SB

75

While in Session:
State Capitol
Juneau, AK 99801-1182
907-465-4958

While in Interim:
P.O. Box 670190
Chugiak, AK 99567
907-694-4958

ALASKA STATE LEGISLATURE

Senator Rick Halford
President of the Senate

SPONSOR STATEMENT
SB 75

An Act relating to municipal service areas and providing for voter approval of the formation, alteration or abolishment of certain service areas"

Service areas are valuable tools for municipalities and boroughs because they allow these local governments to customize the level of service appropriate to different, and often very diverse and non-contiguous geographical areas. It also allows the levying of a different mill rate. Because of the efforts of volunteer supervisors and board members, and the efficiencies of private sector contracting, most residents of these services areas feel they receive superior service, and at a lower cost. Road, parks and recreation, and fire protection service areas are responsive to, and strongly supported by the residents they serve.

SB 75 provides greater local control by setting parameters as to how a service area can be changed. The following are three examples of required local votes.

1) **Abolishment of a service area**. Must be approved by a majority of the voters residing within the service area.

2) **Abolishment and replacement of a service area.** Must be approved by a separate vote by a majority of voters within an existing service area and by a majority of the voters residing in the proposed service area, but outside the existing service area.

3) **Alteration of service area or combining it with another service area.** Must be approved, separately, by a majority of the voters who vote on the question and who reside in each of the service areas or in a proposed service area affected by the proposal.

Citizens from the Kenai Peninsula to Fairbanks have spoken out strongly in favor of maintaining service areas. Local service areas offer a model for the efficiencies and cost savings that can be achieved through private sector contracting. SB 75 would provide meaningful reassurances to these citizens that they can continue to depend on this very successful method of providing for efficient and cost effective delivery of basic services.

ALASKA STATE LEGISLATURE

Senator John Torgerson, Chair
Senator Gary Wilken, Vice Chair
Senator Alan Austerman
Senator Randy Phillips
Senator Georgianna Lincoln

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SENATE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE

SB 75 – Municipal Service Areas

FROM Senator Halford:

- Sponsor Statement

- Support – Press
- Support – Letters
- Support – Anchorage Assembly Resolution

- Legal Opinions
  - Jan. 25, 2001 – Cook: RE: HB 13 – Art. X, Sec. 5
  - Jan. 26, 2001 – Cook: RE: HB 13 – Special Legislation
  - Jan. 26, 2001 – Cook: RE: HB 13 – Diff. Tax Zones
  - Jan. 31, 2001 – Cook: RE: HB 13 – Home Rule Powers

FROM Senator Torgerson:

- Legal Opinion
  - Feb. 9, 2001 – Cook: RE: SB 75

NOTE: At the time of distribution of this packet, a fiscal note was not received from the department. It will be made available when received.

Distributed: 2/12/01 -mj

SB 75 – Municipal Service Areas

FROM Senator Torgerson:

- Legal Opinion
  Feb. 9, 2001 – Cook: RE: SB 75

LEGAL SERVICES

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MEMORANDUM February 9, 2001

SUBJECT: Municipal service areas (SB 75)

TO: Senator John Torgerson, Chair
Senate community and Regional Affairs Committee
Attn: Mary Jackson

FROM: Tamara Brandt Cook
Director TBC

You have informed me that you have been advised that a legal opinion indicates that SB 75 is unconstitutional because it limits the powers of a municipality. You may be referring to a memorandum by Marjorie Vandor, Assistant Attorney General, regarding SSHB 13 which is somewhat similar to SB 75. A copy of that memorandum is attached. It suggests that it is unconstitutional for the legislature, by statute, to limit home rule powers, especially with respect to a matter of local rather than statewide concern, citing as primary support for this position Lien v. City of Ketchikan, 383 P.2d 721 (Alaska 1963), and two other Alaska cases.

It appears that reliance on the Lien case is misplaced. The court in that case simply held that a statute involving lease procedures that preexisted statehood and was adopted before home rule municipalities were established did not apply to home rule municipalities. The court in a case decided after the Lien case and after the other two Alaska cases cited in the memorandum, carefully considered the relationship between statute and home rule powers in the context of Art. X, sec. 11 of the state constitution. (Jefferson v. State, 527 P.2d 37 (Alaska 1974)) The court concluded that our constitution explicitly rejects the test of statewide versus local concern in determining the scope of municipal power. Instead the question is to be resolved based upon whether a particular power or procedure has been prohibited to home rule municipalities by statue. The statutory 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." (Id, at page 43; see also Simpson v. Municipality of Anchorage, 635 P.2d 1197 (Alaska Ct. App. 1981)) Obviously, SB 75 contains an express limitation on home rule municipalities.

While I am not very concerned about the possibility that SB 45 would be held unconstitutional for limiting home rule powers, the constitutionality of the bill is not, in my view, entirely free from doubt. It is possible that the requirement of voter approval with respect to service areas runs afoul of Art. X, sec. 5 of the state constitution:

"Service areas to provide special services within an organized borough may be established, **altered, or abolished by the assembly, subject to the provisions of law or charter.**"

The extent of the constitutional power granted to the assembly and the degree that the power may be limited by law or charter under this provision has not been squarely addressed by the Supreme Court. However, a recent case suggests that the power of the assembly may be limited by a charter provision imposing a requirement of voter approval. (Area G. Home and Landowners Organization, Inc. (HALO) v. Anchorage, 927 P.2d 728 (Alaska 1996) U.S. *cert. denied* 137 L.Ed2d 821) That case involved the application of a charter provision requiring voter approval of certain changes to service areas. The court held that the charter provision permitting expansion of a service area upon approval of a majority of those voting within the area affected permitted the municipality to expand its police protection service area by abolishing its old service area and creating a new service area that included a region that had previously voted against expansion, without giving residents of that included region a separate vote on the expansion. In reaching its decision the court considered both the charter and Art. X, sec. 5. While the application of a voter approval requirement in the charter was the focus of the case, the court never suggested that the requirement of voter approval itself is prohibited under Art. X, sec. 5.

Recall the language of Art. X, sec. 5 making the power of an assembly over service areas "subject to the provisions of law or charter." If, as the court appears to have decided, a charter can impose a requirement of voter approval in these situations, then it appears under the language of the constitution that the law may also impose such a requirement, as will be done if SB 45 is enacted. So, while the precise question was not decided, based on the reasoning in the HALO case, I do not think that it is very likely that a court would find SB 75 unconstitutional under Art. X, sec. 5, although that is possible.

TBC:glc
01-119.glc

Attachments

MEMORANDUM

State of Alaska
Department of Law

TO: The Honorable Deborah Sedwick
Commissioner
Department of Community &
Economic Development

DATE: February 5, 2001

FILE NO.:

TELEPHONE NO.: 465-3600

FROM: Marjorie Vandor
Assistant Attorney General
Governmental Affairs Section –
Juneau

SUBJECT: SSHB 13 -- relating to municipal service areas

As requested, we are providing our legal analysis of constitutional issues that we believe are present in SSHB 13. A similar bill, SCS CSHB 133 (CRA) am S was vetoed by the governor last year due to the same constitutional issues we believe are now present in SSHB 13. Our legal analysis of these issues is presented below.

1. Limitation on Home Rule Municipalities

The requirements made in section 3 of this bill as to abolishing, altering, combining, or replacing existing services, is made applicable to all home rule municipalities (regardless of population). We are concerned that the limitations of AS 29.35.470(c) imposed on home rule municipalities through AS 29.10.200 (Sec. 1 of the bill), may be contrary to the constitutional grant of authority to home rule municipalities to have liberal control over matters of purely local concern.

Service areas are established for the purposes of dealing with matters of local concern that are unique to an area in a borough. How service areas have been established, governed, altered, abolished, or combined are local matters historically dealt with by home rule municipalities in their charters. A home rule charter is considered the organic law of the particular home rule municipality. Vol. 2 McQuillin *Municipal Corporations*, sec. 9.03 (3rd Ed, 1988 Rev).

As stated by the Alaska Supreme Court in *Lien v. City of Ketchikan,* 383 P.2d 271 (Alaska 1963), when dealing with a matter of purely local concern, a municipality's charter and not a legislative act is looked to in order to determine whether a particular power has been conferred upon the municipality. It would be incongruous to recognize the constitutional provision stating that a home rule municipality "may exercise all

legislative powers not prohibited by law or by charter" (Alaska Const. Art. X, sec. 11)[1], and then to say that the power to a home rule municipality is measured by a legislative act. *Id.* at 723. In *Lien,* the issue concerned the leasing of city property. The charter provision allowing the lease of city property was ruled to be controlling over a statute that prohibited the lease. The Alaska Supreme Court found the lease of city property was clearly an issue of local, not statewide, concern. *Id.* Similar to the issue in *Lien,* we believe that service areas of a home rule borough may be found by our court to fall into the category of matters of local, not statewide, concern, due to the very fact service areas are created for the purpose of dealing with uniquely local conditions.

In addition to the "purely local concern" test in *Lien,* the court in *Chugach Electric Assoc. v. City of Anchorage*, 476 P.2d 115 (Alaska 1970) and *McCauley v. Hildebrand*, 491 P.2d 120 (Alaska 1971), adopted the "local activity rule" as an expedient method for resolving impasses between state statutes which sought to further a specific policy and municipal ordinances which either directly or collaterally impeded this implementation. The court essentially determined in *Chugach* that the issue of whether a public utility could operate was a matter of statewide concern and the local ordinance was superceded. The court explicitly contrasts its finding in *Lien*, where it held that the lease of city property was clearly a matter of local concern. And, in *McCauley*, a second constitutional provision came into play that was not present in *Chugach* or *Lien,* by which the court determined the outcome of the "local activity" test was dictated. In *McCauley*, the court noted that Art. VII, sec.1 of the AK Const., mandated that "[t]he legislature shall by general law establish and maintain a system of public schools open to all children of the State . . . ." Thus, the court noted that education was a matter of statewide concern. 491 P.2d at 122 n.5.

Alaska is one of many states which has granted, through its constitution, broad legislative powers to its home rule municipalities. Further, the courts in those states have had numerous occasions to rule on situations as to whether a matter is of statewide or local concern in determining if a statute or local provision controls. These states' test are substantially similar to Alaska's. For example, *see Johnson v. Bradly,* 841 P.2d 990 (CA 1992) (first step in determining whether city charter provision can be upheld, notwithstanding alleged conflict with general state law, under "home rule" provisions of

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[1] It is noteworthy to point out that the Constitution does not state that a statute will prevail over a charter provision. Art. X, Sec. 11 reads: "A home rule borough or city may exercise all legislative powers not prohibited by law **or** by charter." The issue arises when a statute and a charter provision are in conflict and whether one prevails over the other due to the statewide nature of the interest versus a purely local interest.

State Constitution is to determine whether there is, in fact, any conflict between charter provision and general state law); *Englewood Police Ben. Ass'n v. Englewood*, 811 P.2d 404 (Colo. 1991) (municipality's home rule charter is the controlling law on local matters; issue related to special election restrictions in charter); *Committee of Seven Thousand v. Superior Court (City of Irvine)*, 754 P.2d 708 (CA 1988) (ordinances enacted in a charter city relating to matters which are purely municipal affairs prevail over state laws covering the same subject); *City and County of Denver by and Through Bd of Water Com'rs v. Colorado River Water Conservation Dist.*, 696 P.2d 730(Colo. 1985) (in purely local and municipal matters, as contrasted with matters of statewide concern, charter provisions and legislation of home rule city supersede conflicting state statutes; *Oliver v. City of Tulsa*, 654 P.2d 607 (Okla. 1982) (conflict between supremacy of state law and exercise of municipal power under its charter is resolved by determining whether such law pertains to general matters of state and its government or pertains to municipal affairs.).

In sum, we believe there are serious issues as to whether this bill improperly limits home rule municipalities' powers to control their service areas as matters of local concern.

2. Local and Special Legislation

Another constitutional concern is raised by AS 29.35.450(d), which exempts a class of general law boroughs, with a specific population requirement, from the requirements of AS 29.35.450(c). We are concerned that this exemption may violate the constitutional prohibition against special and local legislation under the Alaska Constitution. Such a specific classification of borough (particularly a general law borough) coupled with the population limitation, and resulting in only a few boroughs qualifying to be exempt, raises issues of whether this provision violates the prohibition in art. II, sec. 19 of the Alaska Constitution against local and special acts. Art. II, sec. 19 states, in pertinent part:

> The legislature shall pass no local or special act if a general act can be made applicable. Whether a general act can be made applicable shall be subject to judicial determination.

The ultimate question to be asked is whether the legislature's special treatment of a few boroughs is "reasonably related to a matter of common interest to the whole state." *Abrams v. State*, 534 P.2d 91, 94 (Alaska 1975) *citing Boucher v. Engstrom*, 528 P.2d 456, 463 (Alaska 1974). In *Abrams*, the statute was found to violate art. II, sec. 19 of the

Alaska Constitution because it created a borough in a manner different from that for incorporating other boroughs and no evidence was presented indicating any valid reason for special incorporation procedures applicable only to the one proposed borough. In *State v. Lewis*, 559 P.2d 630 (Alaska 1977), *cert. denied*, 432 U.S. 901 (1977), the court found the statute authorizing a trade of land between the federal government, the state and a Native regional corporation did not violate art. II, sec. 19 of the Alaska Constitution. The court found that the land trade was unique, was of statewide concern, and that the legislation was "as broad as the conditions to which it respond[ed]" could allow. *Lewis*, 559 P.2d at 644.

Applying the *Lewis* standards to this bill, it is questionable that there is a rational basis to exempt certain population-related general law boroughs (but not home rule boroughs of the same population) from the requirements for the municipal service areas addressed in this bill. And, it is questionable that either the class of borough (i.e. second class) or the population restrictions set out in this bill are "as broad as the conditions to which it [this bill] responded" could allow. The court in *Lewis* propounded a test to be used in determining whether a statute violates the special and local prohibition and it is substantially the same as the test used to determine the validity of nonsuspect classifications challenged as violative of equal protection. The legislature must show a rational basis, a good reason, to justify the special treatment.[2] And, while it is the province of the court to determine if a statute violates the prohibition against special and local legislation, we are uncertain as to the constitutionality of the special treatment in this bill. Alaska Const. art. II, sec. 19.

3. Conclusion

In summary, this bill raises complex policy and legal concerns, some of which have yet to be decided by the courts.

MV:bw
cc: Michael Abbot, Legislative Director
Office of the Governor

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[2] In 1978, the court articulated a unified equal protection analysis that utilizes a sliding scale to weigh the interest involved in any classification that avoids distinguishing between suspect and nonsuspect classifications. *State v. Erickson*, 574 P.2d 1 (Alaska 1978). We note that there has not been a case involving the local and special legislation prohibition since the unified equal protection test was adopted in *Erickson*.

alleged errors. The judgment is reversed and the case remanded to the superior court with instructions to vacate the judgment of conviction and commitment and to enter a judgment of acquittal.

O. M. LIEN et al., Appellants,

v.

CITY OF KETCHIKAN et al., and Sisters of St. Joseph of Newark, a Washington corporation, Appellees.

No. 275.

Supreme Court of Alaska.

June 24, 1963.

Action attacking validity of city's lease of hospital to religious order. The Superior Court, First Judicial District, Walter E. Walsh, J., denied relief, and plaintiffs appealed. The Supreme Court, Dimond, J., held, inter alia, that lease of hospital, which was built with federal, state, and local funds, to religious corporation for operation did not violate constitutional provision that no tax shall be levied, or appropriation of public money made, or public property transferred, or public credit used, except for public purpose.

Affirmed.

1. Municipal Corporations ⇐722

Test of whether public purpose is being served by lease of municipal property does not depend on religious or non-religious nature of agency that will operate property, but upon character of use to which property will be put. Const. art. 9, § 6.

2. Municipal Corporations ⇐331

City's lease of hospital, which was built with federal, state, and local funds, to religious corporation for operation did not violate constitutional provision that no tax shall be levied, or appropriation of public money made, or public property transferred, or public credit used, except for public purpose. Hospital Survey and Construction Act, § 601, 42 U.S.C.A. § 291; AS 18.20.140–18.20.220; Laws 1960, c. 182, § 2; Const. art. 9, § 6.

3. Municipal Corporations ⇐79

In case of home rule city, charter, and not legislative act, is looked to to determine whether particular power has been conferred upon city. Const. art. 10, § 7.

4. Municipal Corporations ⇐722

Statute permitting municipalities to lease property where no longer required for municipal purposes did not apply to home rule city, and city was not required to make finding that property was not required for municipal purposes before leasing it. AS 29.10.132(a); Const. art. 10, §§ 7, 9.

5. Hospitals ⇐2

"Public utility", within city charter provision relating to establishments of utilities, did not include hospital, and city could establish hospital without complying with charter provisions relating to utilities.

See publication Words and Phrases for other judicial constructions and definitions.

6. Municipal Corporations ⇐722

City's lease of hospital, by lease recognizing and protecting public interest, did not delegate powers to lessee in violation of charter provision that determination of all matters of policy should be vested in council.

7. Constitutional Law ⇐84

City's lease of hospital to religious order, which was a non-profit corporation organized for charitable purposes and whose articles of incorporation did not indicate that its objective was to further religious beliefs or dogmas, did not violate constitutional provision forbidding making of law respecting establishment of religion or prohibiting free exercise thereof. Const. art. 1, § 4.

8. Constitutional Law ⇐69

Supreme court would not give abstract opinion on whether city's lease of hospital to religious order would be valid should it appear that its effect would be to give preference to church, where order had not commenced operation of hospital. Const. art. 1, § 4.

David J. Pree, Anchorage, for appellants.

E. E. Bailey, Stump & Bailey, Ketchikan, for City of Ketchikan.

R. L. Jernberg, Gore & Jernberg, Ketchikan, and George J. Toulouse, Jr., Seattle, Wash., for Sisters of St. Joseph.

Before NESBETT, C. J., and DIMOND and AREND, JJ.

DIMOND, Justice.

The City of Ketchikan has provided for the construction of a hospital with a combination of federal, state and local funds.[1] After approval by the voters at a special election, the city executed an agreement to lease the hospital to the Sisters of St. Joseph of Newark, a charitable, non-profit corporation, for a period of 10 years at a rental of $1.00 a year. Under the terms of the lease the Sisters are to operate and maintain the hospital at their own expense. In this action to cancel the lease the plaintiff-appellant, Lien, assailed the lease arrangement as being invalid on various grounds. The superior court held against plaintiff and dismissed his complaint, and he has appealed.

Public Purpose

Plaintiff contends that when a hospital constructed with public funds is leased to a non-profit corporation managed by a sectarian religious order, there is a violation of the public purpose section of the state constitution which provides:

> "No tax shall be levied, or appropriation of public money made, or public property transferred, nor shall the public credit be used, except for a public purpose."[2]

[1, 2] The moneys used to construct the Ketchikan hospital were spent for a public purpose, since a community hospital serves the general welfare. That purpose does not become non-public when the hospital is turned over to a charitable, non-profit corporation for operation, rather than being operated by the city itself. The public purpose remains unchanged. This is apparent from those provisions of the lease which obligate the Sisters to not deny admission or care of patients on account of race, color or creed, and which require the Sisters to establish fair and equitable rates and charges "sufficient only to pay the cost of operation." And it is of no consequence that the members of this charitable corporation may belong to a sectarian religious order. The test of whether a public purpose is being served does not depend on the religious or non-religious nature of the agency that will operate the leased property, but upon the character of the use to which the property will be put. The use as a public hospital will not be changed by the lease to the Sisters. There is no violation of article IX, section 6 of the state constitution.

Authority to Lease

A statute authorizes municipalities to sell, lease or otherwise dispose of real estate and other property "when in the judgment of the city council it is no longer required for municipal purposes."[3] Relying upon this statute, plaintiff contends that since no finding was made that the hospital

1. The federal funds are made available by the Hospital Survey and Construction Act, commonly called the Hill-Burton Act. Act of August 13, 1946, ch. 958, 60 Stat. 1041 [42 U.S.C.A. § 291 (1957)]. The state funds are in the nature of matching funds with the federal and are available to local governments on a participating basis. AS 18.20.140–18.20.220; S.L.A.1960, ch. 182, § 2. The local funds were obtained through the sale of the City's general obligation bonds in an amount not to exceed $1,200,000.

2. Alaska Const. art. IX, § 6.

3. AS 29.10.132(a).

property was not required for municipal purposes, and that any such finding if made would not be justified by the facts, that the city had no authority to lease the property.

[3, 4] The statute relied upon by plaintiff has no application to this case. It was enacted prior to statehood when all cities derived their governmental powers from the legislature. Cities are now authorized by the state constitution to adopt home rule charters[4], and the City of Ketchikan had adopted a charter and was a home rule city prior to the time the lease was made. By constitutional provision cities have "the powers and functions conferred by law or charter."[5] The meaning of this provision is that where a home rule city is concerned the charter, and not a legislative act, is looked to in order to determine whether a particular power has been conferred upon the city. It would be incongruous to recognize the constitutional provision stating that a home rule city "may exercise all legislative powers not prohibited by law or by charter"[6], and then to say that the power of a home rule city is measured by a legislative act. We hold that AS 29.10.132(a), which authorizes municipalities to lease property, is not relevant where the powers of a home rule city are being considered. This statute is not the source of the city's power to lease its hospital to the Sisters. Therefore, the portion of that statute which requires a finding that property to be leased is not required for municipal purposes is not a limitation on the power of the City of Ketchikan to lease its hospital.

[5] Plaintiff contends that the lease is without effect because of the city's failure to comply with certain provisions of the charter relating to the establishment of a public utility and a granting of a franchise to furnish a public utility service. This contention must be rejected for the reason that the language of the charter dealing with utilities does not suggest that the term "public utility" was meant to include a hospital, and plaintiff has failed to show that this was contemplated by the framers of the charter.

Delegation of Power

The lease provides that "The Lessee shall have the responsibility for establishing the necessary rules, regulations and by-laws for the internal operation of the hospital and nothing in this lease may be construed as delegating this power to the Lessor." Plaintiff argues that this provision constitutes an invalid delegation of the city's power and duty to determine all matters of policy, in contravention of section 2-4 of the city charter which states:

> "Except as otherwise provided in this charter, all powers of the city, including the determination of all matters of policy, shall be vested in the council."

[6] We find no violation of this section of the charter. The city had the power to lease the hospital; it was under no obligation to operate it as a governmental institution, administered and staffed by municipal employees. It would be impracticable for the city to attempt to provide rules and regulations for the internal functioning of an institution which has been turned over to another for management and operation. The city has established policy in the lease by including provisions which adequately recognize and protect the public interest. The Sisters are obliged to operate and maintain the hospital and equipment at their own expense, and in such a manner that there will be compliance with minimum hospital standards prescribed by the state, and eligibility for accreditation by the Joint Commission on Accreditation of Hospitals. Provision must be made for the care of Indian patients as prescribed by federal law, and a reasonable volume of charity care must be provided to conform to the requirements of the federal Hill-Burton Act. No person

4. Alaska Const. art. X, § 9.

5. Alaska Const. art. X, § 7.

6. Alaska Const. art. X, § 11.

may be denied admission to the hospital on account of race, creed or color. The Sisters must establish fair and equitable rates and charges sufficient only to pay the costs of operation, and they must establish and maintain an adequate accounting system and provide the city with an annual audit of hospital accounts made by a certified public accountant.

The foregoing lease provisions demonstrate that the city has fulfilled, rather than abdicated, its duty of determining policy matters. There has been no invalid delegation of municipal power.

Freedom of Religion

Asserting that the Sisters are a sectarian order of the Catholic faith, plaintiff contends that the effect of the lease is to give a preference to the Catholic church. This, plaintiff argues, violates article I, section 4 of the state constitution which forbids the making of a law respecting the establishment of religion or prohibiting the free exercise thereof.[7]

[7] The Sisters are a non-profit corporation, organized for charitable purposes.[8] There is nothing in the articles of incorporation indicating that the corporation's objective is to further religious beliefs or dogmas of the Catholic church. The hospital was constructed and the lease made in order to provide for the care of the sick, without regard to race, color or creed, and thus accomplish a valid public purpose. There is nothing in this arrangement from which it can be inferred that a tax-established, public institution is to be utilized to aid a religious group to spread its faith or to interfere with the religious beliefs of others.[9] The city's action was not designed, nor does it have the effect by its nature, of promoting or giving a preferred position to whatever religious beliefs the individual members of the corporation might have. The fact that specific sectarian beliefs may be entertained by those persons does not bar the city from achieving its valid secular goal of caring for the sick.[10]

Plaintiff asserts that when the hospital has been completed and turned over to the Sisters in accordance with the lease[11], that the Sisters, as a matter of fact, will engage in the practice of teaching patients religion, and will operate the hospital under a sectarian code of ethics so as to give one sect preference over another and so as to interfere with the free exercise of plaintiff's own religious beliefs.

[8] If it should appear as an objective fact, after the Sisters commence operation of the hospital, that the operative effect of the lease arrangement is to violate the constitutional provision regarding the establishment of religion and religious freedom, then that will be time enough for the judiciary to intervene. Out of a proper regard for the right of the city to administer its affairs and serve the public need as it deems fit, this court will refuse to strike down the city's arrangement in the absence of a factual situation where judicial intervention becomes a practical necessity. At this time plaintiff is unable to show that he has sustained or is immediately in danger of sustaining some

7. Alaska Const. art. I, § 4 reads: "No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof."

8. The articles of incorporation of the Sisters of St. Joseph of Newark provide in art. III: "The objects and purposes of this incorporation shall be to establish and maintain hospitals, orphanages, homes for young women, homes for the aged, the blind, or the infirm and with the further object and purpose of engaging generally in any such kindred charities as those concerned in this corporation may from time to time find necessary or convenient."

9. But cf. Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 210, 68 S.Ct. 461, 464, 92 L.Ed. 649, 658 (1948).

10. See McGowan v. Maryland, 366 U.S. 420, 445, 81 S.Ct. 1101, 1115, 6 L.Ed.2d 393, 410 (1961).

11. At the time the superior court rendered its decision the hospital was still under construction.

direct injury as a result of the city's plan for hospital care, which makes it incumbent upon the court to pass upon the constitutional question. What plaintiff asks us to do is to give an abstract opinion on what is in essence a hypothetical case, and that we shall not do.[12] Suffice it to say we find no violation of article I, section 4 of the constitution on the face of the city's arrangement to lease its hospital to the Sisters.

The remaining specifications of error raised by plaintiff in his brief do not warrant discussion—either because they have been disposed of by the points covered in this opinion, or because they are lacking in substance.

The judgment is affirmed.

12. See Poe v. Ullman, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961).

ough assembly. The statute had four sections. The first section dictated only the number of seats on the assembly; the remaining sections stated how those seats were to be apportioned among the voters. If those apportionment standards were unconstitutional,[13] they could have been declared void without affecting the first section, since the first section was clearly separable from the latter sections. The test for separability of a statute (where one part of it is invalid) is whether the remaining parts are so independent and complete that it may be presumed that the legislature would have enacted the valid parts without regard to the invalid part.[14] In this case the test is satisfied; we presume that the legislature undertook to establish the number of assemblymen for each class of borough and would have done so whether or not any particular apportionment formula be provided.

[10] Moreover, even were these provisions—the structure of the assembly and the apportionment of assembly seats—completely inseparable, we do not conclude that the lack of a valid legislative body would prevent the valid incorporation of the municipality. This conclusion is bolstered by noting that Alaska's newly-enacted Municipal Government Code[15] has completely separated the statutes relating to the incorporation procedure[16] from those relating to the borough's legislative body.[17] We agree with the legislature that the incorporation of a municipality is a process both conceptually and functionally distinct from that of establishing a legislative body for that corporation.

We are satisfied that there was a valid statute under which the Borough could and did incorporate. Since Jefferson made no claim concerning the other three elements necessary to establish *de facto* municipal existence, the superior court properly ruled that the Borough was a valid entity as against a collateral attack.[18]

THE CITY'S CHARTER

Jefferson argues also that the sewer transfer was and is invalid, because the City's home rule charter prohibits the sale or disposition of the City's utility assets unless three-fifths of the City's voters approve the disposition.[19] No election was held.[20]

The Borough contends that the City's charter is over-ridden by state law in this area.[21] In particular, the Borough relies on former[22] AS 7.15.310, which provides in part:

"No city of any class, whether home rule or not, within an organized borough,

13. Judge Stewart ruled that this representational scheme was unconstitutional in City of Juneau v. Borough First Judicial District Cause No. 65-317 (1968), 6 Alaska L.J. 197-9 (1968).

14. *See* 2 J. Sutherland, Statutory Construction § 2404 (3rd ed. F. Horack 1943).

15. Chapter 118, S.L.A.1972 repealed and replaced the statutes under which the Borough was incorporated.

16. Chapter 18, of Title 29, entitled "Incorporation."

17. Chapter 23, Art. 1 of Title 29, entitled "Borough Assembly."

18. Our disposition of this issue makes it unnecessary to rule on the Borough's contention that Jefferson's complaint was never properly amended to include this attack on the Borough's existence.

19. The City of Anchorage has adopted a home rule charter which provides in § 13.4:
"The counsel may sell, lease or otherwise dispose of a municipal utility or of property and interest in property used or useful in the operation of a utility only after a proposition to do so is approved by three-fifths of the electors of the city voting on the proposition."

20. The Borough makes no claim that the areawide sewer election of 1966 satisfied the city charter requirement.

21. The City joins the Borough in making this contention.

22. This controversy must be decided with reference to the former statutes, *see* n. 5, *supra*, governing transfer of powers because Ch. 118, S.L.A.1972 had a savings clause:
"A right or liability of a home rule or general law city or borough existing on September 10, 1972 is not affected by the enactment of this Act."

ough assembly. The statute had four sections. The first section dictated only the number of seats on the assembly; the remaining sections stated how those seats were to be apportioned among the voters. If those apportionment standards were unconstitutional,[13] they could have been declared void without affecting the first section, since the first section was clearly separable from the latter sections. The test for separability of a statute (where one part of it is invalid) is whether the remaining parts are so independent and complete that it may be presumed that the legislature would have enacted the valid parts without regard to the invalid part.[14] In this case the test is satisfied; we presume that the legislature undertook to establish the number of assemblymen for each class of borough and would have done so whether or not any particular apportionment formula be provided.

[10] Moreover, even were these provisions—the structure of the assembly and the apportionment of assembly seats—completely inseparable, we do not conclude that the lack of a valid legislative body would prevent the valid incorporation of the municipality. This conclusion is bolstered by noting that Alaska's newly-enacted Municipal Government Code[15] has completely separated the statutes relating to the incorporation procedure[16] from those relating to the borough's legislative body.[17] We agree with the legislature that the incorporation of a municipality is a process both conceptually and functionally distinct from that of establishing a legislative body for that corporation.

We are satisfied that there was a valid statute under which the Borough could and did incorporate. Since Jefferson made no claim concerning the other three elements necessary to establish *de facto* municipal existence, the superior court properly ruled that the Borough was a valid entity as against a collateral attack.[18]

THE CITY'S CHARTER

Jefferson argues also that the sewer transfer was and is invalid, because the City's home rule charter prohibits the sale or disposition of the City's utility assets unless three-fifths of the City's voters approve the disposition.[19] No election was held.[20]

The Borough contends that the City's charter is over-ridden by state law in this area.[21] In particular, the Borough relies on former[22] AS 7.15.310, which provides in part:

"No city of any class, whether home rule or not, within an organized borough,

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"A right or liability of a home rule or general law city or borough existing on September 10, 1972 is not affected by the enactment of this Act."

> may exercise any areawide power provided in this section . . . once that power is being exercised by an organized borough." [23]

This court has dealt with conflicts between state law and a municipal home rule charter or ordinance in several cases.[24] The starting point for an analysis of this issue must be found in the Alaska constitution, Art. X, § 11:

> "A home rule borough or city may exercise all legislative powers not prohibited by law or charter."

The authors of this provision hoped that its simple language and sweeping grant of power would enable home rule municipalities to meet a multitude of legislative needs without depending on specific grants of power from a state legislature.[25] They were aware of the difficulties encountered in other jurisdictions where delegations of power to local government units were conferred in terms, such as "matters of local concern" or "of local affairs," which were intended to create an exclusive sphere of municipal action free from any intrusion by the state legislature.[26] Attempts by the courts in those jurisdictions to resolve conflicts between local enactments under such limited delegations of authority and state statutes relating generally to the same subject have often led to confusion and inconsistencies.[27] Then too, some commentators have suggested that constitutional or statutory home rule provisions had been rendered ineffective in other states because of restrictive court decisions.[28] With this all before them the constitutional delegates undertook to give Alaska home rule municipalities a wide range of powers to meet the differing needs of the varied and scattered communities of this state. It was hoped that the constitutional delegation of authority to local government units under the terms of Art. X, § 11 would lead the courts of this jurisdiction to take a new and independent approach when con-

23. Among the powers "provided in this section" are those transferred from city to borough pursuant to AS 7.15.350, which provides in part:
> "Second class boroughs acquire additional areawide powers in the same manner provided by §§ 710–800 of this chapter . . . except that the vote on the question is areawide."

24. It has been claimed our approach has not always been entirely consistent. *See* Sharp, Home Rule in Alaska: A Clash Between the Constitution and the Court, 3 U.S.L.A.—Alaska L.R. 1 (1973).

25. Art. X, section 1, the introductory section on home rule in the Alaska constitution reads: "The purpose of this article is to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdiction. A liberal construction shall be given to the powers of local government units."

26. *See* Sharp, *supra*, note 24 at 3. Most courts fail to distinguish between the types of home rule provisions. The provisions of other jurisdictions described in the text are sometimes designated as "shield" or "protection" provisions and usually require a court's determination of whether an exercise of municipal power is statewide or local in nature, when such exercise of power conflicts with a state statute. Alaska's home rule provision is a "grant" or "sword" of legislative power given to the municipality to be exercised as long as it is not prohibited by law. Art. X, § 11.

This difference between "shield" and "sword" provisions was implicitly recognized in Rubey v. City of Fairbanks, 456 P.2d 470, 475 (Alaska 1969) where the court declined to follow California's pre-emption-by-state-occupation-of-the-field doctrine because of the difference between California's and Alaska's home rule provisions. California's provision is a combination "shield" and "sword", while Alaska's is solely a "sword". *See* Duvall, Delineation of the Powers of the Alaska Home Rule City: The Need for a Beginning, 8 Alaska L.J. 232, 233–35 (Oct. 1970); Sato & Van Alstyne, State and Local Governm . Law 216–218 (1970).

27. Alaska Legislative Council and Local Affairs Agency, Final Report on Borough Government, 36 (1961).

28. *See* Fordham & Asher, Home Rule Powers in Theory and Practice, 9 Ohio St.L.J. 18 (1948); Richland, Courts Nullify Home Rule, 44 Nat'l Mun.Rev. 565–70 (1955); Sato, "Municipal Affairs" in California, 60 Cal. L.Rev. 1055 (1972). *But see also* Saundlow, The Limits of Municipal Powers Under Home Rule; A Role for the Courts, 48 Minn.L.R. 643 (1963–64).

flicts inevitably arose between the municipalities and the state.[29] The foundation for this new approach has been laid in the past decisions of this court which have favored the exercise of legislative powers by local government units.[30]

[11] However, to say that home rule powers are intended to be broadly applied in Alaska is not to say that they are intended to be pre-eminent. The constitution's authors did not intend to create "city states with mini-legislature."[31] They wrote into Art. X, § 11 the limitation of municipal authority "not prohibited by law or charter." The test we derive from Alaska's constitutional provisions is one of prohibition, rather than traditional tests such as statewide versus local concern.[32] 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.[33]

[12] In this case we find the prohibition to be express. The statutes established a procedure by which certain city powers could be transferred to a second class borough and precluded a city from exercising a power once that power was being exercised areawide.[34]

This then presents a clear case in which statutory authority overrides a provision in a home rule charter. Our conclusion is consistent with the new municipal code, which retains in large measure the relevant statutory provisions we have found controlling in this case.[35]

29. *See* Sharp, Home Rule in Alaska, *supra*, note 25, at 22–27.

30. *See* Lien v. City of Ketchikan, 383 P.2d 721–723 (Alaska 1963); City of Juneau v. Hixson, 373 P.2d 743 (Alaska 1962); Rubey v. City of Fairbanks, 456 P.2d 470–475 (Alaska 1969).

31. Duvall, Delineation of the Powers of the Alaska Home Rule City: The Need for a Beginning, 8 Alaska L.J. 232, 240 (Oct. 1970).

32. *See* Sharp, *supra* note 25, at 30–31; Duvall, *supra* note 27 at 235, 237–239. In Rubey v. City of Fairbanks, 456 P.2d 470, 475 (Alaska 1969) this court recognized a prohibition test for conflict resolution between state and local legislation:

"Article X, section 11 of the Alaska constitution provides that a home rule city, such as Fairbanks, 'may exercise all legislative powers not prohibited by law or by charter.' There is no legislative enactment in Alaska that expressly prohibits a home rule city from making assignation a criminal offense. We do not find such prohibition from the fact that the Alaska legislature has extensively covered the field of sexual offenses. We believe there would have to be some additional factor from which the intent of the legislature to prohibit local regulation in this area could be reasonably inferred. We are not aware of any such factor in this case."

33. We reaffirm our rejection of the doctrine of state pre-emption by "occupying the field." We will not read into a scheme of statutory provisions any intention to prohibit the exercise of home rule authority in that area of the law. If the legislature wishes to "pre-empt" an entire field, they must so state. *See* Rubey v. City of Fairbanks, 456 P.2d 470 (Alaska 1969).

We note that the legislature has done this in its new Title 29, Municipal Code. AS 29.-13.100 provides in part:

"Only the following provisions of this title apply to home rule municipalities as prohibitions on acting otherwise than as provided."

34. Formerly AS 7.15.350; AS 7.15.310. The statutes further provided that such boroughs (of which the Anchorage borough is one) shall acquire city powers in the manner provided in AS 7.15.710–7.15.800, except that the vote on the question is areawide.

AS 7.15.710–7.15.800 provided for the filing of a petition by the borough with the Local Affairs Agency (now the Dept. of Community and Regional Affairs), review of the approved (as to form) petition by the Local Boundary Commission, a hearing on the petition held by the Local Boundary Commission, and finally an election on the proposal.

35. AS 29.33.010(b) (exercise of areawide borough powers); AS 29.33.290(c) (acquisi-

Our decision in the case at bar is in accord with this court's opinions relating to cases of conflict between local ordinances and state enactments. In Lien v. City of Ketchikan,[36] we held that the home rule provisions of the state constitution validated a lease of a hospital to a charitable non-profit corporation despite non-compliance with a state statute governing leases by municipalities. The statute was held inapplicable and not a limitation upon the city's home rule authority, the source of which is found in Article X, section 7 of Alaska's constitution.

In Chugach Electric Association v. The City of Anchorage[37] the issue was whether the City of Anchorage could block the electric association from providing electrical service to a customer within the association's service area. The Alaska Public Service Commission had previously granted the association a certificate of convenience and necessity to provide electrical service within certain areas of the city. The City refused to issue to the Association a building permit on the grounds that the City's own electrical utility could better serve the customer. We resolved the conflict by application of a rule requiring the local enactment to yield where it directly or indirectly impeded implementation of statutes which sought to further a specific statewide policy. This court discerned in the statute a strong policy in favor of treating regulation of public utility service areas as a matter of statewide concern. The situation was one in which locally created variations from state regulation could have affected public utilities beyond the local area. In these circumstances we found a legislative intent that regulated utilities were to be within the exclusive jurisdiction of the Public Service Commission to the extent that such jurisdiction was conferred upon the Commission. Accordingly, municipalities were prohibited from regulating the same utilities to the extent of the Commission's proper jurisdiction.

In Macauley v. Hildebrand[38] a state statute permitted borough assemblies to centralize by ordinance their school district accounting systems with other borough operations with school board consent. An ordinance of the City and Borough of Juneau required the Juneau School District to centralize the district's accounting system without the school board's consent. Although the statutory prohibition in *Macauley* was direct, this court offered another reason for striking down the questioned ordinance. The statute involved in *Macauley* was an express delegation by the state legislature to municipal corporations of a constitutionally mandated legislative power.[39] We reasoned that the language of the state constitution mandating maintenance of a school system by the state vested the legislature with pervasive control over public education. Thus, home rule municipalities were precluded from exercising power over education unless, and to the extent, delegated by the state legislature; and the local ordinance was therefore overriden by the statute.

Affirmed.

CONNOR, J., concurs separately.

CONNOR, Justice (concurring separately).

I agree with the majority opinion, but wish to add some observations about judicial method in resolving conflicts between state statutes and municipal ordinances. More particularly I wish to discuss the "local activities rule", and the place it has in the process of determining the validity of ordinances of a home rule municipality.

tion of additional areawide powers). These are enumerated as specific prohibitions to municipalities in AS 29.13.100. *See* note 34 *supra*.

36. 383 P.2d 721 (Alaska 1963).

37. 476 P.2d 115 (Alaska 1970).

38. 491 P.2d 120 (Alaska 1971).

39. Alaska Const., Art. VII, § 1:
The legislature shall by general law establish and maintain a system of public schools open to all children of the State.

There is no question that we must adhere to the policy expressed in the constitution which requires that we give a broad reading to the powers of home rule cities and boroughs. That in itself poses no difficulty. This general policy, however, will not solve the real problem, which lies in the inherent potentiality of conflict between statutory law enacted by the legislature and local ordinances.

One possible solution is to hold that only where the legislature has expressly declared its intention to prohibit the exercise of municipal powers should we declare municipal ordinances void. Such an approach would have the advantage of simplicity. Unfortunately, such a mechanical jurisprudential technique is so simple that it would not serve the needs of the public. In extreme cases it probably would not survive constitutional attack.[1]

The state legislature has expressly prohibited the exercise of total local power in such areas as taxation, AS 29.73.040, AS 29.53.350, AS 29.53.400; utilities regulation, AS 29.48.040–29.48.100; security for bonds, AS 29.58.180(b); municipal elections, AS 29.28.010, AS 29.28.020(b)–29.28.030; and other matters of general state concern. *See,* AS 29.13.100. It is naive, however, to expect that these prohibitions contemplate each and every matter in which the legislature would properly wish to restrict local power. A home rule concept which relies only on express prohibition to define the scope of local power presupposes a degree of legislative foresight and draftsmanship ability which is completely unrealistic. *See* Duvall, Delineation of the Powers of the Alaska Home Rule City: The Need for a Beginning, 8 Alaska Law Journal 232, 239 (1970).

For example, the Uniform Commercial Code, AS 45.05.002 et seq., and the Insurance Code, AS 21.03.010 et seq., enacted by the legislature, no doubt were meant to operate upon a statewide basis, though nothing in those codes expressly prohibits municipal legislation in the field of commercial law or insurance law. Yet to say that a home rule city could alter the operation of such comprehensive statutory systems would be intolerable. Transactions whose reliability is vital to a functioning economy would become unsettled, to the detriment of the business community and the citizenry of the state. A conflict between the city and the state could not be ignored in this type of situation, despite the absence of an express prohibition.

In such instances the courts must resolve the conflict. There is no escape from our duty to adjudicate legal claims which arise from two constitutional provisions of equal dignity, *i. e.,* the grants of power to both the legislature and to home rule cities.

The question, then, is not the propriety of judicial action or abstention. Rather, the problem is what methods should be employed by courts when presented with those conflicts between municipal ordinances and state statutes which will inevitably occur. As with many questions of public law, the answer is to be found through an analysis and weighing of the various social and governmental interests which bear upon such a conflict.

One test we have used in determining whether the ordinance or the statute must yield, is the "local activities rule." This test, as applied in Chugach Electric Association v. City of Anchorage, 476 P.2d 115 (Alaska 1970), and Macauley v. Hildebrand, 491 P.2d 120 (Alaska 1971), should not be regarded, as it has been by one commentator,[2] as the rule the framers of the constitution rejected in establishing a broad home rule policy. Rather, it should

1. Examples are Turner v. Staggs, 510 P.2d 879 (Nev.1973), and Reich v. State Highway Department, 386 Mich. 617, 194 N.W.2d 700 (1972). These cases concern municipal ordinances barring suit by tort claimants unless notice is given within a certain period of time following the injury. Because the time periods provided by ordinance were shorter than the statutory period of limitation applicable to claimants against private persons, the ordinances were in these cases held unconstitutional as denying to tort claimants the equal protection of the laws.

2. *See,* Sharp, Home Rule in Alaska: A Clash Between the Constitution and the Court, 3 UCLA Alaska Law Review 1, 53 (1973).

be recognized as a realistic tool by which to interpret this policy. The "local activities rule" requires the court to focus upon whether the particular subject under consideration is of such statewide concern that the exercise of municipal power is inconsistent with the effectuation of statewide policy, as expressed by statute. Some matters are obviously of statewide concern, some less so. Some matters are so traditionally and readily classified as matters of local government that there will be no difficulty in finding that they are within municipal competence. Here, too, the municipal code adopted by the legislature is of great help in delineating the areas of permissible local action.

Inevitably, there will be cases which fall within a gray area. As to those the courts must attempt to balance competing interests, bearing in mind the constitutionally stated policy of permitting maximum home rule and yet preventing the chaotic state of affairs which would result if each home rule municipality were allowed to legislate as though it were a feudal city-state. When dealing with cases in the gray area, the courts must strike a balance as best they can, after careful consideration of the competing interests and public policies which bear upon the outcome. Thus in Chugach Electric Association, *supra*, 476 P.2d at 123, we spoke of balancing "the needs of the entire state against the desirable autonomy which only home rule can provide." The ultimate question, of course, is whether, from an examination of the statutes, a prohibition against home rule powers can be discerned, either expressly or by implication. Fortunately, if the judicial decision in such cases is unacceptable, relief may still be sought from the legislature, which can, if it chooses, alter the determination. A judicial decision of such a question is not, therefore, the end of the controversy.

Those who advocate that the conflict between statutes and ordinances should be resolved by simply holding in favor of home rule in all instances where the legislature has not stated an express prohibition are seeking an illusionary, unworkable solution to a problem which is quite complex and which is, like many things in modern life, not susceptible to decision by mere slogans or mechanical formulae. "The price of certainty is too high when it involves a failure to face the real policy questions involved." [3]

I favor the "local activities rule" applied in *Macauley* and *Chugach*, for the rule is, in my opinion, a useful one in resolving the conflict between statute and ordinance.

3. Calif. Governor's Comm'n on the Law of Preemption, Report and Recommendations, 6 (1967), cited in Duvall, *supra*, at 244.

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FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SB 75
() Publish Date:

Revision Date/Time (Note if correction): 02/12/2001 3:50p.m.
Dept. Affected: DCED
Title: Service Area: Voter Approval/Tax
BRU: Community & Business Development
Component: Community & Business Development
Sponsor: Senator Halford
Requester: Senate CRA
Component Number: 2486

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2001) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2002 budget proposal: [ ]

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This legislation provides for voter approval of the formation, alteration,or abolishment of certain municipal service areas. This legislation would have no fiscal impact on the department

Prepared by: Pat Poland, Director
Phone (907) 269-4580
Division: Community & Business Development
Date/Time 02/12/2001 3:50p.m.
Approved by: Commissioner Deborah B. Sedwick
Date 2/12/2001
Agency: Department of Community & Economic Development

For distribution information, call the Governor's Legislative Office

(Rev 2/7/2001 OMB)

SB 75 – Municipal Service Areas

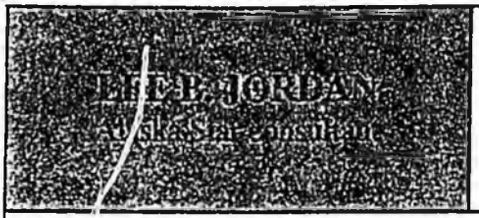
FROM Senator Halford:

- Support – Press
- Support – Letters
- Support – Anchorage Assembly Resolution

OPIN

Published Weekly Alaska Star

News About Alaskans, By Alaskans, For Alaskans Since 1971



"No man is good enough to govern another man without that other's consent."

–Abraham Lincoln

Age, changes service area foes

Supporters of local service areas learned Monday that the passage of time is working against them. Members of the House Judiciary Committee who listened to testimony on HB 13, a bill introduced by Rep. Con Bunde, spent most of the first hour asking just what a service area is and what kinds of local government are available in Alaska.

Unfortunately, some of what they learned about what was created 46 years ago left them even more confused.

HOUSE BILL 13 would prohibit boroughs (the Municipality of Anchorage is a unified home rule city and borough) from creating, altering or abolishing service areas without the approval of voters who reside within the service area and also those who live outside the service area. Similar language is already in the state constitution and the Anchorage charter, except that only the vote of those who are affected is required. Until now, the definition of "those affected" has not been clear.

Rep: Bunde represents the Hillside area, where residents five times had rejected annexation to the city police service area. Several years ago, the Anchorage Assembly and Mayor Rick Mystrom came up with a scheme that forced that action. By gerrymandering a new service area and presenting the question to all voters within the larger area, the expansion was accomplished despite an overwhelmingly negative vote within the area that was added. The action was upheld in state courts.

The administration of Mayor George Wuerch is looking at doing away with all service areas in the municipality. Most are limited road service areas in Rep. Bunde's district. They also include the Girdwood area, where a service area does things provided by the City of Girdwood prior to unification in 1975, and Chugiak-Eagle River, where there is a parks and recreation district and a road district, and in Chugiak where there is a volunteer fire department.

LOCAL GOVERNMENT OFFICIALS want to eliminate the different levels of service and the many local boards that oversee the service areas. They say it is duplication. They also argue, as did Mayor Mystrom in the case of the Hillside police issue, that all residents should receive the same level of service and pay the same rate in taxes.

Being raised in the Legislature is the argument that requiring voters who live in the service area to have a say in how services are to be delivered gives a veto to a minority. Those who hold that opinion argue that the governing body should act for the common good and make things equal for all.

Unfortunately, that argument carries weight with people who aren't familiar with how well service areas are working. And too many of them look at local control as exercised by the people who receive and pay for a service as a hindrance to efficient operation of big government.

Star LIGHT

A lighthearted look at things

by LEE JORDAN

Service districts give local folks degree of control

When Ed Willis a couple of weeks ago saw the story about City Hall wanting to do away with the free ambulance ride for people transported by Chugiak medics, it was a call to arms. He and some other folks who were involved in the discussions that led to Anchorage's Home Rule Charter reacted like old-time fire horses. Enjoying a life of leisure and no longer called upon to rush the firefighting equipment to the scene of an emergency, they still feel the call to duty whenever the alarm rings.

Debating the threat to service areas, Ed brought up the recent feat of now-retired World War II sailors who overhauled a landing craft at its resting place in Greece, making it ship-shape and sailing it home to the States. Their story tweaked the pride in veterans all over the country, showing they can still do the job they learned to do when responding to the defense of their country.

The problem with our new challenge is slightly similar to what those intrepid old salts ran into. Not too many people remember the part the landing craft played in that war and the danger those crews faced as they ferried invasion troops from their transports to the beaches of the Pacific and at Normandy. The boats were built quickly as America rose to meet the challenges of war; they were sturdy and continued to serve in commercial ventures around the world once the invasions were a thing of the past. But 55 years later, those exploits have long been forgotten. The history of hard-fought battles are confined to musty pages in dark archives, recounted only occasionally by students of that war and sometimes coming to light in an obituary of one of those heroes.

Just what is a service area? You may well be asking that question after seeing me rail in recent editorials about the threat.

The state constitution allows for service areas to be created by citizens who wish to provide a service for themselves that cannot be provided by the existing government.

Excellent examples of that concept can be found in Chugiak-Eagle River.

The first to be created was the Chugiak fire service area. It was seen by local residents as the ideal solution to the need for fire suppression and emergency medical service. Initially, the volunteer fire department had operated, using scrounged equipment, strictly on private donations and a steady stream of fundraisers. There was never enough money to make needed repairs, buy the gas and keep the firehouses warm enough for the trucks to start and keep the water in liquid form in winter.

But when the Greater Anchorage Borough was formed as one of seven mandatory boroughs created by legislative fiat in 1964, the possibilities were immediately evident. A proposition was put on the ballot at the request of Chugiak residents. It passed handily.

Part of the reason it passed was that the tax rate was reasonable. Even more laudable was the fact that it provided for an elected board of supervisors who would oversee the budget and serve as the liaison between the volunteer fire department, the community and the borough assembly. How the service was operated was up to the people in Chugiak. It has worked well for 37 years. The district has four fire stations housing a large fleet of modern equipment. That equipment was bought for cash under a no-debt philosophy established at the beginning.

Chugiak-Eagle River has one of many separate road service districts within the municipality. It is overseen by a board of supervisors whose membership is designated by local community councils. Its work is accomplished by contractors. The tax rate is lower than charged in the Anchorage Bowl where work is done by city crews. How well does it work? After a snow storm, local roads are plowed within 24 hours. In the city, they take up to 96 hours to clear residential streets.

Parks and Recreation is another local service area. Again, a local board sets policy. Assistance is given to local non-profit groups who help provide the services, although maintenance is done by city crews. We happen to have some major park facilities located at Beach, Edmonds and Mirror lakes. They and the McDonald Center are supported from taxes collected in Chugiak-Eagle River but are heavily used by residents from a much wider area.

Those service areas are working just fine, so what's the big deal?

The deal is that City Hall doesn't like bothering with local groups. They figure that it's all one municipality, so all the services should be the same. They argue that people who pay a lower tax rate are getting a free ride, just like those patients who aren't charged for emergency transportation by the unpaid volunteers. City Hall argues that having separate districts is a bookkeeping nightmare; they completely overlook the fact that they rake off more than one-third of all our tax payments to cover their exorbitant administrative costs.

And City Hall believes that now government can provide the services it could not provide 37 years ago. To the downtown bureaucracy, tailored service and commensurate tax rates are of no importance.

The reality is that they want us to pay more and they want to get rid of service areas that do a better job for less. We're an embarrassment.

So it's little wonder that folks who took a part in seeing that service areas were provided for in the city charter are ready to get back in the traces to fight this threat. It took three tries for the charter to gain voter approval. It would not have passed in 1975 without the assurance that service areas would continue.

The Legislature currently is debating a bill introduced by Rep. Con Bunde that would require approval of residents within a service area before it could be created, altered or abolished. He represents the Hillside area, the first victim of forced annexation through a gerrymandered election.

Protection against further violations of the municipal charter and existing state law are needed.

Without such protection, these old fire horses are apt to break loose and head for the scene of the inferno. And I'll be right in the midst of them.

Lee Jordan is a consultant to the Alaska Star.

We must maintain local control of service areas

By Sen. Rick Halford

To the Point

I am currently in the process of drafting legislation (similar to the previously introduced House Bill 13) that would help ensure continuation of local service areas. For Chugiak-Eagle River, that means preserving local control of Parks and Recreation, road service, fire protection and emergency medical services.

A key component of the Charter that unified the City of Anchorage and the old Anchorage Borough (after two previous defeats) was the guarantee of local service areas. This was to allow outlying areas of the municipality the ability to determine the level of local services appropriate to their neighborhoods.

In Chugiak-Eagle River, our Parks and Recreation and rural road service areas have delivered services commensurate with the level that residents want. The service offered by Chugiak, Birchwood, Eagle River Rural Road Service Area is the envy of our city neighbors. While they get recorded messages that assures them they will be plowed out within 72 hours, our streets are usually cleared within the first day after a snowfall. And because of the dedicated work of our volunteer directors, and through the efficiencies of private sector contracting, we are able to accomplish basic road maintenance and ongoing road and drainage improvements at a lower mill rate assessment to property owners.

Similarly, the northern end of our community is in a local service area served by the Chugiak Volunteer Fire Department. I am somewhat perplexed by the recent objections from the municipality that the CVFD does not charge for the ambulance services they provide. This fails to recognize that CVFD's EMTS are volunteers. The elected supervisors for the CVFD should have every right to not charge, or perhaps charge a lower rate. It seems only logical to pass along the savings accrued by not having to meet the payroll of a union represented, paid fire department.

'The service offered by Chugiak, Birchwood, Eagle River Rural Road Service Area is the envy of our city neighbors.'

ADN
February 3, 2001
Attn: Bill
3 Pgs

Suburbs' autonomy addressed

■ **BILL:** Bunde moves to protect service areas from city interference.

By MARTHA BELLISLE
Anchorage Daily News

JUNEAU — A handful of small communities within and around Anchorage, Fairbanks and the Mat-Su Valley fear their autonomy is under siege by municipalities hungry for their tax dollars, some legislators say.

They are backing a bill to give voters in local service areas a stronger voice in any proposed changes to how they get their roads plowed or potholes filled.

Ed Willis of Eagle River said his community's self-reliance is being challenged. "They're trying to make an end run around the people in the service areas. This bill would protect those people," he said.

Willis, a veteran of the Anchorage unification battles of the 1960s and early 1970s, noted that the unification of the city and borough of Anchorage into one municipality was based on a promise that residents of local service areas could maintain their independence.

The Anchorage Municipal Charter, approved in 1975 on the third try, grants service areas the right to assess themselves for a level of service they want — road service, for example — then hire their own contractors to do the work.

Rep. Bunde, R-Anchorage, the main sponsor of House Bill 13, lives in a local road service area on the Anchorage Hillside.

"My roads are plowed before I leave for work," he said. Folks in his community elect a road service supervisor and hire a private contractor to clear snow from the roads, and don't want that system changed unless they vote to change it.

"We get better and cheaper services at an appropriate level for our local area," he said. The bill would block any aggression from cities, Bunde said, adding, "there are always rumors that they'll absorb these areas and use them as cash cows."

Under the measure, a majority of voters in the city and a majority of voters in communities like Hillside, Girdwood and Chugiak-Eagle River, and the 117 limited road service areas around Fairbanks or the Mat-Su, would need to approve any changes to their respective areas.

At present, changes can be made with the majority approval of all voters, in and out of the cities.

"The issue, in essence, is how do you define local control?" Bunde said this week. "Is it local government or does it lie with individual voters?"

The Anchorage Assembly approved a resolution last Tuesday supporting the bill, arguing the legislation "will settle a long-time debate about who is entitled to vote during the creation, alteration or abolishment of a service area."

But some Assembly members had second thoughts and plan to reconsider the resolution Tuesday.

See Page B-5, BILL

Legislature in session

DWI: Softened bill disappoints activist seeking tougher laws. **B-2**

BILL: *Bunde moves to protect service areas*

Continued from B-1

One elected official who is not rethinking his position on the bill is Rep. Eldon Mulder, a Republican representing Muldoon, where people pay full taxes for the full set of city services.

For him, the bill is like opening an old wound, "part of a pin prick that still exists" over the battles in the mid-1990s to get Anchorage Hillside residents to pay for city police protection.

Hillsiders had voted down previous attempts to join the city's police service area, the police tax district, arguing that they could rely on state troopers instead. City officials noted that police still responded to emergencies outside the service area and said Hillside residents benefited from police protection in the rest of town.

Then-Mayor Rick Mystrom and the Anchorage Assembly tried a new tack: They put the question to all city voters, who in 1996 imposed city police service. The Alaska Supreme Court upheld the decision.

Bunde, whose district spans much of the Hillside, said this bill has nothing to do with the police issue. He said he does not agree with the court, "but it's the law of the land."

Gov. Tony Knowles vetoed this same measure after it passed both houses last session. In his veto letter to Speaker Brian Porter, Knowles said the legislation would give too much power to a minority of voters, thereby taking power away from borough assemblies.

The Department of Law argues that it is unconstitutional. Bunde said that the Legislature's attorneys hold a different view and that "we'll have dueling legal opinions when we meet on Monday."

■ Reporter Martha Bellisle can be reached at mbellisle@adn.com and 907-586-1531.

Municipality of Anchorage

George P. Wuerch, Mayor

Department of Public Works

Chugiak-Birchwood-Eagle River Rural Road Service Area

Board of Supervisors

11901 Business Boulevard, Suite 107
Eagle River, Alaska 99577

January 30, 2001

Representative Con Bunde
State Capitol, Rm. 501
Juneau, AK 99801

Re: Support for House Bill 13

Dear Representative Bunde:

At the January 22, 2001 of the Chugiak-Birchwood-Eagle River Rural Road Service Area Board of Supervisors, the Board unanimously passed a motion in support of House Bill 13. It is the opinion of the Board that this Bill will help strengthen service areas such as ours and ensure that the voting public has adequate say in the future of their service areas.

Sincerely,

Chris Ingmanson, Chair
Chugiak-Birchwood-Eagle River Rural Road
Service Area Board of Supervisors

Cc: Area Legislators
Assembly Member Anna Fairclough
Assembly Member Dan Kendall

Subject: [Fwd: HB 13]
Date: Tue, 30 Jan 2001 10:15:07 -0900
From: Patti Swenson <Patti_Swenson@legis.state.ak.us>
To: Bill Stoltze <Bill_Stoltze@legis.state.ak.us>

I have replied to this e-mail, but I thought you would like to see what your constituents are writing.

Patti

Subject: HB 13
Date: Mon, 29 Jan 2001 22:18:25 -0900
From: ngdial@juno.com
To: Patti_Swenson@legis.state.ak.us

The Chugiak, Birchwood Eagle River Rural Road Board of Supervisors voted unanimously to support House Bill 13 at the January 22, 2001 meeting.

Service areas should provide a grass roots approach to government services with communities receiving the type of service that they want at the price they are willing to pay. Without the protection that House Bill 13 provides, local control cannot survive. We are constantly reminded that we exist only if the municipal assembly allows us to exist. Service districts can be absorbed into a larger district without the wishes of the people residing in the area, taxes raised and little to no service provided.

Our road board maintains and improves nearly 200 miles of road. The community is diverse with many difficult to maintain mountain roads. In addition, the rapid residential development with little regard to providing adequate street width to accommodate snow storage has created multiple problems for our maintenance crews. In spite of this, we can do a complete plow out in 24 to 48 hours during the heaviest of snowfalls. We can provide better and faster service at less cost by using private contractors. Because we are geographically separated from Anchorage by two military bases, a river and a mountain range, we would receive little to no service in our communities and pay much higher taxes.

We are dependent on our service districts for roads, parks, fire and emergency medical service. It is imperative that this bill pass and not be vetoed again if we are to survive.

Gail Dial
Birchwood Supervisor
CBERRRSA Board of Supervisors

KACHEMAK AREA COALITION INC. DBA

Citizens Concerned About Annexation

2-5-01 PO BOX 1715 HOMER, AK 99603

House Judiciary Committee

to: Community and Regional Affairs Committee

FEB 05 2001

re: HB 13, Service Areas: Voter Approval/ Tax zones

We support this bill.

You may wonder what this bill has to do with annexation, but the basic issue is the same -- who gets to decide. And we do have a service area that may be affected by annexation.

I understand the gist of this bill is that the people within a special service area should be the ones to approve any changes to the service area, rather than have the changes imposed by the ruling municipality. (I'm including boroughs in the term municipality.) Service areas, like municipalities, are about collecting taxes and providing services. Changes to a service area, or a municipality, aren't just lines on a map; they involve changing the taxes paid and services received by a group of people. In a free country, it is the people who make these choices, not some branch of government. To make these changes without a vote is socialism. This concept applies equally for boundary changes to cities and boroughs; the affected people have a right to vote on what they will have for local government.

As an example, last year we established a new fire and emergency services area, which was approved by the voters residing in the area. The City of Homer is trying to annex a portion of the new service area, which if approved would take a significant bite out of it. Under current law it is entirely up to the state to make this decision!! We get no vote whatsoever. We voted to set up this service area but it can be taken away against our will, without a vote, at the whim of the government. This is wrong, and needs to be changed. Not only should the service area itself have to approve the change, but the people who will have their service area replaced by city government have a right to vote on this change.

All people deserve the level of autonomy promised by this bill. Gov. Knowles was wrong to veto last years version. Taking power from government, at whatever level, and giving it to the people is a good thing. It all boils down to the same question -- who gets to decide local government issues -- the state or the people? It should be the people.

Thank you for removing the restriction on 2nd class boroughs

~~As a step in the right direction, we would like see HB 13 broadened to apply to all service areas in all boroughs and unified municipalities. Anything less is unfair and probably a violation of the Equal Protection Clause of the US Constitution.~~ of under 60,000 population. This does need to apply to all boroughs, and all service areas.

The right to vote needs to apply to all local government changes, even if it means changing the Constitution.

(My apologies for the last minute changes.)

Abigail Fuller, Vice-President
235-3630

To House Judiciary Committee: 2-5-01

Sallie Dodd Butler from the Fritz Creek area outside of Homer.

Thank you for dropping the 50,000 population limit from the initial bill, and especially Con Bunday on the importance of local control by the voters rather than control of the voters on issues of self determination that directly affect their lives.

If this bill "flies in the face of state law or the Alaskan Constitution," then it's time to correct state law or the Alaskan Constitution; because as an 11th generation American and a 28 year resident of this area, I think the entire issue of annexation or taxation without Representation needs to be changed.

Thank you for being concerned about this issue, and for maintaining fair and open minds.

Sallie Dodd Butler
PO 1273
Homer Ak 99603
Feb 5-01

Subject: HB 13
Date: Fri, 26 Jan 2001 12:51:41 -0900
From: "Watermark Printers" <watrmark@alaska.net>
To: <Patti_Swenson@legis.state.ak.us>

Dear Con,

I am contacting you on behalf of the homeowners in the Talus West Limited Road Service Area. We were gratified to learn that you are re-introducing a bill that will protect those in limited service areas from being annexed to a larger service area against their wishes. We are a successful, and "solvent", road service area that has maintained a high level of road service, with a quicker response time on snow removal than those areas serviced by the Municipality of Anchorage. We have done all of this at 1/2 the cost for the same services if they were provided by the Municipality. In addition, our homeowners have a "direct pipeline" to their elected officials when problems occur. All they have to do it call one of their board members, who is also one of their neighbors. This "hands-on" approach results in their concerns being address quickly, directly and with sensitivity based on local area knowledge. They can also expect a response from board members "outside normal business hours," as we are just a phone call away, even in the evenings and on weekends. We have found that working together to solve our problems and meet our own needs has engendered a spirit of cooperation, as well as a genuine pride in our neighborhoods as small communities within the larger community.

As residents of Anchorage, we often hear about apathy towards community service, and the failure of it citizens to become involved in solving the problems within this city. Lately, we have also been hearing a lot about running local government in a more cost effective manner, without degradation or loss of services. Being part of a limited service area addresses both these issues "head on". The success of our service area is not due to the board members, but rather to the participation of the homeowners themselves in making decisions that directly affect them. It was, therefore, particularly ironic and disgusting that local government was the very entity that requested the Governor veto the last attempt to protect the status of limited service areas. To "net it out", local government wants its citizens to "participate" and to help them "save money", but then they ask that a bill be vetoed that protects our ability to do just that! WHAT'S WRONG WITH THIS PICTURE????!!!!!

I has become obvious that we will get no help on a local level, and that the only way that limited service areas will gain any measure of protection is through action by our legislators. We ask that you please impress upon your colleagues the importance of quickly passing this legislation, and that they stand firmly on our side and over-ride a veto by the Governor should that become an issue once again.

It doesn't get any more "grass roots" than this!

Thank you, Con, for your ongoing support, and for your sensitivity to meeting your constituents needs and addressing their concerns. Through all your years of public service, you have consistently been the kind of legislator that restores the common man's faith in a political system that seems only to favor the "big guy".

Sincerely,

Karen Hendrickson
Talus West LRSA Board of Supervisors

4731 Talus Drive
Anchorage, AK 99516
907-345-5634

Subject: [Fwd: Legislative Update - Start of Session]
Date: Mon, 15 Jan 2001 08:17:01 -0900
From: Representative Con Bunde <Representative_Con_Bunde@legis.state.ak.us>
Organization: Alaska State Legislature
To: Patti Swenson <Patti_Swenson@legis.state.ak.us>

From:
ConniLivsey@cs.com

ConniLivsey@cs.com wrote:

> *Dear Representative Bunde:*
>
> *Thank you for your ongoing efforts to preserve our LRSAs. My husband Bill Ennis and I live at the far back end of Bear Valley, and he has served on our LRSA Board for many years. We are acutely aware how much better our road service is under our LRSA system than if we were part of the Muni service area. Good grief - we'd never get plowed out, and with the wind and snow we can get back here, we'd be stranded for days every winter using the MOA's current prioritization scheme!*
> *-Conni Livsey*

Subject: [Fwd: SSHB-13]
Date: Mon, 22 Jan 2001 08:03:46 -0900
From: Representative Con Bunde <Representative_Con_Bunde@legis.state.ak.us>
Organization: Alaska State Legislature
To: Patti Swenson <Patti_Swenson@legis.state.ak.us>

From:
david sears <dsears@girdwood.net>

david sears wrote:

> *Representative Bunde:*
>
> *Thank you for sending me a copy of HB-13. This legislation holds special*
> *interest for me as I was living on the Anchorage hillside when city*
> *police protection was bestowed upon us.*
>
> *Dave Sears*
> *Girdwood*

B13

Subject: HB13
Date: Mon, 22 Jan 2001 17:11:35 -0900
From: "Bob Johnston" <bobj@mosquitonet.com>
To: <Patti_Swenson@legis.state.ak.us>

Hello Ms. Swenson,

I am writing in support of Rep. Con Bunde's sponsorship of House Bill 13. I appreciate the opportunity to lend my name to your efforts in getting this bill passed and signed by Governor Knowles.

I would really like to participate in the teleconference, however, being an administrator in a high school my schedule is such that I cannot plan on future time to testify. Please be assured that I would be happy to send Governor Knowles or any other legislator e-mail to help "sway" their support should the need arise.

Again, thank Rep. Bunde's efforts on this important issue.

Respectfully,

Bob Johnston
bobj@mosquitoent.com
bobj@northstar.k12.ak.us

Subject: LRSA Bill
Date: Wed, 24 Jan 2001 21:27:56 -0900
From: William Ennis <bennis@ak.net>
To: Patti_Swenson@legis.state.ak.us

Rep. Bunde,

I appreciate your January 15 letter to me concerning the future of the Limited Road Service Area. As a twenty-year resident and home owner from the upper Hillside area of Anchorage, I am keenly aware of the necessity for the continuance of the LRSA. Although my small area has seen enormous growth in recent years, the residents of my LRSA are still on the outskirts of Anchorage and few in number.

When the wind blows and the snow drifts, however, our need for immediate road maintenance is crucial. With a single road serving the entire Bear Valley community of our hundred or so families, a winter storm can completely eliminate our necessary trips to work and school. In addition ot reducing our routine transportation, of course, is the reduction of emergency services which poor road conditions create.

We would be fools to think that the Anchorage municipality would provide winter plowing within hours of snow fall. Our contracted service providers do exactly that. Our roads are cleared for trips to school and work sooner than most subdivisions in the Anchorage bowl are cleared. We simply must be allowed to provide our own contractual road maintenance.

We also have concerns about the financial affect on the service providers should the LRSA system be abolished. These are local business people and the loss of their livelihood would be felt in our city.

I urge you to do all that you can to promote the LRSA model. It has served us well for many years and we wish to see it protected for the future.

Please contact me at your convenience if I can be of further assistance.

Regards,

Bill Ennis
Chairman, Bear Valley Limited Road Service Area

B13

Subject: HB13
Date: Wed, 24 Jan 2001 19:43:08 -0900
From: William Larkin <brolar@gci.net>
To: Patti@jnu-unix.legis.state.ak.us, Patti_Swenson@legis.state.ak.us

Dear Patti Swenson;

I want to add my name to the list of people in favor of the bill to require that the Voters get to vote on any change that would be made in services arears as it take away the local control that was the reason for forming a service area in the first place. A good reason is that the Assembley's often chane things to favor the area that they represent and mke other areas pay for some areas that do not want to pay their ownbills. A case in point is the people living in the Bogard area are paying for a Fire Station in the Point Mckensie area.

Yours Truly
William B. Larkin

P.S. If you need any other reasons I belive I can come up with a few more.

Subject: Service areas
Date: Thu, 25 Jan 2001 12:25:32 +0100
From: Jane Elam <nelam@northstar.k12.ak.us>
To: Patti_Swenson@legis.state.ak.us

To Representative Con Bunde:

I support your stand on service areas. The road service areas near us have not taxed themselves as long as we have and as a result have worse roads than ours. It would not be equitable for us to be forced to join them and use our money to fix their roads. It would be difficult to reach a commissioner who understood your situation if the areas become too large. Thank you for introducing legislation concerning this issue.

Naomi Jane Elam
3177 Judy Lane
North Pole, AK 99705

Diane Subdivision Service Area

****
Helen Clark helen@northstar.k12.ak.us
Lathrop High School Library (907) 456-7794 x117

"Not all those who wander are lost."
-J.R.R. Tolkien

****

Subject: Service Areas/HB 13
Date: Wed, 24 Jan 2001 09:35:20 -0900
From: "William W. Lanning" <billkate@gci.net>
To: <Patti_Swenson@legis.state.ak.us>

Dear Mr. Con Bunde:

Thank you for sponsoring HB 13. I support you strongly on this issue. It is more important this year, and in the future because of events taking place:

1. The State of Alaska is cutting way back on funds to Service Areas.

2. In Fairbanks, the Borough has begun charging Service Areas a management fee. In the past two years they have only billed the Service Districts 1/2 of the dollar amount. To our District that was $5,000.00

3. Because of the combined effect of 1 and 2 above many of our smaller Service Districts are trying to combine with larger Districts, whether or not they are wanted by the larger District.

4. In our District (Wildview) we have seen substantial new growth, by current state law developers can do a very poor job on road construction and basically our District has to come in and rebuild the road. Our funds are already spoken for in maintaining existing roads to safe standards. Money is in short supply.

Again I appreciate your work in this area, If I can be of any assistance please call.

William W. Lanning
469 Prospector Trail
Fairbanks, Ak 99712

907-457-7384
e-mail: billkate@gci.net

Subject: HB 13 Support
Date: Tue, 23 Jan 2001 21:58:51 -0900
From: "John & Diane Ferree" <jbferree@ptialaska.net>
To: <Patti_Swenson@legis.state.ak.us>

Representative Bunde,

I am in complete support of HB 13, "An Act relating to municipal service areas and providing for voter approval of the formation, alteration, or abolishment of certain service areas". I am chairman of Smallwood Trail Service Area in the Fairbanks North Star Borough. My fellow commissioners are in full support of this biil. Their names are Floyd Bullen and Mary Liston. Thank you for you efforts in support of local service areas. John Ferree, Chairman, Smallwood Trail road service area.

Subject: HB13 "An Act relating to municipal service areas.....
Date: Mon, 22 Jan 2001 19:46:48 -0900
From: "Diane Hutchison" <dlh119@hotmail.com>
To: Patti_Swenson@legis.state.ak.us

Dear Rep. Bunde

Thank you for sponsoring HB 13, "An Act relating to municipal service areas and providing for voter approval of the formation, alteration, or abolishment of certain service areas." I am a service area commissioner in the McGrath Estates Service Area, north of Fairbanks. I believe that service areas are an integral part of providing services in our borough and I have come to realize that different service areas need differing amounts of service, much based on topography of the area.
My own area is very hilly, therefore requiring more road service in the winter for snowplowing and sanding, than would be required or understood by residents in a lower, flatter area. It would be ashame for our costs to be unilaterally imposed on them to pay for our maintenance levels, as it would be unfair to us to have them making the decision about whether our costs were necessary when their own area may not require sanding of the level roads.

You have my full support in this matter. Please relay this to the other representatives who have co-sponsored this bill: Reps. Kohring, Dyson, Halcro, Fate, and Coghill.

Sincerely,
Diane L. Hutchison
Road Commissioner- McGrath Estates Service Area
1-907-456-1531
email: dlh119@hotmail.com

Fwd: Legislative Update - Upcoming Public Meetings]

Subject: [Fwd: Legislative Update - Upcoming Public Meetings]
Date: Mon, 22 Jan 2001 08:37:39 -0900
From: Representative Con Bunde <Representative_Con_Bunde@legis.state.ak.us>
Organization: Alaska State Legislature
To: Patti Swenson <Patti_Swenson@legis.state.ak.us>

From:
"plotsaas" <plotsaas@alaska.net>

plotsaas wrote:

> Dear MR. BUNDE, Thanks for your input on the local road service area concern. I support the concept of retaining local control, over the past 20 years our contractor has provided very good and timely service. I might suggest to the Municipal League that they consider other areas of Anchorage to be allowed to establish their own areas of control. The result may be a more responsive and efficient service. Michael Singsaas

.oad Service Areas

Subject: Road Service Areas
Date: Mon, 22 Jan 2001 06:15:18 -0900
From: "James E. Spohn" <boondox@gci.net>
To: Patti_Swenson@legis.state.ak.us

Rep Con Bunde

I support your SSHB13. Please use my support for this legastion to assist in the passage of this bill.

James E. Spohn
Chairman
Moose Creek Servic Area
3417 Baker Road
North Pole, AK 99705-6930
907-377-2354=wk #
907-488-2384= Hm #

IB 13

Subject: HB 13
Date: Sun, 21 Jan 2001 18:56:26 -0900
From: "Stephen Routh" <srouth@rcflegal.com>
To: <Patti_Swenson@legis.state.ak.us>

Patti-I am chairman of the Rockhill LRSA Board of Supervisors, and write in support of Con's bill, HB 13. I think people living within an LRSA should be entitled to vote on matters concerning the abolishment or alteration of their service areas.

Stephen Routh
907-27?-4333

George L. Majors
P.O. Box 70865
Fairbanks, Alaska 99707

January 23, 2001

Representative Con Bunde
State Capitol, RM. 501
Juneau, AK 99801

Dear Representative Bunde,

As a resident in the Fairhill Service Area living in our home at 182 City Lights Blvd. I wish to express my favor for HB 13 as being sponsored by you giving local property owners control over the formation, alteration, or abolishment of certain service areas.

I feel that the service to our area concerning road maintainance, etc., can best be done locally as it has been now for many year.

Sincerely,

George L. Majors

P.O. Box 81109
Fairbanks, AK 99708-1109
(907) 479-4394

January 19,2001

Rep. Con Bunde
Alaska State House of Representatives
Juneau, AK

Dear Rep. Bunde,

I have been on the Viewpointe Service Area Commission since 1981, and chairman since 1983. Also, since 1982, I have been employed driving a heating oil delivery truck throughout many of the service areas and the neighborhoods not in service areas around the Fairbanks North Star Borough. Road improvements brought about by service areas greatly enhance safe driving and make living outside the city of Fairbanks much more enjoyable than prior to their existence. Usually service area roads are in as good or better condition than the roads in downtown Fairbanks, especially during winters with heavy snow.

I strongly support HB13 that you have filed for the 2001 session of the Alaska State Legislature. The changes in Alaska State Law provided by this bill will alleviate some serious problems experienced when new neighborhoods join existing service areas. After reading the bill it looks very similar, if not identical, to a bill filed by you last year (2000), HB 133. I wrote a letter in support of that bill also. I hope the Governor will see fit to sign the bill this year.

Presently the Fairbanks North Star Borough does not want to add to the high number of existing service areas. New neighborhoods that want to better maintain or improve their roads by using the Borough as a vehicle to collect taxes for these improvements are forced to join existing service areas. The process we have now is very unfair and undemocratic, since only the residents of the area that is seeking to join an existing service area are allowed to vote on the issue. The residents of the existing service area are given no voice in the process. In the past this process has resulted in well run and financially sound service areas being forced to absorb another neighborhood sometimes not contiguous and always with roads that are in poor condition, needing many dollars to upgrade to meet Borough standards. In all these cases, tax money from the existing service areas has gone to the new areas for road improvements because there cannot be two levels of road conditions within a single service area. Sometimes property taxes had to be raised in the older part of the service area along with the new part to cover the road improvement costs of the new part. The existing process naturally creates ill feelings and tension between the residents of the old and the new parts of the newly merged service area, often putting the commissioners, who are just trying to do their jobs, in the middle.

America does have a history of wealth redistribution, especially in the last eight years, to make the country supposedly a better place, but the wealthy residents of our country have always been allowed a vote in the process. As it is now in the State of Alaska, the residents of the existing service area have no vote and could very likely see their tax dollars go to improving roads that they do not even drive on. The residents of existing service areas, who have been left out of the voting process, often angrily turned to the FNS Borough Assembly to stop the whole the process. When the existing service area residents were successful, the new neighborhood was left with no efficient way to collect funds to improve their roads and make them safer to drive on.

House Bill 13 provides a solution for this unjust situation. Not only does it allow both the residents of the new and existing parts of a combined service area to vote on the merger; it allows for differing levels of taxation within the newly formed service area. Two levels of taxation would allow the new part of the service area to temporarily have a higher tax assessment to defray the costs of improvements needed to upgrade the roads in the new part of the service area. This seems to me to be a fair and reasonable solution to what is now a very unfair and unreasonable process.

In 1999, Fairbanks North Star Borough Mayor Hank Hove introduced a plan that would set up a loan fund to allow newer parts of merging service areas to borrow from it to speed up their improvement schedule, if HB133 was passed and signed into law in 2000. Since we now have a new Mayor, Rhonda Boyles, and new leadership on the Assembly, I do not know if this loan fund will still be available. I thought it was a great idea, and will be urging the new Assembly and Mayor Boyles to bring this idea forward again if HB13 becomes law. Some of us commissioners met with Mayor Boyles about this service area problem before she was elected, and since Ms. Boyles is a former commissioner herself, she was very receptive to our suggestions for a solution.

Sincerely,

Randy Frank

Randy Frank
Chairman
Viewpointe Service Area

Cc: Governor Tony Knowles
Sen. Gary Wilken
Sen. Pete Kelly
Sen. Gene Therriault
Rep. John Davies
Rep. Hugh Fate
Rep. Eldon Mulder
Rep. Lisa Murkowski
FNSB Mayor Rhonda Boyles

Subject: SSHB 13
Date: Mon, 22 Jan 2001 22:17:31 -0900
From: "jerry" <lookout@ptialaska.net>
To: <Patti_Swenson@legis.state.ak.us>

Representative Con Bunde
Vice Chair
House Finance Committee

Sir:

I fully support your efforts (SSHB 13) to protect the interests of neighborhoods that have formed service areas to address local needs. The local government's plan to force responsible, financially sound service areas to assume the long neglected problems of less responsible or non existent entities is unethical. How the local government (Borough) can transfer their failure(s) to a blameless second party can only be explained by the arrogance of the bureacracy that dreams up this nonsense. I have had discussions with the FNSB Rural Services Department on this issue, and the only justification they can give for this policy is their own failure - and some vague statement about helping others (who don't elect to help themselves).

Our service area faces real hardship if this policy is left to stand. We are located between two very poor "roads" that have received little or no maintenance in the last 15 years (that I am aware of). At the end of one of these roads is a collection of shacks that rent for $200 month - survival type housing. The landlord of this "neighborhood" has collected a lot of rent over that period, but spent nothing on upgrading the road. The other road is about a mile long, in poor condition, and has about 3 or 4 low value houses. The borough would like to make us a "gift" of these 2 areas, increasing the length of roads in our service area by 50% and adding little to our tax base. As an added insult, there is no offer to bring these roads up to minimal standards prior to making us responsible for them. Of course the Borough answer is "you can always raise your tax rate to compensate".

I apologize for rambling on, but when faced with the mindset of the bureaucrats that come up with this stuff - I know why our forefathers decided to bid the King of England farewell. Mr. Bunde, I thank you for your efforts to pass SSHB 13 and will support this legislation in any way I can.

Gerald Holland
Commissioner
Goldstream Alaska S. A.

Submitted by: Assemblymembers ABNEY, Tosche
Prepared by: Assembly Office
For reading: JANUARY 30, 2001

ANCHORAGE, ALASKA
AR NO. 2001- 26

A RESOLUTION OF THE ANCHORAGE MUNICIPAL ASSEMBLY SUPPORTING HOUSE BILL 13, "AN ACT RELATING TO MUNICIPAL SERVICE AREAS AND PROVIDING FOR VOTER APPROVAL OF THE FORMATION, ALTERATION, OR ABOLISHMENT OF CERTAIN SERVICE AREAS".

WHEREAS, Alaska's Constitution provides for maximum local self-government (Art. X, Sec. 1), and for the creation, alteration, or abolishment of service areas subject to the provisions of law (Art. X, Sec. 5); and AS 29.35.450 codifies these Constitutional provisions and establishes the mechanism by which service areas are created, altered, and abolished; and

WHEREAS, Alaska has over 200 service areas - in these areas the local residents use private contractors for necessary services and assess themselves to pay for a desired level of service; and

WHEREAS, House Bill 13, sponsored by State Representative Bunde, amends AS 29.35.450 by:

- Clearly identifying who should vote under the following scenarios:

  Abolishment of a service area - subject to approval by the majority of the voters residing in the service area.

  Abolishment and replacement of a service area - must be approved separately by a majority of voters residing in an existing service area and by a majority of the voters residing in the proposed service area, but outside the existing service area.

  Alteration of a service area or combining it with another service area - must be approved separately by a majority of the voters who vote on the question and reside in each of the service areas or in the proposed service area affected by the proposal.

  This legislation will settle a long-time debate about who is entitled to vote during the creation, alteration or abolishment of a service area.

- Allowing for differential tax zones within a service area, thus allowing smaller areas to combine with larger service areas and to assess themselves at different levels within the combined area - achieving economies of scale and getting the level of service they need.

  This legislation will result in fewer service areas and it will decrease the burden on municipal and borough governments.

NOW, THEREFORE, the Anchorage Municipal Assembly resolves:

Section 1: That the Assembly supports House Bill 13.

Section 2: That, upon passage and approval, a copy of this resolution be forwarded to the State Legislature.

PASSED AND APPROVED by the Anchorage Municipal Assembly this _____day of _____, 2001.

_____
Chair

ATTEST:

_____
Municipal Clerk

SB 75 – Municipal Service Areas

FROM Senator Halford:

- Legal Opinions
  - Jan. 25, 2001 – Cook: RE: HB 13 – Art. X, Sec. 5
  - Jan. 26, 2001 – Cook: RE: HB 13 – Special Legislation
  - Jan. 26, 2001 – Cook: RE: HB 13 – Diff. Tax Zones
  - Jan. 31, 2001 – Cook: RE: HB 13 – Home Rule Powers

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Deliveries to: 129 6th St., Rm. 329

MEMORANDUM January 25, 2001

SUBJECT: Municipal service areas; Art. X, sec. 5 of the State Constitution (SSHB 13)

TO: Representative Con Bunde
Attn: Patti Swenson

FROM: Tamara Brandt Cook
Director TBC

SSHB 13 provides for voter approval of formation of or certain changes to municipal service areas. You ask whether the requirement of voter approval with respect to service areas runs afoul of Art. X, sec. 5 of the state constitution. The provision of concern is "Service areas to provide special services within an organized borough may be established, altered, or abolished by **the assembly, subject to the provisions of law or charter**.

The extent of the constitutional power granted to the assembly and the degree that the power may be limited by law or charter under this provision has not been squarely addressed by the Supreme Court. However, a recent case suggests that the power of the assembly may be limited by a charter provision imposing a requirement of voter approval. Area G Home and Landowners Organization, Inc. (HALO) v. Anchorage, 927 P.2d 728 (Alaska 1996) U.S. *cert. denied* 137 L.Ed 2 821, 117 S.C. 1694). That case involved the application of a charter provision requiring voter approval of certain changes to service areas. The court held that the charter provision permitting expansion of a service area upon approval of a majority of those voting within the area affected permitted the municipality to expand its police service area by abolishing its old service area and creating a new service area that included a region that had previously voted against expansion, without giving residents of that included region a separate vote on the expansion. In reaching its decision the court considered both the charter and Art. X, sec. 5. While the application of a voter approval requirement in the charter was the focus of the case, the court never suggested that the requirement of voter approval itself was prohibited under Art. X, sec. 5.

Recall the language of Art. X, sec. 5 making the power of an assembly over service areas "subject to the provisions of law or charter." If, as the court appears to have decided, a charter can impose a requirement of voter approval in these situations. then it appears under the language of the constitution that the law may also impose a such a requirement, as will be done if HB 13 is enacted. While the precise question was not decided, based

on the reasoning in the HALO case, I do not think that a court would find HB 13 unconstitutional under Art. X, sec. 5.

TBC:glc
01-059.glc

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MEMORANDUM January 26, 2001

SUBJECT: Constitutional prohibition against local or special legislation (SSHB 13)

TO: Representative Con Bunde
Attn: Patti Swenson

FROM: Tamara Brandt Cook
Director TBC

You ask for an explanation of the constitutional prohibition against local and special legislation in connection with SSHB 13. Bill section 3 adds a new voting requirement that applies before certain changes may be made to service area boundaries if the service area provides road or fire protection services. Furthermore, the new voting requirement does not apply to a second class borough with a population that is under 60,000 although it applies to other boroughs. While bill section 3 is limited in application, the limitations are worded in general terms and do not have the effect of confining the new provision to only one or very few service areas or boroughs. Therefore, I do not think the bill would be held to violate the constitutional prohibition against local and special legislation contained in Art. II, sec. 19 of the state constitution. That section states in relevant part:

> The legislature shall pass no local or special act if a general act can be made applicable. Whether a general act can be made applicable shall be subject to judicial determination.

The test employed by the Alaska Supreme Court to determine whether an act violates the prohibition against local or special acts is substantially the same as that applied under nonsuspect class equal protection analysis. Upon examining the legislative goals and the means used to advance them, the court determines whether the legislation bears a fair and substantial relationship to a legitimate state purpose. State v. Lewis, 559 P.2d 630, 643 (Alaska 1977), cert. denied, 432 US 901, 53 L.Ed.2d 1073 (1977). To satisfy the "fair and substantial relationship" standard, the classification established by the legislation must be tailored to the purpose of the legislation. The classification must be neither overinclusive nor underinclusive. Isakson v. Rickey, 550 P.2d 350, 362 (Alaska 1976). If the "fair and substantial relationship" standard is met, the bill will not be invalidated because of incidental local or private advantages. Lewis, 559 P.2d at 643.

In Lewis, the court agreed that legislation of statewide significance need not have an effect in all parts of the state; legislation does not become "local" merely because it

operates only on a limited number of geographical areas rather than on a statewide geographical basis. The Lewis case involved the Cook Inlet land exchange and the court accepted the premise that the land exchange, while only affecting land in Southcentral Alaska, required legislation to be accomplished and was of common interest to the whole state. The court relied heavily on the record developed by the legislature in support of the need for the land exchange and the decision to resolve serious issues surrounding Alaska Native land selections under the Alaska Native Claim Settlement Act through legislation authorizing the Cook Inlet land exchange.

In a case where a violation of sec. 19 was found, the court said that legislation establishing the Eagle River Borough was special and peculiar to the locality where the borough was established. Since there was nothing in the nature of the Eagle River-Chugiak area that justified a departure from the general law scheme for the establishment of boroughs, the statute violated sec. 19. Abrams v. State, 534 P.2d 91 (Alaska 1975).

Recently the court upheld an act modifying oil and gas leases on the Northstar field because "the Act's exclusive focus on the Northstar leases reflects their unique nature, and because the Act fairly and substantially relates to legitimate state purposes." Baxley v. State, 958 P.2d 422 at 431 (Alaska 1998)

TBC:lmb
01-029.lmb

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MEMORANDUM January 26, 2001

SUBJECT: Differential Tax Zones (SSHB 13)

TO: Representative Con Bunde
Attn: Patti Swenson

FROM: Tamara Brandt Cook
Director TBC

Bill section 4 of SSHB 13 adds a new provision that states: "The assembly may by ordinance establish, alter, and abolish differential tax zones within a service area to provide and levy property taxes for a different level of services than that provided generally in the service area." You ask if differential tax zones are unconstitutional. While it is possible, that under certain facts, a particular differential tax zone may be problematical, I am aware of no constitutional problem that generally arises in connection with differential tax zones. (Op. Att'y Gen, December 8, 1986, pointing out in connection with a differential tax zone the requirement of a rational relationship between the benefits conferred and the additional costs imposed on the taxpayer)

The language in the bill is almost identical to a provision that has existed for many years: AS 29.45.580 allowing cities to establish differential tax zones. That provision became the subject of litigation when the City of Valdez imposed a tax on oil and gas property that was higher than the tax imposed on other property and claimed it could do so by treating the oil and gas property as a differential tax zone. The court concluded that Valdez could not impose higher taxes on oil and gas property, because another provision, AS 43.56.010(d), specifically prohibits a municipal tax rate on oil and gas property that is higher than that on other property. Because AS 43.56.010(d) is specific to oil and gas property whereas AS 29.45.580 is generally applicable to all property, the court decided that AS 43.56.010(d) controlled. While the precise issue of the constitutionality of differential tax zones was not addressed, the court took a close look at AS 29.45.580 and made no suggestion that the statute suffers from constitutional infirmity. (City of Valdez v. State, Dept. of Community and Regional Affairs, 793 P.2d 532 (Alaska 1990))

Assuming that a city may be authorized to establish differential tax zones without creating a constitutional problem, then it would seem that the legislature could permit a differential tax zone to be established in a service area as well. Note that the assembly has explicit constitutional authority to impose a tax in a service area and that the tax revenue must be used "to finance the special services." (Art. X, sec. 5, Constitution of

the State of Alaska) Any tax levied in a differential tax zone would, I believe, be subject to this provision and have to be used for the special services in that tax zone.

TBC:lmb
01-027.lmb

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MEMORANDUM January 31, 2001

SUBJECT: Legislative limitations on home rule powers (SSHB 13)

TO: Representative Con Bunde
Attn: Patti Swenson

FROM: Tamara Brandt Cook
Director TBC

You have supplied me with a letter dated January 29, 2001 from the Department of Community and Economic Development suggesting that it is unconstitutional for the legislature, by statute, to explicitly limit home rule powers especially with respect to a matter of local rather than statewide concern. An attachment to the letter cites as support for this position Lien v. City of Ketchikan, 383 P.2d 721 (Alaska 1963).

It appears that the department's reliance on the Lien case is misplaced. The court in that case simply held that a statute involving lease procedures that preexisted statehood and was adopted before home rule municipalities were established did not apply to home rule municipalities. The court in a later case, Jefferson v. State, 527 P.2d 37 (Alaska, 1974), carefully considered the relationship between statute and home rule powers in the context of Art. X, sec. 11 of the state constitution. The court concluded that our constitution explicitly rejects the test of statewide versus local concern in determining the scope of municipal power. Instead the question is to be resolved based upon whether a particular power or procedure has been prohibited to municipalities by statute. The statutory 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." (Id, at page 43; see also Simpson v. Municipality of Anchorage, 635 P.2d 1197 (Alaska Ct. App. 1981) Obviously, SSHB 13 contains an express limitation on home rule municipalities. A copy of the Lien case and relevant portion of the Jefferson case is attached.

TBC:lmb
01-034.lmb

LIEN

8. Constitutional Law ⇐69

Supreme court would not give abstract opinion on whether city's lease of hospital to religious order would be valid should it appear that its effect would be to give preference to church, where order had not commenced operation of hospital. Const. art. 1, § 4.

David J. Pree, Anchorage, for appellants.

E. E. Bailey, Stump & Bailey, Ketchikan, for City of Ketchikan.

R. L. Jernberg, Gore & Jernberg, Ketchikan, and George J. Toulouse, Jr., Seattle, Wash., for Sisters of St. Joseph.

Before NESBETT, C. J., and DIMOND and AREND, JJ.

DIMOND, Justice.

The City of Ketchikan has provided for the construction of a hospital with a combination of federal, state and local funds.[1] After approval by the voters at a special election, the city executed an agreement to lease the hospital to the Sisters of St. Joseph of Newark, a charitable, non-profit corporation, for a period of 10 years at a rental of $1.00 a year. Under the terms of the lease the Sisters are to operate and maintain the hospital at their own expense. In this action to cancel the lease the plaintiff-appellant, Lien, assailed the lease arrangement as being invalid on various grounds. The superior court held against plaintiff and dismissed his complaint, and he has appealed.

Public Purpose

Plaintiff contends that when a hospital constructed with public funds is leased to a non-profit corporation managed by a sectarian religious order, there is a violation of the public purpose section of the state constitution which provides:

> "No tax shall be levied, or appropriation of public money made, or public property transferred, nor shall the public credit be used, except for a public purpose." [2]

[1, 2] The moneys used to construct the Ketchikan hospital were spent for a public purpose, since a community hospital serves the general welfare. That purpose does not become non-public when the hospital is turned over to a charitable, non-profit corporation for operation, rather than being operated by the city itself. The public purpose remains unchanged. This is apparent from those provisions of the lease which obligate the Sisters to not deny admission or care of patients on account of race, color or creed, and which require the Sisters to establish fair and equitable rates and charges "sufficient only to pay the cost of operation." And it is of no consequence that the members of this charitable corporation may belong to a sectarian religious order. The test of whether a public purpose is being served does not depend on the religious or non-religious nature of the agency that will operate the leased property, but upon the character of the use to which the property will be put. The use as a public hospital will not be changed by the lease to the Sisters. There is no violation of article IX, section 6 of the state constitution.

Authority to Lease

A statute authorizes municipalities to sell, lease or otherwise dispose of real estate and other property "when in the judgment of the city council it is no longer required for municipal purposes." [3] Relying upon this statute, plaintiff contends that since no finding was made that the hospital

1. The federal funds are made available by the Hospital Survey and Construction Act, commonly called the Hill-Burton Act. Act of August 13, 1946, ch. 958, 60 Stat. 1041 [42 U.S.C.A. § 291 (1957)]. The state funds are in the nature of matching funds with the federal and are available to local governments on a participating basis. AS 18.20.140–18.20.220; S.L.A.1950, ch. 182, § 2. The local funds were obtained through the sale of the City's general obligation bonds in an amount not to exceed $1,200,000.

2. Alaska Const. art. IX, § 6.

3. AS 29.10.132(a).

property was not required for municipal purposes, and that any such finding if made would not be justified by the facts, that the city had no authority to lease the property.

[3, 4] The statute relied upon by plaintiff has no application to this case. It was enacted prior to statehood when all cities derived their governmental powers from the legislature. Cities are now authorized by the state constitution to adopt home rule charters [4], and the City of Ketchikan had adopted a charter and was a home rule city prior to the time the lease was made. By constitutional provision cities have "the powers and functions conferred by law or charter." [5] The meaning of this provision is that where a home rule city is concerned the charter, and not a legislative act, is looked to in order to determine whether a particular power has been conferred upon the city. It would be incongruous to recognize the constitutional provision stating that a home rule city "may exercise all legislative powers not prohibited by law or by charter" [6], and then to say that the power of a home rule city is measured by a legislative act. We hold that AS 29.10.132(a), which authorizes municipalities to lease property, is not relevant where the powers of a home rule city are being considered. This statute is not the source of the city's power to lease its hospital to the Sisters. Therefore, the portion of that statute which requires a finding that property to be leased is not required for municipal purposes is not a limitation on the power of the City of Ketchikan to lease its hospital.

[5] Plaintiff contends that the lease is without effect because of the city's failure to comply with certain provisions of the charter relating to the establishment of a public utility and a granting of a franchise to furnish a public utility service. This contention must be rejected for the reason that the language of the charter dealing with utilities does not suggest that the term "public utility" was meant to include a hospital, and plaintiff has failed to show that this was contemplated by the framers of the charter.

Delegation of Power

The lease provides that "The Lessee shall have the responsibility for establishing the necessary rules, regulations and by-laws for the internal operation of the hospital and nothing in this lease may be construed as delegating this power to the Lessor." Plaintiff argues that this provision constitutes an invalid delegation of the city's power and duty to determine all matters of policy, in contravention of section 2-4 of the city charter which states:

> "Except as otherwise provided in this charter, all powers of the city, including the determination of all matters of policy, shall be vested in the council."

[6] We find no violation of this section of the charter. The city had the power to lease the hospital; it was under no obligation to operate it as a governmental institution, administered and staffed by municipal employees. It would be impracticable for the city to attempt to provide rules and regulations for the internal functioning of an institution which has been turned over to another for management and operation. The city has established policy in the lease by including provisions which adequately recognize and protect the public interest. The Sisters are obliged to operate and maintain the hospital and equipment at their own expense, and in such a manner that there will be compliance with minimum hospital standards prescribed by the state, and eligibility for accreditation by the Joint Commission on Accreditation of Hospitals. Provision must be made for the care of Indian patients as prescribed by federal law, and a reasonable volume of charity care must be provided to conform to the requirements of the federal Hill-Burton Act. No person

4. Alaska Const. art. X, § 9.

5. Alaska Const. art. X, § 7.

6. Alaska Const. art. X, § 11.

may be denied admission to the hospital on account of race, creed or color. The Sisters must establish fair and equitable rates and charges sufficient only to pay the costs of operation, and they must establish and maintain an adequate accounting system and provide the city with an annual audit of hospital accounts made by a certified public accountant.

The foregoing lease provisions demonstrate that the city has fulfilled, rather than abdicated, its duty of determining policy matters. There has been no invalid delegation of municipal power.

Freedom of Religion

Asserting that the Sisters are a sectarian order of the Catholic faith, plaintiff contends that the effect of the lease is to give a preference to the Catholic church. This, plaintiff argues, violates article I, section 4 of the state constitution which forbids the making of a law respecting the establishment of religion or prohibiting the free exercise thereof.[7]

[7] The Sisters are a non-profit corporation, organized for charitable purposes.[8] There is nothing in the articles of incorporation indicating that the corporation's objective is to further religious beliefs or dogmas of the Catholic church. The hospital was constructed and the lease made in order to provide for the care of the sick, without regard to race, color or creed, and thus accomplish a valid public purpose. There is nothing in this arrangement from which it can be inferred that a tax-established, public institution is to be utilized to aid a religious group to spread its faith or to interfere with the religious beliefs of others.[9] The city's action was not designed, nor does it have the effect by its nature, of promoting or giving a preferred position to whatever religious beliefs the individual members of the corporation might have. The fact that specific sectarian beliefs may be entertained by those persons does not bar the city from achieving its valid secular goal of caring for the sick.[10]

Plaintiff asserts that when the hospital has been completed and turned over to the Sisters in accordance with the lease [11], that the Sisters, as a matter of fact, will engage in the practice of teaching patients religion, and will operate the hospital under a sectarian code of ethics so as to give one sect preference over another and so as to interfere with the free exercise of plaintiff's own religious beliefs.

[8] If it should appear as an objective fact, after the Sisters commence operation of the hospital, that the operative effect of the lease arrangement is to violate the constitutional provision regarding the establishment of religion and religious freedom, then that will be time enough for the judiciary to intervene. Out of a proper regard for the right of the city to administer its affairs and serve the public need as it deems fit, this court will refuse to strike down the city's arrangement in the absence of a factual situation where judicial intervention becomes a practical necessity. At this time plaintiff is unable to show that he has sustained or is immediately in danger of sustaining some

7. Alaska Const. art. I, § 4 reads: "No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof."

8. The articles of incorporation of the Sisters of St. Joseph of Newark provide in art. III: "The objects and purposes of this incorporation shall be to establish and maintain hospitals, orphanages, homes for young women, homes for the aged, the blind, or the infirm and with the further object and purpose of engaging generally in any such kindred charities as those concerned in this corporation may from time to time find necessary or convenient."

9. But cf. Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 210, 68 S.Ct. 461, 464, 92 L.Ed. 649, 653 (1948).

10. See McGowan v. Maryland, 366 U.S. 420, 445, 81 S.Ct. 1101, 1115, 6 L.Ed.2d 393, 410 (1961).

11. At the time the superior court rendered its decision the hospital was still under construction.

direct injury as a result of the city's plan for hospital care, which makes it incumbent upon the court to pass upon the constitutional question. What plaintiff asks us to do is to give an abstract opinion on what is in essence a hypothetical case, and that we shall not do.[12] Suffice it to say we find no violation of article I, section 4 of the constitution on the face of the city's arrangement to lease its hospital to the Sisters.

The remaining specifications of error raised by plaintiff in his brief do not warrant discussion—either because they have been disposed of by the points covered in this opinion, or because they are lacking in substance.

The judgment is affirmed.

12. See Poe v. Ullman, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961).

ough assembly. The statute had four sections. The first section dictated only the number of seats on the assembly; the remaining sections stated how those seats were to be apportioned among the voters. If those apportionment standards were unconstitutional,[13] they could have been declared void without affecting the first section, since the first section was clearly separable from the latter sections. The test for separability of a statute (where one part of it is invalid) is whether the remaining parts are so independent and complete that it may be presumed that the legislature would have enacted the valid parts without regard to the invalid part.[14] In this case the test is satisfied; we presume that the legislature undertook to establish the number of assemblymen for each class of borough and would have done so whether or not any particular apportionment formula be provided.

[10] Moreover, even were these provisions—the structure of the assembly and the apportionment of assembly seats—completely inseparable, we do not conclude that the lack of a valid legislative body would prevent the valid incorporation of the municipality. This conclusion is bolstered by noting that Alaska's newly-enacted Municipal Government Code [15] has completely separated the statutes relating to the incorporation procedure [16] from those relating to the borough's legislative body.[17] We agree with the legislature that the incorporation of a municipality is a process both conceptually and functionally distinct from that of establishing a legislative body for that corporation.

We are satisfied that there was a valid statute under which the Borough could and did incorporate. Since Jefferson made no claim concerning the other three elements necessary to establish *de facto* municipal existence, the superior court properly ruled that the Borough was a valid entity as against a collateral attack.[18]

THE CITY'S CHARTER

Jefferson argues also that the sewer transfer was and is invalid, because the City's home rule charter prohibits the sale or disposition of the City's utility assets unless three-fifths of the City's voters approve the disposition.[19] No election was held.[20]

The Borough contends that the City's charter is over-ridden by state law in this area.[21] In particular, the Borough relies on former [22] AS 7.15.310, which provides in part:

"No city of any class, whether home rule or not, within an organized borough,

13. Judge Stewart ruled that this representational scheme was unconstitutional in City of Juneau v. Borough First Judicial District Cause No. 65–317 (1968), 6 Alaska L.J. 197–9 (1968).

14. *See* 2 J. Sutherland, Statutory Construction § 2404 (3rd ed. F. Horack 1943).

15. Chapter 118, S.L.A.1972 repealed and replaced the statutes under which the Borough was incorporated.

16. Chapter 18, of Title 29, entitled "Incorporation."

17. Chapter 23, Art. 1 of Title 29, entitled "Borough Assembly."

18. Our disposition of this issue makes it unnecessary to rule on the Borough's contention that Jefferson's complaint was never properly amended to include this attack on the Borough's existence.

19. The City of Anchorage has adopted a home rule charter which provides in § 13.4:
"The council may sell, lease or otherwise dispose of a municipal utility or of property and interest in property used or useful in the operation of a utility only after a proposition to do so is approved by three-fifths of the electors of the city voting on the proposition."

20. The Borough makes no claim that the areawide sewer election of 1966 satisfied the city charter requirement.

21. The City joins the Borough in making this contention.

22. This controversy must be decided with reference to the former statutes, *see* n. 5, *supra*, governing transfer of powers because Ch. 118, S.L.A.1972 had a savings clause:
"A right or liability of a home rule or general law city or borough existing on September 10, 1972 is not affected by the enactment of this Act."

> may exercise any areawide power provided in this section . . . once that power is being exercised by an org[illegible]ed borough."[23]

This court has dealt with conflicts between state law and a municipal home rule charter or ordinance in several cases.[24] The starting point for an analysis of this issue must be found in the Alaska constitution, Art. X, § 11:

> "A home rule borough or city may exercise all legislative powers not prohibited by law or charter."

The authors of this provision hoped that its simple language and sweeping grant of power would enable home rule municipalities to meet a multitude of legislative needs without depending on specific grants of power from a state legislature.[25] They were aware of the difficulties encountered in other jurisdictions where delegations of power to local government units were conferred in terms, such as "matters of local concern" or "of local affairs," which were intended to create an exclusive sphere of municipal action free from any intrusion by the state legislature.[26] Attempts by the courts in those jurisdictions to resolve conflicts between local enactments under such limited delegations of authority and state statutes relating generally to the same subject have often led to confusion and inconsistencies.[27] Then too, some commentators have suggested that constitutional or statutory home rule provisions had been rendered ineffective in other states because of restrictive court decisions.[28] With this all before them the constitutional delegates undertook to give Alaska home rule municipalities a wide range of powers to meet the differing needs of the varied and scattered communities of this state. It was hoped that the constitutional delegation of authority to local government units under the terms of Art. X, § 11 would lead the courts of this jurisdiction to take a new and independent approach when con-

23. Among the powers "provided in this section" are those transferred from city to borough pursuant to AS 7.15.350, which provides in part:

> "Second class boroughs acquire additional areawide powers in the same manner provided by §§ 710–800 of this chapter . . . except that the vote on the question is areawide."

24. It has been claimed our approach has not always been entirely consistent. *See* Sharp, Home Rule in Alaska: A Clash Between the Constitution and the Court, 3 U.S.L.A.—Alaska L.R. 1 (1973).

25. Art. X, section 1, the introductory section on home rule in the Alaska constitution reads: "The purpose of this article is to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdiction. A liberal construction shall be given to the powers of local government units."

26. *See* Sharp, *supra*, note 24 at 3. Most courts fail to distinguish between the types of home rule provisions. The provisions of other jurisdictions described in the text are sometimes designated as "shield" or "protection" provisions and usually require a court's determination of whether an exercise of municipal power is statewide or local in nature, when such exercise of power conflicts with a state statute. Alaska's home rule provision is a "grant" or "sword" of legislative power given to the municipality to be exercised as long as it is not prohibited by law. Art. X, § 11.

This difference between "shield" and "sword" provisions was implicitly recognized in Rubey v. City of Fairbanks, 456 P.2d 470, 475 (Alaska 1969) where the court declined to follow California's pre-emption-by-state-occupation-of-the-field doctrine because of the difference between California's and Alaska's home rule provisions. California's provision is a combination "shield" and "sword", while Alaska's is solely a "sword". *See* Duvall, Delineation of the Powers of the Alaska Home Rule City: The Need for a Beginning, 8 Alaska L.J. 232, 232–35 (Oct. 1970); Sato & Van Alstyne, State and Local Government Law 216–218 (1970).

27. Alaska Legislative Council and Local Affairs Agency, Final Report on Borough Government, 36 (1961).

28. *See* Fordham & Asher, Home Rule Powers in Theory and Practice, 9 Ohio St.L.J. 18 (1948); Richland, Courts Nullify Home Rule, 44 Nat'l Mun.Rev. 565–70 (1955); Sato, "Municipal Affairs" in California, 60 Cal. L.Rev. 1055 (1972). *But see also* Sundalow, The Limits of Municipal Powers Under Home Rule; A Role for the Courts, 48 Minn.L.R. 643 (1963–64).

flicts inevitably arose between the municipalities and the state.[29] The foundation for this new approach has been laid in the past decisions of this court which have favored the exercise of legislative powers by local government units.[30]

[11] However, to say that home rule powers are intended to be broadly applied in Alaska is not to say that they are intended to be pre-eminent. The constitution's authors did not intend to create "city states with mini-legislature."[31] They wrote into Art. X, § 11 the limitation of municipal authority "not prohibited by law or charter." The test we derive from Alaska's constitutional provisions is one of prohibition, rather than traditional tests such as statewide versus local concern.[32] 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.[33]

[12] In this case we find the prohibition to be express. The statutes established a procedure by which certain city powers could be transferred to a second class borough and precluded a city from exercising a power once that power was being exercised areawide.[34]

This then presents a clear case in which statutory authority overrides a provision in a home rule charter. Our conclusion is consistent with the new municipal code, which retains in large measure the relevant statutory provisions we have found controlling in this case.[35]

29. *See* Sharp, Home Rule in Alaska, *supra*, note 25, at 22–27.

30. *See* Lien v. City of Ketchikan, 383 P.2d 721–723 (Alaska 1963); City of Juneau v. Hixson, 373 P.2d 743 (Alaska 1962); Rubey v. City of Fairbanks, 456 P.2d 470–475 (Alaska 1969).

31. Duvall, Delineation of the Powers of the Alaska Home Rule City: The Need for a Beginning, 8 Alaska L.J. 232, 240 (Oct. 1970).

32. *See* Sharp, *supra* note 25, at 30–31; Duvall, *supra* note 27 at 235, 237–239. In Rubey v. City of Fairbanks, 456 P.2d 470, 475 (Alaska 1969) this court recognized a prohibition test for conflict resolution between state and local legislation:

"Article X, section 11 of the Alaska constitution provides that a home rule city, such as Fairbanks, 'may exercise all legislative powers not prohibited by law or by charter.' There is no legislative enactment in Alaska that expressly prohibits a home rule city from making assignation a criminal offense. We do not find such prohibition from the fact that the Alaska legislature has extensively covered the field of sexual offenses. We believe there would have to be some additional factor from which the intent of the legislature to prohibit local regulation in this area could be reasonably inferred. We are not aware of any such factor in this case."

33. We reaffirm our rejection of the doctrine of state pre-emption by "occupying the field." We will not read into a scheme of statutory provisions any intention to prohibit the exercise of home rule authority in that area of the law. If the legislature wishes to "pre-empt" an entire field, they must so state. *See* Rubey v. City of Fairbanks, 456 P.2d 470 (Alaska 1969).

We note that the legislature has done this in its new Title 29, Municipal Code. AS 29.-13.100 provides in part:

"Only the following provisions of this title apply to home rule municipalities as prohibitions on acting otherwise than as provided."

34. Formerly AS 7.15.350; AS 7.15.310. The statutes further provided that such boroughs (of which the Anchorage borough is one) shall acquire city powers in the manner provided in AS 7.15.710–7.15.800, except that the vote on the question is areawide.

AS 7.15.710–7.15.800 provided for the filing of a petition by the borough with the Local Affairs Agency (now the Dept. of Community and Regional Affairs), review of the approved (as to form) petition by the Local Boundary Commission, a hearing on the petition held by the Local Boundary Commission, and finally an election on the proposal.

35. AS 29.33.010(b) (exercise of areawide borough powers); AS 29.33.290(c) (acquisi-

Our decision in the case at bar is in accord with this court's opinions relating to cases of conflict between local ordinances and state enactments. In Lien v. City of Ketchikan,[36] we held that the home rule provisions of the state constitution validated a lease of a hospital to a charitable non-profit corporation despite non-compliance with a state statute governing leases by municipalities. The statute was held inapplicable and not a limitation upon the city's home rule authority, the source of which is found in Article X, section 7 of Alaska's constitution.

In Chugach Electric Association v. The City of Anchorage[37] the issue was whether the City of Anchorage could block the electric association from providing electrical service to a customer within the association's service area. The Alaska Public Service Commission had previously granted the association a certificate of convenience and necessity to provide electrical service within certain areas of the city. The City refused to issue to the Association a building permit on the grounds that the City's own electrical utility could better serve the customer. We resolved the conflict by application of a rule requiring the local enactment to yield where it directly or indirectly impeded implementation of statutes which sought to further a specific statewide policy. This court discerned in the statute a strong policy in favor of treating regulation of public utility service areas as a matter of statewide concern. The situation was one in which locally created variations from state regulation could have affected public utilities beyond the local area. In these circumstances we found a legislative intent that regulated utilities were to be within the exclusive jurisdiction of the Public Service Commission to the extent that such jurisdiction was conferred upon the Commission. Accordingly, municipalities were prohibited from regulating the same utilities to the extent of the Commission's proper jurisdiction.

In Macauley v. Hildebrand[38] a state statute permitted borough assemblies to centralize by ordinance their school district accounting systems with other borough operations with school board consent. An ordinance of the City and Borough of Juneau required the Juneau School District to centralize the district's accounting system without the school board's consent. Although the statutory prohibition in *Macauley* was direct, this court offered another reason for striking down the questioned ordinance. The statute involved in *Macauley* was an express delegation by the state legislature to municipal corporations of a constitutionally mandated legislative power.[39] We reasoned that the language of the state constitution mandating maintenance of a school system by the state vested the legislature with pervasive control over public education. Thus, home rule municipalities were precluded from exercising power over education unless, and to the extent, delegated by the state legislature; and the local ordinance was therefore overriden by the statute.

Affirmed.

CONNOR, J., concurs separately.

CONNOR, Justice (concurring separately).

I agree with the majority opinion, but wish to add some observations about judicial method in resolving conflicts between state statutes and municipal ordinances. More particularly I wish to discuss the "local activities rule", and the place it has in the process of determining the validity of ordinances of a home rule municipality.

tion of additional areawide powers). These are enumerated as specific prohibitions to municipalities in AS 29.13.100. *See* note 34 *supra*.

36. 383 P.2d 721 (Alaska 1963).

37. 476 P.2d 115 (Alaska 1970).

38. 491 P.2d 120 (Alaska 1971).

39. Alaska Const., Art. VII, § 1:
The legislature shall by general law establish and maintain a system of public schools open to all children of the State.

There is no question that we must adhere to the policy expressed in the constitution which requires that we give a broad reading to the powers of home rule cities and boroughs. That in itself poses no difficulty. This general policy, however, will not solve the real problem, which lies in the inherent potentiality of conflict between statutory law enacted by the legislature and local ordinances.

One possible solution is to hold that only where the legislature has expressly declared its intention to prohibit the exercise of municipal powers should we declare municipal ordinances void. Such an approach would have the advantage of simplicity. Unfortunately, such a mechanical jurisprudential technique is so simple that it would not serve the needs of the public. In extreme cases it probably would not survive constitutional attack.[1]

The state legislature has expressly prohibited the exercise of total local power in such areas as taxation, AS 29.73.040, AS 29.53.350, AS 29.53.400; utilities regulation, AS 29.48.040–29.48.100; security for bonds, AS 29.58.180(b); municipal elections, AS 29.28.010, AS 29.28.020(b)–29.28.030; and other matters of general state concern. *See*, AS 29.13.100. It is naive, however, to expect that these prohibitions contemplate each and every matter in which the legislature would properly wish to restrict local power. A home rule concept which relies only on express prohibition to define the scope of local power presupposes a degree of legislative foresight and draftsmanship ability which is completely unrealistic. *See* Duvall, Delineation of the Powers of the Alaska Home Rule City: The Need for a Beginning, 8 Alaska Law Journal 232, 239 (1970).

For example, the Uniform Commercial Code, AS 45.05.002 et seq., and the Insurance Code, AS 21.03.010 et seq., enacted by the legislature, no doubt were meant to operate upon a statewide basis, though nothing in those codes expressly prohibits municipal legislation in the field of commercial law or insurance law. Yet to say that a home rule city could alter the operation of such comprehensive statutory systems would be intolerable. Transactions whose reliability is vital to a functioning economy would become unsettled, to the detriment of the business community and the citizenry of the state. A conflict between the city and the state could not be ignored in this type of situation, despite the absence of an express prohibition.

In such instances the courts must resolve the conflict. There is no escape from our duty to adjudicate legal claims which arise from two constitutional provisions of equal dignity, *i. e.*, the grants of power to both the legislature and to home rule cities.

The question, then, is not the propriety of judicial action or abstention. Rather, the problem is what methods should be employed by courts when presented with those conflicts between municipal ordinances and state statutes which will inevitably occur. As with many questions of public law, the answer is to be found through an analysis and weighing of the various social and governmental interests which bear upon such a conflict.

One test we have used in determining whether the ordinance or the statute must yield, is the "local activities rule." This test, as applied in Chugach Electric Association v. City of Anchorage, 476 P.2d 115 (Alaska 1970), and Macauley v. Hildebrand, 491 P.2d 120 (Alaska 1971), should not be regarded, as it has been by one commentator,[2] as the rule the framers of the constitution rejected in establishing a broad home rule policy. Rather, it should

1. Examples are Turner v. Staggs, 510 P.2d 879 (Nev.1973), and Reich v. State Highway Department, 386 Mich. 617, 194 N.W.2d 700 (1972). These cases concern municipal ordinances barring suit by tort claimants unless notice is given within a certain period of time following the injury. Because the time periods provided by ordinance were shorter than the statutory period of limitation applicable to claimants against private persons, the ordinances were in these cases held unconstitutional as denying to tort claimants the equal protection of the laws.

2. *See*, Sharp, Home Rule in Alaska: A Clash Between the Constitution and the Court, 3 UCLA Alaska Law Review 1, 53 (1973).

be recognized as a realistic tool by which to interpret this policy. The "local activities rule" requires the court to focus upon whether the particular subject under consideration is of such statewide concern that the exercise of municipal power is inconsistent with the effectuation of statewide policy, as expressed by statute. Some matters are obviously of statewide concern, some less so. Some matters are so traditionally and readily classified as matters of local government that there will be no difficulty in finding that they are within municipal competence. Here, too, the municipal code adopted by the legislature is of great help in delineating the areas of permissible local action.

Inevitably, there will be cases which fall within a gray area. As to those the courts must attempt to balance competing interests, bearing in mind the constitutionally stated policy of permitting maximum home rule and yet preventing the chaotic state of affairs which would result if each home rule municipality were allowed to legislate as though it were a feudal city-state. When dealing with cases in the gray area, the courts must strike a balance as best they can, after careful consideration of the competing interests and public policies which bear upon the outcome. Thus in Chugach Electric Association, *supra*, 476 P.2d at 123, we spoke of balancing "the needs of the entire state against the desirable autonomy which only home rule can provide." The ultimate question, of course, is whether, from an examination of the statutes, a prohibition against home rule powers can be discerned, either expressly or by implication. Fortunately, if the judicial decision in such cases is unacceptable, relief may still be sought from the legislature, which can, if it chooses, alter the determination. A judicial decision of such a question is not, therefore, the end of the controversy.

Those who advocate that the conflict between statutes and ordinances should be resolved by simply holding in favor of home rule in all instances where the legislature has not stated an express prohibition are seeking an illusionary, unworkable solution to a problem which is quite complex and which is, like many things in modern life, not susceptible to decision by mere slogans or mechanical formulae. "The price of certainty is too high when it involves a failure to face the real policy questions involved." [3]

I favor the "local activities rule" applied in *Macauley* and *Chugach*, for the rule is, in my opinion, a useful one in resolving the conflict between statute and ordinance.

3. Calif. Governor's Comm'n on the Law of Preemption, Report and Recommendations, 6 (1967), cited in Duvall, *supra*, at 244.

SB 75 – Municipal Service Areas

FROM Senator Torgerson:

- Legal Opinion
  Feb. 9, 2001 – Cook: RE: SB 75

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
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MEMORANDUM February 9, 2001

SUBJECT: Municipal service areas (SB 75)

TO: Senator John Torgerson, Chair
Senate community and Regional Affairs Committee
Attn: Mary Jackson

FROM: Tamara Brandt Cook
Director TBC

You have informed me that you have been advised that a legal opinion indicates that SB 75 is unconstitutional because it limits the powers of a municipality. You may be referring to a memorandum by Marjorie Vandor, Assistant Attorney General, regarding SSHB 13 which is somewhat similar to SB 75. A copy of that memorandum is attached. It suggests that it is unconstitutional for the legislature, by statute, to limit home rule powers, especially with respect to a matter of local rather than statewide concern, citing as primary support for this position Lien v. City of Ketchikan, 383 P.2d 721 (Alaska 1963), and two other Alaska cases.

It appears that reliance on the Lien case is misplaced. The court in that case simply held that a statute involving lease procedures that preexisted statehood and was adopted before home rule municipalities were established did not apply to home rule municipalities. The court in a case decided after the Lien case and after the other two Alaska cases cited in the memorandum, carefully considered the relationship between statute and home rule powers in the context of Art. X, sec. 11 of the state constitution. (Jefferson v. State, 527 P.2d 37 (Alaska 1974)) The court concluded that our constitution explicitly rejects the test of statewide versus local concern in determining the scope of municipal power. Instead the question is to be resolved based upon whether a particular power or procedure has been prohibited to home rule municipalities by statue. The statutory 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." (Id, at page 43; see also Simpson v. Municipality of Anchorage, 635 P.2d 1197 (Alaska Ct. App. 1981)) Obviously, SB 75 contains an express limitation on home rule municipalities.

While I am not very concerned about the possibility that SB 45 would be held unconstitutional for limiting home rule powers, the constitutionality of the bill is not, in my view, entirely free from doubt. It is possible that the requirement of voter approval with respect to service areas runs afoul of Art. X, sec. 5 of the state constitution:

"Service areas to provide special services within an organized borough may be established, **altered, or abolished by the assembly, subject to the provisions of law or charter.**"

The extent of the constitutional power granted to the assembly and the degree that the power may be limited by law or charter under this provision has not been squarely addressed by the Supreme Court. However, a recent case suggests that the power of the assembly may be limited by a charter provision imposing a requirement of voter approval. (Area G. Home and Landowners Organization, Inc. (HALO) v. Anchorage, 927 P.2d 728 (Alaska 1996) U.S. *cert. denied* 137 L.Ed2d 821) That case involved the application of a charter provision requiring voter approval of certain changes to service areas. The court held that the charter provision permitting expansion of a service area upon approval of a majority of those voting within the area affected permitted the municipality to expand its police protection service area by abolishing its old service area and creating a new service area that included a region that had previously voted against expansion, without giving residents of that included region a separate vote on the expansion. In reaching its decision the court considered both the charter and Art. X, sec. 5. While the application of a voter approval requirement in the charter was the focus of the case, the court never suggested that the requirement of voter approval itself is prohibited under Art. X, sec. 5.

Recall the language of Art. X, sec. 5 making the power of an assembly over service areas "subject to the provisions of law or charter." If, as the court appears to have decided, a charter can impose a requirement of voter approval in these situations, then it appears under the language of the constitution that the law may also impose such a requirement, as will be done if SB 45 is enacted. So, while the precise question was not decided, based on the reasoning in the HALO case, I do not think that it is very likely that a court would find SB 75 unconstitutional under Art. X, sec. 5, although that is possible.

TBC:glc
01-119.glc

Attachments

MEMORANDUM

State of Alaska
Department of Law

TO: The Honorable Deborah Sedwick
Commissioner
Department of Community &
Economic Development

DATE: February 5, 2001

FILE NO.:

TELEPHONE NO.: 465-3600

FROM: Marjorie Vandor
Assistant Attorney General
Governmental Affairs Section –
Juneau

SUBJECT: SSHB 13 -- relating to municipal service areas

As requested, we are providing our legal analysis of constitutional issues that we believe are present in SSHB 13. A similar bill, SCS CSHB 133 (CRA) am S was vetoed by the governor last year due to the same constitutional issues we believe are now present in SSHB 13. Our legal analysis of these issues is presented below.

1. Limitation on Home Rule Municipalities

The requirements made in section 3 of this bill as to abolishing, altering, combining, or replacing existing services, is made applicable to all home rule municipalities (regardless of population). We are concerned that the limitations of AS 29.35.470(c) imposed on home rule municipalities through AS 29.10.200 (Sec. 1 of the bill), may be contrary to the constitutional grant of authority to home rule municipalities to have liberal control over matters of purely local concern.

Service areas are established for the purposes of dealing with matters of local concern that are unique to an area in a borough. How service areas have been established, governed, altered, abolished, or combined are local matters historically dealt with by home rule municipalities in their charters. A home rule charter is considered the organic law of the particular home rule municipality. Vol. 2 McQuillin *Municipal Corporations*, sec. 9.03 (3rd Ed, 1988 Rev).

As stated by the Alaska Supreme Court in *Lien v. City of Ketchikan,* 383 P.2d 271 (Alaska 1963), when dealing with a matter of purely local concern, a municipality's charter and not a legislative act is looked to in order to determine whether a particular power has been conferred upon the municipality. It would be incongruous to recognize the constitutional provision stating that a home rule municipality "may exercise all

legislative powers not prohibited by law or by charter" (Alaska Const. Art. X, sec. 11)[1], and then to say that the power to a home rule municipality is measured by a legislative act. *Id.* at 723. In *Lien,* the issue concerned the leasing of city property. The charter provision allowing the lease of city property was ruled to be controlling over a statute that prohibited the lease. The Alaska Supreme Court found the lease of city property was clearly an issue of local, not statewide, concern. *Id.* Similar to the issue in *Lien,* we believe that service areas of a home rule borough may be found by our court to fall into the category of matters of local, not statewide, concern, due to the very fact service areas are created for the purpose of dealing with uniquely local conditions.

In addition to the "purely local concern" test in *Lien,* the court in *Chugach Electric Assoc. v. City of Anchorage*, 476 P.2d 115 (Alaska 1970) and *McCauley v. Hildebrand*, 491 P.2d 120 (Alaska 1971), adopted the "local activity rule" as an expedient method for resolving impasses between state statutes which sought to further a specific policy and municipal ordinances which either directly or collaterally impeded this implementation. The court essentially determined in *Chugach* that the issue of whether a public utility could operate was a matter of statewide concern and the local ordinance was superceded. The court explicitly contrasts its finding in *Lien*, where it held that the lease of city property was clearly a matter of local concern. And, in *McCauley*, a second constitutional provision came into play that was not present in *Chugach* or *Lien,* by which the court determined the outcome of the "local activity" test was dictated. In *McCauley*, the court noted that Art. VII, sec.1 of the AK Const., mandated that "[t]he legislature shall by general law establish and maintain a system of public schools open to all children of the State . . . ." Thus, the court noted that education was a matter of statewide concern. 491 P.2d at 122 n.5.

Alaska is one of many states which has granted, through its constitution, broad legislative powers to its home rule municipalities. Further, the courts in those states have had numerous occasions to rule on situations as to whether a matter is of statewide or local concern in determining if a statute or local provision controls. These states' test are substantially similar to Alaska's. For example, *see Johnson v. Bradly,* 841 P.2d 990 (CA 1992) (first step in determining whether city charter provision can be upheld, notwithstanding alleged conflict with general state law, under "home rule" provisions of

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[1] It is noteworthy to point out that the Constitution does not state that a statute will prevail over a charter provision. Art. X, Sec. 11 reads: "A home rule borough or city may exercise all legislative powers not prohibited by law **or** by charter." The issue arises when a statute and a charter provision are in conflict and whether one prevails over the other due to the statewide nature of the interest versus a purely local interest.

State Constitution is to determine whether there is, in fact, any conflict between charter provision and general state law); *Englewood Police Ben. Ass'n v. Englewood*, 811 P.2d 464 (Colo. 1991) (municipality's home rule charter is the controlling law on local matters; issue related to special election restrictions in charter); *Committee of Seven Thousand v. Superior Court (City of Irvine)*, 754 P.2d 708 (CA 1988) (ordinances enacted in a charter city relating to matters which are purely municipal affairs prevail over state laws covering the same subject); *City and County of Denver by and Through Bd of Water Com'rs v. Colorado River Water Conservation Dist.*, 696 P.2d 730(Colo. 1985) (in purely local and municipal matters, as contrasted with matters of statewide concern, charter provisions and legislation of home rule city supersede conflicting state statutes; *Oliver v. City of Tulsa*, 654 P.2d 607 (Okla. 1982) (conflict between supremacy of state law and exercise of municipal power under its charter is resolved by determining whether such law pertains to general matters of state and its government or pertains to municipal affairs.).

In sum, we believe there are serious issues as to whether this bill improperly limits home rule municipalities' powers to control their service areas as matters of local concern.

2. Local and Special Legislation

Another constitutional concern is raised by AS 29.35.450(d), which exempts a class of general law boroughs, with a specific population requirement, from the requirements of AS 29.35.450(c). We are concerned that this exemption may violate the constitutional prohibition against special and local legislation under the Alaska Constitution. Such a specific classification of borough (particularly a general law borough) coupled with the population limitation, and resulting in only a few boroughs qualifying to be exempt, raises issues of whether this provision violates the prohibition in art. II, sec. 19 of the Alaska Constitution against local and special acts. Art. II, sec. 19 states, in pertinent part:

> The legislature shall pass no local or special act if a general act can be made applicable. Whether a general act can be made applicable shall be subject to judicial determination.

The ultimate question to be asked is whether the legislature's special treatment of a few boroughs is "reasonably related to a matter of common interest to the whole state." *Abrams v. State*, 534 P.2d 91, 94 (Alaska 1975) *citing Boucher v. Engstrom*, 528 P.2d 456, 463 (Alaska 1974). In *Abrams*, the statute was found to violate art. II, sec. 19 of the

Alaska Constitution because it created a borough in a manner different from that for incorporating other boroughs and no evidence was presented indicating any valid reason for special incorporation procedures applicable only to the one proposed borough. In *State v. Lewis*, 559 P.2d 630 (Alaska 1977), *cert. denied*, 432 U.S. 901 (1977), the court found the statute authorizing a trade of land between the federal government, the state and a Native regional corporation did not violate art. II, sec. 19 of the Alaska Constitution. The court found that the land trade was unique, was of statewide concern, and that the legislation was "as broad as the conditions to which it respond[ed]" could allow. *Lewis*, 559 P.2d at 644.

Applying the *Lewis* standards to this bill, it is questionable that there is a rational basis to exempt certain population-related general law boroughs (but not home rule boroughs of the same population) from the requirements for the municipal service areas addressed in this bill. And, it is questionable that either the class of borough (i.e. second class) or the population restrictions set out in this bill are "as broad as the conditions to which it [this bill] responded" could allow. The court in *Lewis* propounded a test to be used in determining whether a statute violates the special and local prohibition and it is substantially the same as the test used to determine the validity of nonsuspect classifications challenged as violative of equal protection. The legislature must show a rational basis, a good reason, to justify the special treatment.[2] And, while it is the province of the court to determine if a statute violates the prohibition against special and local legislation, we are uncertain as to the constitutionality of the special treatment in this bill. Alaska Const. art. II, sec. 19.

3. Conclusion

In summary, this bill raises complex policy and legal concerns, some of which have yet to be decided by the courts.

MV:bw
cc: Michael Abbot, Legislative Director
Office of the Governor

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[2] In 1978, the court articulated a unified equal protection analysis that utilizes a sliding scale to weigh the interest involved in any classification that avoids distinguishing between suspect and nonsuspect classifications. *State v. Erickson*, 574 P.2d 1 (Alaska 1978). We note that there has not been a case involving the local and special legislation prohibition since the unified equal protection test was adopted in *Erickson*.

alleged errors. The judgment is reversed and the case remanded to the superior court with instructions to vacate the judgment of conviction and commitment and to enter a judgment of acquittal.

O. M. LIEN et al., Appellants,
v.
CITY OF KETCHIKAN et al., and Sisters of St. Joseph of Newark, a Washington corporation, Appellees.
No. 275.

Supreme Court of Alaska.
June 24, 1963.

Action attacking validity of city's lease of hospital to religious order. The Superior Court, First Judicial District, Walter E. Walsh, J., denied relief, and plaintiffs appealed. The Supreme Court, Dimond, J., held, inter alia, that lease of hospital, which was built with federal, state and local funds, to religious corporation for operation did not violate constitutional provision that no tax shall be levied, or appropriation of public money made, or public property transferred, or public credit used, except for public purpose.

Affirmed.

1. Municipal Corporations ⇐722

Test of whether public purpose is being served by lease of municipal property does not depend on religious or non-religious nature of agency that will operate property, but upon character of use to which property will be put. Const. art. 9, § 6.

2. Municipal Corporations ⇐331

City's lease of hospital, which was built with federal, state, and local funds, to religious corporation for operation did not violate constitutional provision that no tax shall be levied, or appropriation of public money made, or public property transferred, or public credit used, except for public purpose. Hospital Survey and Construction Act, § 601, 42 U.S.C.A. § 291; AS 18.20.140–18.20.220; Laws 1960, c. 182, § 2; Const. art. 9, § 6.

3. Municipal Corporations ⇐79

In case of home rule city, charter, and not legislative act, is looked to to determine whether particular power has been conferred upon city. Const. art. 10, § 7.

4. Municipal Corporations ⇐722

Statute permitting municipalities to lease property where no longer required for municipal purposes did not apply to home rule city, and city was not required to make finding that property was not required for municipal purposes before leasing it. AS 29.10.132(a); Const. art. 10, §§ 7, 9.

5. Hospitals ⇐2

"Public utility", within city charter provision relating to establishments of utilities, did not include hospital, and city could establish hospital without complying with charter provisions relating to utilities.

See publication Words and Phrases for other judicial constructions and definitions.

6. Municipal Corporations ⇐722

City's lease of hospital, by lease recognizing and protecting public interest, did not delegate powers to lessee in violation of charter provision that determination of all matters of policy should be vested in council.

7. Constitutional Law ⇐84

City's lease of hospital to religious order, which was a non-profit corporation organized for charitable purposes and whose articles of incorporation did not indicate that its objective was to further religious beliefs or dogmas, did not violate constitutional provision forbidding making of law respecting establishment of religion or prohibiting free exercise thereof. Const. art. 1, § 4.

8. Constitutional Law ⇐62

Supreme court would not give abstract opinion on whether city's lease of hospital to religious order would be valid should it appear that its effect would be to give preference to church, where order had not commenced operation of hospital. Const. art. 1, § 4.

David J. Pree, Anchorage, for appellants.

E. F. Bailey, Stump & Bailey, Ketchikan, for City of Ketchikan.

R. L. Jernberg, Gore & Jernberg, Ketchikan, and George J. Toulouse, Jr., Seattle, Wash., for Sisters of St. Joseph.

Before NESBETT, C. J., and DIMOND and AREND, JJ.

DIMOND, Justice.

The City of Ketchikan has provided for the construction of a hospital with a combination of federal, state and local funds.[1] After approval by the voters at a special election, the city executed an agreement to lease the hospital to the Sisters of St. Joseph of Newark, a charitable, non-profit corporation, for a period of 10 years at a rental of $1.00 a year. Under the terms of the lease the Sisters are to operate and maintain the hospital at their own expense. In this action to cancel the lease the plaintiff-appellant, Lien, assailed the lease arrangement as being invalid on various grounds. The superior court held against plaintiff and dismissed his complaint, and he has appealed.

Public Purpose

Plaintiff contends that when a hospital constructed with public funds is leased to a non-profit corporation managed by a sectarian religious order, there is a violation of the public purpose section of the state constitution which provides:

> "No tax shall be levied, or appropriation of public money made, or public property transferred, nor shall the public credit be used, except for a public purpose." [2]

[1, 2] The moneys used to construct the Ketchikan hospital were spent for a public purpose, since a community hospital serves the general welfare. That purpose does not become non-public when the hospital is turned over to a charitable, non-profit corporation for operation, rather than being operated by the city itself. The public purpose remains unchanged. This is apparent from those provisions of the lease which obligate the Sisters to not deny admission or care of patients on account of race, color or creed, and which require the Sisters to establish fair and equitable rates and charges "sufficient only to pay the cost of operation." And it is of no consequence that the members of this charitable corporation may belong to a sectarian religious order. The test of whether a public purpose is being served does not depend on the religious or non-religious nature of the agency that will operate the leased property, but upon the character of the use to which the property will be put. The use as a public hospital will not be changed by the lease to the Sisters. There is no violation of article IX, section 6 of the state constitution.

Authority to Lease

A statute authorizes municipalities to sell, lease or otherwise dispose of real estate and other property "when in the judgment of the city council it is no longer required for municipal purposes." [3] Relying upon this statute, plaintiff contends that since no finding was made that the hospital

1. The federal funds are made available by the Hospital Survey and Construction Act, commonly called the Hill-Burton Act. Act of August 13, 1946, ch. 958, 60 Stat. 1041 [42 U.S.C.A. § 291 (1057)]. The state funds are in the nature of matching funds with the federal and are available to local governments on a participating basis. AS 18.20.140–18.20.220; S.L.A.1960, ch. 182, § 2. The local funds were obtained through the sale of the City's general obligation bonds in an amount not to exceed $1,200,000.

2. Alaska Const. art. IX, § 6.

3. AS 20.10.132(a).

property was not required for municipal purposes, and that any such finding if made would not be justified by the facts, that the city had no authority to lease the property.

[3, 4] The statute relied upon by plaintiff has no application to this case. It was enacted prior to statehood when all cities derived their governmental powers from the legislature. Cities are now authorized by the state constitution to adopt home rule charters [4], and the City of Ketchikan had adopted a charter and was a home rule city prior to the time the lease was made. By constitutional provision cities have "the powers and functions conferred by law or charter." [5] The meaning of this provision is that where a home rule city is concerned the charter, and not a legislative act, is looked to in order to determine whether a particular power has been conferred upon the city. It would be incongruous to recognize the constitutional provision stating that a home rule city "may exercise all legislative powers not prohibited by law or by charter" [6], and then to say that the power of a home rule city is measured by a legislative act. We hold that AS 29.10.132(a), which authorizes municipalities to lease property, is not relevant where the powers of a home rule city are being considered. This statute is not the source of the city's power to lease its hospital to the Sisters. Therefore, the portion of that statute which requires a finding that property to be leased is not required for municipal purposes is not a limitation on the power of the City of Ketchikan to lease its hospital.

[5] Plaintiff contends that the lease is without effect because of the city's failure to comply with certain provisions of the charter relating to the establishment of a public utility and a granting of a franchise to furnish a public utility service. This contention must be rejected for the reason that the language of the charter dealing with utilities does not suggest that the term "public utility" was meant to include a hospital, and plaintiff has failed to show that this was contemplated by the framers of the charter.

Delegation of Power

The lease provides that "The Lessee shall have the responsibility for establishing the necessary rules, regulations and by-laws for the internal operation of the hospital and nothing in this lease may be construed as delegating this power to the Lessor." Plaintiff argues that this provision constitutes an invalid delegation of the city's power and duty to determine all matters of policy, in contravention of section 2-4 of the city charter which states:

> "Except as otherwise provided in this charter, all powers of the city, including the determination of all matters of policy, shall be vested in the council."

[6] We find no violation of this section of the charter. The city had the power to lease the hospital; it was under no obligation to operate it as a governmental institution, administered and staffed by municipal employees. It would be impracticable for the city to attempt to provide rules and regulations for the internal functioning of an institution which has been turned over to another for management and operation. The city has established policy in the lease by including provisions which adequately recognize and protect the public interest. The Sisters are obliged to operate and maintain the hospital and equipment at their own expense, and in such a manner that there will be compliance with minimum hospital standards prescribed by the state, and eligibility for accreditation by the Joint Commission on Accreditation of Hospitals. Provision must be made for the care of Indian patients as prescribed by federal law, and a reasonable volume of charity care must be provided to conform to the requirements of the federal Hill-Burton Act. No person

4. Alaska Const. art. X, § 9.

5. Alaska Const. art. X, § 7.

6. Alaska Const. art. X, § 11.

may be denied admission to the hospital on account of race, creed or color. The Sisters must establish fair and equitable rates and charges sufficient only to pay the costs of operation, and they must establish and maintain an adequate accounting system and provide the city with an annual audit of hospital accounts made by a certified public accountant.

The foregoing lease provisions demonstrate that the city has fulfilled, rather than abdicated, its duty of determining policy matters. There has been no invalid delegation of municipal power.

Freedom of Religion

Asserting that the Sisters are a sectarian order of the Catholic faith, plaintiff contends that the effect of the lease is to give a preference to the Catholic church. This, plaintiff argues, violates article I, section 4 of the state constitution which forbids the making of a law respecting the establishment of religion or prohibiting the free exercise thereof.[7]

[7] The Sisters are a non-profit corporation, organized for charitable purposes.[8] There is nothing in the articles of incorporation indicating that the corporation's objective is to further religious beliefs or dogmas of the Catholic church. The hospital was constructed and the lease made in order to provide for the care of the sick, without regard to race, color or creed, and thus accomplish a valid public purpose. There is nothing in this arrangement from which it can be inferred that a tax-established, public institution is to be utilized to aid a religious group to spread its faith or to interfere with the religious beliefs of others.[9] The city's action was not designed, nor does it have the effect by its nature, of promoting or giving a preferred position to whatever religious beliefs the individual members of the corporation might have. The fact that specific sectarian beliefs may be entertained by those persons does not bar the city from achieving its valid secular goal of caring for the sick.[10]

Plaintiff asserts that when the hospital has been completed and turned over to the Sisters in accordance with the lease[11], that the Sisters, as a matter of fact, will engage in the practice of teaching patients religion, and will operate the hospital under a sectarian code of ethics so as to give one sect preference over another and so as to interfere with the free exercise of plaintiff's own religious beliefs.

[8] If it should appear as an objective fact, after the Sisters commence operation of the hospital, that the operative effect of the lease arrangement is to violate the constitutional provision regarding the establishment of religion and religious freedom, then that will be time enough for the judiciary to intervene. Out of a proper regard for the right of the city to administer its affairs and serve the public need as it deems fit, this court will refuse to strike down the city's arrangement in the absence of a factual situation where judicial intervention becomes a practical necessity. At this time plaintiff is unable to show that he has sustained or is immediately in danger of sustaining some

7. Alaska Const. art. I, § 4 reads: "No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof."

8. The articles of incorporation of the Sisters of St. Joseph of Newark provide in art. III: "The objects and purposes of this incorporation shall be to establish and maintain hospitals, orphanages, homes for young women, homes for the aged, the blind, or the infirm and with the further object and purpose of engaging generally in any such kindred charities as those concerned in this corporation may from time to time find necessary or convenient."

9. But cf. Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 210, 68 S.Ct. 461, 464, 92 L.Ed. 649, 658 (1948).

10. See McGowan v. Maryland, 366 U.S. 420, 445, 81 S.Ct. 1101, 1115, 6 L.Ed.2d 393, 410 (1961).

11. At the time the superior court rendered its decision the hospital was still under construction.

direct injury as a result of the city's plan for hospital care, which makes it incumbent upon the court to pass upon the constitutional question. What plaintiff asks us to do is to give an abstract opinion on what is in essence a hypothetical case, and that we shall not do.[12] Suffice it to say we find no violation of article I, section 4 of the constitution on the face of the city's arrangement to lease its hospital to the Sisters.

The remaining specifications of error raised by plaintiff in his brief do not warrant discussion—either because they have been disposed of by the points covered in this opinion, or because they are lacking in substance.

The judgment is affirmed.

12. See Poe v. Ullman, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961).

ough assembly. The statute had four sections. The first section dictated only the number of seats on the assembly; the remaining sections stated how those seats were to be apportioned among the voters. If those apportionment standards were unconstitutional,[13] they could have been declared void without affecting the first section, since the first section was clearly separable from the latter sections. The test for separability of a statute (where one part of it is invalid) is whether the remaining parts are so independent and complete that it may be presumed that the legislature would have enacted the valid parts without regard to the invalid part.[14] In this case the test is satisfied; we presume that the legislature undertook to establish the number of assemblymen for each class of borough and would have done so whether or not any particular apportionment formula be provided.

[10] Moreover, even were these provisions—the structure of the assembly and the apportionment of assembly seats—completely inseparable, we do not conclude that the lack of a valid legislative body would prevent the valid incorporation of the municipality. This conclusion is bolstered by noting that Alaska's newly-enacted Municipal Government Code[15] has completely separated the statutes relating to the incorporation procedure[16] from those relating to the borough's legislative body.[17] We agree with the legislature that the incorporation of a municipality is a process both conceptually and functionally distinct from that of establishing a legislative body for that corporation.

We are satisfied that there was a valid statute under which the Borough could and did incorporate. Since Jefferson made no claim concerning the other three elements necessary to establish *de facto* municipal existence, the superior court properly ruled that the Borough was a valid entity as against a collateral attack.[18]

THE CITY'S CHARTER

Jefferson argues also that the sewer transfer was and is invalid, because the City's home rule charter prohibits the sale or disposition of the City's utility assets unless three-fifths of the City's voters approve the disposition.[19] No election was held.[20]

The Borough contends that the City's charter is over-ridden by state law in this area.[21] In particular, the Borough relies on former[22] AS 7.15.310, which provides in part:

"No city of any class, whether home rule or not, within an organized borough,

13. Judge Stewart ruled that this representational scheme was unconstitutional in City of Juneau v. Borough First Judicial District Cause No. 65-317 (1968), 6 Alaska L.J. 197-9 (1968).

14. *See* 2 J. Sutherland, Statutory Construction § 2404 (3rd ed. F. Horack 1943).

15. Chapter 118, S.L.A.1972 repealed and replaced the statutes under which the Borough was incorporated.

16. Chapter 18, of Title 29, entitled "Incorporation."

17. Chapter 23, Art. 1 of Title 29, entitled "Borough Assembly."

18. Our disposition of this issue makes it unnecessary to rule on the Borough's contention that Jefferson's complaint was never properly amended to include this attack on the Borough's existence.

19. The City of Anchorage has adopted a home rule charter which provides in § 13.4:
"The counsel may sell, lease or otherwise dispose of a municipal utility or of property and interest in property used or useful in the operation of a utility only after a proposition to do so is approved by three-fifths of the electors of the city voting on the proposition."

20. The Borough makes no claim that the areawide sewer election of 1966 satisfied the city charter requirement.

21. The City joins the Borough in making this contention.

22. This controversy must be decided with reference to the former statutes, *see* n. 5, *supra*, governing transfer of powers because Ch. 118, S.L.A.1972 had a savings clause:
"A right or liability of a home rule or general law city or borough existing on September 10, 1972 is not affected by the enactment of this Act."

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> may exercise any areawide power provided in this section . . . once that power is being exercised by an organized borough." [23]

This court has dealt with conflicts between state law and a municipal home rule charter or ordinance in several cases.[24] The starting point for an analysis of this issue must be found in the Alaska constitution, Art. X, § 11:

> "A home rule borough or city may exercise all legislative powers not prohibited by law or charter."

The authors of this provision hoped that its simple language and sweeping grant of power would enable home rule municipalities to meet a multitude of legislative needs without depending on specific grants of power from a state legislature.[25] They were aware of the difficulties encountered in other jurisdictions where delegations of power to local government units were conferred in terms, such as "matters of local concern" or "of local affairs," which were intended to create an exclusive sphere of municipal action free from any intrusion by the state legislature.[26] Attempts by the courts in those jurisdictions to resolve conflicts between local enactments under such limited delegations of authority and state statutes relating generally to the same subject have often led to confusion and inconsistencies.[27] Then too, some commentators have suggested that constitutional or statutory home rule provisions had been rendered ineffective in other states because of restrictive court decisions.[28] With this all before them the constitutional delegates undertook to give Alaska home rule municipalities a wide range of powers to meet the differing needs of the varied and scattered communities of this state. It was hoped that the constitutional delegation of authority to local government units under the terms of Art. X, § 11 would lead the courts of this jurisdiction to take a new and independent approach when con-

23. Among the powers "provided in this section" are those transferred from city to borough pursuant to AS 7.15.350, which provides in part:

> "Second class boroughs acquire additional areawide powers in the same manner provided by §§ 710–800 of this chapter . . . except that the vote on the question is areawide."

24. It has been claimed our approach has not always been entirely consistent. *See* Sharp, Home Rule in Alaska: A Clash Between the Constitution and the Court, 3 U.S.L.A.—Alaska L.R. 1 (1973).

25. Art. X, section 1, the introductory section on home rule in the Alaska constitution reads: "The purpose of this article is to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdiction. A liberal construction shall be given to the powers of local government units."

26. *See* Sharp, *supra*, note 24 at 3. Most courts fail to distinguish between the types of home rule provisions. The provisions of other jurisdictions described in the text are sometimes designated as "shield" or "protection" provisions and usually require a court's determination of whether an exercise of municipal power is statewide or local in nature, when such exercise of power conflicts with a state statute. Alaska's home rule provision is a "grant" or "sword" of legislative power given to the municipality to be exercised as long as it is not prohibited by law. Art. X, § 11.

This difference between "shield" and "sword" provisions was implicitly recognized in Rubey v. City of Fairbanks, 456 P.2d 470, 475 (Alaska 1969) where the court declined to follow California's pre-emption-by-state-occupation-of-the-field doctrine because of the difference between California's and Alaska's home rule provisions. California's provision is a combination "shield" and "sword", while Alaska's is solely a "sword". *See* Duvall, Delineation of the Powers of the Alaska Home Rule City: The Need for a Beginning, 8 Alaska L.J. 232, 233–35 (Oct. 1970); Sato & Van Alstyne, State and Local Government Law 216–218 (1975).

27. Alaska Legislative Council and Local Affairs Agency. Final Report on Borough Government, 30 (1961).

28. *See* Fordham & Asher, Home Rule Powers in Theory and Practice, 9 Ohio St.L.J. 18 (1948): Richland, Courts Nullify Home Rule, 44 Nat'l Mun.Rev. 565–70 (1955); Sato, "Municipal Affairs" in California, 60 Cal. L.Rev. 1055 (1972). *But see also* Saudalow, The Limits of Municipal Powers Under Home Rule; A Role for the Courts, 48 Minn.L.R. 643 (1963–64).

flicts inevitably arose between the municipalities and the state.[29] The foundation for this new approach has been laid in the past decisions of this court which have favored the exercise of legislative powers by local government units.[30]

[11] However, to say that home rule powers are intended to be broadly applied in Alaska is not to say that they are intended to be pre-eminent. The constitution's authors did not intend to create "city states with mini-legislature."[31] They wrote into Art. X, § 11 the limitation of municipal authority "not prohibited by law or charter." The test we derive from Alaska's constitutional provisions is one of prohibition, rather than traditional tests such as statewide versus local concern.[32] 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.[33]

[12] In this case we find the prohibition to be express. The statutes established a procedure by which certain city powers could be transferred to a second class borough and precluded a city from exercising a power once that power was being exercised areawide.[34]

This then presents a clear case in which statutory authority overrides a provision in a home rule charter. Our conclusion is consistent with the new municipal code, which retains in large measure the relevant statutory provisions we have found controlling in this case.[35]

29. *See* Sharp, Home Rule in Alaska, *supra*, note 25, at 22–27.

30. *See* Lien v. City of Ketchikan, 383 P.2d 721–723 (Alaska 1963); City of Juneau v. Hixson, 373 P.2d 743 (Alaska 1962); Rubey v. City of Fairbanks, 456 P.2d 470–475 (Alaska 1969).

31. Duvall, Delineation of the Powers of the Alaska Home Rule City: The Need for a Beginning, 8 Alaska L.J. 232, 240 (Oct. 1970).

32. *See* Sharp, *supra* note 25, at 30–31; Duvall, *supra* note 27 at 235, 237–239. In Rubey v. City of Fairbanks, 456 P.2d 470, 475 (Alaska 1969) this court recognized a prohibition test for conflict resolution between state and local legislation:

"Article X, section 11 of the Alaska constitution provides that a home rule city, such as Fairbanks, 'may exercise all legislative powers not prohibited by law or by charter.' There is no legislative enactment in Alaska that expressly prohibits a home rule city from making assignation a criminal offense. We do not find such prohibition from the fact that the Alaska legislature has extensively covered the field of sexual offenses. We believe there would have to be some additional factor from which the intent of the legislature to prohibit le regulation in this area could be reasonably inferred. We are not aware of any such factor in this case."

33. We reaffirm our rejection of the doctrine of state pre-emption by "occupying the field." We will not read into a scheme of statutory provisions any intention to prohibit the exercise of home rule authority in that area of the law. If the legislature wishes to "pre-empt" an entire field, they must so state. *See* Rubey v. City of Fairbanks, 456 P.2d 470 (Alaska 1969).

We note that the legislature has done this in its new Title 29, Municipal Code. AS 29.-13.100 provides in part:

"Only the following provisions of this title apply to home rule municipalities as prohibitions on acting otherwise than as provided."

34. Formerly AS 7.15.350; AS 7.15.310. The statutes further provided that such boroughs (of which the Anchorage borough is one) shall acquire city powers in the manner provided in AS 7.15.710–7.15.800, except that the vote on the question is areawide.

AS 7.15.710–7.15.800 provided for the filing of a petition by the borough with the Local Affairs Agency (now the Dept. of Community and Regional Affairs), review of the approved (as to form) petition by the Local Boundary Commission, a hearing on the petition held by the Local Boundary Commission, and finally an election on the proposal.

35. AS 29.33.010(b) (exercise of areawide borough powers); AS 29.33.290(c) (acquisi-

Our decision in the case at bar is in accord with this court's opinions relating to cases of conflict between local ordinances and state enactments. In Lien v. City of Ketchikan,[36] we held that the home rule provisions of the state constitution validated a lease of a hospital to a charitable non-profit corporation despite non-compliance with a state statute governing leases by municipalities. The statute was held inapplicable and not a limitation upon the city's home rule authority, the source of which is found in Article X, section 7 of Alaska's constitution.

In Chugach Electric Association v. The City of Anchorage[37] the issue was whether the City of Anchorage could block the electric association from providing electrical service to a customer within the association's service area. The Alaska Public Service Commission had previously granted the association a certificate of convenience and necessity to provide electrical service within certain areas of the city. The City refused to issue to the Association a building permit on the grounds that the City's own electrical utility could better serve the customer. We resolved the conflict by application of a rule requiring the local enactment to yield where it directly or indirectly impeded implementation of statutes which sought to further a specific statewide policy. This court discerned in the statute a strong policy in favor of treating regulation of public utility service areas as a matter of statewide concern. The situation was one in which locally created variations from state regulation could have affected public utilities beyond the local area. In these circumstances we found a legislative intent that regulated utilities were to be within the exclusive jurisdiction of the Public Service Commission to the extent that such jurisdiction was conferred upon the Commission. Accordingly, municipalities were prohibited from regulating the same utilities to the extent of the Commission's proper jurisdiction.

In Macauley v. Hildebrand[38] a state statute permitted borough assemblies to centralize by ordinance their school district accounting systems with other borough operations with school board consent. An ordinance of the City and Borough of Juneau required the Juneau School District to centralize the district's accounting system without the school board's consent. Although the statutory prohibition in *Macauley* was direct, this court offered another reason for striking down the questioned ordinance. The statute involved in *Macauley* was an express delegation by the state legislature to municipal corporations of a constitutionally mandated legislative power.[39] We reasoned that the language of the state constitution mandating maintenance of a school system by the state vested the legislature with pervasive control over public education. Thus, home rule municipalities were precluded from exercising power over education unless, and to the extent, delegated by the state legislature; and the local ordinance was therefore overriden by the statute.

Affirmed.

CONNOR, J., concurs separately.

CONNOR, Justice (concurring separately).

I agree with the majority opinion, but wish to add some observations about judicial method in resolving conflicts between state statutes and municipal ordinances. More particularly I wish to discuss the "local activities rule", and the place it has in the process of determining the validity of ordinances of a home rule municipality.

tion of additional areawide powers). These are enumerated as specific prohibitions to municipalities in AS 29.13.100. *See* note 34 *supra*.

36. 383 P.2d 721 (Alaska 1963).

37. 476 P.2d 115 (Alaska 1970).

38. 491 P.2d 120 (Alaska 1971).

39. Alaska Const., Art. VII, § 1:
The legislature shall by general law establish and maintain a system of public schools open to all children of the State.

There is no question that we must adhere to the policy expressed in the constitution which requires that we give a broad reading to the powers of home rule cities and boroughs. That in itself poses no difficulty. This general policy, however, will not solve the real problem, which lies in the inherent potentiality of conflict between statutory law enacted by the legislature and local ordinances.

One possible solution is to hold that only where the legislature has expressly declared its intention to prohibit the exercise of municipal powers should we declare municipal ordinances void. Such an approach would have the advantage of simplicity. Unfortunately, such a mechanical jurisprudential technique is so simple that it would not serve the needs of the public. In extreme cases it probably would not survive constitutional attack.[1]

The state legislature has expressly prohibited the exercise of total local power in such areas as taxation, AS 29.73.040, AS 29.53.350, AS 29.53.400; utilities regulation, AS 29.48.040–29.48.100; security for bonds, AS 29.58.180(b); municipal elections, AS 29.28.010, AS 29.28.020(b)–29.28.030; and other matters of general state concern. *See*, AS 29.13.100. It is naive, however, to expect that these prohibitions contemplate each and every matter in which the legislature would properly wish to restrict local power. A home rule concept which relies only on express prohibition to define the scope of local power presupposes a degree of legislative foresight and draftsmanship ability which is completely unrealistic. *See* Duvall, Delineation of the Powers of the Alaska Home Rule City: The Need for a Beginning, 8 Alaska Law Journal 232, 239 (1970).

For example, the Uniform Commercial Code, AS 45.05.002 et seq., and the Insurance Code, AS 21.03.010 et seq., enacted by the legislature, no doubt were meant to operate upon a statewide basis, though nothing in those codes expressly prohibits municipal legislation in the field of commercial law or insurance law. Yet to say that a home rule city could alter the operation of such comprehensive statutory systems would be intolerable. Transactions whose reliability is vital to a functioning economy would become unsettled, to the detriment of the business community and the citizenry of the state. A conflict between the city and the state could not be ignored in this type of situation, despite the absence of an express prohibition.

In such instances the courts must resolve the conflict. There is no escape from our duty to adjudicate legal claims which arise from two constitutional provisions of equal dignity, *i. e.*, the grants of power to both the legislature and to home rule cities.

The question, then, is not the propriety of judicial action or abstention. Rather, the problem is what methods should be employed by courts when presented with those conflicts between municipal ordinances and state statutes which will inevitably occur. As with many questions of public law, the answer is to be found through an analysis and weighing of the various social and governmental interests which bear upon such a conflict.

One test we have used in determining whether the ordinance or the statute must yield, is the "local activities rule." This test, as applied in Chugach Electric Association v. City of Anchorage, 476 P.2d 115 (Alaska 1970), and Macauley v. Hildebrand, 491 P.2d 120 (Alaska 1971), should not be regarded, as it has been by one commentator,[2] as the rule the framers of the constitution rejected in establishing a broad home rule policy. Rather, it should

1. Examples are Turner v. Staggs, 510 P.2d 879 (Nev.1973), and Reich v. State Highway Department, 386 Mich. 617, 194 N.W.2d 700 (1972). These cases concern municipal ordinances barring suit by tort claimants unless notice is given within a certain period of time following the injury. Because the time periods provided by ordinance were shorter than the statutory period of limitation applicable to claimants against private persons, the ordinances were in these cases held unconstitutional as denying to tort claimants the equal protection of the laws.

2. *See*, Sharp, Home Rule in Alaska: A Clash Between the Constitution and the Court, 3 UCLA Alaska Law Review 1, 53 (1973).

be recognized as a realistic tool by which to interpret this policy. The "local activities rule" requires the court to focus upon whether the particular subject under consideration is of such statewide concern that the exercise of municipal power is inconsistent with the effectuation of statewide policy, as expressed by statute. Some matters are obviously of statewide concern, some less so. Some matters are so traditionally and readily classified as matters of local government that there will be no difficulty in finding that they are within municipal competence. Here, too, the municipal code adopted by the legislature is of great help in delineating the areas of permissible local action.

Inevitably, there will be cases which fall within a gray area. As to those the courts must attempt to balance competing interests, bearing in mind the constitutionally stated policy of permitting maximum home rule and yet preventing the chaotic state of affairs which would result if each home rule municipality were allowed to legislate as though it were a feudal city-state. When dealing with cases in the gray area, the courts must strike a balance as best they can, after careful consideration of the competing interests and public policies which bear upon the outcome. Thus in Chugach Electric Association, *supra*, 476 P.2d at 123, we spoke of balancing "the needs of the entire state against the desirable autonomy which only home rule can provide." The ultimate question, of course, is whether, from an examination of the statutes, a prohibition against home rule powers can be discerned, either expressly or by implication. Fortunately, if the judicial decision in such cases is unacceptable, relief may still be sought from the legislature, which can, if it chooses, alter the determination. A judicial decision of such a question is not, therefore, the end of the controversy.

Those who advocate that the conflict between statutes and ordinances should be resolved by simply holding in favor of home rule in all instances where the legislature has not stated an express prohibition are seeking an illusionary, unworkable solution to a problem which is quite complex and which is, like many things in modern life, not susceptible to decision by mere slogans or mechanical formulae. "The price of certainty is too high when it involves a failure to face the real policy questions involved." [3]

I favor the "local activities rule" applied in *Macauley* and *Chugach* for the rule is, in my opinion, a useful one in resolving the conflict between statute and ordinance.

3. Calif. Governor's Comm'n on the Law of Preemption, Report and Recommendations, 6 (1967), cited in Duvall, *supra*, at 244.