

# LEGAL SERVICES

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## MEMORANDUM

September 3, 2013

**SUBJECT:** Bill Authorizing Municipalities to Prohibit Cell Phone Use While Driving (Work Order No. 28-LS0960\A)

**TO:** Senator Kevin Meyer  
Attn: Edra Morledge

**FROM:** Kathleen Strasbaugh  
Legislative Counsel

Please find enclosed the draft bill you requested authorizing a municipality to adopt an ordinance prohibiting cell phone use while driving in school zones or on school grounds. There is some question about whether authorizing legislation is necessary. The answer is probably yes, as discussed below.

As you may know, AS 28.01.010 requires that traffic laws must be uniform across the state:

**Sec. 28.01.010. Provisions uniform throughout state.** (a) The provisions of this title and the regulations adopted under this title are applicable within all municipalities of the state. A municipality may not enact an ordinance that is inconsistent with the provisions of this title or the regulations adopted under this title. A municipality may not incorporate into a publication of traffic ordinances a provision of this title or the regulations adopted under this title without specifically identifying the provision or regulation as a state statute or regulation.

(b) A municipality may adopt by reference all or a part of this title and regulations adopted under this title, and may request and shall receive from the Department of Commerce, Community, and Economic Development and, as appropriate, either the Department of Administration or the Department of Public Safety, assistance in the drafting of model ordinances for adoption by reference. Notwithstanding (a) of this section, a municipality may enact necessary ordinances to meet specific local requirements. . . .

As AS 28.01.010(b) provides, a municipality may adopt an ordinance to meet local requirements. The Alaska Court of Appeals has determined that to invoke the local requirement exception, a municipality must demonstrate that any discrepancy in the ordinance does not impede or frustrate policy expressed by state law. *Simpson v. Municipality of Anchorage*, 635 Pd.D. 1197, 1204 (Alaska Ct. App. 1981).

A municipality may well be able to make this argument for a local exception requirement prohibiting cell phone use in school zones if it demonstrates a special problem compared to other jurisdictions within the state. However, a statute prohibiting the use of electronic devices while driving makes a specific exception for cell phones:

**Sec. 28.35.161. Use of electronic devices while driving; unlawful installation of television, monitor, or similar device.** (a) A person commits the crime of driving while texting, while communicating on a computer, or while a screen device is operating if the person is driving a motor vehicle, and

(1) the vehicle has a television, video monitor, portable computer, or any other similar means capable of providing a visual display that is in full view of a driver in a normal driving position while the vehicle is in motion, and the monitor or visual display is operating while the person is driving; or

(2) the person is reading or typing a text message or other nonvoice message or communication on a cellular telephone, personal data assistant, computer, or any other similar means capable of providing a visual display that is in the view of the driver in a normal driving position while the vehicle is in motion and while the person is driving.

(b) A person may not install or alter equipment described in (a) of this section that allows the images to be viewed by the driver in a normal driving position while the vehicle is in motion.

*(c) Subsections (a) and (b) of this section do not apply to*

*(1) portable cellular telephones or personal data assistants being used for voice communication or displaying caller identification information;*

.....

*(e) It is an affirmative defense to a prosecution under (b) of this section that the equipment installed or altered includes a device that, when the motor vehicle is being driven, disables the equipment for all uses except those described in (c) of this section.*

AS 28.35.161 (*emphasis supplied*). AS 28.35.161 also provides exceptions for certain other communications devices that might be deemed covered under a cell phone ordinance. AS 28.35.161(d). Thus it might well be argued that an ordinance prohibiting cell phone use by persons operating motor vehicles in school zones would frustrate the legislature's purpose in adopting the exception for cell phones. *Compare and contrast State v. Hamilton*, 216 P.3d 547, 549 (Alaska Ct. App. 2009) (Juneau ordinance prohibiting squealing tires does not frustrate purpose of any state statute); *Lampley v. Municipality of Anchorage*, 159 P.3d 515, 524 - 25 (Alaska Ct. App. 2007) (city

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ordinance imposing a higher degree of culpability concerning driving while license is suspended did not frustrate state law where state had concurrent jurisdiction over offense).

If I may be of further assistance, please advise.

KJS:lnd  
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Enclosure