

MEMORANDUM 14-004

TO: MAYOR AND CITY COUNCIL MEMBERS
FROM: THOMAS F. KLINKNER
RE: REPEAL OF SALES TAX EXEMPTION FOR SALES OF
NONPREPARED FOODS
FILE NO.: 506,742.101
DATE: DECEMBER 17, 2013
CC: WALT WREDE, JO JOHNSON

1. Introduction.

Two ordinances repealing the current City sales tax exemption for sales of nonprepared foods from September 1 through May 31 have been proposed for the January 13, 2014 Council meeting agenda. One would repeal the exemption unconditionally. The other would repeal the exemption, dedicate part of the entire City sales tax to fund a parks and recreation department, and make both the repeal and the dedication subject to voter approval at the October 7, 2014 regular City election.¹

This memorandum describes the history of the sales tax exemption for sales of nonprepared foods, and then answers two legal questions raised by the proposed ordinances. First, the Council may repeal the sales tax exemption for sales of nonprepared foods without voter approval. Second, any dedication of sales tax revenue for a particular purpose, with or without voter ratification, will not restrict the legislative power of future Councils to determine the purposes for which sales tax revenue may be spent.

2. History of the Sales Tax Exemption for Sales of Nonprepared Foods.

Before January 1, 2009, the City levied a sales tax at an aggregate rate of 4.5% "on all sales, rents and services within the City."² The City Code did not identify transactions that were exempt from the tax; instead it levied the tax on transactions

¹ The following analysis assumes that this dedication of sales tax revenue would not result in any increase in the City's present aggregate sales tax rate of 4.5%.

² HCC 9.16.010.

“except as the same may be otherwise exempted by law.”³ AS 29.45.700(a) makes the City sales tax subject to all exemptions from the sales tax levied by the Kenai Peninsula Borough (“Borough”), subject to the authority of the “assembly...by ordinance [to] authorize a city to levy and collect sales and use taxes on other sources.”⁴ Thus, sales were exempt from City sales tax if, and only if, exempt from the sales tax levied by the Borough, or exempt under other federal or state law.

An initiative proposition to exempt sales of nonprepared food from September 1 to May 31 from Borough sales tax was placed on the ballot at the October 7, 2008 regular Borough election (“Borough Proposition”).⁵ Under AS 29.45.700(a), voter approval of this initiative would have precluded the City from taxing the sales that the initiative exempted from Borough sales tax unless the Borough Assembly by ordinance authorized the City to tax them.

Anticipating this effect of the initiative on the levy of sales taxes by general law cities in the Borough, the Borough Assembly adopted Ordinance 2008-28, authorizing “the general law cities in the Kenai Peninsula Borough ... to levy and collect sales taxes on nonprepared food items on a year-round basis except for sales that are required to be exempted by AS 29.45.700 as now enacted or may be hereinafter (sic).”⁶ Ordinance 2008-28 became effective upon voter approval of the Borough Proposition at the October 7, 2008 regular Borough election. The exemption enacted by the Borough Proposition became effective on January 1, 2009.

Because Borough Ordinance 2008-28 authorized the City’s existing sales taxation of sales of nonprepared foods, voter approval of the Borough Proposition had no effect on the City’s taxation of those sales. However, on December 8, 2008, the City Council adopted Ordinance 08-32(S)(A-2). This ordinance enacted HCC 9.16.100(a), exempting sales of nonprepared foods from City sales tax from September 1 through May 31 of each year, commencing January 1, 2009. Section 3 of Ordinance 08-

³ *Id.*

⁴ See, *City of Homer v. Gangl*, 650 P.2d 396, 399-400 (Alaska 1982), rejecting a bed tax enacted by the City because it did not conform to the Borough’s sales tax structure. However, this requirement does not apply to home rule cities, because AS 29.45.700(a) is not among the provisions of Title 29 that AS 29.10.200 designates as “apply[ing] to home rule municipalities as prohibitions on acting otherwise than as provided.”

⁵ The initiative proposed enacting Kenai Peninsula Borough Code 5.18.200(15)(d) as follows:

(d) Sales of nonprepared food items. Sales tax is prohibited on all sales of nonprepared food items from September 1 until May 31 of each year. These food items exempted from sales tax include those which have been previously granted exemption in KPB 5.18.200(14) for food purchased with coupons issued under the federal food stamp program.

⁶ AS 29.45.700(d) prohibits the City from levying a sales tax on food purchases made with food stamps or with certain other government subsidies.

32(S)(A-2) also stated, "The Council intends to bring forward a proposition for an advisory vote regarding the sales tax structure for nonprepared food items as soon as administratively practical."

On January 26, 2009, the Council adopted Ordinance 09-02, providing for the levy of a sales tax on nonprepared foods from September 1 through May 31 at a rate of 3.0%, effective January 1, 2010, but only if the City voters approved a proposition to that effect at the October 6, 2009 regular City election. At the October 6, 2009 regular City election, a majority of those voting on the question voted against this proposition.

Since 2009, the Council has considered, but not enacted, three ordinances repealing in whole or in part the exemption from City sales tax for sales of nonprepared foods. None of these ordinances made repeal of the sales tax exemption subject to voter approval. Ordinance 10-46, which would have repealed the exemption completely, was rejected on September 27, 2010. Ordinance 12-54(S), which would have repealed the exemption for specified categories of nonprepared foods, was rejected on December 10, 2012. Ordinance 12-53(S), which would have repealed the exemption completely, was rejected on January 14, 2013.

3. *The Council May Repeal the Sales Tax Exemption for Sales of Nonprepared Foods without Voter Approval.*

AS 29.35.250(a) authorizes the City to "exercise any power not otherwise prohibited by law." AS 29.20.050(a) vests the legislative power of the City in the Council. Thus, the Council may exercise its legislative power without voter approval, except where prohibited by law from doing so. One prohibition on the exercise of legislative power by the Council is the requirement in AS 29.45.670 that "[a] new sales and use tax or an increase in the rate of levy of a sales tax approved by ordinance does not take effect until ratified by a majority of the voters at an election." In contrast, the power to grant sales tax exemptions is not so limited: "[sales tax] exemptions may be granted by ordinance."⁷

*City of St. Mary's v. St. Mary's Native Corporation*⁸ addressed the question whether a city council's repeal of a sales tax exemption adopted by ordinance was subject to voter approval. A taxpayer challenged the council's repeal by ordinance of an exemption from sales tax of the part of a sale in excess of \$1,000. The court held that repealing a sales tax exemption neither increases the rate of levy of a sales tax, nor imposes a new sales tax—the two actions that AS 29.45.670 makes subject to voter approval.⁹ Thus, the city council could repeal the sales tax exemption under its implicit authority to repeal any ordinance that it had the power to enact:

⁷ AS 29.45.650(a).

⁸ 9 P.3d 1002 (Alaska 2000).

⁹ 9 P.3d at 1006-1008.

Alaska Statute 29.45.650(a) grants a municipality the power to grant an exemption to a sales tax by ordinance without voter approval. We conclude that this grant of power implies the power to repeal such an exemption by ordinance. As one commentator has observed:

Specific grant of power to repeal ordinances, however, ordinarily is not necessary since it is the general rule that power to enact ordinances implies power, unless otherwise provided in the grant, to repeal them. It is patently obvious that the effectiveness of any legislative body would be entirely destroyed if the power to amend or repeal its legislative acts were taken away from it.

Moreover, Alaska's constitution and our prior case law require us to interpret AS 29.45.650(a) in favor of the broad power of municipal governments. We have concluded that article X, section 1 of the Alaska Constitution restrains us from implying limitations "on the taxing authority of a municipality where none are expressed."¹⁰

The City having exempted sales of nonprepared foods from sales tax by ordinance, under *City of St. Mary's* the Council may repeal that exemption by ordinance without voter approval. Moreover, as discussed below, the City voters' prior rejection of Ordinance 09-02 partially repealing the exemption does not change this result.

Ordinance 09-02 made its partial repeal of the tax exemption for sales of nonprepared food items from September 1 through May 31 subject to voter approval. The voters' rejection of that partial repeal caused the failure of a condition to the effectiveness of Ordinance 09-02, but had no other legal effect. Nothing in the voters' rejection of Ordinance 09-02 restricts the Council's future authority to legislate regarding the sales tax exemption for sales of nonprepared foods. Moreover, such a restriction would not be permissible. It is a well established rule of municipal law that a city council may not limit the legislative power of future councils by prohibiting the repeal of an ordinance:

The power of repeal extends, generally speaking, to all ordinances. Indeed, a municipal corporation cannot abridge its own legislative powers by the passage of irrevocable ordinances. The members of its legislative body are trustees for the public, and the nature and limited tenure of their office impress the ordinances enacted by them with liability to change. One council may not by an ordinance bind itself or its successors so as to prevent free legislation in matters of municipal government. Accordingly, in the absence of a valid provision to the contrary, a municipal council or assembly, having the power to legislate on, or exercise discretionary or

¹⁰ 9 P.3d at 1007 (footnotes omitted).

regulatory authority over, any given subject, may exercise that power at will by enacting or repealing an ordinance in relation to that subject.¹¹

Thus, the Council's adoption of Ordinance 09-02 could not "abridge its own legislative power" by either expressly or implicitly abdicating that power in favor of the voters' rejection of its partial repeal of the sales tax exemption for sales of nonprepared foods. Notwithstanding that voter rejection, the Council may repeal the sales tax exemption for sales of nonprepared foods without voter approval.

4. Voter Ratification of a Dedication of Sales Tax Revenue Will Not Bind Future City Councils.

Even if the City voters ratify an ordinance that purports to dedicate sales tax revenues to a particular purpose, the City Council at any time still may enact an ordinance either amending or repealing that dedication, or appropriate funds by ordinance contrary to the dedication.

As discussed above, it is a well established rule of municipal law that a city council may not limit the legislative power of future councils by prohibiting the repeal of an ordinance. Thus, the Council cannot "abridge its own legislative power" by enacting an ordinance that dedicates sales tax revenue to fund a parks and recreation department. Moreover, voter ratification of the dedication has no effect on the power of a future Council to repeal it.

In addition to amending or repealing the dedication of sales tax revenue to fund a parks and recreation department, the Council may abrogate the dedication simply by appropriating sales tax revenue to any other City purpose. The Council makes appropriations by ordinance,¹² and the subsequent legislative act of such an appropriation would release the City from the prior legislative constraints of the dedication of sales tax revenue.¹³

Please let me know whether we may be of further assistance in this matter.

TFK/TFK

¹¹ 6 McQuillin, *The Law of Municipal Corporations* § 21.10, at 374 (rev. 3d ed. 2007) (footnotes omitted).

¹² AS 29.25.010(a)(4).

¹³ See, *Miller v. Matanuska-Susitna Borough*, 54 P.3d 285, 292 (Alaska 2002), holding that a later-enacted ordinance superseded a contrary municipal code provision.