

## **PART I: INTRODUCTION, SCOPE OF REVIEW, AND DISCLAIMER**

On May 4, 2006, the Chair of the Ketchikan Charter Commission wrote to Local Boundary Commission (LBC) Staff requesting that LBC Staff, in consultation with officials of the City of Ketchikan and the Ketchikan Gateway Borough, undertake a technical review of the proposed Charter included with the Amended Petition for Consolidation of the City of Ketchikan and the Ketchikan Gateway Borough.<sup>1</sup> Specifically, the Chair wrote:

The Ketchikan Charter Commission met on May 3, 2006 to approve that a request be sent to DCED for a technical review of the Petition for Consolidation's charter. That agenda item passed unanimously.

In accordance with the suggestion in the Preliminary Report on the Ketchikan Charter Commission's Consolidation Petition, we respectfully request that the DCED conduct a technical review of the Charter contained within the Ketchikan Charter Commission's Petition for the proposed consolidated Municipality. We encourage the DCED to consult with staffs of the City of Ketchikan and the Ketchikan Gateway Borough during this technical review.

A copy of the letter was provided to officials of the City of Ketchikan (City Manager, City Clerk, City Finance Director, and City Attorney), officials of the Ketchikan Gateway Borough (Borough Manager, Borough Clerk, Borough Finance Director, and Borough Attorney), and others.

LBC Staff undertook a diligent review of the Charter to offer constructive comments regarding technical aspects of the Charter. In the course of the review, LBC compiled a 107-page listing of 2005 Alaska Statutes that expressly limit home-rule powers. Home-rule limitations were found in AS 14 (Education, Libraries, and Museums), AS 21 (Insurance), AS 23 (Labor and Workers Compensation), AS 29 (Municipal Government), AS 30 (Navigation, Harbors, and Shipping), AS 42 (Public Utilities and Carriers), AS 43 (Revenue and Taxation), and AS 46 (Water, Air, Energy, and Environmental Conservation). The Charter was examined for conflicts with those limitations. The Charter was also examined for conformance with the initiative adopted by the voters of the Ketchikan Gateway Borough on October 7, 2003, establishing KCC and

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<sup>1</sup> On April 20, 2006, LBC Staff Supervisor Dan Bockhorst wrote to officials of the City of Ketchikan and Ketchikan Gateway Borough inviting input on the proposed Charter. The note stated:

The [LBC Staff Preliminary Report on the proposed consolidation] encourages the LBC to direct and/or the KCC to invite this agency to undertake a technical ("non-policy") review of the proposed home-rule charter in cooperation with the Ketchikan Gateway Borough and the City of Ketchikan. In anticipation that such a review will occur, I would welcome any readily available existing written materials expressing technical concerns on the part of the Borough over provisions in the proposed charter."

providing for the filing of the consolidation petition, including the Charter. Additionally, the Charter was compared to the 2000 Charter, as amended by the LBC.

Style, grammar, and word usage were carefully reviewed. Recommended changes regarding those aspects of the Charter are summarized in Part II. Technical aspects of the Charter were also reviewed. Issues regarding technical elements of the Charter are outlined in Part III.

LBC Staff stresses that the review was provided as a professional courtesy. The Petitioner remains responsible for the content of the Charter. As such, the Petitioner is urged to carefully review the summary of changes outlined here and the specific changes recommended in the Charter.

## **PART II: SUMMARY OF CHANGES REGARDING STYLE, GRAMMAR, AND WORD USAGE**

### **A. Table of Contents.**

The Table of Contents did not precisely reflect the contents of the Charter. For example, no descriptive title was listed in the Table of Contents for Article XVI “General Provisions” even though a title was provided in the Charter. Additionally, words and punctuation in the Table of Contents did not always match that in the article headings (e.g. Article IV “Municipal Manager & Administrative Departments” v “Municipal Manager and Administrative Departments”). Lastly, some page numbers in the Table of Contents were incorrect. LBC Staff crafted a Table of Contents to remedy those matters.

### **B. Article Headings.**

Edits were made to provide for consistency in article headings. Some headings in the Charter were in all capital letters, while others were in “title case” (i.e., first letter of each word was capitalized). In some instances, colons or dashes were used to separate the article number (e.g., “Article II”) and the descriptive title of the article (e.g., “The Assembly”), in some cases spacing was used to separate the two, and in other instances there was no punctuation or spacing to separate the article number from the descriptive title. LBC Staff used the Constitution of the State of Alaska as a guide for article headings. The number of the article appears on the first line of each article, followed by a blank line, followed by the descriptive title of the article. Title case was used for all article headings. No descriptive title was provided for Article I; so LBC Staff added one.

### **C. Section Headings.**

Edits were made to provide for consistency in section headings. Most section headings ended with a period. Where that was not the case, periods were

added. Also, most section headings used title case capitalization. Where that was not the case, the headings were changed to title case capitalization.

#### **D. Consistency in Spelling.**

In a few instances, different spellings of the same words were found in the Charter (e.g., “assemblymembers” v “assembly members”. If a particular term has a technical meaning (e.g., “nonareawide”), LBC Staff used appropriate technical material (e.g., Alaska Statutes) as a spelling guide. Otherwise, the Merriam-Webster Dictionary was used as a spelling guide.

The following spelling inconsistencies were addressed in the LBC Staff edits.

- **“Assemblymembers” v “assembly members”**: Based on the Merriam-Webster Dictionary, “assembly members” and “assembly member” were used. The Alaska Statutes do not contain the term “assemblymember” or “assembly member”; however, they do contain the similar word “council member.”
- **“Nonareawide” v “non-areawide”**: Based on the Alaska Statutes, “nonareawide” was used in lieu of “non-areawide.”

**E. Other Spellings.** Spelling changes were also made regarding the following words:

- **“benefitted”** was changed to **“benefited”**;
- **“de minimus”** was changed to **“de minimis”**;
- **“un-expired”** was changed to **“unexpired”**; and
- **“re-certify”** was changed to **“recertify.”**

#### **F. Consistency in Capitalization**

Inconsistencies in capitalization of a number of terms were found in the Charter (e.g., “Mayor” and “mayor.”) Most often, the inconsistencies related to the governing body or other officials of the Municipality of Ketchikan. *The Chicago Manual of Style* (Chicago Manual) was used as a guide. While the Chicago Manual “generally prefers . . . the parsimonious use of capitals,” it stresses that writers and editors have discretion in capitalization, particularly in official contexts:

[No pattern of capitalization] can be universally applied. In certain official (as opposed to literary contexts, *the College* or *the President*

may appropriately be capitalized. Writers and editors must use discretion and judgment in deciding when to follow the guidelines.

Chicago Manual, 15th Edition, pp. 311 – 312.

Thus, it would generally be acceptable to either capitalize the words or use lower case. However, whatever style is used, it should be consistently applied. Because most of the words in question seemed to be capitalized, that style was consistently applied by LBC Staff. The following inconsistencies in terms of capitalization were addressed in the LBC Staff edits.

- **“Article”** v **“article”**: The term “article” was edited so that it is capitalized in all instances.
- **“Assembly”** v **“assembly”**: The term “assembly” was edited so that it is capitalized in all instances.
- **“Charter”** v **“charter”**: The term “charter” was edited so that it is capitalized in all instances except where reference was made to a charter commission.
- **“Governor”** v. **“governor”**: The term “governor” appears only once in the Charter. Therefore, there is no inconsistency in capitalization of that word. However, it was not capitalized in the Charter. Since the titles of other officials are capitalized, LBC Staff also capitalized the term “governor.”
- **“Manager”** v **“manager”**: The terms “manager” and “municipal manager” were edited so that they are capitalized in all instances.
- **“Mayor”** v **“mayor”**: The term “mayor” was edited so that it is capitalized in all instances.
- **“School District”** v **“school district”**: The term “school district” was never capitalized in the Charter. However, since the titles of other agencies, departments, and the like were capitalized, the term “school district” was edited so that it is capitalized in all instances.
- **“School Board”** v **“school board”**: The term “school board” was never capitalized in the Charter. However, since the title of the other elected body, the assembly, is capitalized, the term “school board” was edited so that it is capitalized in all instances.
- **“Section”** v **“section”**: When referring to a specific section in the Charter, the word was edited so that it was always capitalized.

- **“State” v “state”**: When referring to the State of Alaska, the word was edited so that “state” was always capitalized.
- **“Subsection” v “subsection”**: When referring to a specific subsection in the Charter, the word was edited so that it was always capitalized.
- **“Vice Mayor” v “vice mayor”**: The term “vice mayor” was never capitalized in the Charter. However, since the titles of other officials were capitalized, the term “vice mayor” was edited so that it is capitalized in all instances.

**G. Consistency in Titles of Officials.** Inconsistencies were found in certain titles of municipal officials. LBC Staff made the following suggested edits:

- **“Clerk” v “Municipal Clerk”**: The Charter was edited so that all references to “Clerk” were changed to “Municipal Clerk.”
- **“Manager” v “Municipal Manager”**: The Charter was edited so that all references to “Manager” were changed to “Municipal Manager.”
- **“Superintendent” v “Superintendent of Schools”**: The Charter was edited so that all of those references were changed to “School District Superintendent.”

**H. Consistency in the Style of Numbers.**

In some instances cases, a redundant style of numbering was used (e.g., “at least twenty (20) qualified voters”); however, that style was not used consistently. The State of Alaska *Drafting Manual for Administrative Regulations* states “[t]he older, redundant style sometimes used in legal documents (e.g., ‘five (5)’) should not be used.” Therefore, those redundancies were eliminated in the LBC Staff edits.

**I. Consistency in Legal Citations.**

Legal citations were not consistent. For example, in one instance a constitutional provision was cited as “section 5 of Article XII, Constitution of the State of Alaska.” In another instance, a constitutional citation was given as “Article XI, Section 7, of the State constitution.” All legal citations were edited to conform to the style set out in the State of Alaska *Manual of Legislative Drafting, 2003* (Legislative Drafting Manual).

**J. And/or, And, Or.**

The Legislative Drafting Manual (p. 55) cautions against using “and/or,” because it is “too ambiguous.” “And/or” was used seven times in the Charter (Sections

2.06, 8.03(e), 9.05(b), 10.09(b), twice in 11.01(c), and 11.04). LBC Staff edited the Charter to eliminate those uses. The KCC and other local officials are urged to carefully review those edits to ensure that proper intent was maintained.

#### **K. May, Shall, Must.**

Legislative Drafting Manual, p. 62, discusses use of the words may, shall, and must:

**Use the word "shall" to impose a duty upon someone.** The Alaska Supreme Court has stated that the use of the word "shall" denotes a mandatory intent. . . . **Use the word "must" when describing requirements related to objects such as forms or criteria.** (Use "must" sparingly, however, because most sentences using it can probably be written more clearly to impose a duty on a person, in which case "shall" would be the proper word.) Use the word "may" to grant a privilege or discretionary power. . . . **Use the words "may not" to impose a prohibition upon someone.**

LBC Staff made changes to these words throughout based on the above criteria. With regard to the caution regarding use of "must," Staff simply made the change from "shall" to "must" rather than attempting to rewrite a provision. There were a few instances where "shall be" was not changed.

#### **L. Such and Said.**

The Legislative Drafting Manual cautions against legalese and cites to Reed Dickerson's The Fundamentals of Legal Drafting for a list of words or phrases to avoid in that regard. Among them are "such" and "said". Preferred usage is "the" or "that" or "those". LBC Staff made several changes throughout the Charter to that effect.

#### **M. Present Tense**

The Legislative Drafting Manual at p. 65 discusses the preference for using the present tense. Where LBC Staff believed that use of the present tense was appropriate, it made changes. For example, if consolidation passes, the Municipality "is" a home rule borough.

#### **N. Dates.**

The Legislative Drafting Manual (p. 61) states, "[w]hen referring to the date by month and day only, use "July 1" (instead of July 1st, July one, or July first). Edits were made accordingly.

## **O. Miscellaneous**

LBC Staff also made other minor grammatical suggested changes where it believes the wording was inconsistent with other provisions. In addition, where wording could suggest that the Charter was not law, Staff made suggested rewording. For example, Staff suggests that the phrase, “authorized by law or by this Charter or by forfeiture of office” be reworded to “by this Charter, other law, or forfeiture of office”. A few suggested changes were made to avoid legalize, such as “deem.” Staff suggests a change to “consider”.

## **PART III: TECHNICAL MATTERS**

### **A. Article I: Name, Type and Class of Government, Boundaries, and Powers.**

The initiative approved by the voters on October 7, 2003, that established the Ketchikan Charter Commission and authorized the filing of the consolidation petition expressly provided that, “The proposed consolidated borough shall be named the ‘Municipality of Ketchikan’.” Sections 1.01 and 1.02 were modified to conform to that requirement.

### **B. Article VI: Initiative, Referendum, and Recall.**

Section 6.04(e) of the Charter provides that an initiative or referendum may be proposed for a portion of the Municipality. Specifically, it states:

If the ordinance or resolution that is the subject of an initiative or a referendum petition affects only an area that is less than the entire area of the municipality, only qualified voters residing in the affected area may sign the petition. The petition shall be signed by a number of qualified voters equal to at least twenty percent of the votes cast in that area at the last regular election held before the date written notice is given to the contract person and alternate that the petition is available.

While similar provisions exist in Alaska Statutes with respect to general law municipalities (AS 29.26.130(e)), the State law and the provisions in the Charter are ambiguous in two significant respects.

First, the wording is vague in terms of what portion of the Municipality may be the subject of an initiative or referendum. Must it be some legally defined jurisdictional part of the Municipality such as the nonareawide portion of the Municipality or a service area of the Municipality; or could it be *any* portion of the

Municipality, including a single lot or parcel of land inhabited by just one individual?

LBC Staff notes that AS 29.26.130(e) is not a home-rule limitation. Thus, a home rule borough is not required to provide for an initiative or referendum on less than an areawide basis. Some home-rule boroughs (e.g., the Municipality of Anchorage) make no provision for an initiative or referendum involving only a portion of the borough. Others (e.g., the City and Borough of Juneau) allow an initiative or referendum affecting a portion of the borough, but limit that option to a formally established borough service area. Specifically, Section 7.03 of the Charter of the City and Borough of Juneau states, in part, as follows:

If the subject matter of the petition relates only to a service area, the petition shall be signed by a number of qualified voters residing within the service area equal to at least twenty-five percent of the votes cast in the service area at the preceding regular municipal election.

The second fundamental ambiguity in the Charter and AS 29.26.130(e) regarding an initiative or referendum affecting a portion of the Municipality is who would be eligible to vote on the matter. Both the Charter and AS 29.26.130(e) provide that when a proposed initiative or referendum would affect only a portion of the borough, only voters in that portion may petition for the referendum or initiative. However, neither the State law nor the Charter address who may vote on those initiatives or referenda. In the case of the Juneau Charter, it is clear that an initiative or referendum involving only a service area may be voted on only by voters in that service area. Specifically, Section 7.10(a) of the Juneau Charter states in relevant part as follows:

If the subject matter of the proposed initiative or referred measure relates only to a service area, the measure shall be submitted only to the electorate of the service area.

If the provisions allowing a referendum or initiative in only a portion of the Municipality are retained, it is recommended that a new subsection be added to Sections 6.08 and 6.09 to define who may vote on those initiatives and referenda.

### **C. Section 8.03(f).**

Section 8.03(f) referred to the audit requirements of Section 10.14 of the Charter. The reference appears to be in error and was changed to Section 10.15.

### **D. Section 10.07: Property Tax Limit.**

Section 10.07 of the Charter was found to be ambiguous. For example, the first sentence states, “The increase in the rate of the areawide property tax levy from one year to the next shall not exceed two-tenths (.0.2%) percent 2 mills of the assessed valuation of the property to be taxed, two (2 mills) above the rate levied in the prior fiscal year.”

A two-tenths of one percent increase in the property tax rate would not equal a 2 mill tax increase. For example, if the tax rate were 10 mills, a two-tenths of one percent increase in that rate would result in a tax rate to 10.02 mills (10 mills x 1.002 = 10.02 mills). However, an increase of two-tenths of one percentage **point** in the tax rate would equal two mills. The reference in the same sentence to “(.0.2%)” only adds to the ambiguity. Section 10.07 was rewritten as follows in an attempt to eliminate the ambiguities.

#### **Section 10.07 Property Tax Limit.**

- (a) Except as otherwise provided in this Article, an increase in the areawide property tax levy from one year to the next may not exceed two mills.
- (b) An increase in the areawide property tax levy from one year to the next may exceed two mills if the increase is:
  - (1) approved by at least two-thirds of the total membership of the Assembly at a second meeting regarding the proposed increase, the first of which meetings must have been advertised for at least 30 days; or
  - (2) approved by a majority of the voters voting on the question at a special or regular election.
- (c) The property tax levy during a year may not exceed 30 mills, except that no limitation applies to property taxes levied or pledged to pay or secure the payment of the principal and interest on bonds. Taxes to pay or secure the payment of principal and interest on bonds may be levied without limitation as to rate or amount, regardless of whether the bonds are in default or in danger of default.

#### **E. Section 10.08: Taxation: Supermajority Requirement to Raise Taxes.**

This section of the Charter was found to be unclear. Changes outlined in footnote 56 of the LBC Staff Preliminary Report (pp. 111 – 112) were included in the recommended changes. Additionally, when Section 10.08 of the Charter was reviewed in the context of the remainder of the Charter, further changes were made. For example, Section 10.08 stated that an increase in the rate of taxation would “require the affirmative vote of two-thirds (2/3) of the Assembly.” Similar

language appeared in Section 10.07. However, Sections 2.09 and 3.03 of the Charter contain language that may appear to be similar, but that contains potentially significant and perhaps unintended distinctions in language found in Sections 10.07 and 10.08. Sections 2.09 and 3.03 of the Charter state, "An affirmative vote of at least two-thirds (2/3) of the total membership of the Assembly shall be required ..." (emphasis added). The Legislative Drafting Manual (p. 59) stresses the importance of consistency:

Be consistent. See Dickerson, The Fundamentals of Legal Drafting, 2d ed. (1986), sec. 2.3, pp. 15 - 18, where it is pointed out that "the competent draftsman . . . always expresses the same idea in the same way and always expresses different ideas differently."

Given the rules for statutory construction, the courts could readily conclude that the drafters of the Charter intended different requirements for Section 2.09 and 3.03 compared to Section 10.08. For example, the courts could conclude that while Sections 2.09 and 3.03 clearly provide that at least two-thirds of the seven members of the Assembly must vote for a measure for it to pass, Sections 10.07 and 10.08 could pass with a two-thirds vote among the members present at the meeting.

Section 10.08 was rewritten as follows in an attempt to eliminate the ambiguities.

#### **Section 10.08 Requirement to Raise Taxes**

An ordinance or resolution that will increase the rate of levy of a sales tax, use tax, or property tax on an areawide, nonareawide or service area basis requires the affirmative vote of at least two-thirds of the total membership of the Assembly or a majority of the qualified voters who vote on the ordinance or resolution at a regular or special election. If the increase in the rate of levy of the sales tax, use tax, or property tax is limited to a service area or is nonareawide, the vote is limited to those qualified to vote in that area.

#### **F. Section 11.02(b): Notice of Bond Indebtedness.**

Section 11.02(b) provides that omissions or errors regarding information required by Section 11.02(a)(2), (3), and (4), and (5) shall not invalidate any election. That language suggests to LBC Staff that omissions or errors regarding information required by Section 11.02(a)(1) would be cause to invalidate an election. Is that the intent?

#### **G. Section 12.03(b): Services Provided by Service Area.**

Section 12.03(b) specifies that the powers described in Section 12.03(a)(1)-(5) are the Charter are to be exercised in the Gateway Service Area. However, Section 12.03(a) lists six powers, not five. On the assumption that the reference should be to Section 12.03(a)(1)-(6), the Charter was edited to include (6).

#### **H. Section 12.04(d): Expansion or Reduction of Powers in Service Areas.**

Section 12.04(d) is unclear. It states that, “. . . any power, other than those listed in Section 12.02, that was previously exercised by the City of Ketchikan may, without approval of the voters, be exercised by the Municipality on a nonareawide basis within the Gateway Service Area.” On the assumption that the reference should be to “service area basis” rather than “nonareawide basis”, the Charter was edited to “service area basis.”

#### **I Section 16.01: Personal Financial Interest; Nepotism.**

Section 16.01 is ambiguous. It states that unless approved by the “body,” an elected municipal officer may not participate in any official action in which the officer or a member of the officer's household has a substantial financial interest. It is unclear whether the body will always be the Assembly, or whether it would be the School Board where the officer is a member of the School Board. .The Charter was amended to substitute the term “Assembly” for “body.”