April 2, 2007

Terry Reece
Town of Mountain City
210 South Church Street
Mountain City, Tennessee   37683-1599


Dear Terry,

You have asked about fines for violation of Town ordinances. Specifically, you want to know how much the fine can be and if a separate fine can be assessed for each day of a violation.

Your charter authorizes you to levy fines and also specifies the amount. *Article VI, Section 1 (11)* states that the Town can impose fines "... provided that no fine shall exceed fifty dollars ($50)." This is in line with most cities and in compliance with the *Tennessee Constitution*, which also limits the amount of fines to $50 (*Article VI, Section 14*). So, fifty dollars is the limit.

But you have also asked about the possibility of assessing a fine for each day of non-compliance. The ordinance you passed which adopted your *Code of Ordinances* specifically states, "Each day any violation of the municipal code continues shall constitute a separate civil offense." Thus it would appear at first glance that you could assess a fine for each and every day of non-compliance.

But I have spoken with Sid Hemsley, MTAS Attorney in Knoxville, and he says that you need to be careful about how you do this. He says it is best to levy repeated fines only after you have given the person a reasonable amount of time to correct the violation. After this period of time you can then assess the fine again.

For example, if you have a person with a junk-vehicle on their property in violation of a city ordinance you can send them notice that if they don't remove the vehicle within 14 days (for example), they will be fined fifty dollars. At the end of 14 days if the vehicle is still there you can go through the whole process again, that is, once again sending notice and asking for correction within 14 days. If compliance does not occur then you can do all of this again, and so on and so on.

Here is how Sid responded when I asked him about all of this:

> *In some cases, a city can, in theory, levy a fine of $50 per day for each violation of a municipal ordinance. Indeed, § 5 of the adopting ordinance of most municipal codes in Tennessee contain a provision making each day of a violation of a municipal ordinance a separate offense. But in <u>City of Chattanooga v. Davis</u>, 54 S.W.3d 248 (Tenn. 2001), the Tennessee Supreme Court held that the fines or penalties for municipal ordinance violations are limited to $50 where the fine or civil penalty is punitive, and to $500 where the fine or civil penalty is remedial. From a practical standpoint, the distinction between "punitive" and "remedial" is a difficult one even for municipal courts to understand. But the distinction obviously turns on whether the municipal court is trying to "punish" the offender (as in the case of most traffic offenses and many other offenses), or whether the municipal court is trying to secure the violator's compliance with the ordinance, or recover the cost of enforcing the ordinance (as in the case of at least some building or property codes).*

> *In <u>Davis</u> the Tennessee Supreme Court had held that under Article VI, § 14, punitive municipal fines were limited to $50. But in the recent case of <u>Town of Nolensville v. King</u>, 151 S.W.3d 427 (Tenn. 2004), the question was whether a two-tiered municipal court fine system in which the municipal court could impose punitive fines of over $50, where the defendant had the right to appeal his conviction de novo to the circuit court, was constitutional under Article VI, § 14. No, held the Tennessee Supreme Court.*

> *However, pertinent to the code enforcement and property maintenance aspects of this case, the defendant in <u>King</u> was charged by the City of Nolensville with violating its overgrown and dirty lots ordinance, which closely tracked the "Overgrown and Dirty Lots Statute" found in <u>Tennessee Code Annotated</u>, § 6-54-113, but was free-standing. The ordinance also prohibited on real property in the city the storage or lodging of "abandoned or unusable automobiles, motor vehicles, or storage trailers." But in the Court's own words:*

>> *The appellant had, at that time, nine inoperative vehicles, one trailer, two piles of scrap and a pile of wooden pallets illegally stored on his property. The appellant was found guilty and fined fifty dollars; however, the fine was suspended for thirty days to give the appellant an opportunity to correct the violation. Apparently, all of the offending items were removed, and in May, the appellant was issued a second citation for having an inoperative automobile, a trailer, and a "pile of assorted personal belongings" stored on his property in violation of the ordinance.*

The appellant was again found guilty in municipal court but given another sixty days in which to remedy the violation.  Finally, in August of 1999, a third hearing was held in municipal court.  The appellant was found to be in continuing violation of the ordinance and fined $300 per day for each of the sixty-two days it was determined he had been in violation up to that point.  Thus, the total of the fines levied against the appellant was $18,600. [At 429]

With respect to the distinction between punitive and remedial fines, the Court said that, "In the case before us today, both parties agree in this Court that the sanctions imposed by the municipal court judge were 'fines' [apparently punitive ones] within the meaning of Article VI, section 14." It also declared that "We stress that our holding today, along with our previous holding in  City of Chattanooga v. Davis, applies only to punitive monetary sanctions and preserves a municipality's power to impose remedial monetary assessment for violations of ordinances." [At 433]

Because the penalties in this case were punitive, the Court reduced the fine from $18,600 to $3,100, which reflected a fine of $50 per day for each of the 62 days the defendant was in violation of the ordinance.

King stands for the proposition that punitive fines of $50 for each day a municipal ordinance is violated are generally legal.  But that case was an egregious one, which actually involved two cases, one preceding the case to which the per diem fine attached, and the defendant's clear abuse of the ordinance after the court gave him two lengthy opportunities to clean up the property.

That case points to this practical proposition:  It is probably generally best for municipalities not to overreach in most code enforcement cases. That is why I suggest that cities charge a municipal ordinance violation in such cases, and start over again with another case if the defendant does not clean up the property in question.  That is practical advise based on what I think courts will generally do and not do in code enforcement cases.  In most cases they simply are not going to impose a $50 fine for each day the ordinance is violated, especially on the first go around.  Where a city can show a record of trying to cajole compliance with such violations it is more likely that the city court will respond to the city's effort.  It is, after all, the municipal court which must decide to impose what is a relatively draconian penalty of $50 a day.  If the defendant decides to appeal such a penalty to the circuit court where the case is heard all over again as if it were never tried in the city court.  Generally, many circuit courts will not impose fines of $50 for each day the ordinance is violated.

Those are the reasons... that it is best for municipalities to take a conservative approach to handling code enforcement type cases in city court.  While a city may have a right to reach for a fine of $50 per day for each violation of such ordinances, I think that

*right rests upon narrow practical grounds that require careful treading.*

I know all of this seems complicated, and I guess it is. But that's all the more reason to be a little careful when assessing a fine on a repeated basis. Anyway, I hope this answers your question. If not, or if I can provide any further information please let me know.

Sincerely,

Patrick Hardy
Municipal Management Consultant

cc: MTAS Attorney Sid Hemsley