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The Honorable Dave Hardy
Cabinet Secretary
West Virginia Municipal Home Rule Board
1900 Kanawha Blvd. E.
Charleston, WV 25305

Dear Secretary Hardy:

You have asked for an Opinion of the Attorney General concerning certain ordinances enacted by municipalities participating in the Municipal Home Rule Program. This Opinion is being issued under West Virginia Code § 5-3-1, which provides that the Attorney General "shall give written opinions and advice upon questions of law ... whenever required to do so, in writing, by ... any … state officer [or] board." To the extent this Opinion relies on facts, it is based solely on the factual assertions in your correspondence with the Office of the Attorney General.

In 2007, the West Virginia Legislature created the Municipal Home Rule Pilot Program to help municipalities better "carry out their duties and responsibilities in a cost-effective, efficient, and timely manner." W. Va. Code § 8-1-5a(a). Three years ago the Legislature "made the pilot program a permanent program" and opened it up for "all West Virginia municipalities" to apply for admission. *Municipal Home Rule Program Guidelines*, West Virginia Department of Revenue, https://revenue.wv.gov/HomeRule/Documents/HomeRule.Guidelines.pdf.

Municipalities apply to the Program by submitting a plan to the West Virginia Home Rule Board—the Program's administering body. W. Va. Code § 8-1-5a(f). The Board reviews the plan, provides feedback, and ultimately decides whether to approve the plan and admit the municipality into the Program. *Id.* § 8-1-5a(e)(1)-(2). The Board has other duties, too: It reviews proposed amendments to existing plans, consults with agencies affected by new or amended plans, and "[p]erform[s] any other powers or duties necessary to effectuate the provisions" of the Program. *Id.* § 8-1-5a(e)(3)-(5).

A participating municipality "may not pass an ordinance, act, resolution, rule, or regulation, under the provisions of [the statute], that is contrary to" that municipality's written plan, the Program's authorizing statute, or certain other state and federal laws, regulations, and standards. W. Va. Code § 8-1-5a(i). Among those laws are "Chapters 60A [the Uniform Controlled Substance Act], 61 [Crimes and Their Punishment], 62 [Criminal Procedure] … or any other provisions of [the West Virginia Code] governing state crimes and punishment." *Id.* § 8-1-5a(i)(11).

Your letter asks whether municipal ordinances imposing court fees violate this Section 8-1-5a(i)(11) prohibition. As examples, you cite five recent ordinances imposing a "Technology and Court Maintenance" fee or a "Municipal Court Administration" fee for which various municipalities requested and (for four of the five) received Board authorization:

Date Authorized	Municipality	Fee Type	Fee Amount	Date Implemented
08/2014	Morgantown	Technology and Court Maintenance	$3 - $5	04/2015
04/2016	Shepherdstown	Technology and Court Maintenance	$3 - $5	11/2016
07/2017	Elkins	Technology and Court Maintenance	$1	09/2017
01/2020	Nutter Fort	Technology and Court Maintenance	$30 - $65	N/A
N/A	Elkins	Technology and Court Maintenance	$10 (up from $1)	N/A
		Municipal Court Administrative Fee	$65	N/A

Your letter raises the following legal questions:

> *Do court-fee ordinances run "contrary to" statutory provisions "governing state crimes and punishment" under West Virginia Code § 8-1-5a(i)(11)? And if so, does the Board have a statutory duty to notify a municipality that the Board now considers an ordinance it previously approved to be in violation of Section 8-1-5a(i)(11)?*

We conclude that while certain court-fee ordinances might violate Section 8-5-1a(i)(11), none of the example ordinances you describe appear to fall into that category. That said, if the Board were to determine that a court-fee ordinance it previously authorized violates Section 8-5-1a(i)(11), the Board might have a responsibility to notify the enacting municipality as part of its "other powers or duties necessary to effectuate the provisions of this section." *Id.* § 8-5-1a(e)(5).

Discussion

The example ordinances you describe impose anywhere from $1 to $65 in fees that cover "technology," "court maintenance," or "administrative" costs incurred by participating municipalities. There is nothing in your description of these ordinances that suggests they run "contrary" to any "provisions of [the West Virginia Code] governing state crimes and punishment." W. Va. Code § 8-1-5a(i)(11).

"Contrary" means "in conflict with." *MERRIAM-WEBSTER*, https://www.merriam-webster.com/dictionary/contrary (last visited May 6, 2022). This is "[t]he simplest … definition" of the term. *Williams v. Taylor*, 529 U.S. 362, 388 (2000) (quoting Webster's Ninth New Collegiate Dictionary 285 (1983)). The phrase "contrary to" is also "commonly understood to mean 'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.'" *Id.* at 405 (quoting Webster's Third New International Dictionary 495 (1976)). This "plain meaning" of the language in Section 8-1-5a(i)(11) controls; it "is to be accepted and applied without resort to interpretation." *State v. Ward*, 245 W. Va. 157, 858 S.E.2d 207, 211 (2021) (quoting syl. pt. 2, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970)).

What's more, the string of amendments to (what is now) Section 8-1-5a(i)(11) underscores that the Legislature's choice to use "contrary to" was intentional. When "a subsequent statute dealing with the same subject [] uses different language concerning that subject," courts "presume[]" the Legislature intended to make that "change in the law." *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 144, 107 S.E.2d 353, 358 (1959). The statute's history shows that is what happened here:

- In 2007, the Legislature wrote an affirmative grant of authority to pass ordinances "not contrary to" certain provisions of the Code. W. Va. Code § 8-1-5a(c), (j)(1), S.B. 747, 78th Leg., Reg. Sess. (W. Va. 2007), effective July 1, 2007.

- In 2013, however, the Legislature exchanged this language for a broader ban on certain municipal acts "pertaining to" those and other provisions. W. Va. Code § 8-1-5a(k)(3), S.B. 435, 81st Leg., Reg. Sess. (W. Va. 2013), effective July 1, 2013 (municipalities … do not have the authority to pass an ordinance, act, resolution, rule or regulation … *pertaining to* … [c]hapters [60A, 61, and 62] of [the West Virginia Code] or state crimes and punishment" (emphasis added)).

- Then, in 2015, the Legislature reverted to granting municipalities "authority to" pass acts "*not contrary to* … [c]hapters [60A, 61, and 62] of [the West Virginia Code] or state crimes and punishment." W. Va. Code § 8-1-5a(i)(11), S.B. 323, 82nd Leg., Reg. Sess. (W. Va. 2015), effective June 12, 2015 (emphasis added).

- Finally, the current version of the statute uses the same "contrary to" phrasing: "The municipalities … may not pass an ordinance, act, resolution, rule, or regulation … that is *contrary to* … Chapters 60A, 61, and 62 of this code or any other provisions of this code

> governing state crimes and punishment." W. Va. Code § 8-1-5a(i)(11), S.B. 4, 84th Leg., Reg. Sess. (W. Va. 2019), effective June 7, 2019 (emphasis added).

While "contrary" means "in conflict with," "pertain" has a broader meaning: "To relate directly to; to concern or have to do with." *Pertain*, Black's Law Dictionary (11th ed. 2019); *see also pertain*, *MERRIAM-WEBSTER*, https://www.merriam-webster.com/dictionary/pertain (last visited May 6, 2022) ("to have reference"). The Legislature's decision to amend the statute to read "pertaining to" in 2013, followed by its return to "contrary to" in 2015 and 2019, confirms that this "change in the law"—specifically, restoring a narrower limit on municipal authority—"was intended." *General Daniel Morgan*, 144 W. Va. at 144.

It is against this backdrop that we consider your example ordinances. Based on the information you provided, the ordinances do not appear to be inconsistent with state criminal law and, indeed, are fully *consistent* with the Program's broader purposes.

First, the ordinances you describe do not undermine or contradict laws "governing state crimes and punishment." W. Va. Code § 8-1-5a(i)(11). On their face, the cited "technology," "court maintenance," and "administrative" fees are about reimbursing or otherwise covering the costs of operating the judicial system, not about specific punishments for any crimes. On this logic, it is not clear whether they would "pertain[] to" the operative statutes were the 2013 version of the Code still in force. In any event, it is even more the case that a reviewing court would almost certainly find that they do not run "contrary to" those provisions. Though these fees may apply generally in criminal contexts, they lack a clear connection to the specific "crimes and punishment" those provisions govern. And because these general fees are tied to court operation costs, they do not appear to impose criminal penalties—much less ones that purport to supplant, supplement, or frustrate the aims of any punitive fines those provisions set forth. *See, e.g.*, Jeff Yungman, *The Criminalization of Poverty*, American Bar Association 34, 39 (Jan./Feb. 2019) ("While fines are primarily punitive, fees and court costs are designed to reimburse the government."). With no barrier to imposing the municipal fees *and* any state-law criminal fine, it is difficult to see how the ordinances are "in conflict with," "diametrically different," the "opposite in character or nature," or "mutually opposed" to the relevant criminal laws. *Williams*, 529 U.S. at 388, 405. Declining to interpret the example ordinances as "contrary to" certain "provisions … governing state crimes and punishment" therefore honors the statute's plain language and the Legislature's decision in 2015 to broaden municipalities' scope of authority under the Program.

Second, the example ordinances appear to honor the Legislature's express intent that the Program will allow municipalities to better address "challenges [associated with] delivering services" and "carry[ing] out their duties and responsibilities in a cost-effective, efficient, and timely manner." W. Va. Code § 8-1-5a(4)-(5). Municipalities by their very nature seek to improve public services as "demanded by their constituents." *Id.* § 8-1-5a(4). Municipal courts do this by improving the quality and efficiency of their court and case-docket operations, among other things. To that end, "technology," "court maintenance," and "administrative" costs are part of doing business. From the information you provided there is no reason to doubt that the example fees are, in fact, being used to cover those costs. Instead of standing in opposition to state criminal laws, they thus appear to advance the Program's goals.

We do note, however, that this Opinion analyzes only whether the Board-authorized municipal court-fee ordinances you describe are contrary to Section 8-1-5a(i)(11). It is beyond the scope of your request whether these or any other potential court-fee ordinances run "contrary to" any of the other categories listed in Section 8-1-5a(i), including "[t]he Constitution of the United States or the Constitution of the State of West Virginia." W. Va. Code § 8-1-5a(i)(9). Though unlikely to be a concern on these facts, this Opinion does not analyze potential Excessive Fine Clause implications, for instance. The Opinion also does not conclude that municipal court fees could never be "contrary to" state criminal laws. For example, particularly large fees or fees imposed under circumstances that suggest they are intended to increase criminal penalties rather than pay for the municipal court system could be seen to undermine the Legislature's decisions concerning criminal penalties.

Finally, in the event the Board encounters a court-fee ordinance it authorized in the past but now determines to violate Section 8-1-5a(i)(11), the Board may have a duty to inform the municipality of its updated position. The Board has a mandatory duty—"shall"—to "[p]erform any other powers or duties necessary to effectuate the provisions of this section." W. Va. Code § 8-1-5a(e)(5). It is difficult to advise what type of hypothetical, previously approved fee might be egregious enough to make correction "necessary" as the statute describes, but if the Board determines an ordinance it previously approved falls into that category, then notifying the municipality would fall within the statutory catchall of "other powers or duties." *Id.*

In short, we conclude that although a municipal court-fee ordinance could, in theory, run "contrary to … provisions of [the West Virginia Code] governing state crimes and punishment," W. Va. Code § 8-1-5a(i)(11), none of the examples you describe appear to do so. If, however, the Board determines that a court-fee ordinance it previously authorized in fact violates Section 8-5-1a(i)(11), the Board must assess whether informing the municipality of that determination is "necessary to effectuate the provisions" of the Program. *Id.* § 8-5-1a(e)(5).

Sincerely,

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Lindsay See
Solicitor General