



THE STATE
of **ALASKA**
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October 24, 2013

VIA EMAIL & U.S. MAIL

The Honorable Tammie Wilson
Alaska State Legislature
1292 Sadler Way, Room 304
Fairbanks, Alaska 99701
Email: Tammie.Wilson@akleg.gov

Re: Proposed Air Quality Control Regulations and FNSB Proposition 3

Dear Representative Wilson,

You have expressed concern to our office that the Alaska Department of Environmental Conservation's ("DEC") proposed changes to its air quality control regulations¹ would trump or nullify an initiative enacted by voters in the Fairbanks Northstar Borough ("FNSB" or "Borough"), a second class borough. We do not believe DEC's proposed regulations would impact the ordinance in question, and we hope the following analysis resolves your concern.

As you are aware, Proposition 3, passed in October 2012 by a plurality of FNSB voters, enacts the following ordinance:

The borough shall not, in any way, regulate, prohibit, curtail, nor issue fines or fees associated with, the sale, distribution, or operation of heating appliances or any type of combustible fuel. "Heating Appliances" is defined as, but not limited to: oil furnaces, gas furnaces, wood stoves, coal stoves, wood-fired hydronic heaters, wood-fired furnaces, coal-fired hydronic heaters, coal-fired furnaces, masonry heaters, pellet stoves, cook stoves, and fireplaces.

A "yes" vote means the Borough would be prohibited from regulating, prohibiting, curtailing, or issuing fines or fees associated with the sale, distribution, or operation of heating appliances or any type of combustible fuel.

¹ 18 AAC 50 (Public Review Draft, September 19, 2013).

A “no” vote defeats the proposition.

As a preliminary matter, under AS 29.26.100, voters in a municipality may enact local laws by initiative. Statewide voters may also enact laws by initiative.² An ordinance passed by initiative is direct legislation by the people, and there is no legal distinction between an ordinance passed by the Borough assembly and an ordinance passed by local voters through initiative.³ Accordingly, Proposition 3 is a presumptively valid local law providing, in essence, that the FNSB shall not regulate heating appliances or combustible fuel in any way. We understand your specific concern to be that proposed 18 AAC 50.245(a) will allow the Borough to act in contravention of Proposition 3 by permitting it to regulate heating appliances or combustible fuel.⁴

Alaska Statute 46.14.400 allows a municipality, with the approval of DEC, “to establish and administer within its jurisdiction a local air quality control program that operates in lieu of and is consistent with all or part of the department’s air quality program.” Under AS 29.35.055, a municipality must enact an ordinance to establish a local air quality control program under AS 46.14.400. Specifically, a municipality may establish such a program “only if the municipality has obtained the consent of its governing body through an ordinance authorizing the participation.” The FNSB has an

² Local use of the initiative derives from statute at AS 29.26.100, as opposed to Article XI, section 1 of the Alaska Constitution, which governs use of the initiative at the statewide level. *See Griswold v. City of Homer*, 186 P.3d 558 (Alaska 2008).

³ *See, e.g., Municipality of Anchorage v. Frohne*, 568 P.2d 3 (Alaska 1977).

⁴ Proposed 18 AAC 50.245(a) provides in full:

Air quality episodes and advisories. The department or a local air quality control program authorized by the department under AS 46.14.400 may declare an air quality episode and prescribe and publicize curtailment action if the concentration of an air pollutant in the ambient air has reached, or is likely in the immediate future to reach, any of the concentrations established in Table 6 of this subsection.

The proposed regulation will apply statewide. Therefore, it has been drafted broadly enough to encompass all local air quality control programs (and their requisite enabling ordinances).

approved local air quality control program and enabling ordinance consistent with state law and with Proposition 3.⁵

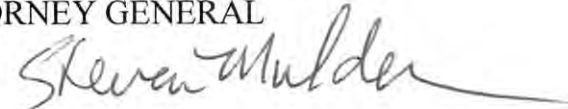
Nothing in DEC's proposed regulations empowers the Borough to act outside the authority of its duly-authorized local air quality control program, which by law includes the enactment of an enabling ordinance. In other words, these proposed regulations do not confer upon the Borough new powers not already granted to it by ordinance, enacted under the statutory framework of the local air quality control program. The ordinance enacted through Proposition 3 and the ordinance enacted through the local air quality control program govern this area, and we understand that the two ordinances have been intentionally harmonized with one another. Alaska Statute 29.35.055 indicates that an air quality control program is constrained by the terms of its enabling ordinance, and these proposed regulations do not change that. In all likelihood, a court faced with interpreting these provisions would resolve any apparent conflict between 18 AAC 50.245(a) and the local ordinances in favor of the ordinances.

We hope this letter addresses your concerns. Please let us know if we can be of further assistance in this matter.

Sincerely,

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By:



Steven Mulder
Chief Assistant Attorney General

SEM/nrd

cc: Larry Hartig, Commissioner, Department of Environmental Conservation
Alice Edwards, Division Director, Department of Environmental Conservation.

⁵ Since 1970, FNSB Code has provided that “The borough by ordinance exercises the following powers on an areawide basis . . . [p]rovides air pollution control in accordance with AS 46.03.” *See* FNSBC 1.02.040. The relevant portion of state statute, air quality control, is now at AS 46.14. The Borough also has a specific air quality control program for PM_{2.5} episodes, the type of episode relevant here. *See* Chapter 8.21 FNSBC. Alaska Statute 46.14.400(d) also requires a municipality “seeking department approval for a local air quality control program to enter into a cooperative agreement with the department that is designed to avoid unnecessary duplication of responsibilities” and requires specific provisions in that agreement. The FNSB and DEC have such an agreement, executed in January 2010.