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MEMORANDUM

TO: Haines Borough Assembly

CC: Dave Sosa, Borough Manager

FROM: Patrick W. Munson
Boyd, Chandler & Falconer, LLP 

RE: Minor Offense and Fine Schedule Ordinance

DATE: June 30, 2015

This memo summarizes the minor offenses and fine schedule ordinance. Our office, the Borough manager, department heads, and staff from the State court system have been working on this project for over a year in order to bring Haines into compliance with the new Alaska State Court system rules regarding minor offenses. Key issues and decisions for the Assembly are described below and included as comments throughout the draft ordinance.

A. Enforcement of Borough Ordinances

First, an overview of what this ordinance seeks to accomplish. In 2013, the Alaska Court system enacted the Alaska Rules of Minor Offense Procedure (RMOP). These new rules established a uniform system for processing low level infractions known as “minor offenses.” Minor offenses are defined in Rule 2 of the RMOP and essentially include minor violations of law that are not so serious as to rise to the level of a misdemeanor. They are sometimes called “quasi-criminal” offenses. Common examples are traffic tickets or leash law violations. The punishment for a minor offense cannot include incarceration, loss of a valuable license,¹ or a fine greater than either \$1,000 or \$500 depending on the circumstances (see sections E and F, below). Most violations (namely, all those listed in the “fine schedule” at proposed HBC 1.24.040) result

¹ This limitation means that a court cannot take away a valuable privilege (such as a driver’s license) as a result of a single conviction or no contest plea. If the court can take away a license or privilege as a result of a violation, the violation cannot be designated a minor offense. Note that the Borough will retain authority to administratively revoke certain permits or licenses based on violations of the law, but the revocation would be separate from the court proceeding adjudicating the minor offense. See, e.g., proposed HBC 5.04.140.

in tickets that can simply be paid by remitting a fixed amount to the court. If a person chooses to contest the citation, the court conducts a simplified proceeding that is fully consistent with due process requirements. Because possible punishment for a conviction is limited, the defendant is not entitled to a jury trial or a court-appointed attorney, but may appear in court to contest the charge (and may hire their own attorney if they wish). People may be familiar with this process from contesting traffic tickets.

Almost all municipalities enforce their laws at least in part as minor offenses. Therefore, almost all have been required to update their ordinances to be consistent with the new Court rules, just as Haines is proposing to do in this ordinance. Among other things, municipalities must ensure that all ordinances they intend to enforce as minor offenses are officially called “minor offenses” both in their own codes and in the Uniform Minor Offense Table on file with the state (<http://courts.alaska.gov/trialcourts/umot.htm>). The court system will not process citations citing ordinances that are not consistent with the new Rules.

Because some of Haines’s ordinances establish other enforcement mechanisms, we also recommend harmonizing those provisions with the minor offense procedures in Borough Code and the new Rules. First and foremost, we recommend changing many of the current “administrative” enforcement offenses to minor offenses. Administrative enforcement proceedings are those that are initiated by Borough staff by a notice of violation. These are often carried out in a rather *ad hoc* fashion of hearings with the Borough manager or other staff, and sometimes an appeal to the Assembly. This *ad hoc* process is confusing, inconsistent, and extremely inefficient because it often require hours of meetings with Borough staff and the Assembly. Moreover, neither staff nor the Assembly is necessarily the best forum in which to adjudicate routine enforcement matters that could just as easily be handled in a courtroom (likely with better safeguards to the accused). It would make much more sense – legally and practically – for as many of these offenses as possible to be cited as minor offenses like other ordinance violations. The court system provides a more efficient and consistent judicial forum to hear such cases than the borough administration building and the Assembly. Using the courts is also likely to be more effective than the informal proceedings that characterize most current administrative enforcement efforts.

Another significant result of converting to minor offenses is that the Borough, rather than the State, will consistently be the prosecuting entity for violations of Borough law. This is not currently the case. Traffic tickets, for example, are currently cited as violations of state law, not Borough code. The State is therefore the official prosecuting entity for such cases and receives the fine money even though Borough officers do much of the enforcement work.

This would change under the proposed new system. When an officer issues a citation for a violation of any law designated a minor offense under Borough law (including but not limited

to traffic laws), the citation will indicate that the offender violated a Borough ordinance, not a state law. The Borough will be the prosecuting entity and will therefore receive the fine money. Because the violations are minor offenses, the Borough is not required to provide a public defender and need not have its own attorney appear even if the charge is contested. Police officers appear in court to support their own citations. This happens anyway under current law, so there should be very little practical change (in traffic enforcement at least) except the Borough will receive fine money instead of the State.

Note that these changes should decrease, not increase, the time Borough employees and officers spend on enforcement. When officers write citations for minor offenses, the citations are filed with the court system for processing. The court handles everything else. Staff's only involvement may be to appear at a brief court hearing to explain the basis for the citation so the judge can adjudicate guilt or innocence (if that is even contested).

Equally important, collection of fines will improve. If the offender pleads or is found guilty he pays the court, which conveys the payment to the Borough. The court system retains a 10% administrative fee of all penalties collected through it. We believe that this fee is well worth the simplicity of enforcing laws through the court system and will be more than offset by the increased fine payments the Borough receives. We therefore recommend that as many ordinances as possible be enforced as quasi-criminal minor offenses.

B. Choosing ordinances to designate as minor offenses

It is important to understand what this ordinance does, and equally, what it does not do. The goal of this ordinance is to facilitate enforcement through the court system of laws that are already on the books, not to outlaw activities that are currently legal. The ordinance is not intended to change the substance of Borough laws. Rather, it implements (now legally required) terminology and clarifies/applies procedures that are consistent with or required by the new court Rules. It also eliminates ordinances that are redundant or unnecessary now that the RMOPs and the new HBC Ch. 1.24 establish rules and procedures for almost all violations of Borough ordinances. Finally, the ordinance proposes to align some penalties with state law.

The Assembly may choose what ordinances to designate as minor offenses. The current draft proposes those that we believe are most likely appropriate, but they are just suggestions. Some of these suggestions apply the correct terminology to violations that are already legally minor offenses under Borough law. Other proposed amendments would re-categorize certain violations that are not currently minor offenses but probably should be. This includes "administrative" offenses as described above and also most offenses currently designated as misdemeanors. We recommend most of the offenses currently referred to as misdemeanors be re-categorized as minor offenses because, as a practical matter, the Borough does not charge

offenders with misdemeanor violations of Borough ordinances. Rather, such offenses are prosecuted by the state (as are felonies). This makes sense because the State's Attorney is the local prosecutor, not the Borough Attorney, and the state is equipped to provide misdemeanor and felony defendants with a public defender, jury trial, and other process necessary to prosecute such crimes. The Borough does not have that institutional infrastructure or capacity. That is perfectly acceptable, but it means that as a practical matter, Borough laws designated as misdemeanors are either unenforced or enforced only as state crimes. In either case, it makes sense to re-categorize such offenses to minor offenses or to eliminate them altogether rather than allow them to go unenforced.

Nor do most of the so-called misdemeanor offenses seem to be the kind of offense that justifies that label. For example, failing to obtain a business license is not an offense for which jail time is likely to be appropriate. Yet HBC 5.02.020 designates this offense as a misdemeanor, meaning jail time is possible and an accused violator is entitled to a jury trial and a public defender at Borough expense. As a result, it will almost never make practical sense for the Borough to charge someone with a violation because the time and expense required to prosecute a misdemeanor likely outweighs any benefit obtained by doing so. So this violation can instead be designated a minor offense with a fine up to \$1,000. This should be equally sufficient to deter violations, is more in line with the severity of the offense, and avoids the expense of charging and trying a person for a misdemeanor.

Again, this does not mean the Borough is becoming more or less aggressive, or that it is legalizing activities that are currently illegal. We believe all the "misdemeanors" under current code that we have proposed deleting or re-categorizing are also illegal under state law (and in fact, are regularly prosecuted by the State as such). So removing these offenses from the Haines Code is more to reflect the reality of what is already occurring (i.e., the offender is prosecuted for a violation of state law; the borough law is effectively irrelevant) than to change existing laws.

In sum, we recommend re-categorizing or eliminating those types of offenses from the code if there is a state statute that covers the same conduct. However, the Assembly can elect to keep any such provision if it prefers. We have identified these in the draft.

C. Civil penalties, administrative enforcement, or minor offenses

There may be a small number of ordinances that the Borough chooses not to designate as minor offenses. Planning and zoning offenses for example, are sometimes problematic. Some of these are appropriately treated as minor offenses, such as failing to obtain a permit. Others, such as encroachments, require more options because issuing a one-time citation is not sufficient to compel compliance. We have proposed multiple enforcement options for some such offenses and flagged specific issues for consideration where appropriate.

D. Traffic laws incorporated by reference

We propose to amend Title 10 significantly to make the Borough's traffic laws easier to use, understand, and enforce. Currently, this title incorporates individual state statutes and regulations one at a time, section by section, essentially codifying state law as the Borough traffic code, but doing so in a way that is extremely cumbersome and inefficient; so confusing in fact, that it is causing the Borough not to collect the traffic fines it should be collecting (because traffic violations are currently cited as state law violations rather than Borough ordinance violations). We therefore recommend amending this title to incorporate into Borough law "all the traffic offenses of the state" except felony and misdemeanors. If this change is approved, Borough police officers will do exactly what they are doing now to issue tickets for traffic violations, but the court system will treat each such citation as a violation of Borough law, not state law, and remit the fine amount to the Borough. Officers and citizens will also be able to look up or refer to traffic laws by their state law designations without also having to look up the parallel cite to Borough code. Note that we have maintained a separate chapter for Haines-specific offenses, which can be amended any time the Assembly determines a change is needed.

E. Fine schedule - mandatory and optional appearances

The final significant change is the fine schedule. The new HBC § 1.20.040 sets forth a table, called a fine schedule, that will include offenses for which a fixed fine has been established. An offender can resolve any "scheduled violation" (*i.e.*, a violation of any ordinance listed in the table) simply by paying the amount listed in the table. He or she is not required to appear in court, but may if he or she wants to contest the charge. These violations are therefore called "optional court appearance" offenses. Any infraction not listed in the table is a "mandatory court appearance" infraction.

The Assembly decides which ordinances are optional and mandatory appearance offenses. There are two main reasons to require court appearances. The most common is where different violations of the same law are likely to be so different in severity that it is appropriate to use a range of possible fines (typically, "up to" a certain amount), rather than a single fixed amount. These offenses are mandatory appearance offenses because a judge must set the specific fine out of the range set by Code. Typically, optional appearance offenses are those for which a single penalty is likely to be sufficient.²

² Of course this does not mean that a fixed fine will exactly fit the severity of the offense in every case. Nor should that level of precision be expected. Fixed fines inevitably mean that some minor violators are fined an amount that seems excessive, or that major violators escape with a lighter fine than might be justified. This limitation is recognized, but in our view it is a reasonable trade-off for more regular enforcement, less time in court for Borough police officers,

Another common reason to require a court appearance is if the Borough wants to compel compliance or change behavior. Failing to connect to Borough sewer, for example, could be an appropriate mandatory appearance offense because the judge could order the offender to connect to the sewer system.

We have proposed the current fine schedule based on our evaluation of the ordinances for which it probably makes sense to set a fixed fine. However, the decision of whether to designate a particular offense optional or mandatory appearance is for the Assembly (subject to some limitations dictated by state law). It is also, admittedly, an inexact science. However, the consequences of choosing “wrongly” on this detail in any particular instance are minimal. In other words, whether someone is *required* to appear in court is generally less critical to the overall justice process than other factors because an accused person can always *choose* to appear.

Note that these tables can be amended at any time just like any other ordinance, so it is not necessary for the Assembly to agree on absolutely every detail prior to enacting the comprehensive ordinance.

F. Fine schedule - Setting fine amount

Finally, the Assembly must set an appropriate fine amount for each offense that is included in the fine schedule, and a maximum fine amount for mandatory court appearance offenses. We have proposed fines (or a range of fines) for every violation of a Borough ordinance that will be treated as a minor offense. Some of these amounts were stated in code already. Others are established by state fine schedules, or have been imposed by the court in past cases. We have not changed the amounts that were already stated in code (with exceptions, explained below) because, as stated earlier, it is not our intent to re-legislate every ordinance or fine that the Assembly has previously enacted. Rather, our goal has been to reorganize existing law into a framework that complies with new court rules, eliminates some discretion in imposing fines, and allows the Borough to receive fine payments rather than the State.

Where the previous Code did not establish the fine for a particular violation, we have proposed fine amounts that seem generally appropriate based on our estimate of what amount might be sufficiently high to deter violations but not so high as to be unreasonable in light of a particular offense. But the amounts in this ordinance right now are just suggestions. Again, the Assembly is free to amend any or all of the fine amounts we have proposed.

and less discretion for a judge in setting fine amounts (which poses its own risks of unfair application).

A brief explanation of the rationale we used for these proposals is in order. The maximum fine for a minor offense is \$1,000 for optional appearance offenses (scheduled fines), and \$500 for mandatory court appearance offenses. AS 29.25.070(a); R. Minor Off. P. 2(d) and (e). There was previously some uncertainty on this point, so the proposed maximum fines throughout this ordinance are currently \$500, but this can be amended if desired. We have reserved that highest amount for serious offenses: those that pose a potentially serious risk to the health and safety of the Borough, its citizens, facilities or infrastructure. We also proposed that amount as the fine for the failure to obtain certain high value permits, such as commercial tour and alcoholic beverage licenses. (Fines may be assessed for every day a violation occurs if necessary.)

We proposed a \$250-300 fine for serious offenses that do not warrant the greatest possible fine. These violations include failing to obtain other permits (such as those in Chapters 5.08 and 18.40), various nuisances, and maintaining dangerous conditions or activities. The offenses may threaten the orderly functioning of the community, pose a risk to property or safety, or involve potential damage to Borough property or interests. Some of these offenses already had fines set in this amount.

We have proposed approximately \$100 fines for violations that are not necessarily or inherently dangerous, but which are more serious than the nominal offenses in the lesser category below. These include exceeding the scope of or violating conditions of a permit, tampering with property, failing to pay for certain services (such as harbor use), engaging in prohibited activities on public Borough land, and smoking (which was set by previous ordinance).

Finally, we propose nominal fines for bicycle and pedestrian offenses. Some of these were established by earlier Code. These offenses likely require only a modest fine, not one that is particularly punitive. Note that all vehicle traffic citation fine amounts are established by state law under the new system proposed here.

Additionally, we propose to eliminate “graduated fines.” These are fines that increase for subsequent violations after the first conviction. The new court rules require a court appearance for all offenses with graduated fines because a judge must confirm the number of previous violations to impose the required fine. This simply is not efficient for violations of, for example, the leash law or dog license violations. A Haines police officer should not be required to go to court to testify for every subsequent dog license violation (nor, arguably, should a citizen who does not contest the charge). Yet that is required in order to enforce graduated fines. In our opinion, the slightly increased fines for subsequent violations does not provide enough additional deterrence over a fixed fine to justify this use of police officers’ time. We have therefore proposed setting a uniform fine for all violations (at an amount equal to the fine for the second violation under the old system).