

KETCHIKAN CHARTER COMMISSION

AGENDA STATEMENT

NO 1 - 2

MEETING OF July 29th & 30th, 2004

ITEM TITLE

Amend Specific Items as Suggested by the Borough Attorney (First Reading)

SUBMITTED BY Glen Thompson

SUMMARY STATEMENT

During the regular meeting of July 23, 2004, the Commission recessed into work session and held a lengthy discussion of a memorandum by Borough Attorney, Scott Brandt-Erichsen, with counter comments by City Attorney, Steve Schweppe. Both attorneys were present and it was decided to bring back the suggested changes in the form of a list for Commission review.

The attached document is a modification of the above-mentioned memorandum, with only those areas the Commission felt were necessary to change included. Any of the items can be removed from this blanket agenda item and be voted on by the Commission in a separate vote.

RECOMMENDED ACTION:

"I move to amend the Draft Consolidation Petition as indicated in each separate item of the attached modified memorandum."

2. On page three (of the Petition), I would recommend that in the listing of 'areawide powers required by statute,' the taxing powers should be re-worded to read, "Assessment and collection of taxes, including but not limited to property, sales and transient occupancy taxes." The future assembly may elect to impose excise taxes or other taxes as alternatives. The Charter section 10.04 gives all taxing powers allowed by law.

6. Similarly, water service is listed as a utility power in the Ketchikan Service Area only. The Borough has water powers in the South Tongass service area, and operates an enterprise function in substantially the same way as a water utility. Phase 3 of the improvements currently under construction include connection of this water distribution system to the City of Ketchikan water system.

8. On page four the tax rates will need to be corrected. Sludge fees will also need to be addressed either here or in exhibit E-3 which is cross-referenced.

9. On page nine, Section 19 should reference as certified copy of the initiative because this process was by initiative rather than resolution.

10. Exhibit A, page 3, the duplicated positions may also include HR Directors, Data Processing personnel, and Executive Assistants in the Manager's Offices.

11. Exhibit A, page 4, the example of Peter Ellis's comments about a borough Building may or may not still be a timely anecdote.

12. Exhibit A, page 5, the reference to services provided to the entire community paid for by the city lists emergency medical services, senior citizens support services, and Ketchikan Public Library. Currently the Borough provides EMS services in the North and South service areas and the city does not pay for those services. Additionally the Borough provides transportation support for seniors. Library services are paid for by borough and city residents on a proportional basis, with the exception of Saxman residents.

13. Exhibit A, page 6, the discussion of the Lewis Reef area for development may need to be updated. Lewis Reef is less of a focus than the Ward Cove area at the present time.

14. Exhibit A-3, page 2, the discussion of schools may be slightly off. Depending upon how the district labels its operations, the four elementary school buildings may be referred to as five schools with two charter schools sharing one building. It may be more accurate if the second sentence indicates that the school district uses four elementary school buildings. However, with the Whitecliff uncertainty, this issue may change again before the petition is filed.

15. Exhibit E-1, page 11, the listing of U.S. survey numbers included in the

service area should also include: tract 1003; tract 3004; and U.S. surveys 1207, 1656, 2090, 2226, 3089, 3154, 3156, 3400, 3769 and 5525. While these were omitted from the listing in the legal description to the borough code, they were included within the boundaries of the map of the service area and are included in the service area in the Borough's current operations. Note: Mr. Brandt-Erichsen suggested in a separate email that these numbers be included in numerical order with the numbers already listed.

16. Exhibit E-3, page 1-2, this portion has the same issues as noted in comments five, six and seven above. Additionally, the facility and vehicle maintenance reference seems inappropriate as a separately identified power. The state statutes provide that a liberal construction shall be given to all powers and functions of a municipality conferred by Title 29, and that unless otherwise limited by law, a municipality has and may exercise all powers and functions necessary were fairly implied in or incident to the purpose of all powers and functions conferred by Title 29. See AS 29.35.400-410. Maintenance of public facilities or vehicles used in the exercise of some municipal or service area power will be, in nearly every case, incidental to the purpose or function of the underlying power. For example, having police powers necessarily includes the ability to maintain police vehicles.

Listing this item as a separate City service area power complicates the picture for maintaining facilities and vehicles that are not part of the City Service Area. While it may track with the method currently used by the City to organize its Public Works Department, it does not make sense to have facility and vehicle maintenance be only a service area power, not exercised areawide. It begs the question of what power is being exercised when repairs are made to the Museum or Civic Center buildings, or when vehicles are used by Assessment, Planning, Parks and Recreation, or in Garbage or Sludge operations and those vehicles are repaired. Facility and vehicle maintenance should not be a separate power, but should be administered in relation to each power in a coordinated and cost-effective manner.

While it is not clear, there appears to be a funding issue driving identification of this power in the prior consolidation petition. City Public Works services are funded largely from sales tax. You will notice that the description of existing powers and duties in exhibit J, page 3-5 recognizes the 1 1/2 percent Public Works sales tax as a funding source for the Library, Museum, Civic Center, mental health/substance abuse, Public Works Engineering, Public Works Streets and Roads, and municipal facility and vehicle maintenance. Although the entire one and one half percent Public Works sales tax is proposed to be retained by the City Service Area, many of those functions funded by that sales tax are identified to no longer be funded by the City Service Area. If some of the current funding for vehicle and facility maintenance and construction for these functions is transferred, then an appropriate portion of the associated sales tax should transfer as well. Otherwise the expense burden on areawide functions is

increased without a corresponding transfer of revenues.

I do not know what level of sales tax would most accurately correspond to this shift, or in the event that Fire facilities, equipment and dispatch are treated as areawide as well, what level of Public Safety sales tax should become areawide, but I do know that failure to address these issues will result in an artificially higher tax burden on areas outside of the City Service Area and lower tax burden on areas within the City Service Area than is currently experienced.

A good example for evaluating whether the division of taxes and the services makes sense is through comparison of impacts on the Forest Park service area and the City Service Area. The Forest Park Service Area has road powers and is included within the South Tongass Service Area. As a result, they have fire, EMS, sewer and road services. Water service is not currently available in that location. The mill levy proposed for roads for 2004/2005 is 2.2. The mill levy proposed for fire and EMS service for 2004/2005 is 2.3. Thus, for no police service and volunteer rather than full-time fire service, Forest Park residents can be expected to pay 4.5 mills. The proposed funding for the Gateway Service Area in the draft petition contemplates 2 1/2 percent sales tax and 2.8 mills. If the final petition has the Forest Park folks paying more taxes for less service than the Gateway Service Area it has not balanced the costs and services equitably. It would make more sense to include Forest Park in the Gateway Service Area than to have them pay more for less.

17. Exhibit E-3, page 2-3, the tax levies and sales tax rates will need to be adjusted. As noted above the South Tongass Service Area mill levy is proposed at 2.3. I also note that the South Tongass Service Area does not include Saxman, contrary to the information on page three.

18. Exhibit F, page 2, I would verify that the Borough Clerk salary is still higher than the City Clerk. I do not know if this is still the case.

19. Exhibit F, page 3, there has been discussion of a port revenue bond for port improvements. It is unclear how much the inter-fund loan would be, or what the purpose of such a loan was. Also, the state revenue-sharing and safe communities funding has been eliminated. Thus the reference to a 15% rate of reduction is now inaccurate.

20. Exhibit F, page 5, these statements regarding the City General Fund, that "most of the assets and liabilities of the City General fund will be transferred to a special revenue fund established to account for the financial resources of the Gateway Service Area" causes some concern. As noted above, some ratio portion of this fund balance is associated with those services that are being transferred to become areawide. It would seem appropriate to transfer a corresponding portion of the city general fund balance to the areawide fund.

21. Exhibit F, page 6, the limitation of any payment in lieu of taxes to the equivalency of the mill rate required to balance the City General Fund at the time of consolidation seems inappropriate. On the one hand, if it is a payment in lieu of taxes it should be made based upon what the actual taxes would be if the property were taxable, not some arbitrary figure. Secondly, this limitation conflicts with the proposed charter section 8.03(e) which calls for a payment in lieu of taxes based on what the full tax liability would be.

22. Exhibit F, page 7, regarding the Gateway Service Area, the comments noted above in item 16 are relevant for determining what portion of the Public Works sales tax should be shifted areawide and how the vehicle and building maintenance “ power” should be exercised.

23. Exhibit F, page 9, the Economic and Parking Development Fund talks about the proceeds being reserved for the benefit of the Ketchikan Service Area. If the current funding is designated for parking facilities in the central business district, then the reservation should be for that purpose, not for the general use of the Gateway Service Area. Otherwise, funds that were intended to create additional parking could be redirected for Police and Fire purposes, or for Public Works activities outside of the downtown core.

24. Exhibit F, page 10, the Special Assessment Guarantee Fund should be an areawide fund. The role of guaranteeing special assessments should be one of the burdens of the areawide government, not the Gateway Service Area. To the extent that the reason to return these funds to the Gateway Service Area fund is based on the fact that the original source of funding was the former city general fund, this argument is unconvincing where many of the services formerly funded by the city General fund are becoming areawide functions.

25. Exhibit F, page 10-11, the US Marshal Property Seizure Fund is proposed to be for the Gateway Service Area on the theory that it is associated with police powers. This is not necessarily a valid assumption. U.S. Marshals are required to seize and sell vessels. Vessel seizure expenses and proceeds would more likely be associated with Ports and Harbor powers resulting from seizure for nonpayment of moorage. As an areawide power, Ports and Harbors would need to be able to access this fund. To the extent that this fund contains money not related to vessels, and is made up of monies received in conjunction with drug prosecutions, the drug forfeiture component should remain with whichever service area or unit that retains the Police Department. This would likely be the Gateway service area.

26. Exhibit F, page 12-14, there have been substantial changes in the borough's Economic Development and Land Trust Funds. These sections will need to be adjusted accordingly. Basically the distinction between many of the sub-funds has been eliminated and some funds have been combined.

27. Exhibit F, page 18, the Major Capital Improvements Fund is slated to go to the Gateway Service Area. As noted in comment 16 above, some of the facilities that these funds were being reserved for are facilities that are being transferred as part of the shift to areawide powers. Accordingly, some portion of this fund should also becoming areawide funds for future improvements to the Civic Center, Gateway Mental-Health facility, the Library, the Museum and the like.

28. Exhibit F, page 19, regarding enterprise funds, the Borough has several enterprise funds listed in its most current budget.

29. Exhibit F, page 20, regarding the Ketchikan Public Utilities Fund: The statement that Water Services will only be offered within the Ketchikan Service Area is incorrect. Water service would be offered South of the Gateway Service Area as well. Whether budgeting for these water services would be combined with the other utility's services is an issue for the Charter Commission and the new Assembly to decide. It seems logical to include all water services under the same umbrella.

30. Exhibit H, page 6, the list of services should be adjusted as noted in prior comments.

31. Charter section 2.04(b)(7) and the cross-referenced section 16.01(b) do not set out either a procedure for an entity to determine whether a violation has occurred. I suggest that this be addressed in section 16.01(b) by providing that: "any municipal officer, employee, or elected official who is found by the assembly to have concealed such financial interest or to have willfully violated the requirements of this section...."

SS: Scott's proposal to incorporate a mechanism for determining malfeasance in office was previously excluded on the grounds that it was unnecessary. It was felt that the new assembly could set up such procedures as it felt necessary under the circumstances and no charter authority was required to do so. If the Charter does more it could raise the interesting question of what happens when an official is convicted in a criminal proceeding but the assembly decides not to remove him or her.

32. Charter section 2.09(b) I recommend the state reference for the Alaska Statutes regarding limitations on mayoral veto be updated to be 2004 version of the statute section.

33. Charter section 3.01(k) should include the word " zoning" between the words " official" and " map."

34. Charter section 3.02(b) creates an awkward situation. Nothing defines how significant an amendment may be before it is considered substantive. If this distinction is to be retained, some clarification would be helpful.

SS: Scott suggests that the provisions of Sec 3.02(b) should be changed to define what is a substantive change in an ordinance. Because this is a question that will be answered by the facts in each case, it is difficult to provide a definition that will apply in all cases. The Supreme Court has already set the standard in *Liberati v Bristol Bay Borough* 584 P2d 1115 (Alaska , 1978) and we felt that no further definitions were required. The Court said that only those changes which were so substantial as to "change the basic character" of the ordinance would require additional assembly action in that case.

35. Charter section 6.01 deals with initiative and referendum. I would suggest that the second sentence include an additional clause providing that the regulations set out by the Assembly be "subject to the limitations of State law." Steve Schweppe's comments in this regard are helpful. (Note: The Clerks plan on bringing a full amendment to this section of the Charter).

36. Charter section 7.01(b) indicates term in the and heading, but the term is addressed in subsection (a).

38. Charter section 8.03(e) requires payment in lieu of taxes. A similar requirement for ports is in Charter section 10.08(b). While this is not a crucial issue, I would suggest using the permissive "may" rather than the mandatory "shall." If it remains "shall" the budget should calculate the full PILT areawide and in service areas. The revenue amount could be significant, certainly more than the current PILT.

39. Charter section 10.07 sets a 14 mill limit on taxes. As noted by Steve Schweppe, this does not clarify the interaction between areawide and service area levies.

42. Charter section 12.04(b) addresses amendment of service area boundaries. I believe this section is too limiting. It would require approval of the voters for any change in service area boundaries. Thus, if only a single homeowner wants to join a service area, that action would require voter approval from the existing service area. Similarly, if the Assembly desires to remove a single parcel from a service area, that action would require approval of voters in the area which would remain. I would recommend a threshold that would moderate this requirement. An example may be seen from AS 29.35.450 that treats less than 1000 persons or 6% of the number of parcels in the service area as a de minimus amount below which a vote of the remainder of the service area is not required. The charter could also identify a de minimus level such as 10% of the assessed value.

SS: Care should be taken in allowing expansion of service areas without approval of voters in each area. While some de minimus alteration might be allowed, it should not be allowed to be repeated over and over so as to in effect add a large area over time without voter approval. This is particularly true in

cases of service areas where large capital costs must be incurred by members of the service area. Outlying areas may well want to join the service area after those costs have been paid so that they can get the benefits of the improvements but not contribute to the cost.

43. This section, 16.05, addresses continuing effect of ordinances. If the intention is to limit building safety and police action to the Ketchikan Service Area, both in this section and in the transition plan (Exhibit J page 23), a jurisdictional limitation upon application of the building safety ordinances and general criminal and traffic ordinances should be spelled out. Otherwise, the Building Safety Code, for example, would apply throughout the jurisdictional boundaries of the new municipality, but would only be enforced within the City Service Area. On the same topic, the procedure called for in the transition plan for resolving conflicting ordinances minimizes the role of the Assembly. I would be surprised to see the Assembly come up with and pass a well-drafted alternative within 30 days. Often it takes longer to have a thoughtful review and adoption. Additionally, I would recommend that the ordinance review process include the Clerk, as well as the Manager, Mayor and Attorney.

NOTE: AT THE JUNE 18, 2004 CHARTER COMMISSION MEETING, THE CITY AND BOROUGH CLERKS BOTH STATED HOW IMPORTANT IT IS THAT THE CLERK BE INCLUDED IN THE ORDINANCE REVIEW PROCESS AND DESIRED THAT THIS INFORMATION BE PASSED ALONG IN THE TRANSITION PLAN.

44. Exhibit J, pages 3-5, several of the funds addressed on these pages note reliance on the 1 1/2 percent Public Works sales-tax. However, the petition, as noted above, does not allocate that sales tax in proportion to allocation of the services funded by that sales-tax.

45. Exhibit J, page 9, regarding facility and vehicle maintenance powers, please see the comments noted above. These are not a separate power, but are ancillary to each of the other powers.

46. Exhibit J, page 13, currently the Borough does not pay in proportion of the cost attributable to the number of residents located in Saxman. Saxman residents do not contribute to funding of the Library.

47. Exhibit J, page 17, the limitation on providing services only within the Ketchikan wastewater collection treatment and discharge system area is potentially problematic. The Borough regulates septic waste in all areas outside of the cities of Ketchikan and Saxman. Following consolidation, it would need to have sewer (i.e. septic waste) powers in all areas outside of Saxman. Otherwise the sludge program would become an unauthorized power.

48. Exhibit J, page 18, as noted previously the Public Safety and Public Works sales-taxes may need to be apportioned based upon those services currently

funded by those funding sources that are transferred to become areawide functions.

50. Exhibit J, page 20, there are numerous operations that would benefit from Engineering services. Contract administration and design services are currently required by the Borough for schools, sewer, water, Parks and Recreation, and other Public Works projects. The engineering services could be more easily be an areawide function for which the Gateway Service Area would pay an intergovernmental charge for the road design needs. Looking at the entire City and Borough, and how the capital projects and responsibilities would be divided after consolidation, the bulk of the demand for Public Works Engineering services would be with the areawide functions, not with the Gateway Service Area. Again, some appropriate portion of the sales tax revenues should follow the function.

51. Exhibit J, page 21, as noted above the current city Public Works Facility and Vehicle maintenance function is not a separate power and should track with the primary powers exercised by the consolidated municipality which use facilities or vehicles.

52. Exhibit J, page 22, the proposed powers and services have been individually addressed in prior comments. The listing on page 22 would need to be adjusted if the commission is to implement some of those prior comments.

53. Exhibit J, page 23, the earlier comments regarding the procedure for selection between competing code provisions applies to this page as well.

54. Exhibit J, page 26, as noted earlier, there have been additional Borough positions added which duplicate corresponding City positions.

55. Exhibit J, page 27, the executive staffing plan is not provided. I would recommend two attorneys and two support staff in the Attorney's office. One support staff would be insufficient to keep up with the workload.

NOTE: At the Commission meeting on 6/18/04 the City & Borough Clerks both expressed their concern at any cuts in personnel for the three year transition period. For a more extensive explanation as to why, please see the minutes of that meeting. They indicated that with the expected workload during the transition years, they would even need a 5th staff member.

56. Exhibit J, page 28, the figures in the proposed taxation levels should be revised to reflect allocation of powers.

57. Exhibit J, page 33, the assets and liabilities to be allocated should be adjusted in accordance with the Commission's allocation of functions and

revenues.

I-2, Attorney-Suggested Amendments Agenda Item
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