STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

MIKE HATCH
ATTORNEY GENERAL

SUITE 1800
445 MINNESOTA STREET
ST. PAUL, MN 55101-2134
TELEPHONE: (651) 297-2040

December 1, 2003

The Honorable Steve Smith
State Representative
Minnesota House of Representatives
2710 Clare Lane
Mound, MN 55364

Dear Representative Smith:

Thank you for your correspondence of October 30, 2003 concerning the legality of certain municipal programs which impose administrative penalties upon persons violating state laws and local ordinances.

FACTS AND BACKGROUND

You provided with your letter examples of city ordinances and explanatory materials from both home-rule and statutory cities describing "administrative offense" procedures established by those cities.

Most of the procedures are similar in several respects:

1. They are intended to provide an "informal, cost-effective and expeditious alternatives" to traditional prosecutions for certain minor offenses.

2. The covered offenses include violations of the state traffic code (Minn. Stat. Ch. 169) and conforming local ordinances, other statutory offenses such as illegal fireworks (Minn. Stat. Ch. 524), disturbing the peace (Minn. Stat. § 609.72) and shoplifting (Minn. Stat. § 609.52), and conduct regulated solely by local ordinances such as curfew violations, failure to mow lawns and alcohol consumption in public parks.

3. They purport to be "voluntary" in that persons charged can elect to be prosecuted under the normal misdemeanor or petty misdemeanor process instead.

4. They include a schedule of monetary penalties for specified offenses. The penalties are often lower than those normally imposed by courts for similar offenses.

5. All money collected as administrative penalties is retained by the city.

6. None apparently provide for reporting any information to other governmental agencies concerning persons "convicted" of, or admitting, violations.

7. Failure to pay the city's administrative penalty results in the city's pursuing a normal misdemeanor or petty misdemeanor prosecution in the courts.

Some of the programs provide alleged offenders a means to challenge the imposition of administrative penalties by way of a hearing conducted by a local official or appointed panel. Others provide that a challenge to the civil penalty will result in the filing of the pertinent misdemeanor or petty misdemeanor charge in court.

You also enclosed information concerning a diversion program employed by one city whereby local peace officers have the option of "holding" citations for certain traffic offenses to give violators an opportunity to complete an eight-hour traffic safety course for which the violator must pay $75. If the violator completes the course within 21 days, the citation is "torn up."

Cities have cited the need for increased revenues, along with frustration over the time and resources required for court prosecutions, and the results achieved thereby, as reasons for creating their own enforcement programs. You note that the State Auditor has recently expressed her views questioning the authority of cities to adopt such procedures.

Based upon this information, you ask the following questions.

1. Is it permissible for a local governmental unit to issue, for an act that would be the equivalent of a misdemeanor, gross misdemeanor, or felony under state law, an administrative citation that provides a penalty substantially below that which would be imposed for a violation of the comparable statute?

2. Does state law preempt county or statutory or home rule charter city ordinances or policies that allow local law enforcement to assess administrative sanctions in lieu of, in addition to, or as an alternative to a citation for a state traffic law violation?

3. Do local administrative procedures and sanctions conflict with state laws intended to punish repeat traffic violators such as Minn. Stat. § 169.89, subd. 1, and § 171.18 (2002)?

4. Does state law preempt county ordinances, statutory city ordinances, or home-rule city ordinances that allow traffic offenders to attend a driver-safety diversion program in lieu of being charged with a petty misdemeanor traffic citation? Are such ordinances or policies in conflict with state law?

5. Do local administrative hearing procedures deny alleged ordinance violators any of their constitutionally protected due process or equal protection rights?

6. Do local administrative hearing procedures violate the principle of separation of powers between the executive branch and the judicial branch by infringing on the district court's original jurisdiction?

Our analysis of these issues is set forth below.

LAW AND ANALYSIS

As a preliminary matter, this Office does not render opinions on hypothetical questions, conduct general reviews of local enactments or proposals to identify possible legal issues or evaluate the constitutionality of legislative enactments. *See* Op. Atty. Gen. 629a, May 9, 1975. Consequently, we are unable to render definitive opinions that fully address the complete range of issues implicit in your questions. We can, however, offer the following comments which we hope will be helpful to the committee in its deliberations.

First, as you probably know, cities, as subdivisions of the state, have only those powers that are expressly granted by statute or charter, or are reasonable and necessary to implementation of such express powers. *See, e.g., County Joe, Inc. v. City of Eagan*, 560 N.W.2d 681 (Minn. 1997).

Second, in the exercise of their general express or implied powers, cities may not establish programs or procedures that are incompatible with state statutes or address areas of the law that have been preempted by state law either expressly or by implication. *See, e.g., LaCrescent Twp v. City of LaCrescent*, 515 N.W.2d 608 (Minn. Ct. app. 1994); *Northwest Residence v. City of Brooklyn Park*, 352 N.W.2d 764 (Minn. Ct. App. 1984). This principle applies notwithstanding the broad powers of self-government generally exercised under home-rule charters. As noted by the Court in *State ex rel. Town of Lowell v. City of Crookston*, 202 Minn. 526, 91 N.W.2d 81 (1958):

> The power conferred upon cities to frame and adopt home rule charters is limited by the provisions that such charter shall always be in harmony with and subject to the constitution and laws of the state.

Id. at 528, 91 N.W.2d at 83.

In general, (a) direct conflict occurs when "the ordinance and the statute contain express or implied terms that are irreconcilable;" (b) more specifically, an ordinance conflicts with state law if it "permits what the statute forbids;" (c) similarly, there is conflict if the ordinance "forbids what the statute *expressly* permits;" and (d) "no conflict exists where the ordinance, though different, is merely additional and complementary to or in aid and furtherance of the statute."

Mangold Midwest Co. v. Village of Richfield, 274 Minn. 347, 352, 143 N.W.2d 813, 816-17 (1966) (citations omitted).

In evaluating whether an area of law has been preempted by the legislature, the courts will consider: (1) the subject matter regulated; (2) whether the subject matter is so fully covered by state law that it has become solely a matter of state concern; (3) whether any partial legislation on the subject matter evinces an intent to treat the subject matter as being solely a state concern; and (4) whether the nature of the subject matter is such that local regulation will have an adverse effect on the general state population. *See Mangold Midwest* at 358, 243 N.W.2d 813, 820.

Third, both statutory and charter cities have substantial authority to enact regulatory ordinances, *see, e.g.*, Minn. Stat. § 412.221 (2002), and to fix penalties for violations. *See, e.g.*, Minn. Stat. § 412.231 (2002), which provides:

> The council shall have the power to declare that the violation of any ordinance shall be a penal offense and to prescribe penalties therefore. No such penalty shall exceed a fine of $700 or imprisonment in a city or county jail for a period of 90 days, or both, but in either case the costs of prosecution may be added.

Fourth, the legislature has, however, prescribed in detail the procedures for prosecution of penal offenses. For example, Minn. Stat. § 487.25, subd. 1 (2002) states:

> Subdivision 1. **General.** Except as otherwise provided in sections 487.01 to 487.38 but subject to the provisions of section 480.059 [Supreme Court authorized to promulgate rules governing criminal procedure], pleading, practice, procedure, and forms in actions or proceedings charging violation of a criminal law or a municipal ordinance, charter provision, or rule are governed by the rules of criminal procedure.

(Emphasis added). Subdivision 10 of that section allocates the authority and responsibility for prosecution of various offenses. In general, city ordinance violations, petty misdemeanors, and misdemeanors occurring within a city must be prosecuted by city attorneys, while felonies and most gross misdemeanors *must* be prosecuted by county attorneys. Minn. Stat. § 487.25, subd. 10 (2002).

With the above principles in mind, we turn your specific questions.

1. Given the extent and detail of legislation addressing statutory criminal offenses and prosecution procedures set forth in Minn. Stat. chs. 169 and 609 through 634, it is clear that the state has *preempted the field* with respect to the offenses and procedures defined in those statutes. Consequently, while cities are empowered to regulate conduct in areas of local interest and to supplement statutory regulations in many areas, *cf., Hannan v. City of Minneapolis*, 623 N.W.2d 281 (Minn. Ct. App. 2001), they may not, in our view, redefine the nature or level of

criminal offenses as specified by statute or modify statutory procedures for enforcement or penalties for an offense.

Further, as you know, city councils are not normally authorized to direct the conduct of county or state law enforcement officers. It is not consistent with state public policy for a public official to direct or urge that city peace officers not enforce the law of the state to the best of their judgment and ability. In addition, while law enforcement officials and prosecutors exercise substantial discretion in making arrest and charging decisions, those decisions should be made on a case-by-case basis in terms of factors pertaining to the evidence, the culpability of the offender and the nature of the offense rather than, for example, the offender's willingness to make a payment directly to the city.

2. In the specific case of traffic offenses, the legislature has plainly preempted the field of enforcement. Minn. Stat. § 169.022 (2002) provides:

> The provisions of this chapter shall be applicable and uniform throughout this state and in all political subdivisions and municipalities therein, and no local authority shall enact or enforce any rule or regulation in conflict with the provisions of this chapter unless expressly authorized herein. Local authorities may adopt traffic regulations which are not in conflict with the provisions of this chapter; provided, that when any local ordinance regulating traffic covers the same subject for which a penalty is provided for in this chapter, then the penalty provided for violation of said local ordinance shall be identical with the penalty provided for in this chapter for the same offense.

In *State v. Hoben*, 256 Minn. 436, 98 N.W.2d 813 (1959), the court affirmed the preemptive nature of state statutes in this area follows:

> The fact that the municipality is given authority to adopt such an ordinance does not change the nature and quality of the offense. As we interpret § 169.03, it was the intention of the legislature that the application of its provisions should be uniform throughout the state both as to penalties and procedures, and requires a municipality to utilize state criminal procedure in the prosecution of the act covered by § 169.03. It would be a strange anomaly for the legislature to define a crime, specify punishment therefore, provide that its application shall be uniform throughout the state, and then permit a municipality to prosecute that crime as a civil offense.

Id. at 444, 98 N.W.2d at 819. *See also* Minn. Stat. §§ 169.91 and 169.99 (2002) which specify the procedures to be followed by peace officers in connection with arrest of traffic violators, and the uniform form of traffic ticket, having the effect of a summons and complaint, which must be used by all peace officers. Consequently, while cities are granted specific authority to exercise

certain regulatory control of streets and roads within their boundaries, they are plainly precluded from creating their own enforcement systems inconsistent with those prescribed by statute.

3. Given our response to the second question, it is unnecessary to address whether local administrative enforcement systems conflict with state laws in the particular matter of providing for keeping records of traffic violations. It is likely, however, that the need for uniform and consistent implementation of such programs is one reason for the strong legislative assertion of state preemption in the area of traffic regulation.

4. A number of Minnesota statutes and criminal procedure rules make a provision for pre-trial, or presentencing, "diversion" programs. *See, e.g.* Minn. Stat. §§ 388.24, 401.065 (2002), 628.69, 30.03, Minn. R. Crim. Proc. Rule 27.05. In particular, in the case of a traffic violation, Minn. Stat. § 169.89, subd. 5 authorizes a trial court to require, as part of or in lieu of other penalties, that convicted persons attend a driver improvement clinic. All such programs, however, require that a *trial court* make the determination as to whether attendance at such a clinic is appropriate. We are aware of no express authority for local officials to create a *pretrial* diversion program.

5. For the reasons set forth in Op. Atty. Gen. 629a, May 9, 1975, the Attorney General's Office does not generally address the constitutionality of statutes or governmentally established procedures. Thus, we are unable to determine the constitutional validity of various administrative "hearing procedures" that might be established by cities.

I note, however, based on the materials you submitted, the majority of the local administrative penalty provisions do not appear to provide for any administrative hearing process at all. Rather, they state that persons who contest their liability or refuse to pay the assessed penalty or complete the required training will be charged through the normal judicial channels. It appears that all the programs to which you refer are entirely voluntary in that the accused may withdraw from the process at any time prior to payment of the city penalty. Given the elective nature of these processes, it is likely that the due process rights of the accused are not jeopardized.

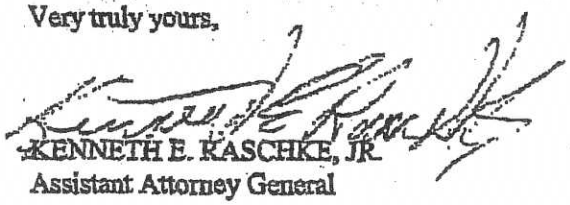
6. Likewise, a completely voluntary process would not appear to offend the separation of powers principles embodied in the constitution or to encroach upon the judicial function. In *Holmberg v. Holmberg*, 588 N.W.2d 720 (Minn. 1999), the court indicated that evaluation of administrative hearing schemes under the separation of powers doctrine involves consideration of, *inter alia* existence of adequate judicial checks, appealability and voluntariness of entry into the administrative process. *Id.* at 725. Furthermore, as the court pointed out in concluding that the role of the administrative board was not judicial in nature in *Meath v. Harmful Substance Compensation Board*, 550 N.W.2d 275 (1996):

> The claimant makes no election of remedies by bringing a claim to the board; the only purpose of the board's investigation or hearing is to provide the claimant the opportunity to prove eligibility for an award. The board's decision is not only unenforceable but, in fact, decides nothing except whether to make the claimant an offer of compensation. If the board makes no offer or if the claimant considers the offer inadequate, the claimant has the option of turning his or her back on the board's treatment of the claim. The claimant, unencumbered by the board's response, which is inadmissible in a civil action, can then commence a civil action against the person or persons alleged to be responsible for the claimant's injury.

Id. So long as a citizen is not legally bound by the city's action until he or she accepts the city's "offer" by payment of the specified penalty, the procedures described would not likely be found to impermissibility encroach upon judicial functions.

I hope these comments are helpful to you and to the Committee.

Very truly yours,



KENNETH E. KASCHKE, JR.
Assistant Attorney General

(651) 297-1141 (Voice)
(651) 297-1235 (Fax)

AG: #945560-v1