

Final committee recommendations for minor offense ordinance.

April 11, 2016

Attorney's responses in red (April 13, 2016)

The following statement in §1.24.010 (D) be removed in its entirety: "Each act of violation and every day upon which the violation shall occur will constitute a separate offense." Intent: to not have a blanket statement on the entire ordinance, but rather include the statement specifically where daily fines are reasonable.

We have deleted this from the draft ordinance, but do not recommend this change. The "daily violation provision" was last addressed at the March 15 meeting, at which time Committee members seemed to support including this provision but imposing a clear requirement to issue separate citations. We agree that both are good additions to the Code. Both are commonly accepted provision of law in other jurisdictions.

We do not perceive any benefits from deleting this umbrella provision in favor of identifying each and every title, chapter, or section where a separate violation, occurring on separate days, can lead to a person being cited for separate offenses. Because of the prohibition against double jeopardy, this change potentially allows all violators of code to pay a one-time fine for the privilege of continuing to violate the law unless an ordinance provides otherwise. An ordinance "providing otherwise" would need to be added to so many chapters of code that it would be very cumbersome to identify each one individually. The failure to so identify a particular ordinance would effectively eliminate effective enforcement of the ordinance. 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?

We can work through the ordinance to provide recommendations for all the chapters where a daily violation provision should be included the Committee desires, but will need direction from the Committee (and time) to determine all the places where it is "reasonable" to prohibit multiple or ongoing violations from continuing indefinitely. From our perspective, it is reasonable to apply this provision to every ordinance, so we will need to understand the Committee's criteria better to accomplish this.

Remove mention of "skis" from 10.26.300 and treat skiing on roadways as 13 AAC 02.175 – pedestrians on highways. Intent: to have skiing on roads be enforced the same as pedestrian rules.

Section 26 of the proposed ordinance already proposes to repeal all of Chapter 10.26 because all of these are addressed under various state laws, which are proposed to be incorporated by reference in proposed HBCO 10.06.020

Adopt provision in 10.42 dealing with bicycle violations along with fine structure as proposed in last attorney memo.

Section 25 of the proposed ordinance already proposes to adopt a fine schedule to include all bicycle laws currently in the Code under HBCO 10.42

Include following wording in Title 16: "Harbormaster will develop and document and with approval by manager implement a training and certification process for harbor personnel that will enforce harbor regulations. Policy will include training in conflict resolution and constitutional rights and responsibilities and visible identification. All harbor staff with enforcement authority shall be administered an oath of office."

This text has been added as a new proposed Code Section 16.08.030(H) (added as new Section 45 of the proposed Minor Offenses Ordinance; subsequent sections adjusted accordingly).

Add an additional chapter 05 to Chapter 8 titled "General Provisions" to include wording "Any enforcement officer granted enforcement discretion in this title shall exercise that discretion according to the principals of the purpose and intent in this section."

What Title and chapter was this intended to refer to? We believe we understand the purpose of the reference, but the reference does not have any meaning without including a statement of the "purpose and intent in this section." Is there proposed text for the "purpose and intent" to apply to the Title in question?

Add section 020 in Title 8 titled Definitions. *Question for attorney: Is wording too vague in Chapter 8? Words like "comfort" and "unreasonable"... are definitions of adjectives necessary?*

All of the individual chapters in Title 8 already have "definition" sections (namely, section .010 of each chapter). If there are particular terms to be added to any of them, please advise.

In response to the question, prohibitive ordinances like these are required to put citizens on notice of what conduct is prohibited in order to withstand a vagueness challenge. They are not required to define every word or articulate rigid quantitative standards for every type of prohibited conduct. They are simply required to put a reasonable person of average intelligence on notice of the conduct that is prohibited. A person should be able to read the ordinance and generally understand what conduct is forbidden. Words like "comfort" have a commonly understood (and dictionary) definition that does not have to be specifically defined, but the Assembly can define any terms it believes are unclear.

Words like “unreasonable” are classic targets for a vagueness challenge because people cited for violations of these laws often argue that they could not possibly have known their conduct would be deemed “unreasonable,” so it is not fair to punish them for committing a particular act. Courts consistently (though not always) reject this type of challenge because (1) citizens are expected to use their common sense and judgment with regard to the reasonableness of their own conduct; and (2) our system of justice often entrusts courts (*i.e.*, judges and or juries, depending on the situation) with determining whether a particular act is “unreasonable” based on the act, the environment in which it occurred, and the prevailing norms of the community. This is one reason why juries have 12 local citizens on them: they collectively determine questions of reasonableness every day.

To use an example, if an officer receives a complaint about excessive noise at a particular location, he might visit the scene, observe the situation, and if he determines that there is probable cause to believe that the person is creating an “unreasonable noise” in violation of HBCO 8.12.020(E), he might write the person a citation (or, more likely, he might first just knock on the door and ask the person to keep it down). If the person wants to pay the fine without contesting it, she can do so. But if she believes the amount of noise was not unreasonable, she would go to court and tell the judge what happened. The officer would do the same, and the judge would listen to all the evidence to decide whether, under all the circumstances presented in court, the person was making the type of noise that is prohibited by HBCO 8.12.020(E), including whether it was unreasonable. If the judge finds that the noise did violate the ordinance, he or she will conclude that a violation occurred and levy the appropriate fine. If the judge determines that the noise was reasonable, the citation will be dismissed. In either case, the losing side can appeal to the superior and ultimately to the Supreme Court. The justice system is set up to adjudicate things like “reasonableness” based on the evidence, case law, and the prevailing norms in the community. Trying to define “reasonable” in code is probably more difficult than helpful.

Having said that, there is nothing wrong with being more specific if the Borough decides that particular ordinances would benefit from more detailed standards. This would be a good item to recommend to the Assembly, but is probably unrelated enough to the Minor Offenses Ordinance itself that it should be taken up separately.

Recommend establishment of a Code Revision Commission in Title 1 that is appointed to review and revise borough code. The Assembly would task the Code Revision Commission to make recommendations and develop verbiage for proposed new codes and revisions of current code. Additionally, the public would be empowered to petition the Commission to add to, delete from, or propose new code. This commission would consist of borough residents, and an assigned Assembly liaison. *Question to attorney: Does this need to be added to ordinance in Title 1 or can it go to committee as general recommendation?*

This is certainly an achievable project but does not necessarily have to be established by Code. We recommend the Committee recommend this to the Assembly but not attempt to draft specific Code provisions at this time because developing ordinances governing such a commission will be a substantial project in its own right that is not part and parcel of the Minor Offenses Ordinance.

Recommend the following statement be inserted for all fines set out in §10.44: “Each act of violation and every day upon which the violation shall occur will constitute a separate offense.”

This has been added as proposed HBCO 10.44.005 in new section 30 of the MOO (subsequent sections adjusted accordingly).

Recommend the following statement be inserted into Title 1: “Separate offenses under this Title shall be cited separately.” *Intent: police or harbor master will have to write/issue separate citations for each offense. Multiple citations cannot be combined on one ticket.*

This has been added as the new proposed HBCO 1.24.010(C).

To recommend the final sentence of §1.24.040 be restated to read as follows: “The penalty imposed for the offense may not exceed the fines set forth below.” *Intent: to give the magistrate discretion in reducing a fine if he deems appropriate.*

This change has been made.

“Recommend the following statement in §8.12.140 C be removed in its entirety: “In any such proceeding, the borough shall be entitled to collect a civil penalty in the same amount of the fine established by this Title and HBC 1.24.040 for the same violation for every day the violation exists.” *Intent: It feels overreaching. What is the purpose of collecting a civil fine as well as the regular fine?*

This provision allows the civil fine to be imposed only in a case where the Borough goes through the nuisance abatement process (*i.e.*, the Borough abates the nuisance using its own personnel or contractors and charges the landowner for the costs thereof, plus a penalty under the ordinance as currently drafted). If an officer also cited the person for creating the nuisance then the Committee is correct this would effectively be a double penalty. But in cases where that does not happen (or if the violation lasts multiple days and the daily violation provision is not applied to ongoing violations of Section 8.12), the civil penalty would be a more efficient way of penalizing the offender for refusing to obey an order by the Borough to abate the nuisance because the Borough would already be charging the person for abatement costs, so the minor offense citation process does not necessarily add any enforcement teeth to the ongoing abatement process.

We have removed this provision from the MOO and have no strong recommendation either way. This change is probably not ultimately that significant, but if the Borough goes through the abatement process it will be because the person has refused to abate the nuisance himself, so a civil fine would not be unreasonable as long as the Borough did not also issue citations for the violations.

Recommend moving 1.24.010 (A) from present location and put in more appropriate place – perhaps high up in ordinance?

This direction was clarified by the accompanying comments. We have renumbered the purpose and intent language as proposed HBCO 1.04.005 under General Provisions applicable to the entire code (subsequent sections renumbered accordingly).

Question for attorney – in 1.24.010 (C) why is it necessary to have wording about the borough being able to pursue compensatory relief? Why necessary to have wording there at all? Wouldn't any individual have the right to pursue compensatory relief? But why would borough need to if borough can already pursue injunctive relief?

Proposed HBCO 1.24.010(B) (correct reference) is based on AS 29.25.070(b). Similar provisions are included in the vast majority of municipal codes in Alaska, and have proven useful in previous disputes where municipalities were required to go to court to recover for damages caused by breaches of local ordinances, such as in actions to recover unpaid sales taxes. An injunction is an entirely separate type of relief and would not, for example, help the municipality recover unpaid taxes. Whether this provision is strictly “necessary” or not, there is no harm and only benefits that come from including this and making the borough’s powers clear under its own laws.

Question for attorney: Are there any glaring issues you see with the changes we've recommended? Any red flags?

All concerns have been noted above. We look forward to helping the Committee complete this project in whatever ways we can.

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