

CITY of NOVI CITY COUNCIL

**Agenda Item 2
August 9, 2010**

SUBJECT: Approval of Ordinance No. 10-149.11, an ordinance to amend Chapter 3, "Alcoholic Liquor", Article I of the Novi Code of Ordinances by amending Section 3-5(f), to comply with state law regarding the administration of preliminary breath tests to minors. **FIRST READING**

SUBMITTING DEPARTMENT: Police *JCY*

CITY MANAGER APPROVAL: *[Signature]*

BACKGROUND INFORMATION:

The Novi Police Department and City Attorney's office have become aware that provisions similar to §3-5(f) have been successfully challenged by criminal defendants in both state and federal court. Currently, this Code provision provides a penalty for any minor who, upon request of a police officer, refuses to submit to a preliminary breath test. The Novi district court found §3-5(f) to be "unconstitutional" in a recent case, and although the ordinance uses the same wording as the state statute [MCL 436.1703(6)], an ordinance similar to Novi's adopted by the City of Troy was also struck down by the Michigan Court of Appeals (*People v Chowdhury*, 285 Mich App 209; 775 NW2d 845 (2009)). Furthermore, the state statute upon which the ordinance is based was struck down as unconstitutional by a federal court judge (*Platte v Thomas Township*, 504 F Supp 2d 227 (ED Mich 2007)).

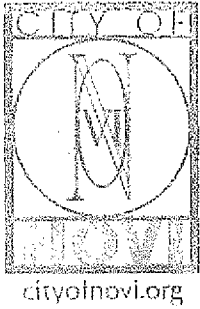
Based on these court rulings, the proposed text amendment removes the penalty for failure of a minor to submit to a request to take a preliminary breath or other test to determine whether a minor has consumed alcohol. This does not prevent a police officer from requesting the minor take the chemical test (and the minor consenting to such test), and if the circumstances warrant, the police officer can still seek a warrant to conduct such a test. In our view, the amended provision complies with the current state of the law in Michigan.

RECOMMENDED ACTION: Approval of Ordinance No. 10-149.11, an ordinance to amend Chapter 3, "Alcoholic Liquor", Article I of the Novi Code of Ordinances by amending Section 3-5(f), to comply with state law regarding the administration of preliminary breath tests to minors.

	1	2	Y	N
Mayor Landry				
Mayor Pro Tem Galt				
Council Member Crawford				
Council Member Fischer				

	1	2	Y	N
Council Member Margolis				
Council Member Mutch				
Council Member Staudt				

MEMORANDUM



TO: DAVID E. MOLLOY, CHIEF OF POLICE
FROM: KEITH A. WUOTINEN, LIEUTENANT (W)
SUBJECT: REVIEW OF PBT ORDINANCE
DATE: JUNE 24, 2010

Background:

The City of Novi has an ordinance, Chapter 3-5, that prohibits underage persons from drinking alcohol. As part of this section, it requires underage persons to submit to a preliminary breath test (PBT) when a police officer asks them to, where there is reasonable cause to believe that the minor has been drinking alcohol in violation of the law.

This provision is substantially similar to the same provision found in Michigan State law at MCL 436.1703.

The language that requires a minor to submit to a PBT upon a showing of reasonable suspicion (without the need for a search warrant) has been the subject of several legal challenges. The first set of challenges occurred in the Federal District Court (See *Spencer v Bay City*, 292 F.Supp.2d 932 (ED Mich, 2003) and more recently in *Platte v Thomas Twp.*, 504 F.Supp.2d 227 (ED Mich, 2007).) Neither one of these decisions are legally binding upon anyone else in the State except for the involved parties to the suit. Additionally, it was one particular federal judge who decided both and neither was subjected to judicial review by a higher court. It was still believed at the time that when or if a higher court reviewed the issue, that the decision could still go in favor of upholding the statute as written.

However, following the *Platte* decision in 2007, the Office of Highway Safety Planning (OHSP), after being brought into the *Platte* case themselves, made some suggested protocol changes to Michigan law enforcement agencies, until these legal issues get more fully worked out. Those suggested changes included, namely, to cease enforcing the penalty upon minors who refuse to take a PBT (and just as importantly, to not tell the minors that there is a penalty for non compliance). The protocol they suggested was to get voluntary consent from the minor for the PBT, and if that is refused, to proceed with your criminal case based upon your observations and/or consider obtaining a search warrant for chemical evidence (breath, blood or urine—most likely blood- as we currently sometimes have to do in drunk driving cases) where needed for the case.

As a result of these suggested changes in protocol, until the issues were more fully sorted out, the Novi Police Department, as a matter of department policy, ceased enforcing the penalty regarding PBT refusal to minors. (Note that persons driving a car, minors or not, are still legally required to take a PBT upon a showing of reasonable

cause). This change in policy was reflected in official department training, and most notably, Novi Police Training Bulletin 08TB005 (attached). Minors were still being successfully arrested and prosecuted for drinking underage, they were just either being asked to voluntarily consent to a PBT with no penalty for non-compliance, or were being successfully prosecuted on the officers observations related to the drinking and intoxication of the minor person.

This issue was next challenged in the City of Troy in the case of *People v Chowdhury*, 285 Mich App 509; 885 NW2d 845 (2009). The City of Troy, like Novi and most other communities, had a local ordinance that was substantially similar to MCL 436.1703, that required minor persons to take a PBT upon a showing of reasonable cause, and there was a civil infraction penalty associated with non-compliance. The Oakland County Circuit Court ruled that the portion of the law that required the minor person to submit to a PBT under penalty of law was unconstitutional, and the City of Troy appealed to the Michigan Court of Appeals. The Michigan Court of appeals affirmed the lower court decision, and struck the portion of the law that requires minor person to submit to a PBT under penalty of law. This is a published Michigan Court of Appeals case, so this case is legally binding upon the City of Novi, unlike the lower court federal decisions that were previously cited (although those decisions can be considered persuasive).

Although the City of Novi has not been enforcing the portion of the law that is now been ruled unconstitutional, the fact that it is still in our ordinance is now becoming fodder for criminal defense attorneys in their representation of their clients arrested for drinking underage. The criminal defense attorneys have been trying to argue, so far unsuccessfully, that since one portion of the Novi ordinance is unconstitutional, that the whole ordinance should be held invalid. (under the *Chowdhury* case). Although the attorneys from Charlie Coopers office have been successful in fending off these motions, it is creating unnecessary work for them, and the time has come to conform the ordinance to the law as it now exists in Michigan.

Proposed Solution:

The law in Michigan is now clear that a minor (who is not operating a motor vehicle) cannot be compelled under legal sanction to take a PBT. However, the law is also clear that the police are still free to ask a minor person to voluntarily take a PBT.

To avoid unnecessary legal challenges to our criminal cases and avoid unnecessary exposure civilly, the time has come to amend our local ordinance to reflect the changes that have been made my court decision, including most notably, the *Chowdhury* decision.

In consultation with the professional legal staff at Secrest Wardell, the Novi Code of Ordinances, section 3-5, has a proposed amendment to make it current and valid with existing law in Michigan. Those proposed changes are attached.

STATE OF MICHIGAN
COUNTY OF OAKLAND
CITY OF NOVI

Ordinance No. _____

AN ORDINANCE TO AMEND CHAPTER 3,
"ALCOHOLIC LIQUOR", ARTICLE I OF
THE NOVI CODE OF ORDINANCES BY
AMENDING SECTION 3-5(f) TO CONFORM
WITH STATE LAW REGARDING THE
ADMINISTRATION OF PRELIMINARY
BREATH TESTS TO MINORS.

THE CITY OF NOVI ORDAINS:

PART I.

Chapter 2, "Alcoholic Liquors," Article 1, "In General", Section 3.5, is hereby amended to read as follows:

Sec. 3-5. Persons under twenty-one--Unlawful purchase, consumption or possession.

(a) – (e) [Unchanged.]

(f) A police officer may request that the minor voluntarily submit to a preliminary breath test or other chemical test. A police officer may arrest a person based in whole or in part upon the results of a preliminary chemical breath analysis. The results of a preliminary chemical breath analysis or other chemical test are admissible in a criminal prosecution to determine whether the minor has consumed or possessed alcoholic liquor or had any bodily alcohol content.

(g) – (o) [Unchanged.]

Part II.

Savings Clause. The amendment of the Novi Code of Ordinances set forth in this Ordinance does not affect or impair any act done, offense committed, or right accruing, accrued, or acquired or liability, penalty, forfeiture or punishment, pending or incurred prior to the amendment of the Novi Code of Ordinances set forth in this Ordinance.

PART III.

Severability. Should any section, subdivision, clause, or phrase of this Ordinance be declared by the courts to be invalid, the validity of the Ordinance as a whole, or in part, shall not be affected other than the part invalidated.

PART IV.

Effective Date: Publication. The provisions of this Ordinance shall become effective fifteen (15) days after its adoption and shall be published within 15 days of its adoption by publication of a brief notice in a newspaper circulated in the City, stating the date of enactment and the effective date of the ordinance, a brief statement as to the subject matter of this Ordinance and such other facts as the Clerk shall deem pertinent, and that a copy of the Ordinance is available for public use and inspection at the office of the City Clerk.

MADE, PASSED, AND ADOPTED BY THE CITY COUNCIL OF THE CITY OF NOVI, OAKLAND COUNTY, MICHIGAN, ON THE ___ DAY OF _____, 2010.

DAVID B. LANDRY – MAYOR

MARYANNE CORNELIUS – CITY CLERK

Ayes:
Nays:
Abstentions:
Absent:

CERTIFICATION OF ADOPTION

I hereby certify that the foregoing is a true and complete copy of an Ordinance passed at a _____ meeting of the Novi City Council, held on the _____ day of _____, 2010.

MARYANNE CORNELIUS – CITY CLERK

Adopted:
Published:
Effective:
1448054_1

STATE OF MICHIGAN
COUNTY OF OAKLAND
CITY OF NOVI

Ordinance No. _____

AN ORDINANCE TO AMEND CHAPTER 3,
“ALCOHOLIC LIQUOR”, ARTICLE I OF
THE NOVI CODE OF ORDINANCES BY
AMENDING SECTION 3-5(f) TO CONFORM
WITH STATE LAW REGARDING THE
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BREATH TESTS TO MINORS.

THE CITY OF NOVI ORDAINS:

PART I.

Chapter 2, “Alcoholic Liquors,” Article 1, “In General”, Section 3.5, is hereby amended to read as follows:

Sec. 3-5. Persons under twenty-one--Unlawful purchase, consumption or possession.

(a) – (e) [Unchanged.]

(f) A peace **police** officer who has reasonable cause to believe a minor has consumed alcoholic liquor or has any bodily alcohol content may require the person to submit to a preliminary chemical breath analysis. may request that the minor voluntarily submit to a preliminary breath test or other chemical test. A peace **police** officer may arrest a person based in whole or in part upon the results of a preliminary chemical breath analysis. The results of a preliminary chemical breath analysis or other acceptable blood alcohol test **chemical test** are admissible in a criminal prosecution to determine whether the minor has consumed or possessed alcoholic liquor or had any bodily alcohol content. ~~A minor who refuse to submit to a preliminary chemical breath test analysis as required in this subsection is responsible for a municipal civil infraction and may be ordered to pay a civil fine of not more than one hundred (\$100.00).~~

(g) – (o) [Unchanged.]

Part II.

Savings Clause. The amendment of the Novi Code of Ordinances set forth in this Ordinance does not affect or impair any act done, offense committed, or right accruing, accrued, or acquired or liability, penalty, forfeiture or punishment, pending or incurred prior to the amendment of the Novi Code of Ordinances set forth in this Ordinance.

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DAVID B. LANDRY – MAYOR

MARYANNE CORNELIUS – CITY CLERK

Ayes:
Nays:
Abstentions:
Absent:

CERTIFICATION OF ADOPTION

I hereby certify that the foregoing is a true and complete copy of an Ordinance passed at a _____ meeting of the Novi City Council, held on the ____ day of _____, 2010.

MARYANNE CORNELIUS – CITY CLERK

Adopted:
Published:
Effective:
1447761_1