

MEMORANDUM

TO: Mayor and Town Council

FROM: Ralph D. Karpinos, Town Attorney

SUBJECT: Town Authority to Regulate the Use of Cell Phones and Similar Devices by Operators of Motor Vehicles on Public Streets in Chapel Hill

DATE: February 22, 2010

On February 8, 2010, the Town Council scheduled a public forum for tonight, February 22, 2010, to receive public comment on the possible regulation of cell phone use by motor vehicle operators. The Council at that time requested information from this office regarding the Town's legal authority to enact such regulations and what steps, if any, would be necessary to receive authority to do so.

SUMMARY

I have reviewed applicable provisions of the North Carolina General Statutes related to the Town's police power as well as state statutes related to streets and highways and the regulation of motor vehicles.

On the basis that review, it is my opinion that the Town's general police power, its authority over Town streets and rights of way, and the provisions of North Carolina motor vehicle law would permit the Town to enact regulations over the use of cell phones and similar devices by operators of motor vehicles in motion on the Town's streets, upon the Town Council's finding evidence demonstrating that such regulations would address conditions determined to be detrimental to the health, safety, or welfare of the Town's citizens.

DISCUSSION

1. General Town Police Power Authority.

Under N.C. General Statute Sec. 160A-174 (a), North Carolina municipalities may

by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances.

This authority is subject to limitations listed in G.S. Sec. 160A-174(b):

(b) A city ordinance shall be consistent with the Constitution and laws of North Carolina and of the United States. An ordinance is not consistent with State or federal law when:

- (1) **The ordinance infringes a liberty guaranteed to the people by the State or federal Constitution;**
- (2) **The ordinance makes unlawful an act, omission or condition which is expressly made lawful by State or federal law;**
- (3) **The ordinance makes lawful an act, omission, or condition which is expressly made unlawful by State or federal law;**
- (4) **The ordinance purports to regulate a subject that cities are expressly forbidden to regulate by State or federal law;**
- (5) **The ordinance purports to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation;**
- (6) **The elements of an offense defined by a city ordinance are identical to the elements of an offense defined by State or federal law.**

The fact that a State or federal law, standing alone, makes a given act, omission, or condition unlawful shall not preclude city ordinances requiring a higher standard of conduct or condition.

Depending on the information received by the Council as part of tonight's public forum and any other information received by the Council, there may be a basis established to satisfy the Council that the use of cell phones by drivers operating motor vehicles travelling on the public streets of Chapel Hill constitutes an activity which is detrimental to the health, safety, or welfare of its citizens.

Regulation of the use of cell phones by operators of motor vehicles, it can be argued, would be an exercise of the Town's general police power pursuant to its authority under G.S. Sec. 160A-174, (rather than an issue related to either the Town's authority under G.S. Sec. 160A-296 or subject to restraints which might otherwise apply under Article 3 of Chapter 20 of the General Statutes, both of which are discussed below) inasmuch as the behavior being restricted is the use of cell phones, not the operation of motor vehicles. Moreover, considering the provisions of G.S. Sec. 160A-174(b) it could be argued, there is no clear pre-emption of the Town's authority to regulate such activity, as evidenced by the selected and limited areas where the state government has chosen to enact regulations thus far (discussed below). ¹ The sole exception to the lack of clear pre-emption, as noted below, is the specific language in G.S. Sec. 20-137.4 prohibiting local ordinances regulating use of phones by operators of school bus drivers.

¹ Some regulations pertaining to use of cell phones by operators of moving vehicles also exist at the Federal level. For example, last month the United States Department of Transportation announced a prohibition on truck and bus drivers sending text messages on hand-held devices while operating commercial vehicles. The new regulations apply to drivers of interstate buses and trucks over 10,000 pounds.

2. Town Authority over Streets.

N.C.G.S. Sec. 160A-296 provides, in part:

§ 160A-296. Establishment and control of streets; center and edge lines.

(a) A city shall have general authority and control over all public streets, sidewalks, alleys, bridges, and other ways of public passage within its corporate limits except to the extent that authority and control over certain streets and bridges is vested in the Board of Transportation. General authority and control includes but is not limited to all of the following:

(5) The power to regulate the use of the public streets, sidewalks, alleys, and bridges.

Many of the major streets within the Town limits are State highways, the authority and control of which is vested in the State. These include Franklin Street, Martin Luther King Jr. Blvd., Columbia Street, Fordham Blvd, Weaver Dairy Road, Homestead Road, Seawell School Road, Estes Drive, Ephesus Church Road and some others.

Several years ago the Town of Chapel Hill requested and received an opinion from the North Carolina Attorney General in response to an inquiry regarding the Town's authority to establish a school zone speed limit on a street which was part of the state highway system. In that opinion, dated March 1, 1988, Senior Deputy Attorney General Eugene A. Smith noted:

Public streets within municipalities include those on the Municipal Street System and those on the State Highway System. State highways within municipalities generally consist of those main through streets and highways. *City of Raleigh v. Riley*, 64 N.C. App. 623 (1983). The Municipal Street System includes the remainder of the public streets. Municipalities have the duty and responsibility of constructing and maintaining streets and highways on the Municipal Street System and the Department of Transportation has the duty and responsibility to maintain streets and highways on the State Highway System. G. S. 136-66.1. *Milner Hotels, Inc. v. City of Raleigh*, 271 N.C. 224 (1967); *Matterness v. Winston-Salem*, 286 N.C. 1 (1974). Municipalities have general police power within municipalities, including state highways. G. S. 160A-296 grants municipalities authority to regulate public streets within municipalities, 'except to the extent power and control is vested in the Department of Transportation.' The Department of Transportation is also vested with general regulatory authority over the use of State Highway System streets. G. S. 136-18. The general grant of authority to municipalities over streets is subordinate to the Department of Transportation's rights and duties to maintain the State Highway System. *Morehead City v. N. C. Department of Transportation*, 74 N.C. App. 66 (1985).

If the Town were to rely on Sec. 160A-296 as legal authority to enact regulations pertaining to the use of cell phones by drivers of motor vehicles in motion based on the

statute and the attorney general opinion, it would be prudent to consider limiting such regulations to activities occurring on streets under the jurisdiction of the Town and not state roads and highways. In addition, appropriate signage at the Town limits along major entranceways should be considered.²

3. Town Authority over Operation of Motor Vehicles.

N.C.G.S. Sec. 20-169, a provision of Article 3 of Chapter 20, the Motor Vehicle Act of 1937, provides as follows:

§ 20-169. Powers of local authorities.

Local authorities, except as expressly authorized by G.S. 20-141 and 20-158, shall have no power or authority to alter any speed limitations declared in this Article or to enact or enforce any rules or regulations contrary to the provisions of this Article, except that local authorities shall have power to provide by ordinances for any of the following:

- (1) Regulating traffic by means of traffic or semaphores or other signaling devices on any portion of the highway where traffic is heavy or continuous.**
- (2) Prohibiting other than one-way traffic upon certain highways.**
- (3) Regulating the use of the highways by processions or assemblages.**
- (4) Regulating the speed of vehicles on highways in public parks.**
- (5) Authorizing law enforcement or fire department vehicles, ambulances, and rescue squad emergency service vehicles, equipped with a siren to preempt any traffic signals upon city streets within local authority boundaries or, with the approval of the Department of Transportation, on State highways within the boundaries of local authorities. The Department of Transportation shall respond to requests for approval within 60 days of receipt of a request.**

Signs shall be erected giving notices of the special limits and regulations under subdivisions (1) through (4) of this section.

(emphasis added)

North Carolina State Law pertaining to the regulating operation of motor vehicles in Article 3 of Chapter 20 of the General Statutes includes three statutes regulating use of mobile phones. Copies of each of these are attached.

a. Regulation of use by persons under 18 years of age.

N.C.G.S. Sec. 20-137.3, enacted in 2006, prohibits persons under the age of 18 from operating a motor vehicle in motion while using a mobile telephone.

² Posting signs in State right of way may require approval of the State Department of Transportation.

b. Regulation of use by school bus drivers.

N.C.G.S. Sec. 20-137.4, enacted in 2007, prohibits persons from operating a school bus in motion while using a mobile telephone or technology associated with such a telephone.

Unlike the two other state statutes regulating use of mobile phones by operators of moving vehicles, this statute includes an express prohibition on any local ordinance purporting to regulate the use of mobile telephones by operators of a school bus.

c. Regulation of use of mobile phones for texting or email messaging.

N.C.G.S. Sec. 20-137.4A, enacted in 2009, prohibits all persons from operating a motor vehicle in motion while using a mobile telephone to read or send any text message.

Session Law 2009-155, which enacted N.C.G.S. Sec. 20-137.4A, also calls for a report from the Joint Legislative Transportation Oversight Committee on the “leading causes of driver inattention or distraction, the risks posed by driver inattention or distraction, and any methods that might be used to manage those driver distractions and promote highway safety.” That report, including any recommendations for legislation, is due to the General Assembly April 15, 2010.

Other than these three provisions I have not any identified a provision of Article 3 of Chapter 20 of the General Statutes that would need to be considered in determining if any proposed regulation of the Town would be permitted in order to not be contrary to the State’s Motor Vehicle Laws. Accordingly, I believe that as long as the Town’s regulations are not contrary to provisions of these three³, they would be not be prohibited by G.S. Sec. 20-169.

CONCLUSION

In the absence of any direct statutory law or binding Court decisions directly on point, it appears that a reasonable argument can be made that the Town has the legal authority to enact regulations on the use of cell phones by operators of motor vehicles in motion on public rights of way within the Town’s corporate limits (other than operators of school buses). The case in support of such regulations would be enhanced if the provisions applied only to streets under the Town’s authority.

In the alternative, upon hearing public comment, if the Council is persuaded that such regulations merit further consideration the Council may wish to defer further consideration until it has had an opportunity to consult with the Town’s legislative delegation about this issue and to hear any information they may have regarding the report of the Joint Legislative Transportation Oversight Committee, noted above.

³ For example, any Town regulation would need to include the exceptions for emergency use as provided in each of the three statutes.

ATTACHMENTS

1. N.C. General Statutes (p. 7).
2. Questions and Answers Regarding Cell Phones (p. 13).
3. Status Report from Insurance Initiative on Highway Safety (p. 17).