

LEGAL SERVICES

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MEMORANDUM

March 2, 2015

SUBJECT: Municipal criminal penalties
(CSHB 75(CRA); Work Order No. 29-LS0345\P.1)

TO: Representative Cathy Tilton
Attn: Heath Hilyard

FROM: Hilary V. Martin 
Legislative Counsel

You have asked about the impact of amendment 29-LS0345\P.1 on HB 75, and generally about the power of municipalities to impose criminal penalties. The answer depends on the interpretation given to the civil authority granted to municipalities in the initiative and may depend on whether the municipality is a home rule municipality.

Initiative

The initiative states:

(b) A local government may enact ordinances or regulations not in conflict with this chapter or with regulations enacted pursuant to this chapter, governing the time, place, manner, and number of marijuana establishment operations. A local government may establish civil penalties for violation of an ordinance or regulation governing the time, place, and manner of a marijuana establishment that may operate in such local government.^[1]

The first sentence of the subsection is unclear. It states that a municipality may enact ordinances or regulations not in conflict with the chapter or regulations adopted under the chapter governing the time, place, manner, and number of marijuana establishment regulations. One potential reading of this language is as a limitation on the power of a municipality to enact ordinances regarding marijuana -- that a municipality may only enact ordinances governing the time, place, manner, and number of marijuana establishments -- and that a municipality is unable to enact ordinances regarding any other subject contained in the initiative.

¹ AS 17.33.110(b). Note that the initiative uses the term "local government" throughout, which is defined in AS 17.38.900(4) as "both home rule and general law municipalities, including boroughs and cities of all classes and unified municipalities." The CS changes "local government" to "municipality" throughout, and the memo will similarly refer to "municipalities."

Another plausible reading of the sentence is that a municipality may adopt regulations regarding time, place, manner, and number of marijuana establishments, but those ordinances may not conflict with the chapter or regulations adopted under the chapter. This interpretation would not limit a municipality from enacting other ordinances regarding marijuana, but any ordinances governing the time, place, manner, and number of marijuana establishments may not conflict with the chapter or regulations adopted under the chapter.

The second sentence of this subsection states that a municipality may establish civil penalties for violation of an ordinance or regulation governing the time, place, and manner of a marijuana establishment that may operate in such municipality. Amendment P.1 adds the words "and criminal" following "civil" to this sentence. It is possible that the intent of this language is to prevent a municipality from imposing criminal penalties on violations of the ordinances, as only civil penalties are mentioned. However, the language does not explicitly limit a municipality from enacting only civil penalties for ordinances.

Municipalities are granted wide powers by art. X, sec. 1 of the Constitution of the State of Alaska, which provides:

The purpose of this article is to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions. A liberal construction shall be given to the powers of local government units.

Statutory authority granted municipalities echo the constitutional purpose and construction. AS 29.35.400 provides:

A liberal construction shall be given to all powers and functions of a municipality conferred in this title.

AS 29.35.410 provides:

Unless otherwise limited by law, a municipality has and may exercise all powers and functions necessarily or fairly implied in or incident to the purpose of all powers and functions conferred in this title. [Emphasis added.]

AS 29.35.410 provides:

A specific example in an enumerated power or function conferred upon a municipality in this title is illustrative of the object and not a limitation on or exclusion from the exercise of the power or function.

A municipality also has general authority to enact and enforce ordinances adopted by it, including setting penalties for those ordinances under AS 29.35.010(7).

The fact that a municipality has otherwise broad authority in addition to that expressly provided by the initiative suggests that the municipality can continue to exercise its general authority. This may be particularly true for home rule municipalities which may generally exercise any power not expressly prohibited by the state and general law municipalities that may exercise powers specified in law and powers not otherwise prohibited by law if properly acquired.

Because the subsection is unclear as to whether it is a limitation on the power of municipalities to otherwise enact ordinances, it may be advisable to amend this subsection and clarify the scope of municipal power regarding ordinances related to marijuana. The legislature is authorized to amend initiatives so long as the amendments do not constitute a repeal of the initiative.²

Alcohol

You have also asked about municipal control over alcohol. Under AS 29.35.080(a), a municipality "may regulate the possession, barter, sale, importation, and consumption of alcoholic beverages under AS 04.11.480 - 04.11.509 and AS 04.21.010." These statutes allow a local governing body to protest the issuance, renewal, relocation, or transfer to another person of an alcohol license,³ create the local option system,⁴ and authorizes a municipality to adopt ordinances governing the importation, barter, sale, and consumption of alcoholic beverages within the municipality and to ban the possession of alcoholic beverages.⁵ AS 04.21.010 also states that an ordinance adopted under that section "may not be inconsistent with this title or regulations adopted under the title."

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² Article XI, sec. 6, Constitution of the State of Alaska; *Warren v. Thomas*, 586 P.2d 400, 402 (Alaska 1977).

³ AS 04.11.480.

⁴ AS 04.11.491 - AS 04.11.509.

⁵ AS 04.21.010.