

## MEMORANDUM

**FROM:** Mary Catherine Roper, Deputy Legal Director, ACLU of Pennsylvania  
**DATE:** September 4, 2015  
**RE:** Legality of a Marijuana Civil Penalty Ordinance in Pittsburgh, PA

This memo reflects our research into whether the City of Pittsburgh has the legal authority to adopt a local ordinance that creates a civil penalty (\$25 fine) for possession of small amounts of marijuana, similar to the 2014 ordinance passed in the City of Philadelphia. We believe that it does.

Pittsburgh's municipal powers are set forth in its Home Rule Charter and the Pennsylvania Home Rule Charter Law. "The City, as a home rule municipality, having adopted the Home Rule Charter and Optional Plans Law (Home Rule Charter Law), may enact any ordinance unless the ordinance involves an exercise of power denied to the City by the Pennsylvania Constitution, the City's own charter or an act of the General Assembly." *Fraternal Order of Police, Fort Pitt Lodge No. 1 v. City of Pittsburgh*, 644 A.2d 246, 247 (Pa. Cmwlth. Ct. 1994). The Pittsburgh Home Rule Charter claims the broadest grant of authority under Pennsylvania's Home Rule Charter Law:

The powers of the City shall be construed liberally in favor of the City, and the specific mention of particular powers in this charter shall not be construed as limiting in any way the general power stated in this article. All possible powers of the City, except as limited above, are to be considered as if expressly set forth in this article whether such powers are presently available to the City, or may in the future become available.

Pittsburgh Home Rule Charter, art. I, § 101. Section § 2964(6) of the Home Rule Charter Law grants municipalities the power to "[a]dopt, amend and repeal any ordinances and resolutions as may be required." 53 Pa. Cons. Stat. § 2964(6). None of the express limitations on municipal power stated in the Home Rule Charter Law are applicable to the creation of a civil penalty for possession of marijuana.<sup>1</sup> 53 Pa. Cons. Stat. § 2962.

Pittsburgh cannot, of course, adopt an ordinance is preempted by state law. But any "preemption" analysis must resolve any ambiguity in favor of a home rule city. "[A] home rule municipality's exercise of authority should not be lightly intruded upon. Accordingly, ambiguities about the scope of the municipality's authority should be resolved in the municipality's favor." *Holt's Cigar Co. v. City of Phila.*, 952 A.2d 1199, 1202 (Pa. Cmwlth. 2008).

The statute that potentially preempts the proposed ordinance is Pennsylvania's Controlled Substance, Drug, Device and Cosmetic Act ("Controlled Substance Act" or "the Act"). 35 P.S. § 780-101 et seq. The Act is silent on the matter of preemption, with the only mention of local

---

<sup>1</sup> The limitations include collection of municipal tax claims, eminent domain procedures, boundary changes, public schools, rates and subjects of taxation, assessment of property for taxation, defining or providing for punishment of any felony or misdemeanor, and municipal planning. 53 Pa. Cons. Stat. § 2962.

regulation being that the Act is not meant to supersede any local ordinance pertaining to the possession or sale of drug paraphernalia. *See* 35 P.S. § 780-101; §780-141.1.

Pittsburgh's ordinance would nonetheless be preempted if it conflicted with the Act, e.g., if it permitted what the Act forbids or prohibited what the Act allows, or if simultaneous compliance with both the ordinance and the Act is impossible. *Fross v. County of Allegheny*, 610 Pa. 421, 438 and n.12 (2011). However, local regulation is permitted if the ordinance merely aids and furthers the goals of the state statute. *Id.*

An ordinance against marijuana possession and the Act would prohibit the same conduct, despite having different penalties. Additionally, both the ordinance and the Act would promote the purpose of deterring the possession of a controlled substance, although the ordinance would serve the additional purpose of not diverting law enforcement resources from the enforcement of more serious crimes.

Pittsburgh can resolve any potential ambiguity by including a section of the ordinance that restates the law, similar to Philadelphia's ordinance stating:

This Chapter shall not be construed to supersede any existing Pennsylvania or Federal law. Philadelphia police officers retain the authority to enforce any applicable laws and it is Council's intent that police officers may undertake custodial arrests where there is probable cause to believe that a criminal offense other than simple possession of a small amount of marijuana has been or is being committed.

Phila. Code § 10-2102(7) (effective October 20, 2014).