



MEMORANDUM

LEGISLATIVE REFERENCE BUREAU

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To: Ald. Terry Witkowski

From: Richard L. Withers, Legislative Fiscal Analyst ext. 8532

Date: May 28, 2013

Subject: Draft Legislation Restricting Open Burning, File Number 120655

This memorandum summarizes the amendments proposed in the attached draft of legislation prohibiting most open burning.

Background

Open burning and outdoor burning hazards are regulated in the Code under Chapter 80 as a public nuisance and under Chapter 214 by the provisions at 214-9 related to eliminating fire hazards.

These general provisions appear to provide mechanisms for addressing open burning, in fire pits or otherwise, that may constitute either a public health hazard, or cause irritation or discomfort. The proposed legislation clarifies the applicability of public nuisance measures to abate and punish violations of open burning restrictions as health violations. The legislation also prescribes the manner in which citizens may make complaints resulting in municipal citations.

Key definitions are already provided in ch. 80 relating to nuisance abatement as follows (emphasis has been supplied):

80-1. Definitions. In this chapter: **1. COMMISSIONER means the commissioner of health, the commissioner of neighborhood services** or any other city official to whom nuisance abatement functions have been delegated pursuant to a memorandum of understanding.

2. DEPARTMENT means the health department, the department of neighborhood services or any other department to which nuisance abatement functions have been delegated pursuant to a memorandum of understanding.

4. PUBLIC NUISANCE includes but is not limited to those nuisances which are referred to in this chapter, in addition to **all other nuisances which threaten, impair or affect the public health** or which are known to the common law of the land or state statutes as nuisances and which may be treated and prosecuted as such.

The proposed legislation substantively changes the regulation of open burning by increasing the minimum distance that open burning may occur from a flammable structure from 15 feet to 50 feet.

Current Fire Code Provisions and Proposed Changes

Sections 214-2 and 214-3 provide for adoption of the State Fire Code and the Model Fire Code. These codes incorporate references to the International Fire Code (*IFC*). Section 307.2.2, *IFC*, provides that the code official (here, the commissioner) may prohibit or order the extinguishment of open burning that is (or will be) “offensive or objectionable due to smoke or odor emissions when atmospheric conditions or local circumstances make such fires hazardous...or objectionable.”

“Open burning” is defined under the International Fire Code as the, “... burning of materials wherein products of combustion are emitted directly into the ambient air without passing through a stack or chimney from an enclosed chamber....”

Section 214-9-1 provides as follows:

214-9. Responsibility to Eliminate Fire Hazards.

1. CONTAINERS FOR OPEN BURNING. a. Open burning shall be conducted only in an approved and listed container or a substantial burner built of metal, concrete or brick, well covered or screened to prevent the escape of sparking and burning embers.

b. A burner shall not be operated within 15 feet of any combustible construction. Open flame cooking devices, including charcoal burners and LP gas burners, are exempt from this requirement for one and 2-family dwellings.

The proposed ordinance makes 3 changes to this subsection: first, the minimum allowable distance between open burning and a flammable structure is increased to 50 feet; second, the exception for cooking fires is clarified to mean open flames actually used for cooking and using a suitable cooking fuel, and; third, a reference is made to alternative penalties under a new public nuisance section.

Current Public Nuisance Provisions and Proposed Changes

A new section 80-6.3 has been created to complement the provisions in ss. 80-6, 80-6.1 and 80-6.2 which specifically cover offensive odors from factories or shops and discharge of offensive or hazardous substances and excessive discharge of air-polluting materials from a premises. The new section outlines nuisance violation procedures for open burning that are substantially the same as those now provided for certain noise nuisances including a citizen complaint. The new section provides:

80-6.3. Open Burning. 1. OPEN BURNING A NUISANCE. Open burning occurring or conducted in violation of s. 214-9 is found to be a nuisance.

2. NOTICE TO EXTINGUISH. Notwithstanding the notice requirements of s. 80-8, upon oral or written notice by the commissioner, or any inspector or other person authorized by the commissioner, any open burning conducted in violation of s. 214-9 shall be immediately extinguished by any party responsible for the open burning or otherwise having control of the premises upon which open burning is found.

3. PROSECUTION BY COMMISSIONER. The commissioner may commence prosecution of any person believed to be responsible for an open burning nuisance violation upon observation by a police officer, department inspector or other person authorized by the commissioner to investigate or initiate prosecution under this section, upon direct evidence of open burning in violation of s.

214-9.

4. COMPLAINT BY MEMBER OF THE PUBLIC. As an alternative to commencement of prosecution based upon the direct observation of a police officer, department inspector or other person authorized by the commissioner to investigate or initiate prosecution under this section, the chief of police or commissioner may commence prosecution upon receipt of a complaint submitted by a member of the public that complies with the requirements of sub. 5 and that alleges conduct that is in violation of s. 214-9.

5. INFORMATION CONTAINED IN COMPLAINT. A complaint by a member of the public, sufficient to authorize the commencement of an open burning nuisance prosecution shall include relevant information relating to the date, time and place of the alleged open burning nuisance, the nature of the open burning, and shall identify the person or persons causing the open burning, or otherwise allowing the open burning, or alternatively, shall include information leading to the identification of the person or persons by police, a department inspector or other person authorized by the commissioner to investigate or initiate prosecution under this section. Information included in the complaint shall also identify one or more persons who witnessed or were affected by the open burning, at least one of whom is an adult available to testify in court.

6. TESTIMONY REQUIRED. No person shall be convicted under this procedure except upon testimony of at least one adult witness.

7. PENALTIES. As an alternative to penalties provided in s. 200-19 for violation of the restrictions on open burning in s. 214-9, conviction under this subsection of an open burning nuisance violation shall be punishable as provided in s. 80-90 for the first offense in a calendar year, and shall be punishable as a Class O offense upon conviction of a second or subsequent offense in a calendar year as provided in s. 61-21.

Note: the penalties provided for a first offense are the same as those provided for violations of ss. 80-6.0 to 80-6.2 which are identified as Class E health penalties of not less than \$50 nor more than \$500.

A second or subsequent offense is subject to Class O health penalties of not less than \$300 nor more than \$1500. These are the same penalties as provided for conviction of second or subsequent offenses under the noise ordinance.

Please contact me if you have questions or suggestions related to the proposed legislation.