ALAN WILSON
ATTORNEY GENERAL

February 11, 2019

The Honorable Alesia Rico Flores
Municipal Judge
City of Charleston
180 B. Lockwood Blvd.
Charleston, SC 29403

Dear Judge Flores:

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

> Pursuant to the City of Charleston Municipal Ordinance Section 21-113, a Law Enforcement Officer or Code Enforcement Officer may issue a Trespass Warning to all individuals who violate any city ordinance or state law on certain property. The property can be owned by the government or a private property owner with a public access easement. As mentioned in the ordinance, a public access easement is an easement in favor of the city granting general public access to private property or limited public access to patrons and invitees of a particular business establishment. The Trespass Warnings may also be issued by persons authorized at the parks and recreation departments to ensure the effective operation, maintenance and security of the location. Trespass warnings can be issued for a period not to exceed one (1) year. The Ordinance goes on to state that appeals shall be heard by the Municipal Court. The rules of evidence would not apply at the hearing and the burden of proof would be clear and convincing evidence.
>
> 1. May a Law Enforcement Officer, Code Enforcement Officer, or Parks and Recreation Employee give an individual a Trespass Warning for violating a city ordinance or state statute prior to an individual's conviction under the ordinance or statute?
> 2. Would it be double jeopardy to use the same set of facts to obtain;
>   a. a conviction for violating an ordinance or statute which lead to a Trespass Warning,

b. a ruling affirming the issuance of a Trespass Warning based on the violation of an ordinance or statute and,
c. a conviction for Trespassing or Trespassing After Notice based on violation of a Trespass Warning related to violation of an ordinance or statute?

3. May a Law Enforcement Officer or Code Enforcement Officer give an individual a Trespass Warning for violating rules or laws on private property with a public access easement without the consent of the owner or manager?
4. Does the Municipality bear the burden of proving the "absence of consent"? In other words, would the owner need to appear in court to testify, or is "consent" a defense to the charge of Trespassing?
5. Can a Municipal Court, whose jurisdiction is limited to criminal, assume appellate jurisdiction over the review of Trespass Warnings, where the burden of proof is clear and convincing evidence?
6. If the answer to (5) is no, then does this nullify 21-113 in its entirety?

Pursuant to the City of Charleston Municipal Ordinance Section 21-85, "No person shall neglect or refuse to depart from the property of another, public or private, when ordered to do so by the owner, occupant or any other person with authority to order such departure."

1. May Law Enforcement Officers enter into an agreement with private property owners to place individuals on Trespass Notice? May Law Enforcement Officers arrest individuals on private property (for example, at an abandoned house) pursuant to the agreement with the private property owner?
2. May Law Enforcement Officers place individuals on Trespass Notice from property owned by a Municipality, but managed by a third party? May Law Enforcement Officers arrest individuals for Trespassing on this property (for example, at a parking garage)?

Law/Analysis

Ordinance § 21-113 describes when a trespass warning may be issued to an individual. Because the issues raised in this request requires a detailed inquiry into the ordinance's framework, the ordinance is reproduced in its entirety below:

(a) Officers of the city police department and other code enforcement personnel are authorized to issue a trespass warning to any individual who violates any city ordinance, rule or regulation promulgated by the body governing the property, or state law which violation was committed while on or within any

facility, building, or outdoor area that is open to the general public, whether owned by the city, by another governmental body, or subdivision thereof, or private property owner, including public parks and including public sidewalks adjacent to public parks where there is also a public sidewalk on the opposite side of the street (but excluding other public right-of-way). The trespass warning shall be limited to the specific property parcel where the violation occurred. The specific property parcel consists of the boundaries set forth on the official property tax maps for the City of Charleston. These warnings may be issued by persons authorized at the parks and recreation departments to insure the effective operation, maintenance and security of the location.

(b) Trespass warnings shall be in writing and issued for a period not to exceed one (1) year.

(c) A copy of the trespass warning shall be provided by mail or hand delivery to the individual given the warning. The written trespass warning shall advise the recipient of the right to appeal and the location at which to file the form to initiate the appeal.

(d) A written trespass warning shall also be issued when officers of the city police department are acting on behalf of another governmental agency or private property owner and issuing a trespass warning to an individual located on public property not owned by the city or on private property subject to a public access easement. For purposes of this section, the term public access easement shall mean an easement in favor of the city granting general public access to private property or limited public access to patrons and invitees of a particular business establishment or establishments.

(e) Any person found on or within any city facility, building, or outdoor area, including public parks, or in any facility, building, outdoor area or park of another governmental agency or private property owner in violation of a trespass warning issued in accordance with this section may be arrested for trespassing after notice, except as otherwise provided in this section, and punished as set forth in section 1-[]16 of the City Code.

(f) Any person found on or within any public property belonging to another governmental agency other than the city or found on or within any private property subject to a public access easement in violation of a trespass warning issued in accordance with this section may be arrested for trespassing.

(g) The mayor, or his designee, may upon request, authorize an individual who has received a trespass warning to enter the property or premises to exercise his or her right to free speech, as provided for in the Constitution of the United States of America and the State of South Carolina, if there is no other reasonable alternative location to exercise such rights or to conduct necessary municipal

business. Such authorization must be in writing, shall specify the duration of the authorization and any conditions thereof, and shall not be unreasonably denied.

(h) This section shall not be construed to limit the authority of any city employee or official with arrest powers to issue a trespass warning to any person for any lawful reason for any city property, including rights-of-way when closed to general vehicular or pedestrian use, when necessary or appropriate in the sole discretion of the city employee or official.

(i) This section shall not be construed to limit the authority of officers of the city police department to arrest or cite individuals for violating any section of the City Code or the statutes of this state.

(j) Appeal of trespass warning. A person whom a trespass warning is issued under this section shall have the right to appeal the issuance of the trespass warning as follows:

(1) An appeal of the trespass warning must be filed, in writing, within twenty (20) days of the issuance of the warning, and shall include the appellant's name, address and phone number, if any. No fee shall be charged for filing the appeal. "Issuance" for purposes of starting the time to appeal means either by personal delivery or when notice of the warning is placed in the mail, whichever occurs first.

(2) Appeals shall be heard by the municipal court.

(3) Within fourteen business days following the filing of the appeal, the municipal court shall schedule a hearing. Notice of the hearing shall be provided to the appellant in one of three ways:

a. By providing the appellant a copy of the notice of hearing in person at the time he or she files the appeal. When it is not reasonably practical or possible to provide notice in this manner, the appellant shall be informed that notice of the hearing will be provided in accordance with either paragraph b. or c. below;

b. By leaving or posting the notice at the front desk of the city police department or leaving the notice with the clerk of council; or

c. By telephone if a telephone number has been provided or mailing when an address has been provided.

(4) The municipal judge shall hold the hearing as soon as possible. In no event shall the hearing be held later than forty (40) days from the filing of the appeal period.

> (5) Copies of documents in the city's control which are intended to be used at the hearing, and which directly relate to the issuance of the trespass warning to the appellant, shall be made available upon request to the appellant at no cost.
>
> (6) The appellant shall have the right to testify and to call witnesses and present evidence and the right to engage an attorney to represent him or her. The appellant shall have the right to bring a court reporter, at his or her own expense.
>
> (7) The municipal court judge shall consider the testimony, reports or other documentary evidence, and any other evidence presented at the hearing. Formal rules of evidence shall not apply, but fundamental due process shall govern the proceedings.
>
> (8) The city shall bear the burden of proving by clear and convincing evidence that the trespass warning was properly issued pursuant to the criteria of this section.
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> (9) If the appellant fails to attend a scheduled hearing, the municipal judge shall review the evidence presented and determine if the trespass warning was properly issued pursuant to the criteria of this section.
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> (10) Within seven (7) business days of the hearing, the municipal judge shall issue a written decision on the appeal which shall be mailed to the appellant at the address provided.
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> (11) The decision of the municipal judge shall be final and the appellant shall be deemed to have exhausted all administrative remedies. Such decision may be subject to judicial review in the manner provided by law.
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> (12) The trespass warning shall remain in effect during the appeal and review process, including any judicial review.

Id. Ordinance § 1-16, cited above in subsection (e), provides the following penalty for violation of a trespass warning:

> (a) Whenever in this Code or any section thereof no penalty is specifically provided for the violation of such Code or section, the court before whom an offender shall be tried may sentence him to pay a fine not exceeding five hundred dollars ($500.00) or serve a term not exceeding thirty (30) days in jail, or both. Each day any violation of this Code or section thereof shall continue shall, unless otherwise specifically provided, constitute a separate offense.

Id. This opinion addresses the issues raised in the request letter below.

1. **Can a Municipal Court, whose jurisdiction is limited to criminal matters, assume appellate jurisdiction over the review of Trespass Warnings, where the burden of proof is clear and convincing evidence?**

A. Municipal courts lack civil jurisdiction.

It is this Office's opinion that a court would likely find the appeal process specified in Ordinance § 21-113(j) conflicts with the statutory limitation that municipal courts "shall have no jurisdiction in civil matters." S.C. Code Ann. § 14-25-45. The request letter asks whether the appeal process for the trespass warning is incompatible with the limited jurisdiction of the municipal court because the standard of proof in subsection (j) is that of "clear and convincing evidence." The South Carolina Code of Laws establishes municipal courts have jurisdiction over the following matters:

> Each municipal court shall have jurisdiction to try all cases arising under the ordinances of the municipality for which established. The court shall also have all such powers, duties and jurisdiction in criminal cases made under state law and conferred upon magistrates. The court shall have the power to punish for contempt of court by imposition of sentences up to the limits imposed on municipal courts. The court shall have no jurisdiction in civil matters.

S.C. Code Ann. § 14-25-45. The first sentence of Section 14-25-45 states that each municipal court has jurisdiction to hear all cases arising under the ordinances of the municipality which established it. City of Columbia v. Haiyan Lin, No. 2010-UP-271, 2010 WL 10079927, at *1 (S.C. Ct. App. May 14, 2010) ("As to whether the circuit court erred in finding the municipal court had jurisdiction: S.C. Code Ann. § 14–25–45 (Supp.2009) (providing that municipal courts have jurisdiction to hear 'all cases arising under the ordinances of the municipality for which established')."). However, the final sentence of Section 14-25-45 apparently prohibits municipal courts from hearing any civil matter. See City of Columbia v. Assaad-Faltas, No. 2005-UP-143, 2005 WL 7083486, at *7 (S.C. Ct. App. Mar. 1, 2005) ("Pursuant to section 14–25–45 of the South Carolina Code (Supp.2004), municipal courts have jurisdiction in criminal cases and are explicitly restricted from having jurisdiction in civil cases."). This Office has found cases which emphasize either the first or last sentence of Section 14–25–45 to say a municipal court either does or does not have jurisdiction, but this Office has not found a case where a court clearly addresses how these two statements are to be reconciled when a violation of a municipal ordinance is a civil matter. This opinion next addresses how a court may resolve this ambiguity.

Statutory interpretation of the South Carolina Code of Laws requires a determination of the General Assembly's intent. Mitchell v. City of Greenville, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015) ("The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible."). Where a statute's language is plain and unambiguous, "the text of a statute is considered the best evidence of the legislative intent or will." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). However, where an ambiguity prevents the statute from conveying a clear and definite meaning, it is necessary to construe the terms of

the statute according to settled rules of construction. Grant v. City of Folly Beach, 346 S.C. 74,79,551 S.E.2d 229,231 (2001) (citations omitted); see also Abell v. Bell, 229 S.C. 1, 91 S.E.2d 548 (1956) ("But where the language of the statute gives rise to doubt or uncertainty as to the legislative intent, the search for that intent may range beyond the borders of the statute itself; for it must be gathered from a reading of the statute as a whole in the light of the circumstances and conditions existing at the time of its enactment.").

The SC Bench Book for Magistrates and Municipal Judges (revised 05/01/94) explains that the General Assembly enacted Section 14–25–45 in 1980 by Act No. 480. The prior statutory authority addressing the mayor's authority to preside over a municipal court and its jurisdiction stated:

> The intendants or mayors of the cities and towns of this State shall have all the power and authority of magistrates in criminal cases within the corporate limits and police jurisdiction of their respective cities and towns and shall especially have the power and authority to try speedily all offenders against the ordinances or laws of the city or town in a summary manner and without a jury, unless demanded by the accused.

S.C. Code Ann. § 14-25-10 (1976). Similarly, Section 14-25-970 stated:

> Such municipal court shall have jurisdiction to try and determine all cases arising under the ordinances of the city in which the court is established and generally shall have all such judicial powers and duties as are now conferred upon the mayor of such city, either by its charter or by the laws of this State. The municipal court shall also have all such powers, duties, and jurisdiction in criminal cases made under municipal or State law as are now conferred upon the magistrates appointed and commissioned for the county in which the court is established, except that such court shall not have the authority of a magistrate to appoint a constable.

S.C. Code Ann. § 14-25-970 (1976). This Office's prior opinions interpreted these statutes to distinguish between the municipal court's authority to hear cases arising under ordinances and those arising under a magistrate's criminal jurisdiction as follows:

> Under authority of South Carolina Code § 15-1002 (1962) the City of Anderson is authorized to establish a municipal court. The jurisdiction of this court extends to all cases under the ordinances of the municipality and additionally to all criminal matters over which a magistrate appointed and commissioned in the county in which the municipality would have jurisdiction. S.C. Code § 15-1010 (1962).

Op. S.C. Atty. Gen., 1971 WL 22594 (October 8, 1971). These statutes stated the municipal courts' jurisdiction positively includes all cases arising under the ordinances of the city where they are established as well as that of a magistrate in criminal cases. 1980 Act No. 480 amended these statutes to provide for a uniform system of municipal courts. S.C. Const. art. V, § 1 ("The

judicial power shall be vested in a unified judicial system, which shall include a Supreme Court, a Court of Appeals, a Circuit Court, and such other courts of uniform jurisdiction as may be provided for by general law."). The current language in Section 14-25-45 positively states municipal court jurisdiction includes all cases arising under the ordinances of the city where it is established and that of a magistrate in criminal cases. However, the statute also negatively states that "[t]he court shall have no jurisdiction in civil matters." The language in 1980 Act No. 480 amended the jurisdiction of the municipal court to exclude civil jurisdiction broadly rather than to maintain the prior inclusive language regarding ordinances and criminal jurisdiction "as are now conferred upon the magistrates." Therefore, it is this Office's opinion that a court would likely interpret the legislative intent behind the adoption of S.C. Code Ann. § 14-25-45 was, in part, to exclude all civil matters from municipal court jurisdiction, including municipal ordinances.

B. The appeal process for a trespass warning in Ordinance §§ 21-113(j) is a civil matter.

It is this Office's opinion that a court would likely find the appeal of a trespass warning is not a criminal matter, and, as a result, a municipal court would not have jurisdiction to hear such an appeal. Ordinance § 21-113(j)(1) permits a person served with a trespass warning to appeal[1] the issuance of the warning. The ordinance directs that municipal courts have exclusive jurisdiction over this appeal. Ordinance § 21-113(j)(2) ("Appeals shall be heard by the municipal court."). At this hearing, the city has the burden of proof by the "clear and convincing evidence" standard associated with civil actions. Ordinance § 21-113(j)(8). In Hudson v. United States, 522 U.S. 93, 99 (1997), the Supreme Court of the United States provided the following guidance for determining whether a punishment is civil or criminal:

> Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction. Helvering, supra, at 399, 58 S.Ct., at 633. A court must first ask whether the legislature, "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." Ward, 448 U.S., at 248, 100 S.Ct., at 2641. Even in those cases where the legislature "has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect," id., at 248–249, 100 S.Ct., at 2641, as to "transfor[m] what was clearly intended as a civil remedy into a criminal penalty," Rex Trailer Co. v. United States, 350 U.S. 148, 154, 76 S.Ct. 219, 222, 100 L.Ed. 149 (1956).

The legislation at issue in this opinion, Ordinance §§ 21-113(e)-(f), provides that a person found on or within a property parcel "in violation of a trespass warning" may be arrested for trespassing after notice or for trespassing respectively. However, the ordinance does not contain an express criminal penalty for the issuance of the trespass warning itself. Further, there is no implication that the receipt of a trespass warning carries a criminal penalty.

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[1] This Office notes that while Ordinance 21-113(j) describes the review of a trespass warning as an "appeal," a court would likely find this to be an initial judicial review because no administrative or judicial hearing is provided prior to this hearing.

The trespass warning appeal process in Ordinance § 21-113(j) is similar to the statutory public library trespass warning appeal process. Section 16-11-625 of the South Carolina Code authorizes a library director, branch manager or acting branch manager of a library to give an individual a trespass warning which specifies a violation of a criminal law or code of conduct and the duration the individual is prohibited from returning to the library. S.C. Code Ann. § 16-11-625(A)(2)(a)-(b). A public library trespass warning is appealable to its library board of trustees. S.C. Code Ann. § 16-11-625(A)(2)(c). This appeal process is not a criminal matter as a library board of trustees does not have jurisdiction in such a case and no criminal penalty results directly from a public library trespass warning being upheld. In contrast, a violation of a public library trespass warning is a misdemeanor and "is triable in the appropriate municipal or magistrates court." S.C. Code Ann. § 16-11-625(B).

Moreover, the clear and convincing standard of proof required in the trespass warning appeal process demonstrates legislative intent that the appeal process be considered a civil matter. Ordinance §§ 21-113(j)(8). The Supreme Court of the United States has held that, in criminal cases, due process requires proof "beyond a reasonable doubt of every fact necessary to constitute the crime." In re Winship, 397 U.S. 358, 364 (1970); see also State v. Daniels, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012) (The State bears the burden of proof in a criminal case to overcome "the presumption of innocence and ... to prove the defendant's guilt beyond a reasonable doubt."); Assaad-Faltas, supra ("The only standard of review utilized by the court is the 'beyond a reasonable doubt' standard established for criminal matters. ... Nothing in the record indicates the judge utilized an incorrect standard."); § 1-3 General Instructions - Burden of Proof, Anderson, S.C. Requests to Charge - Civil, 1-3 ("Clear and convincing evidence is an elevated standard of proof, which lies between the lesser standard of "preponderance of the evidence," used in most civil cases, and the higher standard of "beyond a reasonable doubt," which is required in criminal cases."). As the request letter notes that Ordinance § 21-113 specifies a standard of proof used in civil matters, a court would likely find that the trespass warning appeal process is a civil matter rather than a criminal matter. Therefore, it is this Office's opinion that a court would likely find a municipal court does not have jurisdiction to hear an appeal of a trespass warning under Ordinance § 21-113(j).

C. Severability of the appeal process in Ordinance § 21-113(j).

In light of this Office's opinion that a court would likely find a municipal court does not have jurisdiction over the trespass warning appeal process in Ordinance §§ 21-113(j), the request letter asks the additional question of whether Ordinance § 21-113 would be nullified in its entirety. In Joytime Distributors & Amusement Co. v. State, 338 S.C. 634, 528 S.E.2d 647 (1999), the South Carolina Supreme Court stated its test for severability of a legislative act as follows:

> The test for severability is whether the constitutional portion of the statute remains complete in itself, wholly independent of that which is rejected, and is of such a character that it may fairly be presumed the legislature would have passed it independent of that which conflicts with the constitution. Thomas v. Cooper River Park, 322 S.C. 32, 471 S.E.2d 170 (1996); Thayer v. South Carolina Tax

> Comm'n, 307 S.C. 6, 413 S.E.2d 810 (1992). "When the residue of an Act, sans that portion found to be unconstitutional, is capable of being executed in accordance with the Legislative intent, independent of the rejected portion, the Act as a whole should not be stricken as being in violation of a Constitutional Provision." Dean v. Timmerman, 234 S.C. 35, 43, 106 S.E.2d 665, 669 (1959).

338 S.C. at 648–49, 528 S.E.2d at 654. A legislative act is presumed to be valid until a court rules to the contrary. Op. S.C. Atty. Gen., 2005 WL 1383357, at *9 (May 2, 2005) ("While this Office may comment upon what we deem an apparent constitutional defect, we may not declare the Act void. Put another way, a duly enacted statute 'must continue to be followed until a court declares otherwise.'"). If a reviewing court concludes that the appeal process in subsection (j) is invalid, the court would next consider whether the residue of the ordinance could be left in place in accordance with legislative intent. Joytime, supra. A reviewing court may well find that the City Council of Charleston would not have adopted Ordinance § 21-113 without the specified appeal process and strike down the ordinance in its entirety. Ordinance § 21-113 does not contain a severability clause and the meeting minutes in which city council ratified Ordinance § 21-113 do not include any additional context to ascertain the council's preference. See City Council minutes March 25, 2014, p. 15. Consequently, this Office has found no evidence of legislative intent to prefer the ordinance without the specific appeal process in subsection (j) to striking the ordinance as a whole. Therefore, it is this Office's opinion that a court may well strike the ordinance as a whole.

This Office again notes that Ordinance § 21-113 is presumed to be valid and constitutional, and that only a court could make a determination relating to unconstitutionality or severability. Unless and until a court rules that Ordinance § 21-113 is constitutionally invalid, it must be enforced as it is written.

2. **May a Law Enforcement Officer, Code Enforcement Officer, or Parks and Recreation Employee give an individual a Trespass Warning for violating a city ordinance or state statute prior to an individual's conviction under the ordinance or statute?**

It is this Office's opinion that Ordinance § 21-113 does not require an individual to be convicted before he can be given a trespass warning. The express language in subsection (a) does not state a conviction is required prior to a police officer or code enforcement personnel issuing a trespass warning. While subsection (a) does not directly address this issue, when read in context with subsection (d), the implication is that trespass warnings are intended to be issued contemporaneously with a violation while the individual is in the presence of a police officer or code enforcement officer. Historic Charleston Foundation v. Krawcheck, 313 S.C. 500, 443 S.E.2d 401 (Ct. App. 1994) (legal authority relating to the same subject should be construed together in order "to produce a harmonious body of legislation"). Subsection (d) directs police officers to issue a trespass warning when acting on behalf of another governmental agency or private property owner "to an individual located on public property not owned by the city or on private property subject to a public access easement." Ordinance § 21-113(d) (emphasis added).

The emphasized language indicates that trespass warnings issued under subsection (d) are intended to occur while the individual is located on the subject property in the officer's presence. The ordinance does not distinguish between trespass warnings issued under subsection (a) or (d) in how a written waiver is granted or in how the appeal of the trespass warning is adjudicated. Ordinance §§ 21-113(g),(j). While subsection (c) provides that a "copy" of the trespass warning must be mailed or hand delivered, it does not compel a contrary construction such that an original trespass warning cannot issued at the time of the violation. Therefore, because it appears that a trespass warning issued under subsection (d) is authorized to occur contemporaneously with an individual's presence on subject property, it is a reasonable and fair interpretation that trespass warnings issued according to subsection (a) are similarly authorized to be issued contemporaneously with a violation of statute, regulation, or ordinance.

3. **Would it be double jeopardy to use the same set of facts to obtain;**
    a. **a conviction for violating an ordinance or statute which lead to a Trespass Warning,**
    b. **a ruling affirming the issuance of a Trespass Warning based on the violation of an ordinance or statute and,**
    c. **a conviction for Trespassing or Trespassing After Notice based on violation of a Trespass Warning related to violation of an ordinance or statute?**

It is this Office's opinion that Ordinance § 21-113 does not subject an individual to double jeopardy. S.C. Const. art. I, § 12; V; U.S. Const. Amend. V. The Double Jeopardy Clause protects citizens from being prosecuted multiple times for the same offense after acquittal or conviction and from multiple punishments for the same offense. State v. Brandt, 393 S.C. 526, 538, 713 S.E.2d 591, 597 (2011); State v. Cuccia, 353 S.C. 430, 434, 578 S.E.2d 45, 47 (Ct. App. 2003) ("The 'guarantee [against double jeopardy] has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'"). Where a penalty is determined to be criminal in nature, South Carolina's state courts have "definitively establishe[d] ... a traditional, strict application of the Blockburger 'same elements test.'" Brandt, 393 S.C. at 539, 713 S.E.2d at 598. According to the Blockburger Test, an individual may be convicted of multiple crimes arising from the same conduct without being placed in double jeopardy where each offense calls for proof of a fact which the others do not. Id. The Brandt Court explained the Blockburger Test "requires a technical comparison of the elements of the offense for which the defendant was first tried with the elements of the offense in the subsequent prosecution." Id. (citing Moyd, 321 S.C. at 258, 468 S.E.2d at 9.). However, the Double Jeopardy Clause is less often violated where a punishment is civil or administrative in nature. In State v. Price, 333 S.C. 267, 510 S.E.2d 215 (1998), the South Carolina Supreme Court considered whether an administrative suspension of an individual's driver's license for refusal to submit to a breathalyzer test rendered his later conviction for DUI a violation of the Double Jeopardy Clause. The Court explained how double jeopardy claims are analyzed in the context of a civil sanction as follows:

> Recently, in Hudson v. United States, 522 U.S. 93, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997), the United States Supreme Court set forth the framework within which to analyze a double jeopardy claim in the context of a civil sanction. Hudson held the mere fact that a civil penalty has some deterrent effect does not render it violative of the double jeopardy clause. "[I]f a sanction must be "solely" remedial to avoid implicating the Double Jeopardy Clause, then no civil penalties are beyond the scope of the Clause." 118 S. Ct. at 495. Accordingly, under Hudson, a court looks at the face of a statute to determine if it establishes a criminal or civil penalty, and then determines if the statutory scheme is so punitive in purpose or effect as to transform what was intended as a civil sanction into a criminal penalty. Only the clearest proof will suffice to override legislative intent and transform what has been denominated as a civil remedy into a criminal penalty.

State v. Price, 333 S.C. at 270–71, 510 S.E.2d at 217–18 (footnotes omitted). The Court listed the following factors to consider in determining whether a penalty is so punitive in nature that it has been transformed into a criminal sanction:

> 1) whether the sanction involves an affirmative disability or restraint,
>
> 2) whether it has historically been regarded as a punishment,
>
> 3) whether it comes into play only on a finding of scienter,
>
> 4) whether its operation will promote the traditional aims of punishment-retribution and deterrence,
>
> 5) whether the behavior to which it applies is already a crime,
>
> 6) whether an alternative purpose to which it may rationally be connected is assignable for it, and
>
> 7) whether it appears excessive in relation to the alternative purpose assigned.

333 S.C. at 272 n.5, 510 S.E.2d at 218 n.5. When a penalty is determined to be civil in nature, rather than criminal, "then the double jeopardy clause is not implicated and there is simply no need to conduct a Blockburger analysis." 333 S.C. at 271, 510 S.E.2d at 218.

It is this Office's opinion that Ordinance § 21-113 would not subject an individual to double jeopardy. For purposes of this analysis, this opinion assumes that the trespass warning would be issued according to subsection (a) as one of its elements is a violation of a city ordinance, rule or regulation promulgated by the body governing the property, or state law. Initially, the violation which could authorize the trespass warning may not necessarily be criminal in nature as the violation of regulations and state statutes often may not carry criminal

penalties. However, it will further be assumed that the violation which authorizes the trespass warning is criminal. Next, as discussed above, it is this Office's opinion that the trespass warning itself is civil or administrative nature, rather than criminal. As the Price Court explained that the double jeopardy clause is not implicated where a penalty is determined to be civil, a court likely would not find that the affirmance of a trespass warning as described in Ordinance § 21-113 (j) violates the Double Jeopardy Clause. Finally, it is this Office's opinion that a court would be unlikely to find that a conviction for violation of a trespass warning would disturb the Double Jeopardy Clause because the violation of the trespass warning would necessarily require a separate element from the original criminal violation authorizing the trespass warning; namely that a person issued a trespass warning be found on the property to which the trespass warning applies. Ordinance §§ 21-113(e) & (f).

4. **May a Law Enforcement Officer or Code Enforcement Officer give an individual a Trespass Warning for violating rules or laws on private property with a public access easement without the consent of the owner or manager?**

It is this Office's opinion that a court would likely find Ordinance § 21-113 (a) authorizes law enforcement officers or other code enforcement personnel to issue a trespass warning on private property without first acquiring consent from the property owner or manager because consent is not an element of the subsection. In contrast, Ordinance § 21-113 (d) states that a trespass warning shall also be issued when "officers of the city police department are acting on behalf of... [a] private property owner and issuing a trespass warning to an individual located on ... private property subject to a public access easement." Because subsection (d) states that a police officer acts on behalf of the property owner in issuing the trespass warning thereunder, the plain language of the ordinance demonstrates legislative intent that the officer act with the private property owner's consent in issuing the trespass warning.

5. **Does the Municipality bear the burden of proving the "absence of consent"? In other words, would the owner need to appear in court to testify, or is "consent" a defense to the charge of Trespassing?**

This Office cannot opine on whether the manner in which evidence is presented would be sufficient to support a conviction or a defense as these are more appropriately determined by a trial court. See Op. S.C. Atty. Gen., 2007 WL 2459748 (July 17, 2007) ("As indicated in numerous prior opinions, this office does not have the jurisdiction of a court to investigate and determine facts."). However, this Office will opine on the elements of a violation of the ordinance and the issue of the burden of proof.

For a prosecution under Ordinance § 21-113(e) or (f), the city would be required to prove each element of the offense as specified in the ordinance beyond a reasonable doubt. See State v. Benton, 338 S.C. 151, 155, 526 S.E.2d 228, 230 (2000). However, where a trespass warning is appealed, the city bears the burden of proof "by clear and convincing evidence that the trespass warning was properly issued pursuant to the criteria of this section." Ordinance § 21-113(j)(8). As discussed above, a trespass warning issued under subsection (d) requires that the officer act

with the consent of another governmental agency or private property owner in issuing the trespass warning. Therefore, the city would be required to prove that an officer who issued a trespass warning under subsection (d) did so with the consent of the other governmental agency or private property owner.

Alternatively, a trespass warning issued under subsection (a) is based on a violation of an ordinance, regulation or state law committed on a specific property parcel. The parcel can be owned by "the city, by another governmental body, or subdivision thereof, or private property owner." Where a violation of a trespass warning issued under subsection (a) occurs on the property belonging to another government agency or private property owner, a court may well find that Ordinance § 21-113(e) conflicts with state criminal law and that the city may have exceeded its authority in enacting the ordinance. Article VIII, § 14 of the South Carolina Constitution states that state criminal laws and the penalties and sanctions for violating them "shall not be set aside." The South Carolina Supreme Court construes this constitutional provision to "to prohibit a municipality from proscribing conduct that is not unlawful under State criminal laws governing the same subject." Connor v. Town of Hilton Head Island, 314 S.C. 251, 254, 442 S.E.2d 608, 609 (1994). The Court held that where a town "criminalized conduct that is not unlawful under relevant State law, [it] exceeded its power in enacting the ordinance in question." Connor, 314 S.C. at 254, 442 S.E.2d at 610.

In circumstances where a trespass warning is issued to an individual according to subsection (a) on private property, a court may find that under Ordinance §§ 21-113(e)&(f), the consent of the person in possession of the property, his agent, or representative to the individual's presence on the property is a defense. According to the South Carolina Code of Laws, it is a criminal offense to enter the premises of private property after receiving a warning or to refuse to leave on request. S.C. Code Ann. § 16-11-620. Unlike Ordinance § 21-113(a), one of the elements of the statute requires that the individual be on the property "without legal cause or good excuse" as follows:

> Any person who, without legal cause or good excuse, enters into the dwelling house, place of business, or on the premises of another person after having been warned not to do so or any person who, having entered into the dwelling house, place of business, or on the premises of another person without having been warned fails and refuses, without good cause or good excuse, to leave immediately upon being ordered or requested to do so by the person in possession or his agent or representative shall, on conviction, be fined not more than two hundred dollars or be imprisoned for not more than thirty days.
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> ...

S.C. Code Ann. § 16-11-620 (emphasis added). The plain language of Section 16-11-620 demonstrates that an unlawful trespass charge against an individual who has consent from a person in possession of a property or his agent to be on the premises would not meet all of the elements of trespass after notice. A court may well find that Section 16-11-620 and Ordinance § 21-113(e) both govern the same subject matter; namely entering the premises of another after

being warned against it. Further, to the extent that the violation of a trespass warning issued according to Ordinance § 21-113(a) criminalizes the presence of an individual who has the consent of a person in possession of property or his agent on private property, a court could find Ordinance § 21-113(e) to conflict with state criminal law. Alternatively, a court could find that consent of the person in possession of the property constitutes an affirmative defense to a prosecution Ordinance § 21-113(e).

This Office's prior opinions explain that our state courts interpret S.C. Code Ann. § 16-11-620 to apply to solely to private property:

> In its decision in State v. Hanapole, 255 S.C. 258, 178 S.E.2d 247 (1970), the State Supreme Court ruled that Section 16-11-620 applies only to private property and has no applicability to public property. In that case, the Court further stated that since the trespass statutes "applies only to private property, a conviction thereunder for an alleged trespass upon public property is not warranted and cannot be sustained." Ibid.

Op. S.C. Atty. Gen., 2009 WL 580552 (February 17, 2009) (emphasis added). Yet, a court may find two statutes which relate to trespass on public property also govern the same subject matter as Ordinance § 21-113(e). The South Carolina Code establishes criminal penalties for trespass on public libraries, S.C. Code Ann. § 16-11-625, and on public school property, S.C. Code Ann. §§ 16-11-530, -600.

Section 16-11-625 solely authorizes a library director or branch manager to issue a trespass warning while in the presence of a law enforcement officer. Further, the appeal of such a trespass warning is assigned to the library board of directors. S.C. Code Ann. § 16-11-625(A)(2). It is this Office's opinion that a court would likely find that Section 16-11-625 is a state criminal law which governs the same subject matter as Ordinance § 21-113 when applied to public libraries. If an individual is prosecuted for violation of a trespass warning issued under Ordinance § 21-113(a) on a public library and the individual can demonstrate he had consent of the library director or the library board of trustees, a court may find that Ordinance § 21-113 criminalizes conduct which Section 16-11-625 does not. In such a case, a court may find that the consent of the library director or library board of trustees is a defense to such a prosecution or that the city exceeded its authority in enacting the ordinance.

Similarly, S.C. Code Ann. §§ 16-11-530 & -600 authorize the trustees of a school district to determine if there has been a trespass on school property. This Office previously opined that a school board of trustees may delegate its authority to determine if a trespass has occurred on school property to an agent. See Ops. S.C. Att'y Gen., 2018 WL 1160083 (February 16, 2018); 2017 WL 6403325 (November 30, 2017). It is this Office's opinion that a court would likely find that Sections 16-11-530 & -600 are state criminal laws which govern the same subject matter as Ordinance § 21-113 when applied to public school property. If an individual is prosecuted for the violation of a trespass warning issued under Ordinance § 21-113(a) on public school property and the individual can demonstrate that the school board of trustees or its agent have not determined a trespass occurred or that the individual has the board's consent to be on

the school property, a court may find that Ordinance § 21-113 criminalizes conduct which Sections 16-11-530 & -600 do not. In such a case, a court may find that the consent of the school board of trustees or its agent is a defense to such a prosecution or that the city exceeded its authority in enacting the ordinance. Connor v. Town of Hilton Head Island, supra.

Finally, Ordinance § 21-113(f) directs that a person who violates a trespass warning on public property belonging to another governmental agency other than the city or on private property subject to a public access easement may be arrested for trespassing. Ordinance § 21-85, which codifies trespassing after notice within the Charleston City Code, prohibits the willful entry on the land of another "without the consent of the owner or person in charge." Therefore, consent of the owner or person in charge to an individual's presence would be a defense to a prosecution thereunder. Similarly, statutory trespass or "unlawful trespass," is codified at Section 16-11-620.[2] See McMillian v. State, 383 S.C. 480, 487 n.4, 680 S.E.2d 905, 908 n.4 (2009); State v. Cross, 323 S.C. 41, 43, 448 S.E.2d 569, 570 (Ct. App. 1994) *as amended on denial of reh'g* (Aug. 31, 1994). For a prosecution under either Ordinance § 21-85 or Section 16-11-620, it is this Office's opinion that a court would likely find that consent is a defense, and therefore would be defense under Ordinance § 21-113 (f) as well.

6. May Law Enforcement Officers enter into an agreement with private property owners to place individuals on Trespass Notice? May Law Enforcement Officers arrest individuals on private property (for example, at an abandoned house) pursuant to the agreement with the private property owner?

It is this Office's opinion that Ordinance § 21-113(d) and Ordinance § 21-85(b) both authorize law enforcement officers to issue trespass warnings or arrest individuals on private property respectively. As discussed more fully above, Ordinance § 21-113(d) directs officers of the city police department to issue trespass warnings on private property subject to a public access easement when acting on behalf of the private property owner. Yet, this authority to issue trespass warnings is not available to all private property, but it is instead limited to only private property subject to a public access easement. In contrast, Ordinance § 21-85 applies more broadly to public and private property. Section 21-85 states:

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[2] The South Carolina Court of Appeals explained that lack of consent is an element of common law trespass as well:

> The unwarrantable entry on land in the peaceable possession of another is a trespass, without regard to the degree of force used, the means by which the enclosure is broken, or the extent of the damage inflicted. Lee v. Stewart, 218 N.C. 287, 10 S.E.2d 804 (1940). The entry itself is the wrong. Thus, for example, if one without license from the person in possession of land walks upon it, or casts a twig upon it, or pours a bucket of water upon it, he commits a trespass by the very act of breaking the enclosure.

Snow v. City of Columbia, 305 S.C. 544, 552–53, 409 S.E.2d 797, 802 (Ct. App. 1991) (emphasis added); see also Ravan v. Greenville Cty., 315 S.C. 447, 464, 434 S.E.2d 296, 306 (Ct. App. 1993) ("The essence of trespass is the unauthorized entry onto the land of another.").

> (a) No person shall wilfully [sic] enter upon the lands or premises of another, public or private, without the consent of the owner or person in charge, or after having been forbidden to do so or after such land or premises has been posted by the owner, occupant or any other authorized person with a conspicuous notice forbidding trespassing.
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> (b) No person shall neglect or refuse to depart from the property of another, public or private, when ordered to do so by the owner, occupant or any other person with authority to order such departure.

Id. (emphasis added). It is this Office's opinion that a court would likely find that the plain language of Ordinance § 21-85 authorizes a property owner or person in charge may give notice to the city police department that a privately owned parcel is vacant, as the question suggests, and to authorize officers to order the departure of any individual found on such property.

7. **May Law Enforcement Officers place individuals on Trespass Notice from property owned by a Municipality, but managed by a third party? May Law Enforcement Officers arrest individuals for Trespassing on this property (for example, at a parking garage)?**

It is this Office's opinion that a court would likely find that law enforcement officers are authorized by Ordinance § 21-85 to arrest persons for trespass on property owned by the city and managed by a third party. As discussed above, Ordinance § 21-85 applies to both public and private property. Subsection (a) prohibits an individual from entering the land or premises of another, whether public or private, where the owner, occupant or any other authorized person has forbidden the person from doing so. The plain language of subsection (a) makes clear that the ordinance applies to public property, which would include city-owned property. In general, it appears broadly consistent with the language of Ordinance § 21-85 for such a managing third party to be considered a "person in charge" and have the authority to forbid entry to an individual under subsection (a). Therefore, if such an individual refused to depart when ordered to do so by a third party manager, a court would likely find that a law enforcement officer is authorized to arrest the individual for trespass under the statute. However, whether a particular third party who manages city owned public property can be classified as an "occupant" or "authorized person" will necessarily be fact dependent and is more appropriately addressed by a reviewing court with jurisdiction to determine facts. See Op. S.C. Atty. Gen., 2007 WL 2459748 (July 17, 2007).

Conclusion

It is this Office's opinion that a court would likely find a municipal court does not have jurisdiction to hear an appeal of a trespass warning under City of Charleston Municipal Ordinance § 21-113(j). Further, it is this Office's opinion that a court may well strike the ordinance as a whole because we have found no evidence of legislative intent to prefer the ordinance without the specific appeal process in subsection (j). This Office again notes that Ordinance § 21-113 is presumed to be valid and constitutional, and that only a court could make

a determination relating to unconstitutionality or severability. Unless and until a court rules that Ordinance § 21-113 is constitutionally invalid, it must be enforced as it is written. As to the remaining questions regarding the enforcement scheme in Ordinance § 21-113, please refer to the responses more fully developed above.

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General