

November 18, 2020

VIA EMAIL: Ed.Sniffen@alaska.gov

Clyde "Ed" Sniffen, Jr.
Acting Attorney General
State of Alaska
Department of Law
1031 West 4th Avenue, Suite 200
Anchorage, Alaska 99501

Dear Mr. Sniffen:

The undersigned are attorneys for various second-class boroughs in the state. We are aware of your comments to the media that municipalities, including second class boroughs, have powers to enact mask mandates in response to a pandemic. Earlier this summer, we explained to various members of your department why this is not legally allowable under Alaska law. We have not seen any legal analysis from your department on this issue and are again providing ours for your consideration.

Article X of the Alaska Constitution establishes the framework for local government in Alaska. Article X, Section 1 makes clear that the purpose of Article X is to provide for maximum local self-government; however, Section 3 provides that "The legislature shall classify boroughs and prescribe their powers and functions."¹ In fulfilling this duty, the Alaska Legislature has provided for some severely limited forms of local government.

Second class borough powers are enumerated by statute.² AS 29.04.020 provides that a general law municipality "has legislative powers conferred by law." AS 29 does not confer upon second class boroughs all other powers not otherwise prohibited by law.³ The powers we do have are listed in AS 29 (as well as in a few other statutes); we also exercise those powers approved by the voters in our jurisdictions. Not all of our voters have approved such broad powers for our communities such as you are suggesting.⁴

Understanding the powers second class boroughs do have is necessary in order to analyze the effect of a local disaster declaration. AS 26.23.140 provides that the effect of a local disaster emergency is to activate the response and recovery aspects of any and all applicable local or interjurisdictional disaster emergency plans, and to authorize the furnishing of aid and assistance under those plans. Please note however that AS 26.23.060, which provides for local and interjurisdictional disaster services, specifically

¹ Alaska Const. art. X, § 3

² AS 29.35.210, AS 29.35.300.

³ A home rule borough or city may exercise all legislative powers not prohibited by law or by charter. Alaska Const. art. X, § 11.

⁴ This includes the Fairbanks North Star Borough, Kenai Peninsula Borough, Matanuska-Susitna Borough, Ketchikan Gateway Borough, and Aleutians East Borough.

provides in paragraph (h) that it does not empower a political subdivision to perform responsibilities that it is not otherwise empowered to perform. Importantly, the lack of a power means that second-class boroughs cannot legally provide the facility, service or regulations related to that power, even in a disaster emergency.

Some examples of actions a second-class borough does have the authority to do during an emergency include:

- Stand up emergency shelters directly related to the emergency.⁵
- Activate its Emergency Operations Center to assist with calls and provide a central place for requests and information.
- Maintain a website with updated information regarding closures and other pertinent information for residents.
- Coordinate with other private and public agencies engaged in disaster response activities.
- Comply with orders of the State requesting resources to assist with the emergency.

Absent adoption of an appropriate power, some examples of actions a second-class borough does not have the authority to do on an areawide, nonareawide, or service area basis include:

- Order citizens to isolate or quarantine.
- Close private businesses or otherwise place restrictions on their operations.
- Halt evictions or similar proceedings.
- Order utilities to not shut off service.
- Provide temporary housing for homeless populations.
- Provide food or other assistance to persons who are out of work.
- Require citizens to shelter in place, wear masks or similar health mandates.

To be clear, subject to individual municipal codes, second class boroughs may generally institute measures necessary to respond to the current declared disaster related to COVID-19 provided such actions are related to a power granted to the borough. It must ensure that such measures are not prohibited by state law, do not impermissibly conflict with state law, are not unconstitutional, or are not otherwise preempted by state action. Second class boroughs do not have "police powers" or general health and social services powers and cannot implement measures for the protection of the health, safety, and welfare of its citizens as your office suggests.

/s/ Jill S. Dolan
Jill S. Dolan, Borough Attorney
Fairbanks North Star Borough

/s/ Colette Thompson
Colette Thompson
Kenai Peninsula Borough

⁵ If a borough does not have health and social service powers, it is not able to set up homeless shelters or places to feed people who are out of work.

/s/ Nicholas Spiropoulos
Nicholas Spiropoulos, Borough Attorney
Matanuska-Susitna Borough

/s/ Glenn Brown
Glenn Brown, Borough Attorney
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