



KENAI PENINSULA BOROUGH

144 North Binkley Street • Soldotna, Alaska 99669-7520

Toll-free within the Borough: 1-800-478-4441

PHONE: (907) 262-4441 • **FAX:** (907) 262-1892

www.borough.kenai.ak.us

**MIKE NAVARRE
BOROUGH MAYOR**

MEMORANDUM

TO: Gary Knopp, Assembly President
Members, Kenai Peninsula Borough Assembly

THRU: Mike Navarre, Mayor *MN*

FROM: Colette Thompson, Borough Attorney *CT*
Holly Montague, Deputy Borough Attorney *HM*

DATE: June 5, 2012

SUBJECT: Ordinance 2012-14, adjusting the boundaries of Kachemak Emergency Service Area after City of Kachemak annexation

Question Presented

The question has been raised whether the newly annexed approximately 50 acres to Kachemak City would require a vote of Kachemak Emergency Service Area (KESA) residents in order to approve the deletion of this area from the service area.

Discussion

Fifty acres was annexed to the City of Kachemak by citizen petition as approved by the Local Boundary Commission (LBC) effective February 9, 2012. The area was annexed pursuant to AS 29.06.040(c)(4) which provides that an area adjoining the municipality may be annexed by ordinance without an election if all property owners and voters in the area petition the governing body.

AS 29.35.450(c) provides in part that:

A service area that provides road, fire protection, or parks and recreation services in which voters reside may not be altered or combined with another service area unless that proposal is approved, separately, by a majority of the voters who vote on the question and who reside in each of the service areas or in the area outside of service areas that is affected by the proposal.

The State of Alaska Constitution Art. X Sec. 2 regarding service areas provides "Service areas to provide special services within an organized borough may be established, altered, or abolished

by the assembly, subject to the provisions of law or charter.” It is arguable based on this constitutional provision that the 2001 amendment to AS 29.35.450 is unlawful because it allows the voters to approve or disapprove a function that was specifically delegated to the assembly by the constitution. Alaska case law has held that where the assembly has been specifically delegated a function by statute the voters cannot undermine representative government and the authority delegated the assembly through popular vote.¹

The State of Alaska Constitution Art. X Sec. 12 regarding boundaries established that municipal boundaries be established at state level by providing for a state agency, the Local Boundary Commission, and providing that the legislature was required to approve municipal boundaries, except, the LBC was delegated authority to establish procedures whereby boundaries may be adjusted by local action. AS 29.06.040.

It appears that the two statutes conflict because allowing the vote required by AS 29.35.450 could negate the purpose of the annexation approved by the LBC. While it is possible to have a service area, eg. KESA, encompass both city and borough lands, a primary purpose of the proposed annexation was for the 50 acres formerly served by KESA to become part of the city. The City of Homer would become the first responder for emergency services through a contract with the City of Kachemak, and the 50 acres would be within the taxing jurisdiction of Kachemak and not within that of KESA.

The basic purpose for creating the boundary commission and conferring upon it the powers that it possesses was to resolve a controversy over municipal boundaries which could not be settled at the local level.² The concept when the local boundary commission section of the constitution was being considered by the constitutional convention was that local political decisions do not usually create proper boundaries and that boundaries should be established at the state level. The purpose of the boundary commission was to establish boundaries at a state level, resolve conflicts that cannot be properly solved at the local level, and to avoid “multiplication of facilities and services, duplication of tax burdens, and inevitable jurisdictional conflict and chaos.”³ By giving the state the final approval authority over municipal boundary adjustments the controversies which can arise between two functioning local governments with competing economic and political interests is vitiated.⁴

Here, failing to adjust the KESA boundaries contradicts these purposes of the LBC as it leaves precisely the multiple facilities, services and duplicate taxes that the commission has authority to eliminate with legislative concurrence.

Legislative history and the wording of AS 29.06.055 also support giving deference to AS 29.06.040 over AS 29.35.450. In 2004 AS 29.06.055 was enacted giving the local boundary commission control of property tax jurisdiction as well as boundary determinations. AS 29.06.055 provides that an annexing municipality may not assess taxes in the newly annexed area until January 1 of the immediately following year. However, the annexing municipality

¹ *Whitson v. Anchorage*, 608 P.2d 759 (Alaska 1980) ; *Carmony v. McKechnie*, 217 P.3d 818, (Alaska 2009).

² *Oesau v. City of Dillingham*, 439 P. 2d 180, 183-84 (Alaska 1968).

³ *Id.*

⁴ See, *Mobil Oil Corp. v. Local Boundary Com'n*, 518 P.2d 92 (Alaska 1974).

may provide services in the annexed area prior to it having the authority to tax for these services. The following excerpts from committee hearings explain the purpose of the statute:

Representative Seaton explained that when there is an annexation or incorporation there are almost always overlying service areas. Currently, the service areas lose a major portion of their budget when there is an annexation early in the year but after the service areas have their budgets in place. Furthermore, there is no way for the service areas to make up the loss. Therefore, this legislation specifies that the tax year begins January 1st [of the year immediately following the year an annexation takes effect]. Under the aforementioned scenario budgets can be planned without facing a disruption in service to the local areas.⁵

Public testimony excerpt:

. . . The statutes require municipalities to determine the rate of levy before June 15th and to mail tax statements setting out the levy by July 1st. These deadlines prevent municipalities from levying in the same year for any annexation or incorporation that becomes effective after July 1st. The question remains whether they can disrupt the established schedule to immediately tax properties annexed or incorporated between January 1 and July 1. To complicate the situation, the Local Boundary Commission is given broad powers to place conditions on boundary changes, but there is no clear authority for it to decide property tax jurisdiction. This is a policy issue and it's better resolved through legislation than by the Local Boundary Commission on a case-by-case basis or by dragging it through the court. Clarifying, by statute in cases of incorporation, annexation, and detachment, that property taxes accrue in full each year on January 1 is consistent with existing policies and procedures across the state for assessing property and adding new property tax rolls. It is a practical approach that will simplify the transition planning process and be less disruptive to the effected governmental units and individual taxpayer.

. . .

It is important to note that with many annexations and incorporations there is a corresponding simultaneous detachment from another governmental unit. Using January 1 as the cutoff date to establish value and jurisdiction provides less disruption to that municipality's budget process and service delivery plans. This is a better approach than pro-rating taxes between governments for the remainder of the tax year, because many services are provided on an areawide basis, the cost of which will not decrease proportionately to the territory affected by the simultaneous boundary change. It is also better because municipal governments have flexibility to establish levy dates and payment cycles within the statutory limit and are often different fiscal and budget preparation cycles, which makes pro-rating taxes cumbersome and disruptive.⁶

⁵ *Municipal Annexations and Detachments: Hearing on SB 63 Before the H. CRA Standing Comm., 23rd Legislature (2003-2004) (Feb. 12, 2004) (statement of Rep. Seaton).*

⁶ *Municipal Annexations and Detachments: Hearing on SB 63 Before the H. CRA Standing Comm., 23rd Legislature (2003-2004) (Feb. 12, 2004) (Mary Griswold public testimony).*

AS 29.06.055 was adopted to specifically allow the LBC to make determinations regarding taxing jurisdiction issues and submitting to the voters the KESA boundary alteration resulting from the Kachemak City annexation would undermine the LBC's statutory authority.

The rules of statutory construction also support not referring the KESA boundary alteration to popular vote. AS 29.06.055 giving the LBC authority to determine taxing jurisdictions was adopted four years after AS 29.35.450 requiring a popular vote on service area boundary alternations. Where there is a conflict between two statutes the later in time controls over the earlier.⁷

In yet another case the Supreme Court ruled the superior court erred when it remanded a boundary issue to the voters. The court held "It does not appear that a municipality can ignore an LBC boundary decision. An election permitting voters to choose between two boundaries essentially allows the electorate to establish the boundary without regard to LBC's action."⁸

Conclusion

Based on the foregoing constitutional provisions, statutes, legislative history and case law the alteration of the KESA boundary to delete the portions now in Kachemak City should not be submitted to the voters as it would have the potential to undermine the state's authority to adjust local boundaries and result in the duplication of taxing jurisdictions contrary to the purposes of the LBC.

⁷ *Nelson v. Municipality of Anchorage*, 267 P.3d 636 (Alaska 2011).

⁸ *Lake and Peninsula Borough v. Local Boundary Com'n*, 885 P.2d 1059 (Alaska 1994).