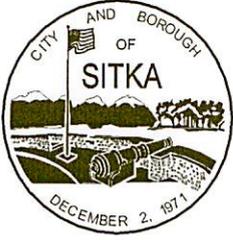


## **POSSIBLE MOTION**

**I MOVE TO** approve Ordinance 2018-18 on second and final reading.

Notes:

- At the May 8 Assembly meeting, second reading of Ordinance 2018-18 was postponed to June 12
- Before the Assembly for consideration on June 12 is first reading of Ordinance 2018-29, an alternative to Ordinance 2018-18



# City and Borough of Sitka

100 Lincoln Street • Sitka, Alaska 99835

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## MEMORANDUM

**To:** Mayor Hunter and Assembly Members

**From:** Keith Brady, Municipal Administrator

**Reviewed:** Brian Hanson, Municipal Attorney

**Date:** 4/19/18

**Subject:** Land Disposal

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### Executive Summary

After requesting legal advice to the constitutionality of certain provisions in the Sitka General Code, we found that areas of the Sitka General Code are unconstitutional and not in line with the Alaska Constitution nor would be upheld by the Alaska Supreme Court.

By removing these provisions in the general code, Sitka then becomes compatible with the Alaska Constitution. Additionally, this ordinance allows for greater flexibility in addressing affordable housing challenges in Sitka. It would expedite making municipal property available and approving municipal property sales and leases, such as the Marine Service Center, Sitka Community Hospital, No Name Mountain, and other properties. These municipal property transactions would not be stalled waiting for a municipal election, which could also require expending municipal monies for a special election.

### Recommendation

Approval of the changes to the Sitka General Code to be compatible with the Alaska Constitution.

### Details

Through discussions and readings regarding the disposal and leasing of municipal property, there has been an Alaska Supreme Court ruling stating that the authority to dispose of property lies with the Assembly or elected body. To verify this we hired outside legal counsel to review and give us their recommendation on the subject. Attorney Mike Gatti's brief lays out the answer to the question of, Should "voter ratification of certain land disposals [that] contain legal infirmity ... be remediated"? He argues that certain areas of Sitka General Code should be repealed because it limits the Assembly's legislative authority to control public assets. He also argues that the Assembly cannot appropriate their authority to the people on disposing of public assets.

The Assembly knows, respects and fully supports the rights of citizens to participate in their government. The Assembly is also responsible for abiding by the Alaska Constitution. The Alaska Constitution limits initiatives, including any approval or disapproval of appropriations of assets. The Sitka

General Code amendments that we are proposing makes these sections of code consistent with the Alaska Supreme Court decision in *Alliance of Concerned Taxpayers Inc. versus Kenai Peninsula Borough* ("ACT"), 273 P.3d 1128 (Alaska 2012). According to this decision, the Assembly, rather than the public, holds the authority to approve or disapprove appropriation of public assets, including such assets as municipal land and its disposal (by sale, lease or destruction). The ACT decision found an initiative, unconstitutional that would have enacted a municipal code section that required any construction project over \$1 million to be approved by a public vote. This decision is applicable here, even though not all of the code sections being amended were created by initiative, some were passed by an Assembly ordinance in response to initiative efforts. The underlying ruling in ACT makes it clear that a long series of Alaska Supreme Court decisions on state legislature authority applies to municipal legislatures. These court decisions extended to municipal appropriations of municipal assets, finding that "the legislature [Assembly], and only the legislature [Assembly] retains control over the allocation of state [municipal] assets among competing needs." ACT, 273 P.3d at 1137.

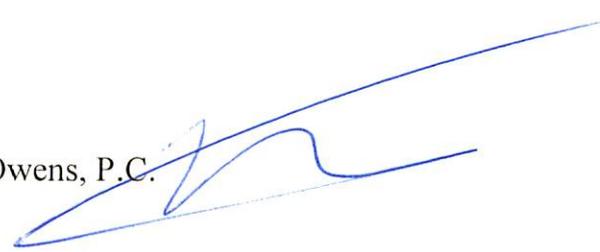
Municipal property transactions (i.e. sales, leases, building destruction) would still involve public hearings because they must be approved by two readings of an ordinance. The public will continue to be advised and involved in these types of municipal property decisions. The changes to the ordinance still allows to the full extent possible under the law for direct involvement of citizens and local government decisions, while recognizing the fact that local governments operate as representatives rather than direct lawmaking form of government. This does not preclude the Assembly from having public advisory votes as desired. These Sitka General Code amendments will expedite the process for addressing land and property disposals, including affordable housing, leasing and sale of property, and disposing of dilapidated municipal buildings and structures. Most importantly, the amendments will result in the Sitka General Code to be consistent with each other and be compatible with provisions of state law and Alaska Constitution.

To: Keith Brady, Borough Administrator  
Brian Hansen, Municipal Attorney

From: Michael Gatti, Jermain Dunnagan & Owens, P.C.

Date: April 11, 2018

Re: Sitka General Code (“SGC”) 18.12.010(B) requiring voter ratification of certain land disposals contains legal infirmities that should be remediated



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The City and Borough of Sitka (“CBS”) has requested legal advice on the question of whether Sitka General Code (“SGC”) 18.12.010(B) requiring voter ratification of certain land disposals contains legal infirmities that should be remediated.<sup>1</sup> For the reasons discussed below, we conclude that the requirement for voter ratification of CBS land disposals should be repealed because it limits the Assembly’s legislative authority to control public assets by imposing a voter ratification requirement on the Assembly’s authority to make land appropriations.<sup>2</sup>

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<sup>1</sup> SGC 18.12.010(B) provides: “Upon sale or disposal of real property valued over five hundred thousand dollars, or upon lease of real property, including tidelands, of a value of more than seven hundred fifty thousand dollars, the ordinance authorizing the sale, lease, or disposition shall provide that the ordinance be ratified by a majority of the qualified voters voting at a general or special election. Any such sale, lease, or disposition shall be revocable pending the outcome of the election. This subsection shall not apply to leases at the former Alaska Pulp Corporation mill site, and the property leased under Ordinance 99-1539.” The voter ratification requirement in various CBS land ordinances has the effect of ratifying or repealing (veto) an Assembly appropriation.

<sup>2</sup> The discussion related to SGC 18.12.010(B) applies equally to SGC 18.12.014(A); SGC 18.16.200; SGC 18.16.220; and SGC 19.07.040. Note land is at a premium in CBS due to its geographical features. The need for affordable housing is another reason land is a very important public asset. The Alaska Constitution, statutes, and the CBS Charter and ordinances establish that the Assembly is the governing body of the Municipality with broad legislative powers to make decisions involving public assets such as lands. AS 29.71.800(10); Alaska Constitution Article 10 Section 1. The CBS Charter requires the Assembly to perform certain acts by ordinance including the conveyance or lease of any lands of CBS. As a home rule municipality (continued) CBS has all legislative powers not prohibited by law or Charter. Sitka Home Rule Charter SHRC 3.01(7). The requirement that the Assembly dispose of

## MUNICIPAL LAND IS A PUBLIC ASSET

In 1978 the Alaska Legislature adopted the Municipal Lands Entitlement Program which is designed to convey land to municipalities to promote community expansion and to establish a source of revenue.<sup>3</sup> In accordance with the State municipal entitlements program, CBS was granted 10,500 acres. Over the years CBS has engaged in a comprehensive land disposal program to identify and classify various parcels of land for municipal purposes. The CBS land disposal program is designed to meet the policy objectives and governmental purposes of the Municipal Lands Entitlement Act and the CBS land management programs. The SGC requirements for voter ratification or veto of the Assembly's land disposal appropriation undermines the Assembly's ability to fully implement the CBS state land entitlement program and its land management function.

## LAND DISPOSAL IS AN APPROPRIATION

The SGC requirement for voter ratification of certain land disposals impermissibly seeks to approve or repeal the appropriation of land by the CBS Assembly. Land is a public asset. Voter ratification (or veto) of Assembly land disposals has the legal effect of making or repealing land appropriations in contravention of Alaska Const., Art. XI, Sec. 7 and Alaska Supreme Court precedent.<sup>4</sup> One of the purposes of this constitutional limitation on direct democracy (on initiative or referendum) is to ensure that “the legislature, and only the legislature, retains control over the allocation of state assets among competing needs.”<sup>5</sup> “[T]he usual rule is ‘to construe voter initiatives broadly so as to preserve them whenever possible. However, initiatives touching upon the allocation

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land by ordinance is mandatory due to the use of the word “shall.” The Assembly is the only entity empowered to enact ordinances. AS 29.04.010. SHRC 1.03; SHRC 2.02.

<sup>3</sup> AS 29.65.010-140, and *see* the CBS Lands Work Session (attached PowerPoint).

<sup>4</sup> While the voter ratification or veto of Assembly land appropriations does not expressly constitute an initiative or referendum because it doesn't follow proper procedure, it improperly imposes an automatic voter initiative or referendum because it affects an Assembly appropriation. *See, Alliance of Concerned Taxpayers Inc. v. Kenai Peninsula Borough*, 273 P.3d 1128, 1138 (2012) (holding “the voters’ ability to veto a capital project, even prior to budget approval, infringes on the assembly’s ability to allocate resources among competing uses because there is nothing that the assembly can do to appropriate money for that project”).

<sup>5</sup> *Alaska Action Center v. Municipality of Anchorage*, 84 P.3d 989, 994 (Alaska 2004) (quoting *Pullen v. Ulmer*, 923 P.2d 54, 62 (Alaska 1996)) (emphasis in original). The legislative body of CBS is the Assembly. AS 29.71.800(10).

of public revenues and assets require careful consideration because the constitutional right of direct legislation is limited by the Alaska Constitution.”<sup>6</sup>

The Alaska Supreme Court has adopted a two-part test for determining whether an initiative or referendum constitutes an appropriation:

We use a two-part inquiry to determine whether a particular initiative makes an appropriation. First, we determine whether the initiative deals with a public asset. In a series of cases, we have determined that public revenue, *land*, a municipally-owned utility, and wild salmon are all public assets that cannot be appropriated by initiative. Second, we determine whether the initiative would appropriate that asset. In deciding where the initiative would have that effect, we have looked to the “two core objectives” of the limitation on the use of the initiative power to make appropriations. One objective is preventing “give-away programs” that appeal to the self-interest of voters and endanger the state treasury. The constitutional delegates were concerned that “[i]nitiatives for the purpose of requiring appropriations [would] pose a special danger of ‘rash, discriminatory, and irresponsible acts.’” The other objective is preserving legislative discretion by “ensur[ing] that the legislature, and *only* the legislature, retains control over the allocation of state assets among competing needs.”<sup>7</sup>

The policy for limiting legislation relating to appropriations is that it “tempt[s] the voter to [prefer] . . . his immediate financial welfare at the expense of vital government activities.”<sup>8</sup> This rationale applies as much to allocation of physical property as it does to allocations of money.<sup>9</sup> Applying these principles to SGC 18.12.010(B) it impermissibly interferes with the Assembly’s legislative authority and discretion to control the allocation of its public assets, in this case *land*, among the competing needs of the community.

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<sup>6</sup> *Pullen v. Ulmer*, 923 P.2d 54, 58 (Alaska 1996) (citing *City of Fairbanks v. Fairbanks Convention & Visitors Bureau*, 818 P.2d 1153, 1155 (Alaska 1991) (internal citation omitted)). This principle applies equally to municipal assets because the Assembly is the municipal legislative body.

<sup>7</sup> *Citizens for Taxi Reform v. Municipality of Anchorage*, 151 P.3d at 422-23 (Alaska 2006) (internal citations omitted) (emphasis added).

<sup>8</sup> *Pullen*, 923 P.2d at 61 (citing *Thomas v. Bailey*, 595 P.2d 1, 8 (Alaska 1979)).

<sup>9</sup> *McAlpine v. University of Alaska*, 762 P.2d at 81, 88-89 (Alaska 1988).

The Alaska Supreme Court has determined that acts involving the transfer of state land are appropriations because public land is a primary asset of the state treasury.<sup>10</sup> Similarly, the CBS ordinances in their application, affect the Assembly's appropriation of land. Because the SGC ordinances at issue requires voter ratification (or veto) if CBS sells or disposes of public land in various circumstances<sup>11</sup> it effectively limits CBS from appropriating one of its very important public assets, its real property. Pursuant to *Thomas v. Bailey*, the voter ratification or veto of ordinances impermissibly seek to regulate the land appropriations of CBS and are therefore invalid. A point squarely brought home by the Alaska Supreme Court in the following opinions.

In *Alaska Action Center, Inc. v. Municipality of Anchorage*,<sup>12</sup> there was an attempt to dedicate, by initiative, a parcel of municipal property as park land to prevent the municipality from developing land for use as a golf course. The Court reviewed the initiative under the *Pullen* objectives and concluded that it resulted in the allocation of a resource among competing demands, by taking away land from the developers, and allocating it for parkland. This was an impermissible use of the initiative which affected an appropriation. Likewise, ordinances requiring voter ratification or veto of the sale or disposal of public real property valued at \$500,000 or more or for leases of property valued at \$750,000 or more is an unlawful delegation of legislative authority.<sup>13</sup> The clear effect of such ordinances is to allow the voters to automatically ratify or vote to repeal sales, disposals, or leases of property that fit this criteria. These actions would have the effect of limiting CBS' authority and discretion to appropriate and allocate its real property assets.<sup>14</sup>

The Alaska Supreme Court agrees.<sup>15</sup>

In *ACT*, the Court concluded that an initiative which would require voters to ratify, and thus allow voters to veto, any capital improvement project over a certain dollar amount had the effect of diluting the Assembly's *exclusive* control over the budget and therefore was an impermissible appropriation.<sup>16</sup> In *ACT*, the Court addressed whether a voter ratification initiative was unconstitutional when it allocates *away from* a particular

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<sup>10</sup> *Thomas v. Bailey*, 595 P.2d 1 (Alaska 1979).

<sup>11</sup> See SGC 18.12.010(B) and Footnote 2.

<sup>12</sup> 84 P.3d 989 (Alaska 2004).

<sup>13</sup> See Footnote 4

<sup>14</sup> See, *Sitkans for Responsible Government*, (Superior Court Case No. 1SI-08-00130 CI and Supreme Court Case No. S-13394); The Sitka Superior Court in the SRG case concluded the land at the SCIP (Sawmill Cove Industrial Park (SCIP) is a public asset of the CBS. SCIP is now renamed the "Gary Paxton Industrial Park" ("GPIP").

<sup>15</sup> See Footnote 4.

<sup>16</sup> *Id.*, at 1136-1139.

purpose.<sup>17</sup> The court concluded that the *ACT* voter ratification measure would require that voters be permitted to allocate public assets even through the ordinance created by the measure did not itself allocate those assets.<sup>18</sup> The court explained, “Practically, when voters refuse to approve a capital project they allocate municipal funds away from the particular project, which interferes with the Borough’s exclusive power to allocate funds among competing issues.”<sup>19</sup> Like the initiative at issue in the *ACT* case, the ordinance at issue here similarly restricts the appropriation power of the CBS Assembly. The ordinance gives the voters the ability to ratify or veto a sale, lease, or other transaction of CBS which impermissibly infringes on the Assembly’s exclusive control over appropriations. The recent *ACT* case resolves this issue and establishes voter ratification of Assembly appropriations would require voters to allocate public assets in contravention of the Assembly’s powers over appropriation and the express limitations of Alaska Const., art. XI, §7.

The *ACT* case squarely establishes the ordinances in question result in an unlawful appropriation of public assets by requiring voter ratification of a sale, lease, or disposal of CBS property. As the *ACT* case demonstrates, a court need not wait until a vote by the electorate ratifying or vetoing a sale or lease of land to determine that it impermissibly removes the exclusive power of allocating public assets away from the Assembly. In *ACT*, the Alaska Supreme Court found the initiative that created an automatic vote to approve or reject capital projects above a certain amount was an appropriation, holding:

Referring capital projects to voters, however, will almost invariably result in voters “vetoing” certain projects, at which point there is nothing the Borough can do to go forward with the project. In *ACT*’s view this means that the municipal funds are still available to be used at the Borough’s discretion. But the voters’ ability to veto capital projects, even prior to budget approval, infringes on the assembly’s ability to allocate resources among competing uses because there is nothing that the assembly can do appropriate money for that project.<sup>20</sup>

The Alaska Supreme Court further explained:

While the ordinance itself does not allocate public assets, it requires that voters be permitted to allocate those resources. Practically, when voters

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<sup>17</sup> *Id.*, at 1137.

<sup>18</sup> *Id.*, at 1138.

<sup>19</sup> *Id.*

<sup>20</sup> 273 P.3d at 1138 (emphasis added). Whether the ordinances in question were adopted by Assembly ordinance or by voter initiative is irrelevant to our legal analysis. The *ACT* case is controlling authority. See, *Kodiak Island Borough v. Mahoney*, 71 P3d 896 (Alaska 2003)

refuse to approve a capital project they allocate municipal funds away from the particular project, which interferes with the Borough's exclusive power to allocate funds among competing uses.<sup>21</sup>

CBS property is a public asset. The ratification election proposed by SGC 18.12.010(B) (and other code sections) violates Alaska law because it has the effect of making or repealing an appropriation of public assets<sup>22</sup> and because they interfere with the Assembly's exclusive ability to allocate funds among competing issues.

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<sup>21</sup> *Id.* (emphasis added).

<sup>22</sup> *See* Footnote 2.