

STATE OF MISSISSIPPI



JIM HOOD  
ATTORNEY GENERAL

OPINIONS  
DIVISION

August 27, 2018

Mr. Ted Tullos  
Selectman Ward 1  
Post Office Box 667  
McComb, MS 39157

Re: Proposed McComb City Ordinance

Dear Mr. Tullos:

Attorney General Hood is in receipt of your request for an official opinion, and it has been assigned to me for research and reply.

### Background and Issues Presented

Your request letter states:

I am sending you a copy of the proposed ordinance which several board members of the City of McComb want to pass which provides maximum penalties that can be imposed by the municipal court for the possession of 30 grams or less of marijuana within the City of McComb. Another facet of this proposed ordinance is that it prescribes the maximum punishment of a fine not to exceed \$100.00, and no term of imprisonment can be imposed.

This proposed ordinance seems to be somewhat in conflict with Section 41-29-139(c)(2)(A)(1) of the Mississippi Code, as amended. That section provides for a penalty of not less than \$100.00 or more than \$250.00. State law does not provide for any imprisonment or any non-imprisonment for a first offense. We need to know if these conflicts are irreconcilable at the present time.

The proposed ordinance provides for some sort of training to address differences between the proposed McComb ordinance and current state law. There is a savings clause in the proposed ordinance that if the

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ordinance is in any way held invalid or unconstitutional, then the remaining terms of the ordinance are still valid. Can the city validly pass such a savings clause in the ordinance?

Another question arises with regard to Section 41-29-139(c)(2)(A)(2) that provides that a person in a vehicle in possession of 30 grams of marijuana or less can be jailed for up to 90 days and fined up to \$1,000.00. Is the proposed city ordinance in conflict with that section as well? Interestingly, Section 41-29-139(c)(3)(A)(F) heavily penalizes traffickers of controlled substances regardless of the amount for a term not less than ten or more than 40 years and shall be fined not less than \$5,000.00 or more than \$1,000,000.00. The ten year mandatory sentence shall not be reduced or suspended. My question is: if the city makes possession of a small amount a very minor offense, how are they going to obtain it? Obviously, they are obtaining it by illegal means, which could infer trafficking.

### Response

This office does not opine on or interpret municipal ordinances nor, as the case here, proposed municipal ordinances. In order to officially respond to your request, this office would be required to interpret the proposed ordinance and then compare our interpretation of the ordinance with our interpretation of state law to determine whether the ordinance is inconsistent with state law.

As a general matter, we note that this office has repeatedly opined that a municipality may enact an ordinance with appropriate criminal penalties if it does not conflict with state law so long as it is reasonable in scope and can pass constitutional scrutiny. MS AG Op., Patten, Jr. (January 10, 1996). An ordinance that conflicts with a state law is preempted thereby. Additionally, we have opined that municipalities can enact criminal ordinances that are not more severe in penalty than state law. In *City of Amory v. Yielding*, 203 Miss. 265, 34 So.2d 726 (1948), the Mississippi court held that "since a municipality cannot validly expand or contract the application of a statute defining a misdemeanor, its ordinance must conform thereto . . ." *City of Amory*, 34 So.2d at 728.

The state statute relevant to your request is Miss. Code Ann. Section 41-29-139(c) which states, in relevant part:

(c) Simple possession. It is unlawful for any person knowingly or intentionally to possess any controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this article. The penalties for any violation of this subsection (c) with respect to a controlled substance classified in Schedules I, II, III, IV or V, as set out in Section 41-29-113, 41-29-115, 41-29-117, 41-29-119 or 41-29-121, including marijuana or

synthetic cannabinoids, shall be based on dosage unit as defined herein or the weight of the controlled substance as set forth herein as appropriate:

\* \* \* \* \*

A person shall be charged and sentenced as follows for a violation of this subsection with respect to:

\* \* \* \* \*

(2)(A) Marijuana and synthetic cannabinoids:

1. If thirty (30) grams or less of marijuana or ten (10) grams or less of synthetic cannabinoids, by a fine of not less than One Hundred Dollars (\$100.00) nor more than Two Hundred Fifty Dollars (\$250.00). The provisions of this paragraph (2)(A) may be enforceable by summons if the offender provides proof of identity satisfactory to the arresting officer and gives written promise to appear in court satisfactory to the arresting officer, as directed by the summons. A second conviction under this section within two (2) years is a misdemeanor punishable by a fine of Two Hundred Fifty Dollars (\$250.00), not more than sixty (60) days in the county jail, and mandatory participation in a drug education program approved by the Division of Alcohol and Drug Abuse of the State Department of Mental Health, unless the court enters a written finding that a drug education program is inappropriate. A third or subsequent conviction under this paragraph (2)(A) within two (2) years is a misdemeanor punishable by a fine of not less than Two Hundred Fifty Dollars (\$250.00) nor more than One Thousand Dollars (\$1,000.00) and confinement for not more than six (6) months in the county jail.

Upon a first or second conviction under this paragraph (2)(A), the courts shall forward a report of the conviction to the Mississippi Bureau of Narcotics which shall make and maintain a private, nonpublic record for a period not to exceed two (2) years from the date of conviction. The private, nonpublic record shall be solely for the use of the courts in determining the penalties which attach upon conviction under this paragraph (2)(A) and shall not constitute a criminal record for the purpose of private or administrative inquiry and the record of each conviction shall be expunged at the end of the period of two (2) years following the date of such conviction;

Miss. Code Ann. Section 41-29-139 (as amended).

For a first offense, the minimum sentence prescribed by state law is at least \$100.00, and the maximum penalty is \$250.00. The proposed ordinance appears to impose a

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maximum fine of \$100.00. For a second offense, the state law penalty does not have a range and is set by statute at Two Hundred and Fifty Dollars (\$250.00) as well as jail time not to exceed sixty (60) days and the necessary drug education program.

For a third conviction within two (2) years, the fine is to be not less than Two Hundred and Fifty Dollars (\$250.00) nor more than One Thousand Dollars (\$1,000.00) and confinement for no more than six (6) months in the county jail. The statute for a third subsequent conviction requires a minimum fine of Two Hundred and Fifty Dollars (\$250.00) and a maximum fine of One Thousand Dollars (\$1,000.00) as well as jail time not to exceed six (6) months.

The draft ordinance you attached has a penalty that can never exceed \$100.00 while state law has higher penalties and never allows for a penalty less than \$100.00. A municipal ordinance which conflicts with a state statute is preempted by state law. We also note that a person in a vehicle possessing less than 30 grams of marijuana shall be fined not more than One Thousand Dollars (\$1,000.00) or confined for not more than ninety (90) days in the county jail, or both. Miss. Code Ann. Section 41-29-139(c)(2)(A)(2). It appears that the proposed ordinance would impose a sentence of only \$100.00.

**OFFICIAL OPINION**

Your letter indicates a belief that a person may be guilty of trafficking less than 30 grams of marijuana. However, the statute provides that trafficking means “[a] violation of **subsection (a)** of this section involving one (1) kilogram or more of marijuana or two hundred (200) grams or more of synthetic cannabinoids.” Miss. Code Ann. Section 41-29-139(f). (Emphasis added). Subsection (a) of Section 41-29-139 deals with possession with intent to do certain acts and NOT simple possession, which is dealt with by subsection (c). Although a person may not traffic less than 30 grams, a person may be found guilty of possession with intent to do certain acts with less than that amount. Miss. Code Ann. Section 41-29-139(b)(2)(A) (Punishment for possession with intent for marijuana of thirty (30) grams or less, is “by imprisonment for not more than three (3) years or a fine of not more than Three Thousand Dollars (\$3,000.00), or both . . .”). *Id.* As noted earlier, our office cannot interpret municipal ordinances by official opinion, and this is especially true with regard to proposed ordinances. Thus, we cannot determine the intent of the proposed ordinance or how it might be applied given differing factual circumstances. There does appear to be a substantial risk that municipal ordinances enacted in the area of marijuana possession could interfere or conflict with what is a comprehensive state criminal regulation of all controlled substances, including marijuana. The legislature has set out a comprehensive penalty and tiered fine system based upon the number of convictions for possession of marijuana, the amount involved and the intent of the accused. Given the comprehensive state statutory scheme, any municipal ordinance would have to be carefully drawn to ensure that the ordinance does not “expand or contract the application of a [state] statute.” *City of Amory*, 34 So.2d at 728. Any ordinance that is contradictory or inconsistent would attempt to nullify those penalties and, in our view, be impermissible under the Mississippi Supreme Court’s holding in *City of Amory*.

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If we can be of further assistance, do not hesitate to call us.

Very truly yours,

JIM HOOD, ATTORNEY GENERAL

By:



Ricky G. Luke  
Assistant Attorney General

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