

April 2, 1992

The Honorable John Gonzales
Alaska State Legislature
House of Representatives
P. O. Box V
Juneau, AK 99811

Re: Denali Borough initiative to
amend charter and repeal taxes
Our file: 663-92-0447

Dear Representative Gonzales:

You have asked whether an initiative petition that proposes to amend the Denali Borough's charter and repeal all of the borough's tax ordinances is valid. Additionally, you ask what effect a repeal of all tax ordinances may have on the Denali Borough's ability to provide basic services. As explained below, we find no particular legal problems with the initiative to repeal the taxes and amend the charter. However, we express concern that loss of all tax revenues could affect the ability of the borough to provide basic services, particularly education.

Facts and Analysis

An initiative petition was recently certified by the Denali Borough clerk and is scheduled for a vote at an election on April 7, 1992. The initiative petition proposes two things. First, it proposes to amend the Denali Borough's home rule charter by eliminating the requirement that voters must approve, by majority vote, all real and personal property taxes proposed by the assembly before a tax is imposed. With respect to this first proposal, article XIV, section 14.01(B), of the Denali Borough charter provides that amendments to the charter may be proposed by initiative petition.¹ Therefore, use of the initiative to amend the charter is in accordance with applicable law.

¹ Under AS 29.10.100(a), a home rule charter may be amended as provided in the charter.

Second, the initiative proposes to repeal the two taxes currently imposed in the Denali Borough: the overnight bed tax and the severance tax.² These tax ordinances were passed at the incorporation election of the Denali Borough in November 1990.³ Your concern regarding the repeal of the borough's tax ordinances appears to be two-fold. First, you ask whether it is proper to allow the repeal of a tax that conditioned incorporation of the borough. The answer is yes. We find no state law prohibiting the repeal of a sales or property tax that conditioned the Local Boundary Commission's initial approval of a petition for incorporation. Just as the borough assembly can propose to amend or repeal tax ordinances and submit them to the voters for approval under the current charter, so can the voters utilize the initiative process to accomplish the same purpose.⁴

You also ask what effect the repeal of the taxes may have on the borough's ability to provide basic government services. It is safe to assume that loss of revenues will have some effect on the services currently provided by the borough. However, the Denali Borough will continue to qualify to receive revenue sharing money from the state under AS 29.60 whether or not it has tax revenues, and at approximately the same level.

² Use of the initiative to repeal a tax ordinance, while not common, is generally allowed under article IX, section 1, of the Alaska Constitution, it not being specifically restricted under article XI, section 7, and AS 29.26.100 (initiative shall not be used to dedicate revenues, make appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation). While restrictions on the initiative right require strict compliance, Citizens Coalition for Tort Reform v. McAlpine, 810 P.2d 162 (Alaska 1991), a liberal construction is to be given to use of the initiative. Boucher v. Engstrom, 528 P.2d 456 (Alaska 1974).

³ Also on the incorporation ballot was a proposed utilities tax measure. While the bed tax and severance taxes passed, the utility tax was rejected. The incorporation of the borough was not conditioned on the passage of either the severance or utilities taxes; only the bed tax.

⁴ In matters of initiative and referendum, the people are exercising a power reserved to them by the constitution and the laws of the state. Mun. of Anchorage v. Frohne, 568 P.2d 3 (Alaska 1977).

According to the Department of Community and Regional Affairs, the amount of revenue-sharing money that the Denali Borough can expect to receive this year and in future years probably will not be affected if the bed and severance taxes are repealed. The amount of revenue collected from the two taxes over the last year has been minimal (approximately \$35,000), resulting in the borough receiving the statutory minimum revenue-sharing entitlement (which is also approximately \$35,000). Therefore, if the taxes are repealed, the borough can expect to continue to receive the minimum entitlement.

While revenue sharing is not expected to be affected by repeal of the taxes, the same is not true for education funding.

Presuming that both taxes are repealed at the election, but the charter amendment fails, then the assembly will be unable to impose any new taxes without a majority vote of the citizens of the borough. The borough may fall short of meeting its local contribution for education in future fiscal years. Under AS 14.17.025(a), the Denali Borough is required to provide local contributions to qualify for state foundation aid to include at least the lesser of

(1) the equivalent of a four mill tax levy on the full and true value of the taxable real and personal property in the district as of January 1 of the second preceding fiscal year. . . ; or

(2) 35 percent of the district's basic need for the preceding fiscal year, as determined under AS 14.17.021(b).

And, under AS 14.17.125(e), "[a] state foundation aid payment may not be made to . . . a borough school district in which the requirements of (a) of this section have not been met."⁵ Therefore, under the worse case scenario, it is possible that the Denali Borough may not qualify to receive a state foundation aid payment in future fiscal years if it has no tax revenues to meet

⁵ Under AS 14.17.025(f), the Denali Borough's local contributions may be less than otherwise required under AS 14.17.025(a) for its first three fiscal years because it qualifies as a newly formed district. However, our analysis is not affected by this fact because a local contribution is still required to be made by the Denali Borough and, without revenues, it would conceivably be unable to pay even the lesser amount.

its required local contribution amount.⁶

Finally, we note that on February 18, 1992, the Denali Borough's attorney, Paul Cragan, sent a letter to the Denali Borough mayor explaining the potential effect of the pending initiative petition on the borough's authority to levy taxes. We agree with Mr. Cragan's analysis.⁷

If you have further questions regarding this matter, please do not hesitate to contact the undersigned.

Sincerely yours,

CHARLES E. COLE
ATTORNEY GENERAL

by:

Marjorie L. Odland
Assistant Attorney General

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cc: The Honorable Edgar Blatchford
Commissioner
Department of Community &
Regional Affairs

Pat Poland
Department of Community and
Regional Affairs

⁶ In coming to this conclusion, we assume that the borough will be unable to meet its local contribution from money received from revenue sharing, AS 29.60.

⁷ On February 20, 1992, Pat Poland, deputy director of the division of municipal and regional assistance, Department of Community and Regional Affairs, wrote a letter to Mayor Brewer also agreeing with Paul Cragan's advice.