

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

February 22, 2018

SUBJECT: Authorizing Municipalities to Prohibit Cell Phone Use While Driving (HB 333; Work Order No. 30-LS1297\A)

TO: Representative Chris Birch
Attn: Ashton Compton

FROM: Allison M. Laffen *AML*
Legislative Counsel

You asked whether the abovementioned bill, which authorizes a municipality to prohibit cell phone use while operating a motor vehicle¹ in school zones or on school property, is necessary for a municipality to adopt such a prohibition. The answer is probably yes, as discussed below. You asked in a subsequent email if current law prohibits cell phone use while driving, or just texting and watching videos, and if "operating a motor vehicle" is limited to driving a vehicle or if the phrase also encompasses a driver texting in a parked or idling vehicle.

1. Municipal authorization. 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,

¹ While the bill title uses the term "driving," proposed AS 28.01.017 uses the term "operating."

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 specific local requirements. The Alaska Court of Appeals has determined that a municipal ordinance regulating the operation of motor vehicles is inconsistent if any discrepancy in the ordinance impedes or frustrates policy expressed by state law² and that such an ordinance is invalid under AS 28.01.010 unless justified under the local requirement savings clause in AS 28.01.010(b). *Simpson v. Municipality of Anchorage*, 635 P.2d. 1197, 1204 - 08 (Alaska Ct. App. 1981).

AS 28.35.161, which prohibits the use of electronic devices while driving, makes an exception for some uses of 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*

² For examples of ordinances found to not be impermissibly inconsistent with state law, see *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 because the Department of Public Safety likely "simply decided to leave this conduct unregulated at a state level"), and *Lamplley v. Municipality of Anchorage*, 159 P.3d 515, 524 - 25 (Alaska Ct. App. 2007) (city ordinance imposing a higher degree of culpability concerning driving with a suspended license did not frustrate state law where state had concurrent jurisdiction over offense and the ordinance "does not authorize conduct that the Alaska Legislature has forbidden, nor does it forbid conduct that the Alaska Legislature has authorized.").

(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.^[3]

AS 28.35.161 also provides exceptions for certain other communication devices that might be deemed covered under a municipal ordinance regarding cell phone use in school zones. AS 28.35.161(d). Thus it might well be argued that under current law, an ordinance prohibiting cell phone use by persons operating motor vehicles in school zones would be inconsistent with the Alaska Motor Vehicle Code and would frustrate the legislature's purpose in adopting the exception for cell phones. A municipality could make an argument for a specific local exception prohibiting cell phone use in school zones. To succeed, a municipality would need to make a two-fold showing of 1) the existence of a specific local requirement, and 2) the necessity of the municipal ordinance -- "in other words, that the specific local problem could not be addressed in a manner consistent with the provisions of the Alaska Motor Vehicle Code."⁴

2. Current law. As discussed above, AS 28.35.161 prohibits certain uses of electronic devices while driving. AS 28.35.161(a) prohibits watching videos and reading or typing a text message while driving. AS 28.35.161(c) makes an exception for cell phones "being used for voice communication or displaying caller identification information." Therefore, under current law, cell phone use is not prohibited while driving if the cell phone use is limited to the permissible uses under AS 28.35.161(c).

3. "Operating a motor vehicle." The language of the Alaska Statutes and case law indicate that "operating" a motor vehicle is more expansive than "driving" a motor vehicle.

The term "operating a motor vehicle" is not defined generally for the Alaska Statutes; however, AS 28.33.190 defines "operating a commercial motor vehicle" for purposes of AS 28.33:

(14) "operating a commercial motor vehicle" means

³ Emphasis added.

⁴ *Simpson*, 635 P.D.D. at 1208 (finding that a high incidence of alcohol-related traffic accidents in the Anchorage area does not, alone, support "specific local requirement" because, at the very least, the municipality would need to demonstrate that the problem of drunk driving in Anchorage was disproportionately higher than other jurisdictions in the state).

- (A) to drive a commercial motor vehicle; or
- (B) whether or not the vehicle is in motion, or is capable of being moved, to be in actual physical control, or to attempt to affect the movement, of a commercial motor vehicle;

AS 28.35.030, regarding the crime of driving under the influence, makes it a crime if a person "*operates or drives* a motor vehicle or operates an aircraft or a watercraft" while under the influence of certain substances. (Emphasis added). In an appeal of a drunk driving conviction where the defendant was found asleep in the passenger side of a vehicle that was parked with the motor running, the Alaska Supreme Court noted: "[a]s a general proposition, it appears that 'to operate' includes a larger class of activities than 'to drive.' While one who drives a vehicle must necessarily in that process operate it, the reverse is not necessarily so."⁵

Proposed AS 28.01.017 in HB 333 authorizes a municipality to adopt an ordinance that prohibits the use of a cellular phone by a person operating a motor vehicle while on school property or in a school zone. This would allow a municipality to adopt an ordinance prohibiting such cell phone use while *operating* a motor vehicle or a subset of operating a motor vehicle, for example, *driving*. In this regard, HB 333 allows a municipality to tailor an ordinance to their own special circumstances or needs in relation to operating a vehicle. If you would like to further restrict the authority of a municipality to adopt an ordinance in this regard the grant of authority to a municipality could be amended.

If I may be of further assistance, please advise.

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⁵ *Jacobson v. State*, 551 P.2d 935, 937 (Alaska 1976).