

**MEMORANDUM**

**TO: MAYOR BETH WYTHE**

**FROM: THOMAS F. KLINKNER**

**RE: CHARTER COMMISSION AND CHARTER ADOPTION**

**CLIENT: CITY OF HOMER**

**FILE NO.: 506,742.101**

**DATE: OCTOBER 21, 2013**

**CC: WALT WREDE, CITY MANAGER  
JO JOHNSON, CITY CLERK**

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**1. *Introduction and Summary.***

This responds to your request for information regarding what a charter commission is, and how it will affect the City. In short, a charter commission is a group of seven City voters that is elected to prepare a proposed home rule charter for the City.<sup>1</sup> The City's voters may petition for the election of a charter commission.<sup>2</sup> The charter that the commission develops is submitted to the City's voters, and becomes effective upon voter approval.<sup>3</sup> Upon adoption of a home rule charter by the City's voters, the City would cease to be a first class, general law city, and would become a home rule city governed by the charter.<sup>4</sup> Adopting a home rule charter would have the following effects on the City. First, the structure of the City government would be determined by the charter rather than by statute. Second, the charter, rather than statute, would govern the scope of the City's general powers. Third, becoming a home rule city would allow the City to adopt a sales tax structure different than that of the Kenai Peninsula Borough without the consent of the Borough Assembly.

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<sup>1</sup> AS 29.10.010(e).

<sup>2</sup> *Id.*

<sup>3</sup> AS 29.10.080(a).

<sup>4</sup> *Id.*

## **2. A Charter's Effect on the City.**

### **A. In General.**

The Alaska Constitution and statutes provide for two general categories of cities. A home rule city is a city that has adopted a home rule charter.<sup>5</sup> A general law city is a city that has no charter.<sup>6</sup> All cities have powers conferred by law (*i.e.*, state statute).<sup>7</sup> In addition, home rule cities have powers conferred by home rule charter and may exercise all powers not prohibited by law or by charter.<sup>8</sup>

There is little practical distinction between the general powers that are granted to home rule and general law cities. While the Alaska Constitution provides that home rule cities may exercise all powers not prohibited by law or charter, statutes grant powers to general law cities in similar broad terms. All cities "may exercise any power not otherwise prohibited by law."<sup>9</sup> A liberal construction is to be given to the powers of all cities.<sup>10</sup> The courts use the same test to determine whether a city's exercise of a power is "prohibited by law" without regard to whether it is a home rule or general law city: "The prohibition must be either by express terms or by implication such as where the statute and ordinance are so substantially irreconcilable that one cannot be given its substantive effect if the other is to be accorded the weight of law."<sup>11</sup>

### **B. A Charter Could Determine the Structure of the City Government.**

Title 29 of the Alaska Statutes governs the powers and functions of municipalities. Only certain provisions of Title 29 apply to home rule cities as a prohibition against acting otherwise.<sup>12</sup> Most of the important provisions of Title 29 that do not apply to a home rule city concern the internal structure of city government. Thus, through a home rule charter the City's voters could determine such matters as the number of council members, the number of votes by which the council may act (either generally or on specific subjects), when and whether the mayor may vote on matters before the council, and the scope of the mayor's veto power.

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<sup>5</sup> Alaska Constitution, art. 10, §9; AS 29.04.010.

<sup>6</sup> AS 29.04.020.

<sup>7</sup> Alaska Constitution art. 10, §7; AS 29.04.020.

<sup>8</sup> Alaska Constitution, art. 10, §11; AS 29.04.010.

<sup>9</sup> AS 29.35.250(a); AS 29.35.260(a); *McCormick v. City of Dillingham*, 16 P.3d 735, 740 (Alaska 2001).

<sup>10</sup> Alaska Constitution, art. 10, §1; AS 29.35.410.

<sup>11</sup> *Jefferson v. State*, 527 P.2d 37, 43 (Alaska 1974); *Gilman v. Martin*, 662 P.2d 120, 124 (Alaska 1983).

<sup>12</sup> AS 29.10.200; *Municipality of Anchorage v. Frohne*, 568 P.2d 3, 5 (Alaska 1977).

**C. A Charter Could Restrict the Exercise of the City's General Powers.**

In addition to the restrictions in state statute on the exercise of powers by a first class city, the City's voters could impose other restrictions on the exercise of the City's powers in a home rule charter. Unlike an ordinance that restricted the exercise of a power by the City, which could be overturned by the subsequent enactment of another ordinance by the Council,<sup>13</sup> restrictions in a home rule charter could be changed or eliminated only with voter approval. Examples that frequently appear in other municipalities' home rule charters include requirements of voter approval to dispose of city property, a limitation on the hours during which the council may meet, and a limitation on city indebtedness to a specified percentage of assessed valuation.

**D. A Charter Would Allow the City to Adopt Its Own Sales Tax Structure.**

Most statutes affecting the relationship of the City to the Kenai Peninsula Borough still would apply to the City if it were a home rule city. One significant exception to this general rule concerns the autonomy of the City's sales tax structure. A general law city within the Borough must uniformly tax the same sources as the Borough, and allow only the same exemptions as the Borough, unless the Borough Assembly by ordinance authorizes the city to levy and collect its sales tax on other sources.<sup>14</sup> However, the statute that requires that the sales tax levied by a city within a borough must conform to the structure of the borough's sales tax is not made applicable to home rule municipalities, and therefore does not act as a prohibition on a home rule municipality acting other than as the statute provides.<sup>15</sup>

**3. The Role of a Charter Commission in the Adoption of a Charter.**

A proposed home rule charter is prepared by a charter commission of seven elected members.<sup>16</sup> The Clerk has certified an application for a petition for a charter commission election and will issue a petition to its sponsors. The petition requirements are similar to those for an initiative or referendum petition.<sup>17</sup> When the Clerk receives the completed petition she delivers it to the Council with a report of the number of valid signatures that she has determined to be on the petition.<sup>18</sup>

If the petition has sufficient valid signatures, the Council fixes a date for the submission of nominations of charter commission candidates.<sup>19</sup> A candidate for a charter commission shall have been qualified to vote in the City for at least one year

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<sup>13</sup> *Miller v. Matanuska-Susitna Borough*, 54 P.3d 285, 292 (Alaska 2002).

<sup>14</sup> AS 29.45.700(a); *City of Homer v. Gangl*, 650 P.2d 396, 399-401 (Alaska 1982).

<sup>15</sup> AS 29.10.200; *Frohne*, 568 P.2d at 5.

<sup>16</sup> AS 29.10.010(e).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> AS 29.10.040(b).

immediately preceding the charter commission election.<sup>20</sup> There are no other qualifications or limitations on eligibility to be elected to a charter commission. A charter commission candidate is nominated by a petition signed by at least 50 voters or the number of voters equal to ten percent of the number of votes cast in the City during the last regular election, whichever is less.<sup>21</sup> Since more than 500 votes were cast at the October 1, 2013, regular City election, each charter commission candidate must be nominated by at least 50 voters. If at least seven nominations for qualified charter commission candidates are not filed, the petition or resolution calling for a charter commission is void and an election on the question may not be held.<sup>22</sup>

The statutes do not prescribe when a charter commission election shall be held. However, the Council may choose to be guided by the provisions for scheduling an initiative or referendum election. An initiative or referendum is submitted to the voters at any of the following occurring at least 60 days after certification of the petition: (i) the next regular election; (ii) a previously scheduled special election; or (iii) a special election scheduled by ordinance if the Council determines it to be in the best interest of the City and no other election will occur within 75 days after certification of the petition.<sup>23</sup> At the charter commission election the voters shall consider the question "Shall a charter commission be elected to prepare a proposed charter?" and shall elect the members of the commission.<sup>24</sup> If the question is approved, the seven candidates receiving the highest number of votes immediately organize as a charter commission.<sup>25</sup>

Within one year after its election, the charter commission shall prepare a proposed home rule charter for the City.<sup>26</sup> The commission shall give published notice of and hold at least one public hearing on the proposed charter.<sup>27</sup> The proposed charter shall be signed by a majority of the members of the commission and filed in the office of the Clerk.<sup>28</sup> Within 15 days, the Clerk shall publish the proposed charter and make copies available.<sup>29</sup> The proposed home rule charter is submitted to the voters at an election held not less than 30 days or more than 90 days after the proposed charter is published.<sup>30</sup> If a majority of those voting favor the proposed charter, the proposed

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<sup>20</sup> AS 29.10.040(a).

<sup>21</sup> AS 29.10.040(b).

<sup>22</sup> AS 29.10.040(c).

<sup>23</sup> AS 20.26.170(a), 29.26.180(a).

<sup>24</sup> AS 29.10.050.

<sup>25</sup> *Id.*

<sup>26</sup> AS 29.10.060.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> AS 29.10.070.

charter becomes the organic law of the City effective on the date the election is certified.<sup>31</sup>

If the proposed charter is rejected, the charter commission shall prepare another proposed charter to be submitted to the voters at an election to be held within one year after the date of the first charter election.<sup>32</sup> If the second proposed charter is also rejected, the charter commission shall be dissolved and the question of adoption of a charter shall be treated as if it had never been proposed or approved.<sup>33</sup>

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<sup>31</sup> AS 29.10.080(a).

<sup>32</sup> AS 29.10.090(a).

<sup>33</sup> *Id.*



## MEMORANDUM

**TO: MAYOR AND COUNCIL MEMBERS**

**FROM: THOMAS F. KLINKNER**

**RE: EFFECT OF ADOPTING HOME RULE CHARTER**

**CLIENT: CITY OF HOMER**

**FILE NO.: 506,742.101**

**DATE: DECEMBER 3, 2013**

**CC: WALT WREDE, CITY MANAGER  
JO JOHNSON, CITY CLERK**

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I previously have described the process by which the City would adopt a home rule charter, and some of the consequences of doing so. The purpose of this memorandum is to provide a more general discussion of the effect on the City of adopting a home rule charter.

The home rule option first appeared in the Alaska Constitution—there were no home rule cities in Alaska before statehood. The Alaska Constitution and statutes now provide for two general categories of cities. A home rule city is a city that has adopted a home rule charter.<sup>1</sup> A general law city is a city that has no charter.<sup>2</sup>

The starting point for describing the effect of adopting a home rule charter is Article 10, §11 of the Alaska Constitution, which provides:

A home rule borough or city may exercise all legislative powers not prohibited by law or charter.

The constitution was intended to grant broad power to home rule municipalities:

The authors of this provision hoped that its simple language and sweeping grant of power would enable home rule municipalities to meet a multitude of legislative needs without depending on specific grants of power from a state legislature.<sup>3</sup>

However, the evolution since statehood of Title 29 of the Alaska Statutes, which provides for municipal government, has blurred part of the distinction between home rule and general law cities. While the Alaska Constitution provides that home rule municipalities may exercise all

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<sup>1</sup> Alaska Constitution, art. 10, §9; AS 29.04.010.

<sup>2</sup> AS 29.04.020.

<sup>3</sup> *Jefferson v. State*, 527 P.2d 37, 42 (Alaska 1974).

powers not prohibited by law or charter, Title 29 also provides that all cities—whether home rule or general law—may “exercise any power not otherwise prohibited by law.”<sup>4</sup>

With this introduction, I will examine the two-part constitutional limitation on the powers of home rule cities: (i) prohibition by law, and (ii) prohibition by charter, emphasizing the remaining distinctions between home rule and general law cities.

Prohibition “by law” means prohibition by statute enacted by the legislature.<sup>5</sup> The courts use the same test to determine whether a home rule or general law city’s exercise of a power is prohibited by law: “The prohibition must be either by express terms or by implication such as where the statute and [city] ordinance are so substantially irreconcilable that one cannot be given its substantive effect if the other is to be accorded the weight of law.”<sup>6</sup>

Title 29 continues to distinguish between home rule and general law cities in expressly prohibiting the exercise of powers. All prescriptions in Title 29 of the manner in which municipal governments must act are express prohibitions on general law municipalities acting otherwise. In contrast, only those provisions of Title 29 that are identified in AS 29.10.200 “apply to home rule municipalities as prohibitions on acting otherwise than as provided.”<sup>7</sup>

An example of prohibition by implication is that state statutes of limitations impliedly prohibit a home city from requiring written notice within 120 days after an injury to allow the injured person to bring a lawsuit against the city.<sup>8</sup>

Prohibition “by charter” means that the City’s home rule charter itself could prohibit the City from exercising certain powers. Once included in a home rule charter, such a prohibition could be changed only by a charter amendment, which requires voter approval.<sup>9</sup> Examples that frequently appear in other municipalities’ home rule charters include requirements of voter approval to dispose of city property, a limitation on the hours during which the council may meet, and a limitation on city indebtedness to a specified percentage of assessed valuation. In contrast, the Council may not limit the legislative power of future councils by enacting ordinances that include restrictions on their future amendment or repeal: “One council may not

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<sup>4</sup> AS 29.35.250(a); AS 29.35.260(a); *McCormick v. City of Dillingham*, 16 P.3d 735, 740 (Alaska 2001).

<sup>5</sup> See, *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 772-773 (Alaska 1980); Alaska Constitution Art. XII, §11: “As used in this constitution, the terms, ‘by law’ and ‘by the legislature,’ or variations of these terms, are used interchangeably when related to law-making powers.”

<sup>6</sup> *Jefferson v. State*, 527 P.2d 37, 43 (Alaska 1974); *Gilman v. Martin*, 662 P.2d 120, 124 (Alaska 1983).

<sup>7</sup> *Municipality of Anchorage v. Frohne*, 568 P.2d 3, 5 (Alaska 1977). A copy of AS 29.10.200 is attached for your reference.

<sup>8</sup> *Johnson v. City of Fairbanks*, 583 P.2d 181, 186-87 (Alaska 1978).

<sup>9</sup> AS 29.10.100(a).

by an ordinance bind itself or its successors so as to prevent free legislation in matters of municipal government.”<sup>10</sup>

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<sup>10</sup> 6 McQuillin, *The Law of Municipal Corporations* § 21.10, at 374 (rev.3d ed. 2007) (footnotes omitted).

**AS § 29.10.200. Limitation of home rule powers.** Only the following provisions of this title apply to home rule municipalities as prohibitions on acting otherwise than as provided. These provisions supersede existing and prohibit future home rule enactments that provide otherwise:

- (1) AS 29.05.140 (transition);
- (2) AS 29.06.010 (change of municipal name);
- (3) AS 29.06.040--29.06.060 (annexation and detachment);
- (4) AS 29.06.090--29.06.170 (merger and consolidation);
- (5) AS 29.06.190--29.06.420 (unification of municipalities);
- (6) AS 29.06.450--29.06.530 (dissolution);
- (7) AS 29.10.100 (charter amendment);
- (8) AS 29.20.010 (conflict of interest);
- (9) AS 29.20.020 (meetings public);
- (10) AS 29.20.050 (legislative power);
- (11) AS 29.20.060--29.20.120 (assembly composition and apportionment);
- (12) AS 29.20.140 (qualifications of members of governing bodies);
- (13) AS 29.20.150 (term of office);
- (14) AS 29.20.220 (executive power);
- (15) AS 29.20.270(e) (ordinance veto by mayor);
- (16) AS 29.20.630 (prohibited discrimination);
- (17) AS 29.20.640 (reports);
- (18) AS 29.25.010(a)(10) (municipal exemption on contractor bond requirements);
- (19) AS 29.25.050 (codification);
- (20) AS 29.25.060 (resolutions);
- (21) AS 29.25.070(e) (notices of certain civil actions);
- (22) AS 29.25.074 (surcharge);
- (23) AS 29.25.080 (breast-feeding);
- (24) AS 29.26.030 (notice of elections);
- (25) AS 29.26.050 (voter qualification);
- (26) AS 29.26.250--29.26.360 (recall);
- (27) AS 29.35.020 (extraterritorial jurisdiction);
- (28) AS 29.35.030 (eminent domain);
- (29) AS 29.35.050(a)--(c) (garbage and solid waste services);
- (30) AS 29.35.055 (local air quality control program);
- (31) AS 29.35.060 (franchises and permits);
- (32) AS 29.35.070 (public utilities);

- (33) AS 29.35.080 (alcoholic beverages);
- (34) AS 29.35.090(b) (certain vacations of rights-of-way prohibited);
- (35) AS 29.35.120 (post audit);
- (36) AS 29.35.125 (fees for police protection services);
- (37) AS 29.35.131--29.35.137 (enhanced 911 system);
- (38) AS 29.35.141 (regulation of radio antennas);
- (39) AS 29.35.144 (sprinkler fire protection systems);
- (40) AS 29.35.145 (regulation of firearms and knives);
- (41) AS 29.35.160 (education);
- (42) AS 29.35.170(b) (assessment and collection of taxes);
- (43) AS 29.35.180(b) (land use regulation);
- (44) AS 29.35.250 (cities inside boroughs);
- (45) AS 29.35.260 (cities outside boroughs);
- (46) AS 29.35.340 (acquisition of areawide power);
- (47) AS 29.35.450 (service areas);
- (48) AS 29.35.500--29.35.590 (hazardous materials and wastes);
- (49) AS 29.40.160(a)--(c) (title to vacated areas);
- (50) AS 29.40.200 (subdivisions of state land);
- (51) AS 29.45.010--29.45.560 and 29.45.800 (property taxes);
- (52) AS 29.45.650(c), (d), (e), (f), (i), (j), and (k) (sales and use tax);
- (53) AS 29.45.700(d), (e), and (g) (sales and use tax);
- (54) AS 29.45.750 (taxation of mobile telecommunications);
- (55) AS 29.45.810 (exemption from municipal taxation);
- (56) AS 29.46.010(b) (exemption from municipal assessment);
- (57) AS 29.47.200(b) (security for bonds);
- (58) AS 29.47.260 (revenue bonds);
- (59) AS 29.47.470 (air carriers);
- (60) AS 29.65 (general grant land);
- (61) AS 29.71.040 (procurement preference for state agricultural and fisheries products);
- (62) AS 29.71.050 (procurement preference for recycled Alaska products).

