

CLERK'S OFFICE
APPROVED
Date: 12-12-06

Submitted by: Chair of the Assembly at the
Request of the Mayor
Prepared by: Dept. of Law
For reading: November 21, 2006

ANCHORAGE, ALASKA
AO No. 2006-152

AN ORDINANCE AMENDING ANCHORAGE MUNICIPAL CODE SECTIONS 9.28.020 AND 9.28.040 REGARDING OPERATING UNDER THE INFLUENCE AND RECOVERY OF REASONABLE COSTS OF EMERGENCY SERVICES RESPONDING TO A MOTOR VEHICLE ACCIDENT.

THE ANCHORAGE ASSEMBLY ORDAINS:

Section 1. Anchorage Municipal Code subsections 9.28.020A. and B. are hereby amended to read as follows:

9.28.020 **Operating [DRIVING] under the influence--Prohibited; sentencing.**

A. It is unlawful for any person to commit the crime of operating [DRIVING] under the influence.

B. A person commits the crime of operating [DRIVING] under the influence if the person [HE] operates [, DRIVES OR IS IN ACTUAL PHYSICAL CONTROL OF] a motor vehicle, [OR OPERATES AN] aircraft, or [A] watercraft:

1. While under the influence of an alcoholic beverage, inhalant, controlled substance as defined in AS 11.71.900, or other impairing substance, or any combination thereof [OR DEPRESSANT, HALLUCINOGENIC, STIMULANT OR NARCOTIC DRUGS AS DEFINED IN AS 11.71.140--11.71.190]; or

2. Having consumed a sufficient quantity of alcohol that [WHEN], as determined by a chemical test taken within four hours after operating [THE ALLEGED OFFENSE WAS COMMITTED], there is 0.08 percent or more by weight of alcohol in the person's blood or 80 milligrams or more of alcohol per 100 milliliters of blood, or [WHEN] there is 0.08 grams or more of alcohol per 210 liters of the person's breath; or

3. Having consumed a sufficient quantity of alcohol that, as determined by a chemical test taken within four hours after operating, there is 0.04 percent or more by weight of alcohol in the person's blood or 40 milligrams or more of alcohol per 100 milliliters of blood, or there is 0.04 grams or more of alcohol per 210 liters of the person's breath, and the vehicle is a commercial motor vehicle as defined in AS 28.40.100.

[WHILE THE PERSON IS UNDER THE COMBINED INFLUENCE OF AN ALCOHOLIC BEVERAGE OR INHALANT AND A DRUG, OR AN ALCOHOLIC BEVERAGE OR INHALANT AND ANOTHER SUBSTANCE THAT WHEN INTRODUCED INTO THE BODY ACTS AS A CENTRAL NERVOUS SYSTEM DEPRESSANT OR STIMULANT, TO A DEGREE WHICH RENDERS THE PERSON INCAPABLE OF DRIVING SAFELY;]

[4. WHILE THE PERSON IS UNDER THE INFLUENCE OF A DRUG, OR ANOTHER SUBSTANCE THAT WHEN INTRODUCED INTO THE BODY ACTS AS A CENTRAL NERVOUS SYSTEM DEPRESSANT OR STIMULANT, TO A DEGREE WHICH RENDERS THE PERSON INCAPABLE OF DRIVING SAFELY; OR]

[5. IN THE CASE OF AN INDIVIDUAL OPERATING A COMMERCIAL MOTOR VEHICLE, WHEN, AS DETERMINED BY A CHEMICAL TEST TAKEN WITHIN FOUR HOURS AFTER THE ALLEGED OFFENSE WAS COMMITTED, THERE IS 0.04 PERCENT OR MORE BY WEIGHT OF ALCOHOL IN THE PERSON'S BLOOD, OR 40 MILLIGRAMS OR MORE OF ALCOHOL PER 100 MILLILITERS OF BLOOD, OR WHEN THERE IS 0.04 GRAMS OR MORE OF ALCOHOL PER 210 LITERS OF THE PERSON'S BREATH.]

Editor's note: AO No. 2001-150, as amended lowered the legal limits effective 9/1/01.

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(AO No. 267-76; AO No. 78-72; AO No. 78-230(S); AO No. 80-122; AO No. 81-75; AO No. 82-126; AO No. 83-168, 10-17-83; AO No. 89-52; AO No. 91-56(S); AO No. 91-190; AO No. 94-68(S), § 11, 8-11-94; AO No. 95-84(S-1), §§ 1--9, 4-27-95; AO No. 95-163(S), §§ 1--5, 8-8-95; AO No. 97-72, § 1, 6-10-97; AO No. 97-87, § 1, 6-3-97; AO No. 2001-51, § 1, 2-27-01; AO No. 2001-150, § 1, 8-28-01; AO No. 2001-145(S-1), § 6, 12-11-01; AO No. 2002-125, § 2, 8-20-02; AO No. 2003-73, §§ 8, 9, 4-22-03; AO No. 2003-106, §§ 3, 4, 7-1-03)

Editor's note: AO No. 97-87 occasioned by 1996 Proposition 3 Initiative enacting Chapter XXI.

Cross references: Penal code, Ch. 10.50.

Section 2. Anchorage Municipal Code section 9.28.020 is hereby amended to add a new subsection P. to read as follows:

9.28.020 **Operating [DRIVING] under the influence--Prohibited; sentencing.**

*** *** ***

P. It is not a defense to a charge under this section that the person, having voluntarily consumed a substance, did not know the substance would impair the person's ability to operate a motor vehicle, aircraft, or watercraft.

(AO No. 267-76; AO No. 78-72; AO No. 78-230(S); AO No. 80-122; AO No. 81-75; AO No. 82-126; AO No. 83-168, 10-17-83; AO No. 89-52; AO No. 91-56(S); AO No. 91-190; AO No. 94-68(S), § 11, 8-11-94; AO No. 95-84(S-1), §§ 1--9, 4-27-95; AO No. 95-163(S), §§ 1--5, 8-8-95; AO No. 97-72, § 1, 6-10-97; AO No. 97-87, § 1, 6-3-97; AO No. 2001-51, § 1, 2-27-01; AO No. 2001-150, § 1, 8-28-01; AO No. 2001-145(S-1), § 6, 12-11-01; AO No. 2002-125, § 2, 8-20-02; AO No. 2003-73, §§ 8, 9, 4-22-03; AO No. 2003-106, §§ 3, 4, 7-1-03)

Editor's note: AO No. 97-87 occasioned by 1996 Proposition 3 Initiative enacting Chapter XXI.

Cross references: Penal code, Ch. 10.50.

Section 3. Anchorage Municipal Code section 9.28.040 is hereby amended to read as follows:

9.28.040 **Operating [DRIVING] under the influence—Responsibility for costs of emergency response.**

A. If the acts for which a person is convicted under Section 9.28.020 contribute[S] to a motor vehicle accident, the court shall order the person to pay [POLICE AND FIRE DEPARTMENTS MAY BILL] the reasonable costs of any emergency services responding to the accident, if [RESPONSE TO] the convicted person or the convicted person's insurer has not already paid the cost of the emergency services.

B. If payment is required under this section, the payment shall be made directly to the emergency services and [REASONABLE COSTS UNDER THIS SECTION] shall be equal to the actual cost of [PEACE OFFICERS OR FIRE DEPARTMENT OFFICIALS, INCLUDING AMBULANCE SERVICE, EMERGENCY MEDICAL TECHNICIANS, AND EMERGENCY TRAUMA TECHNICIANS,] responding to the accident or the previous year's annual average cost of responding to a motor vehicle accident, whichever is higher.

C. In this section, emergency services includes peace officers, fire department services, ambulance services, emergency medical technicians, and emergency trauma technicians.

(AO No. 2001-145(S-1), § 7, 12-11-01)
State law references: AS 28.35.030(m).

Section 4. This ordinance shall be effective on January 1, 2007, to allow sufficient time for submission to and update of the state uniform offense citation table.

PASSED AND APPROVED by the Anchorage Assembly this 12th day of December, 2006.


Chair of the Assembly

ATTEST:


Municipal Clerk
Deputy

G:\mat\open matters\Municipal Attorney - Criminal\9.28.020-040 rev consolidated AO.DOC

MUNICIPALITY OF ANCHORAGE
Summary of Economic Effects -- General Government

AO Number: 2006- 152

Title: AN ORDINANCE AMENDING ANCHORAGE MUNICIPAL CODE
SECTIONS 9.28.020 AND 9.28.040 REGARDING OPERATING UNDER
THE INFLUENCE AND RECOVERY OF REASONABLE COSTS OF
EMERGENCY SERVICES RESPONDING TO A MOTOR VEHICLE
ACCIDENT.

Sponsor: Mayor
Preparing Agency: Department of Law
Others Impacted:

CHANGES IN EXPENDITURES AND REVENUES:		(In Thousands of Dollars)				
	<u>FY06</u>	<u>FY07</u>	<u>FY08</u>	<u>FY09</u>	<u>FY10</u>	
Operating Expenditures						
1000 Personal Services						
2000 Non-Labor						
3900 Contributions						
4000 Debt Service						
TOTAL DIRECT COSTS:	<u>\$ -</u>	<u>\$ -</u>	<u>\$ -</u>	<u>\$ -</u>	<u>\$ -</u>	
Add: 6000 Charges from Others						
Less: 7000 Charges to Others						
FUNCTION COST:	<u>\$ -</u>	<u>\$ -</u>	<u>\$ -</u>	<u>\$ -</u>	<u>\$ -</u>	
REVENUES:						
CAPITAL:						
POSITIONS: FT/PT and Temp						

PUBLIC SECTOR ECONOMIC EFFECTS:

None. There is no impact on the caseload of the Department of Law, Criminal Division. These amendments provide better tools for the prosecutor and the court in cases involving operating under the influence.

PRIVATE SECTOR ECONOMIC EFFECTS:

None.

Prepared by: Department of Law

Telephone: 343-4545

MUNICIPALITY OF ANCHORAGE
ASSEMBLY MEMORANDUM

No. AM 838 -2006

Meeting Date: November 21, 2006

From: MAYOR

Subject: AN ORDINANCE AMENDING ANCHORAGE MUNICIPAL CODE SECTIONS 9.28.020 AND 9.28.040 REGARDING OPERATING UNDER THE INFLUENCE AND RECOVERY OF REASONABLE COSTS OF EMERGENCY SERVICES RESPONDING TO A MOTOR VEHICLE ACCIDENT.

This ordinance proposes amendments to Anchorage Municipal Code sections 9.28.020 and 9.28.040, regarding operating under the influence and recovery of reasonable costs of emergency services for responding to a motor vehicle accident involving operating under the influence. The purpose of the proposed amendments are described in detail below.

A. The proposed amendments to section 9.28.020 accomplish five goals for the Municipality and the Department of Law:

1. **Clarification of nature of offense.** Under both the state DUI statute and the municipal DUI ordinance, it is unlawful for a person to drive or operate a motor vehicle while under the influence. Alaska case law, over time, has defined what it means to “operate” a motor vehicle. For example, the definition of “operating” encompasses a broader range of acts than actual driving, including being seated in the driver’s seat with the engine off but the keys in the defendant’s possession. The amendments include a change to the section title, and elimination of the word “driving”, since driving is included within the definition of “operating.”
2. **Ensuring all impairing substances are included.** It is an unfortunate reality that human beings constantly find new ways to impair themselves. New drugs surface frequently, and some become popular within a relatively short period of time. Occasionally, a drug attains widespread use long before the Alaska Legislature gets around to classifying it as a “controlled substance.” For instance, Ambien is a very commonly-used sleep aid recently vaulted to the forefront of DUI prosecutions across the country. To date, however, it is not included within the state’s list of controlled substances under AS 11.71. In order to ensure all substances that, when consumed, have the effect of impairing a person’s ability to operate a vehicle safely, the amendments include adding the phrase “or other impairing substance.”
3. **Eliminating the “big gulp” defense.** For many years, defendants charged

with driving under the influence have relied upon the “big gulp” defense. The defense, successful in certain cases, begins with a claim that the defendant consumed a large quantity of alcohol very quickly, immediately before getting into a vehicle. Because there is generally a period of anywhere from 45 minutes to two hours between the time of a traffic stop and the time of a breath or blood sample, the defendant argues that, although over the legal limit at the time of the chemical test, the defendant may have been still under the limit while driving. This type of argument was validated by the Alaska Court of Appeals a few years ago in *Conrad v. State*, 54 P.3d 313 (Alaska App. 2002). The end result is that, because the government is required to prove the defendant’s breath- or blood-alcohol content was .08% or more at the time of operating the vehicle, a person can drink copious amounts of alcohol, then “race the alcohol home” and not be guilty of DUI. The public safety implications of such a legal loophole are obvious.

In response to the *Conrad* decision, the state amended its DUI statute to eliminate the “big gulp” defense, as a number of other states have done. The problem with Alaska’s modification is it is poorly worded and confusing. This ordinance borrows language from North Carolina’s statute, cited by the Alaska court in *Conrad*. The North Carolina statute provides an eloquent and easy-to-understand solution to the “big gulp” defense by making it a crime to operate a motor vehicle “having consumed a sufficient quantity of alcohol” to be over the legal limit.

4. **Eliminating the defense of ignorance of effect.** The Municipality encounters this defense with increasing frequency in cases involving prescription drugs such as Ambien. The essence of the defense is the defendant didn’t know the substance ingested would impair the ability of the defendant to drive safely. It is common knowledge that medications are generally prescribed by doctors who routinely explain the effects of the drugs, and they are packaged in containers with warning labels and inserts. It is also common, however, for the recipients not to bother reading or listening to the warnings. Since the government bears the burden of proving the defendant had a culpable mental state – i.e., the defendant acted with a conscious disregard of the consequences of the actions – a defendant can successfully argue lack of mental state because the effects of the substance consumed were unknown to the defendant. The Municipality proposes to place the onus upon the defendant to know the effects of any substance voluntarily consumed.
5. **Clear, streamlined language.** In addressing the issues outlined above, every effort has been made to structure the proposed modified ordinance as clearly and succinctly as possible. Where appropriate, provisions contained in separate paragraphs were combined, redundant language avoided, and wording selected to provide clear and understandable language for members of the public.

1 B. The proposed amendment to section 9.28.040 is necessary to vest authority in the
2 sentencing court to order defendants convicted of driving under the influence to pay
3 the reasonable costs of emergency response services when the offense involves a
4 motor vehicle accident.

5
6 The parallel state statute, AS 28.35.030(m), directs courts to order restitution for
7 emergency services in state DUI accident cases. Unfortunately, the current language
8 in section 9.28.040 is worded differently, merely authorizing the Municipality to bill
9 defendants for the costs of emergency services rather than imposing a duty upon the
10 court to order the costs be paid. As a result, the local courts determined they are not
11 authorized to order restitution for emergency services in municipal DUI cases,
12 leaving the Municipality with no basis for requesting criminal sanctions if defendants
13 fail to pay for the costs incurred.

14
15 The amendment in the proposed ordinance adopts the language of the existing state
16 statute to empower the sentencing judge to order restitution for emergency response
17 services in municipal DUI cases as well.

18
19 **THE ADMINISTRATION RECOMMENDS APPROVAL OF AN ORDINANCE**
20 **AMENDING ANCHORAGE MUNICIPAL CODE SECTIONS 9.28.020 AND 9.28.040**
21 **REGARDING OPERATING UNDER THE INFLUENCE AND RECOVERY OF**
22 **REASONABLE COSTS OF EMERGENCY SERVICES RESPONDING TO A**
23 **MOTOR VEHICLE ACCIDENT.**

24
25 Prepared by: Department of Law
26 Approved by: James N. Reeves, Municipal Attorney
27 Concur: Denis C. LeBlanc, Municipal Manager
28 Respectfully submitted: Mark Begich, Mayor
29
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Content Information

Content ID : 004547

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AN ORDINANCE AMENDING ANCHORAGE MUNICIPAL CODE SECTIONS 9.28.020 AND 9.28.040 REGARDING OPERATING

Title: UNDER THE INFLUENCE AND RECOVERY OF REASONABLE COSTS OF EMERGENCY SERVICES RESPONDING TO A MOTOR VEHICLE ACCIDENT.

Author: fehlenrl

Initiating Dept: Legal

AN ORDINANCE AMENDING ANCHORAGE MUNICIPAL CODE SECTIONS 9.28.020 AND 9.28.040 REGARDING OPERATING

Description: UNDER THE INFLUENCE AND RECOVERY OF REASONABLE COSTS OF EMERGENCY SERVICES RESPONDING TO A MOTOR VEHICLE ACCIDENT.

Keywords: motor vehicle, operating under the influence, DUI

Date Prepared: 11/8/06 4:20 PM

Director Name: James N. Reeves

Assembly

Meeting Date 11/21/06

MM/DD/YY:

Public Hearing

Date MM/DD/YY: 12/12/06

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Workflow History

<u>Workflow Name</u>	<u>Action Date</u>	<u>Action</u>	<u>User</u>	<u>Security Group</u>	<u>Content ID</u>
AllOrdinanceWorkflow	11/8/06 4:33 PM	Checkin	fehlenrl	Public	004547
Legal_SubWorkflow	11/8/06 5:31 PM	Approve	fehlenrl	Public	004547
OMB_SubWorkflow	11/9/06 9:45 AM	Approve	mitsonjl	Public	004547
MuniManager_SubWorkflow	11/13/06 8:11 AM	Approve	abbottmk	Public	004547
MuniMgrCoord_SubWorkflow	11/13/06 8:11 AM	Approve	abbottmk	Public	004547