ALAN WILSON
ATTORNEY GENERAL

June 25, 2012

Terry W. Richards, Chief
Lyman Police Department
Lyman Municipal Complex
81 Groce Road
Lyman, SC 29365

Dear Chief Richards:

We received your request for an opinion from this Office regarding the validity of a Spartanburg County ordinance that, in addition to a fine of not more than five hundred dollars, imposes a jail sentence of up to thirty days imprisonment for a violation of a drug paraphernalia ordinance even though State law only imposes a civil fine for such a violation. Specifically, S.C. Code Ann. §44-53-391(a) states that "[i]t shall be unlawful for any person to advertise for sale, manufacture, possess, sell or deliver, or to possess with the intent to deliver, or sell [drug] paraphernalia." Pursuant to §44-53-391(c), a violation of this statute is ". . . a civil fine of not more than five hundred dollars except that a corporation shall be subject to a fine of not more than fifty thousand dollars."[1]

In an opinion of this Office dated September 10, 2009, a copy of which is enclosed, we addressed your precise question. Initially, we acknowledged an opinion dated July 1, 2004, which discussed the question of whether a local ordinance that made the possession of drug paraphernalia a criminal offense subject to a penalty of not more than two hundred dollars or a term of imprisonment not exceeding thirty days was superseded by §44-53-391. Noting the general presumption of the validity of a municipal ordinance along with other supporting case law, this office concluded that the local ordinance was valid. However, the 2009 opinion explained:

> [a]dmittedly, the case law in this area is somewhat ambiguous. See, *e.g.*, Beachfront Entertainment, Inc. v. Town of Sullivan's Island, 379 S.C. 602, 666 S.E.2d 912 (2008) and Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 660 S.E.2d 264 (2008). However, the decision in City of North Charleston v. Harper, 306 S.C. 153, 410 S.E.2d 569 (1991) cited by you does not appear to control. In the situation before the Court, there was a state statute

[1]Section 44-53-391(c) further prides that "[i]mposition of such fine shall not give rise to any disability or legal disadvantage based on conviction for a criminal offense." See Op. S.C. Atty. Gen., August 25, 2009 [advising that this provision indicates the imposition of a "civil fine" should not prevent an individual from receiving an expungement otherwise authorized by §22-5-910(B)].

> that set a penalty for the offense of simple possession of marijuana of a term of imprisonment not to exceed thirty days or a fine of not less than one hundred dollars nor more than two hundred dollars. The city ordinance provided a mandatory sentence of a term of imprisonment of thirty days. The Court stated that
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> > [t]he legislature has provided parameters within which local governments may enact ordinances dealing with the criminal offense of simple possession of marijuana. This legislation occupies the field as far as penalties for this offense are concerned. Local governments may not enact ordinances that impose greater or lesser penalties than those established by these parameters. (emphasis added).
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> [Harper,] 306 S.C. at 156. The Court cited a violation of Article VIII, Section 14 of the State Constitution which limits the powers of local governments by providing that "...local governments may not attempt to set aside state "criminal laws and the penalties and sanctions in the transgression thereof...." Id. It does not appear that Harper controls inasmuch as the municipal ordinance in establishing a term of imprisonment for the violation does not attempt to set aside a criminal law inasmuch as the State law on drug paraphernalia only establishes a civil penalty. But see: Connor v. Town of Hilton Head, 314 S.C. 251, 442 S.E.2d 608 (1994) (a municipality cannot criminalize nude dancing where relevant State law does not). While the prior opinion of this office dated September 1, 1988 also cited by you suggested in a footnote a contrary conclusion to the July 1, 2004 opinion referenced above, it did state that "[i]t is generally recognized that a criminal penalty of a fine or imprisonment is distinguishable from a civil fine."

We concluded in the 2009 opinion that:

> [w]hile this office in its opinion dated July 1, 2004 concluded that a local ordinance that made the possession of drug paraphernalia a criminal offense subject to a penalty of not more than two hundred dollars or a term of imprisonment of thirty days was valid, because of the ambiguity of the law in this area generally, in order to resolve this matter, consideration should be given to seeking a declaratory judgment which would resolve the matter with finality.

It is the policy of this Office that where a prior opinion governs, we will not issue a new opinion and will presume that the prior opinion is correct. Id. We will not reverse a prior opinion unless such prior opinion is clearly erroneous or the applicable law has been changed. Id. Based upon our further review of the question presented, the response provided in the referenced opinion remains the opinion of this Office.

We thus strongly suggest that you review the matter with the county attorney and that consideration should be given to seeking a declaratory judgment which would resolve this matter with finality.

If you have any further questions, please advise.

Very truly yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General