

KENAI PENINSULA BOROUGH

144 North Binkley Street • Soldotna, Alaska 99669-7520

Toll-free within the Borough: 1-800-478-4441

PHONE: (907) 262-4441 • **FAX:** (907) 262-1892

www.kpb.us

**MIKE NAVARRE
BOROUGH MAYOR**

August 6, 2015

VIA EMAIL: john.calder@alaska.gov

John Calder
Alcoholic Beverage Control Board
550 West Seventh Avenue, Suite 1600
Anchorage, AK 99501

RE: Comments on Proposed Regulations – Set 1, Round 2 and Set 2

Dear Mr. Calder:

Please find following the Kenai Peninsula Borough's comments on Set 1, Round 2 and Set 2 of the marijuana regulations. These comments are based on the recommendations of the Kenai Peninsula Borough Marijuana Task Force made at its July 15 and July 30, 2015 meetings.

COMMENTS ON SET 1, ROUND 2:

3 AAC 306.200(c), Local options.

The reference to (b)(2) in proposed 3 AAC 306.200(c) should be stricken as there is no paragraph (b)(2). Paragraph (b)(2) contained a reference to villages which has been deleted from the regulation.

3 AAC 306.230, Procedure for local option election.

There are numerous formatting issues, capitalization, and punctuation issues that need to be corrected in 3 AAC 306.230.

3 AAC 306.230(a), Procedure for local option election.

This section has been revised since the first release of set one to require the number of signatures on a local option petition to be 25 percent of that in the last regular election. In order to be consistent with AS 29.26.130, if the population of a municipality exceeds 7,500, the number of signatures on a petition must equal 25 percent of the votes cast in the last regular election. If the municipal population is under 7,500, then only the equivalent of 15 percent of the

votes in the last regular election is required on the petition. This provision should be changed to be consistent with AS 29.26.

3 AAC 306.230(b), Procedure for local option election.

This section contains the same language and thus the same concerns that the first release presented. It proposes that the ballot questions contain the local option language set forth in the regulations "rather than the language of an initiative or resolution." Pursuant to AS 29.26.110 the only way an initiative question can be accepted by a municipal clerk is through an ordinance or resolution. The language of paragraph (b) strikes the language of AS 29.26.120(b)(1) and (2) requiring the initiative petition include a summary of the ordinance being initiated and the complete ordinance. This provision requires the municipal clerk to ignore important mandates in AS 29.26.120. A local option question is not undermined by being put in proper ordinance form including whereas clauses which help convey the intent of the sponsors to potential petition signatories. A proper summary also aids potential signatories in understanding the particular prohibition proposed. Following are suggested revisions in legislative format.

3 AAC 306.230, Procedure for local option election.

....

(b) In a general law municipality, AS 29.26.110 -29.26.160 apply to a petition under (a) of this section. [EXCEPT THAT THE

1. AN APPLICATION FILED UNDER AS 29.26.110] The local option ordinance must at least contain language substantially similar to the questions set out under 3 AAC 306.200(c), 3 AAC 306.210, or 3 AAC 306.220. [RATHER THAN LANGUAGE OF AN ORDINANCE OR RESOLUTION;

2. A PETITION MUST AT LEAST CONTAIN LANGUAGE SUBSTANTIALLY SIMILAR TO THE QUESTIONS SET OUT UNDER 3 AAC 306.200(C), 3 AAC 306.210, OR 3 AAC 306.220 RATHER THAN MATERIAL REQUIRED UNDER AS 29.26.120 (A)(1) AND (2).]

3 AAC 306.230(c), Procedure for local option election.

While this section was revised from the first set, it still contains language that violates AS 29.26. Neither the assembly nor the voters can change the effect of an initiative within 24 months after its adoption pursuant to a regulation. This is also true of an ordinance that was adopted by the governing body in lieu of an initiative petition. However, neither the voters nor the assembly can be prohibited by a state regulation from changing to a less restrictive option after 24 months. While a governing body could chose by ordinance to limit its own ability to eliminate or lighten a local prohibition within a 36-month period, a state regulation cannot impose this obligation on a governing body. The following language should be stricken from this section: "or more than once in a 36-month period, except that if an original prohibition was passed by ordinance, an election as set forth in this article to change the ordinance may be conducted within the 36 month period following the passage of the ordinance." The state regulation should not undermine or conflict with AS 29.26. The state should let individual governing bodies determine whether they will limit their ability to change a local option more than 24 months after a local option initiative has been adopted. It is unlikely a governing body

would be able to limit the voters' ability to lighten or eliminate a local option after the 24-month period has lapsed. AS 4.11.507 addressing alcohol related local options does not allow an election to remove or lighten a local option within the first 12 months after a local option is adopted, nor more than once in an 18-month period. It is suggested the regulation be revised to disallow removal or change to a lesser prohibition within 24 months of the adoption of a local option to be consistent with AS 29.26.

3 AAC 306.200 in conjunction with 210 and 3 AAC 306.230(d), Procedure for local option election.

Proposed 3 AAC 306.200 provides for four separate local options: (1) sale; (2) the operation of one or more of the four types of licenses; (3) retail sale on premises other than those operated by municipality; and (4) the sale or importation for sale. 3 AAC 306.230(d) allows only one local option question per election. This language is similar to AS 4.11.507, but is problematic. If both an initiative for a retail ban and an initiative for a cultivation ban were circulated separately for signature, only one could be placed on a ballot at an election. Yet the language of 3 AAC 200(a)(2) allows one or more types of licenses to be included in the same local option, which is contradictory to the concept that there can only be one local option question per election. It is proposed that the final sentence of 3 AAC 230(d) allowing only one local option question per election be stricken. Since 3 AAC 306.200(2) provides that more than one type of facility may be the subject of a local option it makes sense that separate ballot propositions or initiatives could propose different bans and appear on the ballot at the same election. It is suggested that the language allowing the inclusion of four license types in the same local option question be revised to require each type of license to appear as a separate question on the ballot. Allowing more than one license type in a single question may be confusing to the voters as a voter may be willing to ban one type of license but not another.

The proposed regulation requires the clerk to reject a local option petition until another petition that meets the criteria of 3 AAC 230(a) and (b) has been voted on. There is no authority in AS 29.26 for the clerk to reject a ballot proposition that would otherwise meet the criteria of AS 29.26. As discussed above, meeting the criteria of 3 AAC 306.230(a) and (b) also conflicts with the criteria of AS 29.26.120(a)(1) and (2). While there may be some guidance for the marijuana regulation in the alcohol statute, it is recommended that consideration be given to the initiative and referendum framework that municipal clerks must work within and that the marijuana local option provisions be drafted to be consistent with this framework rather than contradicting it. It is possible to do this rather than simply applying the alcohol statute as the marijuana regulations.

3 AAC 306.260, Licensing after prohibition on sale except in premises operated by municipality.

As stated in the comments on the first set of local option provisions, 3 AAC 306.260 does not appear to be consistent with and reasonably necessary to implement AS 17.38.¹ It allows for local voter approval to prohibit the sale of marijuana, marijuana products, or operations of marijuana establishments except by the municipality. 3 AAC 306.260 goes beyond implementing AS 17.38.100 and 110 as there is no mention of municipal operated facilities in AS 17.38. Therefore, this regulation does not appear to be reasonably necessary to implement the authorizing statute as it appears to exceed the authority of the promulgating statute. The purpose of this regulation appears to be that it is also in the alcohol statute. The statutory intent of AS 17.38.010 is aimed at curtailing availability of marijuana to minors, promoting tax-paying citizens as marijuana operators rather than criminals, and consumer protection through proper labeling and packaging. The provision allowing a voter mandate that marijuana establishments be borough operated is not authorized by AS 17.38 and does not appear to be necessary in order to carry out the statutory intent of ballot measure no. 2.

COMMENTS ON SET 2:

3 AAC 306.010, License restrictions.

3 AAC 306.010(a) is similar to AS 4.11.410 restricting alcohol establishments near schools and churches. It limits the issuance of licenses within 200 feet of schools, daycares, or other facilities providing services to children, a building in which religious services are regularly conducted, or a correctional facility. None of these terms are defined but need to be. It may be the intent to define these terms by cross-reference to a law already defining these terms or that the definitions will be included in the regulation set that will cover general provisions, 3 AAC 306.900 et seq. The lack of definitions raises numerous questions. For example, how regularly must the religious services be held in a mall church in order for the distance restriction to apply? What are child centered service facilities? Would this include a free-standing pediatrician's office but not a pediatrician in a building with many other types of medical offices or businesses that are not child centered? While "outer boundaries of the child centered facility" is presumably the legal parcel lines, this should be clarified.

3 AAC 306.010(c), License restrictions.

3 AAC 306.010(c) prevents issuance of a license where the municipality has protested the license based on a zoning ordinance prohibiting such establishments, unless the municipality has approved a variance of the local ordinance. This raises several concerns. This is another provision that appears in the alcohol statutes at AS 4.11.420. Pursuant to AS 29.40.040, a use

¹ The Alaska Supreme Court reviews an agency's regulation for whether it is "consistent with and reasonably necessary to implement the statutes authorizing [its] adoption." Toward this end the court considers: (1) whether [the agency] exceeded its statutory authority in promulgating the regulation; (2) whether the regulation is reasonable and not arbitrary; and (3) whether the regulation conflicts with other statutes or constitutional provisions.

variance cannot be granted by a general law municipality in the state of Alaska. Therefore, if a certain marijuana establishment were disallowed in a particular zone the municipality couldn't grant a variance to allow it.² Second, it is difficult to conceive of a situation where a municipality would grant a variance to allow a particular marijuana establishment in a zone and then protest the issuance of a license for the same establishment based on its zoning regulations. Finally, it is recommended that the term "land use regulation" be used instead of "zoning ordinance." Zoning is a particular kind of land use regulation that divides land into geographic districts and then allows and prohibits certain types of uses in those geographical districts. The Kenai Peninsula Borough has a rural zoning district that is unregulated but for specific use land use regulations. It is not known at this point whether the KPBB will engage in any kind of land use regulation of marijuana establishments; however, the use of the broader term "land use regulation" would more accurately encompass both a zoning approach and a specific use approach to the land use regulation of marijuana.

3 AAC 306.010(d)(2), License restrictions.

It seems the term "illegally without a license" should simply state "without a license" as how could one operate legally without a license? There should not be superfluous language in legislative drafting because it leads to interpretation issues as every word in the regulation should have meaning. A "marijuana club" is not mentioned in AS 17.38, giving rise to the concern that the term at a minimum should be defined, and it should be considered how such clubs fit into the regulatory scheme as they are not referenced in AS 17.38. While there are varying definitions for such establishments, one definition is a private club where participants purchase a membership (as opposed to purchasing marijuana). An attorney general opinion could be sought by the marijuana control board regarding the status of marijuana clubs.

3 AAC 306.025, Application Procedure

The posting of the entire application appears to be unnecessary to meet the purposes that the posting is intended to serve. Posting gives notice that a marijuana establishment is being considered at a certain location. The purposes of the notice could be served by posting the information that is required in the published form of notice in 3 AAC 306.025(b)(2)(A). It is recommended that the language in 3 AAC 306.025 (b)(1) be changed as follows:

3 AAC 306.025. Application procedure. (a) An applicant shall initiate a new marijuana establishment license application on a form the board prescribes, using the board's electronic system.

(b) As soon as practical after initiating a new marijuana license application, the applicant shall give notice of the application to the public by

(1) posting [A TRUE COPY OF THE APPLICATION] a notice of the application containing the information required by 3 AAC 306.025(b)(2)(A)-(E) for 10 days at

² A municipality could grant an area variance under AS 29.40.040 . For example, while a municipality could not allow a retail store through a variance in a zone where such stores are disallowed, a municipality could allow a variance to the size of the building housing the retail store or the number of parking spaces.

- (A) the location of the proposed licensed premises; and
 - (B) one other conspicuous location in the area of the proposed premises;
- and
- (2) by publishing an announcement once a week for three consecutive weeks in a newspaper of general circulation in the area, or in areas where no newspaper circulates, twice a week for three successive weeks during triple A advertising time by announcements on a radio station serving the local area where the proposed licensee seeks to operate, stating
 - (A) the name of the applicant and the transferee if applicable;
 - (B) the name and location of the proposed premises;
 - (C) the regulation citation and type of license applied for;
 - (D) that any comment or objection may be submitted to the board; and
 - (E) whether the application is for a new license or transfer of an existing license to another person; and
 - (3) by submitting a true copy of the application to
 - (A) the local government; and
 - (B) any community council in the area of the proposed licensed premises.

3 AAC 306.030, Application for renewal of license.

Paragraph (b)(2) requires the same information as is required by 3 AAC 306.020(a) for the application for an original license, except public notice is not required. Public notice is required by 3 AAC 306.025. This provision also includes that the applicant for an original license must copy the local government with the application. It is unclear if the reference deleting the requirement for public notice for renewals would also delete the requirement for a copy of the renewal application to be submitted to a local government. AS 17.38.100(c) requires that marijuana control board "immediately" forward to a local government that has established a local regulatory authority the application and half the fee. It should be clarified that municipalities receive renewal notices for licenses within their boundaries. Local governments receive renewal and transfer notices from the Alcoholic Beverage Control Board for alcohol licenses pursuant to AS 4.11.480.

3 AAC 306.040, Application for transfer of a license to another person.

By cross-reference to 3 AAC 306.020 which cross-references 3 AAC 306.025 municipalities are entitled to notice from the applicant of the transfer. It should be clarified that local governments are entitled to notice of applications, transfers, and renewals. It would be preferable for this notice to be issued by the board as opposed to relying on the applicant or licensee to provide the notice, or the applicant should be required to provide proof of service on the municipality.

3 AAC 306.080, Informal conference.

This provision allows an applicant or licensee to have an informal conference with the director of the board when aggrieved by a denial. This is another provision with its roots in the

alcohol statute, AS 4.11.510. If the informal conference does not resolve the matter to the applicant's satisfaction, the applicant may request a formal hearing. It does not appear local government is entitled to notice, comment, or attendance at this informal conference although it may be a local government's protest or condition that is at issue. Local government should be allowed to participate in the informal process if the local government's protest or condition is at issue.

3AAC 306.095, Fees, refund, and forfeiture.

Pursuant to AS 17.38.100 a municipality that has established a local regulatory authority is entitled to half the registration application fee filed with the state. However the regulation separates the application fee from the license fee itself. Municipalities are now tasked with addressing the regulation of marijuana establishments in some manner as the result of a statewide initiative and municipalities which have established a regulatory authority should receive half the licensure fee not just the much less significant application fee.

ADDITIONAL COMMENTS

Additionally, it would be helpful if any future revisions to released regulations are done in legislative format bracketing the deleted provisions and underlining additions so one does not have to hunt through the regulations to spot the revisions.

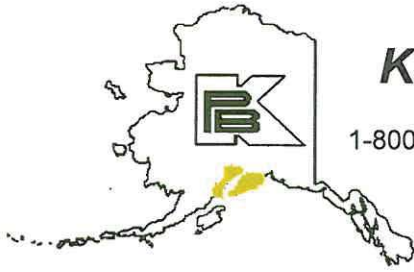
Your consideration of these comments is appreciated.

Sincerely,



Mike Navarre
Borough Mayor

cc: KPB Marijuana Task Force



KENAI PENINSULA BOROUGH

144 North Binkley St., Soldotna, Alaska 99669-7520
1-800-478-4441, Ext. 2150 • 907-714-2150 • Fax 907-714-2377
www.borough@kpb.us • mayor@kpb.us



MEMORANDUM

TO: Marijuana Control Board/Marijuana Regulations
FROM: Mike Navarre, Kenai Peninsula Borough Mayor *P.O. for M.N.*
DATE: July 17, 2015
SUBJECT: Questions on Draft Set 2

Please find the following questions regarding Set 2 of the marijuana regulations released on July 8, 2015. These questions were recommended to the administration by the Kenai Peninsula Borough Marijuana Task Force.

1) Proposed 3AAC306.020, Application for a new license

What is the purpose for the detailed information required of an applicant by proposed 3AAC306.020? Is this the same or similar criteria required of applicants for alcohol related licenses? If more detailed information is required for a marijuana license than an alcohol license what is the justification for the distinction?

2) Proposed 3AAC306.095, Fees, Refund and forfeiture.

The fees for some of the marijuana facility licenses are set at the \$5000.00 cap set forth in AS 17.38 and are significantly higher than alcohol related licenses and the fees are due annually rather than biannually which will require more frequent license reviews for marijuana related businesses by the state and municipalities.

Why are the fees set at the statutory cap? Why is renewal of a license on an annual basis, rather than a biannual basis as it is with alcohol related licenses? What are the anticipated costs associated with administering the licensing process? What is the justification for the annual, as opposed to biannual license, and the licensing fees being set at the statutory cap?

3) Proposed 3 AAC 306.200(a)(2)(A), Local Options

There is no reference to a marijuana brokerage license or facility in AS 17.38. As of yet it is not defined in the proposed regulations. The various types of marijuana business licenses are defined in AS 17.38. The cited authority for 3 AAC 306.200 is AS 17.38.090, AS 17.38.110, and AS 17.38.900, none of which authorize a marijuana brokerage license.

Proposed 3 AAC 306.200(a)(2) groups a brokerage facility in the same category as cultivation: "marijuana cultivation facility *or* marijuana brokerage facility" (emphasis added.) Does use of the word "or" mean one could have a license for cultivation or brokerage but not both? How is marijuana brokerage defined, and how is it authorized by AS 17.38?

4) Proposed 3 AAC 306.310(c)(3)(B)(C), Act prohibited at marijuana retail store

This paragraph states a marijuana retail store may not "for any reason" provide a marijuana product at a price below the marijuana retail stores acquisition cost or provide a consumable product other than marijuana for free or compensation.

This section appears to disallow the sale of bottled water, candy bars and similar items one might purchase in an alcohol retail store. Is the purpose of this regulation to curtail marketing of marijuana or is it to limit what is sold in a retail marijuana store? What is the justification for limiting the sale of items such as candy bars and bottled water in a retail marijuana store?

Alcohol retail stores have "loss leaders" that are sold below the price of purchase. Is it the intent of the regulations to prohibit "loss leaders" sales? If so what is the justification for this position?

5) AS 17.38 authorizes a registration process for marijuana facilities. 3 AAC 306.010 et seq. establishes a licensing process. What is the difference between registration and licensing? Why is licensing being implemented rather than the registration process authorized by AS 17.38?



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**MIKE NAVARRE
BOROUGH MAYOR**

June 19, 2015

VIA EMAIL: john.calder@alaska.gov

John Calder
Alcoholic Beverage Control Board
550 West Seventh Avenue, Suite 1600
Anchorage, AK 99501

RE: Comments on Proposed Regulations – 3 AAC 306.200-270 and .990

Dear Mr. Calder:

These comments are supplemental to the comments filed by the Kenai Peninsula Borough (KPB) dated June 18, 2015, and relate to whether borough local options are exercised on an areawide or nonareawide basis. AS 17.38.110 provides “a local government may prohibit the operation of marijuana cultivation facilities ... through the enactment of ordinance or by a voter initiative.” “Local government” is defined by AS 17.38.900 as “both home rule and general law municipalities, including boroughs and cities of all classes and unified municipalities.”

The KPB interprets this language to mean each individual “local government” has the authority to exercise the local option. When presented with a ballot proposition to exercise a local option the KPB considered it a nonareawide ballot proposition and would not have referred the question to the voters of the six cities within the KPB, each of which can exercise its own local option under the language of AS 17.10.110(a).

The local option vote regarding a marijuana facility must be distinguished from land use regulation. The statutory schemes set forth by AS 17.38 “Regulation of Marijuana” and AS 29.40 “Planning, Platting and Land Use Regulation” are different processes. The authorization for a vote regarding marijuana establishments is specific to prohibiting, not regulating, marijuana establishments. AS 17.38 is similar to other state laws which authorize municipalities to ban certain activities that are highly regulated by the state, such as, fireworks, alcohol establishments and gambling.¹ Similarly, AS 17.38 authorizes a local option election on the prohibition of

¹ AS 18.72.060 provides that a municipality may prohibit the sale, exposure for sale, use, or explosion of fireworks. AS 5.15.620 allows for local option elections on charitable gaming. AS 4.11.491 provides for local option elections to ban the sale, importation and possession of alcoholic beverages.

marijuana establishments. These statutes allow for total bans on potentially deleterious activities because of the danger they may present to the public health, safety, and welfare regardless of location or conditions that may be placed on the establishment to ameliorate the negative impacts of the activity. Alcohol, gaming and fireworks are subject to state-issued licenses. The registration provisions in AS 17.38 are more akin to licensing than to zoning.

Licensing is also to be distinguished since, unlike zoning laws which are primarily concerned with the uniformity of land use and stability of community growth, licensing regulations are generally concerned with proper operation or with the limitation or distribution or outright suppression of an operation; licensing laws typically regulate establishments based on the type of business they conduct while zoning laws regulate them based on their location.²

The authority for a popular vote regarding the prohibition of marijuana facilities within the borough's boundaries is also inconsistent with local land use regulation since initiatives on land use regulation questions have been judicially disapproved.³ Part of the rationale for this disapproval is that initiatives regarding land use regulation bypass the planning commission which is required to consider such regulations under the AS 29.40 statutory scheme. AS 17.38 does not require planning commission involvement to decide whether marijuana establishments should be prohibited in the borough. While boroughs could protect the public health, safety, and welfare through a land use or zoning ordinance regulating the location of marijuana establishments as anticipated by AS 17.38.110(b), the local options authorized by AS 17.38 should not be confused with local zoning regulations.

It may be through amendments to AS 17.38 authority could be developed for a cooperative delegation from cities to boroughs to conduct local options on an areawide basis. The issue of whether borough local options are areawide or nonareawide was not addressed by Set 1 of the proposed regulations. If there is to be any revision to the currently pending regulations addressing whether boroughs exercise local options on an areawide or nonareawide basis the KPB requests additional time to consider and comment on any such revisions. Your consideration of these comments is appreciated.

Sincerely,



Mike Navarre
Borough Mayor

cc: KPB Marijuana Task Force

² 83 Am. Jur. 2d Zoning and Planning § 1.

³ *Griswold v. City of Homer*, 186 P. 3d., 588 (Alaska 2008); *Carmony v. McKechnie*, 217 P. 3d., 818 (Alaska 2009).



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**MIKE NAVARRE
BOROUGH MAYOR**

June 18, 2015

VIA EMAIL: john.calder@alaska.gov

John Calder
Alcoholic Beverage Control Board
550 West Seventh Avenue, Suite 1600
Anchorage, AK 99501

RE: Comments on Proposed Regulations – 3 AAC 306.200-270 and .990

Dear Mr. Calder:

The first meeting of the Kenai Peninsula Borough (KPB) Marijuana Task Force (MTF) was held on June 15, 2015. A primary purpose of this meeting was to review Set 1 of the proposed regulations promulgated pursuant to AS 17.38.090. The MTF was established by KPB assembly resolution 2015-13 in part to make recommendations to the assembly and administration on the state's implementation of AS 17.38. Please find following the MTF's comments regarding the proposed regulations implementing AS 17.38.100 and 110.

A legal memorandum was presented to the MTF which expressed concerns that the regulations, in part, exceeded the authority granted by AS 17.38.090 et seq. and conflict with AS 29.26 governing municipal elections. This memorandum was approved by the MTF and is enclosed and incorporated by reference in this letter as part of the MTF's comments on the proposed regulations.

The MTF expressed concern that persons who have started and invested labor and capital in marijuana businesses would not have stability if local options adopted by the governing body or initiative required them to close their businesses. It was believed that allowing businesses to operate within a three year time-frame without threat of closure would provide for a more robust legal marijuana market and aid in the conversion of the marijuana trade from the black market to the legal market. It would further allow businesses to operate and test a newly established regulatory system. The MTF would support regulations that would allow a three year window of operation for marijuana businesses without threat of closure through a local option adopted by initiative or the governing body. Such regulations should be drafted to be consistent with AS 29.26.

EXHIBIT A

The MTF also supports a definition of “marijuana brokerage facility” to be consistent with AS 17.38.090 et seq.

The MTF recommends the following revision to proposed regulation 3 AAC 306.240(a):

3 AAC 306.240(a). If a majority of the voters vote to prohibit the importation for sale of marijuana and marijuana products under 3 AAC 306.200(a)(4) or (b)(3), or if the assembly or city council passes an ordinance to the same effect, a person, beginning on the first day of the month following certification of the results of the election, may not knowingly send, transport, or bring marijuana or marijuana products **for sale** into the municipality or established village.

This suggestion is made as personal use would still be a legal activity in a municipality that had prohibited the sale of marijuana.

The MTF recommends that 3 AAC 306.260(b) be deleted in its entirety. This recommendation is consistent with the legal analysis contained in the enclosed memorandum as a popular vote requiring marijuana establishments to be exclusively operated by municipalities goes beyond the authority of AS 17.38 and is not necessary in order to carry out the statutory intent of ballot measure no. 2. Further, there would be practical difficulties with a voter approved initiative mandating the municipality apply for a license.

Your consideration of these comments is appreciated.

Sincerely,



Mike Navarre
Borough Mayor

Enc.

cc: KPB Marijuana Task Force



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**MIKE NAVARRE
BOROUGH MAYOR**

MEMORANDUM

TO: KPB Marijuana Task Force

FROM: Holly B. Montague, Deputy Borough Attorney

DATE: June 15, 2015

SUBJECT: Proposed Local Option Regulations for Implementation of AS 17.38.100-110

Regulations implementing ballot measure 2 (AS chapter 17.38) promulgated by the Alcoholic Beverage Control Board (ABC Board) are pending and open for comment. The local option provisions of these regulations present a legal concern. Title 29 of the Alaska statutes governs second class boroughs. The borough must act consistently with the laws set forth in AS 29 unless AS 29 authorizes the Kenai Peninsula Borough (KPB) to adopt a different process. AS 29.26 governs elections and specifically includes provisions regarding local initiative and referendum.

One concern is that the pending regulations significantly raise the percentage of petition signatures required for a local option election from that which is required by AS 29.26.130. AS 29.36.130 requires 15 percent of the votes cast in the last regular election to meet petition signature requirements. The promulgated regulations at 3AAC 306.230 require a number of signatures at least equal to 35 percent of the number of votes cast in the last election. A regulation should not directly conflict with a statute, rather regulations should interpret and implement a statute.

Another concern is that 3 AAC 306.230 alters the petition requirements for an initiative required by the AS 29.26. Pursuant to AS 29.26.110 only an ordinance or resolution can be the subject of an initiative petition. 3 AAC 306.230 requires language set forth in the regulation regarding adopting, changing, or removing a local option, be placed on the ballot "rather than the language of an ordinance or resolution." Proposed 3 AAC 306.230(c)(2). However, the proposed regulations specifically refer to the assembly adopting an ordinance to implement, change, or remove a local option. If the assembly actions regarding local option must be in the form of an ordinance so must the voters. Under AS 29.26 there is nothing to be initiated or referred if it is not an ordinance or resolution. This conflict should be resolved in the proposed regulations.

3 AAC 306.230 further requires that the material that is required by AS 29.26.120 (a)(1) and (2) be eliminated. These paragraphs require that a petition for initiative or referendum contain a summary of the ordinance or resolution to be referred, and also require the petition

include the complete ordinance or resolution as submitted by the sponsors be included in the petition. 3 AAC 306.230 substitutes the proposition language set forth in 3 AAC 306.200(c), 210, and 220 for the AS 29.26.120(a)(1) and (2) requirements.¹ Arguably, the complete ordinance presented would be the question set forth in the promulgated regulations regarding adopting, changing, or removing a local option. Although once codified the prohibition would be a statement not a question. 3 AAC 306.200(d) requires that the ballot for an election on the options to prohibit one or more of the four license types set forth in 3 AAC 306.200(b)(2) include a brief explanation of the activity that each license type on the ballot may carry out. This essentially could be the ballot summary as required by AS 29.26. Striking the ballot summary provisions with regards to changing a local option would result in no explanation of the license type activity that may be subject to change as there is no requirement in the regulations that the language in 3 AAC 306.200(d) applies to changes or removals of local option. With regards to removing a local option the deletion of the ballot summary may result in the voters not being aware of when the removal would be effective which would typically be explained in a ballot summary. Also where prohibition on the sale of marijuana is approved by the voters the lack of summary would mean the effective date of the prohibition and boundaries of the prohibition contained in 3 AAC 306.250 would not be included in a ballot summary for the voters benefit.

3 AAC 306.230(d) may also conflict with AS 29.26.190 which addresses the timeframe for changing the effect of an initiative or referendum. The assembly may not change the effect of an initiative or referendum for a two-year period. The ban on changing to a less restrictive option or removing an option within a 36 month period may extend beyond the 24 month prohibition on changing the effect of an initiative or referendum election set forth in AS 29.26.190. 3 AAC 306.230(d) begins with "Notwithstanding any other provisions of law" which essentially grants permission to ignore other provisions of law. A regulation should not invite ignoring statutory requirements, whether those statutory requirements are the authority for the regulation or another statute that conflicts with the regulation.

The Alaska Supreme Court reviews an agency's regulation for whether it is "consistent with and reasonably necessary to implement the statutes authorizing [its] adoption." Toward this end the court considers: (1) whether [the agency] exceeded its statutory authority in promulgating the regulation; (2) whether the regulation is reasonable and not arbitrary; and (3) whether the regulation conflicts with other statutes or constitutional provisions.²

The third prong of this test is of particular concern. 3 AAC 306 is being promulgated pursuant to AS 17.38.100-110. The regulations contradict a separate statute, AS 29.26, that governs municipal initiative and referendum elections. Regulations are meant to implement, interpret, or make more specific the statute which provides the authority for the regulations, not undermine or conflict with other statutes. It is suggested that comments to the ABC board be

¹ The 3 AAC 306.200(c) language provides "Shall (name of municipality or village) adopt a local option to prohibit (local option under (a) or (b) of this section)? (yes or no)."

The 3 AAC 306.210 language provides "Shall (name of municipality or village) change the local option currently in effect, that prohibits (current local option), and adopt in its place a local option to prohibit (Proposed local option)? (yes or no)."

The 3 AAC 306.220 language provides "Shall (name of municipality or village) remove the local option currently in effect, that prohibits (current local option), so that no local option continues in effect? (yes or no)."

² *Manning v. State, Dept. of Fish & Game*, 2015 WL 2328727, Alaska, May 15, 2015 (No. S-15121).

made regarding these conflicts so that the Board may make an effort to harmonize the proposed regulations with AS 29.26.

3 AAC 306.260 also raises some legal and practical concerns. The provision allows for local voter approval to prohibit the sale of marijuana, marijuana products, or operation of marijuana establishments except by the municipality. Even though voters may approve exclusively borough operated facilities how would the voters force the assembly to carry out this edict. At a minimum this is a practical concern. Without more in-depth analysis it is not clear whether an initiative requiring a borough to be the exclusive operator of marijuana businesses would be lawful. However, it appears that 3 AAC 306.260 goes beyond implementing AS 38.100 and 110 as there is no mention of municipal operated provisions in these statutes. Therefore, this regulation may violate the first prong of the above-stated test for whether a regulation is consistent with and reasonably necessary to implement the authorizing statute as it appears to exceed the authority of the promulgating statute. Further, the provision allowing voter mandate that marijuana establishments be borough operated does not appear to be necessary in order to carry out the statutory intent of ballot measure no. 2.

Recommendation

The conflict between the petition requirements for a local option initiative between AS 29.26 and 3 AAC 306 should be resolved in favor of abiding by AS 29.26, or language should be redrafted to harmonize the proposed regulations with AS 29.26. It is further recommended that the ABC Board be advised that voter approval of municipal marijuana establishments may go beyond the statutory authority granted for the regulations and may present implementation challenges for municipalities.