HB

101

Alaska State Legislature

Interim:
600 E. Railroad Ave
Wasilla, AK 99654

Phone: (907) 376-3725
Fax: (907) 376-4768

Session:
Alaska State Capitol, Rm 108
Juneau, AK 99801-1182

Phone: (907) 465-3743
Fax: (907) 465-2381
Toll Free: (800) 565-3743
Rep_Carl_Gatto@legis.state.ak.us

Representative Carl Gatto

Co-Chair, House Resources Committee
District 13 - Palmer

SPONSOR STATEMENT
HB 101
"An Act relating to uniform traffic laws."

The ignition interlock law was enacted in 2004 as a tool to reduce the number of alcohol related deaths. Ignition interlock devices are required for DUI offenders whose Blood Alcohol Content (BAC) registers twice the legal limit. Of the alcohol related vehicle deaths that occurred in Alaska in 2005, 77% of those involved had BAC levels that were over the legal limit and 30% of those drivers had BAC levels of .10 or greater.

This bill inserts language that closes a loophole in statute whereby municipalities may disregard enforcement of the ignition interlock law due to a lack of clarity in statutes. For example, currently the Municipality of Anchorage does not enforce the ignition interlock law.

This law is part of the State of Alaska's Uniform Traffic Laws and it is essential to insert clarifying language that compels enforcement of the ignition interlock law. I urge your support for HB 101.

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 October 30, 2006

SUBJECT: Requirement of Ignition Interlock Device for Drunk Drivers Not Being Enforced in Anchorage (Work Order No. 25-LS0143)

TO: Representative Carl Gatto
Attn: Cody Rice

FROM: Gerald P. Luckhaupt
Legislative Counsel

AS 28.35.030(r) provides that courts must require the use of ignition interlock devices by persons who are convicted of drunk driving with a blood alcohol level of .16 or higher. The requirement applies when the person regains the privilege to drive, including any limited privilege, and applies for a minimum of six months or one year depending upon the offender's actual blood alcohol level. Apparently this requirement is not being applied or enforced in Anchorage, and you have asked if the failure to apply or enforce this requirement is justified. With regard to your request you have provided me a copy of an email from John McConnaughy, Deputy Anchorage Municipal Attorney, who states that Anchorage is not violating state law by failing to require ignition interlock devices because

> [w]e asked the courts to order the use of ignition interlock devices pursuant to AS 28.35.030(r), but they ruled that the subsection does not apply in Municipal cases. There are no similar provisions under the Municipal Code.

Mr. McConnaughy then continues and states, "that we discussed asking the Assembly to enact similar requirements into the Municipal Code, but decided not to after reviewing AS 28.35.030(r)." Mr. McConnaughy then states that he does not like the way the section is drafted and believes it could cause problems in the courts "because it is procedurally unclear and confusing." He further states that he is concerned because the legislature chose to apply the requirement only to DUI cases and not to refusal cases and that he didn't want to create additional problems by incorporating these requirements into the Municipal Code. Mr. McConnaughy expounds on his concerns in a further email in which he states that he is puzzled by how AS 28.35.030(r) is written and that he is "concerned that the subsection has the potential to create confusion and lengthen trials."[1]

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[1] Cody Rice will remember that I also had serious concerns with the bill that gave rise to this provision and the amendments that were made to the bill as it proceeded through the

While I can sympathize with Mr. McConnaughy's concerns, those concerns are irrelevant to the question of whether the AS 28.35.030(r) is applicable to and within the Municipality of Anchorage. Neither I or Mr. McConnaughy have the authority to decide whether AS 28.35.030(r) will apply. The legislature has provided that the traffic laws of the state shall be uniform throughout the state and shall apply within all municipalities of the state. Therefore, I question the authority of a court or the Municipality of Anchorage to fail to apply or enforce this requirement. The failure to adopt or apply AS 28.35.030(r), can only arise from a misapprehension of the authority of a municipality vis-a-vis the legislature with regard to the traffic code in Alaska.

The legislature has adopted the Alaska Uniform Traffic Laws Act.[2] AS 28.01.010(a) of that Act provides:

> **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. [Emphasis added.]

Notwithstanding AS 28.01.010(a), municipalities are given the authority under state law to "enact necessary ordinances to meet specific local requirements." Municipalities are required to forward copies of their traffic ordinances to the commissioner of public safety and must provide specific notice of any inconsistent ordinance. That a particular municipality is a home rule municipality has no bearing on whether an ordinance is inconsistent with a state traffic law, as the Act operates as a limitation on the powers of home rule cities and an inconsistent traffic ordinance is an exercise of home rule power that is expressly prohibited by the legislature. *Adkins v. Lester*, 530 P.2d 11 (Alaska 1974).[3]

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legislature. I questioned both the choices being made and how the bill was to be applied. In addition, Mr. McConnaughy's concerns about (r) not applying to refusals and therefore encouraging persons to refuse a chemical test are valid. The legislature, though, rejected similar concerns and chose not to apply this provision to refusals. The legislature has instead chosen to prohibit refusals from ever receiving a limited license under AS 28.15.201, therefore providing, apparently at least, a limited counterbalance.

[2] AS 28.01.

[3] The legislature has also allowed municipalities to deviate from state law with regard to the impoundment and forfeiture of motor vehicles. See AS 28.01.015. *McCormick v. Anchorage*, 999 P.2d 155 (Alaska App. 2000).

Concerns that the state law makes it harder to prosecute or lengthens trials are irrelevant to deciding whether or not a local ordinance is inconsistent with a state traffic law. For example, in *Simpson v. Municipality of Anchorage*, 635 P.2d 1197, 1204 (Alaska App. 1981) Anchorage's .10 per se under the influence law was found to be inconsistent with state law drunk driving laws that required a finding that a driver actually be under the influence of an intoxicating liquor. Anchorage argued that home rule authority and the high number of alcohol-related accidents in Anchorage authorized the use of this expediency (which necessarily would result in an ease in prosecution as we have subsequently found) as a deviation from state law. The court rejected Anchorage's arguments. The court found that the Anchorage ordinance was inconsistent with state law as it tended to frustrate a statewide policy enacted by the legislature. In examining a case where an inconsistency was not found (*Cremer v. Anchorage*, 575 P.2d 306 (Alaska 1978)) with a case where an ordinance was found to be inconsistent (*Adkins, supra*) the *Simpson* court said:

> The holding of the court in *Cremer* is especially helpful, for it articulates specific standards by which the issue of inconsistency under AS 28.01.010(a) may be evaluated. The court stated, first, that an ordinance could be deemed inconsistent only if it was 'found that it directly or indirectly impeded implementation of a statute which sought to further a specific statewide policy.' 575 P.2d at 307 (footnote omitted). Second, in distinguishing its holding from the holding of *Adkins v. Lester*, the court indicated that an essential criterion of inconsistency under 28.01.010(a) is whether the ordinance in question seeks to proscribe conduct which, by statute, 'the legislature intended, as a matter of policy, to permit . . . .' 575 P.2d at 308 n.5. From these statements we infer that, when the question of inconsistency under AS 28.01.010(a) is raised, the issue is not whether there is a mere discrepancy between state law and local ordinance; rather, the inquiry must focus on whether any discrepancy in the ordinance impedes or frustrates policy expressed by state law.

In AS 28.35.030(r) the legislature has expressed the statewide policy that drunk drivers with a blood alcohol level of at least double the legal limit as found by the trier of fact must use an ignition interlock device for a minimum period of time when regaining the privilege to drive. The Anchorage ordinance that is being applied does not include this requirement and "impedes and frustrates" this statewide policy set by the legislature. The Anchorage ordinance therefore must give way so as to allow the statewide policy to be implemented and applied. Mr. McConnaughy's concerns should have been addressed to the legislature when HB 342 was being heard or to the Anchorage Assembly once HB 342 became law. The Anchorage Assembly conceivably could have addressed Mr. McConnaughy's concerns and made some changes to AS 28.35.030(r), provided those changes did not frustrate or impede the general state policy set by the legislature requiring the use of ignition interlock devices for this class of drivers.

GPL:med
06-489.med

MADD
Activism | Victim Services | Education

Motor Vehicle Traffic Fatalities by Age and the Highest BAC in the Crash - 2000

2000 FARS-ARF

	BAC .00		BAC .01-.09		BAC .10+		Total Killed in Alcohol-Related Crashes		Total Killed	
Age	#	%	#	%	#	%	#	%	#	%
<5	550	77.9	62	8.7	94	13.3	156	22.1	706	100.0
5-9	580	80.5	44	6.1	97	13.4	141	19.5	721	100.0
10-14	738	80.6	64	6.9	114	12.5	178	19.4	916	100.0
15-19	3,408	65.8	565	10.9	1,207	23.3	1,772	34.2	5,180	100.0
20-24	2,423	46.3	648	12.4	2,162	41.3	1,810	53.7	5,233	100.0
25-29	1,673	45.9	370	10.2	1,602	44	1,973	54.1	3,646	100.0
30-34	1,435	45.2	290	9.1	1,448	45.6	1,739	54.8	3,174	100.0
35-39	1,595	46.1	339	9.8	1,527	44.1	1,867	53.9	3,462	100.0
40-44	1,609	49	312	9.5	1,363	41.5	1,676	51	3,285	100.0
45-49	1,571	55.1	219	7.7	1,059	37.2	1,277	44.9	2,848	100.0
50-54	1,449	61.9	207	8.8	685	29.3	892	38.1	2,341	100.0
55-59	1,216	66.7	132	7.2	475	26	607	33.3	1,823	100.0
60-64	1,081	73.6	114	7.8	274	18.7	388	26.4	1,469	100.0
65-69	1,011	77.3	86	6.6	210	16.1	297	22.7	1,308	100.0
70-74	1,221	82.8	90	6.1	163	11.1	253	17.2	1,474	100.0
75+	3,416	88.5	175	4.5	269	7	445	11.5	3,861	100.0
Unknown	190	50.8	44	11.7	140	37.4	184	49.2	374	100.0
Total	**25,168**	**60.2**	**3,761**	**9**	**12,892**	**30.8**	**16,653**	**39.8**	**41,821**	**100.0**

*Souce - National Highway Traffic Safety Administration FARS data

FISCAL NOTE

STATE OF ALASKA
2007 LEGISLATIVE SESSION

Fiscal Note Number: HB101-DOA-DMV-2-8-07
Bill Version: HB101
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Administration
Title "An Act relating to uniform traffic laws"
RDU Division of Motor Vehicles
Component Motor Vehicles
Sponsor Rep. Gara
Requester (H) CRA
Component No. 2348

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0	0.0	0.0	0.0	0.0	0.0
Other (Specify Type--Do not abbreviate)	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2007) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2008 budget proposal:

POSITIONS

Full-time	0	0	0	0	0	0
Part-time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

ANALYSIS: *(Attach a separate page if necessary)*

This bill does not impact the Division of Motor Vehicles

Prepared by: Duane Bannock, director
Phone 465-2200
Division Motor Vehicles
Date/Time 2/8/07 12:00 PM
Approved by: Kevin Brooks, Deputy Commissioner
Date 2/8/2007
Agency Department of Administration

(Revised 9/18/2006 OMB)

25-LS0262\C
Luckhaupt
3/12/07

CS FOR HOUSE BILL NO. 101( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIFTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES GATTO, Lynn

A BILL

FOR AN ACT ENTITLED

"An Act relating to uniform traffic laws and to operating a vehicle while under the influence of an alcoholic beverage, inhalant, or controlled substance."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** AS 28.01.010(a) is amended to read:

(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 **or enforce** 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.

*** Sec. 2.** AS 28.35.030(r) is amended to read:

(r) If a person is convicted under (a) of this section and **at sentencing the court determines by a preponderance of the evidence** [IT IS DETERMINED BY

THE TRIER OF FACT] that, as determined by a chemical test taken within four hours after the offense was committed,

(1) there was at least 0.16 percent by weight of alcohol in the person's blood but less than 0.24 percent by weight of alcohol in the person's blood or at least 160 milligrams of alcohol per 100 milliliters of blood, but less than 240 milligrams of alcohol per 100 milliliters of blood, or when there was at least 0.16 grams of alcohol per 210 liters of the person's breath, but less than 0.24 grams of alcohol per 210 liters of the person's breath, the court shall require the person to use an ignition interlock device as provided in AS 12.55.102 for a minimum of six months after the person regains the privilege, including any limited privilege, to operate a motor vehicle;

(2) there was 0.24 percent or more by weight of alcohol in the person's blood or 240 milligrams or more of alcohol per 100 milliliters of blood, or when there was 0.24 grams or more of alcohol per 210 liters of the person's breath, the court shall require the person to use an ignition interlock device as provided in AS 12.55.102 for a minimum of one year after the person regains the privilege, including any limited privilege, to operate a motor vehicle.

Municipality of Anchorage

P.O. Box 196650
Anchorage, Alaska 99519-6650
Telephone: (907) 343-4250
Fax: (907) 343-6689
http://www.muni.org

Mark Begich, Mayor

DEPARTMENT OF LAW
Criminal Division
632 W 6th Avenue, Suite 210

CRA-

February 26, 2007

The Honorable Gabriel LeDoux
Co-Chai House Community and Regional Affairs Committee
State Capitol, Room 412
Juneau, AK 99801-182

RE: HB 101 - Ignition Interlock Devices

Dear Representative LeDoux:

Thank you for the opportunity to follow up the telephonic contact I had with your committee on Feb. 15, 2007, regarding HB101.

We are troubled that some legislators are under the mistaken impression that Anchorage takes the issue of driving under the influence of alcohol less than seriously. Nothing could be further from the truth. I can assure you and the committee that this community takes the prosecution of alcohol-related offenses deadly seriously. We aggressively prosecute DUI and other cases where the abuse of alcohol has such a devastating effect on our community.

As for HB101, I believe there is considerable confusion about this measure and the law which prompted it, subsection (r) of AS 28.35.030(r). That subsection begins with a reference to convictions under the state DUI statute. Based on that wording, my office does not believe AS 28.35.030(r) applies to Municipal cases. Mary Ann Henry, who supervised our trial attorneys at the time, reached the same conclusion.

Simply put, the Municipality does not refuse to enforce state law. This state law, as written, does not apply in our cases. We can't enforce it as we have no authority to do so.

The Municipality is well aware of the requirement that its laws be consistent with state law. Our Code tracks state law closely. As the state has changed its laws, we have enacted parallel ordinances to follow suit. After concluding that AS 28.35.030(r) did not apply in Municipal cases, I intended to ask the Assembly to amend the Municipal code by enacting parallel requirements. However, when I looked at the statute, I found it puzzling and problematic. I have discussed my substantive concerns about it with a number of legislative staffers, and summarized them in an e-mail to Cody Rice, a staffer working for a member of the committee. I understood from him that the legislature was working on revising the statute.

I could ask the Assembly to enact an ordinance paralleling AS 28.35.030(r). However, I believe I have an obligation to explain the problems I see with the statute. In my view, the goal is laudable, but the procedure it requires is unclear, it imposes additional burdens on the prosecution while leaving the burden of proof unclear, and it muddies settled Alaska law that has been helpful to the prosecution of criminal cases.

My concerns may be misplaced, but no one has contacted me to point out the fault in my analysis. I spent a good deal of time considering and researching this legislation and the legal issues involved in order to provide helpful information to the legislature as it revised the law. I was taken aback to find that this was being interpreted as a refusal to enforce a state law.

I have provided below a summary of my concerns for the Committee's consideration.

Sincerely,

John E. McConnaughy III
Municipal Prosecutor
Anchorage

Summary :

1) AS 12.35.030(r) applies "if the trier of fact finds" that the breath test is over .16 or .24. "Trier of fact" means the jury in cases that go to trial. But under Alaska law juries are asked to find the offender is under the influence, not the breath test level. They use the breath test in making that decision. The statute appears to add a new element.
2) Juries can decide whether the defendant is under the influence based on the breath test and/or on other evidence of intoxication, like driving behavior and symptoms of intoxication. They don't have to be unanimous about why they decide he or she is under the influence, as long as they are unanimous he is under the influence. That law is well settled and very useful, and has been incorporated into a standard jury instruction. It prevents a miscarriage of justice when some jurors trust the breath test, but others are uncomfortable basing their verdicts on a technology they don't fully understand. It also focuses jurors' attention on the evidence as a whole, and blunts defense arguments focusing on the breath test. The statute seems to muddy this law.
3) The statute doesn't make the procedure clear. Do we use special verdict forms? Does the prosecution need to prove the breath test result by the standard of beyond a reasonable doubt?
4) For many years, the policy embodied in DUI sentencing has been to discourage refusal to submit to a breath test by requiring identical sentences. This provision applies in DUIs, but not refusals, so it contradicts that policy.

When HB 342 was introduced in 2004, it required doubled quadrupled fines where the breath test results were over .16 and .24, which would make some fines higher than the maximum for a class A misdemeanor. In the original bill, the language requiring a finding by the trier of fact was necessary in the light of United States Supreme Court rulings requiring that facts requiring the court to exceed the maximum sentence applicable to an offense be decided by a jury, using the beyond a reasonable doubt standard, as an additional element of the offense. The original drafter of HB 342 very properly placed this language into the bill in order to meet these constitutional requirements. Since that was the purpose of the procedural language, and the procedural language stayed in the bill, our appellate courts are likely to interpret it to mean the procedure still applies: decision by a jury, beyond a reasonable doubt. See: *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its more recent progeny, *Blakely v. Washington*, 542 U.S. 296 (2004).

The bill was later amended to replace the enhanced fines with ignition interlock requirements, but the language requiring a finding by the trier of fact remained. I don't know whether any thought had been given to the question of whether it was necessary. *Apprendi* and *Blakely* are not the most popular Supreme Court decisions among prosecutors. They complicate criminal trials and impose additional burdens on the Prosecution. It is one thing to use more complicated procedures in serious felony cases where the prosecution may be seeking sentence enhancements that may amount to many years of imprisonment. It is quite another to introduce it into a high volume misdemeanor caseload which is generally handled by less experienced attorneys.

Ignition interlocks appear to be useful tools in the fight against drunk driving. According to Mothers Against Drunk Driving, studies have shown reductions in recidivism while the devices are on vehicles belonging to convicted drunk drivers. I support a requirement that drunk drivers install such devices on their vehicles. However, I don't know of any authority suggesting that mandatory ignition interlocks are the sort of sentence enhancement that would require compliance with *Apprendi* or *Blakely*. They are remedial devices which help to protect the public when an offender resumes driving. I can think of no reason they could not be required administratively – a remedial condition imposed upon an offender when he is given back his privilege to drive. Nor do I see any reason why breath test results (or refusal) could not be used to trigger the requirement either. An offender can be administratively deprived of his privilege to drive based on a breath test result, and I see no reason why restoration of the privilege shouldn't have conditions attached based on a breath test result.

I should note that I have spoken with the person who administers the driver's licensing section at the Anchorage DMV. She advised that she saw no problem with dealing with the requirement administratively. She said the DMV already imposes such requirements in certain cases involving limited licenses. She also described to me ways in which imposition of ignition interlocks as an administrative requirement would permit more effective enforcement and monitoring than is possible for prosecutors.

Alaska State Legislature

Rep. Sharon Cissna
Rep. Nancy Dahlstrom
Rep. Mark Neuman
Rep. Kurt Olson
Rep. Woodie Salmon

State Capitol, Room 124
Juneau, AK 99801-1182
Co-Chairs
Rep. Gabrielle LeDoux
(907) 465-3882 FAX 465-4956
Rep. Anna Fairclough
(907) 465-3777 FAX 465-2819

COMMUNITY & REGIONAL AFFAIRS COMMITTEE

February 27, 2007

Mark Begich, Mayor
Municipality of Anchorage
PO Box 196650
Anchorage, Alaska 99519

Dan Sullivan, Chair
Anchorage Assembly
PO Box 196650
Anchorage, AK 99519

Dear Mayor Begich & Chair Sullivan,

The House Community & Regional Affairs Committee (C&RA) held a public hearing February 15, 2007 on HB 101, "An act relating to uniform traffic laws," sponsored by Representative Carl Gatto (R-Palmer). Representative Gatto informed our committee that the Municipality of Anchorage is not in compliance with the State of Alaska's ignition interlock law and has proposed language to require the municipality's compliance.

During the hearing, Deputy Anchorage Municipal Attorney John McConnaughy joined the meeting via teleconference and expressed the Municipality's belief that the law (AS 28.35.030) from his analysis is inconsistent and acknowledged the Municipality is "not requiring interlocks when there's a violation of a municipal ordinance." This is a violation of state statute and requires immediate resolution.

Mr. McConnaughy further stated he believes "there are some problems with the way the current subsection of AS 28.35.030 is written and I think it creates legal problems that would be a problem for the municipality or for anybody else that was trying to enforce it."

It is the Municipality's responsibility to comply with state statutes. Our committee is asking for your cooperation in identifying and if necessary proposing a solution to the inconsistencies alluded to by your Deputy Municipal Attorney in bringing Anchorage into compliance with state law requiring the ignition interlock.

The evening prior (February 14, 2007) to the public hearing of HB 101, Representative Fairclough contacted Assistant Municipal Manager Mike Abbott in an effort to learn the Municipality's position on HB 101, but unfortunately, they were unable to connect before the hearing. Representative Fairclough followed up with a phone call (February 15, 2007) to Mr. Abbot after C&RA met and requested a formal response from the administration addressing why Anchorage is in not complying with the state's ignition interlock law and what language your legal department proposes to meet the intent of the law.

Attached, please find a recent letter from Municipal Prosecutor John E. McConnaughy III, received by House C&RA Co-Chair Gabrielle LeDoux. While his opinion is noted, and we appreciate his response, he does not adequately address the reasoning behind the Municipality's reluctance to comply.

We hope we can all agree that getting drunk drivers off the roads is a priority, not just on a state level, but on a local level as well. We await your response to this letter.

Sincerely,

Anna L Fairclough
Representative Anna Fairclough

Gabrielle LeDoux
Representative Gabrielle LeDoux

Carl Gatto
Representative Carl Gatto

CC: Anchorage Assembly
John McConnaughy III, Municipal Prosecutor

Alaska State Legislature

Interim:
600 E. Railroad Ave.
Wasilla, AK 99654
Phone: (907) 376-3725
Fax: (907) 376-4768

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State Capitol, Room 108
Juneau, AK 99801-1182
Phone: (907) 465-3743
Fax: (907) 465-2381

Representative Carl Gatto
District 13

FOR IMMEDIATE RELEASE: Feb. 28, 2007

CONTACT: Heath Hilyard, (907) 465-3743
Staff to Rep. Carl Gatto

Gatto Bill Aims at MOA's Refusal to Enforce Ignition Interlocks
HB 101 Would Close Municipal Uniform Traffic Law Loophole

(Juneau) – Representative Carl Gatto (R-Palmer) introduced HB 101 earlier this session to close a highly debatable legal loophole that Anchorage Municipal attorneys have been using to avoid enforcing the mandatory use of ignition interlock devices in certain DUI cases within the municipality.

Gatto was the author of Alaska's ignition interlock law, HB 342, which was signed into law in June of 2004. That law stipulates that people convicted of DUI who registered a high blood alcohol content (BAC) at the time of arrest are required to have an ignition interlock device installed in their vehicle for no less than six months after the person regains their driving privilege.

During 2006, Rep. Gatto's office was made aware that the Municipality of Anchorage was failing to enforce this requirement. In a legal memorandum prepared by a member of the Legislature's legal counsel, Deputy Anchorage Municipal Attorney John McConnaughy argued that Anchorage is not violating the law because "[w]e asked the courts to order the use of ignition interlock devices pursuant to AS 28.35.030(r), but they ruled that the subsection does not apply in Municipal cases."

The new bill makes a simple change to the existing law, stipulating that municipalities may not enact or enforce traffic ordinances inconsistent with Alaska's uniform traffic laws. HB 101 was heard in the House Community and Regional Affairs Committee (C&RA) on February 15th. That committee is co-chaired by Reps. Anna Fairclough (R-Eagle River) and Gabrielle LeDoux (R-Kodiak). As a result of that hearing Rep. Fairclough, Gatto, and LeDoux are drafting a letter addressed to the Anchorage Assembly encouraging them to address the Municipality's lack of enforcement of the ignition interlock law.

"It is unfortunate that either the courts or the Municipal attorney have chosen not enforce state law duly passed by the legislature," Gatto said. "I hope that the Anchorage Assembly will choose to rectify this failure on its own. However, I do appreciate that this situation has identified an area in statute that requires greater clarity."

HB 101 is currently in the House Community and Regional Affairs Committee, pending a hearing.

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Municipality of Anchorage

P.O. Box 196650 • Anchorage, Alaska 99519-6650 • Telephone: (907) 343-4431 • Fax: (907) 343-4499 http://www.muni.org

Mayor Mark Begich

Office of the Mayor

March 5, 2007

The Honorable Carl Gatto
Alaska State House of Representatives
State Capitol, Room 108
Juneau, AK 99801-1182

Dear Representative Gatto:

I received a copy of your Feb. 28, 2007, news release charging the Municipality of Anchorage with refusing to enforce a state statute providing for the use of ignition interlock devices by people convicted of operating vehicles under the influence. This is simply incorrect.

My administration and the municipal prosecutor strongly support the use of the ignition interlock device and favor laws that require judges to order these devices be installed on vehicles owned by persons convicted of such offenses. Ignition interlocks are frequently mandated in Anchorage DUI cases and the city's prosecutor often insists that their use be imposed as a condition of sentencing.

However, there is a technical legal problem with the ignition interlock law the Legislature passed in 2004. That statute does not authorize the courts to impose this requirement when the conviction is for a municipal traffic offense, as distinguished from a state offense. The municipal prosecutor alerted the Legislature to this technical legal problem and encouraged the Legislature to fix it by amending the deficient statute.

We believe there are two potential solutions to this oversight in the 2004 law.

<u>Judicial imposition of ignition interlock requirement:</u>
Probably the quickest and easiest solution is for the Legislature to amend AS 12.55.102 by adding a language providing that: "If the court in imposing sentence under AS 28.35.030, or another ordinance with similar elements, finds that the defendant's alcohol level was .16 or more, but less than .24, the court shall impose as a condition of probation or generally as part of the sentence, a requirement that the defendant may not operate a motor vehicle unless it is equipped with a properly functioning, maintained and monitored ignition interlock device for a minimum of six months after the person regains the privilege to operate a motor vehicle."

The next subsection should say the same thing, but specify a minimum of one year if the alcohol level is over .24. An additional subsection should require the same thing, with a one-year minimum, if the defendant is convicted of a violation of AS 28.32.032 (refusal to submit to chemical test) or another ordinance with similar elements). The section should also provide that if the defendant disputes the breath alcohol result, the issue shall be heard by the sentencing court without a jury.

Division of Motor Vehicles imposition of ignition interlock requirement:
The second alternative fix, which is preferred by the municipal prosecutor, is to amend AS 28.15.211, the section that governs issuance of a license a revocation, to require the Division of Motor Vehicles to require an ignition interlock device when the driver gets his or her license back after a license revocation based on a DUI. If the alcohol level was .16 or more, but less than .24, the requirement would be for six months, and if the alcohol result is over .24, or the person refused to take a chemical test, the license revocation would be for one year.

Anchorage takes very seriously our obligation to crack down on drunk drivers and I agree that use of the ignition interlock device is often a useful tool to remove these offenders from our streets. We remain ready to work with you and other legislators to correct the oversight in the 2004 statute.

Sincerely,

Mark Begich
Mayor

CC: Representative Gabrielle LeDoux
Representative Anna Fairclough

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 March 14, 2007

SUBJECT: Uniform Traffic Code, Ignition Interlock Devices, and the Municipality of Anchorage
(HB 101, Work Order No. 25-LS0262\A)

TO: Representative Anna Fairclough
Attn: Renee Limoge

FROM: Gerald P. Luckhaupt
Legislative Counsel

You have asked me to review letters from John McConnaughy, Anchorage Municipal Prosecutor, dated February 26, 2007, and the Honorable Mark Begich, Mayor of Anchorage, dated March 5, 2007, and their comments regarding AS 28.35.030(r) and the reach of that statute vis-a-vis the Municipality of Anchorage.

AS 28.35.030(r) provides that the court must require a person who is convicted of driving under the influence under AS 28.35.030(a) to use an ignition interlock device when the "trier of fact" finds that the person had a blood alcohol level of greater than .16. This subsection was added by a bill[1] sponsored by Representative Carl Gatto. The bill went through many changes as it progressed through its scheduled committees and eventually was enacted into law. Despite this provision being part of the Alaska Uniform Traffic Laws Act,[2] the Municipality of Anchorage has never implemented this provision.

Mr. McConnaughy asserts that AS 28.35.030(r) does not apply to municipal prosecutions, and when he considered approaching the Anchorage Assembly to amend municipal code to bring the code into compliance with this statute he found AS 28.35.030(r) "puzzling and problematic." He states "he could ask the Assembly to enact an ordinance paralleling AS 28.35.030(r). However, I believe I have an obligation to explain the problems I see with the statute." Mr. McConnaughy then points out in a summary at the end of the letter various problems he sees with the statute, including that "trier of fact" appears to involve juries in making this decision, that the provision does clearly spell out the procedure he must use before the trier of fact, and that the provision applies only to driving under the influence cases and not to refusal to submit to chemical

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[1] CSHB 342(FIN)am (23rd Legislature).

[2] AS 28.

test cases.[3] Mayor Begich adds that AS 28.35.030(r) has a technical legal problem and offers a solution to this "oversight in the 2004 law." The Mayor proposes changing the reference to the "trier of fact" to the "sentencing court" or requiring the Division of Motor Vehicles to implement this requirement and entirely remove the ignition interlock provisions from the sentencing process.

While the letters from the Municipality clearly indicate their displeasure with the statute, I disagree with the assumption that the legislature erred when it adopted AS 28.35.030(r). While HB 342 (and AS 28.35.030(r)) went through many changes as it progressed through the legislature, I cannot say that the legislature did not intend what it finally passed. HB 342 was amended many times as it proceeded through the legislature and compromises were probably made; that this occurred and that the legislature enacted a law that a municipality now thinks is unwise or confusing, does not in any way affect the validity of the law and its application under the Alaska Uniform Traffic Laws Act to the municipality. That the legislature chose to require that the "trier of fact" make the decision as to whether the defendant's blood alcohol level is sufficient to invoke these requirements, is not an error or an oversight but rather a choice by the legislature. It is correct that the legislature could have provided that a judge make this finding[4] at sentencing but it is equally correct that the legislature could choose to only impose this requirement when the "trier of fact" who has decided the guilt of the defendant has also decided that the defendant had the requisite blood alcohol level. Perhaps members of the legislature were disclosing their own biases against breathalyzers and accordingly only wanted this penalty imposed when the proof was clear beyond a reasonable doubt. I do not know. I do know that the law the legislature enacted, while maybe not what a prosecutor would have chosen, is what the legislature decided to require as a matter of uniform state law and is what the legislature expected the municipality to adopt and enforce.

As for the complaint that the legislature did not "make the procedure clear," the legislature typically does not specify purely procedural matters.[5] I would assume under

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[3] It is hard to dispute that any provision that increases penalties or sanctions based upon blood alcohol level may result in some refusing the test unless the same penalties and sanctions are applied to refusals. Here, the legislature did not want to impose these requirements on all refusals but the legislature had previously provided an incentive for persons to submit to blood alcohol testing by providing that persons who refuse a blood test are ineligible for limited license privileges under AS 28.15.201(d). The legislature could legitimately conclude that the bar provided in AS 28.15.201(d) might offset the disincentive to testing provided in HB 342.

[4] And utilized a lesser standard of proof.

[5] If the legislature chooses to change procedural court rules then the legislature must specify that it is changing procedural court rules under Art. IV, § 15, Constitution of the State of Alaska, and the change must receive a two-thirds majority vote.

AS 28.35.030(r) in a case tried before a jury that the court would use special verdict forms that would only be submitted to the jury when there has been some evidence presented that the defendant's blood alcohol level is above .16 as determined by a chemical test taken within four hours of the commission of the offense and would only be utilized by the jury once they had found the defendant guilty of the offense. Criticism of the legislature for failing to set forth the procedure to be utilized in court is unwarranted as this is not normally within the legislature's purview. The municipality's concerns should have been addressed to the legislature when HB 342 was being heard or to the Anchorage Assembly once HB 342 became law. The Anchorage Assembly conceivably could have addressed Mr. McConnaughy's concerns and made some changes to the ordinance implementing AS 28.35.030(r), provided those changes did not frustrate or impede the general state policy set by the legislature requiring the use of ignition interlock devices for this class of drivers when the jury or the court, as appropriate, has found that the defendant possessed the requisite blood alcohol level as determined by a chemical test taken within four hours of the offense.

I also disagree with the view presented in the letters that the legislature must specifically refer to municipal ordinances if we want a provision like AS 28.35.030(r) to apply to municipalities. In fact exactly the opposite is true. To exclude a municipality from a particular requirement or to allow a municipality to traffic ordinances that are different from state law requires a specific statute authorizing that inconsistency. See, e.g., AS 28.01.015. The legislature has **never** been required to refer specifically to municipal ordinances when enacting state statutes as part of AS 28, the Alaska Uniform Traffic Laws Act. Merely enacting a state law as part of AS 28 is sufficient to have the state law applicable within the municipality and to require the municipality to enact a similar ordinance. The view that the legislature must specifically refer to municipal enactments in order for AS 28 to apply can only be occasioned by a misapprehension of AS 28, the Alaska Uniform Traffic Laws Act. AS 28.01.010(a) of that Act provides:

> **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. [Emphasis added.]

Notwithstanding AS 28.01.010(a), municipalities are given the authority under state law to "enact necessary ordinances to meet specific local requirements." Municipalities are required to forward copies of their traffic ordinances to the commissioner of public safety and must provide specific notice of any inconsistent ordinance. That a particular municipality is a home rule municipality has no bearing on whether an ordinance is inconsistent with a state traffic law, as the Act operates as a limitation on the powers of

home rule cities and an inconsistent traffic ordinance is an exercise of home rule power that is expressly prohibited by the legislature. *Adkins v. Lester*, 530 P.2d 11 (Alaska 1974).[6]

A concern that the state law makes it harder to prosecute is irrelevant to deciding whether or not a local ordinance is inconsistent with a state traffic law. For example, in *Simpson v. Municipality of Anchorage*, 635 P.2d 1197, 1204 (Alaska App. 1981) Anchorage's .10 per se under the influence law was found to be inconsistent with state drunk driving laws that required a finding that a driver actually be under the influence of an intoxicating liquor. Anchorage argued that home rule authority and the high number of alcohol-related accidents in Anchorage authorized the use of this expediency (which necessarily would result in an ease in prosecution as we have subsequently found) as a deviation from state law. The court rejected Anchorage's arguments. The court found that the Anchorage ordinance was inconsistent with state law as it tended to frustrate a statewide policy enacted by the legislature. In examining a case where an inconsistency was not found (*Cremer v. Anchorage*, 575 P.2d 306 (Alaska 1978)) with a case where an ordinance was found to be inconsistent (*Adkins*, *supra*) the *Simpson* court said:

> The holding of the court in *Cremer* is especially helpful, for it articulates specific standards by which the issue of inconsistency under AS 28.01.010(a) may be evaluated. The court stated, first, that an ordinance could be deemed inconsistent only if it was 'found that it directly or indirectly impeded implementation of a statute which sought to further a specific statewide policy.' 575 P.2d at 307 (footnote omitted). Second, in distinguishing its holding from the holding of *Adkins v. Lester*, the court indicated that an essential criterion of inconsistency under 28.01.010(a) is whether the ordinance in question seeks to proscribe conduct which, by statute, 'the legislature intended, as a matter of policy, to permit . . . .' 575 P.2d at 308 n.5. From these statements we infer that, when the question of inconsistency under AS 28.01.010(a) is raised, the issue is not whether there is a mere discrepancy between state law and local ordinance; rather, the inquiry must focus on whether any discrepancy in the ordinance impedes or frustrates policy expressed by state law.

In AS 28.35.030(r) the legislature has expressed the statewide policy that drunk drivers with a blood alcohol level of at least double the legal limit as found by the trier of fact must use an ignition interlock device for a minimum period of time when regaining the privilege to drive. The Anchorage ordinance that is being applied does not include this requirement and "impedes and frustrates" this statewide policy set by the legislature. That the Municipality of Anchorage believes that there is an "oversight" in AS 28.35.030(r) or that the statute is "confusing" is completely irrelevant to the requirement that the municipality adopt and enforce ordinances that are consistent with

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[6] See AS 28.01.015; *McCormick v. Anchorage*, 999 P.2d 155(Alaska App. 2000).

the Alaska Uniform Traffic Laws Act. AS 28.35.030(r) took effect January 1, 2005. The lack of compliance with the Alaska Uniform Traffic Laws Act appears to me to be a larger issue than any possible confusion resulting from the wording of the statute.

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