



# Borough Code Revision Project

RFP22-003

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**HOLMES WEDDLE & BARCOTT**  
A PROFESSIONAL CORPORATION

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# **KPB Report Executive Summary**

## **Introduction**

Like many public institutions, the Kenai Peninsula Borough (“KPB”) faced an array of challenges presented by the COVID-19 pandemic. Those challenges revealed strengths and demonstrated that when pressed, the people of the Kenai Peninsula are resourceful and committed to their neighbors. However, they also revealed areas where KPB can re-examine its processes and legal code to become better prepared for the next major disaster.

Many of the challenges faced by KPB during the pandemic resulted from the unusual “top-down” implementation of disaster response mechanisms. Instead of developing from a local (and localized) disaster such as fire or flood, the pandemic was immediately national in scope, spreading quickly and unpredictably across the U.S. The typical process of local government seeking the assistance of “upstream” entities with more resources and authority was turned on its head. Instead, national and state governments declared emergencies first, leaving local governments in the awkward position of responding to an emergency which, in many cases, had not yet reached the local level. As the pandemic progressed, boroughs were pressed by the state to provide services and perform activities that were outside their statutory powers. This resulted in a blurring of the boundaries between state and borough powers.

KPB and other boroughs in the state are now re-examining the scope of their own powers, the limit of state powers exercised during the pandemic and what the last two years has to offer in terms of lessons for local government. Other second class boroughs participated with KPB in sending a letter to the Alaska Attorney General in November 2020 addressing the breadth of state and borough powers and their interaction during a disaster emergency. The response received is the genesis of the analysis, proposed ordinances and recommendations included in this report. These recommendations create a platform for KPB to lead in the area of municipal emergency management.

The citizens of KPB count on the borough to plan well and provide the tools for its citizens to protect themselves against a variety of threats. The COVID-19 pandemic presented a unique opportunity to stress test existing systems. Thanks to the ingenuity and professionalism of the borough staff, KPB’s systems largely held up. But in an era where even disasters are subject to politicization, those vested with representative power in local government owe it to their constituents to enact and refine laws that empower its people to protect life and limb, and to press against the overreach of the state, however well intentioned. With these tools in hand, KPB is far better prepared to do just that.

## **Background**

All emergency response tools and powers are governed by statute and subject to legislative oversight. The federal government, as well as all state and local governments, have codes on their books defining their authority, including in an emergency. Just as in other organizations, emergency response policies are adopted to direct employees and the public to uniform methods and practices that facilitate efficiency and safety. Government entities (as well as private companies) also have emergency operations plans (each an “EOP”) which function as on-the-ground guides to carrying out an emergency response. EOPs implement the government’s statutory emergency powers. They include individualized responsibilities and roles, locations and maps, and policies and priorities for local government employees

carrying out the response. EOPs require regular updates to incorporate advances in emergency response techniques and technology, sensitivity to public priorities, and experience gleaned from recent disaster responses. KPB's Emergency Operations Plan has been in place for well over a decade and was most recently updated on July 1, 2020. As with most EOPs, it is formulated in compliance with guidance in the National Incident Management System. Federal law requires local jurisdictions to have such EOPs in place in order to receive certain federal funding, training, emergency response resources, and more. The relative uniformity of local, state and federal EOPs facilitates cooperation at both the operational and administrative levels.

To be more than simply a how-to emergency response guide, however, an EOP must be well supported by state and local code and statutory authority. The depth and breadth of a municipality's ability to meet the needs of its citizens may be as broad and comprehensive as the plans that have been developed, but if the code does not support the strategy and resources, the municipality can be exposed to a variety of risks. Emergency response involves inherently greater risks of death, disability, unequal treatment, impingement on property rights, and more. In order to provide emergency response services without exposing itself and its employees to excessive risk, the borough must work within its authority. The rapidly unfolding nature of an emergency may leave little time for ponderous government processes, but principles of fairness and due process are not suspended. Legislative approval must be obtained in advance to authorize emergency response actions that are yet to be determined. Assembly delegations of power to the executive (including sub-functions such as emergency management) must be limited in scope and/or time to ensure that the executive is not usurping legislative authority but broad enough to allow necessary emergency action.

EOPs provide structure and flexibility in rolling out disaster responses both when a declaration starts at a statewide level, and when it begins at a local level. Most plans are designed to handle more regularly occurring incidents like forest fires, oil spills, earthquakes, and localized flooding. All of these emergencies generally fall into a bottom-up emergency response, where a local government declares a disaster emergency, and turns to the next government entity up the food chain for assistance. This is particularly visible to local communities in the context of forest fires, where a city or borough will declare a disaster because of a fire outbreak and facilitate the presence of state emergency response teams or federal incident management teams. The borough may contribute, for example by coordinating evacuation and re-entry, but it relies upon state and federal firefighting assistance.

The COVID-19 pandemic presented a whole host of new issues for local governments because the typical fire- or flood- response tools simply weren't applicable or up to the task. Not only was the risk itself invisible, but the logistical challenges of implementing the various attempts to minimize spread of the disease while providing everyday essential services was outside the contemplated scope of codes and EOPs already in place.

Particularly unprecedented was the fact that instead of a local, bottom-up declaration of emergency, the COVID-19 declaration started from the federal government and worked its way down. Some local jurisdictions in Alaska had not even had a COVID-19 case when disaster was declared at the national level. The fact that the disaster declaration had occurred on the federal level, and that state governments had been invited by the federal government to declare as well, meant that responsibilities for response began to be handed down to the local level instead of requested up. The fact of the federal

declaration and the scope of the federal declaration were unprecedented. The federal government offered resources to state governments that had declared disaster emergencies and the states, in turn, attempted to deploy those and other resources on a state-wide scale. By declaring a disaster emergency, Alaska's state government activated local EOPs in jurisdictions where no disaster declaration had yet been made.

Even after local declarations were in place, local governments were in the uncomfortable position of being limited by their own EOPs and codes, but being assigned tasks outside those boundaries by the state. In the Kenai Peninsula Borough, which does not have law enforcement powers or health and safety authority, state officials required the local emergency medical services employees to become the de facto vaccine distributors, making fire stations and their crews responsible for vaccine storage, distribution, and recordkeeping. This not only introduced a huge burden to emergency responders who were still responsible for responding to car accidents, overdoses, and other emergency situations, it introduced a sizeable liability risk to the Borough, whose employees were suddenly responsible for maintaining temperature-sensitive drugs and carrying out graduated distribution schemes.

Additionally, as the pandemic progressed, many aspects of the response became politically charged. Vaccination, mask mandates, and shutdowns were not only logistical challenges, they also became points of controversy requiring enforcement and response outside the borough's powers.

In November 2020, as the responsibilities and tasks handed downstream to local municipalities like KPB became increasingly broad and unwieldy, several municipal attorneys wrote a letter to the Alaska attorney general, Ed Sniffen. The municipal attorneys explained the authority available to the boroughs and their concern that the state was instructing the boroughs to do things outside their legal powers, even in an emergency. In a letter dated December 4, 2020, the attorney general's office responded. Under its interpretation, because the Alaska Disaster Act makes local governments responsible for "disaster preparedness and coordination of response" under AS 26.23.060(b), additional powers are liberally conferred to carry out any actions necessary to respond to a disaster emergency. The attorney general emphasized the Alaska Constitution's rule providing that local government powers are to be liberally construed but ignored more restrictive language in the statute. Essentially, the attorney general urged the second class boroughs to stretch responsibility for preparedness and response coordination into a license to take any action the borough deemed necessary to respond to the pandemic or any other disaster-emergency.

The attorney general's broad interpretation of Alaska law ignored significant risk to the boroughs, which could be responsible for damages if Alaska courts found them to be working outside of their statutory authority. It also failed to consider the ancillary question of risk and requirements in the event that the borough's view of necessary actions differed from the State's. As the emergency conditions dragged on, confusion regarding the consequences of the top-down, state-borough emergency response persisted. With calls for termination of state and local disaster declarations rising, the borough was forced to consider the legal consequences of one entity, like the state, extending a disaster declaration past the end of the borough's declaration. Even as the fog of the early pandemic cleared, it became apparent to the borough's Office of Emergency Management that the borough would need increased clarity for the next big disaster.

## The Project

KPB elected in its initial formation process to keep its government small and legislate only as necessary. One result is that KPB emergency management-related code sections are relatively few in number and rely heavily on references to Alaska statutes, leaving operational and liability holes where KPB powers and Alaska emergency statutes meet. Municipalities like Kenai Peninsula Borough have unique perspectives on what their citizens need and want, and are closest to real issues as they arise. KPB now has the opportunity to exploit its COVID-19 lessons, fine tune its disaster response mechanisms and bolster the borough's authority during a disaster emergency.

Given the broad interpretation of the boroughs' disaster powers propounded in the Attorney General's letter, KPB OEM wanted outside eyes on the problems. While OEM had been able to strategize in the moment, it was important for the borough to investigate the questions articulated in the Sniffen letter, and to develop some ideas and strategies for how to fix the holes that presented themselves. To do this, KPB OEM requested bids for a review and analysis of emergency-related law and EOPs at the state and local level. Following the bid process, the KPB hired Holmes Weddle & Barcott, PC ("HWB"), whose team is uniquely equipped with legal and local emergency response perspectives, to perform the analysis.

To understand and address the borough's concerns, HWB reviewed Alaska, KPB, other municipalities and states' laws, federal law and emergency management guidance, and state and local EOPs, to gain a comprehensive understanding of the legal framework for emergency response in which Alaska and the borough operate. HWB also reviewed contract addendums and other policy-related documents the borough had engineered to address the problems and weaknesses it perceived in the borough's emergency toolkit.

After reviewing and analyzing the law and the borough's management of the pandemic, HWB developed this analysis of the state of emergency response law in Alaska and the borough. The team developed a toolbox to improve the borough's position in the event of a top-down or bottom-up disaster, including proposed ordinances for consideration by the Assembly, a model declaration of disaster to ensure legality and autonomy in KPB's disaster response, and recommended procedures for accepting top-down directives and funding from the state.

Passing the proposed ordinances in the toolkit attached as Exhibit E to this report, would lead to increased clarity for the borough, its employees and citizens, and provide a legal roadmap for KPB's emergency response. It would also ensure that those who come after the KPB policy makers and staff that navigated the COVID-19 disaster over the past two years are better equipped to address future disasters.

Full use of this toolkit will also make clearer, more defined boundaries between the role of KPB and its larger, more powerful counterpart, the state. Before bringing on HWB, KPB OEM perceived that the state was forcing the borough into performing tasks and taking on responsibilities beyond the borough's authority. This put the borough at risk of litigation from individuals and entities affected by the pandemic and raised the danger of federal or other penalties for mismanagement of funds or programs, particularly in light of the valuable resources and health and safety issues involved. With this toolkit in the closet, the Borough may plan for the next disaster knowing exactly what it is able and not able to do, and how to clearly articulate and defend its role in handling various aspects of an emergency response.

With the benefit of experience and hindsight, combined with additional expertise and perspective, KPB can put itself in a far stronger position not only to defend itself against litigious individuals or a well-intentioned but overweening state, but to preserve its authority and resources to do what it does best – keep things safe and functional for the citizens of the borough, even when things are not going right.



# Kenai Peninsula Borough Legal Framework for Emergency Response

Borough Code Revision Project RFP22-003

## Review and Recommendations

### I. Emergency Response Law: Alaska Statutes

The Alaska State Constitution articulates baseline standards and operating procedures for how the state runs under normal circumstances and what authorities are available in times of disaster. The constitution also grants subsidiary governments their powers, and outlines how independent subsidiary governments like home rule cities obtain theirs.<sup>1</sup> The constitution states clearly that maintaining the public health is a state function.<sup>2</sup> The governor is the prime authority of the executive branch when it comes to administering disaster related authorities within the state; the constitution states that the governor is also responsible for ‘faithful execution of the laws.’

The State of Alaska’s authority regarding emergency management for most types of disasters is codified at Art. 2 Ch. Tit. 26 Ch. 23 in the Alaska Disaster Act. Management of oil and hazardous substance spills are covered by similarly-structured statutes at Art. 2 Ch. Tit. 26 Ch. 46.

Under AS 26.23.020(c) the Governor of Alaska may declare a condition of disaster emergency upon a finding “that a disaster has occurred or that a disaster is imminent or threatened.” After the governor declares a disaster emergency, the legislature must extend the declaration by a concurrent resolution within 30 days, or the declaration will end as a matter of law.<sup>3</sup>

The governor’s declaration allows the state to employ special powers during a declared disaster emergency and also adds flexibility in its ability to access to its existing powers.<sup>4</sup> Among other things, the governor may suspend regulations, shuffle personnel and allocate specialized funds.<sup>5</sup> A variety of additional powers come with a state disaster declaration, such as the designation of the governor as “commander in chief of the organized and unorganized militia and of all other forces available for emergency duty.”<sup>6</sup> Additionally, the governor’s declaration of a disaster emergency automatically activates the state’s emergency plans, as well as local disaster emergency plans like those adopted by the Kenai Peninsula Borough.<sup>7</sup> At the state level, this may implicate the broad disaster emergency plans administered by the Alaska Division of Homeland Security and Emergency Management and/or specific plans, such as the public health emergency response operations program administered by the Alaska

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<sup>1</sup> See AK Const. Art X.

<sup>2</sup> AK Const. Art VII, Sec. 4 “The legislature shall provide for the promotion and protection of public health.”

<sup>3</sup> AS 26.23.020(c).

<sup>4</sup> AS 26.23.020.

<sup>5</sup> AS 26.23.020(g)(1), (g)(3), (h), (i).

<sup>6</sup> AS 26.23.020(e).

<sup>7</sup> AS 26.23.020(e).

Division of Public Health.<sup>8</sup> Activation allows the State to have access to its own emergency resources, from stockpiled emergency supplies to funding.<sup>9</sup>

During a fiscal year the governor may expend up to \$500,000.00 in state funds for each disaster. Funds become available upon the governor's determination that a situation poses a direct and imminent threat of sufficient magnitude that the risk justifies state action.<sup>10</sup> Once a disaster has been declared, the limit increases to \$1,000,000.00. Even higher limits are available on a statutory basis for certain types of disasters: if the disaster is a fire, there is no limit to the governor's spending authority to save lives, protect property, and protect public health and safety.<sup>11</sup> This broad power within the Alaska Disaster Act is tempered by the statutory requirement to convene the legislature and provide a financing plan for its approval within five days of declaring the disaster emergency.<sup>12</sup> Because of the need for legislative approval, the governor must make a case for the expenditures, typically in the reasoning attached to the declaration of disaster emergency and in the text of the financing plan sent to the legislature.

In addition to its own stockpiles of dedicated supplies, personnel and other resources, the state's disaster declaration and accompanying activation of local emergency plans gives it access to all reasonably available resources within downstream municipalities.<sup>13</sup> The state has authority to access local resources whether or not there is a local declaration of disaster emergency. This authority can effectively limit the individual borough's ability to decide not to declare a local disaster emergency or elect to ignore the State's response measures completely. The implication is that for a local jurisdiction to have a say in the scope and usage of resources borrowed by the state, a local government has little choice but to declare a local disaster emergency and exercise its disaster authority once the state has declared.<sup>14</sup>

Although the Act grants far-reaching powers to the state during a disaster emergency, it also creates significant obligations to provide assistance to local governments to prepare for, respond to and recover from a disaster emergency.<sup>15</sup> The state is tasked with helping local governments to develop effective emergency management plans, provide training to responders, identify local resources and expertise, and stockpile supplies.<sup>16</sup> A declaration of local disaster emergency is typically a condition for submitting a request for a declaration from the governor and utilization of state resources, including money, and other assistance. The state maintains a disaster relief fund which may be used to assist local governments in the form of grants and loans.<sup>17</sup> The governor may exercise the discretion to use a limited amount of state

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<sup>8</sup> See, e.g., <http://ak-prepared.com/Plans/Documents/2018-SOA-EOP.pdf> and <https://dhss.alaska.gov/dph/Emergency/Pages/prepared/default.aspx>

<sup>9</sup> AS 26.23.040

<sup>10</sup> AS 26.23.020(h).

<sup>11</sup> AS 26.23.020(j).

<sup>12</sup> AS 26.23.020(k).

<sup>13</sup> AS 26.23.020(g)(2).

<sup>14</sup> For a list of specific grants of power to the state to use local resources, see Exhibit B.

<sup>15</sup> For a list of the statutory obligations of the state to local governments in the emergency context, see Exhibit B.

<sup>16</sup> See generally, AS 26.23.040.

<sup>17</sup> AS 26.23.300.

money for an immediate response, and to request legislative approval required for larger, ongoing expenditures or accessing special funds such as from the oil and hazardous substance response relief account.<sup>18</sup> The state's public assistance programs are purposely designed to mirror similar FEMA programs for a seamless transition in case the state requests federal assistance and a federal disaster is later declared. Municipalities may apply to the state for assistance in connection with a variety of scenarios, from firefighting to hazardous spill clean up to natural disasters.<sup>19</sup>

It is the state's responsibility to coordinate federal aid from FEMA and other agencies, and to apply for federal funding at the request of the municipality or wherever other available assistance is appropriate.<sup>20</sup> When a president has declared a disaster at the request of the governor, the governor may also apply for a federal loan on behalf of a political subdivision that will suffer a substantial loss of tax or other revenue and demonstrates need of financial assistance to perform its governmental functions.<sup>21</sup> During the recovery phase, the governor may also recommend, after review, the cancellation of all or part of repayment of that loan in certain circumstances. The governor may directly seek and receive a grant to provide financial support to individuals and families affected by disasters.<sup>22</sup> This removes the burden of local governments seeking additional funding after a disaster, and lets them focus on actually recovering from a disaster.

## **II. Emergency Response Law: Second Class Boroughs and KPB Code**

Local governments within a state may either receive their authority through adoption of a charter (home rule jurisdictions) or through a grant of the state. Second-class boroughs like the Kenai Peninsula Borough receive their powers through a statutory grant from the state.<sup>23</sup> The statute grants some powers outright, but a second class borough is not required to exercise all of the powers that are available to it. In addition, Alaska statute allows a second class borough to obtain additional powers by ordinance or by a vote of local populations, or expand the geographical scope of certain powers through an affirming vote of the cities within the borough.<sup>24</sup> A second class borough may adopt any power not prohibited by statute, as long as the power is approved by the appropriate method.<sup>25</sup> This places authority for the size and powers of the borough government squarely with the voters, with local legislative bodies such as assemblies or councils implementing adopted powers via ordinances. Without voter approval, expansion of the borough's powers beyond its basic statutory grants cannot happen. The logistics of legislative action or planning an election alone make it obvious that an expansion of borough powers during a disaster emergency is extremely unlikely.

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<sup>18</sup> AS 26.23.020, AS 46.08.010.

<sup>19</sup> For a list of statutes containing state emergency related obligations to local governments, see Exhibit B.

<sup>20</sup> AS 26.23.010(6), AS 26.23.020(e)(9).

<sup>21</sup> AS 26.23.080.

<sup>22</sup> AS 26.23.090.

<sup>23</sup> AK Const. Art. 10, Sec. 3.

<sup>24</sup> AS 29.35.300(b).

<sup>25</sup> AS 29.35.210(c) and (d); AS 29.35.300.

Following the Sniffen letter’s interpretation of the Alaska Disaster Act as conferring broad emergency-related powers under AS 26.23.060(b) would be a dangerous road for the borough. An attorney general’s opinion may be deemed erroneous by the courts,<sup>26</sup> a real possibility in this instance, since AS 26.23.060(h) provides that the powers granted by AS 26.23.060 do “not empower a political subdivision to perform responsibilities that it is not otherwise empowered to perform.” Alaska case law provides a single reference, and no analysis, with regard to S 26.23.060.<sup>27</sup> Even if the statute was construed to provide KPB with the power to respond to a disaster emergency, Alaska case law requires that any implied powers claimed by KPB as stemming from the statute be strictly construed against KPB.<sup>28</sup> Powers outside of those expressly granted to the borough pursuant to Alaska statute are necessarily implied powers that require such strict construction. In the absence of a clear and express grant of authority to take actions outside of its usual powers in case of a disaster emergency, KPB cannot safely exercise the broad emergency powers urged by the Sniffen letter.

Thus, the extent of the response authority available to a municipality is the sum total of the legal authority vested in the municipality at the time of the disaster emergency and the resources and tools made available pursuant to that authority. Whether or not a municipality gains powers following an emergency declaration or simply gains the flexibility to use its powers with fewer checks and balances depends on the nature of the municipality itself. Although a second-class borough does not gain a statutory list of powers when a disaster has been declared, it gains flexibility in using its extant powers. For instance, it may suspend notice and comment periods in order to quickly implement ordinances in the face of a disaster emergency.<sup>29</sup> A list of the Alaska statutes expressly conferring specific emergency-related powers available to a second-class borough is contained in Exhibit A.

As previously discussed, Alaska statute makes each political subdivision responsible for its own disaster preparedness and coordination, either by itself or in conjunction with the Alaska Division of Homeland Security and Emergency Management.<sup>30</sup> Interjurisdictional service areas may be formed for several different purposes, including for the provision of emergency services not otherwise available and the formulation of plans ensuring the appropriate distribution of emergency response responsibilities.<sup>31</sup> KPB has agreements for fire and other emergency services with a number of service areas established under the statute and KPB Code.<sup>32</sup> Even local governments which are not part of an interjurisdictional agreement are encouraged to enter into mutual aid agreements with nearby authorities to ensure adequate planning and response.<sup>33</sup> KPB is party to a number of mutual aid agreements, generally for the provision

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<sup>26</sup> See, e.g., *Girves v. Kenai Peninsula Borough*, 536 P.2d 1221, 1225 (Alaska 1975).

<sup>27</sup> *City of Seward v. Afognak Logging*, 31 P.3d 780, 785 (Alaska 2001).

<sup>28</sup> *Girves v. Kenai Peninsula Borough*, 536 P.2d 1221, 1224 (Alaska 1975).

<sup>29</sup> AS 29.25.030.

<sup>30</sup> AS 26.23.060(b).

<sup>31</sup> AS 26.23.040.

<sup>32</sup> KPB Ch. 16.

<sup>33</sup> AS 26.23.180.

of fire, including wildfire, and emergency response services. These mutual aid agreements can be between KPB departments, service areas, local cities and state agencies.<sup>34</sup>

KPB also has a six cities within its boundaries which may choose to provide their own services. Mutual aid agreements between these cities and the borough streamline aid for interdependent areas. However, nothing in the Act exempts mutual aid agreements from the rules imposed by law on contracting by the local government. Since the borough's mutual aid agreements are typically limited in scope, it may be necessary to amend them at short notice to respond to an unanticipated type of disaster. An amendment to an existing agreement during a disaster is authorized under existing KPB disaster authorities.

While the Act provides a fairly comprehensive picture of the process and powers flowing before and after a state declaration of disaster emergency, the KPB code contains only a few references to its emergency response powers.<sup>35</sup> The existing code contains little guidance as to the powers that the borough may wield and the scope and process of emergency management functions. This means that KPB officials and citizens must have a strong knowledge of the Act and the scope of KPB's powers at the time that disaster strikes and apply that knowledge under stress. As an example, the mayor must remember to provide a legal underpinning for the disaster declaration, articulate a logic that will gain the support of the assembly, make the right findings to properly trigger emergency procurement and similar provisions, and consider whether the state will exercise its authority to reach in to use borough resources.<sup>36</sup>

Strategic updates to the KPB code can provide a basic roadmap for handling of a disaster emergency and ensure that the borough's powers are clearly articulate and legally supported. This would both improve the borough's ability to manage the many facets of its disaster response and reduce uncertainty or liability for actions taken under time pressure and under extreme circumstances.

### **III. Ramifications for the Borough's Emergency Response:**

Alaska and KPB law has proven effective in ensuring preparedness and advance planning. However, law relating to local action in the response phase of an emergency must cover both the traditional "bottom up" scenario, as well as the newer, "top down" scenario. Adjustments to KPB's existing code and practices will help to ensure that it has increased support and decreased liability with regard to emergency response.

#### **A. Bottom Up Scenario**

The traditional disaster response follows a "bottom-up" scenario. Because disasters tend to be local, local responders and local governments are usually the first to get involved. If response to the

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<sup>34</sup> AS 26.23.180.

<sup>35</sup> For a list of all KPB code provisions relating to disaster emergencies, see Exhibit B.

<sup>36</sup> A template for the KPB mayor's declaration of disaster emergency is attached as Exhibit D.

disaster requires more than the day-to-day resources of the municipality, then it may request aid from a nearby municipality under a mutual aid agreement. In order to access stockpiled supplies or coordinate the actions of multiple agencies, the local government may declare a disaster emergency. This activates its emergency response plan, which may be scaled to meet the scope of the disaster emergency. In addition, the local disaster declaration allows the local chief executive to request help from the state in the form of resources and funds. If the scope of the disaster emergency is large, the state may in turn request assistance from the federal government.

In the bottom-up scenario, the local government maintains control of the situation, subject to its existing authorities, as it begins. It can ensure that the initial disaster declaration makes clear the character and scope of the disaster, that the proper response mechanisms and resources are requested and that its own resources are deployed in a way that responds to the disaster while maintaining the other necessary functions of the borough. A clear, comprehensive and authoritative declaration of disaster underpins all of this.

Since the nature of a disaster is extreme, the local government must consider how it will function in the face of hardship. If its usual decision-makers – the mayor, assembly members, department heads – are incapacitated or otherwise unavailable to act, KPB must still be able to issue an authoritative disaster declaration, approve an extension of the declaration, implement its emergency response plan and request aid. If communications are disrupted on a broad scale, it must still have the ability to procure, legislate and support the emergency response. To ensure these functions continue, the KPB code should provide for backup to the mayor’s emergency response functions. In addition, it should ensure that streamlined assembly processes are available for ratification of the mayor’s actions and any necessary emergency legislation. Several ordinances are proposed to ensure continuity of these functions.<sup>37</sup>

## **B. Top Down scenario**

One of the main lessons of the COVID-19 pandemic was the real possibility of a “top-down” disaster emergency. Although the SARS flu epidemic had ensured that a page of most emergency response plans was devoted to pandemic, the plans were vague and provided little concrete guidance on how a top-down response to an event that can at least somewhat be anticipated by larger government entities with some time to prepare would work. Statutes were drafted and adopted with a traditional bottom-up scenario in mind. Now, for the first time, local governments have the opportunity to evaluate the real world interplay of state and local powers when the disaster begins on the state (or even federal) level.

In the top-down scenario, the state or even the federal government declares a disaster emergency based on a threatened disaster. The disaster may not have reached most, or even any, of the state at the time of the declaration. Activating state and local disaster plans is intended to allow mechanisms to be

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<sup>37</sup> A crosswalk of proposed ordinances, relevant Alaska statute and relevant KPB code is attached as Exhibit E.

put in place as the disaster approaches. The state may want to beef up its own resources and encourage local governments to do the same. Declaring a disaster emergency preemptively also gives state governments the opportunity to receive and distribute federal response funds so that there are resources readily available to local authorities to contract with local providers and procure goods ahead of the need. It may also want to assess the resources of the local governments that can be used in the state's efforts. Because the state has the ability to use all available resources of the local governments, it is important to identify on the local level which resources can be contributed without gutting the borough's ability to carry out its obligations every day to its constituents.

While in terms of mobilizing resources, a top-down declaration can be speedy and efficient, it poses unique problems for local governments "downstream" of the declaring government. First, smaller municipalities may not have the statutory authority to receive or distribute resources in the manner the state expects them to. This puts the local government in the untenable position of overreaching its own authority on behalf of another government without clarity as to what level of protection it has against liability in the event that something goes wrong. The COVID-19 pandemic and ensuing response was one such top-down response where the borough was directed to take responsibility for tasks and resources outside its normal powers, and which could put the borough at serious risk of incurring liability for overstepping its authority.

Downstream governments have several options to minimize their exposure. The surest way for a local government like a borough to protect itself against liability is to only conduct response actions that fit within the statutory authority the borough already has. Even if it is at the behest of the state, staying within the boundaries of its inherent power would mean the borough is protected by its own limits on discretionary authority, whether it is acting on its own initiative or at the at the direction of the state.

Alternatively, the borough could take on response tasks from the state under agency authority. If the borough is simply taking on tasks and resources "in the shoes" of the state, with the state's instruction and by the state's authority, then the risk of something going wrong will also be attributable to the state, at least partially insulating the borough from the risks associated with carrying out its part of the response. Agency is particularly important where the borough does not have the power to carry out its assigned task. In that case, it can only take action as an agent of the state, and where possible, should obtain an express grant of authority.<sup>38</sup>

Another manner in which a borough might protect itself from the risks that come with being the "tip of the spear" in a response is to include explicit language in agreements between the borough and the state allocating liability in a way that suits both parties and minimizes risk to the borough. While the state may not agree to an outright acceptance of all liability, articulating the boundaries the borough expects to operate within and obtaining acknowledgment from an agent of the state can provide great assurance to the borough's risk managers that they will not be unduly or unknowingly exposed to an overwhelming amount of risk and potential legal liability.

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<sup>38</sup> See additional details regarding the extent of local government liability in Exhibit C.

Because the state has access to “all available” borough resources in the context of a declared disaster emergency, the borough might also protect itself by maintaining records and articulating the exact extent of the resources the borough has available. If resources are already allocated for necessary operations of the borough, they may not be deemed “available” for state use and then cannot become sources of loss or risk to the borough. The proposed ordinances accompanying this report meet the concerns articulated in the top-down model of response and give the borough tools to reallocate risks in ways that leave the borough in the best position to respond to the next disaster.<sup>39</sup>

#### **IV. Conclusion**

Based on the interplay of federal, state and local law, and considering the borough’s desire to maximize its ability to provide effective emergency preparation, response and recovery while minimizing liability, it is the HWB team’s recommendation that KPB adopt the proposed ordinances and use the information and templates attached to this report to reach its goals. Moderate updates to the KPB code, a thorough understanding of the extent of KPB’s legal powers and a continued reliance on the borough’s strong emergency planning, response and recovery expertise will place KPB in the strongest possible position to manage future emergencies.

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<sup>39</sup> See attached Exhibit D.



## **EXHIBIT A**

### **Recommendations**

A comprehensive review of the Alaska and Kenai Peninsula Borough legal framework for emergency planning indicates that the borough should fill in gaps where legal support for its actions might not be clear. The state gains a purposefully broad grant of authority in the event of a disaster, while the extent of the borough's powers remains unchanged. In most disaster scenarios, the borough benefits from the state's powers and assistance. However, in a top-down scenario, the borough may need to set boundaries, supported by legal authority, to ensure that the state's demands do not degrade the borough's ability to serve its constituents or expose it to unnecessary liability.

To support the borough's ability to assist itself, its neighbors and the state during a disaster emergency, we recommend that the KPB Assembly consider and approve each of the amendments to the KPB code that we have proposed. The proposed amendments and supporting statements are contained in Exhibit E to this report.

Additional information and templates attached as Exhibits B-D to this report are designed to provide a primer on important concepts and a guide to issues should be considered when a declaration of disaster emergency must be made or the borough must calibrate its emergency response.

Finally, we urge the borough to consider how the pandemic section of its emergency response plan should be amended based on this report and lessons learned from the COVID-19 pandemic. Although a comprehensive review and recommendations for the EOP was not a part of the scope of this report, it is clear that Alaska's emergency response plans, both state and local, do not provide a clear framework for this kind of novel, top-down scenario.

Given the strong expertise available within and to the Kenai Peninsula Borough government, we believe that these tools will give the borough the necessary legal support to weather future disasters with confidence.

## EXHIBIT B

### Kenai Peninsula Borough Legal Framework for Emergency Response

#### Relevant Statutory Provisions

#### I. Emergency powers granted to a second class borough under Alaska Statute:

<b>AS 29.35.040</b>	Nonareawide ability to provide for housing, urban renewal and redevelopment in the same manner as a home rule city if governor/president has declared borough to be a disaster area
<b>AS 29.25.030(a)</b>	Emergency ordinances allowed - may become effective immediately upon adoption by assembly, require affirmative vote of lesser of all members present or ¾ of total membership, can't be used to levy taxes, grant franchise, regulate public utility rates
<b>AS 29.25.030(c)</b>	Emergency ordinance is effective for 60 days
<b>AS 29.35.130</b>	May establish emergency services communication center
<b>AS 26.23.060</b>	May designate emergency liaison, identify agency head for emergency management, prepare for disaster response and preparedness, prepare written emergency plan <u>BUT</u> only if not outside the powers of the relevant political subdivision
<b>AS 26.23.073</b>	May create local emergency planning committee
<b>AS 26.23.100</b>	May acquire, temporarily or permanently, by purchase, lease, or otherwise, sites required for installation of temporary housing units for disaster victims, and to enter into whatever arrangements, including purchase of temporary housing units and payment of transportation charges, that are necessary to prepare or equip those sites to receive and use the housing units
<b>AS 26.23.140</b>	May declare local disaster emergency to activate emergency response plan(s)
<b>AS 26.23.190</b>	Free access for emergency responders to public and private land and public buildings without consent if necessary to take appropriate emergency measures
<b>AS 26.23.500</b>	Participants in intrastate mutual aid plan may request and receive assistance from one another
<b>AS 46.09.060(b)</b>	Authority to contain, clean up, or prevent a release or threatened release of oil or of a hazardous substance, and to exercise other powers necessary to implement AS 46.04, AS 46.08 and AS 46.09, is granted to municipalities that do not otherwise have that authority.

**However, note the following limitations:**

<b>AS 26.23.060</b>	Notwithstanding the definition of “political subdivision” in <a href="#">AS 26.23.900</a> , this section does not empower a political subdivision to perform responsibilities that it is not otherwise empowered to perform. In this section, “political subdivision” includes only a political subdivision that is otherwise empowered to perform the responsibilities assigned under this section.
<b>AS 26.23.200</b>	<p>Nothing in <a href="#">AS 26.23.010</a> — 26.23.220</p> <p>(1) interferes with or allows interference with the course or conduct of a labor dispute, except that actions otherwise authorized by <a href="#">AS 26.23.010</a> — 26.23.220 or other laws may be taken when necessary to forestall or mitigate imminent or existing danger to public health or safety;</p> <p>(2) interferes with or allows interference with dissemination of news or comment on public affairs; but any communications facility or organization, including but not limited to radio and television stations, wire services, and newspapers, may be requested to transmit or print public service messages furnishing information or instructions in connection with a disaster emergency, in a manner that encroaches as little as possible upon the normal functions of the news media;</p> <p>(3) affects the jurisdiction or responsibilities of police forces, firefighting forces, units of the armed forces of the United States, or of any personnel of them, when on active duty; but state, local, and interjurisdictional disaster emergency plans shall place reliance upon the forces available for performance of functions related to disaster emergencies;</p> <p>(4) limits, modifies, or abridges the authority of the governor to proclaim martial law, or exercise any other powers vested in the governor under the constitution, statutes, or common law of this state independent of, or in conjunction with, any provision of <a href="#">AS 26.23.010</a> — 26.23.220; or</p> <p>(5) authorizes the confiscation of a firearm lawfully owned, possessed, or carried by a law-abiding citizen.</p>
<b>AS 46.04.110 and AS 46.09.060(b)</b>	Local government may exercise its police powers within the area of its municipality despite the priority given to the emergency response powers awarded under AS 46.04 and AS 46.09 (hazardous materials and oil spills)

**II. Current KPB Code provisions relating to disaster emergencies:**

<b>KPB 3.04.270</b>	Suspend employee policies under Title 3 of KPB Code
<b>KPB 5.04.080</b>	Make emergency appropriations
<b>KPB 5.28.280</b>	Waiver of requirement for assembly approval of purchases over \$40,000 when mayor determines existence of emergency affecting life, health or safety exists
<b>KPB 5.28.290</b>	Purchasing officer may waive competition, notice and other procedural requirements for award of procurement contracts upon mayor's determination that emergency threatening public health, safety, property or welfare requires that contract be awarded without delay
<b>KPB 5.28.300</b>	Mayor may waive formal bidding procedures
<b>KPB 16.40.030</b>	Provide joint emergency services on areawide basis
<b>KPB 1.26.030</b>	Planning department may issue temporary oral permits to "protect life and property from imminent danger or to restore, repair or maintain public works, utilities or services destroyed, damaged, or interrupted by the emergency." (KPB 21.18.135) Permit fees may be waived in emergency situation (KPB 1.26.030)
<b>KPB 5.12.114</b>	Reassess tax value of property upon request of owner whose property damaged by disaster or by assessor sua sponte if mayor determines property in borough damaged by disaster and owner applies.
<b>KPB 5.12.250</b>	Impose a tax not to exceed 8 mills to "meet an emergency threatening the public peace, health or safety"

**III. State powers to use borough resources (specific grants):**

<b>AS 46.09.060 (a)-(b) and AS 46.04.110</b>	Municipality may exercise its police power unless the exercise conflicts with a provision of AS 46.09 (Hazardous Substance Release Control) or regulation promulgated pursuant to AS 46.09 and 46.04 (oil and hazardous substances)
<b>AS 26.23.020(e)</b>	Proclamation of a disaster emergency activates the disaster response and recovery aspects of the state, local, and interjurisdictional disaster emergency plans applicable to the political subdivisions or areas in question, and constitutes authority for the deployment and use of any force to which the plan or plans apply and for use or distribution of any supplies, equipment, materials, and facilities assembled, stockpiled, or arranged to be made available under AS 26.23.010 — 26.23.220 or any other provision of law relating to disaster emergency response.
<b>AS 26.23.020(g)(2)</b>	Governor may use all available resources of the state government and of each political subdivision of the state as reasonably necessary to cope with the disaster emergency
<b>AS 26.23.040</b>	Alaska division of homeland security may suggest or require revisions to local and interjurisdictional disaster plans
<b>AS 26.23.070</b>	Governor may require interjurisdictional emergency plan
<b>AS 46.09.040</b>	Re hazardous substance spill, the department may <u>contract</u> with a person or a municipality for personnel, equipment, or services that may be useful to carry out the requirements of this chapter

**IV. State obligations to boroughs in emergency context:**

<b>AS 26.23.040(b), (c), (e)</b>	Assist with development of emergency response plans, seek advice of local governments in preparing state emergency response plans and position and provide emergency response resources as listed in the statute
<b>AS 26.23.080(1)</b>	Apply for financial help on behalf of a political subdivision in event of presidential declaration of disaster emergency, recommend repayment forgiveness, etc.
<b>AS 26.23.100</b>	Assist or partner with local government for acquisition of sites necessary for temporary housing, preparation and use of the site and housing, lend funds available to the state
<b>AS 26.23.110</b>	May assist with debris removal and funding for same
<b>AS 26.23.160</b>	May compensate for use or destruction of real property, if commandeered in connection with disaster emergency

## EXHIBIT C

### Local Liability

#### **Borough liability in the emergency management context:**

In the modern world, local governments are generally liable for injuries stemming from the negligence of the municipality or its agents in most circumstances, including during a disaster emergency. Under Alaska law, local governments and their employees may be sued except in narrow circumstances typically related to the exercise of, or decision not to exercise, discretionary functions.<sup>40</sup> However, Alaska statute does provide immunity in certain instances related to emergency management. Immunity is available to a local government acting within its corporate character and within the scope of its authority for

- (a) the exercise of a duty or function performed at the request of, or by the terms of an agreement or contract with, the state to meet emergency public safety requirements; and
- (b) the exercise of a duty in connection with an enhanced 911 emergency system in the absence of gross negligence or intentional misconduct.

It's also worth noting that suit may not be maintained against employees or members of a fire department maintained by a local government when carrying out their duties.

These statutory provisions provide some comfort with regard to liability for emergency actions taken at the request of the state that are within the borough's powers. However, case law indicates that an express request from the state is required; general approval of emergency management plans is not sufficient to invoke the statute.<sup>41</sup>

The wording of the statute underlines the importance of ensuring that the borough is working within the scope of its authority. If a particular action is not part of the borough's statutory authority (including authorities obtained by agreement or election under the statute), then authority must come from another source, such as an agency relationship with the state. Note that the delegation of a function to a local government by the state does not automatically create an agency relationship because the local government acts independently to implement the delegated function. A borough's participation in a federal housing loan program or a school board's arrangements for bus transportation are examples of authority delegated by the state which do not create an agency relationship. The state must exercise a much higher degree of control for a court to infer an agency relationship.<sup>42</sup> An express grant of agency is the best way to extend immunity to a local government, since it leaves no question as to the authority of the agent to act on behalf of the state. That said, the borough's reasonable belief that it is acting as an agent in accordance with the state's (or any principal's) manifestation to the agent, is recognized as actual authority by Alaska courts.<sup>43</sup>

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<sup>40</sup> See AS 09.65.070 and see generally, 2 Antieau on Local Government Law, Second Edition §§35.01, et. seq. and *Lane v. City & Borough of Juneau*, 421 P.3d 83 (Alaska 2018).

<sup>41</sup> *City of Seward v. Afognak Logging*, 31 P.3d 780 (Alaska 2001).

<sup>42</sup> *Kenai Peninsula Borough v. State*, 532 P.2d 1019 (Alaska 1975).

<sup>43</sup> *Askinuk Corp. v. Lower Yukon Sch. Dist.*, 214 P.3d 259, 264 (Alaska 2009).

Alaska statute limits liability of emergency responders to actions that qualify as intentional misconduct or gross negligence. It apportions any remaining liability for responders that are “lent” from one local government to another. Personnel acting under the control of the requesting government are considered to be acting as its agents and any liability for their actions is taken on by the requesting government.<sup>44</sup> The agency relationship does not create an employer-employee relationship, however. All employment benefits (including for death or injury during the emergency) are provided by the responding government who is the regular employer of the emergency responder.<sup>45</sup>

The following provisions of the Alaska Disaster Relief Act implicate the liability of a borough during disaster response and recovery.

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<sup>44</sup> AS 26.23.540.

<sup>45</sup> AS 26.23.520-525.

Relevant Alaska statutes	Comments	Related KPB Code
<p><b>Suits Against Incorporated Units of Local Government</b></p> <p>AS 09.65.070. Suits Against Incorporated Units of Local Government.</p> <p>(a) Except as provided in this section, an action may be maintained against a municipality in its corporate character and within the scope of its authority...</p> <p>(c) An action may not be maintained against an employee or member of a fire department operated and maintained by a municipality or village if the claim is an action for tort or breach of a contractual duty and is based upon the act or omission of the employee or member of the fire department in the execution of a function for which the department is established.</p> <p>(d) An action for damages may not be brought against a municipality or any of its agents, officers, or employees if the claim...</p> <p>(5) is based upon the exercise or performance of a duty or function upon the request of, or by the terms of an agreement or contract with, the state to meet emergency public safety requirements; or</p> <p>(6) is based on the exercise or performance of a duty in connection with an enhanced 911 emergency system and is not based on an intentional act of misconduct or on an act of gross negligence...</p>		None



<p><b>Tort claims related to disaster response</b></p> <p><b>Sec. 26.23.540. Tort liability of participating political subdivisions and emergency responders.</b></p> <p>For purposes of liability, all persons responding under the operational control of the requesting political subdivision shall be considered to be agents of the requesting political subdivision. An action for damages for an act or omission may not be brought against a responding political subdivision, or an officer or employee of a responding political subdivision, in providing assistance under AS 26.23.500 - 549. This section does not preclude liability for civil damages that are the result of gross negligence or reckless or intentional misconduct.</p>	<p>Apportions tort liability between local governments only. But this may serve as a template for a borough acting in an agency capacity on behalf of the state.</p>	<p>None. The only indemnification addressed in the KPB code is KPB 2.34.120-130, addressing indemnity of school district employees acting within the scope of their employment.</p>
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<p><b>Employer liability</b></p> <p><b>AS 26.23.520. Emergency responder not an employee of a requesting political subdivision.</b>  An emergency responder from a political subdivision that responds to a political subdivision requesting assistance is not an employee of the political subdivision requesting assistance and is not entitled to any right, privilege, or benefit of employment from the requesting political subdivision, including compensation, wages, salary, leave, pension, health, or another benefit.</p> <p><b>AS 26.23.525. Workers' compensation and benefits following injury to or death of emergency responder.</b>  An emergency responder that is responding to and rendering assistance in a political subdivision that has requested assistance under AS 26.23.510 who sustains an injury or dies in the course of providing assistance to the requesting political subdivision under AS 26.23.500 — 26.23.549 is entitled to receive only the benefits otherwise authorized by law for an injury sustained, or a death that occurs, in the course of employment with, or while providing services to, the responding political subdivision...</p>	<p>Responsibilities of employer of emergency responders <u>do not</u> shift to jurisdiction requesting help during disaster. Benefits, including for injury and death remain with the original employer.</p> <p>AS 26.23.530 provides that a requesting jurisdiction shall reimburse a responding local government for the assistance provided.</p>	<p>Note that KPB 3.04.270 allows the borough mayor to suspend its employment regulations under Title 3 of the code during a disaster emergency.</p> <p>KPB 3.04.270 - Emergency suspension. Emergency suspension of this title and personnel resolutions of <a href="#">Title 3</a> (Employee Classification and Pay) and resolutions adopted under its authority may be suspended temporarily in whole or in part by the mayor in the event of a natural disaster or major civil disturbance.</p>
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<p><b>Liability for unauthorized actions</b></p>	<p>Unauthorized or “ultra vires” actions of a local government are void, but if the action is outside the government’s powers due only to a procedural irregularity, it may be later be ratified.</p> <p><i>Stevens v. State, Alcoholic Beverage Control Bd., 257 P.3d 1154, 1158 (Alaska 2011).</i> Ultra Vires action can expose the borough to liability for damages, whether or not the borough was aware that it had exceeded its power.</p>	<p>KPB 2.45.020 creates service areas for disaster planning and response. If these service areas were established pursuant to a gubernatorial directive under AS 26.23.070, by election under AS 29.35.300, or by transfer of the powers by the cities inside the borough under AS 29.35.310, then the borough may exercise its powers on an <u>areawide</u> basis. However, the extend of KPB’s response powers within the service areas depends upon the extent of the grant of legal authority. Otherwise, they borough’s emergency response powers are strictly <u>nonareawide</u>.</p>
<p><b>Housing</b></p> <p>AS 29.35.040. Emergency Disaster Powers. (a) A municipality that is wholly or partially in an area that is declared by the President or governor to be a disaster_area may participate in and provide for housing, urban renewal, and redevelopment in the same manner as a home rule city. The exercise of these powers by a borough shall be on a nonareawide basis, except a borough may exercise the powers transferred to it by a city as provided by AS <a href="#">29.35.310...</a></p>	<p>As above, taking action on an areawide basis without the approval of the cities within the borough would create liability.</p>	

## **EXHIBIT D**

### **Template: Declaration of Disaster Emergency**

This template is intended to ensure that the language of the declaration provides the legal support necessary to support the borough's emergency powers, including activating emergency plans, streamlining procurement or accessing funds. It is also intended to provide information that the assembly can rely upon in extending the disaster emergency or ratifying the mayor's emergency actions. Finally, it is intended to provide sufficient support for the various funding requests that the borough made need to make.

**KENAI PENINSULA BOROUGH  
DECLARATION OF DISASTER EMERGENCY**

**The following clauses should always be included in the Declaration:**

WHEREAS, [describe nature of disaster/imminent threat and how it was brought about];

WHEREAS, [define the area that is affected/threatened and the expected duration of the disaster emergency];

WHEREAS, \_\_\_\_\_ threatens the life, health and safety [specify one or more, as appropriate] of borough residents so that streamlined contracting and procurement procedures under KPB 5.28.280 – 5.28.300 must be implemented [give specifics if helpful to justify procurement without assembly approval – in the best interests of the borough or insufficient time to follow full procurement process] (see KPB 5.28.280-300);

WHEREAS, [describe declarations, findings of state, other municipalities, etc. that support KPB’s declaration];

WHEREAS, [describe resources already being applied to disaster emergency];

WHEREAS, the borough’s remaining resources are limited by obligations unrelated to the disaster emergency. Currently, the borough’s available resources to address the disaster emergency are \_\_\_\_\_ [describe extent of resources currently available to address disaster emergency while still fulfilling borough’s other obligations][**Alternative:** are being assessed by the Office of Emergency Management] ;

WHEREAS, [describe amount and source of borough funds initially expected to be used to respond to the disaster emergency];

**The following clauses may be included in the Declaration, if applicable:**

WHEREAS, [describe any state, federal, other outside funds which have been or may be requested][**Alternative:** it is anticipated that the additional resources borough and funding beyond what is currently available to the borough will be required to respond to the disaster emergency];

WHEREAS, the effects of the natural disaster/major civil disturbance [choose one] make it necessary to suspend KPB Title 3/KPB 3.XX.XXX - .XXX [Entire employment title can be suspended, but better approach is to suspend specific provisions, e.g. KPB 3.04.051 (Discharge Authority), KPB 3.04.080 (Hours of Work), or KPB 3.04.230 (Legal Liability – Conduct)].

WHEREAS, I will be requesting that the assembly make emergency appropriations to [See KPB 5.04.080 – must be to meet the public emergency – describe any specific needs that are known].

**Always conclude with:**

WHEREAS, a borough-wide response is needed to fully address this condition of importance to the life, health and safety of borough residents;

NOW THEREFORE, under the authority granted by Alaska Statute 26.23.140 [and Kenai Peninsula Borough Code Section 2.04.090], I hereby declare that a condition of disaster emergency exists [throughout the borough][in \_\_\_\_\_location], and this condition is of sufficient severity and magnitude to warrant a declaration of disaster emergency in order to activate the emergency resources of the borough and request assistance from state and municipal partners.

FURTHER, the Kenai Peninsula Borough Office of Emergency Management is hereby authorized to use funds made available for these purposes, to access other available emergency resources, and to task borough departments and personnel in accordance with the Kenai Peninsula Borough Emergency Response Plan, as necessary to respond to the condition of disaster emergency.

FURTHER, [if the borough wishes to request specific state or other assistance at the time of this declaration, a statement to that effect may be included.]

FURTHER, [if specific KPB sections have been invoked in the whereas clauses, those items should be actuated here, e.g. “the authority of designated administrative officers to suspend, discharge, or demote employees is hereby suspended in \_\_\_\_\_ area during the pendency of the disaster emergency.”]

By: \_\_\_\_\_

Dated: \_\_\_\_\_

\_\_\_\_\_  
Mayor / [Authorized Designee]

## EXHIBIT E

### Proposed Code Updates

Proposed Ordinance	Existing KPB Code	Relation to Alaska Statutes	Reasoning
<p><b>KPB 2.04.090</b></p> <p><i>a) If the borough mayor finds that a disaster as defined by AS 26.23.900 has occurred or that a disaster is imminent or threatened within the borough, the borough mayor may declare a condition of local disaster emergency for the Kenai Peninsula Borough. The borough mayor may make a declaration of disaster emergency when a disaster has occurred within the borough, regardless of any declaration in another municipality or the state.</i></p> <p><i>b) If the mayor is temporarily absent or disabled, the mayor's designee pursuant to KPB 2.04.030 may declare a disaster emergency and take such actions as are</i></p>	<p>Mayor's power to declare is not explicitly set forth in the code. It is referenced in KPB 2.45.020 (Emergency Planning) and 5.12.114 (Tax Exemptions).</p> <p>See KPB 2.04.030</p>	<p>AS 26.23.140 gives the power to declare a local disaster emergency to the principal executive officer of a political subdivision.</p>	<p>This ordinance provides a concise roadmap to the disaster declaration process, since KPB code does not contain a section dedicated to emergency management and references to emergency powers are scattered throughout the code. It also bolsters the legitimacy of the mayor's initial actions in response to a disaster by giving legislative approval to the procedure.</p> <p>(a) Points executive to legal definition of disaster to underpin decision to declare and clarifies that decision is an independent one, whether in top-down or bottom-up situation.</p> <p>(b) Bolsters mayor's ability to name a designee to make the declaration and the authority of the designee through legislative approval. Tracks AS 29.20.260 language re absence/disability.</p>

<p><i>authorized in this section without action of the assembly.</i></p> <p>c) <i>The declaration shall include:</i></p> <ul style="list-style-type: none"> <li>i. <i>A statement indicating the nature of the disaster or emergency, the area threatened or affected and the conditions that have brought it about or that make possible the termination of the disaster emergency;</i></li> <li>ii. <i>An initial statement of available resources to address the disaster emergency,</i></li> <li>iii. <i>An initial statement identifying any borough funds to be expended to respond to the disaster or emergency and any State or other third party funds which may be requested;</i></li> <li>iv. <i>A statement confirming whether an emergency affecting life, health or safety exists for purposes of KPB 5.28.280.</i></li> </ul>	<p>None.</p>	<p>Adapted from governor’s declaration required contents, AS 26.23.020(c) with additions for KPB’s needs.</p>	<p>(c)(i) Provides details necessary for assembly to understand and confirm actions; (ii) protects borough resources from being appropriated by state by defining what’s available for use in this situation; (iii) gives early direction re funds and indicates possible sources; (iv) incorporates statement that triggers streamlined procurement procedures.</p>
<p>d) <i>The declaration of local disaster emergency activates the disaster response and recovery aspects of all relevant borough emergency operations plans applicable to the area in question and constitutes authority for the borough to spend emergency or other borough funds as authorized by the assembly, and to receive and administer state, federal or other funding within the bounds of the borough’s legal authority.</i></p>	<p>None.</p>	<p>AS 26.23.140(b). Note that a disaster declaration by the Governor for an area automatically activates local emergency plans without a local declaration.</p>	<p>(d) clarifies result of declaration and limits use of internal and outside funds to uses within borough’s authority.</p>
<p>e) <i>The mayor or designee’s declaration of local disaster emergency shall remain in effect for seven (7) days unless extended by the assembly.</i></p>	<p>None.</p>	<p>AS 26.23.140. The assembly could extend for 60 days as an emergency ordinance or longer if it is able to meet normal quorum and voting requirements.</p>	<p>(e) incorporates 7 day maximum and need for assembly ratification.</p>



<p><b>KPB 2.04.100</b> Borough authority:</p> <p><i>During the pendency of a disaster emergency declared by the Mayor, and if sufficient resources (including personnel, facilities, equipment or any other resource necessary for the adequate exercise of the delegated authority) are determined to be available, the borough may accept and exercise authority expressly delegated by the State to the borough, as its agent, pursuant to AS 26.20.020.</i></p>	<p>None.</p>	<p>AS 26.23.020(g)(2) allows the Governor to use “all available resources of...each political subdivision of the state as reasonably necessary to cope with the disaster emergency.” The statute does not define resources.</p> <p>Per AS 26.23.060, local governments are responsible for disaster preparedness and coordination of response in conjunction with the Alaska Division of Emergency Management, but they are not empowered to perform responsibilities outside their normal powers in this context.</p> <p>AS 09.65.070 immunizes local governments against actions within their powers taken at the request of the state.</p>	<p>Allows mayor to regulate when borough will accept agency authority, gather input on what resources are available, and require express delegation of state’s disaster authority.</p> <p>Governor’s use of local resources in manner beyond the powers of the local government must be effected under the state’s powers, e.g. under agency authority.</p> <p>An agency grant could be considered to confer powers and create access to state immunity.</p>

<p><b>KPB 2.04.040</b>  <b>Involuntary Succession</b>  Whenever the assembly president and two thirds of the members of the assembly file a written document with the borough clerk, <i>or in the case of a disaster as defined in AS 26.23.900, if the assembly president issues a good faith declaration</i>, showing good and sufficient cause that the borough mayor is temporarily absent or disabled, then the administrative officer designated by the mayor <i>under KPB 2.04.030</i> will exercise the powers and duties of borough mayor until such time as the borough mayor is able to resume <i>[his]</i> office. The administrative officer acting for the mayor shall have the qualifications for the position of mayor, but shall not have veto power. The actions of the administrative officer in exercising the powers and duties of the borough mayor shall be subject to the review of the assembly president. No administrative staff shall be dismissed or replaced during the mayor's absence except with the concurrence of a majority of the assembly. <i>If the determination of the mayor's absence or disability is made by the assembly president alone, then the authority of the designated administrative officer will expire after seven (7) days unless ratified by the assembly.</i></p>	<p>KPB 2.04.040</p> <p>Whenever the assembly president and two thirds of the members of the assembly file a written document with the borough clerk showing good and sufficient cause that the borough mayor is unable to discharge the powers and duties of his office due to some disability, then the administrative officer designated by the mayor will exercise the powers and duties of borough mayor until such time as the borough mayor is able to resume his office. The administrative officer acting for the mayor shall have the qualifications for the position of mayor, but shall not have veto power. The actions of the administrative officer in exercising the powers and duties of the borough mayor shall be subject to the review of the assembly president. No administrative staff shall be dismissed or replaced during the mayor's absence except with the concurrence of a majority of the assembly.</p>		<p>Emergencies generally require an immediate response. This amendment assures quick succession and legal authority for a disaster declaration and emergency actions in the absence of the mayor. Note that it is an underlying assumption of the KPB Emergency Operations Plan that all municipal employees will ensure the safety of their own families before turning to public duties.</p> <p>The emergency ordinance parameters are drawn from AS 29.25.030.</p>
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<p><b>KPB 2.04.110</b> Emergency Agreements</p> <p>(a) <i>Following the declaration of a disaster emergency by the governor pursuant to 26.23.020(c) or by the borough mayor pursuant to AS 26.23.140, the mayor may execute an emergency mutual aid agreement or other cooperative agreement with the state, the federal government, or with any other municipality in the state pursuant to AS 29.35.010(13) for the exchange of aid upon request, including the loan of personnel, equipment and materials and the administration of funds or other resources, all as permitted by law.</i></p> <p>(b) <i>The borough shall be obligated under such mutual aid agreements to perform duties (i) which are within its legal power and (ii) subject to the availability of sufficient resources.</i></p> <p>(c) <i>Any mutual aid agreement promulgated hereunder shall remain in effect until the earlier of (i) the rescission of the relevant local or state emergency disaster declaration or (ii) express rescission of the mutual aid agreement by the assembly.</i></p>	<p>None.</p>	<p>AS 26.23.180 encourages mutual aid in coping with disasters, even where interjurisdictional agreements are not already in place.</p> <p>AS 26.23.060 gives local governments responsibility for coordinating interjurisdictional planning and service areas for disaster response.</p>	<p>Although the borough has the authority to enter into mutual aid agreements, the agreements must typically be ratified by the assembly before going into effect. During the COVID-19 pandemic, in the absence of an express delegation of power from the state, the borough was forced to enter into last-minute mutual aid agreements that allowed it to distribute federal aid money funneled through the state. This code provisions would ensure the legal authority of the borough mayor to sign such temporary agreements and ensure that the expanded powers do not live on past the needs of the disaster.</p>
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<p><b>KPB 1.12.080</b> <i>Emergency Actions of the Assembly</i></p> <p>(a) <i>In the event of a disaster as defined by AS 26.23.900 or other emergency, the assembly may adopt emergency ordinances effective upon adoption. Each emergency ordinance shall contain a finding by the assembly that an emergency exists and a statement of the facts upon which the finding is based. An emergency ordinance may be adopted, amended and adopted, or rejected at the meeting at which it is introduced. The governing body shall print and make available copies of adopted emergency ordinances.</i></p> <p>(b) <i>An emergency ordinance may not be used to levy taxes, to grant, renew, or extend a franchise, or to regulate the rate charged by a public utility for its services.</i></p> <p>(c) <i>The affirmative vote of all members present, or the affirmative vote of three-fourths of the total membership, whichever is less, is required for adoption of an emergency ordinance, the confirmation or extension of a local disaster declaration or the ratification of emergency actions taken by the executive.</i></p> <p>(d) <i>An emergency ordinance, or any other action taken under this section, is effective for 60 days.</i></p>	<p>None.</p>	<p>AS 29.25.030 authorizes the passage of emergency ordinances effective upon adoption and good for 60 days “to meet a public emergency.” Appropriate voting requirements and other restrictions specified in the statute.</p>	<p>This code section is designed to streamline assembly actions during a disaster emergency where assembly members are unable to attend a meeting and communications systems are unavailable or unreliable. The actions taken under this section are limited in time so that the assembly must take additional action within 60 days. At that point, the longer term response to the disaster should be more in focus.</p>
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<p><b>KPB 1.09</b> <i>Enumeration of Powers</i></p> <p><i>The mayor shall supervise the compilation and maintenance of a list enumerating the powers that may be exercised by the borough, whether bestowed by statute or acquired by other legal means. The list of powers shall be readily available for reference by the borough's departments and the general public.</i></p>	<p>None.</p>	<p>The Fairbanks-Northstar Borough Code contains an example of a comprehensive statute which codifies a list of the borough's powers. To draft the appropriate statute for KPB, it would be necessary to research which KPB powers have been obtained by statute, by election and by agreement. The alternative is to ensure that a list of powers is compiled and maintained within the KPB government. In either case, this code section would provide certainty with regard to the extent of the borough's powers, useful at any time but especially in the midst of a disaster emergency.</p>	<p>The Alaska statutes (a) require second class boroughs to exercise certain powers, (b) bestow the ability to exercise certain powers, (c) allow second class boroughs to acquire certain powers by ordinance or agreement, and (d) allow second class boroughs to acquire certain powers by election. Because each second class borough maintains its own character, the powers that each borough government has chosen to wield vary widely. A roadmap defining the powers that the KPB government exercises will aid it in determining the extent of its powers under the pressure of a disaster emergency, in addition to providing a conceptual base for how the assembly chooses to govern the borough.</p>
<p><b>2.45.010. Established.</b></p> <p>There is established an office of emergency management as a department in the Kenai Peninsula Borough. The Senior Manager of the Office of Emergency Management shall administer the department, <i>shall assume primary responsibility for managing and coordinating department responsibilities during a declared disaster emergency</i>, and shall report to the mayor or designee. The department shall be responsible for <i>response to, and recovery from, a declared disaster emergency</i>, for the development of borough and inter-jurisdictional disaster response and recovery plans, and for coordination of disaster management between the borough,</p>	<p>None.</p>	<p>Under AS 26.23.060, each political subdivision is responsible for its own disaster preparedness, for preparation of a local emergency plan and for coordination of response with the state and other local governments.</p>	<p>The edits to existing code make clear that OEM is responsible not just for disaster planning but also for response and recovery. It places the management of any disaster response primarily in the hands of the borough department with the appropriate expertise (OEM) and prevents misunderstanding of the scope of any other emergency powers, such as those that may fall upon the mayor's designee.</p>

the State of Alaska, and other municipalities and response and recovery organizations.			
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