Representative Tilton
Chair, House Community and Regional Affairs Committee
State Capitol Room 411
Juneau, Alaska 99801

February 23, 2015

Re: CSHB 75(CRA)

Dear Madam Chair,

I am the Borough Attorney for the Ketchikan Gateway Borough. However, I am writing this letter in my personal capacity, and it does not necessarily represent the official Borough position on these issues. I offer my comments based upon my experience of 27 years as a municipal lawyer, and my familiarity with challenges municipalities face in addressing undesirable conduct where there are similar state provisions at work.

I have had the opportunity to review CS HB 75(CRA) version P. As proposed legislation regarding regulation of marijuana works its way through the legislature, the primary areas of concern I have had relate to preservation of flexibility for municipalities to adopt and enforce their own local ordinances, and preservation of the ability to levy local taxes and fees. In relation to the former, legislation relating to municipal enforcement authority is of concern.

I believe it is important for municipalities to be able to include criminal penalties for certain municipal ordinances. While criminal penalties are not appropriate for all types of local regulations, some violations would be difficult to effectively enforce without that potential. To this end, I suggest that in CSHB 75(CRA) version P, section 9, AS 17.38.110(b) should be amended to clearly allow municipalities to enact criminal as well as civil penalties. Arguably, silence will allow home rule municipalities to still enact criminal penalty ordinances which are not frustrating the purpose of state law, but I recommend that the issue be clarified to explicitly allow criminal penalties.

The general rule for local regulation, where there are State regulations as well, was stated by the Court in Jefferson v. State, 527 P.2d 37,43 (Alaska 1974). There the Court wrote:

> " A municipal ordinance is not necessarily invalid in Alaska because it is inconsistent or in conflict with a state statute. The question rests on whether the exercise of authority has been prohibited to municipalities.

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."

Accordingly, there may be substantial areas for local regulation of these enterprises where those regulations are not in conflict with State statute or regulation. Further, this local regulation should include the ability to prescribe both civil and criminal penalties where appropriate, so long as such ordinances are, as prescribed by AS 17.38.110(b) of the initiative, "not in conflict with" the State statutes or regulations on the same topic.

In a related matter, the provision of SB 30 which proposes amendment to AS 29.35 to add a new section 148 prohibiting municipalities from enforcing an ordinance which is inconsistent with AS 17.38, would unnecessarily restrict the ability of municipalities to adopt local time, place and manner restrictions which are more restrictive than statewide provisions on the subject. For example, if state regulations required marijuana businesses to be 500 feet from a church or school, but a municipality wanted to have the distance be 1000 feet, it should be allowed to do so without risking invalidation because the greater distance is "inconsistent" with the state standard even though it is not in conflict with that standard.

The initiative language prohibits municipal ordinances which are "in conflict" with State provisions. A more desirable approach both for the issue of whether municipal criminal penalties may be included and whether municipal regulation may go beyond the provisions of State statutes or regulations, is to stick to the current rule applied by the Court, which allows local provisions which are more restrictive or extensive so long as the State provisions and the local provisions are not so substantially irreconcilable that one cannot be given its substantive effect if the other is to be accorded the weight of law.

Thank you for consideration of my comments.

Sincerely,

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Cc: Representative Ortiz