

the Department made a determination whether consideration should be given to the possibility of consolidating any school districts with 250 or more students.

4. Opportunities for Legislative Action Re: School Consolidation.

Senator Wilken asked in his letter of November 6 that the Commission and Department consider possible legislative actions that would accomplish school consolidation.

The Commission offers the following suggestions for consideration in that regard.

(a) Promote Borough Government.

Outside of specific legislation expressly providing for consolidation of school districts, there is probably no greater action that the Legislature could take to encourage responsible consolidation of schools than to promote borough formation.

Since the 1980s, the Local Boundary Commission has urged the Legislature to examine and address the substantial disincentives for borough incorporation and annexation. The Legislature and the Commission have complementary duties relating to that issue. Specifically, the Legislature has the constitutional duty to prescribe procedures and standards for borough formation (see Article X, Section 3 of the Constitution of the State of Alaska). The Commission has the statutory duty to make studies of local government boundary problems (see AS 44.33.812(a)(1)).

Alaska's Constitution encourages the creation of organized boroughs.⁵³ The authors of Alaska's Constitution envisioned that organized boroughs would be established wherever citizens were ready for and capable of assuming the responsibilities of local government. According to Constitutional Convention Delegate Victor Fischer:⁵⁴

[T]he convention gave consideration to whether boroughs should be established on a voluntary or compulsory basis. The [Local Government] committee had previously decided that although voluntary incorporation was preferable, organized boroughs should be created without approval in the area if considered necessary by the state, because the borough would, as appropriate, carry out state functions. Also, the state may want to mandate incorporation if an area is deemed to have reached a position where 'it should take on the burden of its own government.'⁵⁵ Committee members anticipated, however, that the legislature might choose to provide the local people with the opportunity to vote upon the issue in a referendum,⁵⁶ and that the state would offer adequate inducement to local people to accept organized borough status and to initiate incorporation.⁵⁷

The founders recognized that the Legislature would have divergent alternatives available to carry out its constitutional duty to prescribe methods for borough formation.

As noted above, delegates preferred a voluntary, rather than compulsory, approach to borough incorporation. The delegates also recognized that, to be successful, a voluntary approach must be coupled with adequate inducements to establish boroughs. Constitutional Convention Delegate Maynard D. Londborg reflected such in his comments to the Convention:

We felt that it could be handled in different ways, but I will mention two: one is to have some state agency that would survey the whole thing and say now is the time you have to incorporate; there is no

⁵³ See, *Mobil Oil Corporation v. Local Boundary Commission*, 518 P.2d 92, 101 (Alaska 1974).

⁵⁴ *Borough Government in Alaska*, p. 39.

⁵⁵ *Alaska Constitutional Convention Proceedings*, Alaska State Legislature, Alaska Legislative Council, pp. 2673-74, November 1963.

⁵⁶ *Ibid.*, pp. 2674-76.

⁵⁷ *Ibid.*, pp. 2650-51.

way you can get out of it; you have to organize. I believe the method that Mr. Rivers brought out would be the more desirable, by having skilled men that would study this matter and set it up so that it would come in the form of an inducement so that they can see that they are going to benefit, definitely benefit by organizing, by getting into the picture of local government.⁵⁸



Alaska Constitutional Convention Delegate John Rosswog.

The issue of mandatory borough incorporation was also addressed at the Constitutional Convention. Delegate John Rosswog, Chair of the Committee on Local Government asserted: “[W]e allow for the boroughs remaining unorganized until they are able to take on their local government func-

tions.”⁵⁹ However, Delegate Barrie White queried, “Haven’t we here inducement to an area to remain an unorganized borough and to get the state to provide all the necessary functions?”⁶⁰ Further, Delegate James Hurley asked: “Is my idea correct that no organized borough will become effectuated without the voice of the people in the area?”⁶¹ According to Delegate Victor Fischer, Secretary of the Committee on Local Government, “The answer, I think, is ‘no’ . . . [W]hen a certain area reaches a position where it can support certain services and act in its own behalf, it should take on the burden of its own government (emphasis added).”⁶²

In 1961, the Legislature enacted the initial laws implementing procedures for the formation of organized boroughs. With minor exceptions, those laws remain in place today. The 1961 Legislature opted to try the voluntary approach to borough formation.

However, inducements to organize were lacking. Legislators recognized from the very beginning that adequate incentives had not been provided to encourage people to form boroughs. Jay Hammond, who was a member of the State House of Representatives when the Borough Act of 1961 was adopted, characterized the matter as follows:⁶³

Attractive enough on paper, in practice, the organized borough concept had little appeal to most communities. After all, why should they tax themselves to pay for services received from the state, gratis?

Constitutional Convention Delegate Victor Fischer and Thomas Morehouse portrayed the Borough Act of 1961 as follows:⁶⁴

[T]he 1961 Borough Act was predicated on the assumption that local desire to establish borough government would supply the force toward incorporation, despite the findings of previous Boundary Commission hearings that there was little enthusiasm in the state for the unknown and untried form of local government. There were also pockets of intense local opposition, particularly in areas outside independent school districts.

Roger Pegues, Director of the Local Affairs Agency in 1960 - 1962, stated: “It was generally believed [by the drafters and supporters of the original Borough Act of 1961] that the 1963 legislature would adopt a mandatory incorporation law.”⁶⁵

⁵⁸ *Ibid.*, p. 2651.

⁵⁹ *Ibid.*, p. 2612.

⁶⁰ *Ibid.*, p. 2650.

⁶¹ *Ibid.*, p. 2673.

⁶² *Ibid.*

⁶³ Jay Hammond, *Tales of Alaska’s Bush Rat Governor*, Epicenter Press, Fairbanks, AK, 1994, p. 149.

⁶⁴ *Borough Government in Alaska*, p. 73.

⁶⁵ Roger W. Pegues, “A Study of Borough Government,” in *The Metropolitan Experiment in Alaska*, p. 92.

However, by the end of the fourth year of statehood, only one undersized organized borough had formed. It encompassed only about 600 residents. A number of officials were critical that Alaska's only organized borough was a drastic departure from the regional concept envisioned by the Constitutional Convention Delegates. Each of the nine regions of the state that had created independent school districts – legal under Territorial law, but not recognized under Alaska's Constitution – clung to those single purpose governmental units.

When the 1963 Legislature convened, Representative John Rader took the position that the lack of progress toward borough formation was the “greatest unresolved political problem of the State.”⁶⁶

My experience as the Anchorage City Attorney and the State Attorney General led me to believe that the greatest unresolved political problem of the State was the matter of boroughs. As near as I could see, no reasonable solutions were being propounded. A great opportunity to create something of value could be lost. A state of the size, population density, and distribution of Alaska makes State administration of local problems impossible. Anyone who had ever worked in Alaska on the local level or on the State level could see the frustrations of honest attempts repeatedly failing because of the simple fact that there was no governmental structure upon which to hand necessary governmental functions. I therefore decided to do what I could.

To address the pressing issue, Representative Rader drafted and introduced a bill that mandated incorporation of boroughs in all areas of Alaska that had independent school districts. Nine areas were named in the legislation. Those consisted of Ketchikan, Sitka, Juneau, Kodiak Island, Kenai Peninsula, Anchorage, Matanuska-Susitna valleys, Lynn Canal – Icy Straits Election District, and Fairbanks.⁶⁷ In promoting his bill, Representative Rader stressed:⁶⁸

We must make local government and, in this instance, boroughs, financially desirable and generally give communities additional incentives to govern themselves. Apparently, the desire for self-government as a principle has not been strong enough in most areas of the state to cause the incorporation of boroughs under the present law. Too frequently, Alaskans have found that when they form a local unit of

government (either a city, public utility district or school district) that they continue to pay the same



John Rader.

amount of state taxes and also pay local taxes to provide services which the state previously supplied free of charge. Not only is there little incentive for local government under these conditions, but there is an actual penalty placed upon the citizens who assume responsibility for local problems by organizing local government.⁶⁹

The legislation was amended during deliberations to remove the Haines-Skagway region from the bill. Following the amendment, the bill narrowly passed and was signed into law by Democratic Governor William A. Egan.

An agreement had reportedly been reached among legislators during the First Session of the Third Alaska Legislature prior to approval of the 1963 Mandatory Borough Act that additional boroughs would later be mandated by the Legislature.⁷⁰ However, neither the Second Session of the Third

⁶⁶ John L. Rader, “Legislative History,” in *The Metropolitan Experiment in Alaska, A Study of Borough Government*, p. 93.

⁶⁷ The bill was ultimately amended to exclude the Haines-Skagway area from the mandate to incorporate a borough.

⁶⁸ Ronald C. Cease, *Areawide Local Government in the State of Alaska: the Genesis, Establishment, and Organization of Borough Government*, [Claremont, CA] 1964, pp. 71-72.

⁶⁹ *Ibid.*, p. 47.

⁷⁰ Personal communication with Clem Tillion, member of the House of Representatives in the Third Alaska Legislature, April 28, 2000.

Alaska State Legislature nor any other subsequent legislature has mandated additional boroughs. While neither the Borough Act of 1961 nor the 1963 Mandatory Borough Act provided adequate incentives to form boroughs voluntarily, the 1963 Mandatory Borough Act did promise that organized boroughs would not be penalized because of incorporation. Specifically, Section 1 of Chapter 52, SLA 1963 provided as follows:

Declaration of Intent. It is the intention of the legislature to provide for maximum local self-government with a minimum number of local government units and tax-levying jurisdictions, and to provide for the orderly transition of special service districts into constitutional forms of government. The incorporation of organized boroughs by this Act does not necessarily relieve the state of present service burdens. *No area incorporated as an organized borough shall be deprived of state services, revenues, or assistance or be otherwise penalized because of incorporation.* (Emphasis added.)

Notwithstanding the promise of equity in the 1963 Mandatory Borough Act, organized boroughs are *severely* penalized with respect to certain State financial aid. Consider, for example, public education.

As noted earlier, organized boroughs are mandated by State law (AS 29.35.160) to carry out, within their boundaries, the duties of the State of Alaska under Article VII, Section 1 of the Constitution for public education. Moreover, organized boroughs are mandated by State law (AS 14.17.410) to pay a significant portion of the State's cost of education in the form of a *local contribution*.

The local contribution required of organized boroughs is deducted from the level of State education foundation funding that would otherwise be paid to the district. For FY 2004, organized boroughs received \$155,843,584 less in State educational foundation aid than they would have received had they not been organized as boroughs.⁷¹ The required local contribution amounted to \$1,520 per student in each organized borough during FY 2004.⁷²

Thus, contrary to the express intent of the 1963 Mandatory Borough Act, organized boroughs are being severely deprived of State services, revenues, or assistance and are being penalized because of incorporation.

In addition to the \$155.8 million in required *local contributions* for FY 2004, the 16 organized boroughs made *voluntary local contributions* of \$133,870,110, or \$1,305 per student in FY 2004. The total contributions in support of schools by organized boroughs in FY 2004 amounted to \$289,713,694, or \$2,825 per student.

Attempts by boroughs to achieve a judicial remedy of perceived tax inequities inherent in the education funding formula have been unsuccessful. In one recent case, the court concluded that freedom from disparate taxation lies at the low end of the continuum of interests protected by the equal protection clause.⁷³ Justices Matthews and Rabinowitz stated that any remedy of the perceived inequities must be pursued through the Legislature rather than the courts.

⁷¹ Home-rule and first-class cities in the unorganized borough are subject to the same laws requiring a local contribution in support of schools. They may also make voluntary local contributions under AS 14.17.410(c). However, the remainder of the unorganized borough, made up of REAAs, which comprises approximately two-thirds of the population of the unorganized borough, has no obligation to make a local contribution. As such, REAAs suffer no reduction in the level of State education foundation aid, as is the case for municipal school districts. In fact, the single purpose REAAs in Southeast Alaska receive National Forest Receipts funding which boosts their level of financial aid well beyond the basic need determination made under the education foundation formula.

⁷² Using a borough FY 2004 average daily membership of 102,546.5.

⁷³ *Matanuska-Susitna Borough School District v. State*, 931 P.2d 391, 398 (Alaska 1997).

[T]he legislature can decide whether and how much to tax property in REAAs free from legally maintainable claims brought by taxpayers in other taxing jurisdictions that its decision is wrong. Here, as with State spending decisions, any available remedy must be pursued through majoritarian processes rather than through the courts.⁷⁴

A summary of the disincentives for borough incorporation and annexation that exist in the current law follows:

- Ü Areas of the unorganized borough outside of home-rule and first-class cities have no obligation to financially support operation of their schools. Borough formation results in the imposition in those areas of the requirement for local contributions in support of schools (4 mill equivalent or 45 percent of basic need, whichever is less). A significant levy of taxes by the Legislature in areas outside municipal school districts would address, at least in part, this disincentive.
- Ü Borough formation would bring about consolidation of school districts in the unorganized borough, an effect that is commonly perceived as a loss of local control regarding schools. Under the present circumstance, the delivery of education services in the unorganized borough is fractionalized. Although the unorganized borough accounts for approximately 13 percent of the state's population, the unorganized borough encompasses 70 percent of Alaska's school districts.
- Ü In some cases, borough formation carries the prospect of substantial education funding reductions in the form of eliminated supplementary funding floors under AS 14.17.490, reduced area cost differentials, and other factors.
- Ü Borough formation or annexation would mean the loss of eligibility on the part of REAAs and cities in the unorganized borough for National Forest Receipts. Funds would be received by the new borough.

- Ü The extension of borough government would result in the loss of eligibility on the part of cities for federal payments in lieu of taxes (PL 94-565, as amended by PL 104-333). Funds would be paid to the borough.
- Ü Borough formation or annexation would mean a 50 percent reduction of the entitlement of cities within the unorganized borough to fisheries business tax refunds from the State.
- Ü The extension of borough government requires areawide planning, platting, and land use regulation. Such is commonly perceived by cities currently exercising those powers as a loss of local control (although boroughs may delegate the powers to cities within the borough).
- Ü In some cases, borough formation carries with it the prospect of significant funding reductions from the State for coastal zone management.

In their 1971 critique of borough government, Victor Fischer and Thomas Morehouse asserted that, "The State has never had a sound policy . . . it has been unable to cope effectively with the problems of borough formation."⁷⁵

Perhaps no statistic is more illustrative of the effect of the disincentives for borough government than the fact that only 4 percent of Alaskans live in boroughs that were formed voluntarily.⁷⁶ In contrast,

⁷⁴ *Ibid.*, p. 406.

⁷⁵ *Borough Government in Alaska*, p. 138.

⁷⁶ Boroughs that have formed voluntarily typically enjoy abundant natural resources or other attributes that make borough government particularly attractive for those regions. Many of the eight boroughs formed under the 1963 Mandatory Borough Act lack comparable resources. The eight boroughs that formed voluntarily are the Bristol Bay Borough, Haines Borough, North Slope Borough, Northwest Arctic Borough, Aleutians East Borough, Lake and Peninsula Borough, Denali Borough, and Yakutat Borough.

83 percent of Alaskans live in organized boroughs that were formed under the 1963 mandate from the Legislature. The remaining 13 percent of Alaskans live in the unorganized borough.

It is noteworthy that the Alaska Municipal League shares the Commission's concerns. In a 2002 Policy Statement, the Alaska Municipal League states:

Encouragement of Municipal Government in the Unorganized Borough: The League supports state policies that remove disincentives and encourage the formation and annexation to boroughs in the unorganized areas of the state

Call for a Review of the Role of Government. The League calls for a review of municipal government . . . to determine if state policies are consistent with the intent of the Alaska Constitution mandating 'maximum local self-government with a minimum of local government units. . . .' According to the Local Boundary Commission, the state has created significant disincentives to the formation of new municipal governments.

It is also noteworthy that the City of Cordova, the seventh most populous city in the unorganized borough, has advocated for borough reform. In December 1999, the Council of the City of Cordova adopted Resolution Number 1299-83 urging "*the executive and legislative branches of the government of the State of Alaska to review and amend the borough formation process.*" Cordova City officials drafted a paper outlining a concept to promote borough formation in those parts of the unorganized borough that have the capacity to assume the responsibility for local government.

In 2001, the Commission developed a proposal to address impediments to borough government incorporation and annexation for consideration by the Legislature. That proposal was introduced as Senate Bill 48. The legislation passed the Senate in modified form (CSSB 48(FIN) am) but died in the Community and Regional Affairs Committee in the House of Representatives.

The Commission believes that a carefully designed process must be created to promote borough incorporation and annexation in those areas of Alaska that have the human and financial resources to support fundamental local governmental operations. As previously discussed, in 2003 the Commission completed the unorganized borough study⁷⁷ mandated by the 2002 Legislature. The Commission, as constituted at that time, concluded that seven unorganized areas meet the standards for borough incorporation. Those areas are the Aleutians West Model Borough; Chatham Model Borough; Copper River Basin Model Borough; Glacier Bay Model Borough; Prince William Sound Model Borough; Upper Tanana Basin Model Borough; and Wrangell-Petersburg Model Borough. The Commission, as currently constituted, wishes to examine whether other areas of the unorganized borough, particularly Prince of Wales Island, meets the standards for borough incorporation.

There are a number of unorganized regions that have expressed concern that they may be compelled to form boroughs even though they might not be able to afford to do so. In deciding whether any borough should be formed, the Commission is required to make a thorough review of the financial capabilities of any region proposed for incorporation based on standards that have long been established in State law. The Commission clearly recognizes that it would be counter to the interests of the State to create organized boroughs that were not financially viable. Nonetheless, the Commission takes the position that there is benefit in addressing the concerns raised about this issue.

⁷⁷ 2003 *Unorganized Borough Report*.

(b) Establish Threshold for School Districts to Relinquish School Powers.

State law provides a minimum 400-population threshold for the incorporation of a new home-rule or first-class city.⁷⁸ It also provides a minimum 400-resident population threshold for the reclassification of a second-class city to a first-class city.⁷⁹ Additionally, state law provides a presumptive 250-student minimum for the creation of a new school district.⁸⁰

Once a community incorporates, reclassifies to become a home-rule or first-class city, or once it establishes a city school district, however, there is no population or student threshold that triggers the dissolution/reclassification of the city or the withdrawal of school powers. The Legislature should consider the establishment of such thresholds.

The Legislature should review the very small school districts that are having a difficult time meeting the 70 percent minimum expenditure (maybe 60 percent or less) to see if there is an alternate method of providing quality education.

The Legislature may also wish to consider thresholds other than student population or general population that would trigger school consolidation. Those might include (1) higher administrative costs; (2) small districts that are able to offer only limited high school curricula; or (3) small districts or single-site districts that are within close proximity.

(c) Establish Formal Procedures for REAA Boundary Changes.

It would be helpful if the Legislature established specific procedures for changes to the boundaries of regional educational attendance areas other than those that automatically result from changes to boundaries of organized boroughs (i.e., incorporation, annexation, detachment, dissolution).

(d) Address the Establishment of Federal Transfer REAAs Through Apparent Local and Special Legislation.

As the prior discussion indicates, serious questions exist whether the 1985 law establishing the two FTREAs was local and special legislation. If it was, the two districts were established in an unconstitutional manner.

Clearly, the two FTREAs are distinctly different from all other school districts in Alaska. While both are categorized as “regional,” neither truly is. More significantly, both seem to have been created notwithstanding contrary provisions in law. For example, while State law bars a second-class city in the unorganized borough from operating a school district, the boundaries of one of the FTREAs are coterminous to those of a second-class city. The other initially followed the boundaries of three noncontiguous second-class cities (two of which have since dissolved).

The Kashunamiut FTREA is a 700-acre enclave within the Lower Yukon REAA. The Kashunamiut district had an FY 2004 ADM of 365.6. The Lower Yukon REAA’s ADM for the same period was 2,040.2. If the two districts were consolidated, the resulting district would have an ADM of 2,405.8.

The Yupiit FTREA is comprised of three noncontiguous villages encompassing a total of approximately 19 square miles. Each of those three areas is an enclave within the Lower Kuskokwim REAA. The Yupiit district had an FY 2004 ADM of 439. The Lower Kuskokwim REAA’s ADM for the same period was 3,799. If the two districts were consolidated, the resulting district would have an ADM of 4,238.

⁷⁸ AS 29.05.011(a)(1).

⁷⁹ AS 29.04.040(a).

⁸⁰ AS 14.12.025.

(e) Remove Disincentives for School Consolidation from Education Funding Formula.

According to a January 29, 2004, newspaper account, the Kenai Peninsula Borough school district has been blocked by provisions in the State education foundation funding formula in its efforts to substantially close a \$5 million budget gap.⁸¹ The article states as follows:

Kenai Peninsula school officials drew up plans this winter to close nine more schools next year in a desperate effort to fill a \$5 million budget deficit. But when they ran the final numbers, they were shocked to discover that the plan for fewer, bigger schools would actually lose more money.

The problem turned out to be the state's education funding formula, which provides more state aid per student in small schools than in large ones.

"All the money you save from infrastructure you lose on the revenue side," said Kenai Peninsula School Superintendent Donna Peterson, who released the long awaited report on school consolidations Wednesday.

...

Indeed, the flop of the "if-all-else-fails" plan leaves the district still staring at a \$5 million hole for next year and more trouble in years to come.

...

Closing some of the district's 43 schools has long been held forth as the ultimate answer, though one likely to be avoided politically for as long as possible. A budget review committee urged the district to accelerate the consolidation process last fall.

Despite the long bus rides and loss of intimacy, closing schools held the promise of better education, Peterson said. The district's schools were built to hold 12,000 students, and enrollment is around 9,500. Small or underused schools can't offer the same programs as bigger ones, they said.

The article indicates that officials of the Kenai Peninsula Borough School District had determined that closing the nine schools in question would save \$3 million in administrative and operating costs.

The report indicates, however, that school district officials were "shocked" to learn that the State's education foundation funding formula would penalize the district if it closed the small schools. District revenues would decline by \$3.5 million, resulting in a net loss to the district of one-half million dollars annually.

The loss would result from a provision in the State's foundation funding formula that provides for a significantly higher level of funding for smaller schools through an upward adjustment of the student count (average daily membership). In some cases, the upward adjustment is as much as nearly four times the actual number of students in the smallest schools. Details concerning adjustments for *school size factors* are outlined in the definition of *basic need* in the glossary provided in this report. Since the Kenai plan called for students from the smaller schools to be consolidated with students from larger schools, the financially advantageous weighted adjustment of the average daily membership under AS 14.17.450 (school size factor) would have declined dramatically, bringing about the loss projected in the article.

The Local Boundary Commission urges the Legislature to address ways to ensure that the education foundation funding formula does not impose financial penalties on school districts that attempt to increase efficiency through consolidation of schools, as is the case in the Kenai Peninsula Borough. That might be accomplished in a fashion similar to provisions enacted by the Legislature to ensure that when city and borough governments unify, they will not be financially penalized. That law, codified as AS 29.06.400, states that, "All provisions of law authorizing aid from the state or federal government to a former municipality that was in the area of a unified municipality remain in effect after unification."

⁸¹ *Peninsula halts plan to shutter 9 schools*, Tom Kizzia, *Anchorage Daily News*, January 29, 2004.

The Commission notes that such provisions might be appropriate for consolidation of schools within a school district (e.g., Kenai Peninsula Borough); however, they may not always be suitable for consolidation of school districts resulting from borough incorporation or certain other boundary changes, particularly where such involves territory formerly outside the boundaries of a municipal school district.

(f) Create Incentives for School Consolidation.

Beyond the above recommendations that the Legislature promote borough government and remove disincentives for school consolidation from the education funding formula, the Commission urges the Legislature to create inducements for school consolidation where such would serve the broad public interest.

