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MEMORANDUM

TO: Mayor Bob Weinstein
Members of the City Council City of
Ketchikan

Karl Amylon City
Manager

FROM: Steven H. Schweppe
94/

City Attorney

RE: Draft Charter For Consolidation of the City of Ketchikan and the
Ketchikan Gateway Borough

DATE: August 20, 2004

I have reviewed the draft Charter which the Charter Commission has prepared as part of its consolidation proposal. The following are my comments. Some of them are **technical changes** which were also issues with the City's 2000 draft Charter. Other comments are more specifically addressed to the Charter Commission's draft.

- (1) Section 2.01(d). Terms of Assembly members and Mayor Elected at First Election. This section provides that the first term for Assembly members does not include the period between the first election and the first Tuesday of October following that first election. It does not similarly exclude that time for the first mayor. In order to get the mayor's term on the same October-to-October cycle, line 9 of (d) should be changed to read:

"the first term for ~~[Assembly members]~~ **persons** elected at the first election, the period between that. . ."

- (2) Section 2.03 (c). Filling of Vacancies. This section provides that the assembly shall appoint a person to fill out a vacancy until the next regular election.

Frequently charters provide that if the vacancy occurs within the 60 days prior to the election, the assembly fills the position, not just for the period before the next election, but for the following year. It may be impossible for candidates to circulate nomination petitions or for ballots to be printed if the vacancy occurs immediately prior to the election.

- (3) Section 2.10(a)(2)(c), Other Public Offices, Employment or Contract. This section provides that elected municipal officials may enter into contracts provided that the goods or services contracted for are sold at an amount to be set by ordinance. After this section was written, the draft Charter was changed to allow KPU Telecommunications to set some rates by regulation, not by ordinance. (C) should be changed to reflect this fact. I suggest the following change:

"(C) The goods or services contracted for, purchased, exchanged or sold at an amount to be set by ordinance **or regulation.**"

- (4) Section 3.03, Ordinances—Emergency. This section has been changed to provide that an emergency ordinance automatically expires in 60 days. This section seems impractical. Emergency ordinances may authorize contracts. A contract needs to be approved by an ordinance which does not expire automatically in 60 days. Furthermore, it may be worthwhile to consider expanding the definition of emergency. As you may recall, the City was asked to pass an emergency ordinance to authorize the refinancing of the Four Dam Pool. The emergency was not for the immediate preservation of public peace, health, or safety, but for the purpose allowing the Four Dam Pool to take advantage of a low interest rate in a rapidly rising interest rate environment. The City could not declare an emergency for this purpose. The Borough's present code is more flexible in that it allows the assembly to adopt emergency ordinances "to meet a public emergency." Since the Borough code does not limit emergency to "public peace, health, or safety," the Borough ordinance allows greater flexibility to meet other types of emergencies. I would change the first sentence in Section 3.03 to read as follows:

"An emergency ordinance is an ordinance which in the judgment of the assembly is necessary to meet a public emergency and which will become effective immediately without a second reading."

- (5) Section 4.01. This section provides that neither the mayor nor any assembly member may be appointed manager during the term for which the member

was elected. This is not consistent with 2.10(a) (1) which says that no elected official may be hired for a period of one year after vacating office.

- (6) Section 6.02(a) and 6.03 (6) These sections deal with the question of who can sponsor and circulate initiative and referendum petitions. Section 6.02 states that an application must be signed by at least 10 residents who sponsor the petition. Section 6.03 states that the sponsor must personally circulate the petition. A recent Supreme Court decision states that municipalities cannot limit the right to circulate referendum and initiative petitions to residents. For this reason, I would change the fourth sentence of Section 6.02(a) to read as follows:

"An application shall be signed by at least 10 persons at least 18 years of age who will sponsor the petition."

This change would allow non-residents to circulate initiative and referendum petitions as the Supreme Court has ruled.

- (7) Section 8.03(e), Payment in Lieu of Taxes, and Section 10.08(b), Port Payments in Lieu of Taxation. Both of these sections provide for payments in lieu of taxes to the municipality. As the Charter is now written, the assembly may, but is not required to, make payments in lieu of taxes to service areas. In order to assure that the Gateway Service Area will receive a payment in lieu of taxes from the municipal utilities and from the port, both these sections could be changed to require that the utilities and port make a payment in lieu of taxes to the Gateway Service Area. The need for this is particularly clear in the case of ports. The ports are major users of services provided by the Gateway Service Area, including, but not limited to, police, fire, and public works. The service area should be assured that it will receive reasonable contributions from the port for these services.

- (8) Section 9.05(d). The last sentence of this subsection should be changed as follows:

~~"[The school board recognizes that]~~ Decisions by the assembly shall be final in matters concerning school construction and other capital improvements, site selection, employment of architects and building plans."

The Charter is not a statement of policy or agreement, but a statement of the law. The language that the school board recognizes the assembly's power is superfluous and confusing.

- (9) Section 10.05(b) Taxation: Sales and Use Taxes. This subsection requires that any increase in the sales tax levy must be approved by the voters. Under the present City Charter, the City Council can increase the City sales tax without a vote of the people. This puts the City sales tax and the City property tax on an even basis. If sales tax increases require voter approval, then property tax increases become the quickest and simplest means to increase taxes. Since the City Council can raise both the sales tax and the property tax, the Council has the flexibility to balance these taxes rather than automatically raise property taxes before sales taxes. The proposed Charter would not give the assembly this flexibility.
- (10) Section 10.07, Property Tax Limit. I am sure that this section will have considerable discussion. It gives the new assembly very limited authority to raise the mill rate. If there is any significant overrun in the transition budget, the new assembly will need to immediately go to the voters for a property tax increase. I do not think that a tax cap is a good idea. If, however, there is to be a cap, it should provide realistic limits. The way the proposed Charter is drafted, there will be either sales tax or property tax increases proposed at many elections. Tight tax caps force the municipality to rely on fees to fund many agencies. I would anticipate that Planning and Zoning fees would increase dramatically as well as fees for recreational and school programs. These fees will need to cover much of the costs of these programs. Finally, it is probable that the tax cap will cause a mushrooming of service areas. Since service area taxes are not subject to the tax cap, more governmental services will need to be provided by service area. This will, of course, result in inefficiencies as each service area will duplicate some of the costs in other service areas. The mushrooming of service areas has become an issue in other municipalities. The tax cap will probably also adversely affect the social service agencies and civic groups that rely upon municipal funding.

If a tax cap is to be imposed, it must be made absolutely clear that it does not limit the ability to pay bond obligations. The last section of 10.07 should be changed to read as follows:

"The property tax levy during a year shall not exceed 3% of the assessed value of the property in the municipality. The limitations provided for in this section do not apply to taxes levied or pledged to pay or secure the payment of the principle and interest on bonds. Taxes to pay or secure the payment of principle 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."

This new language adopts Alaska Statutes 29.45.100. It clarifies that in determining the tax cap the amounts needed to pay interest and principle are excluded from the 9 mill or 30 mill limits.

- (11) Section 10.15, Deposit and Investment of Funds. You may want to revisit the question of how municipal funds may be invested. Section 10.15 provides that funds may be invested in general obligation bonds of the United States, State of Alaska, or other states, and Alaska municipalities. It also provides that investments may be made in "other securities as may be authorized by ordinance." This section would allow the new municipality to invest in the stock market, for example, or corporate bonds.
- (12) Section 12.02(c), Mandatory Areawide Powers. The draft removes mental health and substance abuse programs from the mandatory areawide powers. I understand that the transition plan states that these will be provided on an areawide basis. I do not know why they were removed from the list of mandatory areawide powers. Perhaps the Commission thought that their inclusion would require the new municipality to provide these services. I do not read Section 12.02 as requiring the municipality to provide these areawide services. Instead it simply says that if the municipality provides these services, they shall be provided on an areawide basis. The status of mental health and substance abuse should be clarified.
- (13) Section 12.03, Services Provided by Service Area. The draft Charter provides that street construction and maintenance and building code enforcement shall be provided by service area only. If street construction and maintenance and building code enforcement are to be by service area, then the remainder of Section 12.03 needs to be updated as well. The last sentence in 12.03(a) should be changed to read:

"No areawide power shall be interpreted to include or authorize any of the powers described in (1) through [(3)] (5) above."

The first sentence of section (b) should also be changed to read as follows:

"Unless otherwise changed, that area described in the consolidation petition as the Gateway Service Area shall be a service area for each and all of the powers described in (a)(1) — [(3)] (5) [~~above, for the power to build, operate, maintain and replace road, bridges, sidewalks, culverts, storm sewers and drainage ways and other public works].~~"

The question of whether the new municipality should have road powers is an important one. It seems obvious to me that the new municipality will in fact be building roads on an areawide basis. The only question is whether the new municipality will do this in a legally straight-forward manner or by trying to twist other powers to include road powers. The current Borough may broadly interpret its school and recreational powers to allow for areawide roads. At one point the Borough was working on a major road extension under the theory of providing roaded access to recreational areas. In the event that the State stops maintaining the North Point Higgins Road, the Borough will probably seek to address that road power under its educational powers. If Gravina Island is going to be developed, the new municipality will need to incur large expenses for road building. It is not practical to believe that these costs will be paid by LIDs. To the extent that municipal property is subjected to the LID, all that has happened is that the road has been built on an areawide basis since the property was owned on an areawide basis. If the Borough's Gravina Island property and other Gravina Island property is to be developed, roads will need to be built. There is not a practical or straight-forward funding mechanism for these roads unless road power is areawide.

There has been some concern as to what would happen to existing service areas which exercise road powers. Under Alaska Statutes 29.35.450, a service area that provides roads cannot be altered or combined without separate votes of the electorate. Thus, if an existing service area provides roads, it would not be effected by the areawide power. I anticipate that most neighborhood roads would continue to be provided by service area. Simply because the new municipality will have areawide road powers does not mean that it will exercise that power on an areawide basis in all cases. However, there will be situations when collector streets or highways need to be built. These thoroughfares will benefit the entire municipality and will need to be built larger than they would need to be built for neighborhood use. They cannot be fully paid for by LIDs or by service areas. They will need to be built not only for the neighbors' use but for the entire community. The lack of areawide road powers will limit the growth of the municipality and will force it to assert that roads are "auxiliary functions" to other areawide powers. In our 2000 draft this is precisely the thing we sought to avoid. We wanted the new municipality's powers to be straight-forward and not subject to strained interpretations of its areawide powers.

- (14) Fire and EMS Services. The Commission tried, but failed, to provide for areawide fire and EMS. I think this is regrettable. If the consolidation occurs, it will be difficult to unite the four existing fire departments at a later date. State law would require voter approval within each service area that is

united. The consolidation process represents a last chance to unite these department within the foreseeable future. I have always felt that the lack of a unified fire and EMS service is not only wasteful but is a large hole in the community's emergency response system. If a catastrophe hits this community, questions will arise as to whether you respond first to the greater community danger or to the lesser danger within your own service area. Do the people who need the response get it first or do the people paying for the response get it first? Questions will also arise as to who pays the costs for service area personnel who work or are injured in response to emergencies outside their service area. Who pays for equipment damaged in such a response? Questions of command also arise. While the current mutual aid systems may work acceptably well for the routine fire call, I think it can be expected to break down quickly in the event of an areawide disaster. Since the City has the greatest availability of equipment and personnel, these questions are particularly important for City taxpayers. It is regrettable that service area concerns over neighborhood control, firefighter fitness standards, and equipment use cannot be overcome. In the final analysis, it may be the existing service areas that suffer the greatest consequences.

cc: Bob Newell