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TO: The Public Safety Coordinating Council

FROM: Al Hadeed

DATE: May 20, 2016

RE: Legal Memo on Authority for Marijuana Civil Citation Offenses

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We have been requested to address whether Flagler County has the legal authority to enact a civil citation system for marijuana use and possession offenses. It does have such authority pursuant to its constitutional home rule powers and particularly under Florida Chapter 162, Part 2. This statute authorizes the use of a civil citation system by counties that mirrors in a number of ways a traffic ticket approach.

If Flagler County uses the authority under this statutory part to set up a civil citation system by ordinance for drug offenses, the County could not criminalize the violation of such an ordinance. Instead, violations by statute yield civil penalties in the form of fines not exceeding $500 for each incident. The ordinance could specify the amount of the fines for first, second, third or more violations but none exceeding the statutory $500 cap for any one violation.

The offender could be cited by a law enforcement officer for the incident. The offender has the option to pay the citation (issued like a traffic ticket but on a different form and using a different pathway within the court system). There is no arrest or booking. The offender does not have to appear in court if the offender pays the citation amount.

The offender has the option to request a hearing before the county court (not circuit court) to contest the commission of the violation. Presumably too, the offender could challenge the fine amount. The ability to challenge the fine amount has not been established by appellate case law but it is common for county courts to entertain requests for fine reduction or remission. There are a number of ways to address a failure to pay a civil citation, but they are more limited than paying a traffic ticket or failing to abide by a criminal sanction.

Most importantly, the failure to pay the civil fine cannot be criminalized. It is a purely civil system governed by Part 2 of the statute. See Attorney General Opinion 2009-29, copy attached for reference.

Apart from a civil citation system, the County does have the alternate power to criminalize marijuana possession but only if it utilizes its authority under Part 1 of Florida Chapter 162. We assume this is not relevant to the Coordinating Council's consideration, as we understand the goal of any ordinance is to offer an alternative to criminally prosecuting illegal drug possession and creating criminal records.

In short, to understand the difference between the two approaches, a violation of an ordinance promulgated under Part 1 could be prosecuted as a misdemeanor with jail time of up to 60 days and criminal penalties not exceeding $500 for each offense. Under Part 2, it is a civil fine with limited enforcement but with no criminal record or using the criminal justice system.

We will note that in Flagler County for over the last three decades there have been very few misdemeanor prosecutions for ordinance violations. Civil remedies are what is pursued almost as a matter of course.

Case law supports local governments enacting ordinances in the realm of illegal drug use and possession. Local governments are not preempted by the State from enacting ordinances for illegal drug possession and use. Such local government authority is limited only by the State's maximum penalty for such an offense. The local government's ordinance cannot exceed it. Edwards v. State, 422 So. 2d 84 (Fla. 2nd DCA 1982), copy attached for reference. A number of local governments (counties and cities) have relied on this holding to enact ordinances imposing civil fines by way of a civil citation system for illegal drug use or possession.

There are other details to address in an ordinance for a civil citation system and the actual management of such a system. We can more easily discuss when the Coordinating Council (or its subcommittee) decides on a basic direction.

Florida Attorney General
Advisory Legal Opinion

Number: AGO 2014-04
Date: June 18, 2014
Subject: Municipalities -- Code Enforcement -- Costs

Ms. Heather M. Ramos
GrayRobinson
Post Office Box 3068
Orlando, Florida 32802-3068

Dear Ms. Ramos:

On behalf of the Town of Windermere, you have asked for my opinion on substantially the following questions:

1. Do the provisions of section 162.07(2), Florida Statutes, permit the Town of Windermere to recover from the code violator the costs that the town pays to the special magistrate for his time for performing his services as a special magistrate?

2. Do the provisions of section 162.07(2), Florida Statutes, permit the Town of Windermere to recover from the code violator the costs that the town pays to the special magistrate's assistant for her time spent assisting the special magistrate with the performance of his services as a special magistrate?

In sum:

1. The provisions of section 162.07(2), Florida Statutes, which authorize the recovery of all costs incurred by a municipality in prosecuting a violator before a code enforcement board or special magistrate do not authorize the award of compensation or fees as "costs" to the special master for his or her services incurred in such a prosecution.

2. Section 162.07(1), Florida Statutes, requires a local governmental body utilizing the services of a special magistrate as a code enforcement board, to provide clerical and administrative personnel as are reasonably required to accomplish the duties of the board. Nothing in Chapter 162, Florida Statutes, would authorize the inclusion of these administrative personnel charges within the "costs" assessed against a code violator.

According to information you have provided to this office, the Town of Windermere has created an alternate code enforcement system pursuant to subsection 162.03(2), Florida Statutes. The system gives a special magistrate designated by the town council the authority to conduct code enforcement hearings and impose and authorize the collection of fines and costs against pending or repeat violators of town codes and ordinances. The town's special magistrate has the same status as an enforcement board under Chapter 162, Florida Statutes. The special magistrate sits as an impartial hearing officer to determine, based on the evidence presented during the hearing, if a violation has occurred. The special magistrate does not initiate enforcement proceedings or inspect for code violations.

Question One

You ask whether section 162.07(2), Florida Statutes, permits the Town of Windermere to recover the funds the town pays to the special magistrate for performing the official services of a special magistrate from a code violator.

Chapter 162, Florida Statutes, establishes administrative enforcement procedures and a means of imposing administrative fines by local governmental bodies for violations of local codes and ordinances for which no criminal penalty has been specified. This mechanism is necessary in light of the provisions of Article V, section 1, and Article I, section 18, Florida Constitution, which provide that while commissions established by law or administrative officers or bodies may be granted quasi-judicial power in matters connected with the functions of their offices, no administrative agency shall impose a sentence of imprisonment, nor shall it impose any other penalty *except as provided by law.*[1] Thus, unless provided for in statute, no administrative penalty or fine may be imposed by an administrative agency such as a code enforcement board or a special master serving as the code enforcement board.[2]

Section 162.07(2), Florida Statutes, states:

"Each case before an enforcement board shall be presented by the local governing body attorney or by a member of the administrative staff of the local governing body. *If the local governing body prevails in prosecuting a case before the enforcement board, it shall be entitled to recover all costs incurred in prosecuting the case before the board and such costs may be included in the lien authorized under s. 162.09(3).*" (e.s.)

Thus, your question is whether the amounts paid to the special magistrate by the town for performing his services may be characterized as "costs" which are recoverable under the statute. It is my opinion that they may not as they constitute "fees" paid to a public officer for his services not "costs" incurred in prosecuting or

defending an action.

Section 162.07(2), Florida Statutes, provides no definition for the term "costs" as used in that statute. However, "costs" are generally understood to be allowances to a party for the expenses incurred in prosecuting or defending a suit and are an incident to the judgment. The term "costs" is commonly understood in the legal sense to mean "[t]he charges or fees taxed by the court, such as filing fees, jury fees, courthouse fees, and reporter fees. - Also termed *court costs*." [3] (Emphasis in original) "Costs" are distinguishable from "fees" although the two terms are frequently used interchangeably.[4] "Fees" are understood to be compensation to public officers for services rendered in the course of the case.[5] "Fees" represent a charge for labor or services, especially professional services.[6]

Therefore, it is my opinion that the provisions of section 162.07(2), Florida Statutes, which authorize the recovery of all costs incurred by a municipality in prosecuting a violator before a code enforcement board or special magistrate do not authorize the award of compensation or fees as "costs" to the special master for his or her services incurred in such a prosecution.

Question Two

Your letter also advises that the special magistrate employs an assistant or paralegal who assists in providing services related to the special magistrate position. You ask whether, pursuant to section 162.07(2), Florida Statutes, the town may recover from a code violator the costs incurred by the town for the services of the special magistrate's assistant.

Based on the discussion above relating to the fees paid special magistrates, I believe that your second question has been answered. The compensation paid to public officers for services rendered in the course of the case are not included within the term "costs" unless the Legislature has specifically included them. I am aware of no such legislative determination in section 162.07(2), Florida Statutes, and thus, must conclude that these fees may not be included within those "costs."

As support for this conclusion, I note that this office, in Attorney General Opinion 72-60, considered the assessment of court costs in criminal cases and stated:

"Costs properly chargeable against a defendant on conviction generally do not include the general expense of maintaining the system of courts and the administration of justice, all of which is an ordinary burden of government. Under this principle the costs of jurors or other expenses in connection with jurors are not chargeable. Likewise, expenses of the trial judge are considered part of government expense

and not chargeable as costs. As a general rule, fees and mileage of government witnesses are held taxable costs of prosecution against convicted defendants."

While your questions deal with quasi-judicial code enforcement procedures and not with criminal proceedings, it would appear that the same considerations would apply in determining whether the expenses of the special magistrate and his or her assistant or paralegal are chargeable as costs.

In fact, section 162.07(1), Florida Statutes, includes the following directive:

"The local governing body shall provide clerical and administrative personnel as may be reasonably required by each enforcement board for the proper performance of its duties."

Thus, it appears that the local government is made responsible for providing the clerical and administrative personnel that may be required to accomplish the duties of the code enforcement board or a special magistrate serving as the code enforcement board.

In sum, it is my opinion that the provisions of section 162.07(2), Florida Statutes, which authorize the recovery of all costs incurred by a municipality in prosecuting a violator before a code enforcement board or special magistrate do not authorize the award of compensation of fees as "costs" to the paralegal or assistant to the special master for his or her services incurred in such a prosecution.

Sincerely,

Pam Bondi
Attorney General

PB/tgh

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[1] *See generally* Op. Att'y Gen. Fla. 79-109 (1979) (governing body of charter county prohibited in absence of statutory authorization from providing by ordinance for imposition of civil penalties); *Broward County v. Plantation Imports, Inc.*, 419 So. 2d 1145, 1148 (Fla. 4th DCA 1982) (holding that provisions of county ordinance authorizing assessment of penalties by county agency was unconstitutional and agreeing with conclusion in Op. Att'y Gen. Fla. 79-109).

[2] *See* Op. Att'y Gen. Fla. 09-29 (2009) (a local government or its governing body derives no delegated authority from Ch. 162, Fla. Stat.; further, municipalities derive no home rule power from Art. VIII, s. 2(b), Fla. Const., or s. 166.021, Fla. Stat., to regulate code enforcement boards or otherwise regulate statutorily prescribed

enforcement procedure); Ops. Att'y Gen. Fla. 85-84 (1985), 79-109 (1979); *Broward County v. Plantation Imports, Inc.*, 419 So. 2d 1145 (Fla. 4th DCA 1982) (holding that the provisions of a county ordinance authorizing assessment of penalties by county agency was unconstitutional and agreeing with Op. Att'y Gen. Fla. 79-109).

[3] *See* Black's Law Dictionary *cost*, p. 372 (8th ed.).

[4] *See* 20 C.J.S. *Costs* s. 3, "Distinctions" (1990).

[5] *See Dade County v. Strauss*, 246 So. 2d 137 (Fla. 3d DCA 1971), *cert. denied*, 253 So. 2d 864 (Fla. 1971), *cert. denied*, 92 S.Ct. 1793, 406 U.S. 924, 32 L.Ed.2d 125 (1972) ("costs" and "fees" are different in their nature generally; "costs" are allowances to party of expenses incurred in successful transaction or defense of suit while "fees" are compensation to officer for services rendered in progress of cause). *And see Flood v. State*, 117 So. 385 (Fla. 1928) ("fee" is charge fixed by law for service or public officer of for use of privilege under government's control); *and see* 20 C.J.S. *Costs* s. 3, "Distinctions" (1990).

[6] *See* Black's Law Dictionary *fee*, p. 647 (8th ed.). *Cf.* Op. Att'y Gen. Fla. 09-07 (2009) (provisions of s. 162.07(2), Fla. Stat., which authorizes the recovery of all costs incurred by a municipality in prosecuting a violator before a code enforcement board would not authorize the board to award attorney's fees to the municipality for attorney's fees incurred in such a prosecution whether those fees are incurred directly or indirectly).

422 So.2d 84
District Court of Appeal of Florida,
Second District.

Lawrence E. EDWARDS, Petitioner,
v.
STATE of Florida, Respondent.

No. 82-1591. | Nov. 19, 1982.

Plaintiff filed petition for a writ of certiorari seeking review of a decision of the Circuit Court, Sarasota County, Evelyn Gobbie, J., which reversed a decision of a county court declaring invalid the ordinance under which defendant was charged. The District Court of Appeal, Grimes, J., held that: (1) city's authority to enact ordinances concerning subject of drug abuse control was not preempted, and (2) to extent that municipal ordinance prohibiting possession of cannabis and cocaine set a greater penalty than that prescribed by state law, it was invalid.

Petition granted in part and denied in part.

Attorneys and Law Firms

***85** Elliott C. Metcalfe, Jr., Public Defender, and Becky A. Titus, Asst. Public Defender, Sarasota, for petitioner.

Jim Smith, Atty. Gen., Tallahassee, and Frank Lester Adams, III, Asst. Atty. Gen., Tampa, for respondent.

Opinion

GRIMES, Judge.

The state charged Edwards in county court with possession of less than one ounce of cannabis in violation of Venice City Ordinance 888-81. The county court declared the ordinance invalid and granted Edwards's motion to dismiss. The circuit court reversed and reinstated the information. Edwards now brings this petition for certiorari seeking review of the circuit court's decision.

The ordinance at issue prohibits the possession of cannabis and cocaine and prescribes penalties for the possession of varying amounts of each substance. For example, a conviction for possession of one ounce (approximately twenty-eight grams) of cannabis would result in a penalty of at least forty-eight hours imprisonment and a fine of $150. The ordinance establishes increased minimum mandatory penalties for possession of cannabis up to one hundred pounds. It also sets comparable minimum mandatory penalties for the possession of up to seven grams of cocaine. The maximum penalty for any violation cannot exceed sixty days incarceration and a fine of $500. Thus, the City of Venice has chosen to proscribe certain conduct involving drugs which would constitute felonies under state law.

[1] Initially, Edwards argues that the city did not have the authority to enact the ordinance since the legislature has preempted the subject of drug abuse control. The legislative findings of fact which accompanied the passage of the Florida Comprehensive Drug Abuse Prevention and Control Act lend some support to this argument:

> WHEREAS, uniformity between the Laws of Florida and the Laws of the United States is necessary and desirable for effective drug abuse prevention and control, and
>
> WHEREAS, it is desirable that the State of Florida exercise more authority over manufacture and distribution of dangerous drugs, and
>
> WHEREAS, the inconsistencies in penalty provisions of current law demand amendment; NOW THEREFORE, ...

Ch. 73-331, Laws of Fl. However, under section 166.021(3)(c), Florida Statutes (1981), the legislative body of a municipality may enact legislation concerning any subject except for those areas "expressly preempted" by the constitution or state law. An "express" reference is one which is distinctly stated and not left to inference. *Pierce v. Division of Retirement,* 410 So.2d 669 (Fla. 2d DCA 1982). There is no suggestion of a constitutional preemption, and neither the language of the legislative findings of fact nor the terminology of chapter 893, Florida Statutes (1981), expressly preempts the field of drug abuse control. The City of Venice may, therefore, enact ordinances on that subject.

[2] **[3]** Edwards next argues that, even if chapter 893, Florida Statutes (1981), does not preempt the area of drug abuse control, the Venice ordinance conflicts with state law. A state statute always prevails over a conflicting municipal ordinance. *Rinzler v. Carson,* 262 So.2d 661 (Fla.1972). *City of Miami Beach v. Rocio Corp.,* 404 So.2d 1066 (Fla. 3d DCA 1981). In this case, the state statutes prescribe penalties which differ in severity from the penalties established by the ordinance. A local ordinance does not conflict with a state statute merely because it provides for a less severe penalty.

Hilliard v. City of Gainesville, 213 So.2d 689 (Fla.1968), *appeal dismissed,* 393 U.S. 321, 89 S.Ct. 556, 21 L.Ed.2d 517 (1969). However, an ordinance penalty cannot exceed that of state law. 5 E. McQuillin, The Law of Municipal Corporations § 17.15 (3d ed. 1981).

[4] In some respects, the Venice ordinance sets a greater penalty than that prescribed by the law of Florida. Except in serious cases involving minimum mandatory ***86** sentences, state law grants a trial judge the discretion to withhold adjudication and order probation. § 948.01, Fla.Stat. (1981). Moreover, where drug charges are brought under sections 893.13(1)(e) or (1)(f), Florida Statutes (1981), the judge is authorized to require a violator to participate in a drug rehabilitation program in lieu of prison or probation. § 893.15, Fla.Stat. (1981). For the less serious violations of chapter 893, the judge also retains the discretion to decide whether or not to impose a fine. Yet, the Venice ordinance eliminates all of these options and requires a minimum mandatory sentence and a minimum fine for each violation. To this extent, the ordinance is invalid because it conflicts with state law. *People v. Quayle,* 122 Misc. 607, 204 N.Y.S. 641 (Albany County Ct.1924). In view of the severability clause contained therein, the balance of the ordinance can be sustained.

We hereby grant certiorari to the extent that we direct the circuit court to remand the case with instructions to delete those portions of Venice City Ordinance 888-81 which establish minimum mandatory sentences and fines not similarly punishable under state law. Otherwise, the petition for certiorari is denied.

BOARDMAN, A.C.J., and CAMPBELL, J., concur.

All Citations

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