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SPRINGFIELD

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MUNICIPALITIES:
Power of Municipalities
to Legislate Concurrently
With The State

Honorable John J. Bowman
State's Attorney
DuPage County
207 South Reber Street
Wheaton, Illinois 60187

Dear Mr. Bowman:

I have your letter wherein you state that both home rule and non-home rule municipalities in DuPage County have enacted ordinances regulating certain activities also regulated by State statute. By way of example, you enclosed a copy of an ordinance recently enacted by the non-home rule municipality of Hinsdale, making it a municipal offense knowingly to possess 30 grams or less of cannabis. Based on this factual background, you ask first whether a non-home rule municipality such as Hinsdale has the power to enact such an ordinance.

Under section 7 of article VII of the Illinois Constitution of 1970, a non-home rule municipality has only those powers granted it by law or expressly set forth in the Constitution itself. Section 11-20-5 of the Illinois Municipal Code (Ill. Rev. Stat. 1975, ch. 24, par. 11-20-5) gives to the corporate authorities of every municipality the power "to do all acts and make all regulations which may be necessary or expedient for the promotion of health". Section 11-1-1 of the same Act (Ill. Rev. Stat. 1975, ch. 24, par. 11-1-1) gives municipal authorities the power "to pass and enforce all necessary police ordinances".

Reading the public health power and police power provisions together, the Illinois Supreme Court has upheld municipal ordinances regulating such diverse activities as the sale of dangerous weapons (Biffer v. City of Chicago, 278 Ill. 562), and the conduct of strip-mining. (Village of Spillertown v. Prewitt, 21 Ill. 2d 228.) In all these cases the court emphasized the obvious danger to the public health presented by the activities being regulated.

In the present situation, it seems clear that these two sections when read together authorize the cannabis ordinance enacted by the non-home rule municipality of Hinsdale. The decision of the corporate authorities of

Hinsdale that the use of cannabis presents a serious health hazard to the community is amply supported by the legislative findings set forth in section 1 of the Cannabis Control Act (Ill. Rev. Stat. 1975, ch. 56 1/2, par. 701) which provides in pertinent part:

> "§ 1. The General Assembly recognizes that (1) the current state of scientific and medical knowledge concerning the effects of cannabis makes it necessary to acknowledge the physical, psychological and sociological damage which is incumbent upon its use; * * * "

The fact that the Cannabis Control Act does exist raises another issue, however. Although it is well established that a non-home rule municipality and the State may legislate with regard to the same subject (City of Chicago v. Union Ice Cream Mfg. Co., 252 Ill. 311), when a municipal ordinance is inconsistent or in conflict with a State statute, the latter prevails. (Arrington v. City of Chicago, 45 Ill. 2d 316.) In the Arrington case, decided before the effective date of the new Constitution, the controversy centered around a State statute and a Chicago ordinance, both of which regulated the carrying of fire arms. The statute in question authorized jail keepers to carry their guns while commuting between their homes and places of employment while the Chicago ordinance did not. The court held the ordinance invalid to the extent it prohibited that which the statute

expressly permitted.

I find no such conflict or inconsistency between the Cannabis Control Act and the municipal ordinance which you have enclosed. The municipal authorities of Hinsdale have made it a violation of their ordinance knowingly to possess any quantity up to 30 grams of any substance containing cannabis. This provision is in harmony with section 4 of the Cannabis Control Act (Ill. Rev. Stat. 1975, ch. 56 1/2, par. 704), which provides that knowing possession of up to 30 grams of any substance containing cannabis is a misdemeanor. Furthermore, the definition of "cannabis" found in the Hinsdale ordinance is identical to that found in section 3 of the Cannabis Control Act. (Ill. Rev. Stat. 1975, ch. 56 1/2, par. 703.) The fact that the ordinance may provide a different penalty than does the State statute does not create any inconsistency or conflict. (City of Evanston v. Wazau, 364 Ill. 198.) As the court noted in Village of Mt. Prospect v. Malouf, 103 Ill. App. 2d 88 at 93, in those cases in which Illinois courts have found municipal ordinances to be in conflict with State statutes, the courts were concerned with the conduct regulated rather than the penalty imposed.

It is therefore my opinion that pursuant to its

power to protect the public health and adopt appropriate police regulations, a non-home rule municipality may enact a cannabis control ordinance such as that enacted by Hinsdale.

You next ask whether a home rule municipality has the power to enact such an ordinance. In my opinion they clearly do. Sections 11-20-5 and 11-1-1 of the Illinois Municipal Code, discussed above, apply equally to home rule and non-home rule municipalities. As a result the power of a home rule municipality to regulate cannabis can be no less than that of a non-home rule municipality such as Hinsdale.

You next ask whether home rule and non-home rule municipalities may enact an ordinance regulating conduct which is also regulated by the Criminal Code of 1961. (Ill. Rev. Stat. 1975, ch. 38, pars. 1-1 et seq.) I am of the opinion that in general both types of municipalities may enact such ordinances. However, absent a specific ordinance or set of facts a conclusive answer is not possible. Individual cases may warrant different answers.

Section 6(a) of article VII of the Illinois Constitution of 1970 gives to home rule municipalities the authority to exercise any power "pertaining to its government and affairs including, but not limited to, the power to regulate for the

protection of the public health, safety, morals and welfare". In most instances, a municipal ordinance enacted to regulate criminal conduct would serve to protect the health, safety, morals and welfare of the community and as a result, would seem to be within the powers granted by section 6(a). Sections 6(h) and 6(i) of article VII of the Illinois Constitution of 1970 enable the legislature to limit specifically the power of a home rule unit to legislate concurrently with the State. I am unaware, however, of any attempt by the General Assembly to amend the Criminal Code of 1961 in order to so limit the power of home rule municipalities in this area.

I have already stated that with regard to non-home rule municipalities, it is the rule in Illinois that when the necessary statutory authority exists a non-home rule municipality may exercise the police power concurrently with the State. When the municipal exercise of the police power is inconsistent or in conflict with the State's exercise the latter clearly prevails. The fact that a municipal ordinance and a State statute regulating the same conduct provide different penalties has been held not to constitute such inconsistency, however. In my opinion these general principles governing the power of a non-home rule municipality are also applicable when the State statute involved

is the Criminal Code of 1961.

Your fifth question concerns the applicability of the prohibition against double jeopardy contained in both the Federal and State Constitutions, to the situation you describe in your first four questions. In my opinion it is clear that when an individual is convicted of violating a municipal ordinance, a subsequent prosecution of the same individual arising out of the same incident under a State statute regulating the same conduct, would constitute double jeopardy in violation of both the Federal and State Constitutions. Waller v. Florida, 397 U.S. 387; People v. Allison, 46 Ill. 2d 147.

As you note in your letter, the fact that double jeopardy does apply in this situation creates the potential for friction between municipal authorities and the State's Attorney. The question of whether or not to sanction such potential conflict is, however, a matter of legislative discretion.

Finally, you ask what effect the exercise of municipal power in the manner described in your first four questions would have on the Juvenile Court Act. (Ill. Rev. Stat. 1975, ch. 37, pars. 701-1 et seq.) The exercise of such power is controlled by section 2-7 of the Act (Ill. Rev. Stat.

1975, ch. 37, par. 702-7) which provides in part that:

> "(1) Except as provided in this Section, no minor who was under 17 years of age at the time of the alleged offense may be prosecuted under the criminal laws of this State or for violation of an ordinance of any political subdivision thereof.
>
> (2) Subject to paragraph (1) of Section 2-8, any minor alleged to have committed a traffic, boating or fish and game law violation or an offense punishable by fine only may be prosecuted therefor and if found guilty punished under any statute or ordinance relating thereto, without reference to the procedures set out in this Act.
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> * * * "

It is therefore evident in my opinion that should the municipal ordinance in question provide only a fine for its violation, a juvenile alleged to have violated the ordinance may be prosecuted thereunder and if found guilty, punished under that ordinance without reference to the Juvenile Court Act. If however, the punishment provided is other than a fine, the juvenile alleged to have violated the ordinance in question must be dealt with pursuant to the provisions of the Juvenile Court Act.

Very truly yours,

ATTORNEY GENERAL