

# MEMORANDUM

State of Alaska  
Department of Law

**TO:** Dan Bockhorst  
LBC Staff Supervisor  
Local Boundary Commission  
Department of Community &  
Economic Development

**DATE:** March 8, 2002

**A.G. FILE NO:** 663-02-0140

**TELEPHONE:** 465-3600

**FROM:** Marjorie L. Vandor  
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**SUBJECT:** Haines Consolidation Petition;  
AS 29.06.090 – 29.06.170;  
miscellaneous issues

On behalf of the Local Boundary Commission (LBC), you have asked our opinion regarding a technical issue relating to a pending consolidation petition in Haines. The petition for consolidation proposes to consolidate the existing first class City of Haines with the third class Haines Borough, to create a newly incorporated home rule municipality to be called the City and Borough of Haines.<sup>1</sup> Since such time as the petition for consolidation was filed with the LBC, an initiative petition to create a land use service area in the Haines Borough passed at a borough election and became Ordinance 01-15.<sup>2</sup> This service area encompasses the entire borough outside the limits of the City of Haines and proposes to regulate commercial helicopter flightseeing tours. As to this particular service area and the method under which it was created (i.e., by the initiative process under AS 29.26.100 -- 29.26.190), you raise several questions that may affect the consolidation petition currently before the LBC.<sup>3</sup> Due to time constraints, we will address the main question you raise in your opinion request, as we believe our response may resolve the other questions you raise.

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<sup>1</sup> See *Preliminary Report on the Proposal to Consolidate the City of Haines and the Haines Borough* (July 2001), pp. 1-5.

<sup>2</sup> The initial petition was filed in December 2000, and the initiative election resulting in Haines Borough Ordinance No. 01-15 was held October 2, 2001.

<sup>3</sup> Under AS 29.35.450(a), a service area in a borough may be established by ordinance. And under AS 29.35.490(b), a third class borough may exercise in a service area any power not otherwise prohibited by law if the exercise of the power is approved by a majority of the voters residing in the service area. We do not render an opinion at this time as to whether the service area created by Haines Borough Ordinance 01-15 meets the statutory requirements. The municipal attorney for the Haines Borough is the proper person to address that issue at this juncture. See 1988 Inf. Op. Att'y Gen. (July 29; 663-88-0525).

**Question:** Can the effect of a general law municipal ordinance legally adopted in an initiative election be modified or negated within two years after its effective date by a successor home rule municipal government incorporated through the municipal consolidation process?<sup>4</sup>

**Answer:** In brief, we believe the answer is yes, provided certain facts are presumed as applied to the consolidation statutes, AS 29.06.090 -- 29.06.170. In analyzing this question as it pertains to a municipal consolidation, we will assume that the ordinance resulting from an initiative petition meets all the legal requirements under AS 29.26.100 and article XI, section 7 of the Alaska Constitution<sup>5</sup> and is enforceable by its terms. Also, because this is a consolidation, we note that the two existing municipalities to be consolidated will individually dissolve by operation of law (AS 29.71.800(6))<sup>6</sup> and a newly incorporated municipality will succeed to the rights, powers, duties, assets, and liabilities of the consolidated municipalities. And, under AS 29.05.160, the ordinances, resolutions, regulations, procedures, and orders of the former municipalities remain in force *until superseded* by the action of the new municipality.

Based upon the language of the above consolidation statutes, and assuming consolidation is approved by the voters under AS 29.06.140 and AS 29.10.080, Ordinance No. 01-15 remains in effect until the new municipality supercedes the ordinance. The restrictions of AS 29.26.190(a) will end by operation of law at the time consolidation is approved because the entity to which the restrictions on Ordinance No. 01-15 apply, the Haines Borough, will have been dissolved and there is no basis upon which to conclude that the restrictions of AS 29.26.190(a) prevent the new entity from superceding the ordinance under AS 29.06.160. We come to this conclusion for two reasons. First,

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<sup>4</sup> The initiative statute at issue here is AS 29.26.190(a), which reads: “The effect of an ordinance or resolution may not be modified or negated within two years after its effective date if adopted in an initiative election or if adopted after a petition that contains substantially the same measure has been filed.”

<sup>5</sup> Alaska Statute 29.26.100 reads: “The powers of initiative and referendum are reserved to the residents of municipalities, except the powers do not extend to matters restricted by art. XI, sec. 7 of the state constitution.” Art. XI, sec. 7 provides that the “. . . initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules or enact local or special legislation.” We render no opinion as to the validity or legality of Haines Borough Ordinance No. 01-15, as that is the province of the municipal attorneys who advise the local governments.

<sup>6</sup> Alaska Statute 29.71.800(6) reads: “‘consolidation’ means dissolution of two or more municipalities and their incorporation as a new municipality.”

AS 29.06.160 makes no exception or distinction as to which ordinances remain in force during transition or which can be superceded and no exceptions or distinctions should be inferred. The statute is clear on its face. *See U.S. v. Hanousek*, (C.A. 9 Alaska) 176 F.3d 1116, *cert. denied* 120 S.Ct. 860 (statutory interpretation begins with the plain language of the statute; if the language of the statute is clear, court need look no further than that language for determining the statute's meaning); *Gerber v. Juneau Bartlett Mem. Hosp*, 2 P.3d 74 (Alaska 1999) (where a statute's meaning appears clear and unambiguous, the party asserting a different meaning bears a corresponding heavy burden of demonstrating contrary legislative intent). Second, because the new entity will be a home rule borough, the restrictions of AS 29.26.190(a) will not apply. *See* AS 29.26.200. Finally, it is relevant to note that Ordinance No. 01-15 was voted on by only those persons residing in the Haines Borough outside the City of Haines. Therefore, if a new home rule municipality forms through consolidation, it will represent the citizens of the two municipalities and be specifically authorized to supercede the "ordinances, resolutions, regulations, procedures, and orders of the former municipalities" in order to provide for new ordinances, etc., as the representative government.

Therefore, according to AS 29.06.160, all ordinances of the City of Haines and the Haines Borough, regardless of how those ordinances were initially passed (i.e., by council, assembly or vote of the citizens), are subject to be superceded by the new municipality and will remain in force in their respective areas only during the transition period. *See 6 McQuillin Municipal Corporations* §21.27 (3rd ed. 1988) (where a consolidation of two or more municipal corporations is effected, each having its peculiar ordinance provisions, it is sometimes provided in the act of consolidation that the ordinances then in force shall remain in force within the limits of the territory for which they were enacted, until repealed by the consolidated entity).

### **Broad Power of LBC to Amend Petitions**

We also wish to point out that because a consolidation petition must be found to meet the standards of incorporation and the LBC may amend the petition and impose conditions on the consolidation (AS 29.06.130(a)), and because the initiative petition that resulted in Ordinance No. 01.15 was not in effect at the time the petition for consolidation was filed, it is certainly an option for the LBC to impose a condition to have the borough service area in question be dissolved as a condition of consolidation. Dissolving existing service areas has been recommended by the LBC in other consolidation and incorporation petition processes. It is proper to do so since the LBC enjoys broad discretion in amending and approving petitions brought before it. *Petitioners for Incorporation of City of Yakutat v. Local Boundary Comm'n*, 900 P.2d 721, 725 (Alaska 1995) (decided prior to 1994 amendment to AS 29.05.100).

We are not able to address, at this time, the issue related to whether it is legally permissible for the third class borough to create a non-areawide service area, but hope to have an opinion addressing this issue at a future date. However, as noted earlier, we believe that legal issue is first best addressed by local municipal counsel as it is well within their purview to render such a decision.

We hope this addresses your immediate concerns for the March 9, 2001, hearing on the consolidation petition.

MLV:jn