



TECHNICAL BRIEF

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ADMINISTRATIVE HEARINGS: AN OPTION FOR MUNICIPAL REGULATORY FUNCTION (Part II)

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This Technical Brief, Report #200-1203-10, June 2007, is part II of a two-part brief which considers Administrative Hearings as an option to make municipal regulatory function more effective and efficient. It focuses on the advantages of decriminalizing various moving violations or other municipally regulated “criminal” activity for which the penalty is normally a fine and rarely, if ever, results in incarceration. Regulating these behaviors through an administrative process by fines and/or vehicle impoundment is a more efficient use of municipal resources and endorses a more collectable revenue stream for municipalities. Questions remain whether an act of “decriminalization” is valid under Mississippi’s “home rule” statute or whether enabling legislation is necessary.

Part I, released as Report #200-1203-09, May 2007, dealt with administrative hearings as an option for municipal regulatory function.

A survey of Mississippi municipalities reveals regulatory default and neglect. Municipalities set up ordinances to guide the development of their communities, to protect their citizenry, to regulate business and commercial interests, and for other relevant regulatory reasons, but rarely do they implement an effective regulatory function.

The failure to implement an effective regulatory function is a two-fold default: (1) it is a default of the community’s expectation of governance and (2) it is a default of the municipal responsibility for governance.

Municipal regulatory function is varied. It entails the regulation of non-criminal traffic violations, animal compliance in the community, fire codes, building codes, zoning codes, retail and commercial business licenses, truancy and the like. The most effective regulation function paradigm is a collaboration between the municipal department in which the regulatory function is housed and an administrative adjudication process. The administrative adjudication process is a quasi-judicial process that can be housed under the office of the Mayor/Executive or as an administrative

appendage of the Municipal Court. In communities which provide services for which they charge, such as water, sewer or garbage collection, the administrative adjudication process can be authorized to handle delinquencies and termination of service issues.

Various states have taken legislative action to “decriminalize” various activities which are handled in the municipal forum so that they can be dealt with administratively; other states have taken the action to “decriminalize” various activities so that they can be dealt with administratively under home rule authorization. Regardless of the vehicle (home rule or specific legislative authorization), this “decriminalization” process, when appropriately applied, affords more expeditious resolution with the use of lesser municipal resources.

“Decriminalization” should occur only when the municipality can document that a conviction for certain activity rarely, if ever, carries the probability of incarceration (although incarceration is a possibility as a result of the conviction) and normally results in a fine as the only form of penalty imposed

Typical actions to decriminalize certain offenses which are not of a serious nature, making them – instead of criminal offenses – administrative violations, normally occur when a state or community comes to the realization that decriminalization of non-noxious criminal offenses result in the elimination of arraignments on these violations, disposition of uncontested violations by mail, and informal, administrative hearings when the actual elements of the violation are questioned and/or there is a question relative to the proposed penalty, thus streamlining the handling of those violations and achieving a more expeditious system for the administrative processing of these violations or infractions. States or communities that have taken this action have sought to:

- Eliminate the long and tedious arraignment proceeding for a majority of traffic matters;
- Facilitate and encourage the resolution of formerly minor criminal infractions through payment of a monetary assessment;
- Speed the disposition of contested cases through an administrative hearing in which the rules of evidence will not apply and the hearings officer will consider as evidence the notice of traffic infraction, applicable written police reports or other written statements by the officer who issued the notice, other relevant written material, and any evidence or statements by the person contesting the notice of infraction;
- Dispense in most cases with the need for witnesses, including law enforcement officers, to be present and dispense with the participation of a prosecuting attorney and a judicial officer;
- Allow judicial, prosecutorial, and law enforcement resources to be used more effectively and efficiently;
- Save community funding by less dependence on judicial, prosecutorial and enforcement personnel;
- Reduce taxpayer frustration with the judicial system by simplifying the traffic court process.

The highest courts in a number of states have considered the decriminalization process and found it to be constitutionally sound.

The State of Hawaii is one of the most recent states to pass enabling legislations which authorize communities to decriminalize various offenses. In making that decision, the Hawaii Legislature articulated the following:

Where the demand on judicial resources continues to outstrip the supply, efforts to increase the use of non-judicial dispute resolution methods are necessary, not only to focus those limited resources on matters of the highest priority, but to instill in the public the confidence that those resources are being used fairly, efficiently, and quickly in those cases that must go to court. Widespread attention has been paid to alternative dispute resolution in the civil contest – arbitration, mediation, private judges, etc. – but efforts to prioritize the use of judicial resources in criminal cases is less well known, and perhaps more controversial.

At least part of the pressure on judicial resources arises from the traditional legislative practice of trying to deter undesirable conduct by making it a criminal offense. While, at one time, the prospect of being convicted of a criminal offense might have dissuaded offenders from engaging in prohibited conduct, the proliferation of non-traditional criminal offenses outside the Hawaii Penal Code and an emerging jurisprudence requires those offenses be judicially processed in an increasingly tedious fashion has diluted the intended deterrent effect and made the prospect of actually having to suffer punitive consequences (i.e., incarceration) increasingly remote.¹

The State of Hawaii's Legislative Research Office was charged with studying a suggestion made by the District Court Traffic Judges Group which requested, in addition to standardization of traffic case processing statewide, the treating of some non-serious criminal offenses as administrative violations. The undertaking by the research office established a methodology of study (1) to identify criminal violations in the criminal code and (2) to identify criminal violations which reside outside the criminal code and have been criminalized based on the penalty imposed upon conviction of the violation; and (3) to identify whether there are offenses which, although not legislatively denominated as criminal, have been treated as criminal violations by virtue of judicial decision. Thereafter, the research office attempted to quantify the scope of the problem by identifying (from the list previously established via the methodology) those offenses that most frequently came before the court even though the punishments regularly imposed were actually more like those punishments regularly imposed for non-serious, decriminalized traffic offenses.

The Legislative Research Office formalized recommendations which included directing decriminalization of offenses that are more appropriately disposed of through fines; allowing for a scheme of graduated penalties so that criminal penalties attach in the event of subsequent offenses (during a specific period of time, for instance); and developing authorization for all enforcement personnel who have the power to arrest offenders and issue citations to have the authority to enforce any administrative rule promulgated pursuant to the decriminalization of certain offenses.

¹ Baker, Edwin L., "Decriminalization of Non-serious Offenses: A Plan of Action". Report No. 3, 2005; Legislative reference Bureau, State Capitol, Honolulu, Hawaii 96813 (January 2005).

A reading of Mississippi's home rule statute, supporting case law and attorney generals' opinions, could assure the reader that a Mississippi municipality has the authority to act to decriminalize offenses if they choose. However, it is prudent to say that Mississippi courts (and courts in other states) have historically construed Mississippi's home rule statute in a way that "engenders a cautious attitude in local officials [and] makes them wary of innovation".²

²Barron, David J., Gerald E. Frug, and Rick T. Su, "Dispelling the Myth of Home Rule: Local Power in Greater Boston; Rappaport Institute, Cambridge Massachusetts (2003).

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Quarles remains active in bar work, and currently chairs the Women in the Profession Committee, a standing committee of the Mississippi Bar. She also serves as co-chair of the Mississippi Supreme Court's "Gender Fairness Implementation Study Committee" and acts as the Chief Operating Officer of the Workers' Compensation Section of the Mississippi Bar. She is a fellow of the Mississippi Bar Foundation, a recipient of the Mississippi Bar's Distinguished Service Award, a member of the Mississippi School for Math and Science Foundation Board and a member of the MUW Alumni Board. Quarles was recently honored by the American Bar Association's Administrative Law and Regulatory Practice Section, receiving the Mary C. Lawton Award for lasting contributions to the Mississippi Workers' Compensation Commission in the areas of alternative dispute resolution and access for Hispanic workers.

In 2004, Quarles was named one of Mississippi's 50 Leading Business Women by the Mississippi Business Journal; the Journal recognized her service to the State as a Commissioner as well as entrepreneurial skills developed in her property management business in Starkville, Spruill Property Management, LLC

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