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THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE  
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Local Ordinances and Infractions

Dear Mr. Schwartz:

I am responding to the letter sent to our office by William Nary, former Meridian City Prosecutor, requesting an opinion as to whether counties and cities can create ordinances punishable as infractions rather than misdemeanors. We also received a similar letter from D. Ray Barker, city attorney for Genesee, requesting an opinion as to whether dog-at-large and other minor offenses could be changed from misdemeanor to infraction offenses. Because the research involved in both requests was identical, I will respond to your request as well as that of Mr. Barker in this letter.

I have concluded that:

1. Under the police power delegated to cities and counties by the Idaho Constitution, cities may create ordinances punishable as infractions.
2. In the area of traffic regulation the state has specifically authorized local governments to regulate traffic and to create traffic ordinances punishable as infractions.

3. In areas other than traffic regulation, cities and counties may create ordinances under their police power. These ordinances may be punishable as infractions or misdemeanors within the penalty limitations set forth in Idaho Code § 50-302 and § 31-714.
4. State statutes which provide for suspension of the driver's license of a person who fails to appear or pay the penalty of an infraction citation are applicable only to traffic infractions. State law provides no effective means to collect the penalty on a citation written for an infraction which is not a traffic infraction, since a driver's license may be suspended only for failing to pay a traffic citation. Under their police power, cities and counties may wish to create a separate misdemeanor offense of failure to appear on an infraction citation to ensure that the courts have an effective tool for dealing with persons who fail to appear or pay the penalties on non-traffic infractions.

I.

GENERAL POWER OF CITIES AND COUNTIES TO CREATE  
ORDINANCES PUNISHABLE AS INFRACTIONS

A. Introduction

The 1982 Traffic Infractions Act<sup>1</sup> created a new offense known as an "infraction," a "civil public offense, not constituting a crime, which is punishable only by a penalty not exceeding one hundred dollars (\$100) and for which no period of incarceration may be imposed." Idaho Code § 18-111, § 18-113A, § 49-110-I.

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<sup>1</sup>The Idaho Traffic Infractions Act was originally passed in 1981. (1981 S.L., ch. 223, p.415.) This 1981 version was to become effective on July 1, 1982, but it was repealed and major changes were made in the law by the 1982 legislature. (1982 S.L., ch. 353, p.874.) The 1982 version became law on March 1, 1983. References herein to the original Traffic Infractions Act are to the 1982 version which actually went into effect, and not to the 1981 version which was repealed before it became effective.

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The main portion of the law, now titled "Traffic Infractions," is located at Idaho Code § 49-1501 through § 49-1506 (formerly Idaho Code § 49-3401 through § 49-3411). The traffic infractions statutes authorize police officers to issue citations for traffic infractions (Idaho Code § 49-1501); set forth the procedure for processing infraction citations (Idaho Code § 49-1502); clarify that if local ordinances create a misdemeanor for an act which is an infraction under the state law, the punishment under the ordinance must also be an infraction (Idaho Code § 49-1503); set forth the appeal procedure (Idaho Code § 49-1504); provide for the suspension of the driver's license of persons who fail to pay the penalty for a traffic infraction (Idaho Code § 49-1505); and provide that these provisions shall be uniformly applied throughout the state (Idaho Code § 49-1506).

The Traffic Infractions Act was intended to improve, economize, and streamline traffic enforcement. The legislature made the following statement of purpose in its 1982 revision of the infraction laws:

SECTION 1. By the enactment of Chapter 334, Laws of 1981, the state made a dramatic move to reduce congestion in the court system, to improve the ability of peace officers to regulate and control motor vehicle traffic, and to achieve significant economies in the administration of justice.

1982 S.L., ch. 353, p.876. The Traffic Infractions Act, denying the right to a jury trial, has been upheld by the Idaho Supreme Court. State v. Bennion, 112 Idaho 32, 730 P.2d 952 (1986).

#### B. Local Ordinances and Infractions

The current law specifically refers to local ordinances punishable as infractions in only two statutes. Idaho Code § 49-1503(1) states:

49-1503. Penalties for violations of statutes and ordinances. -- (1) No local authority may, by ordinance, regulation or otherwise make any act a misdemeanor which, but for that ordinance or regulation, would constitute an infraction under any provision of this chapter and all such acts made a misdemeanor or for which a misdemeanor penalty has been established by any local authority through ordinance, regulation or otherwise are hereby declared to be infractions as defined in section 49-110, Idaho Code.

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In other words, if a state statute and a local ordinance both make a particular act illegal, and if the state statute provides that such a violation is an infraction, then the local ordinance must also treat the violation as an infraction, not a misdemeanor. The assumption, obviously, is that local authorities, i.e., cities and counties, can create ordinances punishable as infractions.

Idaho Code § 49-209 states:

49-209. Local traffic-control devices. -- Local authorities in their respective jurisdictions shall place and maintain traffic-control devices upon highways under their jurisdiction as they may deem necessary to indicate and to carry out the provisions of this title, or local traffic ordinances, or to regulate, warn or guide traffic. All traffic-control devices erected shall conform to the state manual and specifications referred to in section 49-201, Idaho Code; provided, however, that any offense created hereunder shall constitute an infraction as the same is defined in section 49-3401(3), Idaho Code.

Traffic ordinances created under this statute must be infractions. Again, the assumption is that cities and counties can enact ordinances punishable as infractions.

C. The Police Power Under the Idaho Constitution

Although there is no explicit authorization for cities and counties to create infraction ordinances, except for the language in Idaho Code § 49-209, none is required. Article 12, § 2, of the Idaho Constitution states:

§ 2. Local police regulations authorized. -- Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws.<sup>2</sup>

<sup>2</sup>The reference to a "charter" in this section apparently no longer applies to any Idaho city. Boise, Bellevue, and Lewiston received charters from the territorial legislature. These charters were continued in force and effect after statehood. Moore, Home Rule for Idaho Cities?, 14 Idaho. L.Rev. 143, 149 (1977). Boise City's special charter was repealed in 1961 and Boise is now subject to the same limitations imposed by constitution and statute upon other Idaho municipalities. Caesar v. State, 101 Idaho 158, 610

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This section of the constitution has been interpreted as a direct grant of police power to the cities and counties to act without necessity of further authorization from the legislature.

This authority was recognized in State v. Robbins, 59 Idaho 279, 81 P.2d 1078 (1938). The Idaho Supreme Court noted that art. 12, § 2, of our constitution is identical to and was copied from art. 11, § 11, of the California constitution. The court in Robbins quoted from Ex Parte Roach, 104 Cal. 272, 37 Pac. 1044, a California case which had interpreted the parallel section of California's constitution:

The power to make these regulations is by this section conferred upon the city as well as upon the county, and must be held to be equally authoritative in each. It is a portion of the lawmaking power which the people through their Constitution have conferred upon these respective bodies, and its exercise is entitled to the same consideration and to receive the same obedience as that portion of the same power which by the same instrument has been conferred upon the Legislature. The regulations made under this authority are none the less a part of the law because the authority to make them is conferred immediately by the Constitution, than if it had been conferred immediately through an act of the Legislature. The only limitation upon the exercise of the power is that the regulations to be made under it shall not be "in conflict with general laws."

Robbins, 59 Idaho at 285.

In Rowe v. City of Pocatello, 70 Idaho 343, 218 P.2d 695 (1950), the Idaho Supreme Court used similar language in interpreting art. 12, § 2:

a direct grant of police power from the people to the municipalities of the state, subject only to the limitation that such regulations shall not conflict with the general laws. Comprehended in the term, "general laws," are other provisions of the constitution, acts of the state legislature, and, of course, the constitution and laws of the United States. Under this constitutional provision the cities of this state are in a notably different position than are cities in jurisdictions where their police power is

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P.2d 517 (1980). I believe that the special charters of Bellevue and Lewiston have also been repealed.

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strictly limited to that found in charter or legislative grant.

In State v. Clark, 88 Idaho 365, 399 P.2d 955 (1965), the Idaho Supreme Court noted that art. 12, § 2, is a direct grant of police power to the counties and municipalities of the state, and held that "[a] county has authority to make police regulations not in conflict with the general laws, co-equal with the authority of the legislature to pass general police laws." Clark, 88 Idaho at 373. See also Caesar v. State, 101 Idaho 158, 610 P.2d 517 (1980).

Thus cities and counties are constitutionally empowered to make police regulations -- such as ordinances creating traffic infractions -- unless such regulations would be in conflict with the general laws.

D. Idaho Code § 50-302 and § 31-714

It is clear that the power of cities and counties to make ordinances punishable as infractions is bolstered by, and is not in conflict with, the general laws.

Idaho Code § 50-302, applicable to cities, states:

50-302. Promotion of general welfare -- Prescribing penalties. -- Cities shall make all such ordinances, by-laws, rules, regulation [regulations] and resolutions not inconsistent with the laws of the state of Idaho as may be expedient, in addition to the special powers in this act granted, to maintain the peace, good government and welfare of the corporation and its trade, commerce and industry. Cities may enforce all ordinances by fine or incarceration; provided, however, that the maximum punishment of any offense shall be a fine of not more than three hundred dollars (\$300) or by imprisonment not to exceed six (6) months, or by both such fine and imprisonment.

Idaho Code § 31-714, applicable to counties, states:

31-714. Ordinances -- Penalties. -- The board of county commissioners may pass all ordinances and rules and make all regulations, not repugnant to law, necessary for carrying into effect or discharging the powers and duties conferred by the laws of the state of Idaho, and such as are necessary or proper to provide for the safety, promote the health and prosperity, improve the morals, peace and good order, comfort and

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convenience of the county and the inhabitants thereof, and for the protection of property therein, and may enforce obedience to such ordinances with such fines or penalties as the board may deem proper; provided, that the punishment of any offense shall be by fine of not more than three hundred dollars (\$300) or by imprisonment not to exceed six (6) months, or by both such fine and imprisonment.

These statutes have generally been interpreted as limitations placed by the legislature upon the powers granted cities and counties by art. 12, § 2, rather than as grants of power from the legislature to the cities and counties. In Rowe, supra, the Idaho Supreme Court said that "in this state acts of the legislature governing municipal police regulations are to be looked to as limitations upon, rather than as grants of power to the municipalities." Rowe, 70 Idaho at 348.

In his 1977 law review article, Michael C. Moore concluded that "Idaho cities have a direct grant of the police power from the people under Art. 12, § 2, of the Idaho Constitution, and are not dependent upon the state legislature for a grant of express authority while acting under the police power." Moore, Home Rule for Idaho Cities?, 14 Idaho L. R. 143, 155 (1977). Moore also concluded that Idaho Code § 50-302 confers no more powers upon cities than they already possessed under the constitution and that Idaho Code § 50-302 is clearly a limitation upon the power of cities, since it restricts the type and amount of punishment which can be inflicted for violation of a city ordinance. Id. at 168.

Moore noted that "[a]lthough some cases have interpreted I.C. § 50-302 as a grant of authority to Idaho cities [Voyles v. City of Nampa, 97 Idaho 597, 548 P.2d 1217 (1976)], the better rule, as adopted by the Idaho Supreme Court [in Rowe, supra,] is that this statute [I.C. § 50-302] should be viewed as a limitation upon, not a grant of, the powers of cities." Id. at 168. See also Idaho Attorney General Opinion No. 76-3 (1976), pp.25, 26; Benewah County Cattlemen's Association, Inc. v. Board of County Commissioners of Benewah County, 105 Idaho 209, 212, 668 P.2d 85 (1983).

Regardless of the precise relationship between Idaho Constitution art. 12, § 2, and Idaho Code § 50-302 and § 31-714, it is clear that cities and counties are granted police power by the Idaho Constitution, that no further enabling legislation is required for cities and counties to invoke their police power, that Idaho Code § 50-302 and § 31-714 act as limitations on that police power, and that cities and counties may exercise their

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police power as they desire insofar as it does not conflict with other general laws of the state.

## II.

### INFRACTION TRAFFIC ORDINANCES

It is clear that the legislature expected local ordinances to be created under the 1982 Traffic Infractions Act and thus such ordinances are not in conflict with the general laws. Idaho Code § 49-1104 (now § 49-236) and Idaho Code § 49-3406 (now § 49-1503) both contained the following paragraph:

It is an infraction for any person to violate any county, city or other local ordinance which has been adopted as provided in section 49-582 [now 49-208], Idaho Code, or any other provisions of title 49, Idaho Code, and such infraction is punishable only by a penalty not exceeding one hundred dollars (\$100) and no imprisonment.

1982 S.L., ch.353, pp.895-896. This language was removed during the 1988 recodification of title 49. S.L. 1988, ch.265, pp.587, 756. Similar language was removed from Idaho Code § 49-582 (now § 49-208). The only remaining similar language is in the current Idaho Code § 49-209, which states that "any offense created hereunder shall constitute an infraction as the same is defined in section 49-3401(3), Idaho Code." This reference to Idaho Code § 49-3401(3) is obviously an error, since § 49-3401 no longer exists (having been recodified in 1988 to Idaho Code § 49-1501).

Maureen Ingram, from the Idaho Legislative Council, advises that the above quoted language in Idaho Code § 49-209 should have been removed during the recodification and that its presence in the recodified title 49 was due to a computer error. Removal of this language eliminates all references to local infraction ordinances which were contained in the original 1982 law. It does not appear this amendment was intended to prevent cities and counties from enacting traffic infraction ordinances. On the contrary, it is generally recognized that the 1988 recodification was intended only as a "clean up" of the code and that no substantive changes were intended.

In sum, it is my conclusion that cities and counties have authority under Idaho Constitution art. 12, § 2, Idaho Code § 50-302 and § 31-714, respectively, and Idaho Code § 49-208 and § 49-209 to enact traffic infraction ordinances and that no further explicit legislative authority is required.

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### III.

#### NON-TRAFFIC INFRACTION ORDINANCES

There are only three infractions in the Idaho Code outside title 49. Idaho Code § 67-4237 provides that motor vehicle parking violations in a state park shall be an infraction; Idaho Code § 39-5507 in the Clean Indoor Air Act provides that any violation of that act shall be an infraction; and Idaho Code § 67-5510 further provides that smoking on a bus shall be an infraction.<sup>3</sup> Assuming, then, that although the Idaho Code § 67-4237 parking violation law is a traffic infraction even though it is not in title 49, the two smoking laws in title 67, along with pedestrian and bicycle infractions in title 49, are the only infractions in the Idaho Code which are not traffic infractions.

The distinction between traffic and non-traffic infractions is important because Idaho Code § 49-1505 provides that the driver's license of a person who fails to pay a traffic infraction penalty shall be suspended for 90 days and that his license shall not be reinstated until the penalty is paid. These provisions are applicable only to traffic infractions and not to the pedestrian, bicycle or smoking infractions in title 67.

Thus, there is no method to compel the payment of infraction penalties by pedestrian, bicycle, or other non-traffic offenders. As originally enacted in 1982, Idaho Code § 19-3901 contained a provision to obtain an arrest warrant for a person who failed to appear on an infraction citation, and Idaho Code § 19-3901A contained a provision that a failure to obey an infraction citation was a separate misdemeanor offense. 1982 S.L., ch. 353, pp.878-879. These provisions were removed in 1983. In their present version, it is only the failure to appear or obey a citation on a misdemeanor that constitutes a separate offense.

The Idaho Infraction Rules set forth more specific guidance regarding suspension of a driver's license for failure to pay an infraction penalty, but these provisions also apply only to traffic infractions. Infraction Rule 10(e) states that "[n]othing in this rule shall limit the inherent powers of the

<sup>3</sup>The compiler's notes in Idaho Code § 67-7115 contain the text of an amended version of § 67-7115 which provided that a violation of winter recreational parking permit requirements was an infraction, but this amended version was not passed into law. Indeed, the 1989 legislature made a violation of Idaho Code § 67-7115 a misdemeanor, punishable by a fine of ten dollars. 1989 S.L., ch.106, p.243.

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court to enforce its judgments and orders by execution or by other means and sanctions authorized by law." Execution, however, is unlikely to be a cost-effective means of collecting infraction penalties. In short, there is no effective means of dealing with persons who fail to appear or who fail to pay the penalty on infraction citations issued for non-traffic offenses.

Since there is no effective means of dealing with persons who fail to appear or pay penalties on non-traffic infractions in the state code, I recommend that if a city or county were to create non-traffic infraction ordinances, it should also create a misdemeanor ordinance similar to the 1982 version of Idaho Code § 19-3901A, which provided for an offense of misdemeanor failure to appear for persons who failed to obey their infraction citations. 1982 S.L., ch. 353, pp.878-879.

Although this provision was eliminated from the state law in 1983, there is no constitutional provision or state law which prohibits such an ordinance. A local ordinance which merely goes further than a state statute in imposing additional regulation of a given conduct does not conflict with state law. Voyles v. City of Nampa, 97 Idaho 597, 548 P.2d 1217 (1976). Again, when exercising their police powers, cities and counties are free to act if their actions do not conflict with other laws. I conclude that an ordinance creating a misdemeanor crime of failure to appear on a city or county ordinance citation would not conflict with state law.

A. Do Idaho Code § 50-302 and § 31-714 Require that Violations of Ordinances Be Punishable as Misdemeanors?

A review of several cities' ordinances reveals that violations of nearly all city ordinances in Idaho are classified as misdemeanors. Idaho Code § 50-302 and § 31-714 do not use the word "misdemeanor" in describing a violation of a local ordinance, but merely state that the maximum penalty is a \$300 fine or six months in jail, or both. This maximum penalty is identical to the maximum penalty specified in Idaho Code § 18-113 for a misdemeanor.

A review of the history of Idaho Code § 50-302 and § 31-714 shows that these statutes were created in 1976. (1976 S.L., ch. 145, p.530.) The maximum penalty under an earlier version of Idaho Code § 50-302 was limited to a fine "not exceeding the amount permissible in probate, justice, and courts of similar jurisdiction for any one offense, or penalties of not more than thirty (30) days imprisonment in the city jail, or both. . . ." 1967 S.L., ch. 429, sect. 27, p.1259. A yet earlier statute provided for a fine not exceeding \$100 plus costs, and

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imprisonment and hard labor if the fine and costs were not paid. Idaho Code Ann. 1932, § 49-1109; Title 32, § 3948, Idaho Compiled Statutes, 1919, Vol. I, p.1120. None of these earlier statutes used the term "misdemeanor" for a violation of an ordinance; they simply specified the maximum penalty which could be imposed.

Cities and counties have chosen to refer to violations of their ordinances as "misdemeanors" without specific authorization under Idaho Code § 50-302 and § 31-714. Although Idaho appellate courts have apparently not specifically addressed the issue, in numerous appellate decisions the courts refer to and uphold misdemeanor convictions under city and county ordinances, without comment about the use of the term "misdemeanor." (See, for example, State v. White, 67 Idaho 309, 177 P.2d 472 (1947) and list of cases reviewed in Idaho Attorney General Opinion No. 76-3 at pp.29-41.)

The appellate courts' tacit approval of the term "misdemeanor" for a violation of city and county ordinances shows that when exercising their police power, cities and counties are free to act insofar as they do not conflict with state law. Although the maximum penalty specified for a violation of an ordinance is identical to the maximum penalty for a misdemeanor, there is no suggestion that an ordinance violation must be termed a misdemeanor. The only requirement is that the maximum penalty not exceed a \$300 fine or six months' jail, or both. I believe that if a city or county may label a violation of its ordinances a "misdemeanor," it may also label such a violation an "infraction," and that such a use would conflict with no state laws.

#### IV.

#### THE AIR QUALITY ORDINANCE

Ada County, Meridian City, Boise City, and Garden City each have an air quality ordinance which requires regular inspection of motor vehicles. Ada County Code, 6-1-1, et seq.; Boise City Code, 8-13-1, et seq.; Meridian City Code, 7-601, et seq.; Garden City Code, 5-4-1, et seq. The air quality ordinances of these entities are essentially identical. They cite Idaho Code § 49-582(t), now Idaho Code § 49-208(s), experimental or temporary traffic regulations, as the authority under which they were created. A violation of these ordinances is an infraction. Boise City's ordinance makes no mention of former Idaho Code § 49-582(t) or Idaho Code § 49-208(s) and a violation of the ordinance is a misdemeanor (Boise City Code § 8-13-14).

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Assuming that the regulation of air pollution and auto emissions is within the police power, Ada County and the cities within Ada County may properly create ordinances to regulate such emissions under the authority granted by the Idaho Constitution. Whether such an ordinance punishable as an infraction is a traffic infraction, however, is open to debate.

Violation of the following statutes under title 49 is an infraction: All statutes in chapters 6 (Rules of the Road); 7 (Pedestrians and Bicycles); 8 (Signs, Signals, and Markings); and 9 (Vehicle Equipment); 41-213(2), parking in a handicap space; 49-430, failure to register; and 49-441, vehicle registration. All of these except violations of chapter 7, of course, are traffic infractions. All of these traffic infractions involve the operation of a motor vehicle in some fashion and all (except the parking violations) are violations for which a citation would be issued by a police officer to the driver, who would be required to display his driver's license.

It is my understanding, on the other hand, that the Ada County Air Quality Board, which administers the air quality program for the entire county, treats citations under the air quality infraction ordinances as traffic infractions and that if persons who receive such citations fail to appear, Ada County obtains a default judgment and takes the necessary steps for a driver's license suspension under Idaho Code § 49-1505. I do not know whether an Ada County court has ruled whether these are traffic infractions, but I am not certain an appellate court would so rule.

In Voyles v. City of Nampa, 97 Idaho 597, 548 P.2d 1217 (1976), the Idaho Supreme Court noted that "the mere presence of a motor vehicle among the language of an ordinance . . . does not automatically cause the measure to become a traffic ordinance." The ordinance in question prohibited being drunk or intoxicated in a private motor vehicle while the vehicle was upon a public or private road. Voyles argued that the ordinance conflicted with state statutes controlling motor vehicles. The court held that the ordinance was directed at the control of public intoxication, not at the operation of a motor vehicle and that therefore it was not a traffic ordinance.

Similarly, although these infraction air quality ordinances purport to be traffic infractions, they have little to do with the operation of a motor vehicle. It is my understanding that testing notices and violation notices are sent to vehicle owners without regard to whether the vehicle is being operated or whether it is even in operating condition. Such violations have little to do with the operation of a motor vehicle.

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I express no opinion on whether violations of the air quality ordinances are traffic infractions. The entities using such infraction ordinances, however, should either satisfy themselves that violations of these ordinances are indeed traffic infractions, or they should adopt another scheme for dealing with failures to appear and failures to pay infraction penalties, other than suspending driver's licenses of offenders. As stated above, a county or city could adopt an ordinance which made failure to obey an infraction citation a separate misdemeanor offense, thus preserving the simplicity of the infraction process for most offenders and at the same time having a tool to deal with scofflaws who will not respond to the infraction citation.

V.

DOG-AT-LARGE AND OTHER ORDINANCES

Control of dogs-at-large is within the police power. State v. White, 67 Idaho 309, 177 P.2d 472 (1947) (rev. on other grounds). As stated above, cities and counties are free to act within their police power insofar as their acts do not conflict with state law. Cities and counties could create infraction ordinances to deal with dogs-at-large and other matters within the police power, although the state laws provide no method for dealing with persons who fail to appear on or pay their non-traffic infraction citations. As stated above, a city or county which creates non-traffic infraction ordinances should also create a misdemeanor ordinance for failure to obey an infraction citation so they have a tool for dealing with offenders who fail to pay their infraction penalty.

I hope that you have found this information helpful. Should you have additional questions, please feel free to contact me.

Sincerely,

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