ALAN WILSON
ATTORNEY GENERAL

March 23, 2018

The Honorable Alan Clemmons, Member
South Carolina House of Representatives
District No. 107
PO Box 11867
Columbia, SC 29211

Dear Representative Clemmons:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter states the following:

> I write you to request an opinion on whether there is anything that would preempt or prohibit a local governing body from enacting an ordinance requiring a motor vehicle to be towed when a person fails to provide proof of insurance during a traffic stop. Section 56-10-225 of the S.C. Code of Laws provides that the owner of a vehicle must maintain proof of insurance at all times in their vehicle. In addition, it provides a statewide penalty for a violation of the statute. It does not, however, expressly state that no other action relating to driving without insurance by a local governing body is unauthorized nor does it appear that an ordinance of this nature would be inconsistent with the Constitution or general laws of the state.

Law/Analysis

Without the text of a proposed or enacted ordinance, this Office cannot opine on whether such an ordinance will comply or violate the laws of this State or applicable federal authority. However, it is this Office's opinion that an ordinance which requires a vehicle to be towed if a the vehicle owner cannot furnish proof of insurance could be drafted such that it is consistent with the general laws of South Carolina, the South Carolina State Constitution, and the Federal Constitution.[1] Counties and municipalities of the State are statutorily granted the authority "to

[1] Please note that S.C. Code Ann. § 56-5-5635 "controls as to those vehicles directed to be towed by law enforcement officers in situations resulting from a law enforcement action, such as a collision, vehicle breakdown or vehicle recovery incident to arrest." Op. S.C. Atty. Gen., 2003 WL 22172240 (September 12, 2003). S.C. Code Ann. § 56-5-5635(A) states:

> Notwithstanding another provision of law, a law enforcement officer who directs that a vehicle be towed for any reason, whether on public or private property, must use the established towing procedure for his jurisdiction. A request by a law enforcement officer resulting from a law

enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State." S.C. Code Ann. §§ 4-9-25 (powers of counties); 5-7-30 (powers conferred upon municipalities). The South Carolina Code of Laws explicitly lists these powers may be exercised by a municipality in relation to "roads, streets, markets, law enforcement, health, and order in the municipality or respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it." S.C. Code Ann. § 5-7-30.[2] Further, the South Carolina State Constitution provides that "all laws concerning local government shall be liberally construed in their favor." S.C. Const. art. VIII, § 17. This Office's March 14, 2017 opinion discussed the deference afforded local governments in adopting an ordinance and when such an ordinance will be found invalid as follows:

> Initially, we note that the courts have consistently recognized the basic principle that a local ordinance, just like a state statute, is presumed to be valid as enacted unless or until a court declares it to be invalid. See McMaster v. Columbia Bd. of Zoning Appeals, 395 S.C. 499, 504, 719 S.E.2d 660, 662 (2011) ("A municipal ordinance is a legislative enactment and is presumed to be constitutional."), citing Town of Scranton v. Willoughby, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1991); Casey v. Richland County Council, 282 S.C. 387, 320 S.E.2d 443 (1984); Op. S.C. Atty. Gen., 2003 WL 21471503 (June 4, 2003). An ordinance will not be declared invalid unless it is clearly inconsistent with general state law. Hospitality Ass'n of S.C. v. County of Charleston, 320 S.C. 219, 464 S.E.2d 113 (1995). Only the courts, and not this Office, possess the authority to declare such an ordinance invalid. Therefore, [an ordinance will] be presumed valid and must be followed until a court sets it aside or subsequent legislative action revokes or amends its application.

Op. S.C. Atty. Gen., 2017 WL 1095386, at *1 (March 14, 2017).

As the authorities cited above note, such local ordinances must be consistent with the general laws of the State. In Foothills Brewing Concern. Inc. v. City of Greenville, 377 S.C. 355, 660 S.E.2d 264 (2008), the South Carolina Supreme Court described the two-step process used to determine whether a local ordinance is valid as follows:

> 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.

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enforcement action including, but not limited to, a vehicle collision, vehicle breakdown, or vehicle recovery incident to an arrest, is considered a law enforcement towing for purposes of recovering costs associated with the towing and storage of the vehicle unless the request for towing is made by a law enforcement officer at the direct request of the owner or operator of the vehicle.

[2] See also S.C. Code Ann. § 4-9-25 (Counties similarly exercise legislative 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.").

> [Second, where] 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.
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> 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)).

377 S.C. at 361, 660 S.E.2d at 267; see also Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 35, 530 S.E.2d 369, 372 (2000) ("Determining if a local ordinance is valid is a two-step process: (1) Did the municipality have the power to enact the ordinance, and (2) Is the ordinance inconsistent with the Constitution or general law of the State?"). The Court elaborated that "additional regulation to that of State law does not constitute a conflict therewith." Foothills Brewing, 377 S.C. at 366–67, 660 S.E.2d at 270. However, the Court described the additional constitutional limitations on local regulations which pertain to criminal laws as follows:

> Although Article VIII deals generally with the creation of local government, Article VIII, section 14 limits certain powers of local governments. See City of North Charleston v. Harper, 306 S.C. 153, 155–56, 410 S.E.2d 569, 570 (1991). Section 14 provides, in pertinent part: "In 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." S.C. Const., art. VIII, § 14.
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> We have observed that this subsection of the Constitution requires "statewide uniformity" regarding the criminal law of this State, and therefore, "local governments may not criminalize conduct that is legal under a statewide criminal law."

377 S.C. at 365, 660 S.E.2d at 269 (citations omitted). With this framework in mind, this opinion next examines S.C. Code Ann. § 56-10-225 to determine whether an ordinance which requires a vehicle to be towed if its owner cannot furnish proof of insurance is consistent therewith or is otherwise preempted.

Section 56-10-225 requires vehicle owners to maintain proof of insurance in their vehicles as follows:

> (A) A person whose application for registration and licensing of a motor vehicle has been approved by the Department of Motor Vehicles must maintain in the motor vehicle at all times proof that the motor vehicle is an insured vehicle in conformity with the laws of this State and Section 56-10-510.
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> ...
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> (C) A person who fails to maintain the proof of insurance in his motor vehicle as required by subsection (A) is guilty of a misdemeanor and, upon conviction, is subject to the same punishment as provided by law for failure of the person driving or in control of a motor vehicle to carry the vehicle registration card and to display the registration card upon demand. However, a charge of failing to maintain proof that a motor vehicle is insured must be dismissed if the person provides proof to the court that the motor vehicle was insured on the date of the violation. Upon notice of conviction, the department shall suspend the owner's driver's license until satisfactory proof of insurance is provided. If at any time the department determines that the vehicle was without insurance coverage, the owner's registration and driving privileges will be suspended pursuant to Section 56-10-520.

S.C. Code Ann. § 56-10-225.

While the statute clearly states that it is a misdemeanor criminal offense to fail to maintain proof of insurance in one's vehicle, there is no express or implied limitation therein which prevents counties and municipalities from regulating the vehicles which are driven on public roads within their jurisdiction. In Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 530 S.E.2d 369 (2000) the South Carolina Supreme Court was asked whether a municipal ordinance conflicted with state law when, in pertinent part, the ordinance required property owners to post signage and towing companies to receive written authorization from a private property owner before towing a vehicle even though a state statute made parking a vehicle on private property without permission a misdemeanor and authorized the towing of such a vehicle. 340 S.C. at 35-36; 530 S.E.2d at 372-373. The Court explained that the ordinance did not conflict with the state statute as follows:

> [T]he focus of the state statute is on the conduct of the vehicle owner, whereas the focus of the city ordinance is on the conduct of the property owner and towing company.
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> ...
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> The statute at issue in this case makes it unlawful to park on private property if the property owner has posted a sign in a conspicuous place near the entrance. S.C. Code Ann. § 16-11-760 (1976). The statute also provides that an unlawfully parked vehicle may be towed at the owner's expense and any towing and storage charges shall constitute a lien on the vehicle. Id. The statute is silent

> as to the content of the signs, the amounts to be charged for towing and storage, the records to be maintained, or any of the other details dealt with in the ordinance. Moreover, the "mere differences in detail" concerning the location and number of signs to be posted do not render the statutes conflicting. See Fine Liquors, 302 S.C. at 553, 397 S.E.2d at 664.
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> Our constitution mandates "home rule" for local governments. S.C. Const. art. VIII. "Implicit in Article VIII is the realization that different local governments have different problems that require different solutions." Hospitality Ass'n, 320 S.C. at 230, 464 S.E.2d at 120. As a city whose economy is based largely on tourism, Myrtle Beach was privileged to enact an ordinance to deal with its peculiarly local towing problems. Appellant has not argued § 23-133 was beyond the city's police power, and we conclude the ordinance does not conflict with S.C. Code Ann. § 16-11-760 (1976).

340 S.C. at 36–37, 530 S.E.2d at 372–73. The Court's analysis in Quality Towing appears equally applicable to an ordinance which would require a vehicle to be towed upon failure to provide proof of insurance. While Section 56-10-225 states that the failure to maintain proof of insurance is a misdemeanor, the statute focuses on the conduct of the vehicle owner. An ordinance which requires a vehicle to be towed could be viewed instead as regulating the roads, streets, and law enforcement for preservation of health, peace, and order within the jurisdiction of the county or municipality which enacts it. See S.C. Code Ann. §§ 5-7-30; 4-9-25.[3] Further, an ordinance which requires towing upon failure to provide proof of insurance could also be interpreted as mere difference in detail as Section 56-10-225 is silent in regards to the vehicle itself. Therefore, it is this Office's opinion that a court would likely find a county or municipal ordinance which requires the towing of a vehicle when a person fails to maintain proof of insurance therein would not conflict with S.C. Code Ann. § 56-10-225.

Again, because this Office has not been provided with the text of a proposed ordinance, this opinion cannot anticipate all of the legal challenges which such an ordinance may face. When asked to opine on potential constitutional issues without the text of a proposed municipal ordinance, this Office has generally cautioned as to the following considerations:

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[3] While Brashier v. S.C. Dep't of Transp., 327 S.C. 179, 490 S.E.2d 8 (1997), overruled on other grounds by I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) held that Article VIII, section 14 required statewide uniformity for state highway projects, its holding is distinguishable from the present discussion of municipal or county towing ordinances. The Brashier Court discussed the constitutionality of a statute which left a multimillion dollar state highway project "entirely within counties' discretion. Counties are under no obligation to even submit a certain project to a referendum." 327 S.C. at 185, 490 S.E.2d at 12. The Court held that statute constitutionally delegated authority to approve or disapprove a governmental service which requires statewide uniformity; i.e., "the planning, construction, and financing of state roads." Id. In contrast, the proposal of an ordinance which would require the towing of a vehicle which cannot be legally operated due to a failure to provide proof of insurance from a public roadway does not present a similar impediment the construction and maintenance of the state highway system.

> [T]he City also is limited by the constitutions of both the United States and the State of South Carolina. As you no doubt are aware, the Fourth Amendment of the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Additionally, the Fifth Amendment provides that "[n]o person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." US Const. amend. V. Moreover, the Fourteenth Amendment similarly provides that "[no State shall] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The Fourteenth Amendment also incorporated additional federal constitutional protections and made them binding upon the states. U.S. Const, amend. XIV, § 1; Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) (Fourth Amendment incorporation); Chicago, Burlington & Quincy Railroad Co. v. City of Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897) (partial Fifth Amendment incorporation). Similarly, the South Carolina Constitution mandates that "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated." S.C. Const. art. I, § 10. Additionally, the South Carolina Constitution forbids "any person [being] deprived of life, liberty, or property without due process of law." S.C. Const. art. I, § 3.
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> While we have set out these constitutional limits in order to respond to your question as fully as possible, we cannot speculate whether or how any of these limitations might apply in practice without the text of an ordinance and a particular factual scenario.

Op. S.C. Atty. Gen., 2017 WL 4707545, at *5 (October 11, 2017). This Office offers these constitutional principles as guideposts for local governments to consider when drafting such an ordinance.

Conclusion

It is this Office's opinion that an ordinance which requires a vehicle to be towed if proof of insurance is not furnished could be drafted such that it is consistent with the general laws of South Carolina, the South Carolina State Constitution, and the Federal Constitution. Counties and municipalities of the State are statutorily granted the authority "to enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State." S.C. Code Ann. §§ 4-9-25 (powers of counties); 5-7-30 (powers conferred upon municipalities). While Section 56-10-225 states that the failure to maintain proof of insurance is a misdemeanor, the statute focuses on the conduct of the vehicle owner. An ordinance which requires a vehicle to be towed could be viewed instead as regulating the roads, streets, and law enforcement for preservation of health, peace, and order within the jurisdiction of the county or municipality

which enacts it. See S.C. Code Ann. §§ 5-7-30; 4-9-25. Further, an ordinance which requires towing upon failure to provide proof of insurance could also be interpreted as mere difference in detail as Section 56-10-225 is silent in regards to the vehicle itself. Therefore, it is this Office's opinion that a court would likely find a county or municipal ordinance which requires the towing of a vehicle when a person fails to maintain proof of insurance therein would not conflict with S.C. Code Ann. § 56-10-225. Please note that because this Office has not been provided with the text of a proposed ordinance, this opinion cannot anticipate all of the legal challenges which such an ordinance may face.

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General