UNC SCHOOL OF GOVERNMENT

LOCAL GOVERNMENT LAW BULLETIN NO. 130 | DECEMBER 2012

Criminal versus Civil Enforcement of Local Ordinances—What's the Difference?

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Cities and counties have a range of methods available to enforce their ordinances. One method is by criminal (or infraction) enforcement, with the punishment usually being payment of a fine (or, in the case of an infraction, a penalty). A second is by civil enforcement through an action in the nature of debt, with the punishment being payment of a penalty.[1] Local governing boards may specifically limit enforcement to one method or the other, or may provide for enforcement by either method. If the ordinance does not specify the enforcement method, state law provides that it is enforceable as a misdemeanor or infraction.[2] From the standpoint of the violator's pocketbook, there might not appear to be much difference between paying a fine or infraction penalty or paying a civil penalty—so why might a city or county choose one method over another? This bulletin explores the differences that can result because a city or county decides to enforce a particular ordinance through one or the other method of enforcement. The differences affect the amount and disposition of the fine or penalty, the difficulty of collection, the statute of limitations, control of the prosecution, who issues the citation, the standard of proof and other evidentiary matters, trial and post-trial procedure, and the degree of stigma to the violator. Local government boards and their attorneys may find it useful to consider and balance these considerations when adopting ordinances or revising them to specify how they will be enforced.

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1. N.C. Gen. Stat. (hereafter G.S.) § 160A-175(c) provides that an "ordinance may provide that violation shall subject the offender to a civil penalty to be recovered by the city in a civil action in the nature of debt if the offender does not pay the penalty within a prescribed period of time after he has been cited for violation of the ordinance." The comparable county citation is G.S. 153A-123(c).

2. G.S. 160A-175(b) provides that "[u]nless the Council shall otherwise provide, violation of a city ordinance is a misdemeanor or infraction as provided by G.S. 14-4." The comparable county citation is G.S. 153A-123(b).

The Maximum Amount of the Fine or Penalty

The first difference between enforcing an ordinance as a misdemeanor or infraction (hereafter *criminal enforcement*),[3] on the one hand, or through a civil action in the nature of debt (hereafter *civil enforcement*), on the other, is that a violator can be required to make a larger monetary payment under the latter method.

Criminal enforcement of an ordinance proceeds pursuant to Section 14-4 of the North Carolina General Statues (hereafter G.S.), which makes violation of an ordinance either a misdemeanor or an infraction.[4] For those ordinances the violation of which constitutes a misdemeanor, the default punishment is a fine of not more than $50. If an ordinance involves the operation or parking of vehicles, violation is not a misdemeanor but rather an infraction, and a person found responsible can be required to pay an infraction penalty of not more than $50.[5] G.S. 14-4(a) permits a city or county to increase the maximum *fine* for any particular ordinance to as much as $500, but it does not permit any increase in the maximum *infraction penalty*.

In contrast neither G.S. 160A-175 nor G.S. 153A-123 sets a statutory maximum amount for a civil penalty, and it seems clear that a city council or board of county commissioners may set such penalties at much more than $500, the maximum misdemeanor fine—probably in the thousands of dollars rather than the hundreds.[6] In the case of a few environmental ordinances, various statutes allow imposition of penalties as high as $25,000.[7]

In summary:

- If a local ordinance is enforced as an infraction, a person found responsible for a violation can be required to pay no more than $50.
- If a local ordinance is enforced as a misdemeanor, a person convicted of a violation can be required to pay no more than $500 and can be required to pay no more than $50 unless the governing board sets a higher limit for the particular ordinance.
- If a local ordinance is enforced through a civil action in the nature of debt, a person found guilty of a violation can be required to pay whatever amount is imposed by the governing board for that particular ordinance, and that amount clearly can be $1,000 or more.

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3. This is a rough shorthand inasmuch as infractions are not crimes. They are enforced in a similar way, however, and the various points made in this bulletin generally apply as much to infractions as to misdemeanors.

4. G.S. 14-3.1(a) defines an infraction as "a noncriminal violation of law not punishable by imprisonment."

5. It can be confusing that the outcome of both an infraction proceeding and a civil action in the nature of debt to enforce an ordinance can be a requirement to make a payment that is labeled a "penalty." Despite having the same name, the two penalties are not the same, as the remainder of this bulletin will make clear. For that reason this bulletin labels the payment associated with an infraction an "infraction penalty" and that associated with a civil action in the nature of debt a "civil penalty."

6. *See* David M. Lawrence, *Are There Limits on the Size of Penalties to Enforce Local Government Ordinances?* Local Government Law Bulletin No. 128 (UNC School of Government, July 2012).

7. *See* G.S. 143-215.6A (three specific environmental programs) and G.S. 143-215.114A (air pollution control programs).

Difficulty of Collection

A second potential difference between criminal and civil enforcement lies in the relative difficulty of collection. Many civil penalties imposed for ordinance violations are paid without an enforcement action being necessary; the violator simply receives a citation and then pays it. Similarly, though, there are a number of local ordinances for which, if the ordinance is enforced as a misdemeanor or infraction, the fine or penalty can be paid without a court appearance. Under G.S. 7A-148, the Conference of Chief District Court Judges annually adopts lists of misdemeanors and infractions for which such a waiver of appearance is permitted. Under the 2011 lists—the most recent to be posted—waivers are permissible for violations of local ordinances regulating operation or parking of vehicles[8] and for violations of ordinances adopted pursuant to G.S. 18B-300(c), which regulates the possession or consumption of beer or wine on public streets or public property.[9] Only if a local government routinely collects civil penalties for other sorts of ordinances without need of bringing an enforcement action is there any advantage to the civil penalty method of enforcement.

On the other hand, local governments sometimes have difficulty convincing some violators to pay their civil penalties voluntarily. Parking ticket scofflaws are a well-known phenomenon. It is much less likely that a violator will ignore a document charging him or her with an infraction or misdemeanor.

Disposition of the Proceeds of the Fine or Penalty

A third difference between criminal and civil enforcement is that if an ordinance is enforced criminally the local government gets none of the money; but if an ordinance is enforced civilly it is possible to structure the ordinance so that the local government retains the penalty.

Under Article IX, section 7(a), of the North Carolina Constitution, "the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State" must be transmitted to the local school systems. The effect of this provision, as interpreted by the North Carolina appellate courts, has been fully and clearly described in an online essay by Kara Millonzi entitled *Locally-Collected Penalties & Fines: What Monies Belong to the Public Schools?*,[10] and that discussion will not be repeated here. The gist of the matter is as follows.

First, the full proceeds of misdemeanor fines and of infraction penalties must be transmitted to the public schools; the local government whose ordinance was violated gets none of the proceeds.

Second, a local government is entitled to retain any civil penalties imposed for violation of a local ordinance if two conditions are met:

- The governing board has decriminalized the ordinance; that is, it has expressly provided that violation of the ordinance *does not* constitute a misdemeanor or an infraction.

8. Available at www.nccourts.org/Forms/Documents/1219.pdf (accessed November 29, 2012).
9. Available at www.nccourts.org/Forms/Documents/1220.pdf (accessed November 29, 2012).
10. Kara Millonzi, *Locally-Collected Penalties & Fines: What Monies Belong to the Public Schools? in* Coates' Canons: NC Local Government Law Blog (UNC School of Government, November 17, 2011), http://canons.sog.unc.edu/?p=5991.

- The ordinance defines a completely local offense, so that the local government is not enforcing state-mandated requirements[11] or a *state* penal statute.[12]

Statute of Limitations

A fourth difference is that there is a two-year statute of limitations on criminal enforcement of ordinances but apparently no statute of limitations on civil enforcement.

G.S. 15-1 sets the statute of limitations for prosecution of a misdemeanor at two years after commission of the crime. There is no express statute of limitations for infractions, but perhaps they would be subject to the same limitations period as misdemeanors.[13]

By contrast the North Carolina court of appeals has held that there is no limitations period for civil enforcement of a parking ordinance, and the court's reasoning suggests that this would be true for any ordinance enforced civilly. In *City of Greensboro v. Morse* the defendant had ignored some eighty citations for violations of various city parking ordinances issued over a three-year period, at which point the city brought suit to collect the accumulated civil penalties (which totaled more than $2,300).[14] At the trial the defendant successfully moved to dismiss the city's complaint, arguing that the complaint was barred by the one-year statute of limitations set out in G.S. 1-54(2). That statute covers actions

> [u]pon a statute, for a penalty or forfeiture, where the action is given to the State alone, or in whole or in part to the party aggrieved, or to a common informer, except where the statute imposing it prescribes a different limitation.

The court of appeals reversed. It first held that the statute did not apply, because the penalties in the case were imposed by local ordinance and not by statute. The court then went on to agree with the city that in fact no statute of limitations barred the action, because it was pursuant to a governmental function. The court invoked the common law doctrine of *nullum tempus occurrit regi*—"time does not run against the king"—to explain its holding. The state supreme court had held that this doctrine remains in effect in North Carolina and, depending on the sort of activity involved, "applies to exempt the State and its political subdivisions from the running of time limitations unless the pertinent statute expressly includes the State. . . .[15] If the function at issue is governmental, time limitations do not run against the State or its subdivisions unless the statute at issue expressly includes the State. If the function is proprietary, time limitations do run against the State and its subdivisions unless the statute at issue expressly excludes the State."[16]

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11. Donoho v. City of Asheville, 153 N.C. App. 110, 569 S.E.2d 19 (2002) (local ordinance passed to enforce state-mandated air quality standards is penal law of the state; local program is acting as agent for state).

12. Shavitz v. City of High Point, 177 N.C. App. 465, 630 S.E.2d 4 (2006) (offense defined by state law and not local ordinance and therefore penalty imposed for violation of penal law of the state).

13. G.S. 15A-1111 specifies that where the infraction article is silent "the procedures applicable to the conduct of pretrial and trial proceedings for misdemeanors in district court are applicable [to infraction proceedings]."

14. 197 N.C. App. 624, 677 S.E.2d 505 (2009).

15. Rowan Cnty. Bd. of Educ. v. U.S. Gypsum Co., 332 N.C. 1, 8, 418 S.E.2d 648, 653.

16. *Id.*, at 9, 418 S.E.2d at 654.

The distinction between governmental and proprietary functions is grounded, of course, in the law of governmental immunity or liability in tort. In *Morse* the court of appeals had no difficulty in holding that the collection of parking penalties and late fees imposed for parking violations is a governmental function, relying on *Wall v. City of Raleigh*,[17] which was directly on point. That earlier case cited a variety of national sources for the proposition that the enforcement of ordinances is a governmental or legislative function immune from tort actions, but there are ample North Carolina cases that reach the same conclusion. For example, in *Hull v. Roxboro*, the town had adopted an ordinance regulating pigsties, hog pens, and privies, requiring them to be kept clean and not become a nuisance.[18] A neighbor of the plaintiff allegedly kept his pigsties and privies in a filthy condition, and they drained onto the plaintiff's property, sickening his wife and child. The plaintiff notified the town of the ordinance violation and asked that the ordinance be enforced, and the town's health officer reported the matter to the board as well. Nevertheless, the plaintiff alleged that the town had not enforced the ordinance and that he had suffered damage as a result. The trial court sustained the town's demurrer, and on appeal the state supreme court held that the adoption and enforcement of ordinances is a governmental—as opposed to a proprietary—activity of a town, and there can be no liability to a town for damage incidental to the town's failure to enforce one of its ordinances. Similarly, in *Goodwin v. Town of Reidsville* the plaintiff's decedent was allegedly killed through being hit by a baseball thrown or batted in a baseball game being conducted on a public street.[19] The plaintiff alleged either that the town did not have but should have had an ordinance prohibiting such play, or that the town had such an ordinance and had not enforced it. Either way, the supreme court held that the plaintiff's suit must fail:

> It is immaterial whether the plaintiff founds her claim upon the failure to enact an ordinance prohibiting baseball on the streets, or upon the failure to enforce such an ordinance. The municipality would not be liable for the negligence of its officers because the act is governmental in its nature, and the corporation is as much exempt from suit in such cases as the state itself.[20]

Thus, under North Carolina precedents as well as national ones, enforcement of ordinances is a governmental activity, and so no statute of limitations should stop a government from such enforcement.

Control of the Prosecution

A fifth difference lies in control of enforcement actions—by the state or the local government.

If an ordinance is to be enforced criminally, enforcement will be the responsibility of and under the control of the local district attorney. Many district attorneys believe that the resources available to them are limited and therefore must be allocated to have the greatest

17. 121 N.C. App. 351, 465 S.E.2d 551 (1996).

18. 142 N.C. 453, 55 S.E. 351 (1906).

19. 160 N.C. 411, 76 S.E. 232 (1912).

20. *Id.*, at 414, 76 S.E. at 234. *See also* Hill v. Bd. of Aldermen of the City of Charlotte, 72 N.C. 55 (1875) (no liability because of failure to adopt ordinance); Orange Cnty. v. Heath, 282 N.C. 292, 192 S.E.2d 308 (1972) (enforcement of zoning ordinance is a governmental function).

effect; one outcome of that allocation process might well be that enforcement of state criminal statutes is given greater priority than enforcement of city or county ordinances.[21] By contrast civil enforcement of ordinances is under the sole control of the county or city that adopted the ordinance, with the proceeding undertaken by the county or city attorney or under his or her supervision. If a local government wishes to emphasize enforcement of a particular ordinance or set of ordinances, civil enforcement allows it to do so. Of course, this route carries budgetary implications. If an ordinance is enforced criminally, the costs associated with actual prosecution will be borne by the state. If it is enforced civilly, however, those costs will be borne by the city or county.

In addition, many civil penalty enforcement actions can take place in small claims court, which opens the opportunity to use nonattorney employees to create the paperwork and manage the case at that level. The North Carolina appellate courts have held that a corporation may be represented in small claims cases by nonlegal employees or agents,[22] and both counties and cities are corporate entities.[23] (If an enforcement case begins in district court or is appealed to that court, the local government will have to be represented by an attorney.) [24]

Issuance of Citation

A sixth difference lies in who may issue a citation to a person who has violated an ordinance. A local government has greater flexibility when the ordinance will be enforced civilly rather than criminally.

Under G.S. 15A-302 a citation that is issued to require a person to answer a charge of a misdemeanor or an infraction must be issued by a law enforcement officer or "other person authorized by statute." There is no statute that generally permits local governments to issue citations for misdemeanor or infraction enforcement of their ordinances through persons other than sworn law enforcement officers, and therefore only such officers may issue these sorts of citations.

When a county or city enforces an ordinance civilly, however, G.S. 15A-302 does not apply, even though it is common to refer to the document issued to a violator as a citation. That is because this sort of citation does not charge a misdemeanor or infraction. (Indeed, this sort of citation does not require the alleged violator to appear in court, as does a misdemeanor or infraction citation. Getting into court requires the usual forms of process used before a magistrate or in district court.) Because the statute does not apply, there is no statutory regulation

21. Under G.S. 153A-212.1 and G.S. 160A-289.1, counties and cities may enter into contracts with the Administrative Office of the Courts to appropriate funds to add positions in a local district attorney's office "for the speedy disposition of cases involving drug offenses, domestic violence, or other offenses involving threats to public safety." Given the quoted language in the statutes, these authorizations do not seem to support contracts by which a county or city sought to fund positions in a district attorney's office to support ordinance enforcement generally.

22. Duke Power Co. v. Daniels, 86 N.C. App. 469, 358 S.E.2d 87 (1987). *See* State v. Pledger, 257 N.C. 634, 127 S.E.2d 337 (1962).

23. G.S. 153A-11 for counties and G.S. 160A-11 for cities.

24. Lexis-Nexis, Div. of Reed Elsevier, Inc. v. Travishan Corp., 155 N.C. App. 205, 573 S.E.2d 547 (2002).

regarding who may issue a civil citation, and therefore local governments may assign the responsibility to employees who are not sworn law enforcement officers.

Standard of Proof and Other Evidentiary Matters

A seventh difference lies in the rules that govern the enforcement litigation, including the standard of proof applicable to the different enforcement methods and other evidentiary rules. Again, civil enforcement offers advantages to the city or county.

Standard of Proof

In any criminal prosecution, including one for violation of an ordinance, the prosecution must prove the defendant guilty beyond a reasonable doubt.[25] In civil cases, however, the normal standard of proof is a preponderance of the evidence. In a very limited group of civil actions, the standard of proof is "clear, cogent, and convincing," which is more rigorous than a preponderance of the evidence, but that limited group does not include actions in the nature of debt. In *In re Thomas* the North Carolina Supreme Court noted that this higher standard "is required to establish parol trusts, contents of lost documents, and such matters."[26] Many years earlier in *Ellett v. Ellett* the court elaborated a little, noting that the higher standard is required in "matters of an equitable nature," listing establishment of parol trusts, reformation of a written instrument, and proving the contents of a lost will.[27] An action in the nature of debt is not an equitable proceeding, and therefore there is no reason to believe that the standard of proof is anything more than a preponderance of the evidence.[28]

Defendant as Compelled Witness

In a criminal case the Fifth Amendment to the United States Constitution prohibits requiring the defendant to appear as a witness, but that prohibition does not apply to civil proceedings.[29] Certainly a witness in a civil case is entitled to claim the amendment's privilege against self-incrimination, but the plaintiff is nevertheless permitted to call the defendant as a witness.[30]

Trial and Post-Trial Procedure

A eighth set of differences lie in the motions that are available to a plaintiff during or at the end of a civil trial, as opposed to what is available to the State in a criminal action, and in the plaintiff's right to appeal.

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25. G.S. 15A-1114(f) makes clear that this highest standard of proof applies to infractions.

26. 281 N.C. 598, 603 (1972).

27. 157 N.C. 162, 163 (1911).

28. That is the usual standard in other states. *See, e.g.,* City of Highland Park v. Curtis, 226 N.E.2d 870 (Ill. Ct. App. 1967); Viccaro v. City of Fort Wayne, 449 N.E.2d 1161 (Ind. Ct. App. 1983); Warren v. State, 76 N.W.2d 728 (Neb. 1956).

29. Under Rule 30 of the Rules of Civil Procedure, any party may take the deposition of any person, including another party; and under Rule 43(b) a party to a civil case may call an adverse party as a witness.

30. *See* Vill. of Bayside v. Bruner, 148 N.W.2d 5 (Wis. 1967).

Motions

Because a criminal defendant is entitled to be tried and convicted by a jury, the State cannot make and a judge cannot grant a motion for a directed verdict in a criminal action. But civil enforcement of an ordinance is just that—civil—and therefore a county or city civilly enforcing an ordinance has available the full set of motions available to any civil litigant. These include motions for summary judgment,[31] for a directed verdict,[32] and for a new trial in the case of a verdict for the defendant.[33]

Right to Appeal

If a criminal trial results in a jury verdict for the defendant, the prosecution has no right of appeal. A retrial of such a defendant would violate the constitutional ban on double jeopardy. There is no such ban on a city that is pursuing civil enforcement of an ordinance appealing an adverse verdict and judgment. Again, a right to appeal is a standard feature of civil litigation, and an action to collect a civil penalty is no different in this regard from other civil actions.[34] Because the entire matter is civil, the prohibition on double jeopardy does not protect a defendant from a second trial should the local government's appeal be successful.[35]

Lack of Stigma

A final difference might affect the willingness of city or county officials to undertake a vigorous enforcement program. If an ordinance is enforced criminally, a violator who is prosecuted and found guilty (or responsible, if the offense is an infraction) has been found guilty of a crime. Because of the stigma that a criminal conviction might be thought to carry, some local government officials might be uncomfortable undertaking a vigorous enforcement program through criminal means for some categories of ordinances. But if a local government uses civil enforcement, there is no crime and no criminal conviction; there is simply the loss of a civil lawsuit. That difference from the outcome of a criminal prosecution might increase the comfort level for some of the local government's officials. Of course, sometimes a local government might want violators to bear the stigma associated with a criminal prosecution, hoping that it might serve as more of a deterrent than the prospect of simply paying a civil penalty.

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31. *E.g.,* Vill. of Beckmeyer v. Wheelan, 569 N.E.2d 1125 (Ill. Ct. App. 1991).

32. *E.g.,* Lloyd v. Canon City, 103 P. 288 (Colo. 1909); City of Milwaukee v. Burns, 274 N.W. 273 (Wis. 1937).

33. *E.g.,* City of Carthage v. Bird, 129 S.W. 1054 (Mo. Ct. App. 1910).

34. *E.g.,* Vill. of Maywood v. Houston, 139 N.E.2d 233 (Ill. 1956).

35. *Id.* The matter is more complicated if the State should attempt to prosecute criminally someone who has already paid a civil penalty because of the alleged criminal act. *See* Hudson v. U.S., 522 U.S. 93 (1997).

Conclusion

There are a number of advantages for a city or county if it decides to enforce some of its ordinances by civil penalties. Most of these advantages are present even if the local government retains both civil and criminal options for a particular ordinance; the one that is not is the local government's ability to retain the proceeds of any civil penalties that it imposes and collects.