

STAFF REPORT

TO: Public Safety Committee DATE: February 23, 2015
FROM: Robin Currin, City Attorney
VIA: Catherine Hofmann, Assistant City Attorney
SUBJECT: Warning Citation Requirement –Section § 1-5 of the Asheville Code

Summary Statement: Consideration of Amending Section 1-5 of the Asheville City Code.

Review and Analysis:

1. City of Asheville Code Section 1-5

Section 1-5 of the City of Asheville Code of Ordinances (Ordinance number 2585), is entitled “General penalty; civil remedies; enforcement of ordinances; continuing violations.” Subsections (j) and (k) in part read as follows:

- (j) Upon determination of a violation of any section of this Code, the penalty for which is a civil penalty, **the city shall cause a warning citation to be issued to the violator ... The warning citation shall specify that a second citation shall incur a civil penalty.**
- (k) **Upon failure of the violator to obey the warning citation, a civil citation shall be issued** by the appropriate official of the city and either served directly on the violator
....

(emphasis added)

2. City of Asheville Ordinances Assessing Civil Penalties

The City’s authority to assess civil penalties to enforce its ordinances is found in N.C. Gen. Stat. § 160A-175(c). That statute reads:

- (c) 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.

There are many ordinances in Asheville’s City Code that subject violators to a civil penalty. Currently, pursuant to Section 1-5(j) and (k), before assessing any civil penalty for a violation of any City ordinance, the violator must be issued a “warning citation.” This section is both ineffective and problematic for several reasons, including but not limited to:

1. Many of the City's ordinances that subject offenders to civil penalties independently require a warning citation or notice prior to assessing a civil penalty. (See, e.g., Sections 7-18-3 and 16-3(e)); and

2. The enforcement of other ordinances is hindered by the notice requirement of Section 1-5. For example, Section 19-137(b) makes it illegal to park a vehicle in any area designated as a fire lane. A violation of Section 19-137(b) subjects the offender to a \$50.00 penalty. Pursuant to Section 1-5, before assessing a civil penalty for parking in a fire lane the violator must first be issued a warning citation. This procedure hinders the City's ability to properly enforce illegal parking in a designated fire lane. The same result occurs with overtime parking at metered or nonmetered spaces, handicapped parking violations, safety equipment at skateboard parks, violations regarding pushcarts, outdoor dining areas and outdoor merchandise areas, animal control violations and noise violations.

3. The Transportation Department has also expressed concern with Section 1-5, as they must be able to issue parking tickets for overtime parking without first issuing a warning citation.

Based on all of the above, amending Section 1-5 to remove the requirement for a warning citation is in the City's best interest. A redline copy of the ordinance is attached hereto as Exhibit A.

Pros:

- Removes repetitive and unnecessary notice requirements prior to assessing civil penalties.
- Improves enforcement of ordinances.
- Complies with the authority granted in N.C. Gen. Stat. § 160A-175.
- Clarifies ambiguities.

Cons: None.

Recommendation: Adoption of the ordinance amending Section 1-5.

Attachments:

(1) Proposed Ordinance

Exhibit A

Sec. 1-5. - General penalty; civil remedies; enforcement of ordinances; continuing violations.

- (a) Unless otherwise specifically provided, violation of any provision of this Code or any other city ordinance shall subject the offender to the remedies provided in this section, except that where the General Statutes of North Carolina provide specific civil remedies for violations of provisions of this Code adopted pursuant to such statutes, such remedies available to the city for enforcement of this Code shall be in addition to the remedies stated in this section.
- (b) Violations of all provisions of this Code, unless otherwise specifically provided in this Code and/or specifically enumerated in appendix B of this volume, shall be a misdemeanor and punishable as provided by N. C. Gen. Stat. sec. 14-4.
- (c) Violations of the provisions enumerated in appendix B of this volume shall subject the offender to a civil penalty upon the issuance of a citation for such violation as provided in this section. The civil penalty, if not paid to the city finance director within 15 days of the issuance of a citation, may be recovered by the city in a civil action in the nature of debt. Unless otherwise provided by a specific provision of this Code, such civil penalties shall be in the amount of \$50.00 for each violation, and each day any single violation continues shall be a separate violation. The provisions of this Code which shall subject the offender to a civil penalty are as enumerated in appendix B of this volume.
- (d) In addition to any civil or criminal penalties set out in this section, any provision of this Code or any other city ordinance may be enforced by an appropriate equitable remedy issuing from a court of competent jurisdiction. In such case, the general court of justice shall have jurisdiction to issue such orders as may be appropriate, and it shall not be a defense to the application of the city for equitable relief that there is an adequate remedy at law.
- (e) In addition to any civil or criminal penalties set out in this section, any provision of this Code or any other city ordinance that makes unlawful a condition existing upon or use made of real property may be enforced by injunction and order of abatement, and the general court of justice shall have jurisdiction to issue such orders. When a violation of such a provision occurs, the city may apply to the appropriate division of the general court of justice for a mandatory or prohibitory injunction and order of abatement commanding the defendant to correct the unlawful condition upon or cease the unlawful use of the property. The action shall be governed in all respects by the laws and rules governing civil proceedings, including the Rules of Civil Procedure in general and rule 65 in particular.

(f) In addition to an injunction, the court may enter an order of abatement as a part of the judgment in the cause. An order of abatement may direct that:

- (1) Buildings or other structures on the property be closed, demolished or removed;
- (2) Fixtures, furniture or other movable property be removed from buildings on the property;
- (3) Grass and weeds be cut;
- (4) Improvements or repairs be made; or
- (5) Any other action be taken that is necessary to bring the property into compliance with this Code or such ordinance.

If the defendant fails or refuses to comply with an injunction or with an order of abatement within the time allowed by the court, he may be cited for contempt, and the city may execute the order of abatement. The city shall have a lien on the property for the cost of executing an order of abatement in the nature of a mechanic's and materialman's lien. The defendant may secure cancellation of an order of abatement by paying all costs of the proceedings and posting a bond for compliance with the order. The bond shall be given with sureties approved by the clerk of superior court in an amount approved by the judge before whom the matter is heard and shall be conditioned on the defendant's full compliance with the terms of the order of abatement within a time fixed by the judge. Cancellation of an order of abatement shall not suspend or cancel an injunction issued in conjunction therewith.

- (g) The provisions of this Code and any other city ordinances may be enforced by one, all or a combination of the remedies authorized and prescribed by this section, except that any provision, the violation of which incurs a civil penalty, shall not be enforced by criminal penalties.
- (h) Except as otherwise specifically provided, each day's continuing violation of any provision of this Code or any other city ordinance shall be a separate and distinct offense.
- (i) Any ordinances adopted by the mayor and council, the violation of which shall incur a penalty, shall specify whether the enforcement shall be pursuant to the civil penalty or criminal penal provisions of this section.

~~Upon determination of a violation of any section of this Code, the penalty for which is a civil penalty, the city shall cause a warning citation to be issued to the violator, setting out the nature of the violation, the section violated, the date of the violation and an order to immediately cease the violation or, if the violation is in the nature of an infraction for which~~

~~an order of abatement would be appropriate in a civil proceeding, stating a reasonable period of time in which the violation must be abated. The warning citation shall specify that a second citation shall incur a civil penalty.~~

- (j) ~~Upon failure of the violator to obey the warning citation~~Unless provided otherwise in this Code, upon determination of a violation, the penalty for which is a civil penalty, the City shall cause a civil citation to be issued to the violator.; ~~a~~ A civil citation shall be issued by the appropriate official of the city and either served directly on the violator or his duly designated agent or registered agent, if a corporation, in person or posted in the United States mail service by first class mail addressed to the last known address of the violator as contained in the records of the city or obtained from the violator at the time of issuance of the warning citation. The violator shall be deemed to have been served upon the mailing of such citation. The citation shall direct the violator to appear before the city clerk, located in the city hall, within 15 days of the date of the citation or alternatively to pay the citation by mail. The violation for which the citation is issued must have been corrected by the time the citation is paid; otherwise, further citations shall be issued. Citations may be issued for each day the offense continues until the prohibited activity is ceased or abated.
- (k) If the violator fails to respond to a citation within 15 days of its issuance and pay the penalty prescribed therein, the city may institute a civil action in the nature of debt in the appropriate division of the state general court of justice for the collection of the penalty.