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MEMORANDUM

February 27, 2015

SUBJECT: Requirement under AS 17.38.110 that municipalities adhere to the provisions of AS 44.62 (CSHB 75(CRA); Work Order No. 29-LS0345\P)

TO: Representative Cathy Tilton
Attn: Heath Hilyard

FROM: Megan A. Wallace
Legislative Counsel 

You have asked for an opinion relating to the requirements in AS 17.38.110(d) and (l) that make municipalities subject to AS 44.62 (Administrative Procedure Act).

AS 17.38.110(d) provides that "[a] local government may establish procedures for the issuance, suspension, and revocation of a registration issued by the local government in accordance with (f) of this section or (g) of this section. These procedures shall be subject to all requirements of AS 44.62 (Administrative Procedure Act)." *Id.* AS 17.38.110(l) also provides that "[n]othing in this section shall limit such relief as may be available to an aggrieved party under AS 44.62 (Administrative Procedure Act)." *Id.*

It is unclear under AS 17.38.110(d) and (l) whether a court would require municipalities to comply with all requirements of the Administrative Procedure Act, or whether in establishing procedures "for the issuance, suspension, and revocation of a registration," the municipalities must do so in a manner consistent with the Administrative Procedure Act at the local level. It should be noted, however, that the Administrative Procedure Act establishes the regulatory procedures to be followed by "a state agency," including submission of regulations to the Lt. Governor. *See* AS 44.62.030; AS 44.62.040. "Agency" is defined under AS 44.62.800(1) as:

[A] department, an institution, or a division or other administrative unit of the executive branch of state government authorized or required by law to make regulations, except that 'agency' does not include

(A) a board, a commission, a council, an authority, or a public corporation of the executive branch of state government authorized or required by law to make regulations; or

(B) the Department of Corrections;

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Because a municipality or local government is not a unit of the executive branch, the Administrative Procedure Act does not otherwise apply to municipalities, and it is unclear whether a municipality could as a practical matter meet all of the procedures set in place for state agencies. For this reason, I recommend that AS 17.38.110(d) and (l) be amended to clarify that municipalities are not required to strictly follow the Administrative Procedure Act but must establish local procedures "for the issuance, suspension, and revocation of a registration" in a manner that is consistent with the Administrative Procedure Act.¹

Usually, municipalities act by ordinance. It would seem to me that adoption of an ordinance would be consistent with AS 44.62, if not providing greater opportunity for public comment and involvement than is provided by AS 44.62.²

You have also asked about the difference between AS 17.38.250(a) and AS 17.38.250(c), and why subsection (c) does not allow for participation of a local government. In this regard, AS 17.38.250(a) allows a local government to establish the perimeter of an established village, but AS 17.38.250(c) allows the board to reestablish a perimeter if the board determines that the perimeter established by the local government under AS 17.38.250(a) does not accurately reflect the perimeter of the established village. Therefore, it appears that AS 17.38.250(c) does not provide for participation of a local government, because the board has determined that the perimeter established by the local government under AS 17.38.250(a) was not accurate.

If you have any questions, or if I can be of further assistance, please advise.

MAW:lnd

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¹ In some instances, however, state law can preempt municipal procedures. *See Municipality of Anchorage v. Repasky*, 34 P.3d 302, 311 (Alaska 2001) ("State law can also prohibit a municipality from exercising authority 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. In general, for state law to preempt local authority, it is not enough for state law to occupy the field. Rather, if the legislature wishes to preempt an entire field, [it] must so state."); *see also Jefferson v. State*, 527 P.2d 37, 43 (Alaska 1974) ("The constitution's authors did not intend to create 'city states with mini-legislature.' They wrote into Art. X, sec. 11 the limitation of municipal authority not prohibited by law or charter".).

² Some municipalities do provide for the adoption of regulations, although I am unable to comment upon whether any particular municipal regulation process might be consistent with AS 44.62.