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Are There Limits on the Size of Penalties to Enforce Local Government Ordinances?

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Introduction

Both cities and counties enjoy statutory authority to enforce their ordinances through civil penalties, which if necessary can be collected in a civil action in the nature of debt.[1] Section 14-4 of the North Carolina General Statutes (hereinafter G.S.) sets the upper limit of the fines or penalties for local ordinances enforced as misdemeanors or infractions, but there is no statutory maximum for civil penalties in general. This *Local Government Law Bulletin* considers what limits, if any, there are on the size of civil penalties imposed by local ordinances. The conclusion is that penalty levels under current North Carolina practice are unlikely to be susceptible to a challenge that they are too high.

Existing Case Law

There is almost no North Carolina case law on how large civil penalties may be or whether a particular penalty is somehow excessive. There are two cases, though, in which the court has addressed the general theory of penalties and the issues raised when the amount of the penalty seems quite large in comparison to the harm caused by the conduct leading to the penalty.

The first case is *State ex rel. Carter v. Wilmington & Weldon Railroad Co.*,[2] in which the plaintiffs twice attempted to deliver thirty head of cattle to the defendant railroad, which refused to accept delivery each time. A statute set a $50 penalty for each article of commerce for which service was denied, and therefore the plaintiffs sued for $3,000. (Under the statute, the penalty went to whoever brought suit for it.) The railroad lost at trial, and on appeal argued that the trial court had calculated the penalty improperly. Rather than assessing $50 per head of cattle, the railroad argued, the court should have considered the herd to be a single article of commerce. The North Carolina Supreme Court agreed with the trial court, writing:

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1. N.C. Gen. Stat. (hereinafter G.S.) § 160A-175(c) for cities; G.S. 153A-123(c) for counties.
2. 126 N.C. 437 (1900).

> The object in providing a penalty is clearly to compel the common carrier to perform its duty to the public, not simply to the abstract public, but to each individual. Penalties are made cumulative so as to make it under all circumstances, as far as practicable, to the interest of the carrier to perform its duty. Punishment and compensation are essentially different. The one aims merely to repair the injury done; the other, to prevent its recurrence. Compensation should under all circumstances exactly equal the injury; while punishment, to be effective, must exceed the injury, or at least be greater than any possible benefit which can accrue to the offender from a violation of the law. Suppose a large number of cattle were offered for shipment, it might be cheaper for the carrier to pay a penalty of $50 than to go to any extra expense or trouble to obtain the necessary cars.[3]

The second case is *Grocery Company v. Railroad*,[4] in which suit was brought to collect the penalty imposed by statute because the carrier did not deliver goods tendered to it within the five days required by statute. The goods in question were a box of nutmegs, worth no more than $17. The railroad was grievously late, however, and the penalty had reached $320 by the time of suit. As a result, on appeal the railroad argued that the penalty was so much greater than any harm caused that it should be struck down. The court refused, citing *Carter*, summarized just above, as to the deterrent purpose of penalties, and the so-called Rice case as an example of penalties that greatly exceeded the actual monetary damages from the statutory violation. The latter case was *McGowan v. The Wilmington & Weldon Railroad Co.*,[5] in which the plaintiff complained that his agent had delivered to the defendant twenty-seven bags of rice and that the bags were not shipped for three months. There was a statutory penalty for non-shipment that was $25 a day for each day more than five, and apparently the total penalty awarded was $3,000. (The opinion in *McGowan* does not give the total, but later cases do; indeed, the size of the penalty was not an issue addressed in the *McGowan* opinion itself.) Both *Grocery Company* and *McGowan*, then, stand for the principle that the amount of a penalty is based on the intended deterrent effect and the size of economic harm is largely immaterial.[6]

Possible Sources of Limitations on the Size of Penalties

Except for the cases just summarized, there is no case law from North Carolina on the appropriate size of civil penalties, and so any listing of possible sources of law that might limit penalty size is of necessity somewhat speculative. But based on the national case law and general principles of local government law, there are three likely sources of limitation that could be put forth.

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3. *Id.* at 440.
4. 136 N.C. 396 (1904).
5. 95 N.C. 417 (1886).
6. Some U.S. Supreme Court cases from the same era involved penalties very much greater than the economic loss arising from the violation, and that Court reached the same conclusion. *E.g.,* Seaboard Air Line Ry. v. Seegers, 207 U.S. 73 (1907) ($1.75 economic loss and penalty of $50); St. Louis, I.M. & S. Ry. Co. v. Williams, 261 U.S. 63 (1919) ($0.66 overcharge on railroad fare and penalty of $75). In the latter case, the Court wrote that because the penalty was "imposed as a punishment for the violation of a public law, the Legislature may adjust its amount to the public wrong rather than the private injury." *Id.* at 66.

The first is a lack of statutory authority. Obviously cities and counties have basic statutory authority to impose and collect penalties, but it would be possible to argue that penalties over a certain size are beyond what the General Assembly might reasonably have intended with its authorizations.

The second is the Excessive Fines clause, a part of the Eighth Amendment to the U.S. Constitution.

The third is substantive due process under the Fourteenth Amendment to the U.S. Constitution.

Each of these three potential sources of limitation will be discussed in turn.

Lack of Statutory Authority

As noted at the beginning of this bulletin, the General Statutes expressly permit both cities and counties to impose civil penalties on persons or entities violating local ordinances. The statutory authorizations, however, say nothing about an upper limit on the size of the penalties that local governments may impose. Should a court be uncomfortable with the size of the ordinance-specified penalty in a particular case, one strategy for invalidating the penalty would be to hold that it was so high as to be beyond the reasonable intentions of the General Assembly in authorizing the use of civil penalties. There have not been any efforts at such an argument reported in the appellate decisions of the North Carolina courts, and so we cannot be sure that those courts would be receptive to such an argument. If such a case did arise, though, are there standards that might be applied to establish safe havens for local ordinances—standards that might be presented to a court to show that penalties in a particular amount are certainly within the statutory authorization? There are at least three.

Analogies to Specific Authorizations

First, there are a few statutory authorizations for local governments to impose and collect civil penalties on the same basis as state agencies in the cooperative enforcement of certain state regulatory programs. These authorizations establish specific dollar maximums for the size of any civil penalty under these programs and are clear statutory authority to impose penalties up to those maximums.

One such authorization is found in G.S. 113A-64, involving imposition of civil penalties in order to enforce the sedimentation control statutes. Local governments with approved ordinance enforcement programs are given the same statutory authority as the state to enforce sedimentation control rules, including the authority to impose civil penalties as high as $5,000 per violation. The statute specifically states that each day can be counted as a separate violation.

A second authorization is found in G.S. 143-215.6A, which permits local imposition of penalties in the enforcement of three specific environmental regulatory programs. Again local governments are given the same power to impose penalties as the appropriate state agency, and in this case the maximum penalty is set at $25,000 per violation. And again, the statute specifically states that each day can be counted as a separate violation. It should be noted that the statute limits penalties above $10,000 to repeat violators.

A third authorization is found in G.S. 143-215.114A, which permits local imposition of penalties to enforce air pollution rules, with local governments again receiving the same power to impose penalties as the appropriate state agency. In this case the statute sets the maximum penalty at $25,000 and specifically states that each day can be counted as a separate violation.

These statutes clearly show that the General Assembly has authorized local governments to impose civil penalties in the range of several thousands of dollars. It should be noted, though, that each of these statutes authorizes variable penalties; that is, penalties within a stated range. For most ordinances, local governments are not authorized to provide for variable penalties but rather must set out a single sum certain in the ordinance.[7]

Comparisons to Earlier Statutes

During much of the nineteenth century, the state turned to civil penalties as a predominant method of enforcing various sorts of regulatory statutes. Penalties were commonly imposed on public officials who failed to meet the responsibilities of their offices[8] and on businesses that violated early rules to protect consumers or the public more generally.[9] This statutory history might provide some insight into what the General Assembly believed was a reasonable amount for penalties imposed for violations of law. Of course, the amounts of the penalties imposed in these early statutes—as low as $1 per violation—seem laughably small today, but we should remember that the value of money has changed enormously in the past two centuries. If we can estimate present-day equivalents for the amounts of penalties imposed during the nineteenth century, when local governments first obtained their authority to impose penalties to enforce ordinances, those equivalents may well indicate amounts that a local government could comfortably establish as ordinance penalties today.

What were common amounts of nineteenth century statutory penalties? Here is a list based on a review of some of the penalty cases decided by the North Carolina Supreme Court during that century, with the year cited being the year of judicial decision and not statutory enactment:

$1: Against landowner for failure to provide required hands for local road maintenance, at $1 per hand (1845)[10]

$10: Against fertilizer manufacturer for failure to properly tag fertilizer, at $10 per bag (1896)[11]

$25: Against railroad for not shipping goods within five days of receipt, at $25 for each day over the five days required by statute (1881)[12]

$50: Against landowner for setting fire to woods without statutory notice to neighbors (1850)[13]

Against railroad for refusing to accept goods offered for shipment, at $50 per article of commerce (1900)[14]

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7. *See* Lawrence, David, *Civil Penalties for Ordinance Violations—Specific or Variable?*, Local Gov't Law Bulletin No. 127 (UNC School of Government, May 2012).

8. *E.g.,* Dowd v. Seawell, 14 N.C. 185 (1831) (justice of the peace marrying a couple without a license); Wright v. Wheeler, 30 N.C. 184 (1847) (clerk of court issuing complaint without obtaining adequate security from plaintiff); Martin v. Martin, 50 N.C. 346 (1858) (sheriff making false return on a writ of execution); State v. Snuggs, 85 N.C. 541 (1881) (register of deeds improperly issuing marriage license).

9. *E.g.,* State v. Muse, 20 N.C. 463 (1839) (sale of liquor without license); Doughty v. Atlantic and North Carolina R.R. Co., 78 N.C. 22 (1878) (railroad not maintaining draw in bridge over navigable waterway); Katzenstein v. Raleigh and Gaston R.R. Co., 84 N.C. 688 (1881) (railroad not delivering freight within time specified in statute); Sutton v. Phillips, 116 N.C. 502 (1895) (butcher not in compliance with weights and measures law).

10. Duffy v. Averitt, 27 N.C. 455 (1845).

11. State *ex rel*. Goodwin v. Caraleigh Phosphate and Fertilizer Works, 119 N.C. 120 (1896).

12. *E.g.*, Katzenstein v. Raleigh and Gaston R.R. Co., 84 N.C. 688 (1881).

13. Harshaw v. Crow, 33 N.C. 240 (1850).

14. State *ex rel*. Carter v. Wilmington and Weldon R.R. Co., 126 N.C. 437 (1900).

$100: Against justice of the peace or minister, for marrying a couple without a license (1831)[15]
Against sheriff for failing to mark on each process the day it had been received (1870)[16]

$200: Against guardian for improperly employing an agent to maintain the ward's property (1861)[17]
Against register of deeds for improperly issuing a marriage license (1881)[18]

$500: Against sheriff for filing a false return to a writ of execution (1858)[19]

What do these values mean in terms of current values? It turns out that this is not the easiest of questions and that there are a number of ways of comparing values, with markedly different results. An excellent source for such comparisons is the website MeasuringWorth.com, which sets out several ways of measuring historical changes in the relative value of money. Two measures are used in this bulletin. The first is the consumer price index (CPI), which attempts to measure changes in the price of a bundle of goods purchased by the typical household.[20] A potential problem with this measure is that it does not account for increases in the general standard of living, whereby over time it takes a smaller percentage of that household's income to purchase that bundle of goods. The second measure, the Unskilled Wage Index (UWI) deals with that issue by measuring changes in the amount of work an unskilled laborer would have to perform in order to earn a sufficient amount to purchase a given good or set of goods.[21] The table below takes the value of $100 at three different dates in the nineteenth century and calculates the relative value of that amount in 2011, using the two indices just described.[22]

15. Dowd v. Seawell, 14 N.C. 185 (1831). The statutory penalty was actually £50, but the contemporary equivalent was roughly $100.
16. Duncan v. Philpot, 64 N.C. 479 (1870).
17. Norman v. Dunbar, 53 N.C. 317 (1861).
18. State v. Snuggs, 85 N.C. 541 (1881).
19. Martin v. Martin, 50 N.C. 346 (1858).
20. MeasuringWorth.com explains the Consumer Price Index (CPI) in this way:

> The **CPI** is most often used to make comparisons partly because it is the series with which people are most familiar. This series tries to compare the cost of things the average household buys such as food, housing, transportation, medical services, etc. For earlier years, it is the most useful series for comparing the cost of consumer goods and services. It can be interpreted as how much money you would need today to buy an item in the year in question if its price had changed the same percentage as the average price change.

21. MeasuringWorth.com explains the Unskilled Wage Index (UWI) in this way:

> The **Unskilled Wage** is a good way to determine the relative cost of something in terms of the amount of work by unskilled labor that it would take to produce, or the relative time spent in work by unskilled workers in order to earn its cost. This indicator can also be useful in comparing different wages over time. The unskilled wage is a more consistent measure than the average wage for making comparisons over time. This is because the average wage changes both because of changes in the composition of skills in the workforce as well as the general cost of labor. The level of skills of the unskilled are assumed to stay the same.

22. The calculator is found at www.measuringworth.com/uscompare (last visited May 30, 2012).

The Changing Value of $100 over Time

$100	In 1820	In 1850	In 1875
Today (CPI)	$ 1,980	$ 2,970	$ 2,120
Today (UWI)	$25,400	$20,600	$13,620

These numbers can be multiplied or divided to determine the relative value of other nineteenth century penalties.

These relative values, particularly those calculated using the Unskilled Laborer Index, show that the $25,000 maximum penalty set out in various environmental statutes is not out of line with penalties from one to two hundred years ago.

Comparisons to Other States

Many states have authorized local governments to impose civil penalties to enforce local ordinances, and the amounts of these penalties as reported in various cases can give some idea of national practices. By and large the basic penalties are most often in the range of one hundred to several hundreds of dollars per violation. Many ordinances treat each day that a violation continues as a separate violation, so it is possible to accumulate total penalties that are significant multiples of the basic penalty. Here are some examples:

$100: Operating a valet parking service without a license; each day is a separate offense[23]

$150: Violating housing code requirements; each violation and each day is a separate offense[24]

$250: Violating housing code requirements; each violation and each day is a separate offense[25]

$350: Violating sign ordinance; each day is a separate offense[26]

$400 to $800: Not completing construction project within eighteen months after permit issued; $400 per day for first sixty days, $600 for next sixty days, $800 per day thereafter[27]

$1,000: Violating housing code requirements; each violation and each day is a separate offense[28]

23. Express Valet, Inc. v. City of Chicago, 869 N.E.2d 964 (Ill. Ct. App. 2007). The total amount of penalties involved in the suit was more than $135,000.

24. Moustakis v. City of Fort Lauderdale, 338 Fed. Appx. 820 (11th Cir. 2009). The total amount of penalties involved in the suit was more than $700,000.

25. Morrow v. City of San Diego, 2011 WL 4945015 (S.D. Cal. 2011). The total amount of penalties involved in the suit was $9,000.

26. State of New Jersey, Twp. of Pennsauken v. Schad, 733 A.2d 1159 (N.J. 1999). The total amount of penalties involved in the suit was $95,920.

27. Laidley v. City of Belvedere, 2007 WL 2819534 (Cal. Ct. App. 2007). The total amount of penalties involved in the suit was $100,000, which was the maximum under the ordinance.

28. City and Cnty. of San Francisco v. Sainez, 92 Cal. Rptr. 2d 418 (Cal. Ct. App. 2000). The total amount of penalties involved in the suit was $660,000.

These amounts from actual ordinance enforcement actions indicate that it is far more common for ordinances to set penalties in the hundreds than in the thousands of dollars. The amounts are also much closer to the amounts seen in the city codes of North Carolina cities. In this regard it is worth repeating that the environmental penalties referenced above each authorize variable penalties, and state enforcement actions show that the state regulatory agencies often impose penalties well below the statutory maximums.[29] Because most local government penalties must be set as a sum certain rather than a variable amount and thus must fit a range of circumstances, it would be prudent for local governments to set their penalties well below the maximums allowed for the variable environmental penalties—in the general range of penalties set by local governments in other states. If penalties are set using this philosophy, it is highly unlikely that a court would determine that the amount of any penalty was so high as to be unauthorized by statute.

The Excessive Fines Clause

The Excessive Fines Clause is part of the Eighth Amendment to the U.S. Constitution, which reads as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.[30]

Although the first and third clauses of this Amendment are limited to criminal prosecutions, that is not true of the Excessive Fines Clause. The U.S. Supreme Court has held that it applies to civil forfeitures that are intended as punishment,[31] and the lower courts have extended that reasoning to civil penalties with a similar purpose.[32]

Even so, it is very difficult to succeed in an argument that a civil penalty or set of penalties violates the Excessive Fines Clause. The test, as established in *United States v. Bajakajian*,[33] is whether the amount of the penalty (or fine or forfeiture) is "grossly disproportional" to the offense charged. In *Bajakajian* the defendant violated a federal statute that requires persons transporting more than $10,000 out of the country to report that fact to the federal government. If a person violates the statute by failing to file a report, he or she is subject to criminal penalties and in addition must forfeit all the cash that was being taken out of the country. In this case the defendant's criminal sentence was three years' probation and a fine of $5,000, the maximum permitted under the statute. But he was carrying $357,000, and the government sought the forfeiture of that entire amount. By a 5-4 vote, the Supreme Court held that this penalty violated the Excessive Fines Clause; the loss was simply too great for what the majority termed a reporting offense.

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29. *E.g.*, MW Clearing & Grading, Inc. v. N.C. Dept. of Env't and Natural Res., Div. of Air Quality, 171 N.C. App. 170 (2005) (statutory maximum of $10,000 but agency penalties against this violator ranged from $1,250 to $4,000 per violation).

30. The North Carolina Constitution contains a provision, Article I, section 27, that is almost identical to the Eighth Amendment. The Excessive Fines clause of the North Carolina provision, however, has not been interpreted by the North Carolina appellate courts, and therefore this discussion focuses on cases interpreting the federal Amendment.

31. Austin v. U.S., 509 U.S. 602 (1993); United States v. Bajakajian, 524 U.S. 321 (1998).

32. *E.g.,* Towers v. City of Chicago, 173 F.3d 619 (7th Cir. 1999).

33. *Bajakajian*, 524 U.S. 321 (1998).

It would be extremely difficult, perhaps almost impossible, to invalidate an ordinance penalty on its face, assuming that the penalty was within the limits discussed in the preceding section. Penalties within those limits are relatively modest, and the courts have shown themselves loath to second-guess legislative bodies about the basic levels of penalties.[34] *Towers v. City of Chicago* is a good example of the difficulties inherent in challenging a basic penalty.[35] The city had ordinances that called for impounding any vehicle in which were found either illegal drugs or unregistered firearms. In order to recover possession of the vehicle, the owner was required to pay a $500 civil penalty plus towing and storage charges. There were three defenses an owner could use to avoid the penalty, but having no knowledge of the contraband material was not one of them. If an owner willingly lent his or her vehicle to another, and the contraband was found, the ordinance penalty applied. In applying the *Bajakajian* test, the court admitted that allowing someone else to use one's vehicle is not antisocial behavior, but it still declared that such owners are not "completely lacking in culpability." The city's intention was to cause vehicle owners to be careful about to whom they lent their cars, and that was an appropriate legislative purpose. As to whether the $500 penalty was grossly disproportionate, the court wrote:

> We must conclude that the fine is not so disproportionate to the gravity of the conduct as to offend the strictures of the Excessive Fines Clause. Five hundred dollars is not a trifling sum. But the City, in fixing the amount, was entitled to take into consideration that the ordinances must perform a deterrent function—to induce vehicle owners to ask borrowers hard questions about the uses to which the vehicle would be put or to refrain from lending the vehicle whenever the owner has a misgiving about the items that might find a temporary home in that vehicle. The $500 fine imposed in this case is large enough to function as a deterrent, but it is not so large as to be grossly out of proportion to the activity that the City is seeking to deter.[36]

Given how difficult it is to make a facial challenge to a statutory or ordinance penalty, it is not surprising that most Excessive Fines Clause cases argue not that the penalty provision is invalid on its face but that the penalty in a particular case is excessive. These cases arise because the defendant has committed multiple violations, and the cumulative amount of penalties is consequently very high. Four cases illustrate this sort of controversy.

In *State of New Jersey, Township of Pennsauken v. Schad* the defendant operated two adult businesses in the township and was charged with violations of the town's sign ordinance at each

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34. In *State ex rel. Utah Air Quality Bd. v. Truman Mortensen Family Trust*, 8 P.3d 266 (Utah 2000), the board brought suit against the owner of a nine-unit apartment building for gross violations of the asbestos removal laws, and the trial judge imposed a civil fine of $23,000. On appeal the court noted that the regulations would have permitted a civil fine of as much as $41,000, and because the actual fine was below this maximum it was *therefore* not excessive. In *State v. Spilton*, 315 S.W.2d 350 (Mo. 2010), the state was seeking penalties from a clinical social worker who admitted to making fraudulent Medicare claims. The trial court assessed penalties at $5,000 per violation for a total of $1,625,000. In upholding the penalties, which were at the bottom of the statutory range, the court wrote that "[c]ivil fines within statutory limits will not be considered excessive, as a matter of law, when the statute authorizing the punishment is valid and when the punishment imposed is within the range prescribed by the legislature." *Id.* at 358.

35. *Towers*, 173 F.3d 619 (7th Cir. 1999).

36. *Id.* at 625–26.

location.[37] Each day was a separate offense, and the defendant was ultimately assessed a penalty of $95,920, mostly based on penalties of $350 a day for almost fifty days.

In *City and County of San Francisco v. Sainez* the defendants owned a six-unit apartment building that was cited for a number of serious violations of the city's housing code.[38] They resisted correction of the violations for many months and ultimately were assessed penalties totaling $660,000, based on the minimum penalty of $1,000 a day for 660 days.

In *Express Valet, Inc. v. City of Chicago* the defendant operated a number of valet parking sites in Chicago.[39] Such a business requires a permit, which in turn requires liability insurance. Operating without a valid permit exposes the violator to a penalty for each day of operation. In this case the operator did not have liability insurance for an entire year and misrepresented its coverage to the city. As a result, the city imposed a penalty of $100 a day for each of the defendant's sites, totaling $126,900.

In *Moustakis v. City of Fort Lauderdale* the city directed the plaintiffs to correct a code violation in their home or pay a civil fine of $150 a day until it was corrected.[40] Fifteen years later the correction had not been made, the total of fines had reached more than $700,000, and the plaintiffs brought suit claiming that the total was constitutionally excessive.

In each of these cases, and in a number of similar cases in other courts, the court upheld the cumulative penalty, despite its having grown to such a large amount. Basically these courts point out that the number of violations and therefore penalties is a matter within a defendant's control, either through complying with the relevant regulations and thereby avoiding penalties in the first place or by correcting a violation promptly once it is pointed out.[41] It makes no sense, say these courts, for a defendant to delay and delay correcting a violation, thereby running up a large cumulative total of penalties, and then argue that the penalties are now so large as to be constitutionally excessive.

In summary, as long as a penalty is not grossly disproportionate to the offense—which is highly unlikely as a practical matter under current North Carolina practice—neither the penalty on its face nor an accumulation of penalties in a particular case is at all likely to be found in violation of the Excessive Fines Clause.

Substantive Due Process

The federal courts have only in the past decade or two paid much attention to the Excessive Fines Clause, but litigants have been challenging civil penalties as excessive for much longer than that. Before the judicial discovery of the Excessive Fines Clause, the usual basis for challenge was the Due Process Clause of the Fourteenth Amendment.[42] Although courts now sometimes take the position that due process analysis is no longer necessary given the new attention

37. 733 A.2d 1159 (N.J. 1999). The court was considering whether the cumulative penalties were "cruel and unusual punishment," but it applied a grossly disproportionate test.

38. 92 Cal. Rptr. 2d 418 (Cal. Ct. App. 2000).

39. 869 N.E.2d 964 (Ill. Ct. App. 2007).

40. 338 Fed. Appx. 820 (11th Cir. 2009). The statute permitted civil fines up to $250 a day for a first violation and $500 a day for subsequent violations.

41. In *Moustakis* the court pointed out that "[r]ather than being grossly disproportionate to the offense, the $700,000 fine is, literally, directly proportionate to the offense." *Id.* at 823.

42. *E.g.,* Waters-Pierce Oil Co. v. State of Texas, 212 U.S. 86 (1921); Metro. Sanitary Dist. of Greater Chicago v. On-Cor Frozen Foods, Inc., 343 N.E.2d 577 (Ill. Ct. App. 1976). Indeed in *Waters-Pierce* the court expressly denied any reliance on the Excessive Fines Clause:

on the Excessive Fines Clause,[43] others continue to undertake a due process analysis that allows a defendant some additional arguments.[44] What are those arguments?

The first argument is to focus on the culpability of the defendant.[45] Was this an inadvertent violation or was it part of a pattern of widespread and intentional violations? Did the defendant act quickly to correct the violation once notified, or did the defendant delay doing so? Obviously this is an argument that will be made in a particular case and probably one with a large amount of accumulated penalties. It is not an argument that can be made to challenge the facial validity of an ordinance penalty. It also probably makes sense only with respect to an ordinance or statute that provides for variable penalties, allowing an argument that the agency or court selected a penalty too near the upper end of the permitted range.

The second argument, not accepted by all courts, is to focus on the ability of the defendant to pay the penalty.[46] As with the defendant's culpability, this is an argument that will be made only

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> It is not contended in this connection that the prohibition of the 8th Amendment to the Federal Constitution against excessive fines operates to control the legislation of the states. The fixing of punishment for crime or penalties for unlawful acts against its laws is within the police power of the state. We can only interfere with such legislation and judicial action of the states enforcing it if the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law. 212 U.S. at 111.

There were a number of cases in the first part of the twentieth century in which the U.S. Supreme Court invalidated statutory penalties because they continued to run while an alleged violator was litigating the validity of the underlying regulation. *E.g., Ex parte* Young, 209 U.S. 123 (1907); Missouri Pacific Ry. Co. v. Tucker, 230 U.S. 340 (1913). The concern in these cases is that the penalties could accumulate to such an amount that it made litigating the validity issue too expensive to risk, and that outcome was held to violate due process. States eventually gave regulated entities a chance to challenge regulations before they went into effect and before penalties began to run, and this issue became of historical interest only.

43. "A separate analysis of the two constitutional provisions is, however, unnecessary. . . . [H]ere the case involves a civil penalty subject both to the state and federal constitutional bans on excessive fines as well as state and federal provisions barring violations of due process. It makes no difference whether we examine the issue as an excessive fine or a violation of due process." People *ex rel.* Lockyer v. R.J. Reynolds Tobacco Co., 124 P.3d 408, 420–421 (Cal. 2006). Having said this, however, the California court discussed factors not present in the U.S. Supreme Court's Excessive Fines case law, in effect importing due process considerations into Eighth Amendment doctrine.

44. These courts may be operating on a false analogy. The U.S. Supreme Court held that the Excessive Fines Clause did not apply to punitive damages in civil suits, Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989), but subsequently held that punitive damages were reviewable under the Due Process Clause, BMW of North America v. Gore, 517 U.S. 559 (1996), and this background is sometimes cited in support of applying a due process analysis to civil penalties as well. *See, e.g.*, Express Valet, Inc. v. City of Chicago, 869 N.E.2d 964 (Ill. Ct. App. 2007). But civil penalties sued for by governments are subject to the Excessive Fines Clause, and there are obvious differences between civil penalties and punitive damages. For one thing, in *Gore* the Court supported application of due process with this argument: "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State will impose." 517 U.S. at 574. There may be no way of predicting the amount of punitive damages a jury might impose, but the amount of civil penalties—particularly when the ordinance or statute sets a sum certain—is easily predictable; there is clearly fair notice.

45. *E.g., In re* Marriage of Miller, 879 N.E.2d 292 (Ill. 2007).

46. The California courts have included an ability-to-pay factor in their due process analyses, *e.g.,* City and County of San Francisco v. Sainez, 92 Cal. Rptr. 2d 418 (Cal. Ct. App. 2000), while the Illinois courts have rejected it, *In re* Marriage of Miller, 879 N.E.2d 292 (Ill. 2007) (""Our lawmakers are under

in a particular case and most likely one with a large amount of accumulated penalties. It too is not an argument that can be made to challenge the facial validity of an ordinance penalty.

The third argument is to compare the penalty imposed by the ordinance for this sort of violation with penalties imposed for other sorts of violations to see if this penalty appears to be much greater than others without any basis for that difference.[47] This is an argument that can be made in a facial challenge, and therefore it behooves a local government that imposes a much higher penalty for one sort of violation to develop a clear rationale for having done so.

Conclusion

Ordinance penalties in North Carolina typically are set in the hundreds of dollars or less, with an occasional penalty being set at one thousand or a few thousand dollars. Penalties in this range are very likely to survive any attack, either as beyond the statutory authorization or as violations of either the Excessive Fines Clause or the Due Process Clause. The one sort of penalty that might be susceptible to attack, under due process, would be one that was exceptionally high compared with others imposed by the city or county.

Similarly, if the basic penalty will survive attack, it is equally likely that an accumulation of penalties—even one that reaches a large amount—will survive attack. The case law under the Excessive Fines Clause and the Due Process Clause consistently rejects attacks made because the defendant committed a large number of violations, leading to a large amount of accumulated penalties.

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no obligation to make unlawful conduct affordable, particularly where multiple statutory violations are at issue." *Id*. at 303). Litigants tried to import an ability-to-pay argument into an Excessive Fines Clause case in New York City, when an association of street vendors brought suit to challenge a doubling of penalties for violations of the city's street vendor regulations. Street Vendor Project v. City of New York, 841 N.Y.S.2d (N.Y. Sup. Ct., App. Div. 2007). Both the trial and appellate court rejected the attempt, with the trial court noting that "[r]educed to its essence, petitioners' argument is that the Schedule [of penalties] is constitutionally excessive because street vendors will no longer be able comfortably to pay the fines as a cost of doing business." Street Vendor Project v. City of New York, 811 N.Y.S.2d 555, 560 (N.Y. Sup. Ct., Trial Div. 2005).

47. *E.g.,* City and Cnty. of San Francisco v. Sainez, 92 Cal. Rptr. 2d 418 (Cal. Ct. App. 2000).

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