

**Thompson, Colette**

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**From:** Thomas Klinkner [tklinkner@BHB.com]  
**Sent:** Tuesday, October 12, 2010 10:40 AM  
**To:** Thompson, Colette  
**Subject:** Ordinance Serial No. 2010-07

Colette,

The following are my responses to the questions that Mr. Smalley emailed to you.

1. "...the issue of a change in qualifications of the job being implemented mid term, which appears to violate state statute which indicates that a change in qualifications takes effect at the end of a term rather than mid-term."

Response: AS 29.20.150(b) provides that if the term of a member of the Assembly is changed by charter or ordinance the term of the member holding office when the change becomes effective is not affected. It is arguable that under AS 29.20.150(b), Section 1 of Ordinance Serial No. 2010-07 should not apply to Mr. Smalley until his current term on the Assembly expires. However, the common-law rule against holding incompatible offices, on which my opinion relies, precedes Mr. Smalley's term on the Assembly. Moreover, AS 29.29.150(b) only addresses changes to the term of a sitting Assembly member that are effected by "charter or ordinance"--it does not affect the application of the common-law rule against incompatible offices.

2. "Additionally it is awkward that 5 people, none of which reside within the city of Kenai, can overturn what voters have the freedom to determine by their voting rights."

Response: The Alaska Supreme Court addressed the relationship of a prohibition on dual office holding to the right to vote for a candidate of one's choice in *Acevedo v. City of North Pole*. Acevedo asserted that a North Pole home rule charter prohibition on simultaneous service as a council member and a city employee unlawfully restricted a voter's choice of candidates for city office. The Court rejected that argument, holding that the interests served by the prohibition on holding incompatible offices justified the prohibition notwithstanding its restriction on a voter's choice of candidates for city office.

3. "Prior to Ordinance 2010-07 any of up to 5 members of the Assembly residing within a city could have held a City Council seat and Assembly seat. No one else did, but then if it were only me as I currently held two offices, the ordinance is an single issue, applied to an individual, in such violates state law prohibiting law written to an individual of a specific issue."

Response: Mr. Smalley appears to argue that Section 1 of Ordinance Serial No. 2010-07 unlawfully discriminates against him as the only Assembly member who also served on a city council at the time the ordinance was adopted. Section 1 of Ordinance Serial No. 2010-07 prohibits dual office holding in general terms--it would apply to any Assembly member who was elected to a city council, not just to Mr. Smalley. The *Court in Acevedo v. City of North Pole* concluded that a prohibition on dual office holding had the necessary close relationship to the governmental interests that are served by that prohibition. Thus, I conclude that Section 1 of Ordinance Serial No. 2010-07 would survive a challenge alleging its discrimination against Mr. Smalley.

Mr. Smalley also appears to be concerned that he was advised not to vote on Ordinance Serial No. 2010-07 due to conflict of interest. Nonetheless, I understand that the ordinance received the number of votes that was required for its passage--Mr. Smalley's abstention from voting on the ordinance did not affect whether the ordinance was validly adopted.

4. During the debate on the adoption of Ordinance 2010-07, Assembly members Knopp and Fischer both stated that Ordinance 2010-07 would not affect Mr. Smalley's tenure on the Assembly until the expiration of his Assembly term in 2011.

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**Response:** The common-law prohibition on holding incompatible offices applies to Mr. Smalley independently of Ordinance 2010-07. Under the common-law rule, Mr. Smalley would forfeit his seat on the Assembly upon taking office as a Kenai City Council member. Therefore, the effect of Ordinance 2010-07 on Mr. Smalley's tenure on the Assembly is moot.

5. "So, if one is on the Board of Directors or serving as the President of the AML and supports a state-wide issue which may be different than the KPB Assembly, that would be defined as serving two masters and one cannot then serve as an officer or on the Board of AML."

**Response:** The common-law rule against dual office holding applies only to serving simultaneously in two public offices. It does not address serving on the board or as an officer of a nongovernmental organization such as AML while holding office as an elected official. The latter situation would be governed by state statutes and Borough ordinances that address elected officials' conflicts of interest, and is outside the scope of my opinion.

6. "This Assembly position represents the City of Kenai. Unless there are very unusual circumstances I would support the city as its representative on the Assembly. That is not serving two masters unless the 'common law' definition would define an assembly member supporting his/her constituency as serving a second master, with the KPB being the other."

**Response:** Of course, all members of the Assembly are accountable to the constituency that elected them. The law views this accountability differently than an elected official's fiduciary duty to the institution (Borough or city) that the official is elected to serve. It is the high level of fidelity to the institution that the elected official serves that makes problematic the simultaneous holding of elected offices with the Borough and City, which may contract with each other, may transfer powers and responsibilities from one to the other, and may reject or concur in some of each others' actions.

7. "...then yet another master is served- one's personal contracting business or his/her company that contracts with the borough."

**Response:** An Assembly member's entering into contracts with the Borough would be governed by state statutes and Borough ordinances that address elected officials' conflicts of interest, and is outside the scope of my opinion. Generally, however, such contracting is prohibited.

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