

SB

1 1 4

LEGAL SERVICES

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

(907) 465-2067 or 465-2460
FAX (907) 465-2028
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1188
Deliveries to: 129 6th St., Rm. 208

MEMORANDUM

March 9, 2005

SUBJECT: Service areas in second class boroughs (CSHB 121(CRA))

TO: Representative Bill Thomas,
Co-chair, House Community and Regional Affairs Committee
Attn: Kaci Schroeder

FROM: Tamara Brandt Cook
Director *TBC*

You have supplied me with a letter from Michael Black, Director of the Division of Community Advocacy, and a copy of comments by Dan Bockhorst. You ask whether the analysis of CSHB 121(CRA) in these materials is correct. It is.

AS 29.35.450 applies as a home rule limitation. This means that home rule municipalities are bound by the requirements in this statute. (AS 29.10.200(46)) Subsection (c) of AS 29.35.450 is amended in CSHB 121(CRA) by creating an exception to the voting requirements of that subsection in certain circumstances to permit a borough to abolish a service area or consolidate service areas. However, the exception, by its terms, applies only to service areas of second class boroughs. The exception does not apply in unified municipalities or home rule boroughs.

TBC:med
05-167.mod

Post-It® Fax Note	7671	Date	4/5	# of pages	1
To	Melanie	From	MB		
Co./Dept.		Co.			
Phone #		Phone #	3517		
Fax #		Fax #			

AMENDMENT

OFFERED IN THE HOUSE
TO: CSHB 121 (RLS)

1. Page 1, line 1, following "abolishing certain":
2. Insert "road"
- 3.
4. Page 2, line 8, following "of a". *pg 2, line 4 "insert road"*
5. Insert "road"
- 6.
7. Page 2, line 9, following "more":
8. Insert "road"
- 9.
10. Page 2, lines 10-13:
11. Delete "(1) borough's population in 2005 was less than 65,000 or more than
12. 75,000; and
13. (2)"
- 14.
15. Page 2, line 17:
16. Delete ";
17. Insert "; and
18. (1) taxes have not been levied in the service area for the road
19. services during the last three years and there is no balance in any account for the
20. service area;
21. (2) the service area board has not met for at least one year; or
22. (3) there are no road maintenance contracts in effect for the
23. service area."

DRAFT

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
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Sally
x5440

MEMORANDUM

April 6, 2005

SUBJECT: Service areas in second class boroughs (SB 114)

TO: Senator Gary Stevens, Chair
Senate Community and Regional Affairs Committee
Attn: Melanie Lesh

FROM: Tamara Brandt Cook
Director

TOC

You have shared with me a memorandum dated March 9, 2005 from Marjorie Vandor, Assistant Attorney General, expressing concerns over the constitutionality of SB 112 and asked for my opinion. Although the bill could be attacked based on the two points made in the memorandum, it has a reasonably good chance of being upheld.

(1) Exempting only second class boroughs from the majority vote requirement of AS 29.35.450(c) and not home rule boroughs is contrary to the state constitution framers intent to grant home rule municipalities liberal powers. Ms. Vandor cites in support of this position Lien v. City of Ketchikan, 383 P.2d 721 (Alaska 1963). The court in that case simply held that a statute involving lease procedure 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 the 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, SB 114 contains an express limitation on home rule municipalities.

(2) Limiting the exemption to second class boroughs raises concerns as to local and special legislation. Article II, sec. 19 provides in 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."

Senator Gary Stevens

April 6, 2005

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The test employed by the Alaska Supreme Court under Article II, section 19 is substantially the same as that applied to 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 (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 an Act 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 application, while only affecting land in Southcentral Alaska, required legislation to be accomplished and was of statewide significance. 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 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 Act violated sec. 19. Abrams v. State, 534 P.2d 91 (Alaska 1975).

SB 112 does not apply in a purely local or special manner to only one borough or place in the state. Rather, it is of general applicability to all second class boroughs that now exist and, potentially, to second class boroughs that are formed in the future. Many statutes that deal with municipal powers make distinctions between boroughs based on classification. (See for example AS 29.35.160 - 29.35.350) Indeed, Art. X, sec. 3 specifically states: "The legislature shall classify boroughs and prescribe their powers and functions."

TBC:lmb

05-110.lmb

DIFFERENCES AMONG HOME RULE, FIRST CLASS, SECOND CLASS AND THIRD CLASS BOROUGHS

Prepared by Local Boundary Commission Staff, February 25, 1994

The difference in the powers available to and the duties required of home rule, first class and second class boroughs is minimal. Home rule boroughs, first class boroughs and second class boroughs all have broad capacity to take on various powers. Third class boroughs have limited capacity for areawide and non-areawide powers, but broad capacity for service area powers.

However, authority to exercise any power must be lawfully obtained. There is considerable distinction among the four classes of boroughs concerning the manner in which each may gain authority to exercise a particular power. These distinctions are summarized in the following chart. The chart is followed by a discussion of the topic.

POWER	AREAWIDE				NON-AREAWIDE				SERVICE AREA			
	Home Rule	First Class	Second Class	Third Class	Home Rule	First Class	Second Class	Third Class	Home Rule	First Class	Second Class	Third Class
Education	*	*	*	*	*	*	*	o
Taxation of Property	*	*	*	*
Taxation of Sales	+	*	*	NA	.	.	.	.	NA	◆	x	◆
Plan, Plat., Land Use Reg.	+	.	.	NA	.	.	.	.	NA	◆	x	◆
Transportation Systems	◆	x	x	NA	◆	x	x	x	NA	◆	x	◆
Water Pollution Control	◆	x	x	NA	◆	x	x	x	NA	◆	x	◆
Air Pollution Control	◆	x	x	NA	◆	x	x	x	NA	◆	x	◆
Regulation of Animals	◆	x	x	NA	◆	x	x	x	NA	◆	x	◆
License Day Care Facilities	◆	x	x	NA	◆	x	*	*	NA	◆	x	◆
Regulate Fireworks	◆	*	*	NA	◆	x	x	x	NA	◆	x	◆
Solid Waste	◆	*	*	NA	◆	x	x	x	NA	◆	x	◆
Housing Rehab	◆	*	*	NA	◆	x	x	x	NA	◆	x	◆
Economic Development	◆	*	*	NA	◆	x	x	x	NA	◆	x	◆
Roads & Trails	◆	*	*	NA	◆	x	x	x	NA	◆	x	◆
EMS Communications	◆	*	*	NA	◆	x	x	x	NA	◆	x	◆
Regulate Motor Vehicles	◆	*	*	NA	◆	x	x	x	NA	◆	x	◆
Development Projects	◆	*	*	NA	◆	x	x	x	NA	◆	x	◆
Hazardous Substance Control	◆	*	*	NA	◆	x	x	x	x	◆	x	◆
Other Powers Not Prohibited	◆	*	*	NA	◆	x	*	*	NA	◆	x	◆

- A mandatory power which must be exercised in the manner set out in statute.
- +
- ◆ May be exercised in the manner set out in the home rule charter.
- x May be exercised by ordinance.
- * May be exercised upon non-areawide voter approval.
- ★ May be exercised upon approval of the voters areawide or by transfer of power from all cities within the borough.
- ☆ May be exercised upon approval of the voters areawide, or transfer from all cities and approval of the voters non-areawide.
- ◆ May be exercised upon approval of voters in service area or by all property owners in service area.
- NA Not available
- o May be exercised upon approval of voters in service area, DNR for certain state lands.

MEMORANDUM**State of Alaska**

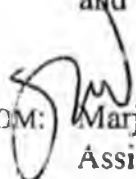
Department of Law

TO: Sally Saddler
Legislative Liaison
Department of Commerce, Community
and Economic Development

DATE: March 9, 2005

OUR FILE:

TELEPHONE NO: 465-3600

FROM:  Marjorie Vandor
Assistant Attorney General
Labor & State Affairs Section - Juneau
Department of Law

SUBJECT: Senate Bill 114

On behalf of Commissioner Blatchford, you have asked for our legal opinion as to certain constitutional concerns that have been raised by your department with respect to Senate Bill 114,¹ a bill relating to consolidating or abolishing certain service areas in second class boroughs. The bill amends AS 29.35.450(c), by inserting language that exempts second class boroughs from the requirement that a service area may be abolished or consolidated only if approved by majority vote. The exemption will apply if a second class borough assembly determines that abolishment or consolidation is necessary to protect the finances of the borough, to resolve financial or legal problems of a service area, or to ensure that adequate service is provided to the residents of a service area.

In brief, the concerns that have been raised by the department in earlier legislative committee hearings on a similar bill (HB 121) are:

1. by exempting only second class boroughs from the majority vote requirement of AS 29.35.450(c), and not extending it to home rule boroughs (in particular), is incongruous with article X, section 11 of the Alaska Constitution and contrary to the framers intent to grant home rule municipalities liberal powers; and
2. by limiting the exemption to second class boroughs in AS 29.35.450(c) as proposed in this bill raises concerns as to local and special legislation.

With respect to the first issue, the limitations as to how a borough can abolish or consolidate its service areas per AS 29.35.450(c), limitations imposed on home rule boroughs as well as general law boroughs through AS 29.35.450(d), is arguably contrary

¹ There is an identical bill that was introduced in the House, HB 121.

Sally Saddler

March 9, 2005

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to the constitutional grant of authority to home rule municipalities to have liberal control over matters purely of local concern. How service areas are established, governed, altered, abolished, and combined are local matters historically dealt with in home rule charters as part of the organic law of a particular home rule municipality. As stated by the Alaska Supreme Court in *Lien v. City of Ketchikan*, 383 P.2d 271 (Alaska 1963) where a home rule municipality is concerned with a matter of purely local concern, the 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 [city] municipality "may exercise all legislative powers not prohibited by law or by charter" (Alaska Const. art. X, sec. 11), and then to say that the power of a home rule city is measured by a legislative act. *Id.* at 723.²

And, with respect to the amendment proposed in this bill, which further impinges on the constitutional authority of home rule boroughs by not providing them with at least as much discretion in altering or consolidating its services areas as being allowed to second class boroughs, could also be deemed by a court to be incongruous with article X, section 5 and the framers' intent to grant home rule boroughs liberal powers.

As to the issue of local and special legislation (i.e., exempting only second class boroughs from the majority vote requirements in certain situations), this limitation may violate the constitutional prohibition against special and local legislation under the Alaska Constitution. Such a specific classification of borough raises issues of whether this provision in the bill violates the prohibition in article II, section 19 of the Alaska Constitution against local and special acts. Article II, section 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.

There are 16 boroughs in the state. Borough make-up in the state is as follows: three (3) Unified Home Rule boroughs³, six (6) Home Rule boroughs⁴, and seven (7)

² 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 because the court found the lease of city property was an issue of local, not statewide, concern. *Id.*

³ Municipality of Anchorage, City and Borough of Juneau, and City and Borough of Sitka.

Sally Saddler

March 9, 2005

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Second Class boroughs⁵. The ultimate question to be asked is whether the legislature's special treatment of one class of borough 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).⁶

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 article II, section 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 one class of general law borough from the requirements of a majority vote, while continuing to impose it on other boroughs that may need the exemption for the identical reasons as allowed in this bill (i.e., finances of the borough, etc.). Thus, it is questionable whether providing the exemption to only one class of borough (i.e. second class) is "as broad as the conditions to which it [this bill] responded" could allow.

Finally, under *Lewis*, the legislature must show a rational basis, a good reason, to justify the special treatment.⁷ And, in the end, it will be the province of a court to determine if this proposed statute violates the prohibition against special and local legislation Alaska Const. art. II, sec. 19.

In summary, this bill raises complex policy and legal concerns.

MV/ba

⁴ Denali Borough, Haines Borough, Lake and Peninsula Borough, North Slope Borough, Northwest Arctic Borough, and City and Borough of Yakutat.

⁵ Aleutians East, Bristol Bay, Fairbanks North Star, Kenai Peninsula, Ketchikan Gateway, Kodiak Island, and Matanuska-Susitna.

⁶ In *Abrams*, the statute was found to violate article II, section 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.

⁷ In 1978, the court articulated a unified equal protection analysis that utilizes a sliding scale to weigh the interests 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*.



Alaska State Legislature

Senate Majority Web: www.akrepublicans.org

Sponsor: COMMUNITY & REGIONAL AFFAIRS
Current Version: SB 114
Contact: Melanie Lesh, 465-4989

Fact Sheet for: Senate Bill 114

Short Title: SERVICE AREAS IN SECOND CLASS BOROUGHS

Summary:

- Enables Second Class Boroughs to eliminate or consolidate service areas that are non functional or operating at below minimum standards.
- Allows local governments to decide which consolidations or eliminations will take place.
- Protects service areas that tax at an adequate level to maintain good roads.

Benefits:

- Protects boroughs from any liability associated with poorly maintained roads in service areas.

Background:

- The elimination of municipal revenue sharing slashed the amount of road maintenance funds available to local road service areas. Some roads are not getting the proper maintenance necessary to provide safe transportation. Dangerous roads are a potential liability to boroughs. SB 114 permits boroughs to consolidate or eliminate service areas that are not properly maintaining roads.



DIVISION OF COMMUNITY ADVOCACY

Frank H. Murkowski, Governor

March 8, 2005

The Honorable Paul Seaton, Chair
House State Affairs Committee
Alaska State Capitol
Room 102
Juneau, AK 99801-1182

Dear Representative Seaton:

This is to follow up the House State Affairs Committee meeting of Saturday, March 5, 2005. During the Committee's review of CSHB 121(CRA), several references were made to testimony on the bill provided by Dan Bockhorst of this agency on March 1. A copy of that testimony is attached for your ease of reference.

During the hearing, statements were made that Mr. Bockhorst's analysis of HB 121 with regard to home-rule boroughs was in error and that home-rule boroughs already have the power through charter amendments to abolish service areas.

Upon further review, I believe that Mr. Bockhorst's testimony was accurate and reflected legitimate concerns regarding principles of local government.

If HB 121 takes effect, it will to make it easier for a select group of boroughs (second-class boroughs) to abolish and consolidate certain types of service areas. However, home rule boroughs would not have the same authority. We are basing our opinion on AS 29.35.450(d), which states that the service area provisions apply to a home rule or general law municipality, and AS 29.10.200(46) which lists the limitations on home rule powers. This list includes voter approval of alteration or abolishment of service areas as a limitation.

To my knowledge, it would be the first time that State law imposes greater restrictions on home-rule boroughs compared to some general-law boroughs.

The Honorable Paul Seaton
Page 2
March 8, 2005

While I believe that the testimony previously provided by Mr. Bockhorst, is accurate, we have asked the Department of Law to review our analysis of the matter and provide you with a statement to that effect or to clarify points on which we might have erred. I appreciate the opportunity to clarify concerns raised regarding information this agency has provided.

Sincerely,

DIVISION OF COMMUNITY ADVOCACY



Michael Black
Director

Enclosures: DCCED Testimony of March 1, 2005

cc/enc:

Representative Bill Thomas
Representative Carl Gatto
Representative Jim Elkins
Representative Bob Lynn
Representative Jay Ramras
Representative Berta Gardner
Representative Max Gruenberg
Marjorie Vandor, Assistant Attorney General
Department of Law

**Comments to House State Affairs Committee
Regarding CSHB 121(CRA)**

**By Dan Bockhorst
Department of Commerce, Community, and Economic Development**

March 1, 2005

Thank you Mr. Chairman and members of the Committee. For the record, my name is Dan Bockhorst, I am a Local Government Specialist with the Department of Commerce, Community, and Economic Development.

The Department endorses measures to give borough governments the flexibility needed to provide for the efficient delivery of services. This bill does that for second class boroughs.

However, the Department wishes to make two observations about this bill.

First, there is nothing unique about a second class borough that would suggest that the measures in the bill are needed for that particular class of borough, but not other classes of borough.

Consider, for example, the Ketchikan Gateway Borough. It is currently a second class borough. As such, the assembly of the Ketchikan Gateway Borough would gain needed flexibility under this bill. Yet, a petition is presently pending before the Local Boundary Commission that, if approved by the Commission and voters, would convert the Ketchikan Gateway Borough into a home rule borough. If that occurs, the Ketchikan Borough assembly would then lose the flexibility accorded to second class boroughs as the bill is currently written.

That leads me to my second observation. The bill, as written, gives greater flexibility and authority to a general law (second class borough) than it does to a home rule borough. Under Alaska's Constitution, home rule represents the maximum level of self-governance. I am aware of no instance where State law places a greater restriction on home rule local governments than it does on general law local governments. This bill would be the first in that regard. The provision seems contrary to the intent of home rule local government

Thank you for the chance to comment.

FISCAL NOTE

**STATE OF ALASKA
2005 LEGISLATIVE SESSION**

Fiscal Note Number: _____
 Bill Version: SB114
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Commerce
 Title: Service Areas in RDU: Comm Assist & Ec Dev (405)
Second Class Boroughs Component: Community Advocacy
 Sponsor: Community & Regional Affairs
 Requester: Senate Community & Regional Affairs Component No: 2703

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
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						
1005 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: 00
 Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This legislation excludes second class boroughs from the provisions of AS 29.35.450 (c) if the borough assembly determines that the abolishment or consolidation of the services area(s) is necessary because of one of several conditions. This legislation has no fiscal impact on the operations of the division.

SB 114
Edgar Blatchford
Michael Black
Med Hooper
JUN.

Prepared by: Michael Black, Director Phone: 907.269.4540
 Division: Community Advocacy Date/Time: 3/8/05 2:53 PM
 Approved by: Edgar Blatchford, Commissioner Date: 3/8/2005
 Agency: Commerce, Community & Economic Development