

# MEMORANDUM

## State of Alaska Department of Law

TO: Sandra Stout, Director  
Division of Elections  
Office of the Lieutenant Governor

DATE: October 16, 1997

FILE NO: 663-98-0134

TEL. NO: 465-3600

SUBJECT: Incorporation Elections; Tie  
Votes

FROM: Marjorie L. Vandor  
Assistant Attorney General  
Governmental Affairs Section - Juneau

You have asked for our opinion regarding the legal effect of a tie vote in a city incorporation election conducted under AS 29.05.110. In brief, we believe a tie vote is insufficient to effectuate an incorporation and the incorporation of the municipality would be considered rejected by the voters.

### **Majority Vote Required to Incorporate**

The relevant statute regarding incorporation elections is AS 29.05.110, which reads in relevant part:

(a) Within 30 days after notification [from the Local Boundary Commission of its acceptance of an incorporation petition], the director of elections shall order an election in the proposed municipality to determine whether the voters desire incorporation and, if so, to elect the initial municipal officials. If incorporation is rejected, no officials are elected.

...

(e) The director of elections shall supervise the election in the general manner prescribed by AS 15 (Election Code). The state shall pay all election costs under this section.

(Emphasis added.)

Generally, a statute prescribes that a majority or other percentage of voters shall be necessary in favor of a incorporation. McQuillin Vol. 1 *Municipal Incorporations* § 3.35b (3rd ed., rev. 1987). However, AS 29.05.110 does not specify a majority or other percentage of voters to approve the incorporation in order for the question to pass. Instead, the statute speaks in terms of whether the voters “desire incorporation.” Then, the statute prescribes that “if

incorporation is rejected, no officials are elected.”<sup>1</sup> The latter phrase clearly denotes that approval by the voters is required. Public policy dictates and it is a fundamental idea in all republican forms of government that no measure can be declared carried unless it receives a majority or a plurality of the legal votes cast in the election. *29 C.J.S. Elections* §243 (1965). And, approval, at a minimum, is a majority of those voting on the incorporation question. *See* McQuillin, §3.35b (a majority is usually held to mean a majority of the votes cast on the proposition).<sup>2</sup>

Considering the fundamental principles noted above together with our reading of AS 29.05.110, we believe that a majority of the votes on the question of municipal incorporation must be cast in favor of the incorporation in order for a municipality to be validly created.

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<sup>1</sup> According to *Black's Law Dictionary* (5th ed., 1979), the term “desire” means:

[t]o ask, to request. Ordinarily to wish for more or less earnestly. Sometimes, to empower or authorize. According to context or circumstances, the word may import a request or even a demand.

Thus, “desire of the voters” can be equated to mean a vote intended to authorize the incorporation proposition. Such a vote must be in favor by at least a majority of those voting on the question to effectuate the incorporation. *See 29 C.J.S. Elections* § 243 (1965). The term “rejected” is included in the definition of “refuse” in *Black's Law Dictionary* and means “[t]o deny, decline, reject” (5th ed., 1979). Therefore, if less than a majority of the voters vote in favor of the incorporation it legally follows that the incorporation is rejected.

<sup>2</sup> Generally, an election may be decided by the required majority of the votes actually cast, irrespective of the number of persons entitled to vote, since qualified electors who fail to vote are presumed to acquiesce in the expressed will of the majority of those who do. *29 C.J.S. Elections* § 242.

**In the Event of a Tie Vote, the Result Is a Rejection**

Where a proposition (such as a municipal incorporation question) is submitted under a statute requiring a majority of the votes cast for its adoption and the affirmative and negative of the proposition receive the same number of votes, the result is a rejection of the proposition and consequently there is an election. 29 *C.J.S. Elections* §244; see also *Pacific American Fisheries, Inc. v. Gronn*, 103 F. Supp 405 (D. C. Alaska 1952) (where election for incorporation of utility district resulted in tie vote, district was not validly created).

If there is a tie vote on an incorporation question, then the division should conduct a recount. There is, however, no provision in law for a run-off election or other means to break a tie vote on a proposition. As noted above, the proposition fails and incorporation of the municipality will be deemed rejected by the voters. A new petition for incorporation would have to ensue and be approved by the Local Boundary Commission before another election could be called.

We hope this addresses your concerns. If you have further questions, please do not hesitate to contact me.

MLV:lm

cc: Dan Bockhorst, Local Boundary Commission, DCRA  
Pam Crowe, Office of the Lieutenant Governor