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**MEMORANDUM
KENAI PENINSULA BOROUGH
LEGAL DEPARTMENT**


2005 DEC -6 PM 12: 53



144 N. Binkley Street
Soldotna, Alaska 99669

KPB
CLERK'S OFFICE

Tel. (907) 714-2120
Fax (907) 262-8686

TO: Ron Long, Assembly President
Members, Kenai Peninsula Borough Assembly

THRU:  John J. Williams, Kenai Peninsula Borough Mayor

FROM:  Colette Thompson, Borough Attorney
 Holly B. Montague, Deputy Borough Attorney

DATE: December 6, 2005

Agenda Item P. I. a

Committee Finance

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SUBJECT: Application of Proposition 4 to the Keystone Drive and North Road Extension Projects

Question: What impact, if any, does the adoption of Proposition 4 have on the Keystone Drive and Kenai Spur Road Extension (KSRE), also referred to as the North Road Extension (NRE), projects?¹

Short Answer: While there are arguments on both sides of the issue, in our view it is legally defensible to continue both the Keystone Drive and the KSRE projects without a vote, since requiring a vote for these projects as a result of Proposition 4 would be an improper retroactive application of the law to before the April 15, 2005 effective date.

Applicable ordinance: Following shows the changes to the code as approved by the voters in Proposition 4 during the October 4, 2005 election:

5.04.110. Major capital improvement projects--Referendum required.

A. All major capital improvement projects to be constructed, or acquired by the borough must be approved by the voters of the borough at a regular or special election, before the project is constructed, or acquired, if the total project cost is more than \$1,000,000, including architectural, engineering, inspection, design, administration or any other cost. ~~For the purpose of this section, a major capital improvement project is one whose total project cost is more than \$1,500,000, including architectural, engineering, inspection, design, administration and other costs.~~ This section applies to all proposed capital improvement projects to be financed with borough funds, which are not the proceeds of a bond issue approved by voters, ~~except that federal or state grants for capital improvement projects are not subject to this section.~~ This section does not apply to insurance proceeds covering the repair or replacement of damaged borough capital improvements, ~~including modifications to the capital improvement required by code or statute.~~ A capital improvement project that is proposed to be built in phases shall include the projected cost of all phases as the total project cost for purposes of this ordinance.

B. When the total projected cost of a capital improvement project as defined in this section is more than \$1,000,000 it must receive an affirmative vote by no less than 60% of the affected voters, voting at a borough election for such a project to be approved.

¹ The adoption of Proposition 4 raises several legal concerns. This memo addresses only whether Proposition 4, assuming it is otherwise legal, is applicable to the KSRE and Keystone Drive projects.

DISCUSSION

1) Background.

The assembly appropriated funds of \$1,000,000 or more and approved both of these projects before the April 15, 2005 effective date of Proposition 4, knowing that both projects would exceed \$1 million, and made additional appropriations of over \$1,000,000 after April 15, 2005.² Both projects could be submitted to the voters at this time if the assembly so chooses, prior to entering more contracts that would lead to completion of the projects.

2. Statutory Construction.

KPB 5.04.110 was amended by the passage of Proposition 4. New language in this section includes that the vote must occur "before the project is constructed" if the "total project cost" exceeds \$1,000,000. Ordinances are to be construed narrowly only to the extent they are ambiguous.³ In determining whether ambiguity exists the ordinance is read in a fair and reasonable manner with due regard for its purpose.⁴ Since the language in question is from an initiative, there is no legislative history to guide us in sorting through the ambiguities in the proposition's language.⁵ One of the main ambiguities in this ordinance is that it is not clear at what point before construction a vote must be taken. Since the proposition's purpose was to limit government spending on major capital projects without prior voter approval, waiting until just before construction to take the vote would defeat at least one purpose of the initiative, particularly if large sums of money are spent before the election.

The proposition itself considers all phases of the project to comprise the total project cost⁶ and that it includes "architectural, engineering, inspection, design, administration, or any other cost." When it is known that over \$1 million⁷ would be spent on a project before the assembly ever makes an appropriation, the vote should be taken before the first appropriation to avoid the unnecessary

² KSRE Project: Beginning in 1999 the borough assembly took official action in support of construction of the KSRE through its inclusion on the Alaska Statewide Transportation Improvement Program (STIP) list. To date, the assembly has also adopted eight resolutions and two ordinances supporting various aspects of the NRE project. These began with resolution 2001-053, approving the construction of the NRE, and include numerous other actions supporting progress on the project. In ordinance 2002-19-27 the assembly accepted and appropriated federal and state funds of \$1,250,000 for the project, and in ordinance 2005-19-16, appropriated \$1,830,000 in federal, state and road service area funds for the environmental phase.

Keystone Drive Project: Formal assembly actions began with the adoption of resolution 2001-114 endorsing eleven projects, including Keystone Drive, for the STIP list. On September 2, 2002, the assembly by motion authorized the assembly president to issue a letter of support to the congressional delegation to specifically encourage federal funding of this project. On April 6, 2004, the assembly by motion included Keystone Drive in its list of 2004 federal funding requests. On July 6, 2004, in resolution 2004-067 the assembly authorized spending \$90,300 from the Road Service Area capital improvement fund to the Keystone Drive road improvement project as the local match for a \$1,000,000 federal grant, and authorized the mayor to execute all documents necessary to complete the project. The grant funds of \$909,700 were appropriated February 15, 2005 in Ordinance 2004-19-34. On July 12, 2005 in ordinance 2005-19-01 the assembly appropriated an additional \$2,000,000 in grant funds from the state for this project.

³ *Municipality of Anchorage v. Lloyd*, 679 P.2d 486 (Alaska 1984).

⁴ *Lloyd* at 487.

⁵ There were whereas clauses included with the proposition language that offer some guidance. This language explains the reason for including grant funds as being subject to the voter approval requirement, i.e., the total project costs can exceed the amount of grant funds and even grant-funded projects will have maintenance, operation, and repair costs, which borough taxpayers will bear.

⁶ A capital improvement project that is proposed to be built in phases shall include the projected cost of all phases as the total project cost for purposes of this ordinance. KPB 5.04.110(A).

⁷ There are major capital projects where the cost estimate will not be available until a certain amount of money is spent on design. This could be problematic for capital projects that either exceed the million-dollar cap after the borough is well into the project, or for projects where the cost cannot be estimated until the borough has expended funds in determining the feasibility and/or costs of the project.

expenditure of up to a million dollars only to have the project fail at the polls after the costs reach that amount.

3. Prospective or retroactive application.

As indicated above, numerous formal actions had been taken by the assembly supporting both projects including appropriating funds of more than \$1 million prior to the adoption of Proposition 4. As such, requiring a vote for these projects to continue would seem to be retrospective application of the legislation.

“Ordinances are construed as having only a prospective operation, and are never to be given a retrospective or retroactive effect if susceptible of any other construction . . . an intention that an ordinance shall have a retrospective operation is not to be presumed but must be manifested by clear and unequivocal language, and in case of doubt the statute or ordinance must be construed to have a prospective effect only.” 62 C.J.S. Municipal Corporations, § 309. Alaska case law follows this proposition.

Proposition 4 has explicit language allowing retroactivity to April 15, 2005. When language specifically provides a date to which a new act would apply retroactively, the court has held that it would not apply any further retroactively than the date stated in the act.⁸ Here, there is no indication that the proposition was intended to apply to projects that the assembly had approved and appropriated money for prior to April 15, 2005, even if further appropriations after April 15 would be necessary to complete the project. The Alaska Supreme Court has noted its repeated policy of a statutory presumption against retrospective legislation because people doing business should be able to rely on laws with reasonable certainty. It adopted the following test as to whether a statute is retroactive: “A retroactive [retrospective] statute is one which gives to pre-enactment conduct a different legal effect from that which it would have had without the passage of the statute.”⁹

Using this definition, applying Proposition 4 to the continuation of the Keystone Drive and KSRE projects would be retrospective application. Since the assembly was not legally required to ask voter approval before the appropriations and contracts were entered and would be required to do so now, arguably the legal effect has changed after adoption of the ordinance and the retrospective application is not acceptable. Further, the language of the proposition itself requires all phases of the project be considered a single project. Therefore, the argument that the vote should occur before the second phase is undertaken, or in the middle of phase 1 such as the case would be here for the KSRE, contravenes the language of the ordinance. Also, the policy considerations disfavoring retrospective application, that people conducting their business should be able to rely on existing laws with reasonable certainty, supports this conclusion.¹⁰ There is minimal likelihood that the assembly would have appropriated over \$3,000,000 and the borough would have spent \$534,789.51 on the KSRE prior to October of 2005 (or April of 2005 for that matter) if they had expected that the project would have be subject to 60 percent voter approval at a much later date.

CONCLUSION

In our opinion the law supports the decision to continue the Keystone Drive and KSRE projects without a Proposition 4 vote. The language of the Proposition 4 amendments support requiring a vote prior to initial appropriation, which in this case would result in retroactive application of this proposition to both projects contrary to applicable legal principles.

⁸ *State Dept of Revenue v. Alaska Pulp America*, 674 P.2d 268 (Alaska 1983).

⁹ *Norton v. Alcoholic Beverage Control Board*, 695 P.2d 1090 (Alaska 1985). See also *Eastwind, Inc. v. State*, 951 P.2d 844 (Alaska 1997).

¹⁰ *Eastwind* at 849.