

LEGAL SERVICES

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MEMORANDUM

February 24, 2016

SUBJECT: Electronic Devices while Driving
(SB 123; Work Order No. 29-LS1198\A)

TO: Senator Kevin Meyer
Attn: Edra Morledge

FROM: Hilary V. Martin 
Legislative Counsel

You have asked nine questions related to SB 123.

1. *Where is it in statute that local laws cannot be more severe than state law, at least in reference to traffic laws?*

AS 28.01.010 states that traffic laws must be uniform throughout the 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.

Under this section, any municipal ordinance that relates to the subject contained in AS 28 must be consistent with state law and regulation.¹

2. *If SB 123 is adopted and it results in a lesser penalty than a borough or municipality has, does the local ordinance have to be changed?*

Under AS 28.01.010, all municipal traffic ordinances must be consistent with state law. This does not mean, however, that municipal ordinances have to be identical. The Alaska

¹ The state can also pass a statute directing a municipality to comply with state law. In AS 28.01.010(j), a court cannot enforce a municipal ordinance prescribing a penalty for driving under the influence or refusal to submit to a chemical test unless the ordinance imposes ignition interlock device requirements under AS 28.

Court of Appeals has stated that a court "must consider the totality of the legislative framework within which the municipal ordinance and state statute are included."² The Court of Appeals further stated that when determining whether a municipal ordinance is inconsistent with state law, "the inquiry must focus on whether any discrepancy in the ordinance impedes or frustrates policy expressed in state law."³

In this situation, the question is whether a higher penalty for violation of a municipal ordinance is inconsistent with the lower penalty for the same conduct specified in state law. Under AS 11.81.900, a violation is defined as a "noncriminal offense punishable only by a fine, but not by imprisonment or other penalty; conviction of a violation does not give rise to any disability or legal disadvantage based on conviction of a crime. . . ." So the change in punishment from a misdemeanor, a criminal offense, to a violation, a non-criminal offense, is a significant change. In my opinion, if a municipality has a similar crime to AS 28.35.161, which is punished as a misdemeanor, and SB 123 passes, the municipality must lower their penalty as well to be consistent with state law.

3. Who decides whether an individual will be charged under state or local law?

A law enforcement officer can issue a citation for crimes within the officer's jurisdiction. It is my understanding that an Alaska State Trooper can only issue citations for violations of state law and not for violations of municipal ordinances. A municipal officer, however, can write tickets for violations of state and municipal law within the scope and authority of that officer's appointment. You may wish to speak to the Department of Public Safety about the power of law enforcement officers to issue citations.

4. If an individual in the Anchorage municipality is charged under state law, could the person argue for the lesser municipal penalty?

While a person could certainly argue that the person should be punished under the lesser municipal penalty, this argument would probably fail. The state does not have the power to enforce municipal ordinances, so if a person is charged under state law, the punishment specified in state law would be applied.

5. What are the double jeopardy implications for a person being charged both under local and state law?

The general rule for double jeopardy is that if separate sovereigns are prosecuting a person for the same crime, then there is no double jeopardy violation. Therefore, the state and the federal government could charge the person for the same crime and this would not be a violation of double jeopardy. However, as a municipality is considered

² *Simpson v. Municipality of Anchorage*, 635 P.2d 1197, 1200 (Alaska App. 1981).

³ *Id.* at 1204.

the same sovereign as the state, it would be a violation of double jeopardy for both the state and a municipality to prosecute someone for the same crime.

In *Waller v. Florida*, the U.S. Supreme Court held that after conviction of a crime in municipal court, a subsequent state prosecution for crimes stemming from the same conduct as the municipal crime was barred by the double jeopardy clause of the U.S. Constitution.⁴ In a later case interpreting whether two different states could try a person for the same offense, the Court stated:

In those instances where the Court has found the dual sovereignty doctrine inapplicable, it has done so because the two prosecuting entities did not derive their powers to prosecute from independent sources of authority. Thus, the Court has held that successive prosecutions by federal and territorial courts are barred because such courts are "creations emanating from the same sovereignty." Similarly, municipalities that derive their power to try a defendant from the same organic law that empowers the State to prosecute are not separate sovereigns with respect to the State. These cases confirm that it is the presence of independent sovereign authority to prosecute, not the relation between States and the Federal Government in our federalist system, that constitutes the basis for the dual sovereignty doctrine.^[5]

Because municipalities derive their power to create and enforce ordinances from the state, a municipality and the state could not both prosecute a person for the same crime.

6. Under the language in SB 123, would a law enforcement officer have the discretion to issue a ticket in an amount less than \$500?

The officer who issues the citation does not have the discretion to determine the amount of the penalty for a violation of AS 28.35.161. The court would determine the amount of the fine under AS 12.55.035.

7. Could the amount be negotiated or pled down in traffic court?

If the person receives a citation, and decides to contest the citation in court, there is a possibility the person could receive a fine of less than \$500. AS 12.55.035(b), states:

(b) Upon conviction of an offense, a defendant who is not an organization may be sentenced to pay, unless otherwise specified in the provision of law defining the offense, a fine of not more than

⁴ 397 U.S. 387 (1970).

⁵ *Heath v. Alabama*, 474 U.S. 82, 90 - 91 (1985).

...
(7) \$500 for a violation.

Because the fine is for "not more than \$500," the court has the discretion to lower the fine amount.⁶

8. *If we want the fine to be \$500, does it need to be expressly stated in the bill?*

If you want the punishment for AS 28.35.161 to be a fine of \$500, and not allow for a court to order a fine less than \$500, then you should specify that amount in the bill itself.

9. *If we want to allow an individual to mail in their fine, does that need to be expressly stated in the bill?*

Under AS 28.05.151, the Alaska Supreme Court is required to determine by rule or order "those motor vehicle and traffic offenses, except for offenses subject to a scheduled municipal fine, that are amendable to disposition without court appearance and shall establish a scheduled amount of bail, not to exceed fines prescribed by law, for each offense." If a bail forfeiture amount is set, and if a person chooses not to contest the charges, the person can simply mail back the ticket with the bail forfeiture amount, and not have to appear in court. This is set out in AS 12.25.195:

Sec. 12.25.195. Disposition of scheduled offenses. (a) If a person cited for an offense for which a scheduled amount of bail or a fine has been established does not contest the citation, the person may mail or personally deliver to the clerk of the court with appropriate jurisdiction if a bailable offense, or to the clerk of the municipality that issued the citation if a scheduled municipal fine, the amount of the bail or fine indicated on the citation for the offense together with a copy of the citation signed by the person indicating the person's waiver of court appearance, entry of plea of no contest, and forfeiture of bail or fine. The citation with the bail or fine shall be mailed or personally delivered on or before the 30th day after the date the citation was issued.

(b) When bail or a fine is forfeited under this section, a judgment of conviction shall be entered. The bail or fine paid is complete satisfaction for the offense.

(c) Disposition of an offense under (a) of this section may not occur unless the person cited for the offense pays the surcharge prescribed in AS 12.55.039 in addition to the scheduled bail or fine amount. The surcharge required to be paid under this subsection shall be deposited into the general fund and accounted for under AS 37.05.142.

⁶ While the court has the power to determine the amount of the fine up to \$500, the surcharge required under AS 12.55.039 cannot be waived, deferred, or suspended.

There is currently no bail forfeiture amount set for AS 28.35.161, likely because the previous punishment was a class A misdemeanor.⁷ Generally, the bail forfeiture amount is less than the maximum penalty for an offense. For example, AS 28.35.029, which prohibits driving with an open container, is an infraction. The penalty for an infraction under AS 28.90.010(c) is a fine not to exceed \$300. In Rule 43.1, Alaska Rules of Administration, the bail forfeiture amount for AS 28.35.029 is \$200.

Generally, the legislature has not specifically directed that the court add a particular offense to the bail forfeiture schedules. Once this bill is passed, the Alaska Supreme Court should add it to the bail forfeiture schedule. Therefore, it is not necessary to specify that a person should be able to mail back a fine.

If I may be of further assistance, please advise.

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⁷ The traffic bail forfeiture schedule is found in Rule 43.1, Alaska Rules of Administration.