HB

13

Alaska State Legislature

DURING SESSION
STATE CAPITOL, ROOM 501
JUNEAU, AK 99801-1182
(907) 465-4843 (800) 892-4843
FAX: (907) 465-3871

WEB SITE
http://www.akrepublicans.org/Bunde.htm

REPRESENTATIVE CON BUNDE
District 18

DURING INTERIM
716 W. FOURTH AVE.
ANCHORAGE, AK 99501-2133
(907) 269-0181
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E-MAIL
Representative_Con_Bunde@legis.state.ak.us

CHAIR: HOUSE SPECIAL COMMITTEE ON EDUCATION
VICE-CHAIR: HOUSE FINANCE COMMITTEE

SPONSOR STATEMENT

SCSCSSSHB 13 (CRA)

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

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).

AS 29.35.450 codifies these Constitutional provisions and establishes the mechanism by which service areas are created, altered, and abolished.

Alaska has approximately 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.

SCSCSSSHB 133 (CRA) amends, AS 29.35.450 to support local control by clearly identifying whom should vote on the abolishment and alteration of a service area under three scenarios:

1. **Abolishment of a service area.**
   Subject to approval by the majority of the voters residing in the service area.

2. **Abolishment and replacement of a service area.**
   Must be approved separately by a majority of voters inside an existing service area and by a majority of the voters residing in the proposed service area <u>BUT OUTSIDE</u> 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.

This proposed legislation would settle a long time debate about who is entitled to vote during the creation, alteration or abolishment of a service area. This legislation has support throughout service areas in Alaska and I urge the favorable consideration of this committee.

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Sectional Analysis
SCSCSSSHB 13 (CRA)

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

Sec. 1. This adds AS 29.35.450 to the list of statutes that apply as limitations on the power to home rule municipalities. The result of this is to require home rule municipalities to adhere to AS 29.10.450, which now applies only to general law municipalities.

Sec. 2. This addresses service areas in unified municipalities and contains a cross-reference to subsection (c), added in this draft. There are three unified municipalities in the state: Anchorage, Juneau, and Sitka.

Sec. 3. This adds subsection (c) to AS 29.10. 450 which requires, before a service area is expanded or altered, a separate vote to be held in the area of the existing service area and in the area proposed to be combined or altered. A separate vote is also required when a service area is altered or combined with another service area. Before the service area change may occur it must be approved in each of the areas that votes separately on the question. This section does not apply to a proposed change to a service area that provides fire protection services that would result in increasing the number of parcels of land in the service area or successor service area if the increase is no more than six percent.

Sec. 4. Adds a new subsection to AS 29.35.470, which is not a home rule limitation. This allows borough assemblies to set up differential tax zones in service areas, so that different rates of taxes may be levied in different portions of a service area. Under existing law, only cities set up differential tax zones.

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

FEB 06 RECD

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

February 2, 2001

Dear Chairman Rokeberg:

I wish to offer my support for HB 13, legislation that would help ensure the continuation of local service areas. As a member of the Greater Anchorage Area Borough Assembly (1966-1974), and a participant in the unification battles, I am familiar with the reason local service areas are provided for in the Anchorage Charter.

After the voters rejected two attempts at unification, service areas were provided for in the Charter that was eventually approved by the voters of Anchorage. The guarantee of local service areas was a necessary concession to residents outside the old city limits. Anyone who was involved in the process at the time could undoubtedly affirm that the charter would have been rejected a third time absent the provision for local service areas. Without the guarantee of local service areas, my community, South Anchorage, Spenard and other areas outside of the city would have voted to defeat the proposed charter in 1975. I believe that in one of the first votes in the early 1970's, fewer than a hundred votes were cast from the precincts in Chugiak-Eagle River in favor of unification. Opposition was simply that strong!

I have a local government background, and am generally against intrusions in local authority. I believe, however, that this legislation is different in that it seeks to protect local control, specifically volunteer-run local service areas. And in the case of Anchorage, you would be reinforcing a compact that was made when the charter was approved in 1975.

I appreciate the opportunity to express my views on an issue that is very important to my community. I wish you well in your deliberations.

Sincerely,

Ed Willis

Ed Willis

February 1, 2001

2278 Outside Blvd
North Pole, Alaska 99705-6307
907 488-3143

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

Dear Rep. Bunde,

Thank you for the information on HB 13. As a service commissioner of Brookside Service Area, I fully support passage of this Bill. As a new commissioner, (Since June of 2000), I was under the impression that this bill was passed in last years Legislative session. Little did I realize that Governor Knowles vetoed this bill after the Legislature adjourned.

I agree that requiring the new service area and the existing service area to vote by majority to form a larger or combined service area is necessary. I feel very uncomfortable with the Fairbanks North Star Borough determining taxation levels in the event of a new combined service area. Keeping control within the service areas to determine how our funds are spent should be a made by the residents of the service area, not the Borough.

Once again, thank you for pushing HB 13 once again. You have my support and confidence in getting this important piece of Legislation passed, and keeping the people of Brookside Service Area free to provide a voice in our government.

Sincerely,

James A. Young
Commissioner
Brookside Service Area, FNSB

2001 Officers
Pres. Deborah Luper 694-7700
V. Pres. Charles Horsman 694-6502
Sec. Jim Yeargan 694-2571
Treas. Brian Fay 694-3293

2001 Directors
Carl Waters 696-8886
Dave Sellie 694-3283
Floyd Gori 694-6088

EAGLE RIVER COMMUNITY COUNCIL
P.O. BOX 773952
EAGLE RIVER, ALASKA 99577

14 February, 2001

Dear Representative Bunde,

Eagle River Community held its last meeting on February 8, 2001. At this meeting, HB 13 and SB 75, was reviewed and discussed by the council directors and members present. As a result, Eagle River Community Council passed a resolution to support the goals and intention to protect the autonomy of service areas including (but not limited to) road service areas, parks and recreation service areas, and fire protection service areas as set forth in HB 13 & SB 75.

Thank you for your efforts in sponsoring this bill. We are confident that you will be successful in passing this bill with enough votes to override any potential veto by the governor.

Respectfully,

Charles Horsman
Vice-President, Eagle River Community Council

cc: Representative Dyson
Representative Kohring
Representative Halcro
Representative Fate
Representative Coghill

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

CLERK'S OFFICE
APPROVED
Date: 1-30-01

NOTICE OF RECONSIDERATION WAS
GIVEN BY MS. CLEMENTSON 1-31-01

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

Reconsideration
Failed 2-06-01

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.

BILL HISTORY

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 30 day of January, 2001.

Fay Von Gemingen
Chair

ATTEST:

Municipal Clerk

LEGAL SERVICES

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

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
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

BILL HISTORY

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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Juneau, Alaska 99801-1182
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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

BILL HISTORY

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.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."

> 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 (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* 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 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.