



Date: May 12, 2022

To: Mayor and City Council
From: Kimberly M. Rehberg, City Attorney
Subject: Amend DCC 26-23 (Noise) to Retain Criminal Penalty

Executive Summary

Effective December 1, 2021, the North Carolina General Assembly amended NCGS 160A-175 to provide that violation of an ordinance may be a misdemeanor or infraction only if a city/county specifies such in the particular ordinance. In a few instances in the Durham City Code (DCC), an ordinance will contain language within the ordinance outlining a specific penalty. However, the penalty for the vast majority of DCC provisions has historically been inferred from language in NCGS 160A-175 and contained in a “default” provision—DCC Section 1-9—in the City’s Code, which provides that if no other penalty is listed in the ordinance, violation will be a misdemeanor, an infraction for vehicle operation violations, and a civil penalty for parking violations. As a result of the above-referenced action by the General Assembly amending NCGS 160A-175, DCC Section 1-9 is no longer sufficient for Durham ordinances to be enforceable as a misdemeanor or infraction. Each ordinance must specify whether it is criminally enforceable.

The task of inventorying every single City code provision to see if amendment is required and to make the requisite change in order to comply with the changes to NCGS 160A-175 is an ongoing process being conducted by the Office of the City Attorney. As previously stated, very few DCC provisions had the language now required in order to seek criminal enforcement, so hundreds of provisions have required amendment. Based on the progress of the work, I anticipate that a complete re-write of the City Code, addressing only the issue raised by the change to NCGS 160A-175, will be ready for City Council to adopt at its August 1, 2022 regular Council meeting.

However, the City has received repeated complaints in recent months about the lack of a currently enforceable criminal penalty for violation of the City’s noise ordinance (DCC 26-23). Durham’s noise ordinance is an ordinance that previously defaulted to DCC Section 1-9 to make violation of the noise ordinance a misdemeanor. As such, it requires amendment to specify the penalty within the noise ordinance itself. In light of recent complaints, and in anticipation of additional complaints that may be forthcoming with the advent of summer, the City Attorney’s Office is presenting the requisite text change for the noise ordinance in advance of all other provisions in the Durham City Code, so that the City has criminal penalties available as a potential enforcement tool where appropriate for violation of the noise ordinance.

Motion

To amend the City’s Noise Ordinance to specify that a violation of the ordinance shall constitute a misdemeanor.

Background

While the City prefers to deal with violations of the City Code by educating violators, other enforcement tools are sometimes needed. Senate Bill 300 (“SB 300”), which was enacted by the General Assembly in September 2021, made changes to the criminal enforcement of some City ordinances. No changes were made to civil enforcement tools such as civil penalties and court orders.

Prior to SB 300, State statutes automatically made violation of a city or county ordinance a misdemeanor or infraction. Under the former law, a governing board had to act affirmatively to remove the criminal penalty from a particular ordinance. See N.C. Gen. Stat. § 160A-175(b) (2020). Other enforcement tools, such as civil penalties and injunctions, were available but required that an ordinance specifically adopt them. See N.C. Gen. Stat. § 160A-175(c) – (f). Thus, if an ordinance or a code did not provide a penalty, a misdemeanor or infraction was the default option. The City of Durham had additionally adopted a default provision in its Code—DCC Section 1-9.

SB 300 made the following four changes to how cities enforce their ordinances:

- Eliminated criminal enforcement (that is, enforcement as a misdemeanor or infraction pursuant to 160A-175) as the default option;
- Provided a list of ordinances for which criminal enforcement is prohibited;
- Allowed continued criminal enforcement for many types of ordinances, but imposed special procedures when a city seeks criminal enforcement of an ordinance (most notably, requiring a city to specify that violation of an ordinance “may be a misdemeanor or infraction . . .” only if it is so stated in the subject ordinance itself; thus, invalidating “default” and “catch-all” provisions that provided a criminal penalty for parts or all of a city code); and
- Created two new defenses against criminal prosecution of a city code violation that apply in court.

The changes were effective on December 1, 2021 and apply to offenses and violations committed on or after that date.

Issues and Analysis

The City Attorney’s Office is working on making global changes to the Durham City Code in response to the changes enacted by SB 300. However, communications from the members of the community indicate that there is a need and desire to have criminal penalties as a potential enforcement mechanism for violations of the City’s noise ordinance sooner than the comprehensive changes will be finalized.

Alternatives

The City Council could elect not to make the suggested amendment to the noise ordinance. Presumably, the City would continue to try to achieve compliance without necessarily involving the individual in the criminal justice system. This would entail continuing to address city ordinance violations through education, dialogue, and seeking voluntary cooperation from all those who live, work and visit the City of Durham. The City could issue warnings, create notes and/or a report so there is a record of the complaint, findings and action. If appropriate, staff could partner with internal and external stakeholders to assist in mitigating further complaints. However, unless the Council elects to adopt the suggested amendment, there will not be more impactful tools available to the City to enforce compliance, even for the most egregious and repeated violators of the noise ordinance.

Financial Impact

None.

Equal Business Opportunity Summary

This item is an ordinance amendment prompted by statutory changes passed by the North Carolina General Assembly. It neither needs nor requires review by the Equity & Inclusion Department for compliance with the Ordinance to Promote Equal Business Opportunities in City Contracting.

Contractor Workforce Diversity & Hiring Practices

Due to the nature of this agenda item, obtaining Contractor Workforce Diversity & Hiring Practices information is not applicable.

Attachments

Attachment 1: Section 26-23 (Noise Ordinance) with proposed amendment