

Conceptual Guidelines for Drafting Bill Creating New Type of Organized Borough

Recommended Classification: General law, administrative borough.

A threshold question regarding the broad classification of the proposed new type of borough is whether it should be home rule or general law.

Both are municipal corporations and political subdivisions of the State of Alaska. A home rule borough is one that has adopted a home rule charter; it has all legislative powers not prohibited by law or charter. (AS 29.04.010). A general law borough has no charter; it has legislative powers conferred by the State legislature. (AS 29.04.020)

DCCED recommends general law status for the proposed new type of borough for four principal reasons.

1. The distinction between the powers available to home rule and general law boroughs is nominal.¹ Alaska's Constitution, statutes, and case law extend what can be reasonably described as home-rule like powers to general law boroughs. For example, AS 29.35.200 allows a first class general law borough to acquire "any power not otherwise prohibited by law."² Commerce is unaware of any greater capacity of a home rule borough over a general law borough to cooperate with Native American Tribes (as the home-rule Northwest Arctic Borough does under Section 1.12.010 of its Charter). Moreover, Commerce is unaware of any greater power of a home rule borough to share revenues with unincorporated communities (as the home-rule Lake and Peninsula Borough does under Section 15.11 of its Charter), or to provide for nonvoting representatives of communities not represented by

¹ A more meaningful distinction between the two types exists in terms of the ability of the voters to place restrictions on borough powers. For example, AS 29.45.670 provides that a sales tax by a general law borough is subject to approval by a majority of the voters at an election. A home rule borough, however, is not subject to that limitation. Thus, a home rule borough may be, and some actually are, restricted by charter from implementing a sales tax unless approved by a "super majority" of the voters.

² Regarding the broad constitutional provisions, see Article X, Section 1 of Alaska's Constitution, for example. Regarding powers conferred by the Legislature to general law municipalities, see, for example, AS 29.35.200(a) and (c); AS 29.35.210(c) and (d); AS 29.35.220(d); AS 29.35.250(a); AS 29.35.260(a); AS 29.35.400 and AS 29.35.410. For favorable court rulings, see *Liberati v. Bristol Bay Borough*, 584 P.2d 1115, 1120 (Alaska 1978) and *Gilman v. Martin*, 662 P.2d 120, 124 (Alaska 1983), for examples. These examples and other information regarding the broad powers of general law municipalities are discussed in *Local Government in Alaska*, Local Boundary Commission Staff, March 2004.

an elected person on the Assembly (as provided under Section 15.12 of the Lake and Peninsula Borough Charter).

2. Preparation of a home rule charter is a time consuming and expensive proposition. For example, the Deltana Home Rule Charter Commission has reportedly spent approximately two years developing its proposed charter. That effort required extensive funding. In that particular case, federal funds to mitigate impacts from the Fort Greely missile defense project were used to support the activities of the Deltana Charter Commission. Funding for the development of charters is not available generally.
3. Because home rule boroughs have all legislative powers not prohibited by law or charter, it would be much more involved to list all of the prohibited powers of this new type of borough. (See AS 29.10.200 for a current list of limitations in AS 29 that apply to home rule boroughs.) In contrast, since general law boroughs only have those powers conferred by law, granting of narrow powers (much more than now exists for other types of general law boroughs) is more easily accomplished.
4. Constitutionally, home rule boroughs are the highest form of local self-government in Alaska. To create a new class of home rule borough that is far more restricted than any class of general law borough turns the constitutional principle of home rule on its head.

A subsidiary question regarding classification of the proposed new type of borough is what should the new class of general law borough be called. There are three classes of existing general law boroughs. Those are first class, second class, and third class. It is proposed to deviate from the system of giving numerical designations to the classifications of boroughs in order to emphasize the distinction between the proposed new type of borough and existing classes of borough. In this case, it is proposed to call the new class of borough an “administrative borough.”

Recommended duties (mandatory powers): The mandatory fundamental powers of administrative boroughs should be limited to the following:³

- (1) Receive, review, and provide written comments and recommendations with respect to proposed capital improvements and agency programs and

³ Administrative boroughs would also be subject to the various general duties of organized boroughs. These include, for example the requirement to (1) cooperate with the Alaska Department of Corrections in establishing and maintaining an automated victim notification system required under AS 12.61.050; (2) adopt a conflict of interest ordinance (AS 29.20.010); (3) determine the composition and form of representation of the assembly (AS 29.20.070); (4) prepare a journal of the official proceedings of the assembly (AS 29.20.160); and (5) prepare an annual independent audit of the accounts and financial transactions.

services that involve legislative appropriations and that affect the people and resources of the borough.

- (2) Serve as a clearinghouse for information, data, and other materials that may be helpful or necessary to government entities in the discharge of their responsibilities or in obtaining technical or financial assistance.
- (3) Prepare and maintain a regional planning report that establishes goals for the borough; assesses and reports the needs of residents of the borough; and analyzes alternative ways of meeting the needs of the residents of the borough.

Thus, administrative boroughs should be expressly exempt from the **duty** to:

1. establish, maintain, and operate a system of public schools as provided in AS 14.14.060 (AS 29.35.160);
2. assess and collect property, sales, and use taxes that are levied in the borough's boundaries, subject to AS 29.45 (AS 29.35.170);
3. provide for planning, platting, and land use regulation (general law boroughs must do so in accordance with AS 29.40; home-rule boroughs need not follow AS 29.40) (AS 29.35.180).

Discretionary powers (voluntary powers): While the duties of administrative boroughs would be limited, DCCED is unaware of any argument for limiting the discretionary powers of such boroughs, except as noted herein such as in the case of the power to tax oil and gas property taxed by the State of Alaska. For example, if an administrative borough wanted to provide for areawide education, assessment and collection of property, sales, and use taxes, or provide for planning, platting, or land use regulation, it should be allowed to do so.

Commerce perceives a significant public policy benefit from the State's perspective in promoting boroughs as the principal representative for the region within the boundaries of the borough. Boroughs should be encouraged to take responsibility for local government issues within their regions, including coordination and engineering of public works projects, communicating on behalf of communities to agencies, elections, etc. To encourage such, provisions might be made for eligibility of boroughs to receive State financial aid to be passed through to communities in the borough.

Expand the duties of existing organized boroughs: Existing general law boroughs are required by AS 29.40.030 to adopt a comprehensive plan. That requirement addresses the third recommended duty outlined for administrative

boroughs. However, there is no requirement that existing borough carry out the first two recommended duties. Therefore, it is recommended that the legislation extend those duties to all organized boroughs.

Organization grants. Because of their limited duties, administrative boroughs should be entitled to an organization grant under AS 29.05.190 that is less than that which is available to other types of boroughs. Currently, new boroughs are entitled to \$600,000 over three years. That figure should be substantially increased for newly formed home rule, first class, and second class boroughs. The figure seems more than adequate for an administrative borough.

Municipal land entitlement. Again, because of their limited duties, administrative boroughs should not be entitled to general grant lands under AS 29.65.030. Existing boroughs that do not qualify for an entitlement under AS 29.65.010 or 29.65.020 are entitled to 10 percent of the maximum total acreage of vacant, unappropriated, unreserved land within the boundaries of the borough between the date of its incorporation and two years after that date.

State Financial Aid. State financial aid for administrative boroughs would be most appropriately addressed in the context of any new revenue sharing proposal. Options for such might include graduated funding based upon particular responsibilities such as schools, planning, tax assessment and collection, police, road maintenance, et cetera. Alternatively, the State might make a direct grant annually to each administrative borough.

Incentives to reclassify to another type of general law or home rule borough. Significantly increased organization grants, municipal land entitlements, enhanced revenue sharing, and other options should be used to encourage administrative boroughs to reclassify to other types of existing boroughs.

Standards and procedures for incorporation: The standards and procedures set out for incorporation of existing boroughs set out in AS 29.05 are suitable for the creation of administrative boroughs.

Procedures and requirements for reclassification of administrative boroughs. Procedures should be established in AS 29.04 for reclassification of administrative boroughs to second class or first class boroughs.⁴

⁴ It is noted that the provisions in AS 29.06.190 would allow the proposed new administrative borough to become a home rule unified borough. Additionally, the provisions in AS 29.10.010 would allow an administrative borough to adopt a charter.

However, beyond the issue of procedures, a key question is whether an administrative borough should be required to reclassify when it gains the fiscal capacity to assume local responsibility for education, planning, platting, land use regulation, and the assessment and collection of property, sales, and use taxes. Appropriate measures of such capacity might include specific thresholds for per capita value of taxable property, per capita income, poverty levels, employment, or other reasonable and objective measures. It might also include reasonably anticipated resource development (e.g., Pogo mine).

While any requirement for reclassification of an administrative borough is likely to make passage of legislation more difficult, without such a requirement the creation of administrative boroughs will not likely advance the legitimate and long-standing public policy concerns over equity.⁵ Neither will it likely promote efficiencies in the delivery of essential public services.⁶

Should the entire unorganized borough be divided into administrative boroughs?

Another key question is whether the legislation should provide for the division of the entire unorganized borough into administrative boroughs. Here again, any requirement for such is likely to make passage of legislation more difficult. However, absent such a requirement, history suggests that a strong likelihood would exist that much of the unorganized borough will not take advantage of the opportunity to form an administrative borough.

⁵ For example, more than 80 percent of Alaskans live in boroughs that were formed by legislative mandate more than four decades ago. Residents of those boroughs have had no choice in whether their boroughs incorporated or whether they operate areawide school districts. Moreover, boroughs receive millions of dollars less each year in State aid for schools as a result of the local contribution of 4-mill/45 percent of basic need as set out in AS 14.17.410(b)(2).

⁶ For example, to increase the quality of education in school districts with fewer students, some legislators have long advocated consolidation of small school districts. School districts in the unorganized borough comprise about 70 percent of all school districts in Alaska. About 40 percent of the school districts in the unorganized borough have fewer than 250 students. In 1986, the Legislature enacted a law (AS 14.12.025) prohibiting the formation of new school districts with fewer than 250 students (barring a best interest determination). However, existing small districts were not required to consolidate.

A majority of the school districts in the unorganized borough have difficulty meeting a 1998 State law (AS 14.17.520) that requires each school district to spend a minimum of 70 percent for instruction. If a district is unable to comply "due to circumstances beyond the control of the district," the State Board of Education and Early Development may grant a waiver. For the most recent year on record, the State Board granted waivers to more than two-thirds of the school districts in the unorganized borough.

Discussion items:

Would a borough be able to begin assuming powers at some point, or do they have to move towards reclassification to another form of borough government?

Taxing powers? Expressly limit the taxing powers of administrative boroughs to the following ?:

1. a general sales tax;
2. a specific sales tax (e.g., “bed tax”, vehicle rental tax, tobacco tax, fuel sales tax, or tax on utilities); and
3. a property tax subject to the same limitations as those for a second class city (i.e., require voter approval and limit the tax to 20 mills); additionally, prohibit an administrative borough from levying a property tax on oil and gas property taxed by the State under AS 43.56.