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PETERSBURG, ALASKA

ORDINANCE NO. 2016-XXX

**AN ORDINANCE AMENDING PETERSBURG MUNICIPAL CODE TITLE 9 – HEALTH AND SAFETY BY THE ADDITION OF A NEW CHAPTER PROVIDING REGULATION OF MARIJUANA IN THE PETERSBURG BOROUGH, ALASKA**

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WHEREAS, on February 24, 2015 use and possession of less than an ounce of marijuana by persons over the age of 21 is permitted by state law;

WHEREAS, use of marijuana in public places threatens the health, welfare, and peace of the Petersburg Borough and its residents;

WHEREAS, marijuana possession and use by persons under the age of 21 remains a crime; and

WHEREAS, the Borough has a compelling interest in regulating intoxicating substances and their use;

BE IT ENACTED BY THE Petersburg Borough Assembly:

**Section 1. Classification.** This is a code ordinance.

**Section 2. Amendment to Title 9.** That Petersburg Borough Municipal Code Title 9 – Health and Safety is hereby amended by the addition of a new Chapter 9.30 – Marijuana Regulation to read as follows:

**Chapter 9.30.**

**MARIJUANA REGULATION**

**Sections:**

- 9.30.010**      **Definitions.**
- 9.30.020**      **Local regulatory authority.**
- 9.30.030**      **Violations and remedies.**
- 9.30.040**      **Marijuana use in public prohibited.**
- 9.30.050**      **Marijuana use in vehicles prohibited.**
- 9.30.060**      **Marijuana possession and use under the age of 21 prohibited.**

**9.30.010. Definitions.**

"Marijuana" means all parts of the plant of the genus cannabis whether ~~grown~~ <sup>growing</sup> or not, the seeds thereof, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds, or its resin, including marijuana concentrate.

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borough      within service area 1?

“Public place” means in or upon any ~~city~~ <sup>borough</sup>-owned property, as well as any area to which the public is invited or in which the public is permitted, including, but not limited to, banks, educational facilities, health care facilities, ~~Laundromats~~, public transportation facilities, reception areas, restaurants, bars, clubs, retail food production and marketing establishments, retail service establishments, theaters, waiting rooms, hallways, lobbies and common areas of hotels and multi-unit buildings, shorelines, waterways, and tidelands.

9 ~~8~~.30.020. **Local Regulatory Authority.**

The Borough Assembly is designated as the “local regulatory authority” as that term is used in Alaska Statutes Chapter 17.38 and any implementing legislation or rule-making.

**9.30.030. Violations and remedies.**

A. It is unlawful for any person who operates any restaurant, eatery, bar, hotel or other lodging, ~~or retail establishment~~ to permit marijuana use in violation of this chapter.

B. It is unlawful for any person to consume or use marijuana in violation of this chapter.

C. Any person aggrieved by a violation of this chapter or the ~~city~~ <sup>borough</sup> may bring a civil action against a person who violates this chapter and may recover a civil penalty not to exceed three hundred dollars per violation. An action to enjoin a violation may be brought notwithstanding the availability of any other remedy.

**9.30.040. Marijuana use in public places prohibited.**

Use or consumption of marijuana in a public place is prohibited. This section is not intended to restrict a property owner from further restricting use of marijuana.

~~**9.30.050. Marijuana use in or on motor vehicles prohibited.**~~

~~Marijuana use in or on motor vehicles, on the deck or in the wheelhouse of a watercraft, or in an aircraft is prohibited.~~

<sup>5</sup>  
**9.30.060. Marijuana possession and use under the age of 21 prohibited.**

Possession and consumption of marijuana by persons less than 21 years of age are prohibited.

**9.30.070. Minor Offense Fine Schedule (do we have this somewhere else? If so, this would be an amendment to that chapter/ordinance)**

Code Section	Offense	Penalty/Fine
9.30.030(A)	Permitting unlawful marijuana use	\$100 first offense \$500 second offense Must appear – 3 <sup>rd</sup> offense
9.30.030(B)	Unlawful marijuana use	\$100 first offense \$100 second offense Must appear – 3 <sup>rd</sup> offense
9.30.060	Under-age Marijuana use or possession	\$100 first offense \$200 second offense Must appear – 3 <sup>rd</sup> offense

**Section 4. Effective Date.** This ordinance is effective upon passage.

PASSED and ADOPTED by a duly constituted quorum of the Petersburg Borough  
Assembly on \_\_\_\_\_.

*change to our language*

\_\_\_\_\_  
Mark Jensen, Mayor

ATTEST:

\_\_\_\_\_  
Debra Thompson, Borough Clerk

## Debra Thompson

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**From:** Stephen Giesbrecht  
**Sent:** Tuesday, January 26, 2016 12:49 PM  
**To:** Debra Thompson; Melinda Swihart; Jeigh Gregor  
**Cc:** Mark Jensen; Jody Tow  
**Subject:** FW: Marijuana ordinance

Debbie, our next project! ☺

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**From:** Jim Brennan [mailto:jbrennan@law-alaska.com]  
**Sent:** Tuesday, January 26, 2016 12:37 PM  
**To:** Stephen Giesbrecht  
**Subject:** Marijuana ordinance

Steve,

This is in response to your email to us of January 5, attaching potential marijuana ordinance language and raising additional related questions. My delay in responding is in part due to the impending adoption of state regulations implementing the 2015 statewide marijuana initiative approved by the voters and codified as law as A.S. 17.38.

The new regulations, subsuming 127 pages, were filed by the State last week, and will become effective on February 21, 2016. Like the statute, they do not authorize the consumption of marijuana in public, but empower a new Marijuana Control Board, within the Department of Commerce, Community and Economic Development, to issue licenses to marijuana retail stores, cultivation facilities, product manufacturing facilities and testing facilities, each of which are subject to numerous restrictions and requirements, and to annual license renewals. Licenses are to specific locations. Sales by retailers are limited to one ounce. Retailers, with prior approval of the Board, may permit consumption of marijuana in a designated area onsite of the licensed premises.

Under Section 3 of the Act adopted by the voters, its provisions supersede any conflicting local charter, code ordinances or regulations, so any Borough code must be in conformity with the Act and the regulations. However, the regulations adopt a "local option" procedure analogous to the local option alcohol laws. Under regulation 3 AAC 306.200, a local government can prohibit sale or importation of marijuana, or the operation within municipal boundaries of any of the 4 types of licensed operations. This can be done either by assembly ordinance or by local option majority vote of the people, after a petition and then an election conducted in the same manner as a local initiative election. If a local option prohibition is adopted by the assembly or the voters, the voters may later, after petition, change or remove the prohibition by majority vote. A local option may prohibit some or all of the types of licensed activities. But a local option may not prohibit personal use or possession of marijuana as authorized by the Act.

Under the regulations, an applicant for a new license must post notice and publish notice for 3 weeks in the local newspaper, and give notice to the local government. Notices of annual



renewal must also be filed with the local government. Within 60 days of a new application or renewal, or of a proposed transfer of a license, the local government may protest the application, and the Board will then deny the application unless it finds that the protest is "arbitrary, capricious or unreasonable." The local government can also recommend that the Board attach a condition to the license, which again will be adopted unless the Board finds the condition arbitrary, etc. There are also procedures by which any "person" may protest an application, renewal or transfer.

The Act adopted by the voters does state that a local government may enact laws not in conflict with the Act or state regulations, governing the time, place, manner and number of marijuana establishments, and to establish civil penalties for violations of these. While the Act gives local governments the ability to designate a "local regulatory authority" to issue "registrations" (licenses) to marijuana establishments, this authority is only effective if the State fails to adopt regulations (which it now has done) or fails to timely process applications for registrations or licenses. It does not appear likely, at least for now, that there will be any meaningful authority for a "local regulatory authority"; however, it may be worthwhile to establish such an authority, if for no other reason than that half of the application fees for marijuana establishment licenses within a municipality are to be forwarded to a local regulatory authority, if established.

Of course, all of the foregoing statutes and regulations are subject to litigation challenge, and, to a certain extent, to state politics and further legislative action on the issue. For now, though, it is clear that a local government may not adopt its own laws that conflict with the state laws, but that municipalities may adopt non-conflicting laws governing the time, place, manner and number of these establishments and their operations; that municipalities may by local option prohibit some or all of the licensed establishments within municipal boundaries; and, even where establishments are not prohibited generally, municipalities may exercise substantial "protest" influence over issuance, renewal, transfer or conditions upon individual licenses; but municipalities may not prohibit private (non-public) possession or use of one ounce of marijuana.

The foregoing developments affect the advisability of some parts of the draft ordinance you forwarded:

Section 8.30.010 (this should be renumbered as 9.30.010, and the following section .020 should be similarly renumbered) should refer to "whether growing (not "grown") or not", to comport with the state Act language.

Section 9.30.030 should probably be rewritten. The Borough can enact laws that govern the "place" or "manner" of the establishments, so can probably prohibit their operation in a restaurant, eatery, bar, hotel or other lodging. But prohibition on operations in any "retail establishment" should specifically except and exclude reference to operations in a licensed marijuana establishment. If the intention is to prohibit any licensed marijuana establishment in the Borough, this should be accomplished through a separate ordinance, or voter election, specifically utilizing the "local option" law to prohibit such licenses in the Borough.

Section 9.30.050, prohibiting marijuana use in motor vehicles, on boats or in aircraft, is subject to challenge. At what point does this run afoul of the Act's authorization for non-public use of one ounce of marijuana, and of the Alaska Constitution's right to privacy? This raises the common question as to when and where a person has a legitimate "expectation of privacy", a frequent subject of criminal and civil litigation. On the other hand, public safety is obviously implicated where an operator is impaired. Safer ground here would be to explicitly limit this section to "public" use and, additionally, to use by an operator of the motor vehicle, watercraft or aircraft.

Steve, I believe the foregoing discussion addresses many of the questions posed in your email. As to the Borough's zoning code, I do not think any changes are required; commercial operation of any of the types of marijuana establishments would be disallowed as a principal, accessory or conditional use in any zone below commercial, under current code. Similarly, the sales tax code would automatically cover any sales related to operation of licensed establishments in the Borough.

There is no authority in Title 29 for a municipality to adopt an excise tax, which is ordinarily a flat tax on quantity, without reference to value. The State has adopted a \$50 per ounce excise tax. Municipalities may, however, impose sales taxes. Unlike alcohol taxes, which, by state law (A.S. 04.21.010), may not be sales taxed at a higher rate than other commodities, the Borough may tax marijuana sales at a higher rate. *See next email.*

Please let me know whether you have other questions, or want a formal opinion letter from me. This promises to be an interesting, and evolving area of law.

James T. Brennan  
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## Debra Thompson

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**From:** Stephen Giesbrecht  
**Sent:** Wednesday, January 27, 2016 7:30 AM  
**To:** Jody Tow; Jeigh Gregor  
**Cc:** Debra Thompson; Melinda Swihart  
**Subject:** FW: Marijuana excise taxes

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**From:** Jim Brennan [mailto:jbrennan@law-alaska.com]  
**Sent:** Tuesday, January 26, 2016 3:58 PM  
**To:** Stephen Giesbrecht  
**Subject:** Marijuana excise taxes

Steve,

I realize that my prior message to you today, in its next to last paragraph, gave the impression that the Borough could not impose an excise tax. This is not the case. Even though there is no authority for a municipal excise tax in Title 29, the taxation powers of Alaskan municipalities have been liberally construed. Even though excise taxes are not specifically enumerated in statute, they can probably be adopted and imposed. An excise tax is normally imposed upon some specific action, e.g., bringing a product into the municipality for sale. This can be in addition to a sales tax.

So this is among the options available to the Borough.

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