

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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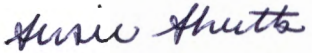
State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

March 1, 2017

SUBJECT: Municipal authority to regulate trapping
(Work Order No. 30-LS0587)

TO: Representative Andy Josephson

FROM: Susie Shutts 
Legislative Counsel

You requested an opinion regarding whether municipalities may regulate trapping. Specifically, may a municipality prohibit trapping that is otherwise permissible under Board of Game regulations?

In order to regulate trapping, a municipality would need to first have the authority to regulate trapping.¹ Provided that a municipality had the authority to regulate trapping, a municipal ordinance would then only be upheld if it were not preempted by state law.

Municipal authority to regulate trapping

The power to regulate trapping has not specifically been granted to general law municipalities as a general power, although that power could be acquired if not prohibited by law. Determination of whether a home rule municipality could adopt an ordinance regarding trapping would require consideration of whether exercise of that power has been restricted in that municipality's charter. In addition, a municipality could enact an ordinance related to trapping in exercise of its police powers to protect public health and safety. In response to the question "Do local governments, i.e. cities and boroughs, have an obligation or authority on behalf of public safety or local zoning that preempts state authority to manage wildlife?" the attorney general issued an opinion that stated:

¹ The legislature classifies boroughs and cities and prescribes their powers and functions. Art. X, secs. 3 and 7, Constitution of the State of Alaska. Under art. X, sec. 11, Constitution of the State of Alaska, home rule municipalities may exercise all powers not prohibited to them by law or charter, whereas general law municipalities may only exercise powers specified in law and powers properly acquired and not prohibited by law. AS 29.35.010 sets out general powers for all municipalities. In addition, the legislature confers certain additional powers to boroughs and cities. *See, e.g.*, AS 29.35.200 (first class boroughs); AS 29.35.210 (second class boroughs); AS 29.35.250 (cities inside boroughs); and AS 29.35.260 (cities outside boroughs).

No, local governments cannot preempt state authority. However, local governments, in the exercise of valid police powers, may restrict the discharge of firearms or enact similar kinds of ordinances that may have an incidental effect on hunting and trapping. However, [. . .] where the local government ordinance goes beyond legitimate local concerns or where it frustrates a statewide program for game management, the local regulation must yield. [. . .] A borough ordinance that did not directly address legitimate local concerns and which frustrated overall game management would probably be held invalid as preempted by the statewide interest in uniform game management. For example, if a borough, through a firearms or similar ordinance, were effectively to close down huge areas of the state to hunting or trapping, for reasons not reasonably related to protection of life and property, the local ordinance would probably be held invalid as a frustration of the statewide management of game. The reason for this result is that effective statewide game management, including regulation of species that transverse local political boundaries, requires uniform management decisions, leaving no room for independent game management jurisdiction by local governments. Localized game control would "substantially interfere" with the purposes of conservation and development of the resources and the functions of the Board of Game [. . .] under no circumstances does a local governmental ordinance "preempt" state authority. Local governments may, however, enact ordinances within their general police powers that are on the same subject as state statutes, so long as they do not conflict with the state statute or frustrate the exercise of statewide laws. Local governments do not have authority to directly regulate the management of fish and wildlife, but may enact legitimate police power regulations such as restrictions on the use of firearms where they are reasonably necessary to protect life or property.^[2]

Whether a municipality has the authority to enact a regulation that affects trapping would also depend on which land the municipal ordinance concerns. Specifically, the ownership and acquisition history of the land at issue and, for example, any public access easements. You asked about whether municipalities "can regulate wildlife management on 'their' lands" and clarified that you are referring to "local governments' abilities to regulate wild animals on their own land." By this, I was not sure whether you meant you are only concerned with municipal regulation on land owned by the municipality or on land within the boundaries of a municipality (whether privately or publicly owned).

² 1982 Inf. Op. Att'y Gen. (Nov. 19; 166-486-82).

Where the *municipality* is the landowner, the municipality would enjoy rights akin to that of a private landowner regarding use of that property by others.³ For example, permission from the municipality could be required for trapping on that land.

Preemption by state law

Provided that a municipality had the authority to enact a specific ordinance related to trapping, the ordinance would only be upheld if it were not preempted by state law. A municipal ordinance is preempted by state law if the ordinance (1) is expressly preempted by the legislature, (2) directly conflicts with a statute,⁴ or (3) substantially interferes with the effective functioning of a state statute or regulation or its underlying purpose.⁵ The Alaska legislature can pass a law clearly prohibiting a municipality from regulating an issue or area, and has done so.⁶ However, in the case of trapping, all municipal regulation is not expressly preempted by the legislature. In the absence of such express legislative direction, the question would therefore be whether state regulation of trapping is substantially irreconcilable with a borough ordinance such that "one cannot be given its substantive effect if the other is to be accorded the weight of law"⁷ or whether the municipal ordinance impedes or frustrates a specific statewide policy expressed by state law.⁸

³ Note that Alaska's criminal trespass statutes do not distinguish between private and public property. See *Turney v. State*, 936 P.2d 533 (Alaska 1997).

⁴ *Jefferson v. State*, 527 P.2d 37, 43 (Alaska 1974). ("The prohibition must be either by express terms or by implication such as where the statute and ordinance are so substantially irreconcilable that one cannot be given its substantive effect if the other is to be accorded the weight of law.").

⁵ *Liberati v. Bristol Bay Borough*, 584 P.2d 1115, 1121 - 22 (Alaska 1978) (upholding borough taxation of fish sales, an activity which the state manages "to a very detailed extent," because the borough tax did not "substantially interfere" with the state scheme).

⁶ See, e.g., AS 28.01.010 (specifies that municipalities may not enact traffic ordinances that are inconsistent with state law); AS 29.35.145(a) (reserves regulation of firearms to the state except as specifically provided by statute); AS 29.35.147 (reserves authority to license massage therapists to the state except as specifically provided by statute); AS 43.55.017(a) (state oil and gas production tax is "in place of all taxes now imposed by the state or any of its municipalities, and neither the state nor a municipality may impose a tax on" producing oil or gas leases, oil or gas produced or extracted in the state, or the value of intangible drilling and development costs).

⁷ *Jefferson*, 527 P.2d at 43.

⁸ *Simpson v. Municipality of Anchorage*, 635 P.2d 1197, 1204 (Alaska 1981).

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For example, under AS 16.05.330(a), "without having the appropriate license or tag in actual possession, a person may not engage in [. . .] trapping." A municipal ordinance that purported to allow a person to engage in trapping in the municipality without the appropriate license or tag would be preempted by this provision. But whether a court would uphold a municipal ordinance that fell short of such blatant preemption would depend on the specific ordinance.

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MEMORANDUM

April 3, 2017

SUBJECT: Borough and city ordinances (Work Order No. 30-LS0790)

TO: Representative Andy Josephson
Attn: Megan Rowe

FROM: Susie Shutts *Susie Shutts*
Legislative Counsel

You asked when a borough ordinance preempts an ordinance by a city within the borough.

The legislature classifies boroughs and cities and prescribes their powers and functions.¹ General law municipalities may exercise powers specified in law² and may exercise powers not otherwise prohibited by law if the power has been properly acquired.³ Home rule municipalities in Alaska may exercise all powers not prohibited to them by law or charter.⁴

Generally, assuming that a borough has the authority to enact a particular ordinance, the borough ordinance would "preempt" a city ordinance if the borough enacted an areawide⁵

¹ Art. X, sec. 3, Constitution of the State of Alaska; art. X, sec. 7, Constitution of the State of Alaska.

² AS 29.04.020 ("A general law municipality . . . has legislative powers conferred by law.").

³ AS 29.35.300 - 29.35.350.

⁴ Art. X, sec. 11, Constitution of the State of Alaska. For limitation of home rule powers under AS 29, *see* AS 29.10.200.

⁵ "Areawide" means "throughout a borough, both inside and outside all cities in the borough." AS 29.71.800(1). A power that is exercised by a borough on an areawide basis is exercised throughout the entire borough, including within cities that are within the borough. In contrast, "nonareawide" means "throughout the area of a borough outside all cities in the borough." AS 29.71.800(14). A power that is exercised by a borough on a nonareawide basis is exercised throughout the borough, except for within cities that are within the borough.

ordinance and did not provide for the city's concurrent exercise of the power. This is because, under AS 29.35.250(b), if a borough ordinance provides for the areawide exercise of a power, "no city may exercise the power unless the borough ordinance provides otherwise or the borough by ordinance ceases to exercise the power."

Planning is an example of a field where the Alaska statutes specify that regulation must be on an areawide basis. AS 29.40.010 provides that "[a] first or second class borough shall provide for planning, platting, and land use regulation on an areawide basis." But, under AS 29.40.010(b):

(b) If a city in a borough consents by ordinance, the assembly may by ordinance delegate any of its powers and duties under this chapter to the city. The assembly may by ordinance, without first obtaining the consent of the city, revoke any power or duty delegated under this section.

The Matanuska-Susitna Borough, which is a second-class borough, has apparently delegated planning authority to the City of Wasilla, which is a first class city.⁶ But, as provided under AS 29.40.010(b), the borough could revoke that delegation.

Generally, as a first class city inside a borough, under AS 29.35.250, Wasilla "may exercise any power not otherwise prohibited by law." However, as explained above, Wasilla may have its powers limited if the borough adopts an ordinance for the areawide exercise of a power and does not permit the city to exercise that same power.

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⁶ See Matanuska-Susitna Borough Code at MSB 17.45.030.