IN THE SUPREME COURT OF THE STATE OF ALASKA

ALASKA TRAPPERS ASSOCIATION, INC., NATIONAL TRAPPERS ASSOCIATION, INC., Appellant, v. CITY OF VALDEZ Appellees.	)	Supreme Court No. S-18189

Superior Court Case Nos. 3VA-20-00015 CI

APPEAL OF THE DECISION OF THE SUPERIOR COURT,
THIRD JUDICIAL DISTRICT, STATE OF ALASKA
THE HONORABLE RACHEL AHRENS

BRIEF OF APPELLEE, CITY OF VALDEZ

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STATUTES AND RULES PRINCIPALLY RELIED UPON

Constitutional Provisions

Alaska Const. Art. VIII, § 1. Statement of Policy

It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.

Alaska Const. Art. VIII, § 2. General Authority

The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

Alaska Const. Art. VIII, § 3. Common Use

Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

Alaska Const. Art. VIII, § 4. Sustained Yield

Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

Alaska Const. Art. X, § 1. Purpose and Construction

The purpose of this article is to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions. A liberal construction shall be given to the powers of local government units.

Alaska Const. Art. X, § 11. Home Rule Powers

A home rule borough or city may exercise all legislative powers not prohibited by law or by charter.

Alaska Statutes

AS 16.05.221. Boards of Fisheries and Game.

(a) For purposes of the conservation and development of the fishery resources of the state, there is created the Board of Fisheries composed of seven members appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session. The governor shall appoint each member on the basis of interest in public affairs, good judgment, knowledge, and ability in the field of action of the board, and with a view to providing diversity of interest and points of view in the membership. The appointed members shall be residents of the state and shall be appointed without regard to political affiliation or geographical location of residence. The commissioner is not a member of the Board of Fisheries, but shall be ex officio secretary.

(b) For purposes of the conservation and development of the game resources of the state, there is created a Board of Game composed of seven members appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session. The governor shall appoint each member on the basis of interest in public affairs, good judgment, knowledge, and ability in the field of action of the board, and with a view to providing diversity of interest and points of view in the membership. The appointed members shall be residents of the state and shall be appointed without regard to political affiliation or geographical location of residence. The commissioner is not a member of the Board of Game, but shall be ex officio secretary.

AS 16.05.255. Regulations of the Board of Game; Management Requirements.

(a) The Board of Game may adopt regulations it considers advisable in accordance with AS 44.62 (Administrative Procedure Act) for

(1) setting apart game reserve areas, refuges, and sanctuaries in the water or on the land of the state over which it has jurisdiction, subject to the approval of the legislature;

(2) establishing open and closed seasons and areas for the taking of game;

(3) establishing the means and methods employed in the pursuit, capture, taking, and transport of game, including regulations, consistent with resource conservation and development goals, establishing means and methods that may be employed by persons with physical disabilities;

(4) setting quotas, bag limits, harvest levels, and sex, age, and size limitations on the taking of game;

(5) classifying game as game birds, song birds, big game animals, fur bearing animals, predators, or other categories;

(6) methods, means, and harvest levels necessary to control predation and competition among game in the state;

(7) watershed and habitat improvement, and management, conservation, protection, use, disposal, propagation, and stocking of game;

(8) prohibiting the live capture, possession, transport, or release of native or exotic game or their eggs;

(9) establishing the times and dates during which the issuance of game licenses, permits, and registrations and the transfer of permits and registrations between registration areas and game management units or subunits is allowed;

(10) regulating sport hunting and subsistence hunting as needed for the conservation, development, and utilization of game;

(11) taking game to ensure public safety;

(12) regulating the activities of persons licensed to control nuisance wild birds and nuisance wild small mammals;

(12) promoting hunting and trapping and preserving the heritage of hunting and trapping in the state.

(b) [Repealed, Sec. 12 ch 52 SLA 1986].

(c) If the Board of Game denies a petition or proposal to amend, adopt, or repeal a regulation, the board, upon receiving a written request from the sponsor of the petition or proposal, shall in addition to the requirements of AS 44.62.230 provide a written explanation for the denial to the sponsor not later than 30 days after the board has officially met and denied the sponsor's petition or proposal, or 30 days after receiving the request for an explanation, whichever is later.

(d) Regulations adopted under (a) of this section must provide that, consistent with the provisions of AS 16.05.258, the taking of moose, deer, elk, and caribou by residents for personal or family consumption has preference over taking by nonresidents.

(e) The Board of Game shall adopt regulations to provide for intensive management programs to restore the abundance or productivity of identified big game prey populations as necessary to achieve human consumptive use goals of the board in an area where the board has determined that

(1) consumptive use of the big game prey population is a preferred use;

(2) depletion of the big game prey population or reduction of the productivity of the big game prey population has occurred and may result in a significant reduction in the allowable human harvest of the population; and

(3) enhancement of abundance or productivity of the big game prey population is feasibly achievable utilizing recognized and prudent active management techniques.

(f) The Board of Game may not significantly reduce the taking of an identified big game prey population by adopting regulations relating to restrictions on harvest or access to the population, or to management of the population by customary adjustments in seasons, bag limits, open and closed areas, methods and means, or by other customary means authorized under (a) of this section, unless the board has adopted regulations, or has scheduled for adoption at the next regularly scheduled meeting of the board regulations, that provide for intensive management to increase the take of the population for human harvest consistent with (e) of this section. This subsection does not apply if the board

(1) determines that intensive management would be

(A) ineffective, based on scientific information;

(B) inappropriate due to land ownership patterns; or

(C) against the best interest of subsistence uses; or

(2) declares that a biological emergency exists and takes immediate action to protect or maintain the big game prey population in conjunction with the scheduling for adoption of those regulations that are necessary to implement (e) of this section.

(g) The Board of Game shall establish population and harvest goals and seasons for intensive management of identified big game prey populations to achieve a high level of human harvest.

(h) [Repealed, 2000 Ballot Measure No. 6].

(i) For the purpose of encouraging adults to take children hunting, the board shall establish annual hunting seasons in appropriate areas of the state for big game, other than bison and musk ox, that are open before schools start in the fall and before regular hunting seasons begin. Only a resident child accompanied by a resident adult or a child accompanied by the child's resident parent, resident stepparent, or resident legal guardian may take big game in an area where a season established under this subsection is in effect. The adult, parent, stepparent, or legal guardian who accompanies the child may only assist the child in taking big game. A big game animal taken under this subsection must be counted against the bag limits of both the child and the adult, parent, stepparent, or legal guardian who accompanies the child. In this subsection,

(1) "adult" means an individual who is 21 years of age or older;

(2) "child" means an individual who is not more than 17 years of age and not younger than eight years of age.

(j) In this section,

(1) "harvestable surplus" means the number of animals that is estimated to equal the number of offspring born in a game population during a year less the number of animals required for recruitment for population maintenance and enhancement, when necessary, and the number of animals in the population that die from all causes, other than predation or human harvest, during that year;

(2) "high level of human harvest" means the allocation of a sufficient portion of the harvestable surplus of a game population to achieve a high probability of success for human harvest of the game population based on biological capabilities of the population and considering hunter demand;

(3) "identified big game prey population" means a population of ungulates that is identified by the Board of Game and that is important for providing high levels of harvest for human consumptive use;

(4) "intensive management" means management of an identified big game prey population consistent with sustained yield through active management measures to enhance, extend, and develop the population to maintain high levels or provide for higher levels of human harvest, including control of predation and prescribed or planned use of fire and other habitat improvement techniques.

(5) "sustained yield" means the achievement and maintenance in perpetuity of the ability to support a high level of human harvest of game, subject to preferences among beneficial uses, on an annual or periodic basis.

AS 16.05.790. Obstruction or Hindrance of Lawful Hunting, Fishing, Trapping, or Viewing of Fish or Game.

(a) Except as provided in (e) of this section, a person may not intentionally obstruct or hinder another person's lawful hunting, fishing, trapping, or viewing of fish or game by

(1) placing one's self in a location in which human presence may alter the

(A) behavior of the fish or game that another person is attempting to take or view; or

(B) feasibility of taking or viewing fish or game by another person; or

(2) creating a visual, aural, olfactory, or physical stimulus in order to alter the behavior of the fish or game that another person is attempting to take or view.

(b) For purposes of (a) of this section, "lawful" means

(1) in compliance with

(A) this title, regulations adopted under this title, or applicable federal statutes and regulations;

(B) the Marine Mammal Protection Act (P.L. 92-522) or the Endangered Species Act (P.L. 93-205); or

(C) federal regulations adopted under 16 U.S.C. 3111 - 3126 relating to subsistence hunting, fishing, or trapping on federal land; and

(2) with the permission of the private landowner if the hunting, fishing, trapping, or viewing of fish or game occurs on private land.

(c) Notwithstanding AS 12.25, only a peace officer may arrest a person for violating this section. A peace officer who has probable cause to believe that a person has violated this section may arrest or cite the person or order the person to desist.

(d) In a prosecution under this section, it is an affirmative defense that the person was lawfully entitled to obstruct or hinder the hunting, fishing, trapping, or viewing of fish or game.

(e) This section does not apply to

(1) lawful competitive practices among persons engaged in lawful hunting, fishing, or trapping;

(2) actions taken on private property with the consent of the owner; or

(3) the obstruction or hindrance of the viewing of fish or game by a person actively engaged in lawful fishing, hunting, or trapping.

(f) A person who violates this section is guilty of a misdemeanor and is punishable by a fine of not more than $500 or imprisonment for not more than 30 days, or both.

AS 29.35.180. Land Use Regulation.

(a) A first or second class borough shall provide for planning, platting, and land use regulation in accordance with AS 29.40.

(b) A home rule borough shall provide for planning, platting, and land use regulation.

AS 29.35.260. Cities Outside Boroughs.
(a) A city outside a borough may exercise a power not otherwise prohibited by law. A provision that is incorporated by reference to laws governing boroughs applies to home rule cities outside boroughs only if the provision is made applicable to home rule boroughs.
(b) A home rule or first class city outside a borough is a city school district and shall establish, operate, and maintain a system of public schools as provided by AS 29.35.160 for boroughs. A second class city outside a borough is not a school district and may not establish a system of public schools.
(c) A home rule city outside a borough shall provide for planning, platting, and land use regulation as provided by AS 29.35.180 (b) for home rule boroughs. A first class city outside a borough shall, and a second class city outside a borough may, provide for planning, platting, and land use regulation as provided by AS 29.35.180 (a) for first and second class boroughs.
(d) This section applies to home rule and general law cities.

Regulations

5 AAC 84.260

It is lawful to trap a furbearer only in a game management unit or a portion of a unit open to trapping in accordance with the open season and bag limit prescribed in 5 AAC 84.270. Bag limits and open seasons are based upon the regulatory year.

5 AAC 92.550 – Areas closed to trapping

The following areas are closed to the trapping of furbearers as indicated:

(1) Unit 1(C) (Juneau area):

(A) a strip within one-quarter mile of the mainland coast between the end of Thane Road and the end of Glacier Highway at Echo Cove;

(B) Auke Lake and the area within one-quarter mile of Auke Lake;

(C) that area of the Mendenhall Valley bounded on the south by the Glacier Highway, on the west by the Mendenhall Loop Road and Montana Creek Road and Spur Road to Mendenhall Lake, on the north by Mendenhall Lake, and on the east by the Mendenhall Loop Road and Forest Service Glacier Spur Road to the Forest Service Visitor Center;

(D) a strip within one-quarter mile of the Douglas Island coast along the entire length of the Douglas Highway and a strip within one-quarter mile of the Eaglecrest Road;

(E) that area within the United States Forest Service Mendenhall Glacier Recreation Area;

(F) a strip within one-quarter mile of the following trails as designated on United States Geological Survey maps: Herbert Glacier Trail, Windfall Lake Trail, Peterson Lake Trail, Spaulding Meadows Trail (including the loop trail), Nugget Creek Trail, Outer Point Trail, Dan Moller Trail, Perseverance Trail, Granite Creek Trail, Mt. Roberts Trail and the Nelson Water Supply Trail, Sheep Creek Trail, Point Bishop Trail, Amalga Trail, Auke Nu/John Muir Trail, Eagle Glacier Trail, Point Bridget Trail, Treadwell Ditch Trail, and Salmon Creek Trail; however, traps that are completely submerged and traps with an inside jaw spread of five inches or less which are set at least five feet above the ground and snow are allowed if set more than 50 yards from the trail;

(G) the area described as the Mendenhall Wetlands State Game Refuge in AS 16.20.034 is closed to trapping; the use of off-road or all-terrain vehicles, motorcycles, or other motorized vehicles (except boats) within the boundaries of Mendenhall Wetlands State Game Refuge is prohibited at all times;

(2) Unit 9: the McNeil River State Game Sanctuary and contiguous tidelands are closed to trapping;

(3) Unit 14(C) (Anchorage Area):

(A) the drainages into Eklutna River and Eklutna Lake, within Chugach State Park except Thunderbird Creek and those drainages flowing into the East Fork of the Eklutna River upstream from the bridge above the lake;

(B) the Eagle River Management Area;

(C) that portion of Chugach State Park outside of the Eagle River, Anchorage, and Eklutna management areas is open to trapping under Unit 14(C) seasons and bag limits, except that trapping of wolf, wolverine, land otter, and beaver is not allowed; killer style steel traps with an inside jaw spread seven inches or greater are prohibited; a person using traps or snares in the area must register with the Department of Natural Resources Chugach State Park area office and provide a trapper identification; all traps and snares in the area must be marked with the selected identification; the use of traps or snares is prohibited within

(i) 50 yards of developed trails;

(ii) one-quarter mile of trailheads, campground, and permanent dwellings;

(iii) repealed 7/1/2009;

(D) all land and water within the Anchorage Management Area as described in 5 AAC 92.530(3);

(E) in the Anchorage Coastal Wildlife Refuge in Unit 14(C), described in AS 16.20.031: all land and water south and west of and adjacent to the toe of the bluff that extends from Point Woronzof southeasterly to Potter Creek;

(F) the Joint Base Elmendorf-Richardson (JBER) Management Area, except for beaver, muskrat, mink, weasel, marten, otter, fox, and coyote in areas designated by the commander;

(4) Unit 15:

(A) repealed 7/1/2005;
(B) repealed 7/1/2005;
(C) repealed 7/27/2005;
(D) the Kenai Moose Research Center Closed Area in Unit 15(A), which consists of that area within the outer boundary fences of the Kenai Moose Research Center, located west and south of Coyote and Vixen Lakes is closed to trapping;

(5) Unit 17: all islands within the Walrus Islands State Game Sanctuary as described in AS 16.20.092 are closed to trapping;

(6) Unit 2: Joe Mace Island Marine Park, a small island off Point Baker on Prince of Wales Island, is closed to trapping;

(7) repealed 8/10/2010;

(8) repealed 8/10/2010.

Ordinances

Valdez Municipal Code, Chapter 9.38 Trapping

Sections:

9.38.010 Purpose of chapter.

It is the purpose of this chapter to enact land use regulations pursuant to AS 29.35.260(c) to protect all persons from hazardous devices and to protect domesticated animals and pets from damage and destruction which may result from uncontrolled trapping activities. (Ord. 20-05 § 1; Ord. 17-03 § 1 (part): Ord. 14-06 § 1 (part): Ord. 05-10 § 1 (part))

9.38.020 Definitions.

The following words and phrases shall have the meanings respectively ascribed to them by this section:

"Trap" means any device used for the purpose of catching, capturing, snaring, holding or killing animals.

"Trapping" means the placing or setting of traps with the intent to catch animals. This definition does not apply to the catching of animals within a dwelling place or garage, shed or barn. (Ord. 20-05 § 1; Ord. 17-03 § 1 (part): Ord. 14-06 § 1 (part): Ord. 05-10 § 1 (part))

9.38.030 Trapping allowed.

Trapping for both recreational and for subsistence purposes is allowed within the Valdez city limits except that:

A. Trapping shall not be allowed within one-half mile in any direction of an occupied subdivision.

B. Trapping shall not be allowed within five hundred feet of any road, excluding bridges and culverts outside the downtown area and past the duck flats. No trapping is allowed within the area known as the Valdez duck flats, which is defined as that area bounded on the east by Mineral Creek Loop Road, on the west by the Richardson Highway, on the south by a line extending from the Valdez Container Terminal to and including Dock Point and on the north by elevation of one thousand feet.

C. Trapping shall not be allowed within portions of Mineral Creek Canyon and all areas northeast of the Richardson Highway from Airport Road to the Glacier Stream Bridge. No trapping is allowed within five hundred feet of the Mineral Creek trails, located in Mineral Creek Canyon as designated on Exhibits A and B to Section 12.08.010.

D. No trapping is allowed within the area known as Mineral Creek State Park, which is defined as a fifty-acre parcel known as Tract A-2, ASLS 99-21; and a 91.68-acre portion of U.S. Survey 5113 bounded on the north by Raven Subdivision and Tract A-1, ASLA 79-117, on the east by Tract A-1, ASLA 79-117, on the south by Blueberry Subdivision and Port Valdez, and on the west by Tract A-2, ASLA 99-21. (Ord. 20-05 § 1; Ord. 17-03 § 1 (part): Ord. 14-06 § 1 (part): Ord. 05-10 § 1 (part))

JURISDICTIONAL STATEMENT

The Superior Court entered its final Order Re: Cross-Motions for Summary Judgment on March 5, 2021. [Exc. 0242-55] A motion for reconsideration and motion for additional ruling was denied on June 21, 2021. [Exc. 0276] Final Judgment against Alaska Trappers was entered on August 31, 2021. [Exc. 0277–78] This Court has jurisdiction over this appeal pursuant to AS 22.05.010.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Superior Court properly concluded that the City of Valdez's ("City" or "Valdez") trapping related ordinance was not impliedly preempted by the Alaska Constitution or Alaska Statutes.

2. Whether the Superior Court properly concluded that City's trapping related ordinance does not conflict with Alaska's State Board of Game ("Board" or "Board of Game") regulation concerning lawful trapping.

3. Whether the Superior Court properly held that the City's trapping related ordinance is not rendered invalid by virtue of being promulgated without express consideration of constitutional principles related to the development and conservation of game.

STATEMENT OF THE CASE

This case arises out of an ordinance within the Valdez Municipal Code ("VMC") Section 9.38 ("VMC 9.38") that prohibits trapping activities within a limited portion of the City's jurisdiction pursuant to the broad constitutional and statutory authority allowing Valdez to regulate land use through local ordinances. The City enacted an ordinance

related to trapping activities in designated areas within the City's jurisdiction in 2005 [Exc. 0134-39] and amended that ordinance in 2014 and 2017. [Exc. 0026-28] The City further amended VMC 9.38 by ordinance on May 18, 2020. [Exc. 0029-31] VMC 9.38, as presently enacted, designates specific areas within the City's jurisdiction where trapping is not allowed in order to "protect all persons from hazardous devices and to protect domesticated animals and pets from damage and destruction which may result from uncontrolled trapping activities." [Exc. 0029]

Alaska Trappers Association, Inc. and National Trappers Association, Inc. ("Alaska Trappers") filed a complaint against the City asserting that (i) VMC 9.38 is preempted by state law; (ii) the City violated AS 16.05.790 by "interfering with trapping activity conducted in compliance with applicable state and federal law;" and (iii) VMC 9.38 was "not promulgated in compliance with Article VIII, Sections 1, 2, 3, 4, 6 and 7 of the Alaska Constitution and [is] in violation of, or prohibited by, these provisions of the Alaska Constitution." [Exc. 0001-6]

Alaska Trappers moved for summary judgment on July 16, 2020 [Exc. 0013-36], and the City filed its opposition to Alaska Trappers' motion for summary judgment and cross-motion for summary judgment on August 21, 2020. [Exc. 0037-39] On March 5, 2021, after briefing and oral argument, the Superior Court issued an order denying Alaska Trappers' motion for summary judgment and granting the City's motion for summary judgment [Exc. 0242-55] ("Superior Court Order").

The Superior Court held that VMC 9.38 is not expressly or impliedly prohibited by state law citing the permissive language in the Board's organic statute to distinguish *Jacko*

v Pebble[1] from the instant case. [Exc. 0247-54] The Court further held that Article VIII of the Alaska Constitution ("Article VIII") does not bar the City's ordinance and that VMC 9.38 does not violate AS 16.05.790. [Exc. 0251-54]

Alaska Trappers moved for reconsideration and additional ruling on the Superior Court Order [Exc. 0256-59], which was denied after full briefing. [Exc. 0276] The State of Alaska ("State") moved to intervene before the Superior Court during the pendency of Alaska Trappers' motion for reconsideration and the Superior Court denied that motion on June 21, 2021. [Exc. 00340-48] On August 31, 2021, the Superior Court entered final judgment in favor of the City. [Exc. 0277]

STANDARD OF REVIEW

The issues presented for review in this appeal involve constitutional and statutory interpretation to which this Court applies its independent judgment.[2]

ARGUMENT

Valdez is a home rule municipality incorporated under Alaska law with broad authority under Article X of the Alaska Constitution ("Article X") to enact land use and public safety ordinances like VMC 9.38. The broad grant of municipal authority under Article X has caused this Court to reject traditional tests for determining when a municipal ordinance is invalid as a result of a conflict with State law, including "the doctrine of state

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1 *Jacko v. State, Pebble Ltd. Partn*., 353 P.3d 337, 342 (Alaska 2015).

2 *State v. Planned Parenthood of the Great N.W.*, 436 P.3d 984, 991 (Alaska 2019) (citations omitted).

pre-emption by 'occupying the field'"[3] and "statewide versus local concern."[4] Instead, this Court focuses on whether the exercise of authority has been expressly or impliedly prohibited.[5]

Having conceded that the City is not expressly prohibited from enacting VMC 9.38, Alaska Trappers seeks to invalidate VMC 9.38 based upon implied prohibition.[6] In advancing this argument, Alaska Trappers largely ignores the legal standard established by this Court that only finds implied prohibition where a municipal ordinance "seriously impedes implementation of [a] statewide legislative policy"[7] and "the statute and ordinance are so substantially irreconcilable that one cannot be given its substantive effect if the other is to be accorded the weight of law."[8] Determining whether this legal standard is met necessarily requires a fact specific inquiry regarding the effect of a municipal ordinance on a statewide legislative policy.

Alaska Trappers insists that VMC 9.38 is invalid because it prohibits trapping where State law would allow it, while ignoring case law firmly establishing that municipal ordinances are not rendered invalid in Alaska merely because they are inconsistent or in

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[3] *Jefferson v. State*, 527 P.2d 37, 43 n.33 (Alaska 1974) ("We reaffirm our rejection of the doctrine of state pre-emption by 'occupying the field.' We will not read into a scheme of statutory provisions any intention to prohibit the exercise of home rule authority in that area of the law. If the legislature wishes to 'preempt' an entire field, they must so state.").

[4] *Id.* at 43. ("The test we derive from Alaska's constitutional provisions is one of prohibition, rather than traditional tests such as statewide versus local concern.").

[5] *Jefferson*, 527 P.2d at 43 ("A municipal ordinance is not necessarily invalid in Alaska because it is inconsistent or in conflict with a state statute. The question rests on whether the exercise of authority has been prohibited to municipalities. The prohibition must be either by express terms or by implication.").

[6] Appellants Brief at 6-25.

[7] *Johnson v. City of Fairbanks*, 583 P.2d 181, 187 (Alaska 1978).

[8] *Jefferson*, 527 P.2d at 43.

conflict with State law.[9] In doing so, Alaska Trappers suggests that this Court must prohibit any municipal regulation impacting trapping regardless of the scope or nature of the impact on the legislative purpose at issue. Under the theory advanced by Alaska Trappers, if the City closed a one-square-foot section of land otherwise open to trapping, that municipal ordinance would necessarily be invalid.

Under Alaska law, VMC 9.38 is presumed to be a valid and constitutional exercise of municipal authority.[10] In addition, "Alaska courts are obliged to avoid construing statutes in a way that leads to patently absurd results or to defeat of the obvious legislative purpose behind the statute,"[11] and it is well established by Alaska courts that "statutes relating to the same subject matter should be read together as a whole in order that a total scheme evolves which maintains the integrity of each act and avoids ignoring one or the other."[12]

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[9] *See e.g., Area Dispatch, Inc. v. City of Anchorage*, 544 P.2d 1024, 1025 (Alaska 1976) ("Numerous court opinions and commentators have explained that a municipal ordinance of a home rule municipality is not invalid because it is inconsistent or in conflict with a state statute.").

[10] *Fraternal Order of Eagles v. City and Borough of Juneau*, 254 P.3d 348, 352 (Alaska 2011) (citing *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 260 (Alaska 2004)) ("[The Alaska Supreme Court has] made clear that '[a] duly enacted law or rule, including a municipal ordinance, is presumed to be constitutional' and that '[c]ourts should construe enactments to avoid a finding of unconstitutionality to the extent possible.'").

[11] *Penetac v. Municipality of Anchorage*, 436 P.3d 1089, 1092 (Alaska 2019) (quoting *Williams v. State*, 853 P.2d 537, 538 (Alaska 1993) (internal quotations omitted).

[12] *Nash v. State, Com. Fisheries Entry Comm'n*, 679 P.2d 477, 478 (Alaska 1984); *see also, Monzulla v. Voorhees Concrete Cutting*, 254 P.3d 341, 345 (Alaska 2011) (quoting *In re Hutchinson's Estate*, 577 P.2d 1074, 1075 (Alaska 1978)) ("All sections of a statute should 'be construed together so that all have meaning and no section conflicts with another.'").

Alaska Trappers' position would have the absurd effect of rendering local governments powerless to take any measures related to trapping, even when they are clearly required to protect people and pets from physical harm or death. This position is directly contradicted by a published Opinion issued by Attorney General Condon ("Condon Opinion") entitled "Authority of Board of Game to Adopt Regulations for Public Safety Purposes," which states:

> Local governments may, however. enact ordinances within their general police powers that are on the same subject as state statutes, so long as they do not conflict with the state statute or frustrate the exercise of statewide laws. Local governments do not have authority to directly regulate the management of fish and wildlife, but may enact legitimate police power regulations such as restrictions on the use of firearms where they are reasonably necessary to protect life or property.[13]

The Condon Opinion illustrates the manner in which municipal powers authorized under Article X may coexist with State trapping regulations in a manner that give effect to both. Like restricting the discharge of firearms, restricting the setting of traps in areas where it is likely that people, domestic animals, or property will be jeopardized is the exercise of a legitimate police power in furtherance of public safety. Importantly, the Condon Opinion recognizes the distinct functions of municipalities, which are tasked with providing for the safety and welfare of their citizens, and the Board, which is tasked with the discretionary authority to regulate the harvest of game "for purposes of conservation

[13] Appendix A (1982 *Inf. Op. Att'y Gen*. at *5*,* 1982 WL 43763 (Nov. 19; 166-486-82)); The Condon Opinion was issued prior to the 2005 amendment of AS 29.35.145, which provides municipalities with the authority to restrict the discharge of firearms "in any portion of their respective jurisdictions where there is a reasonable likelihood that people, domestic animals, or property will be jeopardized."

and development."[14] Indeed, "[n]one of the functions of the Board or Game set out in AS 16.05.255 or elsewhere, grant the Board of Game any independent authority to adopt regulations for public safety purposes."[15]

Here, the stated purpose of VMC 9.38 is "to enact land use regulations pursuant to AS 29.35.260(c) to protect all persons from hazardous devices and to protect domesticated animals and pets from damage and destruction which may result from uncontrolled trapping activities." [Exc. 0029-31] Municipal authority to exercise its police power by implementing regulations in furtherance of public safety and the protection of life and property should not be extinguished merely because AS 16.05.255 provides that "the Board of Game *may* adopt [trapping] regulations it considers advisable."[16] The ability to enact ordinances that impact trapping is particularly important in light of the Board of Game's limited scope of authority, which precludes it from enacting public safety related ordinances. The distinct regulatory functions of municipalities and the Board of Game can and should coexist.

In this context, Alaska law requires a fact-specific inquiry to determine whether VMC 9.38 impedes a statewide legislative policy and is so substantially irreconcilable with State trapping regulations that the ordinance and statutes cannot be given concurrent effect. Alaska Trappers has entirely failed to consider the actual impact of VMC 9.38 on the legislative purpose(s) that it purportedly impedes and provides no evidence that VMC 9.38 is an impediment to any statewide legislative policy. VMC 9.38 advances

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14 Appendix A at 2.
15 *Id*.
16 AS 16.05.255 (emphasis added).

legitimate public safety and protection of property interests within the City's authority and is narrowly tailored in manner that does not impede statewide policy. Accordingly, the City is not impliedly prohibited from enacting VMC 9.38.

I. VALDEZ HAS EXPRESS AUTHORITY TO ENACT VMC 9.38

Valdez, as a home rule municipality, possesses broad constitutional authority to regulate land use within its jurisdiction.[17] The Alaska Constitution establishes the clear purpose of providing for "maximum local self-government" and provides that "a liberal construction shall be given to the powers of local government units."[18] In interpreting Article X, Section 1, the Alaska Supreme Court has held that "[t]he constitutional rule of liberal construction was intended to make explicit the framers' intention to overrule a common law rule of interpretation which required a narrow reading of local government powers."[19] Applying this liberal interpretation of home rule powers, this Court has held that "[h]ome rule municipalities are free to prohibit conduct that is not prohibited by state legislation."[20]

Article X, Section 11, provides Valdez with the authority to "exercise all legislative powers not prohibited by law or by charter."[21] By not specifically enumerating the legislative powers granted to home rule municipalities, the delegates to the Constitutional

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[17] *Fraternal Order of Eagles*, 254 P.3d at 352 ("Article X, section 11 of the Alaska Constitution provides home rule municipalities with broad powers.").
[18] Art. X, § 11.
[19] *Liberati v. Bristol Bay Borough*, 584 P.2d 1115, 1120 (Alaska 1978).
[20] *Anchorage v. Richards*, 654 P.2d 797, 799 (Alaska App. 1982) (citing *Cremer v. Anchorage*, 575 P.2d 306 (Alaska 1978)).
[21] Art. X, § 1.

Convention intended "to grant as much home rule as possible to boroughs and cities."[22] [Exc. 0123-24] As noted by the Alaska Court of Appeals, "[i]t has consistently been held that [Article X, Section 11] was adopted in order to abrogate traditional restrictions on the exercise of local legislative authority."[23] Applying these constitutional principles to the facts of the present case can only yield a finding that VMC 9.38 is a valid exercise of the City's authority.

Not only does the Alaska Constitution provide Valdez with broad constitutional authority to enact land use ordinances for public safety and protection of property, but the Alaska Legislature has expressly mandated that home rule municipalities enact land use regulations. AS 29.35.180 requires that Valdez, as a home rule municipality, "shall provide for planning, platting, and land use regulation." AS 29.40.040(a) provides that municipalities may adopt ordinances that "restrict the use of land" and "discourage specified uses . . . to minimize unfavorable effects of uses." As a home rule municipality, the City's authority over land use regulation is broader than that provided in AS 29.04.040(a).[24] Notably absent from the express limitations on home rule authority set forth in AS 29.10.200 is any restriction related to trapping.

In accord with its duty to regulate land use, the City has adopted numerous ordinances that restrict activities within its jurisdiction. For example, Valdez has

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[22] Appendix B at 3 (Excerpt of Minutes from Alaska Constitutional Convention) "Our policy in this Committee, and it has been practically uniform since our early studies, has been that we would try and institute, or allow to be instituted, under this constitution an intermediate form of government by which the people could largely exercise a broad degree of power, except those especially reserved to the state.").

[23] *Simpson v. Municipality of Anchorage*, 635 P.2d 1197, 1200 (Alaska App. 1981).

[24] AS 29.10.200 (Setting forth the specific Title 29 limitations on municipal power applicable to home rule municipalities.).

established zoning districts within which specific land uses are permitted and prohibited,[25] identified nuisances and prohibited land uses throughout Valdez,[26] established restrictions on the use of motorized vehicles on local trails,[27] and established reasonable restrictions on the discharge of firearms within its jurisdiction.[28] Like these code provisions restricting the use of land in Valdez, VMC 9.38 is a valid exercise of the City's authority as a home rule municipality.

In light of the City's authority to regulate nuisances, the regulation of traps, which clearly pose a threat to life and property, may be viewed as one of semantics. Had the City merely prohibited dangerous devices like those used in trapping as a public nuisance rather than specifically refer to trapping for the sake of clarity, it is doubtful that the instant litigation would have ever occurred. Indeed, the City's nuisance code designates "[w]hatever injures or endangers the safety, health, comfort or repose of the public, offends public decency, interferes with, obstructs or renders dangerous any street, highway, navigable lake or stream, or in any way renders the public insecure in life or property"[29] as a nuisance. The City plainly has the authority to regulate trapping activities

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[25] VMC Title 17.

[26] *See* VMC 8.20.030 ("The following acts and conditions shall constitute a nuisance in all zones: A. Whatever injures or endangers the safety, health, comfort or repose of the public, offends public decency, interferes with, obstructs or renders dangerous any street, highway, navigable lake or stream, or in any way renders the public insecure in life or property.").

[27] VMC 12.08.010.

[28] VMC 9.32.030.

[29] VMC 8.20.030(A).

to the extent they jeopardize life or property, including the safety of pets, which this court has elevated above ordinary property rights.[30]

Although specific legislative powers granted to home rule municipalities are not expressly enumerated, municipalities unquestionably have the authority to enact ordinances for purposes of public safety. It is well settled that home rule municipalities have police power, which includes the power to enact public safety related ordinances.[31] In the context of municipal regulation of trapping, the Condon Opinion acknowledges that municipalities may impact trapping through the exercise of their police powers.[32] Further, during consideration of HB 201, a bill related to municipal authority to regulate trapping introduced to the Alaska Legislature in 2017, Legislative Legal Counsel offered the opinion that municipalities have the power to regulate trapping within their boundaries "to the extent it is a legitimate ordinance and it protects human life and property within the municipality's boundaries, it is a legitimate local concern and well within the municipality's purview." [Exc. 0229-30] It is indisputable that the City has the statutory

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[30] *Haggblom v. City of Dillingham*, 191 P.3d 991, 996 (Alaska 2008) ("[I]nterest in the continuing health and companionship of her pet is an important one. While pets are considered property under the law of Alaska, we agree with the parties that the emotional bond people feel towards their pets elevates this interest above most property.") (internal citations omitted).

[31] *See R & Y, Inc. v. Municipality of Anchorage,* 34 P.3d 289, 297 (Alaska 2001) ("in order to protect the public welfare, governments may exercise their police powers, occasionally impairing the use and value of private property.") (citations omitted); *Ravin v. State,* 537 P.2d 494, 511 (Alaska 1975); Appendix B at 5 (Acknowledging police power of boroughs and cities under the Alaska Constitution).

[32] Appendix A at 5 ("Local governments do not have the authority to directly regulate the management of fish and wildlife, but may enact legitimate police power regulations such as restrictions on the use of firearms where they are reasonably necessary to protect life or property.").

authority to regulate land use within its jurisdiction and enact public safety related ordinances through the exercise of its police power even if such an ordinance impacts trapping. The only constraint on the exercise of this power is the scope and effect of the ordinance, which may not seriously impede a statewide legislative policy. [33]

II. REGULATION OF TRAPPING IN ALASKA

The regulatory scheme for trapping in Alaska reflects a very limited scope of regulation and little, if any, consideration for land use conflicts. The areas closed to trapping in Alaska are *de minimis*,[34] and there are no generally applicable regulations that preclude trapping within or directly adjacent to areas where harm is likely to occur as a result of heavy use by people and domestic animals. Although it is readily apparent that trapping poses a danger to public safety in such areas, the Board of Game has no authority to promulgate regulations based upon public safety concerns if and when it exercises its discretionary authority to regulate trapping.[35]

Article VIII sets forth the policy of the State with regard to natural resources, which is "to encourage the settlement of its land and the development of its resources by making them available for maximum use ***consistent with the public interest***."[36] Article VIII also states that "[t]he legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, ***for the maximum***

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[33] *See Johnson* 583 P.2d at 187.

[34] https://www.adfg.alaska.gov/index.cfm?adfg=huntingmaps.closedtotrapping.

[35] Appendix A at 2 ("None or the functions of the Board of Game set out in AS 16.05.255 or elsewhere, grant the Board of Game any independent authority to adopt regulations for public safety purposes.").

[36] Article VIII, § 1 (emphasis added).

benefit of its people"[37] and that "[f]ish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, ***subject to preferences among beneficial uses.***"[38]

The constitutional provisions applicable to trapping do not suggest that trapping should be permitted to the detriment of other land uses, but instead reflects an intent to develop resources "consistent with the public interest" and to utilize natural resources "for the maximum benefit of the people" but "subject to preferences among beneficial uses." These constitutional provisions establish that the intent behind Article VIII is to balance uses and benefits of natural resources among a diverse group of users. The desire to balance beneficial uses of natural resources is confirmed by the delegates to the Constitutional Convention who acknowledged that fish and wildlife are not given "first consideration among beneficial users" and that Article VIII "doesn't set up an order of beneficial uses."[39]

AS 16.05.255 provides that "the Board of Game ***may adopt regulations*** it considers advisable in accordance with AS 44.62 (Administrative Procedure Act)"[40] for, among other things,

> (2) establishing open and closed seasons and areas; (3) establishing the means and methods employed in the pursuit, capture, taking, and transport of game, including regulations, consistent with resource conservation and development goals, establishing means and methods that may be employed by persons with physical disabilities; (4) setting quotas, bag limits, harvest levels, and sex, age, and size limitations on the taking of game."[41]

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37 Article VIII, § 2 (emphasis added).
38 Article VIII, § 4 (emphasis added).
39 Appendix B at 7-8.
40 AS 16.05.255(a) (emphasis added).
41 AS 16.05.255(a)(2-4) (emphasis added).

The statute also "authorizes the board to regulate regarding the conservation, development, or utilization of game in a manner that addresses whether, how, when, and where the public asset of game is allocated or appropriated."[42] Thus, the legislature delegated the Board of Game with discretionary authority to open or close areas for trapping, but provided no mandate or exclusive authority to do so. The Board has no duty to regulate trapping at all, let alone consider the propriety of allowing trapping in specific areas of the State. Here, there is no evidence that the Board of Game has ever considered whether trapping is appropriate in the areas where it is prohibited under VMC 9.38.

The Board of Game's ability to enact regulations is limited by the scope of authority delegated to the Board by the legislature[43] and the Board's regulations must be consistent with the statute granting regulatory authority and be reasonably necessary to effectuate the statute's purposes.[44] The Board was created "[f]or purposes of conservation and development of the game resources of the state"[45] and has been delegated the authority to enact regulations for only the thirteen enumerated purposes set forth in AS 16.05.255. Indeed, the Board of Game is heavily constrained in its ability to promulgate regulations and "may only open and close areas to game harvest for purposes of conservation and development."[46]

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[42] AS 16.05.255(j).
[43] *Kenai Peninsula Fisherman's Co-op. Ass'n, Inc. v. State*, 628 P.2d 897, 903 (Alaska 1981).
[44] AS 44.62.030.
[45] AS 16.05.221.
[46] Appendix A at 2.

The Board of Game's exercise of its authority with regard to opening or closing areas to trapping is found in 5 AAC 84.260, which states "***[i]t is lawful to trap a furbearer only in a game management unit or a portion of a unit open to trapping***" and 5 AAC 92.550, which closes a very limited selection of areas to trapping. Under 5 AAC 84.260, unless the Board of Game has closed a particular area to trapping, it remains open to trapping by default.[47] Noteworthy is the absence of any regulatory provision expressly opening the areas affected by VMC 9.38 to trapping. There is no statutory or regulatory statement that all areas not closed under 5 AAC 92.550 are open to trapping, nor is there any indication from the statutes and regulations that the legislature or Board of Game intended to preclude local governments from exercising their authority to close areas for public safety purposes.

Of critical importance to this Court's inquiry is the Board's lack of authority to promulgate regulations for purposes of public safety or the protection of property.[48] The Board may only adopt regulations that serve a conservation or development purpose.[49] Because the Board's authority does not extend to public safety or the protection of property, the Board is precluded from adopting regulations intended to advance these important interests. Accordingly, the Board's trapping regulations, including those that open all of Valdez's jurisdiction to trapping, were adopted without consideration of the

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[47] 5 AAC 84.260 (making it lawful to trap during the open season in any game management unit or portion of the unit that has not been closed to trapping); 5 AAC 92.550 (closing certain areas to trapping).

[48] Appendix A at 2.

[49] *See e.g., Kenai*, 628 P.2d at 903 ("The Board [of Fisheries] must act under its specifically delegated regulatory powers, and actions taken must be premised on the need to effectuate conservation and development purposes.").

public safety implications of allowing trapping in the areas identified in VMC 9.38. If, as Alaska Trappers asserts, the Board of Game possesses exclusive authority to enact regulations that impact trapping, no consideration of public safety would occur prior to adoption of any trapping related regulation.

Trapping is inherently threatening to public safety and property when undertaken in areas commonly used by people and domestic animals. The Board of Game itself has acknowledged by resolution that "the general public often is not aware of when trapping seasons are open or how to recognize trapping activity on trails" and "unleashed pets accompanying recreational trail users can come into contact with legal trapping activities." [Exc. 0063] The Alaska Department of Fish and Game ("ADFG") even publishes a pamphlet [Exc. 0065-66] and has an entire webpage dedicated to providing information on how to release pets from traps.[50] In Valdez, at least one incident involving a pet dog being caught in a trap and nearly dying has occurred in recent years. [Exc. 0068-71.]

Unlike in the Anchorage area for example, where State law provides that trapping is entirely closed in residential and heavily used areas [Exc. 0121], and "the use of traps or snare is prohibited within (i) 50 yards of developed trails; (ii) one-quarter mile of trailheads, campground, and permanent dwellings,"[51] in Valdez, there are no such common-sense regulations under State law. Thus, absent some local regulation, the right to trap is placed in a dominant position over the right to be free from physical harm and the destruction of private property. Alaska Trappers' position yields the absurd result of

[50] https://www.adfg.alaska.gov/index.cfm?adfg=trapping.sharing.
[51] 5 AAC 92.550(3).

allowing trapping in areas directly adjacent to schools, homes, parks, playgrounds, trailheads, trails, and similar areas used heavily by people and domestic animals without any regard for public safety. For example, under State law, trapping is permitted across the street from Herman Hutchens Elementary School in Valdez.

ADFG itself acknowledges that local governments may enact regulations that impact trapping. The published ADFG Trapping Regulations state that "[a]lthough regulations presented in this booklet may show an open season on certain furbearers in a specific game management unit, ***local regulations, ordinances,*** or state park rules ***may prohibit access, trapping,*** or the use of firearms, or require an access permit." [Exc. 0077] Indeed, numerous other local governments have also implemented trapping-related code provisions without legal challenge from the state or otherwise.[52] The Anchorage Assembly, for example, passed an ordinance regulating trapping that provides, in relevant part:

> It is unlawful for any person to knowingly or negligently place a trap, or attempt to place a trap, in a prohibited trapping zone. Where trapping is otherwise permitted by the Alaska Department of Fish and Game or Board of Game regulations, the municipality's prohibited trapping zones are within: 1. 50 yards of developed [or public use] trails, excluding off shoot trails; and 2. one-quarter mile of trailheads, campground, and permanent dwellings. [Exc. 0128-33]

The ADFG Trapping Regulations further advise trappers to "[a]void situations where you might catch a domestic dog or cat, such as near homes or trails frequently used by hikers, skijorers, dog mushers, or other people." [Exc. 0077] VMC 9.38 is precisely the type of local ordinance contemplated in the ADFG Trapping Regulations and regulates the precise

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[52] *See* Alaska Wildlife Alliance Amicus Brief at 16-17.

areas the ADFG regulations suggest should be avoided by trappers in order to minimize harm to people and pets. [Exc. 0126]

While local Fish and Game Advisory Committees offer means for the public and municipalities to provide public input on Board of Game actions, they do not provide an adequate means of addressing the public safety implications of trapping. As discussed herein, the Board of Game itself is constrained in its ability to promulgate regulations for purposes of public safety. Local advisory committees have no decision-making authority but instead are tasked with developing regulatory proposals to be submitted to the Board.[53] Local advisory committee membership is limited to candidates that "have knowledge of and experience with the fish and wildlife resources and their uses in the area,"[54] and "members must be representative of fish and game user groups in the area served by the committee."[55] These limitations on membership reflect the distinct functions of the Board of Game and local advisory committees, which is to provide for conservation and use of fish and wildlife, not to promulgate regulations for purposes of public safety.[56] Local advisory committees are not intended to and do not replace the legislative functions of a municipality.

The constitutional, statutory, and regulatory provisions related to trapping reveal that the legislature has granted the Board of Game with nonexclusive, discretionary authority to regulate trapping, thereby allowing home rule municipalities to enact

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[53] 5 AAC 96.050.
[54] 5 AAC 96.040.
[55] 5 AAC 96.060(e)(l).
[56] 5 AAC 96.050; AS 16.05.255.

ordinances related to trapping that address legitimate local concerns such as public safety and the protection of property. This interpretation is bolstered when considering the robust constitutional authority granted to home rule municipalities together with the limited authority granted to the Board.

III. THE CITY'S EXERCISE OF AUTHORITY IN ENACTING VMC 9.38 IS NOT IMPLIEDLY PROHIBITED

To determine whether a municipality is impliedly prohibited by State law from enacting an ordinance, Alaska courts ask whether "the statute and ordinance are so substantially irreconcilable that one cannot be given its substantive effect if the other is to be accorded the weight of law"[57] by analyzing whether an exercise of municipal authority seriously impedes implementation of a statewide legislative policy.[58]

In a veiled attempt to restore the "occupying the field" test for preemption, Alaska Trappers asserts that Article VIII, "convey[s] pervasive state authority that constitutionally preempts municipal regulations."[59] The State, in its Amicus Brief, removes the veil from this argument by arguing that "Alaska's constitutional framers, and in turn the Alaska Legislature, intended to comprehensively occupy the field."[60] Both Alaska Trappers and the State ignore this Court's express rejection of the "doctrine of state preemption by 'occupying the field."[61] Similarly, Alaska Trappers repeatedly asserts that the statewide nature of the regulation of game supports its position that the City is

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57 *Jefferson*, 527 P.2d at 43.
58 *See Jacko*, 353 P.3d at 337.
59 Appellants' Brief at 10.
60 State of Alaska Amicus Brief at 3.
61 *Jefferson*, 527 P.2d at 43 n.33.

prohibited from enacting VMC 9.38. While this argument may support a finding of preemption based upon "statewide versus local concern" or the synonymous "local activity" analysis,[62] this Court has held that "[t]he test we derive from Alaska's constitutional provisions is one of prohibition, rather than traditional tests such as statewide versus local concern."[63]

Although Alaska Trappers insists that any ordinance that impacts the Board's trapping regulations is necessarily void, "[i]nconsistency with state law is not normally a gauge for determining validity of a local ordinance in Alaska."[64] It is well-settled that "merely because the state has enacted legislation concerning a particular subject does not mean that all municipal power to act on the same subject is lost."[65] Specifically, in *Jefferson v. State,* the Alaska Supreme Court held

> A municipal ordinance is not necessarily invalid in Alaska because it is inconsistent or in conflict with a state statute. The question rests on whether the exercise of authority has been prohibited to municipalities. The prohibition must be either by express terms or by implication such as where the statute and ordinance are so substantially irreconcilable that one cannot be given its substantive effect if the other is to be accorded the weight of law.[66]

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[62] *McCauley v. Hildebrand*, 491 P.2d 120, 122 (Alaska 1971) (citations omitted) (Applying the "local activity test" to find state preemption base upon "pervasive state authority in the field.").
[63] *Jefferson*, 527 P.2d at 43 n.33.
[64] *Simpson*, 635 P.2d at 1200.
[65] *Liberati*, 584 P.2d at 1121-22.
[66] *Jefferson*, 527 P.2d at 43.

The legal standard articulated in *Jefferson* remains controlling law today and is the standard that must be applied to the facts of the present case.[67]

Regardless of whether the VMC 9.38 contradicts State law and the regulation of trapping is a matter of statewide concern, the City is only impliedly prohibited if VMC 9.38 seriously impedes a statewide legislative policy and is "so substantially irreconcilable" that State law cannot be given its substantive effect if the ordinance is to be accorded the weight of law.[68]

Here, VMC 9.38 does not seriously impede any statewide legislative policy and is not substantially irreconcilable with pertinent constitutional, statutory, and regulatory provisions related to trapping to the extent that such provisions cannot be given their substantive effect if VMC 9.38 is accorded the weight of law. It is apparent that VMC 9.38 is not impliedly prohibited in light of the broad authority granted to home rule municipalities and the dearth of State statutory or constitutional provisions suggesting that the legislature intended to prohibit the exercise of the municipal authority at issue.

A. VMC 9.38 Does Not Seriously Impede any Legislative Policy.

Determining whether a local ordinance seriously impedes a statewide legislative policy necessarily requires a fact-specific analysis of the nature of the policy at issue and the actual effect of the local ordinance on that policy. The policy at issue in this case is

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[67] *Penetac*, 436 P.3d at 1091 ("When a home rule municipal ordinance is challenged as invalid under state law, we apply the test set out by the Alaska Supreme Court more than forty years ago in *Jefferson v. State*.").

[68] *Jefferson*, 527 P.2d at 43; *Johnson*, 583 P.2d at 181 (Applying *Jefferson* preemption standard); *Jacko*, 353 P.3d at 346 ("the initiative seriously impedes the regulatory process set forth by the Alaska Land Act and is therefore preempted by that statute.").

set forth in Article VIII, Sections 1 through 4. VMC 9.38 does not seriously impede any of these policies and applies to only approximately 25.6 square miles out of the 586,412 square miles within Alaska, most of which is open to trapping. It is disingenuous to suggest that a limitation on trapping in this small geographic area seriously impedes the policy of making game available for "maximum use consistent with the public interest,"[69] "the maximum benefit of the people,"[70] "common use,"[71] or the policy of "sustained yield."[72] In fact, there is no evidence, in the form of affidavit or otherwise, to establish VMC 9.38 has had any effect on the amount of game taken by means of trapping within Valdez.

Rather than focus on the actual effect of VMC 9.38 on the policies at issue, Alaska Trappers asserts that no municipal limitation on trapping is permitted under Alaska law regardless of its purpose or scope. This position is plainly erroneous as courts applying the implied preemption standard set forth in *Jefferson* engage in fact specific analysis.[73] The Condon Opinion provides a useful example of the type of fact specific analysis this Court should engage in. Specifically, that opinion states "if a borough, through a firearms or similar ordinance, were effectively to close down huge areas of the state to hunting or trapping, for reasons not reasonably related to protection of life and property, the local ordinance would probably be held invalid as a frustration of the statewide management of

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[69] Article VIII, § 1.
[70] Article VIII, § 2.
[71] Article VIII, § 3.
[72] Article VIII, § 4.
[73] *See e.g.*, *Jacko*, 353 P.3d at 344 (Discussing effect of proposed initiative on statewide policies related to mining); to *Johnson*, 583 P.2d at 187 (Discussing effect of Charter provision on statewide policy regarding statute of limitations).

game."[74]

Illustrative of the proper balance between municipal public safety functions and the interest in taking game, is AS 29.35.145(b)(2), which allows municipalities to "restrict[] the discharge of firearms in any portion of their respective jurisdictions where there is a reasonable likelihood that people, domestic animals, or property will be jeopardized." AS 29.35.145(b)(2) is not in conflict with Article VIII. It defines the reasonable scope of municipal authority to regulate the discharge of firearms even where such limitations may prohibit hunting in areas otherwise open under Board of Game regulations. Similarly, the regulation of trapping where it is likely to jeopardize life and property is a proper exercise of municipal authority.

Importantly, Alaska Trappers has not addressed the body of case law identifying legislative intent to create statewide uniform policy as a critical component of analyzing the validity of local ordinances. Generally, where a statute is enacted to establish statewide uniformity in an area of law and a local ordinance conflicts with that legislative purpose, courts have found an implied prohibition of the local ordinance.[75] However, where no such intent to create statewide uniformity is present, the courts have generally

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[74] Appendix A at 5.

[75] *Smith v. Municipality of Anchorage*, 652 P.2d 499, n.5 (Alaska App. 1982) ("The Alaska Supreme Court has considered whether a local ordinance differs from state statutes which were enacted for the purpose of establishing statewide uniformity. When state statutes are enacted to establish statewide uniformity in an area of law and a local ordinance appears to conflict with the goal of statewide uniformity of legislation, the court has found an implied prohibition of the local ordinance. However, statewide uniformity is not a significant purpose of AS 11.46.220, concealment of merchandise.").

held that local ordinances are valid.[76] Indeed both *Johnson*[77] and *Jacko*[78] turned on the court's determination that the local ordinances at issue impeded implementation of uniform statewide policies. Here, the trapping regulations themselves reflect the fact that game management substantially differs by game unit. Moreover, as Alaska Trappers concedes, private property owners and municipalities may regulate trapping on their lands, which further eliminates any statewide uniformity in the regulation of trapping. Thus, unlike in *Johnson* and *Jacko,* statewide uniformity is not a significant purpose of AS 16.05.255, which is the Board of Game's organic statute, or of Article VIII. Even if statewide uniformity in game management was a legislative policy, VMC 9.38's limited scope does not impede any such purpose.

The Alaska Legislature has provided that the Board of Game "may adopt regulations it considers advisable for . . . (12) promoting hunting and trapping and preserve the heritage of fishing, hunting and trapping in the state,"[79] but has not expressed that this policy requires trapping to occur within areas like those regulated by VMC 9.38 or that this policy prohibits Valdez from exercising its home rule powers to regulate land use in furtherance of public safety. Moreover, the scope of VMC 9.38 is narrowly tailored to a limited geographical area and cannot be said to "seriously impede" the legislative policy

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[76] *Id*.

[77] *Johnson*, 583 P.2d at 187 ("The uniform limitations period impliedly allows every victim of tortious conduct in Alaska, regardless of where he resides and regardless of whether the alleged tortious conduct was by a governmental unit or not, to commence an action for damages within two years without complying with any other time limit.").

[78] *Jacko*, 353 P.3d at 345 (quoting AS 38.05.135(a)) ("The state legislature has specified that "[e]xcept as otherwise provided, valuable mineral deposits in land belonging to the state shall be open to exploration, development, and the extraction of minerals.").

[79] AS 16.05.050(a)(19) and AS 16.05.255(a)(13).

of promoting trapping activities within Alaska or even within Valdez. VMC 9.38 advances the legislative policy of "maximum local self government,"[80] the City's statutory duty to regulate land use under AS 29.35.260(c) and AS 29.35.180, and the City's obligation to provide for public safety and protection of property while having a *de minimis* impact on the taking of game.

B. Proper Application of Relevant Case Law Supports the Conclusion that VMC 9.38 is a Valid Exercise of Municipal Authority.

While several cases cited by Alaska Trappers contain legal standards that have been abrogated, the cases that apply the *Jefferson* standard weigh in favor of affirming the trial court's determination that VMC 9.38 is not impliedly prohibited. Alaska Trappers application of the case law they rely upon to support a finding of implied preemption ignores the fact-specific nature of the required analysis. The facts of the present case support a different result from that reached in *Jacko*, *Jefferson*, and *Johnson*. Indeed, the facts at issue here are more analogous to cases where this Court has upheld a municipal exercise of authority despite an apparent conflict with State law.

1. *Jacko v. State, Pebble Ltd. Partnership.*

In *Jacko,* the Alaska Supreme Court addressed the validity of the Save our Salmon Initiative ("SOS Initiative"), which prohibited the Lake and Peninsula Borough Planning Commission from issuing a permit "whenever a proposed resource extraction activity '(a) could result in excavation, placement of fill, grading, removal and disturbance of the topsoil of more than 640 acres of land,' and '(b) will have a Significant Adverse Impact

[80] Art. X, § 1.

on existing anadromous waters.'"[81] The Alaska Supreme Court upheld the superior court's holding that the legislature "[b]y so definitively conferring gatekeeper permitting authority upon DNR, . . . impliedly prohibited local governments from assuming a concurrent role."[82]

Alaska Trappers' assertion that VMC 9.38 is invalid because *Jacko* establishes exclusive authority to the legislature over the regulation of trapping is erroneous and fails to give any accord to the plain language of Article X, Section 11, or relevant case law. While the *Jacko* court disagreed with the assertion that "[i]t has been unequivocally established by this Court that the state legislature does not have exclusive authority over the state's natural resources," the court did not hold that the legislature has exclusive authority to invalidate the SOS initiative on those grounds.[83] Instead, the court applied the well-settled legal standard set forth in *Jefferson* and its progeny for determining whether a municipal exercise of authority that conflicts with State law is valid. This case law establishes that even when the legislature has clear authority to implement laws regarding a specific subject matter, municipalities may still enact local laws to the extent they do not seriously impede a legislative policy. Furthermore, there is simply no constitutional provision that supports the conclusion that the legislature has "exclusive authority" over the regulation of trapping[84] and no court has ever held that all municipal

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[81] *Jacko*, 353 P.3d at 338.
[82] *Id*. at 343.
[83] *Jacko*, 353 P.3d at 344.
[84] Article VIII, § 2 states "the legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people," but that statement neither establishes that the legislature is the sole authority permitted to regulate trapping, nor does it prohibit

actions impacting natural resources are prohibited because the legislature has such exclusive authority.

Alaska Trappers also ignore the substantially different statutory language present in *Jacko,* as opposed to the present case. In determining that the SOS Initiative seriously impeded the implementation of the Alaska Land Act, the *Jacko* court relied heavily on AS 27.05.010,[85] through which the legislature unambiguously confers exclusive mandatory authority to regulate mining on the Department of Natural Resources ("DNR").[86] Unlike the strong statutory language of AS 27.05.010 stating that DNR "has charge of all matters affecting exploration, development, and mining of the mineral

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municipalities from exercising the authority to regulate land use in furtherance of public safety.

[85] *Jacko*, 353 P.3d at 343 ("the legislature, through its passage of the Alaska Land Act, has delegated to DNR 'charge of all matters affecting exploration, development, and mining of the mineral resources of the state, . . . and the administration of the laws with respect to all kinds of mining.'" The legislature has further clarified "that [DNR] is the lead agency for all matters relating to the exploration, development, and management of mining, and . . . shall coordinate all regulatory matters concerning mineral resource exploration, development, mining, and associated activities. Before a state agency takes action that may directly or indirectly affect the exploration, development, or management of mineral resources, the agency shall consult with and draw upon the mining expertise of [DNR]. But, while DNR has broad power to regulate mining throughout the State, an 'act of the state legislature' is necessary before DNR may close any area of state land larger than 640 contiguous acres to mining.") (internal citations omitted).

[86] AS 27.05.010 ("(a) The department has charge of all matters affecting exploration, development, and mining of the mineral resources of the state, the collection and dissemination of all official information relative to the mineral resources, and mines and mining projects of the state, and the administration of the laws with respect to all kinds of mining. (b) The department is the lead agency for all matters relating to the exploration, development, and management of mining, and, in its capacity as lead agency, shall coordinate all regulatory matters concerning mineral resource exploration, development, mining, and associated activities. Before a state agency takes action that may directly or indirectly affect the exploration, development, or management of mineral resources, the agency shall consult with and draw upon the mining expertise of the department.").

resources of the state" and providing that DNR "shall coordinate all regulatory matters concerning mineral resource exploration, development, mining, and associated activities," no such statutory language exists with regard to the Board of Game's authority over trapping. Here, the statutory language conferring authority to regulate trapping on the Board of Game merely states that "the Board of Game ***may*** adopt regulations it considers advisable" for a limited set of purposes and makes no mention of any exclusive or mandatory authority conferred upon the Board.[87] While DNR is conferred exclusive, mandatory authority to regulate mining activities, the Board of Game is conferred nonexclusive, discretionary authority to regulate trapping.

In addition to the substantial difference between the statutory authority conferred upon the Board of Game with regard to trapping and DNR with regard to mining, the nature of the exercise of municipal authority at issue is also substantially different. In *Jacko*, the court was faced with an initiative that established a permitting scheme requiring borough approval for all mining developments within the Lake and Peninsula Borough. The SOS Initiative allowed "the Borough to veto projects otherwise authorized by state and federal regulators."[88] In the present case, VMC 9.38 is a narrowly tailored ordinance that defines limited areas where trapping is not permitted in order to protect the public and avoid conflicting land uses.

Further, in *Jacko*, the statutory provisions found to impliedly prohibit the SOS Initiative established a thorough State permitting process whereby the specific use in

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[87] AS 16.05.255 (emphasis added).
[88] *Jacko*, 353 P.3d at 344.

question is analyzed by the State and further subjected to federal permitting requirements. As discussed herein, the Board of Game and ADFG are not required to consider the implications of allowing trapping in specific geographical areas like those regulated by VMC 9.38 or to consider public safety or land use conflicts. Instead, the Board of Game ***may*** implement regulations opening and closing areas to trapping and is precluded from enacting public safety related regulations. It is apparent that the Board has not undertaken an effort to implement regulations tailored to Valdez or considered the implications of failing to do so. The record is devoid of evidence that the Board has ever considered the propriety of allowing trapping in the areas subject to AMC 9.38.

Alaska Trappers' attempts to analogize the present case with *Jacko* do not withstand scrutiny. *Jacko* involved a broad exercise of authority that clearly impeded legislative policy by usurping the exclusive permitting authority granted to DNR. The present case involves a narrow exercise of authority that does not impede any legislative policy or interfere with the nonexclusive, discretionary authority of the Board of Game. When analyzing the facts of *Jacko* and the facts of the present case under applicable law, the substantial differences in both the statutory language at issue and the nature of the exercise of municipal authority necessarily yield different results.

2. *Johnson v. City of Fairbanks*.

In *Johnson v. City of Fairbanks*, the Alaska Supreme Court addressed whether a Fairbanks City Charter provision that shielded the city from liability for negligence unless a plaintiff submitted written notice to the city within 120 days of the incident was impliedly preempted by State statute providing a two-year statute of limitations for tort

actions.[89] The court concluded that Fairbanks' notice requirement was impliedly preempted by AS 09.65.070, which authorizes lawsuits against local governments. Specifically, the court reasoned that:

> [W]e think the practical effect of the city charter provisions is to nullify the state legislature's establishment of a two-year period for commencing tort actions. That is, even though the two years permitted for commencing an action would still apply through AS 09.65.070, the right to bring an action in Alaska's courts would be contingent upon giving a notice of claim within a substantially shorter period of time. If the injured person failed to give notice within the prescribed time, he would be barred from pursuing his remedy in state courts, despite the fact that his action would be timely under the two-year statute of limitations.[90]

Unlike in *Johnson*, where State statute clearly set forth a legislative policy of establishing a uniform limitations period for commencing tort actions, there is no State statute that establishes a legislative policy of conferring exclusive authority on the Board of Game to regulate trapping activities, to establish uniform regulation of trapping, or to permit trapping activities in areas like those regulated by VMC 9.38. Moreover, the exercise of municipal authority in *Johnson* defeated the legislative purpose of establishing uniform limitations periods. VMC 9.38 does not defeat or seriously impede any legislative purpose related to trapping.

3. *Jefferson v. State.*

Alaska Trappers cite *Jefferson v. State* for the proposition that the constitutional grant of home rule powers was not "intended to be pre-eminent" nor did the constitutional framers "intend to create 'city states with mini-legislatures.'"[91] However, immediately

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[89] *Johnson,* 583 P.2d at 185-87.
[90] *Id*. at 187.
[91] Appellants' Brief at 17.

following these statements in *Jefferson*, the court sets forth the proper legal standard for determining whether a municipal ordinance is impliedly prohibited, stating:

> The test we derive from Alaska's constitutional provisions is one of prohibition, rather than traditional tests such as statewide versus local concern. A municipal ordinance is not necessarily invalid in Alaska because it is inconsistent or in conflict with a state statute. The question rests on whether the exercise of authority has been prohibited to municipalities. The prohibition must be either by express terms or by implication such as where the statute and ordinance are so substantially irreconcilable that one cannot be given its substantive effect if the other is to be accorded the weight of law.[92]

Further, the court in *Jefferson* held that the municipal act at issue was expressly prohibited and did not engage in specific analysis related to implied prohibition, aside from articulating the appropriate legal standard.[93] *Jefferson* does not support Alaska Trappers' position that VMC 9.38 is impliedly prohibited by State law. To the contrary, application of the legal standard established in *Jefferson* to the facts of this case can only yield the conclusion that VMC 9.38 is a valid exercise of municipal authority.

4. *McCauley v. Hildebrand.*

Alaska Trappers analogizes *McCauley v. Hildebrand*[94] to the present case and to support the proposition that this Court "implicitly rejected" the argument that that "the City, as a home rule municipality, has the legislative power to close state land to the taking of game because the legislature did not specifically preclude the exercise of this power."[95]

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92 *Jefferson*, 527 P.2d at 43 (citations omitted).
93 *Id.*
94 *McCauley*, 491 P.2d at 120.
95 Appellants' Brief at 17-19.

First, *McCauley* applied the statewide versus local concern test abrogated by *Jefferson*[96] and, therefore, does not support the conclusion that VMC 9.38 should be held invalid under presently applicable law. *McCauley* illustrates that the statewide versus local concern and "local activity" tests are synonymous. Both tests have been abrogated by *Jefferson*.

Second, McCauley turned on the constitutional language set forth in Article VII, section 1 of the Alaska Constitution, which states "[t]he legislature shall by general law establish and maintain a system of public schools open to all children of the State." The court applied the local activity test in holding:

> This constitutional mandate for pervasive state authority in the field of education could not be more clear. First, the language is mandatory, not permissive. Second, the section not only requires that the legislature 'extablish' [sic] a school system, but also gives to that body the continuing obligation to 'maintain' the system. Finally, the provision is unqualified; no other unit of government shares responsibility or authority.[97]

Not only did the court apply a legal standard that is no longer applicable under Alaska law, the court also rendered its decision based upon constitutional and statutory language that is far more definitive than the language present in this case. Article VIII does not create a mandatory duty to create a system by general law, and AS 16.05.255 provides the Board with discretionary rather than mandatory authority to regulate trapping.

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[96] Compare *McCauley*, 491 P.2d at 122 ("the determination of whether a home rule municipality can enforce an ordinance which conflicts with a state statute depends on whether the matter regulated is of statewide or local concern.") with *Jefferson*, 527 P.2d at 43 ("The test we derive from Alaska's constitutional provisions is one of prohibition, rather than traditional tests such as statewide versus local concern.").

[97] *McCauley*, 491 P.2d at 122 (citations omitted).

Third, Alaska Trappers ignores the dissimilar facts of the case at bar compared with those in *McCauley*. In *McCauley*, the City and Borough of Juneau's attempt to control accounting functions of a school district, which was permitted under its charter, was barred by preemption.[98] Unlike the present case, Juneau was directly interfering with the functions of a school district without any underlying legitimate public purpose, such as public safety, to support its actions.

Finally, Alaska Trappers mischaracterizes the trial court's order by suggesting the court declined to find preemption based upon the lack of any specific legislation precluding the City from enacting ordinances that impact trapping.[99] While such language would constitute express preemption, the trial court properly analyzed the case under the implied preemption standards established by this Court.

5. *Anchorage v. Repasky*

In *Municipality of Anchorgage v. Repasky*,[100] this Court upheld the validity of an ordinance granting veto power over school district budgets stating "although the state has pervasive authority over education, it has not prohibited the municipality from exercising its legislative powers, including the mayoral veto power, in the field of education."[101] Thus, *Repasky* militates against Alaska Trappers' argument that pervasive State authority in the field of game management prohibits any municipal ordinance that affects trapping.

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98 *McCauley*, 491 P.2d at 122 (citations omitted).
99 Appellant's Brief at 17.
100 34 P.3d 302, 312 (Alaska 2001).
101 *Repasky*, 34 P.3d 13

Alaska Trappers suggests that *Repasky* stands for the proposition that the absence of any delegation of natural resource management authority to municipalities supports a finding of implied prohibition.[102] This assertion is flawed in several regards. First, the *Repasky* court did not base its decision on an analysis of whether the legislature had delegated authority related to education to municipalities. Instead, the court applied the proper standard for implied preemption analysis articulated herein and held that "allowing a mayoral veto over the school budget does not irreconcilably impede the purposes of Title 14."[103] Second, regardless of whether the State had delegated natural resources regulation functions to municipalities, home rule municipalities, like Valdez, have "all legislative powers not prohibited by law or charter."[104] Legislative delegation of authority is not a prerequisite to an exercise of municipal authority. To the contrary, absent express or implied prohibition, a home rule municipality enjoys all powers regardless of whether they are specifically enumerated. Third, Alaska Trappers ignores the distinct regulatory function the City is fulfilling through VMC 9.83, which is to provide for the protection of the public and property. In *Repasky*, there was no interest at issue aside from the regulation of education. The Municipality of Anchorage was not, for example, advancing public safety interests that impacted education. Instead, the only interest at issue was education in the context of whether the mayor properly could exercise veto power over school district budgets. Application of *Repasky* to the facts of the present cases supports upholding the validity of VMC 9.38.

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[102] Appellant's Brief at 17, n.59.
[103] *Repasky*, 34 P.3d at 315.
[104] Alaska Const. art. X, § 11.

6. *Anchorage v. Richards.*

In *Anchorage v. Richards*, the Alaska Court of Appeals reversed a district court decision that an Anchorage municipal code provision making it "unlawful for any person to carry concealed about his person in any manner . . . a revolver, pistol or other firearm" was invalid.[105] Upon a challenge of the municipal ordinance in the context of firearms concealed in a motor vehicle, the district court reasoned that "the legislature's decision not to prohibit carrying a concealed weapon in a vehicle precluded a municipality from enforcing such a prohibition."[106] Subsequently, the Court of Appeals held that:

> There is nothing in the statute in question suggesting that it was intended to expressly privilege carrying weapons. The most that can be said is that the legislature elected to tolerate such conduct. Such toleration does not rise to the level of the prohibition contemplated by Article 10, section 11 of our state constitution. Home rule municipalities are free to prohibit conduct that is not prohibited by state legislation.[107]
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> . . .
>
> There is nothing in the criminal code suggesting that its provisions dealing with possession of weapons were intended to establish state-wide uniformity; nor is there any state statute regulating firearms which prohibits inconsistent municipal ordinances. Finally, we find absolutely nothing in the state statutes that would suggest an intent to encourage people to carry weapons in automobiles.[108]

Here, as in *Richards*, the court is presented with a municipal ordinance prohibiting conduct not prohibited by State statute. While the provision at issue in *Richards* regulated

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[105] *Richards*, 654 P.2d at 798.
[106] *Id.*
[107] *Id.* at 799.
[108] *Jenkins v. Municipality of Anchorage*, A-10585, 2010 WL 3211165, at *2 (Alaska Aug. 11, 2010).

concealed firearms in vehicles, which was not prohibited by State law, VMC 9.38 regulates trapping in a limited area of Valdez around areas of high use by people and domestic animals, which is not prohibited by State law. No statutory or regulatory provisions suggest the Alaska Legislature or the Board of Game has even considered, let alone sought to encourage, trapping in the limited areas regulated by VMC 9.38. Similarly, there is no indication that the legislature intended for statewide uniformity in the regulation of trapping. As discussed herein, the Board of Game is granted non-exclusive discretionary authority to regulate trapping that inherently results in trapping regulations that are not uniform. *Richards* is a strong example of how this Court has broadly construed home rule powers to include the power to prohibit conduct that is not prohibited under State law.

7. *Cremer v. Anchorage.*

In *Cremer*, the Alaska Supreme Court analyzed whether an Anchorage municipal ordinance making it illegal to drive on public and private property was prohibited by State statute that only applied to such conduct on public property. The court acknowledged that the ordinance and the statute were different and that AS 28.01.010(a) provided "[n]o municipality may enact an ordinance which is inconsistent with the provisions of this title or the regulations promulgated under this title."[109] The court held: "[w]e do not believe that this slight discrepancy between the statute and the ordinance, *i.e.,* the driving of motor vehicles on private property, is of such a nature that the exercise of municipal power has

[109] *Cremer*, 575 P.2d at 307.

been directly or indirectly prohibited by legislative action."[110] Thus, even where a State statute expressly precluded municipalities from implementing provisions inconsistent with the State traffic code, a local ordinance expanding the scope of prohibition for driving without a license to private property in addition to public property was found to be a valid exercise of municipal authority.

Like the ordinance in *Cremer*, VMC 9.38 is an exercise of municipal authority that marginally increases the scope of prohibited conduct set forth in State law. Where the ordinance at issue in *Cremer* increased the scope of offensive conduct to include driving on private property, VMC 9.38 establishes a small area within the City of Valdez closed to trapping.

8. *Liberati v. Bristol Bay Borough.*

In *Liberati*, this court upheld the Bristol Bay Borough's tax on raw fish, even though the sale of raw fish was regulated under State law and the State manages the harvesting of fish "to a very detailed extent."[111] The *Liberati* court cited *Jefferson* and articulated the following legal standard in determining that the tax was not impliedly preempted:

> Merely because the state has enacted legislation concerning a particular subject does not mean that all municipal power to act on the same subject is lost. We have consistently rejected application of any such concept in our cases dealing with home rule municipalities. We do so now with respect to general law municipalities because our constitution requires that their powers be liberally construed as well. We believe that an appropriate accommodation can be made between the state and general law municipalities by a rule which determines preemption to exist, in the absence of an express legislative direction or a direct conflict with a statute, only

[110] *Cremer*, 575 P.2d at 308.
[111] *Liberati*, 584 P.2d at 1121.

> where an ordinance substantially interferes with the effective functioning of a state statute or regulation or its underlying purpose.[112]

The court held that "[b]ecause we do not perceive any substantial interference caused by the ordinance in question with the functioning of any state law, we are unable to impute to the legislature an intent to preclude municipalities from taxing the sale of raw fish."[113] Here, as in *Liberati*, there is no substantial interference caused by the ordinance at issue. Moreover, the present case implicates the exercise of the City's authority to enact public safety and land use ordinances, which is an entirely distinct regulatory function from that delegated to the Board of Game.

IV. VMC 9.38 DOES NOT EXCEED THE REGULATORY AUTHORITY DELEGATED TO THE BOARD OF GAME

In asserting that the authority delegated to home rule municipalities, exceeds that delegated to the Board of Game,[114] Alaska Trappers ignores the nature of the municipal authority being exercised and the limited scope and effect of VMC 9.38. VMC 9.38 is a public safety and land use ordinance promulgated to advance those distinct interests, which are plainly within the City's authority. Alaska Trappers cites limitations on the Board of Game's authority set forth in AS 16.05.255(a)(1), (f), and (g) to establish that VMC 9.38 does exceeds the statutory authority set forth in these provisions and would require legislative approval under State law. First, VMC 9.38 does establish a game reserve area, refuge, or sanctuary as contemplated by AS 16.05.255(a)(1) and therefore would not be subject to legislative approval. The Board of Game may open and close

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[112] *Liberati*, 584 P.2d at 1121-22 (citations omitted).
[113] *Id*. at 1122-23.
[114] Appellant's Brief at 15-16.

areas to trapping without implicating AS 16.05.255(a)(1) under AS 16.05.255(a)(2), which provides the Board with the authority to establish opened and closed areas for the taking of game. Second, AS 16.05.255(f) only applies to actions that "*significantly reduce* the taking of an identified big game prey population."[115] VMC 9.38 cannot be said to significantly reduce the taking of any game and there is no evidence in the record to support the conclusion that it has such an effect. Third, 16.05.255(g) states the Board "shall establish population and harvest goals and seasons for intensive management of identified big game prey populations to achieve a high level of human harvest." Here, there is no evidence that VMC 9.38 has any impact on big game prey populations. Moreover, there are no intensive management programs in Game Management Unit 6 within which Valdez is located, and intensive management has no nexus to this litigation. VMC 9.38 is a valid exercise of the City's statutory and constitutional authority delegated to home rule municipalities. It does not usurp the province of the Board of Game or exceed any authority granted to the Board.

V. VMC 9.38 SHOULD NOT BE INVALIDATED BASED UPON PUBLIC TRUST ANALYSIS

Alaska Trappers and the State advance the argument that because "fish and wildlife are the Property of the State held in trust for the benefit of all residents"[116] management of these resources is within the exclusive jurisdiction of the State. This Court has expressly rejected this argument in *Brooks v. Wright*.[117] In that case, the court held that

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[115] Emphasis added.
[116] State Amicus Brief at 1; *See also* Appellants' Brief at 9-14.
[117] 971 P.2d 1025 (Alaska 1999).

the framers of the Alaska Constitution approved direct democracy related to wildlife management issues[118] and rejected the argument that Article VIII provides the legislature with exclusive authority for game-management regulation.[119]

VI. ALASKA TRAPPERS' RELIANCE ON AS 16.05.790(f) IS MISPLACED

Alaska Trappers argues that VMC 9.38 violates AS 16.05.790, which makes it a misdemeanor to "intentionally obstruct or hinder another person's lawful hunting, fishing, trapping or viewing of fish or game," and that the definition of lawful in that statute "makes it clear the State Legislature has not delegated any of its constitutionally derived authority to municipalities."[120] First, AS 16.05.790 does not apply where "the person was lawfully entitled to obstruct or hinder the hunting, fishing, trapping, or viewing of fish or game." A valid exercise of municipal authority, such as VMC 9.38, is, therefore, not subject to AS 16.05.790(f). Second, the definition of lawful set forth in AS 16.05.790(f) relates exclusively to the section within which that definition is found, which establishes a separate offense for "[o]bstruction or hindrance of lawful hunting, fishing, trapping, or viewing of fish or game." By its own terms, AS 16.05.790(f) does not apply to any other statutory provisions and certainly is not properly applied to the entirety of the regulatory framework for trapping. This Court should not accept the Alaska Trappers strained interpretation of AS 16.05.790(f) as having any bearing on this Court's analysis of the

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[118] *Id*. at 1030.

[119] *Id*. at 1033. ("We find little support in the public trust line of cases for the proposition that the common use clause of Article VIII grants the legislature exclusive power to make laws dealing with natural resource management. Article VIII does not explicitly create a public trust; rather, we have used the analogy of a public trust to describe the nature of the state's duties with respect to wildlife and other natural resources meant for common use."

[120] Appellants' Brief at 20-21.

validity of VMC 9.38. This argument is also unavailing for the reasons set forth in the trial court's order.[121]

VII. MUNICIPALITIES ARE NOT BOUND BY CONSTITUTIONAL RESTRICTIONS ON GAME MANAGEMENT WHERE A LOCAL ORDINANCE ADDRESSES LEGITIMATE PUBLIC INTERESTS SUCH AS PUBLIC SAFETY AND THE PROTECTION OF PROPERTY

Alaska Trappers argues that VMC 9.38 should be rendered invalid for failing to satisfy game management principles set forth in Article VIII, but has provided no authority mandating that a municipality consider or satisfy constitutional game management principles when enacting an ordinance. Home rule municipalities have a statutory duty to regulate land use[122] and routinely enact ordinances that affect access to natural resources in fulfilling this duty. Requiring any local law that impacts access to natural resources to be promulgated based upon consideration of Article VIII would abrogate municipal authority to fulfill the role of local government and place natural resources management in a dominant position over other legitimate interests such as public safety and the protection of property. The narrow scope and small geographic area affected by VMC 9.38 render any argument that it substantially impedes game management policies wholly unavailing. This is particularly true in light Plaintiffs' failure to provide even a scintilla of evidence that VMC 9.38 has any impact on the policies set forth in Article

[121] Exc. 0253-54.

[122] AS 29.35.180 ("A home rule borough shall provide for planning, platting, and land use regulation.").

VIII.

Plaintiffs' arguments turn on the false assertion that by enacting VMC 9.38 the City "claims the Board's authority to manage wildlife" and, therefore, the City is bound to "honor the same principles the board must honor." [Exc. 0149] However, the stated purpose of VMC 9.38 is "to enact land use regulations pursuant to AS 29.35.260(c) to protect all persons from hazardous devices and to protect domesticated animals and pets from damage and destruction which may result from uncontrolled trapping activities,"[123] not to manage the taking of game. The City has in no way assumed the management authority of the Board of Game. Instead, the City enacted a narrowly tailored ordinance for a legitimate governmental purpose that can and should be read together with the trapping regulations promulgated by the Board of Game.

Municipal governments routinely make decisions that implicate the use of or access to "fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State."[124] Indeed, it is a necessary function of municipal governments to implement ordinances that protect the health and safety of citizens and a duty to "provide for planning, platting, and land use regulation."[125] Under Plaintiffs' interpretation of Article VIII, decisions to prohibit the discharge of firearms in certain areas, to limit gravel extraction, or the harvest of timber in specific zoning districts, or to construct a small boat harbor allowing greater access to commercial fisheries must be made in accord with the policies set forth in Article VIII.

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[123] VMC 9.38.010.
[124] Alaska Const. art. VIII, § 4.
[125] AS 29.35.260(c); AS 29.35.180.

Despite the commonplace nature of municipal decisions that may impact natural resources, there is not a single case supporting the proposition that such decisions must be based upon game management policies. Similarly, there are no statutes or regulations that suggest municipalities must implement such policies when exercising municipal authority in a manner that impacts access to natural resources. If the legislature desired municipal decision-making to be based upon game management principles, it could enact legislation to that effect. Of course, imposing such a duty would place a huge administrative burden on municipalities and substantially increase the cost of municipal governance.

The established legal standards for determining the validity of municipal actions, which are articulated here in, provide adequate safeguards against municipal overreach and a mechanism for ensuring that municipal actions do not violate State law.

CONCLUSION

In light of the broad constitutional and statutory authority granted to Valdez to regulate land use that must be interpreted liberally,[126] Alaska Trappers has not overcome the presumption of validity for VMC 9.38.[127] When read together, the constitutional and statutory provisions related to Valdez's municipal authority and those related to State regulation of trapping make clear that Valdez is not expressly or impliedly prohibited from the exercise of authority manifested in VMC 9.38. The legislature has not granted the Board of Game exclusive mandatory authority to regulate trapping, and the regulations

[126] Art. X, § 1.

[127] *Fraternal Order of Eagles*, 254 P.3d at 352 (quoting *Treacy,* 91 P.3d at 260) ("[a] duly enacted law or rule, including a municipal ordinance, is presumed to be constitutional' and that '[c]ourts should construe enactments to avoid a finding of unconstitutionality to the extent possible.'").

promulgated by the Board of Game do not foreclose the ability of municipalities to close areas to trapping in furtherance of public safety and avoiding land use conflicts.

Unlike the cases cited by Alaska Trappers in support of invalidating VMC 9.38, in the present case, there is no legislative policy seriously impeded by the narrowly tailored trapping restrictions set forth in VMC 9.38. The regulatory framework related to trapping in Alaska leaves room for home rule municipalities to enact local ordinances in furtherance of public safety and even contemplate such ordinances in the ADFG Trapping Regulations book. This Court should not imply limitations upon Valdez's authority to enact VMC 9.38 where none are expressed.[128] Put simply, VMC 9.38 is not expressly or impliedly prohibited by State law and, therefore, it is a valid exercise of Valdez's home rule powers.

The Board has no affirmative duty to adopt any regulations related to trapping or even consider whether trapping should be permitted in specific areas within the State. Further, there is no evidence in the record establishing that the Board has ever considered whether trapping is appropriate in the areas identified in VMC 9.38. To the extent any such consideration has occurred, the Board is precluded from enacting regulations for public safety purposes. In light of the Board's limited discretionary authority, which precludes it from making decisions based on public safety, the City must be permitted to enact legitimate land use and public safety ordinances that affect trapping within its

[128] *See e.g., City of St. Mary's v. St. Mary's Native Corp.*, 9 P.3d 1002, 1007 (Alaska 2000) (quoting *Liberati,* 584 P.2d at 1121) ("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.").

jurisdiction. To hold otherwise would preclude any consideration of public safety with regard to where trapping should be permitted within City boundaries.

For the foregoing reasons this Court should affirm the superior court's Order Re: Cross-Motions for Summary Judgment on March 5, 2021.

DATED this 29th day of August, 2022.

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1982 WL 43763 (Alaska A.G.)

Office of the Attorney General

State of Alaska
File No. 166-486-82
November 19, 1982

Authority of Board of Game to Adopt Regulations for Public Safety Purposes

***1** Milstead C. Zahn
Executive Director
Boards of Fisheries and Game
Department of Fish and Game

Your October 6, 1982 memorandum requested advice from this office regarding the scope of authority of the Board of Game to adopt hunting regulations that serve a purpose other than wildlife management. In addition, you asked seven specific questions about game board prohibitions and restrictions relating to shooting.

By way of summary response, the Board of Game may not adopt regulations that exceed the authority delegated to that board by the legislature. Although the Board of Game's authority will be broadly construed, the purpose of the regulations must relate to the conservation and development of the game resources of the state, including resource utilization and allocation. Regulations based upon a purely public safety purpose are not within the scope of the board's authority. These conclusions are analyzed in more detail below.

Any determination of the extent of the Board of Game's authority to adopt regulations requires an examination of the statutes which created the board and established its powers. Kenai Peninsula Fisherman's Cooperative Association v. State, 628 o.2d 897, 901 (Alaska 1981). The legislature created the Alaska Board of Game as a separate P.2d 897, 901 (Alaska 1981). conservation and development of the game resources of the state' AS 16.05.221(b). [1] The legislature gave the Board of Game specific regulation-making powers, but excluded administrative, budgeting, and fiscal powers from the board's functions. AS 16.05.241. The primary regulatory powers of the board are set out at AS 16.05.255, as discussed below. [2] In addition, the Board of Game has authority to adopt emergency regulations under AS 44.62.250, where 'necessary for the immediate preservation of the public peace, health, safety, or general welfare.' However, this does not confer upon the Board of Game broad powers to enact regulations outside the scope of conservation and development purposes. The emergency regulation statutes 'do not . . . augment the authority of a state agency to adopt, administer, or enforce a regulation', and the regulation must still be within the 'scope of authority' conferred upon the board. AS 44.62.020.

AS 16.05.255 provides that the Board of Game 'may make regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.62)' for specific enumerated game management purposes. [3] Game board regulations must to within the scope of these statutory authorities, and 'must be premised on the need to effectuate conservation and development purposes. Kenai Peninsula Fisherman's Cooperative Association v. State, Id. at 903.

As a general rule, conservation laws such as fish and game statutes are liberally construed to achieve their intended purpose. Id. Conservation and development purposes include the concept of utilization of the resource. Id. 'Conservation' has been defined as 'planned management of a resource to prevent exploitation, destruction, or neglect', and 'development' has been defined as 'to make available or usable'. See Webster's New Collegiate Dictionary (1973), quoted in Kenai Peninsula Fisherman's Cooperative Association v. State, 628 P.2d at 903.

***2** Thus, the Board of Game is not vested with any inherent or common law power to enact regulations for the general welfare or public safety. It must act within the scope of authority delegated by the legislature. Id. The board's regulations must be consistent with the statute that grants regulatory authority and be reasonably necessary to carry out the statute's purposes. AS 44.62.030. In other words, the regulations of a state agency must be within the framework of the statutory grant of authority: 'the agency may make rules and regulations supplementing the legislation for its complete operation and enforcement, so long as such rules and regulations are within the standards set forth in the act of the legislative body.' Adams v. Industrial Commission, 547 P.2d 1089, 1090 (Ariz. App. 1976), citing, inter alia, Ruiz v. Morton, 462 F.2d 818 (9th Cir. 1972), affirmed 415 U.S. 199 (1974) .

None of the functions of the Board of Game set out at AS 16.05.255 or elsewhere, grant the Board of Game any independent authority to adopt regulations for public safety purposes. [4] However, the board may adopt regulations that serve a conservation and development purpose, but which incidently have a public safety effect. See e.g., Kenai Peninsula Fisherman's Cooperative Association, Id. at 908.

With the above general principles in mind, the following responses address the seven specific questions set out in your memorandum of October 6, 1982.

1. 'May the board open and close areas to game harvest for purposes other than resource management necessity?'

Answer: No, the board may only open and close areas to game harvest for purposes of conservation and development of the game resources of the state. The board may, under AS 16.05.255(b) and AS 16.05.257, restrict defined geographic areas to subsistence uses only, but the subsistence harvest must be within conservation limits . By analogy, our state supreme court has held that the Commissioner of the Department of Fish and Game's broad authority to adopt emergency field orders under AS 16.05.060 to open and and close seasons 'where circumstances require', must relate to a resource conservation and development purpose. Kenai Peninsula Fisherman's Cooperative Association v. State, 628 P.2d 897 (Alaska 1981). Similarly the Board of Game's implementation of its statutory authority must relate to resource conservation and development needs . [5]

2. 'May the board prohibit shooting in defined areas for the purpose of public safety, or the protection of property?'

Answer: No, the board may only enact game management regulations, but these may include regulation of the 'methods and means' used to take game (AS 16.05.255(a)(3)), and allocations among users, such as bow hunters, rifle hunters, and photographers. If there is coincidentally an effect on public safety, this does not invalidate the regulation.

3. 'In view of the history of shooting prohibitions on highways in Alaska and in other states, and restrictions on shooting over navigable waters, is there any common law precedence for the boards to regulate shooting, per se, when not in a resource management context?'

***3** Answer: No. As discussed above, the Board of Game has no common law powers independent of those powers specifically delegated by the legislature. Clearly, the Board of Game could restrict hunting with guns in the vicinity of highways as a means of making hunting less efficient, to effectuate a conservation purpose. However, merely prohibiting discharge of firearms along roadways for public safety purposes is not within the parameters of the board's authority delegated by the legislature.

4. 'Does the state and federal subsistence priority restrict board authority to make shooting or harvest closures that are not management necessities?'

Answer: Because the Board does not have authority to make shooting or harvest closures that are not related to conservation and development, the subsistence law cannot 'restrict' any such 'authority'. The subsistence law, set out at AS 16.05.255(b) authorizes adoption of regulations to protect customary and traditional subsistence uses by providing allocations of available harvest. The determination of when that harvest is available must be based on a conservation or development purpose. Once that

determination has been made, the subsistence law allows the Board of Game to divide up the available take among subsistence and non-subsistence uses and users giving subsistence uses a priority.

5. 'What authorities other than AS 16 regulate firearm use and hunting closures, such as on highways and state parks? Do these authorities offer any management convenience or restriction in the situation under discussion?'

Answer: Several Alaska statutes relate directly to the use of firearms and other weapons for general public safety purposes, and other statutes grant authority to agencies such as the Department of Natural Resources and local governments to adopt regulations controlling firearms discharge for public safety purposes. [6] Although these statutes do not restrict the authority of the Board of Game to enact regulations for the conservation and development of the wildlife resources of the state, they may effectively result in closures, for public safety purposes of areas that the Board of Game would otherwise wish to have open to hunting.

AS 41.20.020(4) authorizes the Department of Natural Resources to 'control, develop and maintain state parks and recreational areas', and AS 41.20.020(6) authorizes that department to 'establish in accordance with the Administrative Procedures Act [AS 44.62] rules and regulations governing the use and designating incompatible uses within the boundaries of state parks and recreational areas to protect property and preserve the peace.' Based upon this broad authority, the Division of Parks, Department of Natural Resources, can regulate discharge of firearms within areas under its jurisdiction. See 1982 Informal Op. Att'y Gen'l (Alaska, November 19, 1982).

In addition, several statutes establishing specific parks incorporate language relating to discharge of firearms within the park, generally allowing the discharge of firearms 'if authorized by a regulation of the Department of Natural Resources.' See AS 41 .20.230(c); AS 41.20.260(e); and AS 41.20.280. Although state park regulations may limit the discharge of firearms, AS 41.99.010 clearly specifies that 'nothing in this title denies the Alaska Department of Fish and Game or the Boards of Fisheries and Game their management and enforcement responsibilities relating to fish and game within the state.' Thus, regulation of firearms discharge by the Division of Parks must relate to the purposes and policies for which park and recreation areas were created, and may not be based on a game management objective. See AS 44.62.020.

***4** The very fact that the legislature has dealt separately with public safety considerations regarding the discharge of firearms on a statewide basis (in the criminal code and within parks and recreational areas) lends support to the argument that the authority of the Board of Game to adopt regulations for the 'conservation and development' of the wildlife resources does not include the broad authority to enact regulations solely for public safety purposes. [7]

6. 'Where statutory firearm restrictions exist, as in AS 11.61.210(a)(2), is the board obligated to promulgate its regulations in a manner consistent with such statutes?'

Answer: No, the Board of Game is not required to adopt 'consistent' regulations that in effect duplicate existing statutes. By the same token, the board should not adopt regulations that conflict with statutes, since state statutes have precedence over board regulations. The example you gave, AS 11.61.210(a)(2), is a state statute regarding misconduct involving weapons, which precludes discharging a firearm from, on, or across a highway. As indicated in the above discussions, the Board of Game does not have authority to enact regulations for strictly public safety purposes, and therefore could not adopt a regulation directly prohibiting discharge of firearms. The board could, however, as discussed above, enact a regulation restricting hunting near a road system where there is a valid management objective. For example, the board might find that the access to game animals provided by hunting from a road system might result in an overharvest; the board could then enact a regulation precluding hunting within a certain distance from that road system.

Where another statute or regulation (for example, a park statute or regulation that closes a park to the discharge of firearms), already essentially closes an area to hunting, the Board of Game is not under a duty to enact a parallel regulation closing that area to hunting, although it could if the closure was deemed necessary for game management. [8] Clearly the board must take into

account the effect that the other statute or regulation will have on overall game management in that area. Since the board cannot open the area to the discharge of firearms, it should anticipate reduced harvest. In the park regulation example, hunting could, however, continue by means other than firearms, if this were consistent with the game management objectives in the area.

Hunting regulations are an important part of the complex fabric of resource and land use laws in the state. Regardless of which agency (Game Board or Department of Natural Resources) enacts regulations restricting hunting or the methods used for hunting, the state is under a duty to inform the public of the closure. The state could provide this notice either in a separate pamphlet distributed by the Department of Natural Resources (for a park regulation) or, more simply, by supplementing the game hunting regulation booklet with notice of the areas closed by park regulation. See Wacek v. State, 530 P.2d 751 (Alaska 1975).

7. 'Do local governments, i.e. cities and boroughs, have an obligation of authority on behalf of public safety or local zoning that preempts state authority to manage wildlife?'

***5** Answer: No, local governments cannot preempt state authority. However, local governments, in the exercise of valid police powers, may restrict the discharge of firearms or enact similar kinds of ordinances that may have an incidental effect on hunting and trapping. However, as discussed further below, where the local government ordinance goes beyond legitimate local concerns or where it frustrates a statewide program for game management, the local regulation must yield. Macauley v. Hildebrand, 491 P.2d 120 (Alaska 1971).

Under the Alaska constitution, Article 10, Section 1, local government powers are to be given a liberal construction. Home rule boroughs or cities may exercise all legislative powers not prohibited by law or by charter. Alaska Constitution Article 10, Section 11. As the court stated in Jefferson v. State, 527 P.2d 37, 43 (Alaska 1974) 'however, to say that home rule powers are intended to be broadly applied in Alaska is not say that they are intended to be pre-eminent. The constitution's authors did not intend to create city states with mini legislature.'

In determining when a municipal ordinance is invalid as being preempted by a state statute, the court looks at whether the exercise of the authority by the local government has been prohibited by law. City of Kodiak v. Jackson, 584 P.2d 1130 (Alaska 1978). The prohibition must be either by express terms or by implication, such as where the statute and ordinance are 'so substantially irreconcilable that one cannot be given its substantive effect if the other is to be accorded the weight of law.' City of Kodiak v. Jackson, 584 P.2d 1130, 1132 (Alaska 1978) (holding unenforceable a city ordinance requiring mandatory minimum sentences for assault against a police officer where state statute was to the contrary).

Stated otherwise, preemption by state statutes exists either by express legislative direction, or where there is a direct conflict with a statute, or where the ordinance 'substantially interferes with the effective functioning of a state statute or regulation or its underlying purpose'. Liberati v. Bristol Bay Borough, 584 P .2d 1115 (Alaska 1978). Merely because the state has enacted legislation concerning a particular subject does not necessarily mean that all municipal power to enact on the same subject is lost. Id. at 1121. In the absence of express preemption, one must inquire whether the local government ordinance serves a legitimate local concern, and the extent to which it interferes with state statutes.

As the court held in Bennion v. City and County of Denver, 504 P.2d 350 (Colo. 1972), it is often difficult to determine what is a legitimate local, as opposed to a statewide, concern. In that case, the court held that a local government's interest in outlawing resistance to unlawful arrest was not exclusively a matter of local concern, and the local ordinance was deemed invalid in light of a state law authorizing resistance to unlawful arrest.

***6** In Liberati v. Bristol Bay Borough, 584 P.2d 1115 (Alaska 1978), the court upheld a borough tax on raw fish, even though some of the incidents of the sale of raw fish were regulated under state law, and even though the state does manage the harvesting of fish 'to a very detailed extent.' Id. at 1121. The court held the tax to be a legitimate exercise of local taxing power.

A borough ordinance that did not directly address legitimate local concerns and which frustrated overall game management would probably be held invalid as preempted by the statewide interest in uniform game management. For example, if a borough, through a firearms or similar ordinance, were effectively to close down huge areas of the state to hunting or trapping, for reasons not reasonably related to protection of life and property, the local ordinance would probably be held invalid as a frustration of the statewide management of game. The reason for this result is that effective statewide game management, including regulation of species that transverse local political boundaries, requires uniform management decisions, leaving no room for independent game management jurisdiction by local governments. Localized game control would 'substantially interfere' with the purposes of conservation and development of the resources and the functions of the Board of Game, under the test articulated in Liberati.

In summary, under no circumstances does a local governmental ordinance 'preempt' state authority. Local governments may, however, enact ordinances within their general police powers that are on the same subject as state statutes, so long as they do not conflict with the state statute or frustrate the exercise of statewide laws. Local governments do not have authority to directly regulate the management of fish and wildlife, but may enact legitimate police power regulations such as restrictions on the use of firearms where they are reasonably necessary to protect life or property.

I hope these responses have answered all your questions. If you have further inquiries, please direct them to this office.

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Footnotes

1 Before 1975, fish and game management authority was vested in a single board, the Alaska Board of Fish and Game.

2 Other statutes authorize adoption of regulations for specific purposes: AS 16.05.260 (advisory committees); AS 16.05.780 (antlerless moose seasons); AS 16.20.034 (Mendenhall Wetlands State Game Refuge); AS 16.20.040 (State Game Refuges); AS 16.20.160 (McNeil State Game Sanctuary); AS 16.20.240 (critical habitat areas) . With the exception of the statutes discussed in footnote 4, all the regulation-making authorities in these statutes are premised on 'conservation and development' or 'conservation and protection' purposes. See discussion of 'protection' in footnote 4.

3 AS 16.05.255 provides in full: (a) the Board of Game may make regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.62) for

(1) setting apart game reserve areas, refuges and sanctuaries in the waters and the lands of the state over which it has jurisdiction, subject to the approval of legislature;

(2) establishment of open and closed seasons and areas for the taking of game;

(3) establishment of the means and methods employed in the pursuit, capture and transport of game;

(4) setting quotas and bag limits for the taking of game;

(5) classifying game as game birds, song birds, big game animals, fur bearing animals, predators or other categories;

(6) investigating and determining the extent and effect of predation and competition among game in the state, exercising control measures considered necessary to the resources of the state and designating game management units or parts of game management units in which bounties for predatory animals shall be paid;

(7) engaging in biological research, watershed and habitat improvement, and game management, protection, propagation, and stocking;

(8) entering into cooperative agreements with educational institutions and state, federal or other agencies to promote game research, management, education, and information and to train men for game management;

(9) prohibiting the live capture, possession, transport, or release of native or exotic game or their eggs;

(10) establishing the times and dates during which the issuance of game licenses, permits and registrations and the transfer of permits and registrations between registration areas and game management units or subunits is allowed.

(b) the Board of Game shall adopt regulations in accordance with the Administrative Procedure Act (AS 44.62) permitting the taking of game for subsistence uses unless the board determines, in accordance with the Administrative Procedure Act, that adoption of such regulations will jeopardize or interfere with the maintenance of game resources on a sustained-yield basis. Whenever it is necessary to restrict the taking of game to assure the maintenance of game resources on a sustained-yield basis, or to assure the continuation of subsistence uses of such resources, subsistence use shall be the priority use. If further restriction is necessary, the board shall establish restrictions and limitations on and priorities for these consumptive uses on the basis of the following criteria: (1) customary and direct dependence upon the resource as the mainstay as one's livelihood; (2) local residency; and (3) availability of alternative resources.

4 Some game board statutes pertaining to certain limited subjects do authorize adoption of regulations for arguably non-conservation or development purposes. AS 16.05.255(b) and AS 16 .05.257 provide for adoption of regulations allocating the available game harvest for subsistence uses. However, the statutes require that subsistence regulations be within the general ‘conservation’ bounds of maintaining game populations based on the sustained yield, and only authorize priority allocations based on socio-economic considerations within that general framework.

AS 16.20.034, establishing the Mendenhall Wetlands State Game Refuge, authorizes the Board of Game to establish regulations for hunting and recreational activities (AS 16.20.034(e) and (f)), but specifies that no use or activity in the Refuge ‘may occur in a manner that creates a hazard to aircraft.’ AS 16.20.034(h). Under this direct authority, the board could tailor hunting regulations to take into account safety to aircraft. In contrast, AS 16.30.040, relating to refuges in general, authorizes the Board of Game to establish regulations it considers ‘advisable for conservation and protection purposes' in state game refuges. We believe the term ‘protection’ as used in this statute refers to protection of the game and its habitat, not protection of the public in general. This conclusion is based on the overall legislative purpose in establishing refuges, including the ‘value to the state and the nation of areas of unspoiled habitat and the game characteristic to it’ (AS 16.20.010(3)), and the purpose of the refuges to ‘protect and preserve the natural habitat and game population in certain designated areas of the state.’ (AS 16.20.020)

5 In the one area of commercial harvest regulated by the board, trapping, the board may have more flexibility to regulate for non-biological purposes in order to promote development of the industry. For example, the board might determine that allowing trapping in a specific area was inconsistent with an overall plan to foster trapping because of the quality of pelts in that area, or where traps would be wasted by being sprung by domestic dogs. Also, within the board's broad authority to regulate uses of game, it may make allocations for such activities as viewing.

6 AS 11.61.200 specifies those activities that constitute misconduct involving weapons in the first degree. AS 11.61.210 relates to misconduct involving weapons in the second degree, and AS 11.61.220 specifies misconduct involving weapons in the third degree . AS 11.61.210, for example, includes the language that a person who ‘discharges a firearm

from, on, or across a highway or discharges a firearm with reckless disregard for a risk of damage to property or a risk or physical injury to a person' is guilty of misconduct involving a weapon in the second degree.

In addition, other statutes including AS 11.46.482, AS 11.46.484 and AS 11.46.486, relating to criminal mischief, implicitly restrict the use of potentially dangerous items, such as firearms that can create a risk of damage to property.

7 The Department of Fish and Game (as opposed to the Board of Game) does have authority to develop a hunter safety program and develop shooting facilities for the people of the state. AS 16.55.010-AS 16.05.040.

8 AS 41.20.220, relating specifically to Chugach State Park, mandates that the Department of Fish and Game 'cooperate' with the Department of Natural Resources to provide for the purpose for which the Park was created and which are relevant to the duties of the Department of Fish and Game. It could be argued that this requires the Board of Game to adopt regulations that dovetail with Chugach Park regulations (See 1980 Informal Op. Att'y Gen'l (Alaska, May 25, 1980)).

1982 WL 43763 (Alaska A.G.)

End of Document

ALASKA CONSTITUTIONAL CONVENTION

December 19, 1955

FORTY-SECOND DAY

PRESIDENT EGAN: The Convention will come to order. We have with us this morning Reverend A. E. Purviance of the First Methodist Church. Reverend Purviance will give the daily invocation.

REVEREND PURVIANCE: Gracious God, our Heavenly Father, we praise Thy Name for bringing us back together and giving us rest over the weekend. We thank Thee now that we may call upon Thy Name for Thy guidance and Thy wisdom. We do not trust our own strength. We call upon Thee now to be with us during the sessions of this day and that if it be Thy will take us safely to our homes and bring us back together again that we may complete the work that is before us. May Thou hear us in this moment of Thy invocation, for we ask these things with humility of thought and in the Name of the Master of us all. Amen.

PRESIDENT EGAN: The Chief Clerk will call the roll.

(The Chief Clerk called the roll at this time.)

CHIEF CLERK: Seven absent.

PRESIDENT EGAN: A quorum is present. Does the special Committee to read the journal have a report to make at this time? Mr. Knight.

KNIGHT: I have not had a chance to read it. I would like to suspend it.

PRESIDENT EGAN: Mr. Knight has not had a chance to read the journal and asks permission to suspend it. If there is no objection, the reading of the journal will be suspended until the Committee reports. Are there any memorials or communications from outside the Convention? Are there reports of standing committees? Mr. Smith.

SMITH: Mr. President, I understand that the Committee Proposal on Resources is now available for distribution. I wonder if we might have a minute's recess while they are distributed. I understand they are here.

PRESIDENT EGAN: Have they been distributed, Committee Proposal No. 9? It is available.

SMITH: I fail to see it on my desk.

PRESIDENT EGAN: Would the messenger please bring a copy of Proposal No. 9 to Mr. Smith. Mr. Johnson.

ALASKA CONSTITUTIONAL CONVENTION

January 19, 1956

FIFTY-EIGHTH DAY

PRESIDENT EGAN: The Convention will come to order. We have with us Reverend Moore of the Seventh-Day Adventist Church. Reverend Moore will give our daily invocation.

REVEREND MOORE: Our kind heavenly Father, it is a privilege this morning to be able to call upon You again and invite Thy presence here. We would ask You to be with this group as they are working toward a constitution for our great Territory. We ask Thee to guide and direct them in every step as they divide into different study groups, into committees. We ask Thee to direct them. Help them to formulate plans which will be far reaching and which will prove a blessing to each one involved. We would ask Thee to be with the rest of the great nation. Help us to ever cherish the principles of liberty by which we are now a free and mighty country. We ask in Thy Holy Name. Amen.

PRESIDENT EGAN: The Chief Clerk will call the roll.

(The Chief Clerk called the roll at this time.)

CHIEF CLERK: 2 absent.

PRESIDENT EGAN: A quorum is present. The Convention will proceed with its regular order of business. We will hold the report of the Committee to read the Journal until later in the day. Are there any communications from outside the Convention? Are there reports of standing committees? Of select committees? Are there any motions or resolutions? Is there other unfinished business? Mrs. Hermann.

HERMANN: Mr. President, as the President will remember, we had reports from the people who went out into their communities to hold hearings during the hearing recess, and at that time Mr. Nolan and Mr. Peratrovich were absent and it seemed to me we ought to bring the reports up to date by having a word from them about the progress of the hearings in their communities.

PRESIDENT EGAN: If there is no objection, Mr. Peratrovich, would you care to report on any hearings you might have held in your community?

PERATROVICH: Glad to. Mr. Chairman, I was very fortunate in a way; I held hearings in two places, in my home town of Klawock and also Craig, and I had a good response, especially in Craig

throughout the states. We all realize that in speaking of the intermediate areas of government in the states, the cities and the counties, that most or many of them were established a hundred years or more ago, a few of them less. However, the requirements of government, especially the intermediate government of counties, has changed a great deal in that time. In the older state arrangements we find that the counties are a potpourri of boards and commissions with overlapping functions and powers and duties. We find that they are not, rather that the counties as such, were established as more or less an agency of the state in administrative matters. We find that they are not governed by a policy-making body which can itself determine the policies under which they grow and proceed and become effective. As a result, I am going to quote a few words from a book entitled The American County Patchwork of Boards. This book is by Edward W. Weidner, who was a consultant with the National Municipal League and is now a professor of political science at one of our large universities. Our policy in arriving at the form of local government was to try and bridge that gap of 100 years or more in allowing our people to provide a form of intermediate local government at what we call the borough level so they can function effectively and efficiently as a government agency. I think it follows out essentially the pattern we have established in this Convention of allowing, from the legislative and the strong executive on down, a considerable flexibility but also an establishment of substantial authority within the hands of the people to decide and determine their own future. Our policy in this Committee, and it has been practically uniform since our early studies, has been that we would try and institute, or allow to be instituted, under this constitution an intermediate form of government by which the people could largely exercise a broad degree of power, except those especially reserved to the state. The old approach to county government was that they existed and had their authorities only in those specifically delegated to them and specifically spelled out to them by the legislature or by the constitution. The other approach which has been adopted and which has operated in a few states, approximately seven as I recall, particularly in Texas, has been called the Texas Plan, and there, under that plan, they allocate such powers to the intermediate tier of government and the cities as are not specifically reserved or eventually withdrawn by the state itself. They have a broad exercise of local authority much as our cities have today. That has been the matter of the choice -- whether we wanted to follow the old pattern in which the constitution and the legislature would delegate certain specific powers to the intermediate form of government, which often is called the county and which we have designated as the borough, or whether we would follow the plan of reserving powers to the state and letting

ALASKA CONSTITUTIONAL CONVENTION

January 20, 1956

FIFTY-NINTH DAY

PRESIDENT EGAN: The Convention will come to order. We are happy to have Reverend John Stokes of the University Community Presbyterian Church with us this morning. Reverend Stokes will give our daily invocation.

REVEREND STOKES: Let us all pray. Almighty God, we are grateful unto You for this new day and the opportunities which You give us to fulfill the task to which we have been called. Give these delegates hope, wisdom, faith, and love, that the document they produce may give equality to all men, freedom and responsibility in the law of the new state and under Thy grace. In the name of Jesus Christ our Lord. Amen.

PRESIDENT EGAN: The Chief Clerk will call the roll.

(The Chief Clerk called the roll.)

CHIEF CLERK: Six absent.

PRESIDENT EGAN: A quorum is present. The Convention will proceed with its regular order of business. Does the special Committee to read the journal have a report to make at this time? Mr. Knight.

KNIGHT: If there is no objection, could we hold the report until later in the day?

PRESIDENT EGAN: If there is no objection the report will be held in abeyance until later in the day. Are there any petitions, memorials or communications from outside of the Convention? Are there reports of standing committees? Reports of select committees? Are there any motions or resolutions? If not, is there any unfinished business to come before the Convention at this time? Mr. Davis.

DAVIS: Mr. Chairman, I would like to report, or introduce a committee proposal, if they have been distributed, on Style and Drafting for further consideration by the Convention.

PRESIDENT EGAN: If there is no objection we will revert to the introduction of committee reports, that is the Style and Drafting Committee's report on Committee Proposal No. 15.

MCLAUGHLIN: No. This is Committee Proposal No. 15 by Style and Drafting concerning miscellaneous articles.

surrounding countryside. The name "city" itself means tribal dwelling. That is the name of the city. It means that a tribal dwelling, that the tribe once in awhile met in a defensible place, and it is only later that the city legally became a distinct unit, and whenever that happens, hand in hand with this development, went the subjugation, often the exploitation, and the bossing of the surrounding countryside when surrounding countryside became dependent upon the city, economically as well as politically, rather more so politically. I just wondered if we could not give consideration to the idea that Mr. Hurley opened up that the city may not be considered anything more than a point of density in a borough and that there should be no parallel police power, for instance, within a city and without it, that there should be possibly no differentiation at all between the city and the whole borough. When I first heard about this concept weeks ago and the discussions with people during the holidays, we understood what the radically new idea would be that there exists practically no difference between city and borough, except a lessening of density to which the outlying areas of the borough, and I wonder if this idea could have been spelled out better or whether it might have been desirable or whether the Committee considered it undesirable to follow this idea. I am for the amendment, of course, but I don't think it solves the problem.

PRESIDENT EGAN: Mr. Taylor.

TAYLOR: Mr. President, I think practically everybody who has spoken has been in favor of the amendment but in their statements I don't believe they have taken full cognizance of the contents of the paragraph which they seek to change. Now, I can visualize what a service area may be and possibly could be, as Mr. Rivers says, for fire protection; it might be an area that was not near a city but could be near another service area that was already established, and then this particular area would then attempt to incorporate themselves or organize themselves into a service area. We should not lose sight of the fact, also, that this area is represented, or the people in this proposed area are represented in the assembly. They have the representative there, so when this matter is brought up to the assembly they have the right to protest, or to propose that they be organized as a service area for a particular purpose such as to require equipment, or it might be for some sewer lines, or for some better roads, or for any one of the numerous improvement districts that can be organized under our present law. Now, when this matter is brought up to the assembly it may be that members from outside of the city would realize the problems that this particular area was facing so then under the wording of the present article in there, there are four things that they could do. They could allow this area, if it was not near another service area that they could be served from, or if it was not near a city where by annexation they could secure the same service from the city, or they could then

ALASKA CONSTITUTIONAL CONVENTION

January 31, 1956

SEVENTIETH DAY

PRESIDENT EGAN: The Convention will come to order. Mr. Robertson.

ROBERTSON: Mr. President, today I understand Alaska has lost a very good friend and many of us a close personal friend -- a man who I knew since he first came to Alaska as a young man, who I think was a very loyal American and a very loyal Alaskan. I ask that when the Chaplain gives the invocation, it be in honor of General Noyes and that we all stand in honor of General Noyes at that time.

PRESIDENT EGAN: We have with us today Chaplain Henderson of Ladd Air Force Base who will deliver our daily invocation. Today's invocation will be spread upon the Journal in memory of the passing of General John Noyes.

REV. HENDERSON: Let us pray: Our heavenly Father, we thank Thee that in all the occasions of life Thou has told us to come unto Thee in prayer. So on this day as we would pause to honor and pay tribute to one who has served loyally in this Territory, we would pause for a moment of silence in honor and in the memory of General Noyes. Bless, O God, our Heavenly Father, all who are serving Thee and serving our country and this Territory. Bless these members of the convention in the progress which they have made and in the duties of completion that are now near at hand, that in all things Thy divine guidance may be evidenced. Through Christ, our Lord. Amen.

PRESIDENT EGAN: The Chief Clerk will call the roll.

(The Chief Clerk called the roll.)

CHIEF CLERK: All present.

PRESIDENT EGAN: A quorum is present. The Convention will proceed with its regular order of business. Mr. Barr.

BARR: Mr. President, yesterday I tried to put through a certain measure, which was a marked failure, and Mrs. Barr was very much concerned about my lack of success, and in order to secure a little better support next time she whipped up a big batch of fudge, and you will see two boxes on the Secretary's desk there for the members.

PRESIDENT EGAN: You may tell Mrs. Barr that the Convention really appreciates the thought, Mr. Barr. Mr. Hilscher.

legislature has, under another section, been given authority to define what waters access should be given to. By long-established doctrine, the general reservation of fish and wildlife in its natural state is maintained in this article, and the matter of the actual ownership of waters is not upset -- I should say the age-old doctrine is not upset -- except as we have given power to the legislature to define where access shall be allowed.

PRESIDENT EGAN: Mr. Hellenthal.

HELLENTHAL: I don't think that quite answers my question. I know we attempted once by adding two words to take care of this pond surrounded by single ownership. Then we changed that and used some other language. Now we have changed it again. Can you tell me where the legislature -- just point to me the section or the wording --

RILEY: It's not in this section, Mr. Hellenthal.

HELLENTHAL: Anywhere in here?

RILEY: Section 9 is the section.

PRESIDENT EGAN: Your question relates to this section we are on now, Mr. Hellenthal?

RILEY: Section 14, Mr. Hellenthal.

HELLENTHAL: Yes, it does, Mr. Egan. That the legislature may by general law regulate and limit such access?

RILEY: You weren't here last evening, I believe, Mr. Hellenthal, when in Section 14 the word "legislature" was restored on line 4 in place of the word "law".

HELLENTHAL: Oh. I am happy now.

PRESIDENT EGAN: Mr. Rosswog.

ROSSWOG: May I direct a question to Mr. Riley?

PRESIDENT EGAN: You may, Mr. Rosswog.

ROSSWOG: This wording, "general reservation", does that mean that fish and wildlife will be given first consideration among beneficial users?

RILEY: No, I should say not. But I would say that the general reservation which applies, I believe, is set forth in Section 3. Section 3 states "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use." This reiterates that, as concerns the appropriation of waters, "appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law, and to the general reservation of fish and

wildlife". This doesn't set up an order of beneficial uses. The legislature in its wisdom may some day do that.

PRESIDENT EGAN: Mr. Hurley.

HURLEY: May I ask Mr. Riley a question?

PRESIDENT EGAN: You may, Mr. Hurley.

HURLEY: Mr. Riley, if a city were to appropriate a water supply for domestic use, and for purposes of public health and welfare and for protection of the water supply to regulate the trespass on the watershed, would the fish and game that were within the area be available to the public for hunting and fishing?

RILEY: Well, I should say that we make that exception; that might perhaps be implemented by the legislature as to your whole drainage area -- your whole watershed -- that the legislature could, under this language, forbid fishing, we will say, in a reservoir for public water supply.

PRESIDENT EGAN: Mr. Kilcher.

KILCHER: Another question, Mr. Riley. I have two specific inquiries from my home district; one from a man for whom three years ago I drained a lake a 16-acre lake within a 40 subdivision, and another man had a seven-acre homesite near Homer with a three-acre lake on it. There are no creeks going in or out but strangely enough there's fair fish in there. Now, in order to understand the possible impact of this amendment and illustrating this case, I would like to ask you if either one of the two men could possibly be stopped by future legislation or stopped automatically by this amendment here, if it passes, from draining his lake for agricultural purposes, or any purpose. It's shallow land, very little work, and can make seven easy acres available where normally land is hard to clear. It would make fine agricultural land. That is a question that will come up hundreds and thousands of times on the Kenai Peninsula where this practice will become popular, of acquiring cheap farm land by draining shallow lakes.

RILEY: I won't undertake, Mr. Kilcher, to anticipate what the legislature may prescribe, but there is considerable law to the effect that ownership of lakes does not vest in the property owner. That isn't necessarily uniform across the country, but I should say that the question you propound is one which the legislature is going to have to meet.

KILCHER: That's what I am driving at, Mr. Riley. I have asked a similar question before -- I don't want to repeat it myself -- that is weeks ago, but this amendment here if it passes will it tend to make it harder, is it capable of putting more obstacles in a man's way, to give fish and wildlife interests more of a chance to restrict that man's specific uses? Would this amendment have an effect,