


January 27, 2015

TO: The Honorable Mayor and City Council
FROM: Tom Carruthers, City Attorney 
SUBJECT: Rationale of Settlement Policy for Fire Code Violations

Introduction

Historically most businesses and facilities within the City of Greensboro have cooperated with fire officials concerning compliance with the Fire Code. The Collections Division of the Finance Department is the first department to contact businesses to seek payment of outstanding civil citations. In some cases, due to the amount of money owed for civil citations, the matter is turned over to the City Attorney's Office. In April 2010, due to the number of pending cases involving Fire Code Violations, the City Manager's Office directed the City Attorney's Office to prepare a policy for settling cases involving citations issued for Fire Code Violations.

Civil Citations for Fire Code Violations

The Fire Prevention and Protection Ordinances for the City are codified in Chapter 10 of the Greensboro Code of Ordinances. The vast majority of civil penalty matters referred to the City Attorney's Office are for overcrowding. Section 10-4 of Chapter 10 states "Compliance with the provisions of this chapter shall be enforced by the fire inspection officer of the Greensboro Fire Department. Failure to comply with any of the regulations of this chapter shall be unlawful and a violation of the fire ordinance and all remedies authorized by law for noncompliance with the fire ordinance, including the issuance of a civil penalty citation, may be exercised to enforce any violation."

In Greensboro, Section 10-5(a) of Chapter 10 sets out the following violations and penalties:

"Any person, firm, corporation or agent who shall violate any provision of this chapter shall be subject to a civil penalty of fifty dollars (\$50.00). Except as set forth herein, any person, firm, corporation or agent who shall violate any technical provisions of the fire prevention code which creates an imminent safety to life hazards shall be subject to a civil penalty of one hundred fifty dollars (\$150.00) per violation. Any person, firm, corporation or agent who shall exceed any lawfully posted occupancy shall be subject to a civil penalty of one hundred dollars (\$100.00) per person in excess of the posted occupancy. Any person, firm, corporation or agent who fails to maintain a counting procedure (such as mechanical counters) approved

by the fire code official, shall be subject to a civil penalty of one hundred fifty dollars (\$150.00) per missing counter or inaccurate counter. Depending on the number of entrances and exits, at least one "in" counter and at least one "out" counter shall be maintained to provide an accurate count of all occupants inside the building at any time. Any person, firm, corporation or agent who shall lock, block or obstruct an exit shall be subject to a civil penalty of five hundred dollars (\$500.00) per exit for a first violation, one thousand dollars (\$1,000.00) per exit for a second violation and one thousand five hundred dollars (\$1,500.00) per exit for a third and all subsequent violations. Any person, firm, corporation or agent who shall tamper with or maliciously discharge fire protection equipment, or damage any emergency or exit lighting equipment shall be subject to a civil penalty of one hundred fifty dollars (\$150.00) for a first violation, three hundred dollars (\$300.00) for a second violation and four hundred dollars (\$400.00) for a third and all subsequent violations. No penalty shall be assessed until the person alleged to be in violation has been notified of the violation by certified mail, return receipt requested, or by personal service (inspection), or by arrest resulting in prosecution. Any fire inspection officer who has a reason to believe that a violation of this chapter or the aforesaid technical provisions of the fire prevention code has been committed shall either send a civil penalty citation to the violator by certified mail or personally deliver such citation to the violator stating the nature of the violation, the penalty to be imposed upon the violator, and shall direct the violator to pay the penalty to the city tax collector's office within fourteen (14) days of receipt. Also, the owner, tenant, or occupant of any building or land or part thereof and any architect, builder, contractor, agent or any other person who participates or acts in concert, assists, directs, creates, or maintains any condition that is volatile of the requirements of this chapter or the aforesaid technical provisions of the fire prevention code, may be held responsible for the violation and subject to penalties and remedies herein provided."

Settlement Policy

The City Attorney's Office drafted the Settlement Policy, attached hereto as Exhibit 1, incorporated herein by reference. This policy was approved by the City Manager's Office and the Fire Department as well as each individual settlement. This policy allows the City to settle matters in a uniform manner to avoid allegations of favoritism, discrimination, or bias. The City's goal in issuing a citation for any code violation is compliance rather than collection of a fine for the violation. The City Attorney's Office encourages all staff with authority to issue civil citations to educate the violator in an effort to prevent the issuance of subsequent citations. The threat of civil citations has served as an incentive to increase code compliance in most cases.

Due to the time and cost of going through the court system, the necessity of making sure the citation is completed properly and served on the appropriate responsible party, the difficulty in obtaining a verdict for the full amount of the issued civil citations, and the availability of an appeal which will only lengthen the process, the attached settlement policy is the most effective way to receive payment for Fire Code Violations.

North Carolina General Statutes Chapter 160A-175(c) authorizes cities to adopt ordinances allowing the issuance of civil citations for code violations. The procedures in Chapter 10 of the Greensboro Code of Ordinances must be followed for the civil citations to be upheld. The Settlement Policy for Fire Code Violations has resulted in code compliance without spending the court or city employee's valuable time. The Settlement Policy requires a settlement agreement which includes security in the form of a Confession of Judgment for the full amount of the civil citation if the settlement agreement is not complied with in full during the repayment period (typically 2 years). This has the added effective of incentivizing future compliance. To date the City has not experienced repeat offenders after execution of a settlement agreement. The policy is in compliance with the provisions of Section 10-5(b) of Chapter 10, which reads "Civil penalties assessed under this section are considered restorative; intended to provide compensation to the city for costs associated with the city's program to monitor, control, prosecute, cure and/or correct the violation." Traditionally, prior to the written policy in question, the City's practice with regard to civil citations for code violations has been to negotiate them to reduce the civil citations in part or dismiss them in full if the violation was corrected. The Greensboro Fire Prevention and Protection Ordinance, codified in Chapter 10 of the Code of Ordinances are intended to protect the health and safety of the citizens and visitors of Greensboro through code compliance. Civil citations are intended to correct illegal behavior and not to provide significant funds to the City's budget on an ongoing basis.

If you have any questions, feel free to contact me.

TC/jpb

Cc: Jim Westmoreland, City Manager
David Parrish, Assistant City Manager
Chris Wilson, Assistant City Manager
Wesley Reid, Assistant City Manager
Mary Vigue, Assistant City Manager

Exhibit 1



April 6, 2010

TO: Bob Morgan, Asst. City Manager

FROM: Jim Clark

**SUBJECT: PROPOSED SETTLEMENT POLICY FOR FIRE CODE
VIOLATION LAWSUITS**

I. PURPOSE OF POLICY

In view of the fact that the City has numerous Fire Code Violation lawsuits which involve differing positions of fact and law, the City Manager's Office desires to promulgate a settlement policy concerning civil lawsuits to recover Fire Code Violation penalties. It is intended that this policy will provide guidance for the Legal Department and other affected Departments.

II. GRANT OF AUTHORITY FOR SETTLEMENT BY CITY STAFF

Under Greensboro Code of Ordinances sec. 10-5, the fire inspector is given the express authority to initiate a civil action for the collection of a civil penalty, among other remedies. Further, under sec. 10-5(d), "*In addition to or in lieu of the penalty, the fire inspection officer or other appropriate authority may seek a mandatory injunction seeking enforcement of this ordinance [section].*"

While this extension of authority does not expressly state the full range of settlement possibilities available in resolving this form of claim, it clearly gives the fire inspection officer or other appropriate authority (which must necessarily be the City Manager's office) the authority to settle claims. Considering that the language, "or in lieu of the penalty" is used in conferring specific authority, the fire inspection officer or other appropriate authority is clearly granted the discretion to compromise and settle fire code violation civil actions for some remedy less than the full amount of the penalty.

Also, the Ordinance clearly states that, "[C]ivil penalties assessed under this section are considered restorative, and intended to provide compensation to the city for costs associated with the city's program to monitor, control, prosecute, cure and/or correct the violation. As such, the amount declared herein is presumed to provide sufficient restoration to the city for its costs."

III. POLICY GOALS

The singular public policy goal of pursuing civil penalties for fire code violations is to modify the behavior of businesses to conform to the fire code. Violations concerning overcrowding involve significant risk to the consuming public within Greensboro and compliance with safety-related ordinances is intended to protect the public. The nature of the penalty is to deter conduct by impacting the financial circumstances of the violators. Past penalty amounts were less effective because the low amounts were considered a “cost of doing business,” in which repeated violations were more financially profitable than compliance with public-safety laws.

The present amount of penalty is such that businesses are more cautious to avoid violations.

It should also be remembered that the penalty is intended to recover the City’s costs of monitoring, controlling, prosecuting and curing the violations. While these costs are necessarily expensive, they are also matters which are commonly allocated within the City’s budget, and it is the consistent past experience of Legal Department personnel that neither deterrence nor recovery of costs swayed courts to award full monetary penalties in past litigation for collections, *which involved the prior penalty amounts*. The current Ordinance provision, involving substantially increased penalties, is expected to result in similar reductions.

IV. STAKEHOLDER OVERVIEW

A survey of the various departments involved in the prosecution of civil penalties for fire code violations reveals the following:

- A. Fire Department personnel uniformly favor across-the-board enforcement of the full penalty amounts. In their opinion, failure to fully enforce the penalties will lessen its effectiveness in deterring conduct.
- B. Collections Division personnel have no guidance in collecting the penalties short of the full amount; however, a recent case involved the penalized business offering the entire amount of the penalty on a payment plan. Collections personnel halted their efforts to resolve the matter when informed that higher authorities may not be willing to accept anything other than payment in full.
- C. Legal Department personnel believe that full enforcement of the penalty amounts across-the-board presents difficulties that the City should avoid, and also involve results without considering the equities of the individual situations. Additionally, the Legal Department supports limited authority for the Collections Division to resolve matters prior to instituting a lawsuit for purposes of efficiency and cost reduction.

As an example, the Fire Department agreed to waive the filing fees paid to the Guilford County Clerk of Superior Court in favor of recovering the full penalty on a payment plan by the Collections Division. In this instance, the Fire Department was motivated to agree to a limited compromise because the penalized Business owner had been polite, cooperative and willing to accept responsibility for the violation.

The Legal Department supports a defined settlement structure for reducing penalty amounts *in exchange for* 1) actual recovery of penalties to increase the deterrent effect; 2) obtain monetary security to insure payment and obtain leverage against future violations; and 3) agreements to allow the City to terminate the privilege license of penalized Businesses for repeated offenses as additional and greater leverage to insure compliance with the law. The Legal Department's position believes that it synthesizes the interests of the other stakeholders and takes into account:

1. The reductions of time and resources devoted to trial litigation of penalties;
2. The uncertainty of outcomes at trial;
3. The certainty of results obtained by settlement;
4. Reinforcement of the public perception that the City is successful and serious about insuring the public safety;
5. Creation of a limited framework for Collections to settle penalties prior to the filing of a civil action by the Legal Department;
6. The use of settlement agreements to extract security from the penalized Business for payment of the full amount of the penalties and additional penalties for future violations;
7. The use of settlement agreements to implement restraints against the penalized Business;
8. The use of license revocation as additional restraint against penalized conduct;
9. Flexibility to allow the various stakeholders to set penalties which take into account equities or egregious conduct within the confines of a "floor limit", which is believed will create incentives to cooperate with public safety officials and avoid costly litigation or the extreme result in the loss of private business operations.

V. DETAILS OF RECOMMENDED POLICY

The Legal Department believes that the following provisions should be the settlement policy adopted for settlement of Fire Code violations which remain unpaid more than 14 days after issuance of the citation:

- A. Prior to the filing of a lawsuit, the Collections Division is authorized to negotiate payment plans for the payment of fire code violations, provided that the settlement agreement includes security in the form of a Confession of Judgment for the full amount of the violation. The Collections Division is not authorized to reduce the amount of the penalty without the consent of the chief fire inspection officer or higher authority which shall mean Department Head, Assistant City Manager or City Manager.
- B. In the event a civil action is filed to collect a civil penalty, the Legal Department is authorized to negotiate the reduction of a civil penalty subject to the remaining details herein, subject to the consent of the chief fire inspection officer or higher authority which shall mean Department Head, Assistant City Manager or City Manager.

C. In determining the appropriate compromise or reduction of a civil penalty, the Legal Department is required to consider the following factors:

1. A penalty may be reduced or deducted completely from the total amount owed for any individual violation in which there is an insufficient basis in fact and/or law to support an award of judgment.
2. The operator(s) of the penalized Business made a good faith attempt to comply with the fire code;
3. The operator(s) of the penalized Business did / did not cooperate with the fire inspection officers in the investigation and issuance of the civil penalty;
4. The operator(s) of the penalized Business did / did not engage in active concealment of conditions which created or contributed to one or more fire code violations;
5. The business operation of the penalized Business was / was not allowed to continue to operate after the premises was inspected;
6. The penalized Business has / has not paid or otherwise been adjudicated responsible for any other violation of the fire code in Greensboro for the ten years next preceding the violation(s) being settled;
7. The penalized Business has / has not paid or otherwise been adjudicated responsible for any the same violation(s) of the fire code in Greensboro for the ten years next preceding the violation(s) being settled;
8. The penalized Business does / does not owe Greensboro a penalty for any other violation of the fire code or other Ordinance enacted for public safety purposes;
9. The operator(s) of the penalized business did / did not correct the condition(s) which created or contributed to one or more of the violations found by the fire inspector during the initial inspection.
10. The penalized Business was cited for only one / more than one specifically enumerated type of violation (i.e., overcrowding) during one inspection.
11. The operator(s) of the penalized Business carelessly disregarded public safety by knowingly failing to keep safety-related equipment or personnel.
12. Where the total penalty amount is less than \$5,000, consideration may be made to smaller reductions in order to retain the deterrent value of the reduced penalty amount.
13. The penalized Business otherwise acted in flagrant disregard of public safety.

D. The maximum settlement result to which the City may agree is: 1) recovery of the entire amount of the penalty; 2) recovery of all costs which may be awarded by the court; 3) an agreement to cease the same violations for a period of at least 2 years, supported by a Confession of Judgment and agreement to an additional penalty; and 4) an agreement that the penalized Business consents to allow the City to revoke its privilege license as an additional punishment for any violation of the same ordinance during the term of the agreement. This maximum settlement result actually exceeds what the City is entitled to recover with a judgment for a civil penalty, which is a monetary recovery only.

- E. In exchange for reductions of a civil penalty, waiver of costs and/or a payment plan, the City will attempt to obtain one or more of the following alternatives, depending upon the circumstances of the settlement:
1. A Confession of Judgment which secures the total settlement amount, if periodic settlement payments are to be made by the penalized Business.
 2. An agreement that remains in force during the term of the payments or 2 years, whichever is longer, for the penalized Business to receive an additional penalty of \$500 per violation per day for any occurrences of the same violation(s).
 3. Agreement that the Confession of Judgment applies to the current penalty and any possible future penalties incurred as a result of the settlement (this term does not include violations of other fire code provisions, i.e., un-inspected fire extinguisher).
 4. Agreement that the City may, in its sole discretion, determine whether a default under the settlement agreement has occurred by failure to make payments and/or occurrence of new violations, and that such determination is binding upon the penalized Business.
 5. Agreement that the City may, in its sole discretion, revoke the business privilege license of the penalized Business for future violations of the same provision of the fire code.
- F. In negotiating the settlement of a fire code violation, the total reduction of the penalty shall not exceed a 50% "floor limit" of the total penalty amount, excepting only where the penalty is subject to reduction due to the factor described in paragraph C.1. above.
- G. In negotiating the settlement of a fire code violation, all other factors listed in paragraph C. may be taken into account, as well as other factors which may reasonably apply but are not listed in paragraph C. The accumulation of factors which favor the penalized Business may be considered in support a reduction of the penalty amount; however, greater weight in support of a reduced penalty shall be given to the agreement of the penalized Business to cease and desist from future violations upon incurring the additional penalties listed in paragraphs E.2.-5.
- H. A reduction need not be given to each penalized Business, but will be determined on a case-by-case basis and supported by a written memorandum prepared by the Legal Department. The memorandum will specify all of the factors which favored or opposed the reduction of the penalty.
- I. In settling a fire code violation, all settlements where the total penalty does not exceed \$20,000 may be approved by the Department Head, Assistant City Manager or City Manager. Where the total penalty exceeds \$20,000, approval of settlement may only be made by the City Manager, unless the City Manager may otherwise direct.

- J. In the event that a second violation of the same provision of the fire code occurs by the same penalized Business within 10 years of an earlier violation, the City will not agree to reduce the penalty more than 25% of the total amount of the violation. In the event that a second violation occurs within 5 years of an earlier violation, the City will not agree to reduce the penalty more than 10% of the total amount of the violation. In the event of that a second violation of the same provision of the fire code occurs by the same penalized Business within 3 years of an earlier violation, the City will not agree to any reduction of the penalty. The City may also pursue injunctive relief at the direction of the City Manager.
- K. In the event that a subsequent violation of the same fire code provision occurs within three years of an earlier violation appears to be a knowing act, the City Manager may also direct that criminal process issue against the owner(s) and/or operator(s) of the penalized Business, whoever may appear to be criminally responsible.
- L. In settling a fire code violation, all personnel involved in the negotiation shall always take into account the following policy guidance:

The increased civil penalties are intended to create a greater deterrence to unsafe and unlawful conduct which, in the experience of City personnel, had previously been treated as “a cost of doing business.” In every case, City personnel should negotiate reductions of the civil penalty reluctantly and not without reasonable assurance that the reduction will foster continued lawful business while deterring public safety violations. This reasonable assurance must be clearly articulated in a memorandum supporting the reduction, and no negotiation is final without approval as described herein.

JAC/

cc: T. Wood (City Attorney)
G. Grayson (Fire Dept.)
L. Harris (Collections)