor** and that such decision is not reviewable by a court. See, State v Ridge, supra. ["the trial judge may not direct or prevent a nol pros" prior to impaneling and swearing of jury]; State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994) [judicial department cannot infringe upon unfettered prosecutorial discretion]. In short, absent a ruling from our courts to the contrary, for the foregoing reasons, I believe such an Ordinance would be legally suspect.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an