

MEMORANDUM

To: Town Council
From: Jester Gibson & Moore, LLP
Robert R. Marsh, Esq.
Date: April 9, 2024
Re: An Ordinance Amending the Fence Code

Section 10-8-280 of the Town code, entitled “Barbed wire fences prohibited,” makes it unlawful to construct or maintain within the Town barbed wire and certain other types of fences. The ordinance is not clear, however, regarding whether the term “maintain” as used in that section refers to repairs of a fence (i.e., physical repairs or alterations of an existing fence) or allowing an otherwise unlawful fence to remain in place.

An amendment to section 10-8-280 is proposed to clarify that: (1) all of the types of fencing prohibited by the section, not just barbed wire, are unlawful within the Town; (2) allowing an unlawful fence to remain in place is a violation of the code without regard to whether the owner actually constructs or physically maintains the fence; and (3) fencing creating a demonstrable risk to the health or safety of the public, or of wildlife injuries or fatalities, are nuisances subject to prosecution and abatement under Chapter 7, Article 2 of the code.

Over the years there have been various injuries to and/or fatalities of wildlife within the Town caused by fences. These events in proximity to the Town’s residents and visitors create a variety of risks, including but not limited to attracting predators, foul or offensive odors, growth or propagation of disease-carrying insects, and psychological or emotional trauma from witnessing dead or dying animals. Various areas within the Town are also frequented by wildlife and/or constitute their accustomed fawning/calving grounds.

The proposed amendments do not expand the kinds of hazardous fences prohibited within the Town, but clarify and strengthen the Town’s ability to require removal or abatement of hazardous fencing to protect the health, safety, and general welfare of its residents and eliminate demonstrable risks of wildlife injuries or fatalities.

The proposed amendments require the risks that render a fence a nuisance to be “demonstrable.” Therefore, abatement or removal of a hazardous fence would require some actual evidence of a risk, as opposed to a purely hypothetical concern. What form that evidence would take would depend upon the specific circumstances at issue in each enforcement action. Its necessity, however, will prevent undue burden on property owners from enforcement actions without such “demonstrable” basis, while enabling the Town to effectively require abatement of hazardous circumstances creating identifiable risks to wildlife and/or the Town’s residents or visitors. Consistent amendments to the code’s definition of the term “nuisance” are simultaneously proposed and presented under separate cover.