Fairbanks North Star Borough Department of Law
809 Pioneer Road • PO Box 71267 • Fairbanks, AK 99707 - (907) 459-1318 FAX 459-1155

January 30, 2015

Via email: heath.hilyard@akleg.gov
Heath Hilyard
Chief of Staff to Rep. Cathy Tilton
State Capitol Room 411
Juneau, Alaska 99801

Dear Mr. Hilyard:

The following is in response to your request for municipal input regarding Alaska's new marijuana laws, enacted at AS 17.38. Initially, please allow me to thank you, on behalf of the Fairbanks North Star Borough ("FNSB"), for soliciting our input and allowing our community to have a voice in this process. What follows is initial input from FNSB's administration and, in particular, the views of FNSB's Mayor, Luke Hopkins. The opinions expressed herein do not necessarily reflect the view of the FNSB Assembly.

Of initial note and of utmost importance, FNSB would like to ultimately see laws and regulations that grant maximum authority and control to be exercised at the local level. In what follows, I will address the specific questions you posed in your email dated January 26, 2015 and will then provide input from the FNSB on other topics.

1. ALTERNATIVE DEFINITION FOR "PUBLIC USE" OR "IN PUBLIC."

The definition of "public" as used in AS 17.38 was one of the first points of concern identified by the FNSB with the Act as currently written. It is the FNSB's position that, because the personal use provisions of the Act will go into effect on February 24, 2015, and because those provisions prohibit the consumption of marijuana in "public," implementing an enforceable and understandable definition of "public" is of utmost importance.

Unfortunately, simply defining "public" is not as straightforward as it might seem at first glance. There is a problem with the repeated use of the word "public" in different contexts of the Act. For instance, the word "public" is used to ban the consumption of marijuana in public[1] and it is also used to state that cultivated marijuana must remain out of "public view,"[2] and that it cannot be visible to the "general public from a public right-of way."[3]

[1] AS 17.38.020(d) and 17.38.040.
[2] AS 17.38.030(a)(1).
[3] AS 17.38.070(a)(1).

This language creates two options: 1. Redraft the Act's language to more artfully reflect what is intended by the initiative without using the word "public" in several different ways. 2. Define "public" specifically and expressly for the purposes of AS 17.38.020 and 17.38.040, then separately define what "public view" means, what "general public" means, and what "public right-of-way" means. Option 1 appears to be the more efficient of the two options and suggested language is presented below.

Sec. 17.38.020. Personal use of marijuana.
(d) Consumption of marijuana, except that nothing in this chapter shall permit the consumption of marijuana in public;

Sec. 17.38.030. Restrictions on personal cultivation, penalty.
(a) The personal cultivation of marijuana described in AS 17.38.020(b) is subject to the following terms:
(1) Marijuana plants shall be cultivated in a location where the plants are not subject to ~~public~~ view from a highway without the use of binoculars~~, aircraft,~~ or other optical aids, including aircraft.

Sec. 17.38.040. Public consumption banned, penalty.
It is unlawful to consume marijuana in public. A person who violates this section is guilty of a violation punishable by a fine of up to $100.

Sec. 17.38.070. Lawful operation of marijuana-related facilities.
(a) Notwithstanding any other provision of law, the following acts… are lawful…:
(1) Possessing, displaying, storing, or transporting marijuana or marijuana products, except that marijuana and marijuana products may not be displayed in a manner that is visible ~~to the general public~~ from a highway, sidewalk, or similar location ~~public right-of-way~~;

Add a definition that "highway" has the meaning set forth in AS 11.81.900(30).[4]

Add a definition that, for the purposes of AS 17.38, "public" means a place to which the people as a whole or a substantial group of persons has access without restriction and includes, but is not limited to, any building that used by or open to the people as a whole or a substantial group of persons, in or upon any highway as defined by AS 11.81.900(30), whether in a vehicle or not, sidewalks, rivers, lakes, parks, convention centers, shopping centers, transportation facilities, school facilities, correctional facilities, lobbies, doorways and other portions of apartment buildings and hotels that are not designed for actual dwelling or residence, any outdoor location where the consumption of marijuana is clearly observable from the foregoing public places, and any location similar to those

[4] AS 11.81.900(30) defines highway as follows: "highway" means a public road, road right-of-way, street, alley, bridge, walk, trail, tunnel, path, or similar or related facility, as well as ferries and similar or related facilities.

places delineated herein. Notwithstanding the foregoing, a location with proper licensure in place pursuant to AS 17.38 and that is in compliance with applicable municipal ordinances, including municipal licensure requirements, if any, and that is operating within the restrictions of such licensure is not a public place within the meaning of AS 17.38.

2. Address Point 8 from Brooks Chandler's Memorandum of January 23, 2015: "Allowing Local Option Equivalent to Title 4 Local Options in Two Years."

Although the FNSB does not at this time intend to exercise a local option to ban either commercial marijuana facilities as allowed currently, nor to ban personal possession and consumption if that option were available in two years, the FNSB does support the proposition that local communities should have maximum control over such decisions. As such, the FNSB would support amending AS 17.38 in two years to allow local governments to opt-out and make their communities "dry" from marijuana in the same way communities may be made "dry" from alcohol.

3. Address Point 9 from Brooks Chandler's Memorandum of January 23, 2015: "Marijuana Use in So-Called 'Private' Clubs."

The FNSB would like the decision of whether to allow marijuana consumption bars or private, members-only marijuana consumption clubs to be made at the municipality level, based on what each municipality determines is in the best interests of their constituents.

The FNSB does not object to the state creating a basic structure under which such consumption facilities would be regulated at the state level, so long as the municipalities can choose to ban such facilities or regulate them more restrictively at the local level. The FNSB believes that such facilities should be prohibited from serving alcohol or allowing the consumption of alcohol on such marijuana consumption facility premises.

The FNSB is aware that, in combination with Colorado's marijuana laws and its Clean Indoor Air Act, at least one legal, licensed marijuana consumption club[5] has been able to open. To FNSB's understanding, this club is for members only and is not open to the public, thus skirting the no-consumption-in-public ban, it ensures that the consumption activities inside the club are not viewable from the outside, and it employs no more than three employees, which skirts Colorado's Clean Indoor Air Act, which bans smoking in any location that employs more than three people. This type of private consumption club is potentially acceptable to the FNSB, so long as the club is properly licensed under AS 17.38 and any municipal licensure scheme.

[5] ClubNed Café's website is found at www.clubnedcafe.com. An article outlining ClubNed's venture through Colorado's regulatory process can be found at http://www.forbes.com/sites/jacobsullum/2014/03/11/colorado-couple-to-open-first-officially-approved-cannabis-club.

4. Address Point 10 from Brooks Chandler's Memorandum of January 23, 2015: "Default Provisions Regarding a 'Local Regulatory Authority.'"

It is the FNSB's position that there should be very little, if any, state-level dictate regarding Local Regulatory Authorities ("LRA"). Instead, the FNSB believes that each municipality should be given wide latitude to establish the LRA structure that best suits its needs. For example, a community that will not locally regulate or license commercial marijuana establishments may only need an LRA to provide input to the state agency on state license applications as well as be the point of contact for receiving the state application fees to which the locality is entitled. On the other hand, a community which intends to actively regulate commercial establishments at the local level, and which may then set up a local licensure scheme, may find itself needing a much more complex LRA to perform its tasks.

As such, from the FNSB's perspective, AS 17.38's general suggestion that a municipality may choose to set up an LRA is acceptable. The state may wish to specify how the municipality's LRA will communicate with the state agency on license applications (i.e. the LRA must provide the state agency with contact information and/or the LRA must respond to the state agency within a certain period of time) or similar details of state concern but the structure of and tasks performed by an LRA, as well as other LRA details, should be left to each municipality to formulate.

5. Other Provisions of AS 17.38 That Need to Be Addressed.

In addition to the implementation of the definition of "public" as being an issue of utmost importance, the FNSB has identified several other concerns within the personal-use provisions of the Act that the FNSB feels need immediate attention. The FNSB believes that its concerns may be addressed with appropriate definitions of certain terms.

Of extreme concern to the FNSB is the evidence in Colorado of individual marijuana users attempting to create marijuana extractions using highly flammable or combustible chemicals, which has led to many explosions, fires, injury, and death. The current wording of AS 17.38.020, personal use of marijuana, states that processing of marijuana shall not be a criminal or civil offense. Clearly, in the general sense of the term, "processing" could mean virtually anything a person does to marijuana, from taking the usable marijuana off the plant to drying it, to packaging it, to screening it, to creating extractions or tinctures, to putting marijuana in oils or butters – the list goes on.

As with "public" the word "processing" is used in several different places and in different ways throughout the Act. Because it may be appropriate to allow commercial marijuana establishments to prepare the flammable or combustible extractions with proper safeguards in place, which safeguards the state may wish to address, a definition of "processing" specific to AS 17.38.020 seems appropriate. The FNSB proposes the following language:

> As used in AS 17.38.020, "processing" means to handle marijuana, to subject marijuana to an action or a series of actions to alter the form of marijuana, or to otherwise treat marijuana. As used in AS 17.38.020, "processing" does not

include performance of marijuana extractions using flammable or combustible chemicals including, but not limited to, butane, acetone, hexane, naphtha, ethanol, methanol, petroleum ether, and alcohol.

In addition, the FNSB has concerns regarding the Act's personal-use provision which allows a person to possess up to six marijuana plants, three of which may be mature.[6] The Act does not make clear what it means to possess those plants. For example, if four adults over the age of 21 live in one home, may they each possess six plants, thus allowing 24 plants in that one home, 12 of which can be mature at any given time? Further, if these four adults chose to coordinate their grows, assuming a three month grow-to-maturity period, it would appear that this example household could easily have one mature plant every month for the entire year. Estimates of usable marijuana from each plant vary widely,[7] but assuming a four-ounce yield, that household could be producing four ounces each month. Further, while this author is no mathematician, it would appear that the same four-person household, with the same assumed three-month grow period, could coordinate their grow and cycle their plants to have *four* mature plants each month. Assuming a four-ounce yield per plant, that household could be producing a full pound of marijuana each month. On the high end of yield estimates, if those plants yield one pound each, that household could be producing four pounds of marijuana a month. To say that this is a lot of marijuana would be an understatement. Further, the personal-use provisions of the Act appear to allow a person to essentially stockpile the harvested marijuana from their plants without limit.[8] The Act also allows persons to transfer marijuana amongst themselves, one ounce at a time, so long as that transfer is done without "remuneration."[9] This is not to say that a transfer of marijuana could not be done without *benefit*, setting up a potential barter or trade market under the personal-use provisions of the Act.

Given these concerns and to prevent the above scenarios, the FNSB proposes the following:

A. That the state set forth the following presumption:

   As used in AS 17.38.020(b), every person 21 years of age or older living in a residence is presumed to possess each and every marijuana plant in that residence.

B. That the state expressly reaffirm *Noy v. State*'s[10] four-ounce limitation on personal use.

The FNSB recognizes the potential for challenge of such a provision, given that the language of the Act appears to allow unlimited personal stockpiling of the marijuana harvested so long as the marijuana is grown and stockpiled at the same location. However, this author believes that a valid argument can be made for expressly reaffirming *Noy*'s four-ounce limitation.

The provisions at issue in the Act are under the title of "personal use of marijuana." Therefore, the intent is quite clear that the growing and stockpiling is for marijuana intended for personal

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[6] AS 17.38.020(b).
[7] Anecdotal estimates obtained by this author range from two ounces to one pound of usable marijuana per plant.
[8] AS 17.38.020(b).
[9] AS 17.38.020(c).
[10] 83 P.3d 538 (Alaska App. 2003).

use only. In addition, the Act expressly preserves "the right to privacy as interpreted by the Alaska Supreme Court in *Ravin v. State of Alaska* [537 P.2d 494 (Alaska 1975)]."[11] The Act does not speak to *Noy v. State*, in which the court created a bright line rule that a person could possess less than four ounces of marijuana in their home and that amount of marijuana would be presumptively considered for personal use, thus protected under *Ravin*.[12]

Arguably, the layperson voting for Ballot Measure 2 had the general understanding of the state of the law as it related to marijuana prior to voting. Arguably, that understanding was that Alaskans may possess less than four ounces of marijuana in their home for personal use. Arguably, this general understanding of the state of the law has been attributed to the *Ravin* case, the *Noy* case being much less notorious. Given this general understanding from a layperson perspective, it could very well be that the intent of the initiative and of the voters was to allow personal possession of less than four ounces of marijuana in the home, and to allow a person to carry, purchase, and give away one ounce of marijuana at a time.

From the FNSB's perspective, it appears to be important to create some sort of limit on this personal-use provision within the Act. As the Act stands, it would appear that an arguably-legal barter market is created as of February 24, 2015 and so long as the marijuana is grown and processed by an individual in their home, given to another person one ounce or less at a time, and the exchange is for something other than money, the transaction would be perfectly legal. Clearly, this type of system cannot be properly characterized as "personal use." Moreover, this type of system undermines the commercial establishment structure that the Act attempts to set forth in other provisions of the Act and would circumvent licensing, testing, and labelling requirements, among other things.

C. Change "remuneration" to "benefit."

It may be possible to address some of the concerns outlined above by changing the term "remuneration" to "benefit," then defining the word benefit. In this way, the Act could be restructured to allow a person to give their personal marijuana away for free, with the hope being that fewer people would want to engage in such a transaction and the possibility of a "personal use" barter exchange market would be restricted.

6. INPUT ON WHETHER THE STATE SHOULD ESTABLISH RULEMAKING UNDER THE ALCOHOLIC BEVERAGES CONTROL BOARD, CREATE A MARIJUANA CONTROL BOARD, OR PROCEED WITH NO RULEMAKING UNDER ANY BOARD.

The FNSB is aware that there may be contention at the legislative level as to whether the rulemaking called for by AS 17.38 will occur through the Alcoholic Beverages Control ("ABC") Board or through a newly-created Marijuana Control Board ("MCB"). The FNSB is further aware that there may be proponents of doing nothing to address the rulemaking provisions of AS 17.38 at the legislative level.

[11] AS 17.38.010(c).
[12] *Noy*, 83 P.3d at 540 and 543.

Of note, AS 17.38.090's rulemaking provisions are mandatory. Under that statute, the state is required to take several actions by several deadlines. By default, at a minimum, those mandatory rulemaking deadlines fall to the ABC Board. Because of this default provision, it is the FNSB's understanding that the ABC Board has been and continues to work toward meeting the Act's various deadlines. Whether the responsibilities remain with the ABC Board or are transferred to a new MCB, the FNSB's input is limited to expressing a preference that the state meet its deadlines and implement the scheme envisioned by the Act.

7. OTHER INPUT.

A. The FNSB can see value in the state considering potential conflicts between Alaskan communities, in particular neighboring communities, created by local regulation being different in each community. The FNSB would suggest considering a mediation-type role to be played by the state board, whether the ABC Board or the MCB, where a community could take a complaint that one community's regulations, enforcement, or lack of enforcement are negatively impacting another community.

B. The FNSB would suggest that edibles be regulated such that each individual serving be limited to five milligrams of THC, that each individual serving be individually packaged, and that some sort of identifier be required to be a part of the edible itself so as to distinguish it from its non-THC containing counterpart, even outside of its packaging (i.e. each edible must be stamped with a certain recognizable impression or every edible containing THC must be manufactured in a certain recognizable shape, for example, the shape or impression of a marijuana leaf).

C. The FNSB believes the state should focus its efforts on addressing the eight concerns set forth within U.S. Deputy Attorney General James Cole's memorandum dated August 29, 2013, including laws and regulations to prevent the sale of marijuana to minors and outside of the state of Alaska, preventing violence in the marijuana industry, and preventing drugged driving.

8. INPUT ON WORK DRAFT OF UNNUMBERED SENATE BILL DATED JANUARY 24, 2015.

The FNSB has many areas of concern with respect to the work draft senate bill. However, because that bill has not yet been introduced, the FNSB will provide only general input at this time.

A. The FNSB does not understand the creation of a new series of marijuana establishments and a new scheme delineating how marijuana can move between the establishments. The new scheme created within this bill is less clear and comprehensive than that established by AS 17.38. In particular, the FNSB objects to the creation of the "marijuana boutique producer."[13]

B. The FNSB strongly objects to the zoning restrictions set forth in this bill.[14] The FNSB does not object to the state setting forth very general zoning-type restrictions, such as restricting a marijuana establishment from being within 200 feet of a church or school. However, the FNSB believes that zoning should be left to the municipalities in order that each municipality can determine where each type of establishment can best fit into each

[13] Reference new sections beginning at page 7, line 25.

[14] In particular, the FNSB strenuously objects to the provision set forth on page 5, lines 7-10.

individual community. Further, any zoning-type restrictions set forth by the state should allow the municipality to be more restrictive than those created by the state. In short, the FNSB wishes to retain zoning control to the greatest possible extent.

C. The FNSB believes that the state should not attempt to restrict or designate the fees that a municipality may implement if it chooses to allow marijuana establishments. Pursuant to AS 17.38, municipality may regulate establishments up to and including banning them altogether. As such, if a municipality wishes to make local licensure cost prohibitive, the state should not restrict that.[15] At a minimum, if the state chooses to designate municipal fees, such fees should be adjustable for inflation or other factors as contemplated by the original Act.[16]
D. The FNSB objects to the work draft bill's removal of edibles from the definition of marijuana products.[17]
E. Several provisions of this work draft bill appear to be directly contrary to the intent and language of the original Act, including some restrictions on personal consumption and growing. Other portions of the work draft bill appear to raise due process concerns.

Again, the FNSB thanks you for allowing us to provide our input at this early legislative stage. Should you have any questions, concerns, or request additional input, please do not hesitate to contact me.

Sincerely,

Wendy Doxey
Assistant Borough Attorney

cc: Mayor Luke Hopkins

[15] Reference page 5, lines 30-31.
[16] *See* AS 17.38.090(a)(2).
[17] Reference page 23, line 7.