

S B

9 5

SENATE BILL 95
TABLE OF CONTENTS

- ITEM 0: Senate Bill 95
- ITEM 1: Governor's Transmittal Letter
- ITEM 2: 0 Fiscal Note - Depart. of Community & Regional Affairs
- ITEM 3: 0 Fiscal Note - Division of Elections
- ITEM 4: Statement on Borough Government in Alaska - LBC
- ITEM 5: Statutes
- ITEM 6: Lake and Peninsula School District vs LBC, Aleutians East
- ITEM 7: Lake and Peninsula School District vs LBC



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 9, 1989

The Honorable Tim Kelly
President of the Senate
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Senator Kelly:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to the combining of a sales and use tax proposition with the incorporation of a borough.

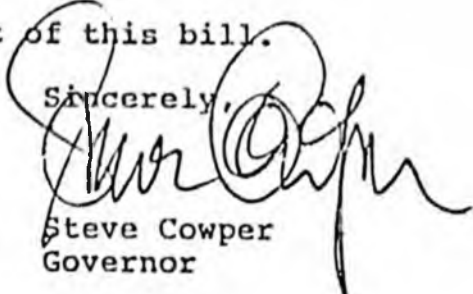
Current law does not provide express authority for a petition and an election ballot for incorporation of a borough to include, at the same time, a sales and use tax proposition. AS 29 provides only for the combining of a sales and use tax proposition with incorporation of a second class city. See AS 29.45.710. The purpose of this bill is to ensure the financial viability of a new borough at the time of incorporation, and to simplify incorporation procedures similar to those governing the incorporation of second class cities. The Local Boundary Commission anticipates that several new boroughs might seek incorporation over the next few years. Many of the proposed boroughs might not be levying property taxes due to the fact that a substantial portion of the property to be included in boroughs is exempt from property taxes (e.g., undeveloped ANCSA land and federal and state land). Therefore, sales and use taxes might constitute the sole tax base for a number of the boroughs to be incorporated.

Section 1 of the bill adds a new section, AS 29.45.680, to authorize a petition for incorporation of a borough (of any class) to request that a sales and use tax proposition be placed on the same ballot with the incorporation question. The petition must state the proposed tax rate. The petition may request that incorporation of the borough be dependent on the passage of the tax proposition. This section does not require a tax proposition to be on the same ballot as the incorporation question. Proposed AS 29.45.680 is identical in procedure and effect to AS 29.45.710 (combining sales and use tax propositions with incorporation of second class cities).

Section 2 of the bill proposes a retroactive date of January 1, 1987 for AS 29.45.680. This is necessitated by the fact that the recently incorporated Aleutians East Borough, a second class borough, included a sales and use tax proposition with the incorporation question in its incorporation petition and on the election ballot in 1987. While the incorporation of the borough was not dependent on the passage of the sales tax proposition (which passed), the borough's sales tax is under legal challenge, and the issue is part of the appeal in Lake and Peninsula School District, et al. v. Alaska Local Boundary Commission, Case Nos. 3AN 87-8005 and 3AN 87-9217 (Consolidated). A retroactive date of January 1, 1987 will render the question moot as to the Aleutians East Borough, and for other proposed boroughs, presently in the incorporation process, that desire to include a sales and use tax proposition at the time of the incorporation election.

I strongly urge your support of this bill.

Sincerely,



Steve Cowper
Governor

FISCAL NOTE

REQUEST:

Revision Date: _____ Agency Affected: Community & Regional Affairs
 Title: "An Act authorizing the combining of a sales and use tax with incorp. of Borough BRU:"
 Sponsor: Rules Committee Components: _____
 Requestor: Governor

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Jim Peterson Phone: 465-4750
 Division: Municipal & Regional Assistance Date: _____
 Approved by Commissioner: Don Crowl Date: 20 Dec 88
 Agency: Community & Regional Affairs

- Distribution (by preparer):
- Legislative Finance
 - Legislative Sponsor
 - Requestor
 - Office of Management and Budget
 - Impacted Agency(ies)

No.

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: SB 95
PUBLISH DATE: 1/7/89

#3

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: Authorizing combining of
sales and use tax proposition
Sponsor: Rules Committee
Requestor: Request of the Governor

Agency Affected: Office of the Governor
BRU: Division of Elections
Components: I - Elections

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL						
---------	--	--	--	--	--	--

REVENUE	0	0	0	0	0	0
---------	---	---	---	---	---	---

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL TIME						
PART TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Linda Edgeworth Phone: 465-4611
Division: Division of Elections Date: 12/20/88

Approved by Commissioner: *Linda Edgeworth* Date: 12/20/88
Agency: Division of Elections, Office of the Lt. Governor

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

sive evaluation of formulas for State aid to municipalities and related matters is warranted.

- It is likely that there are unincorporated regions of the state which are presently able to support borough government. A restructuring of funding programs could likely extend financial viability for borough formation to all regions of the state.
- The concept of home rule boroughs seems to offer the greatest opportunity for residents of a region to tailor the form of government to best meet their needs. Under home rule, residents of each new borough would adopt a charter (constitution) establishing the powers and duties of the borough. State law requires only that a home rule borough provide areawide education and planning (as well as tax assessment and collection, if necessary).
- Few regions of the state are likely to seek formation of boroughs through the local initiative process.
- There is a need to re-examine existing borough boundaries.

Therefore, the LBC recommends that the legislature carefully consider the circumstances discussed in this statement and examine alternative means to deal with the issues raised. Although there may be several others, the following alternatives would seem appropriate for consideration: 1) identifying and eliminating disincentives for the formation of boroughs, 2) revising State laws and programs to provide greater equity in the distribution of financial aid to municipalities, 3) providing for the incorporation of boroughs only in those areas which are presently financially viable and which otherwise meet the standards for borough formation and 4) providing for the formation of boroughs in all parts of the state, coupled with a mechanism to ensure that all boroughs created in this fashion are financially viable.

These recommendations of the LBC have not been made lightly. It is recognized that any proposal to change the status quo is certain to generate intense opposition. Further, it is recognized that the issues and problems identified in this statement will not be resolved overnight and will require the commitment of substantial resources. Nonetheless, this statement is issued as a good faith attempt to carry out the constitutional and statutory duties of the LBC and to seek improvements in the delivery of regional services throughout the state.

While this statement has focused largely on problems concerning the current structure, readers are encouraged to consider the positive aspects of the issue. The creation of boroughs throughout the state would provide residents with a meaningful responsibility and interest in the development of each region. Boroughs offer effective tools to deal with a number of the social problems affecting many parts of Alaska (e.g. alcohol control and mental health).

Further, by improving economies of scale, a borough may be able to offer vast improvements in the delivery of services within a region. Improvements to the structure of service delivery will become even more critical as State funds available for public services continue to shrink.

FOOTNOTES

¹ As used in this statement, the term "borough" means organized boroughs and unified municipalities.

² Victor Fischer, Alaska's Constitutional Convention (Fairbanks: University of Alaska Press, 1975) p. 119.

³ Ibid, p. 120.

⁴ Ronald C. Cease and Jerome R. Saroff, The Metropolitan Experiment in Alaska - A study of Borough Government (New York: Frederick A. Praeger, Publisher, 1968) p. 32.

⁵ Department of Education, Alaska Public School Foundation Funding Program (March 21, 1988), p. 1.

FROM: STATEMENT ON BOROUGH GOVERNMENT IN ALASKA - LOCAL BOUNDARY COMMISSION

§ 29.45.700

MUNICIPAL GOVERNMENT

§ 29.45.710

Article 5. City Sales and Use Taxes.

Section
700. Power of levy

Section
710. Combining sales and use tax with
incorporation of a second class city

Effective date of article. — Section
90, ch. 74, SLA 1985 provides: "This Act
takes effect January 1, 1986."

Sec. 29.45.700. Power of levy. (a) A city in a borough that levies and collects areawide sales and use taxes may levy sales and use taxes on all sources taxed by the borough in the manner provided for boroughs, except that the assembly may by ordinance authorize a city to levy and collect sales and use taxes on other sources.

(b) A city in a borough that does not levy and collect sales and use taxes for areawide borough functions may levy and collect sales and use taxes in the manner provided for boroughs.

(c) A city outside a borough may levy and collect sales and use taxes in the manner provided for boroughs. (§ 12 ch 74 SLA 1985)

Sec. 29.45.710. Combining sales and use tax with incorporation of a second class city. A petition for incorporation of a second class city may request that a sales and use tax proposal be placed on the same ballot. The petition must state the proposed tax rate. The petition may request that incorporation be dependent on the passage of the tax proposition. If so, the incorporation proposition fails if the tax fails. (§ 12 ch 74 SLA 1985)

Chapter 46. Special Assessments.

Section
10. Assessment and proposal
20. Procedure
30. Creation of district
40. Record owner
50. Objections and revision
60. Assessment roll
70. Hearing and settlement

Section
80. Payment
90. Exemption
100. Reassessment
110. Allowable costs
120. Objection and appeal
130. Interim financing
140. Special assessment bonds

(d) If the assembly charges interest on sales taxes not paid when due, the rate of interest may not exceed 15 percent a year on the delinquent taxes and shall be charged from the due date until paid in full. This subsection applies to home rule and general law municipalities.

(e) A borough may provide for the creation, recording, and notice of a lien on real or personal property to secure the payment of a sales and use tax, and the interest, penalties, and administration costs in the event of delinquency. When recorded, a lien authorized under this section has priority over other liens except those for property taxes and special assessments. (§ 12 ch 74 SLA 1985)

Sec. 29.45.660. Notice of sales and use tax. (a) If the borough levies and collects only a sales tax and use tax, the assembly shall provide a notice substantially in the form set out in AS 29.45.020. In providing notice under this subsection, the assembly shall substitute for the millage equivalency its estimate of the equivalent sales tax rate for each of the categories of financial assistance set out in AS 29.45.020. Notice shall be provided

(1) by publishing in a newspaper of general circulation in the borough a copy of the notice once each week for a period of three successive weeks, with publication to occur not later than 45 days after the final adoption of the borough's budget; or

(2) if there is no newspaper of general circulation in the borough, by posting a copy of the notice for at least 20 days in at least two public places in the borough, with posting to occur not later than 45 days after the final adoption of the borough's budget.

(b) Compliance with the provisions of this section is a prerequisite to receipt of municipal tax resource equalization assistance under AS 29.60.010 — 29.60.080 and state aid for miscellaneous municipal services under AS 29.60.100 — 29.60.180. The department shall withhold annual allocations under those sections until municipal officials demonstrate that the requirements of this section have been met. (§ 12 ch 74 SLA 1985)

Sec. 29.45.670. Referendum, adoption, and modification. A new sales and use tax or an increase in the rate of levy of a sales tax approved by ordinance does not take effect until ratified by a majority of the voters at an election. (§ 12 ch 74 SLA 1985)

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

THE LAKE AND PENINSULA SCHOOL DIS-)
TRICT; BAY VIEW, INCORPORATED;)
BRISTOL BAY NATIVE CORPORATION,)

Appellants,)

vs.)

ALASKA LOCAL BOUNDARY COMMISSION,)
ALEUTIANS EAST BOROUGH, CITY OF)
KING COVE, CITY OF SAND POINT,)
CITY OF AKUTAN, CITY OF COLD BAY,)

Appellees.)

No. 3AN-87-8005 CIV

ALASKA PENINSULA CORPORATION,)

Appellant.)

vs.)

ALASKA LOCAL BOUNDARY COMMISSION,)

Appellee.)

No. 3AN-87-9217 CIV
(Consolidated)

Appeal from the Decision of the Local Boundary Commission
Regarding the Petition for Incorporation of the
Aleutians East Borough

BRIEF OF APPELLEE ALASKA LOCAL BOUNDARY COMMISSION

GRACE BEPG SCHAIBLE
ATTORNEY GENERAL

By: MARJORIE L. ODLAND
ASSISTANT ATTORNEY GENERAL
Department of Law
P.O. Box 8 - State Capitol
Juneau, AK 99811
Telephone: 907-465-3600
Attorneys for Appellee LBC

Filed April 1, 1988 in the Super-
ior Court of the State of Alaska

DAVID HAAS, Clerk

By: _____
Deputy Clerk

another borough in the Bristol Bay region, they will have an opportunity to seek a readjustment of the disputed eastern boundary. The same degree of objectivity and consideration will be given to their petition as was given to that submitted by AFB.

VI. ENACTMENT OF THE BOROUGH SALES TAX WAS PROPER

Appellant LPSD asserts that the LBC erred when it authorized an incorporation election that also contained a proposition by which the voters could authorize the levy of a sales and use tax. This assignment of error does not appear to bear any relation to the validity of the LBC's decision concerning the incorporation of the borough. At first, the LBC desired to present a ballot to the voters that combined the incorporation question and the referendum on the levy of a sales and use tax into a single ballot proposition. Under that approach, an affirmative vote on the incorporation question also constituted an affirmative vote on the levy of a sales or use tax.

The LBC, after receiving the advice of the attorney general, severed the incorporation question from the tax levy proposition. The voters were free to approve the incorporation proposition and to express a separate opinion on the tax levy proposition. The LBC desired to promote two important policies by providing for the tax levy referendum. The LBC wanted to simplify the procedures necessary for the new borough to adopt an ordinance for the generation of local revenues. It was also desirable to save the new borough the cost and the delay associated

with calling and holding a special election after incorporation on the tax levy proposition. The latter motivation was especially important because there was a generally acknowledged shortfall of state revenues that threatened the ability of the state to fully support local governments.

Under the procedure authorized by the LBC, the voters would express their will concerning the authority of the borough to levy a sales tax before the tax ordinance was adopted. In effect, the assembly was given prior authorization rather than post-adoption approval. The LBC believed that "it would exalt form over substance" to require post-adoption approval. This makes a lot of sense in the context of borough formation when none of the machinery of local government is in place. A similar procedure is authorized for the formation of second class cities. AS 29.45.710. Section 710 authorizes an incorporation election for a second class city that combines the incorporation question with a tax levy ratification. In that case, a "yes" vote on the question of incorporation is also an affirmative vote for the imposition of a sales or use tax.

The procedure adopted by the LBC is similar to the assumption of powers procedure authorized by law for a newly incorporated borough. AS 29.05.110(b) provides

Areawide borough powers included in an incorporation petition are considered to be part of the incorporation question. In an election for the incorporation of a second class borough, each non-areawide power to be exercised is placed separately on the ballot.

Appellants must agree that the incorporation petition included notice that the new borough was intended to have the power to levy a sales and use tax at a specific rate. However, they argue that the ratification cannot be effective unless the ordinance levying the tax is adopted before the ratification vote.

A careful reading of AS 29.45.670 does not disclose a requirement that a new sales tax for a newly incorporated borough may only be ratified after the levy is authorized by ordinance. Section 670 provides, "A new sales and use tax or an increase in the rate of levy of a sales tax approved by ordinance does not take effect until ratified by a majority of the voters at an election." Section 670 can be interpreted to permit sufficient latitude for prior authorization of a new sales tax proposed for levy by a new general law borough. There is no dispute that a sales tax may only be levied by ordinance. AS 29.25.010(a)(3). However, the words "approved by ordinance" can be read to modify only the phrase "increase in the rate of levy of a sales tax...." This supports the interpretation accepted by the LBC that a new sales and use tax can take effect if it is authorized (ratified) and subsequently levied by an ordinance within the scope of the prior authorization.

Section 670 uses the word "ratify." The term "ratify" means to approve and sanction, to authorize, to confirm, to make valid, and may apply to past events as well as to present. Corbin Supply Co. v. Loftis, 178 S.E. 185 (Ga. 1934). To be effective, a ratification must be made with an intent to be bound by

the acts of, in this case, the borough assembly. Cf. Bruton v. Automatic Welding & Supply Corp., 513 P.2d 1122, 1126 (Alaska 1973). All of the material facts concerning the extent of the proposed sales or use tax were known by the voters. The type of tax, the activity upon which the tax is to be levied, and the rate of the tax were set out in the ballot proposal. There can be little doubt that the voters intended to authorize the levy of a sales or use tax.

Other statutes in pari materia with section 670 support a construction that permits prior authorization of tax levy ordinances. See AS 29.45.600; 29.45.710. Sections 600 and 710 permit merging sales and property tax propositions with incorporation propositions. These sections apply to the incorporation of a second class city. Here, the borough is classified as second class. A second class city and a second class borough are considered general law municipalities, that is, they may exercise only those powers conferred by law. Nothing in the standards for incorporation appear to require a stricter interpretation of the tax levy ratification procedures for a second class borough. Sections 600 and 710 provide evidence that the legislature considered a ratification of a tax to be the equivalent of a prior authorization. Further, appellants can point to no express limitation on the power of the LBC to direct that the incorporation question for a second class borough appear on the same ballot as a tax levy proposition.

Putting aside the question of whether prior authoriza-

tion is appropriate, the issue before the court is whether the borough was properly incorporated. As mentioned earlier, the incorporation question was separate from the tax proposition. Appellants make no argument that supports a finding that the composition of the ballot materially affected the outcome of the incorporation election. Nor could they. Clearly, a voter could have voted "yes" on incorporation while voting "no" on the sales tax. The voters' decisions on the questions presented were entirely voluntary. If the prior authorization procedure is defective, the remedy available to the borough is simple. It must hold a special election after the tax ordinance is adopted. The borough is not forever foreclosed from levying a sales tax. It would take more time and money to do this but certainly would not permanently affect the borough's ability to generate enough local revenue to finance the cost of local government.

VII. APPELLANTS WERE NOT DEPRIVED OF CONSTITUTIONAL RIGHT TO NOTICE AND HEARING

Bay View complains that it was denied its right to due process as to a meaningful opportunity to participate before the LBC made its decision to accept the petition. Bay View Br. at 44. Furthermore, Bay View claims that there was no notice calculated to inform it (or any other property owner adjacent to the boundaries) of the petitioner's intent to annex Bay View's land in the proposed borough and that this denial of due process resulted in an unconstitutional "taking" of its land.

A review of the record on appeal in this case discloses

Working Copy
7

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

THE LAKE AND PENINSULA SCHOOL)
DISTRICT, ALASKA PENINSULA)
CORPORATION, BAY VIEW,)
INCORPORATED, BRISTOL BAY)
NATIVE CORPORATION,)
)
Appellants,)
)
vs.)
)
ALASKA LOCAL BOUNDARY COMMISSION,)
)
Appellee.)

RECEIVED
Department of Law

JAN 19 1988

AM
2,3,9,10,11,12,13,14,15,16,17,18,19,20,21,22,23,24,25,26,27,28,29,30,31,32,33,34,35,36,37,38,39,40,41,42,43,44,45,46,47,48,49,50,51,52,53,54,55,56,57,58,59,60,61,62,63,64,65,66,67,68,69,70,71,72,73,74,75,76,77,78,79,80,81,82,83,84,85,86,87,88,89,90,91,92,93,94,95,96,97,98,99,100

Nos. 3AN-87-8005 and 3AN-87-9217 Civil
(Consolidated)

APPEAL FROM A DECISION OF THE
ALASKA LOCAL BOUNDARY COMMISSION

BRIEF OF APPELLANT
THE LAKE AND PENINSULA SCHOOL DISTRICT

John S. Hedland, Esq.
HEDLAND, FLEISCHER, FRIEDMAN,
DRENNAN & COOKE
1227 West 9th Avenue, #300
Anchorage, Alaska 99501
(907) 279-5523

for incorporation unless a property tax is levied, and if a property tax is levied, there is no rational basis for including the disputed areas. Even allowing the greatest latitude possible for Commission discretion, there is no reasonable basis for its decision to include the disputed areas.

4. A borough sales tax may not be validly enacted at the incorporation election. As noted, the department originally recommended that incorporation of the borough, regardless of the outcome of the incorporation election, be conditioned upon simultaneous enactment of a ballot proposition imposing a sales tax. R. 285. This recommendation grew out of the recognition that the borough would not impose a property tax, and that

[i]n order for the LBC to approve the incorporation proposal, it must determine that the borough is indeed financially viable. . . . Without assurance that the borough will possess the authority to levy the proposed sales tax, the department does not understand how the required determination could reasonably be made. R. 285.

L&P objected to this feature of the proposed action on two grounds, (1) that the Local Boundary Commission had no authority to accept the petition conditionally, and (2) that a tax enacted in that manner would not be valid in any event. R. 293-99. Ultimately, the Commission decided to place the sales tax proposition on the ballot, but did not condition an incorporation upon its approval. Its actions thus leave open the question of the

legitimacy of the ballot proposition relative to the tax, and the effect of its passage.⁸

Deletion of the linkage between enactment of the tax and incorporation of the borough does not solve the problem. In the first place, there is absolutely no authority whatsoever in the Constitution or laws of Alaska for the Local Boundary Commission to place a borough sales tax proposition on the ballot, at an incorporation election or otherwise. See, Alaska Constitution Article X, Section 12, which provides for the Local Boundary Commission and grants it the authority to "consider any proposed local government boundary change." Statutes defining the power of the Local Boundary Commission are contained in AS 19.15 and AS 29.06, and likewise confer no such authority. AS 29.45.650-.710 govern generally the enactment of municipal sales taxes. AS 29.45.710 permits a sales tax proposal to be placed on the ballot at an incorporation election relating to a second-class city only, and it does not apply to an election on incorporation of a borough.

⁸AS 29.05.100 and 19 AAC 10.430(a) plainly do not envision or authorize conditional acceptance of an incorporation petition. Moreover, AS 29.45.710, whose application is expressly limited to second-class cities, specifically authorizes a simultaneous election on incorporation of a second-class city and enactment of a sales tax, with incorporation dependent upon enactment of the tax proposition. There is no comparable provision relating to boroughs or first-class cities. This provision obviously applies only to the incorporation of local government entities which do not have responsibility for education.

The decision cites no authority for the placement of the sales tax proposition on the ballot. Moreover, the specific manner in which a sales tax may be levied by a borough is set out in the statutes. AS 29.45.650 provides that a borough may levy a sales tax. Under AS 29.25.010(a)(3) a tax may be levied by a municipality only through the enactment of an ordinance. AS 29.25.020 sets out certain procedures that must be followed by a municipality in enacting an ordinance, which, beyond argument, are not complied with in this case. In any event, it is conceptually impossible for an ordinance (which must be voted upon by the assembly) to be enacted simultaneously with incorporation and prior to the election of an assembly.

Finally, AS 29.45.670 provides that a borough sales tax ordinance "does not take effect until ratified by a majority of the voters at an election." Consequently, even if the borough assembly enacted a sales tax ordinance after the election, it would not be valid since Section .670 plainly requires that the election be a ratification one after enactment of the ordinance, and not prior to it.

The Commission's response to these problems was two-fold. First, it referred to AS 29.05.110(c), which it read to authorize simultaneous submittal to the voters of the question of incorporation and the approval of the assumption of areawide powers. R. 514. This reference misses the mark completely. In the first place, the Commission is simply misreading the statute,

since it authorizes non-areawide, not areawide, powers to be placed on the ballot. It states as follows:

Areawide borough powers included in an incorporation petition are considered to be part of the incorporation question. In an election for the incorporation of a second-class borough, each nonareawide power to be exercised is placed separately on the ballot. Adoption of a nonareawide power requires a majority of the votes cast on the question, and the vote is limited to the voters residing in the proposed borough outside all cities in the proposed borough.

The sales tax is, beyond argument, of areawide applicability and the Commission is simply wrong in its interpretation of this statute. As the statute plainly provides, areawide powers included in the petition (which include taxation) are "considered to be part of the incorporation question." In other words, approval of the incorporation by the electorate automatically carries with it approval of areawide powers proposed in the petition, including the power of taxation.

The whole issue is moot anyway, since taxation is a mandatory areawide power of a second-class borough. See, AS 29.35.170(a) which provides, under the rubric "mandatory areawide powers", that "A borough shall assess and collect property, sales, and use taxes that are levied in its boundaries, subject to AS 29.45." Finally, the Commission has totally disregarded the distinction between the taxation power, which is mandatory and automatically exists by virtue of incorporation of the borough, and the exercise of that power through the enactment

of a sales tax. Even if AS 29.05.110(c) authorized placing the question of whether the borough should have the taxing power on the ballot, that is not what occurred in this case; rather, the Commission purported to permit the borough to enact a sales tax, without prior enactment of an ordinance, at the incorporation election through an unauthorized plebiscite.

Secondly, the Commission held that it would be more convenient to ignore the law than to follow it, and stated as follows:

An interested party appearing before the Commission has objected to any simultaneous assumption of the sales and use tax power. [sic] The party argues that there must be a strict adherence to the provisions of AS 29.45.670 by first requiring the new assembly to adopt a tax ordinance and then referring it to the voters.

- The Commission finds that a strict adherence to AS 29.45.670 as suggested by the interested party would exalt form over substance. The cost to the Municipality of holding an additional election and the delay occasioned by waiting for the election to be held warrants a procedure which consolidates the electoral process.

R. 514. Since the Local Boundary Commission felt that adherence to the law would "exalt form over substance", it purported to usurp the power of the legislature and simply repeal the law. It obviously does not have the authority to do so. Moreover, in this respect, the Commission also failed to appreciate not only the argument made by the "interested party" but the fundamental distinction between assumption of the taxation power (which is

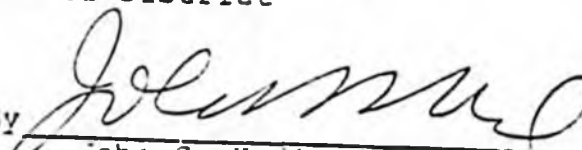
mandatory and automatic with approval of the incorporation) and the exercise of that power through the enactment of a sales tax. The sales tax is null and void since it was not enacted in accordance with law.

CONCLUSION

The action of the Local Boundary Commission with respect to the eastern boundary of the Aleutians East Borough should be reversed.

DATED at Anchorage, Alaska, this 15th day of January, 1968.

HEDLAND, FLEISCHER, FRIEDMAN,
BRENNAN & COOKE
Attorneys for Appellant
The Lake and Peninsula
School District

By 
John S. Hedland