



KENAI PENINSULA BOROUGH

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MIKE NAVARRE
BOROUGH MAYOR

MEMORANDUM

TO: Dale Bagley, Assembly President
Members, Kenai Peninsula Borough Assembly

THRU: Mike Navarre, Mayor *MN*

FROM: Colette Thompson, Borough Attorney *CT*

DATE: April 6, 2015

SUBJECT: Legality of Enacting Ordinance 2015-03 Substitute, Amending the Non-Prepared Food Tax Exemption, While Referendum is Pending on Ordinance 2008-28, Authorizing the Cities to Tax Non-Prepared Food

On March 23, 2015, the Peninsula Clarion published a letter to the editor in which the writer argued that proposed Ordinance 2015-03 Substitute addresses “exactly the same issues” as the pending referendum, and that it would be illegal under AS 29.26.180(b) for the assembly to enact ordinance 2015-03 Substitute. Ordinance 2015-03 Substitute would amend the time-period of the seasonal non-prepared food tax exemption. The ordinance being referred to the voters in the upcoming 2015 borough election is Ordinance 2008-28, which authorizes the cities in the borough to tax non-prepared food even if the borough exempts it.

This memorandum responds to the arguments raised. First, AS 29.26.180(b) only applies when a referendum petition is certified before the effective date of the ordinance being referred. It reads:

(b) If a petition is certified before the effective date of the matter referred, the ordinance or resolution against which the petition is filed shall be suspended pending the referendum vote. During the period of suspension, the governing body may not enact an ordinance or resolution substantially similar to the suspended measure. (Emphasis added.)

Ordinance 2008-28, the ordinance being referred to the voters this coming election, was effective October 14, 2008. The borough clerk certified the referendum petition in 2014, years after the effective date of the matter referred. Therefore AS 29.26.180(b) does not apply because the matter referred became effective in 2008. The purpose of suspending a law that is not yet in

effect pending a referendum election is to avoid confusion. Otherwise, the public would have to comply with the new law and then would not need to if the voters repeal the ordinance.¹

Second, Ordinance 2015-03 Substitute does not address the same issues as the ordinance being referred. While both ordinances relate to the same grocery tax exemption, one addresses the time-period of the exemption and the second one addresses the authority of cities to levy this tax if the borough does not. Those are two distinctly different issues.

It should be noted that if the assembly had approved Ordinance 2015-03, which would have repealed this exemption, the voters would still have had the opportunity to repeal ordinance 2008-28. This would not be meaningless as, although it requires a lot of effort, the voters could again seek voter approval of the exemption through either the referendum or initiative process. Further, if Ordinance 2008-28 is repealed by the voters, the assembly may not enact a similar ordinance for two years after the election repealing it.

¹*Interior Taxpayer Ass'n, Inc. v. Fairbanks North Star Borough*, 742 P.2d 781, 782 (Alaska 1987).