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MEMORANDUM

TO: Haines Borough Assembly

FROM: Patrick W. Munson
Boyd, Chandler & Falconer 

RE: Ad Hoc Committee Recommendations Regarding the Proposed Minor Offense Ordinance

DATE: May 2, 2016

Our office has worked closely with the Ad Hoc Committee to prepare the proposed draft Minor Offense Ordinance. Our office recommends the Assembly adopt the ordinance or an amended version of it. The ordinance codifies existing laws of the Borough in a way that is consistent with the State of Alaska Court Uniform Rules of Minor Offense Procedure. It would provide consistency in enforcement by allowing the court system to adjudicate minor violations of Borough law. Major violations of law will remain designated and treated as state misdemeanors and felonies. The ordinance would also eliminate most of the “administrative proceedings” that require Borough staff and the Assembly to adjudicate violations. This would benefit both citizens and the Borough because it is much more efficient and appropriate under our system of government to allow courts to adjudicate most alleged violations rather than staff members or legislative bodies.

In short, we perceive substantial benefits from this ordinance and no negative impacts. The ordinance is fully consistent with due process requirements and is very similar to the law enforcement systems used in the vast majority of communities in Alaska and the United States. We believe the Committee’s extensive review and revisions have generated an ordinance that also addresses the local concerns that have become apparent during this process.

Our office has provided extensive analysis and commentary on every draft of the ordinance generated by the Committee. We have attended multiple of the Committee’s meetings by teleconference to answer detailed questions and provide feedback on proposed changes. The Assembly and the public should feel free to review any of the memoranda and comments we have provided. We can also be available to discuss the ordinance with the Assembly at any time.

We also provide the following information in an effort to summarize some of the concerns that have been apparent throughout this process and to summarize our understanding of

the Committee's response/recommendations regarding same. This is not intended to be a definitive or exhaustive list of issues addressed by the Committee.

1. *The "Daily Violation Provision"*

Proposed Section 1.24.010(C) clarifies that violations occurring multiple times, on different days, or extending for multiple days in a row, can be treated as separate offenses. An illegally parked car commits two violations if it remains parked illegally for two days. A person who violates curfew on Friday and again on Saturday commits two separate violations. A person who operates a business without obtaining a permit can receive a citation for a separate offense every day he or she operates the business without getting the permit. After much deliberation, the Committee recommended this provision be included in the MOO because it concluded that it is important for the Borough to have the legal authority to issue multiple or separate citations for ongoing or repeated violations.

Our office agrees and strongly recommends this provision be adopted. It would be extremely unusual for a provision like this *not* to be included in a local ordinance enforcement system. Without it, any offender has at least a plausible argument that he or she can only be cited once for committing any offense because the code would not specify any way to distinguish one offense from another one. The constitutional prohibition against double jeopardy gives any violator in that scenario an argument that, for example, after a driver is cited for parking in an illegal location, the car can stay there indefinitely because the owner has already been cited for the violation once and cannot be cited again. In sum, not including a "daily fine provision" potentially would allow all violators of code to pay a one-time fine for the privilege of continuing to violate the law. The Committee did not believe that would be a good policy. For example, why would anyone bother to obtain a business permit (or clean a nuisance, get his or her dog licensed, pay daily mooring fees, move an illegally parked car, not violate curfew a second, third, or fourth time, *etc.*), if they can only be fined once for not getting the permit?

The Committee debated whether it should include an "umbrella" provision like this one (HBCO 1.24.010(C)) that applies to all ordinances unless otherwise noted, or whether it should specifically identify each ordinance where daily violations were authorized. It concluded that there are very few ordinances that might not be appropriate for daily enforcement, so it included the daily provision as the default with exceptions provided where warranted. One such exception is failing to connect to the sewer system, an offense which the Committee believed could not reasonably be corrected in a single day. See Section 36 of the Proposed MOO, amending HBCO 13.08.270(B), establishing weekly violations for this offense. The Committee recommends that similar offenses be addressed later as needed.

The Committee significantly clarified the original version of the Minor Offense Ordinance by including a requirement that separate violations be cited individually. This eliminates any confusion as to how enforcement will and must occur under the authority provided by subsection HBCO 2.24.010(C). A person operating a business without a permit, for example, would have to receive a separate citation for every day of unlawful operation, not one ticket purporting to include multiple days. Each of those citations could be challenged individually in court, so the citizen's rights are not diminished at all and the Borough retains authority to enforce its ordinances meaningfully. Our office recommends the Assembly include this provision if it chooses to adopt the daily violation provision.

2. *Borough Staff Enforcement Authority*

The Committee recommends that only police officers, the harbormaster, and assistant harbormaster have authority to issue citations for violations of Borough law. Neither the manager nor other staff would have such authority. Instead, borough staff would have to report suspected violations to police who could investigate the allegation and issue a citation if warranted. This system makes sense because police are trained to carry out such activities and do so every day.

The Committee concluded that the harbormaster and assistant need citing authority because he or she is in a position of enforcement and it could be impracticable to call the police for many violations, such as failure to pay registration fees, dumping garbage, *etc.* The harbormaster's authority is limited to enforcement of Title 16 (HBCO 16.08.030(A)). The Committee recommended that the harbormaster undergo training in order to exercise his or her enforcement authority (proposed HBCO 16.08.030(H)).

Our office recommends these provisions be adopted as well because they are entirely logical and consistent with the law enforcement systems nationwide and address what was once a contentious issue with the MOO. We would recommend discussions with the police to determine an appropriate training system for the harbormaster and assistant. Those individuals should also be encouraged to consult with our office on enforcement matters if they have any questions.

3. *Title 18 - Land Use Ordinances*

The Committee removed all Title 18 offenses from the Minor Offenses Ordinance. The Committee concluded that the land use provisions of Title 18 require a more detailed analysis before being considered for inclusion in the Minor Offenses Ordinance.

The Committee wanted the Assembly to understand that it was not concluding that violations of Title 18 should not be minor offenses; but rather, the Committee was not prepared to make any recommendations as to whether such violations should be minor offenses or not. Some members of the Committee opposed making such violations minor offenses, while others appeared to support enforcing violations as minor offenses. It was noted that the Planning Commission has extensive experience with Title 18 and has either not been adequately consulted or has not recommended any changes. In light of the lack of consensus, the Committee decided to essentially table the question as to Title 18 so that the rest of the Ordinance could proceed.

This appears to be a reasonable approach for the short term given the lack of any clear consensus among the Committee with regard to Title 18, but we recommend Title 18 be considered for updating in the near future. By tabling the decision, the existing enforcement system (as described in Chapter 18.30, most specifically HBCO 18.30.070-.090) will remain in place unless amended. Under the existing system, the Borough and Planning Commission do have enforcement authority over Title 18, so those ordinances are enforceable at this time. However, the existing enforcement system for Title 18 includes many of the issues and concerns that the Committee has endeavored to eliminate in other sections of Code, such as borough manager enforcement authority (HBCO 18.30.030 and .080(B)), criminal sanctions (HBCO 18.30.090(D)), vagueness as to daily violations (HBCO 18.30.090(A)), and an extremely cumbersome administrative enforcement process. That said, these mechanisms are not the only enforcement avenues under existing code and are not often used, so the effect may be minimal if the Assembly takes up this question relatively soon.

4. Number of Code Violations

The Minor Offense Ordinance has led some people to question whether Haines has “too many” ordinances. The Committee therefore recommended that a separate committee be established to allow the public and Assembly members to purge the Code of “unnecessary” ordinances. We understand this may be occurring or likely to occur in the near future, but we have no opinion on this matter. Our general perception is that Haines does not have a particularly excessive number of ordinances or minor offenses compared to other sophisticated, medium sized communities in Alaska, but if a majority of the Assembly believes certain offenses are no longer necessary then there is no harm in deleting them (using the normal ordinance amendment process). If the Assembly decides this would be a worthwhile project, we will be glad to assist in whatever way we can.