

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT DILLINGHAM

Native Village of Ekuk, a federally)
recognized tribal government, acting)
for itself and for all members of the tribe,)
Appellant,)
v.)
Local Boundary Commission and)
City of Dillingham,)
Appellees.)
_____)

3DI-12-00022 CI

**APPEAL FROM DECISION OF THE LOCAL BOUNDRY COMMISSION OF
THE STATE OF ALASKA DATED DECEMBER 20, 2011**

REPLY BRIEF OF APPELLANT

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3 AAC 110.130(c). Boundaries.

(c) To promote the limitation of community, the proposed expanded boundaries of the city

(1) must be on a scale suitable for city government and may include only that territory comprising an existing local community, plus reasonably predictable growth, development, and public safety needs during the 10 years following the effective date of annexation; and

(2) may not include entire geographical regions or large unpopulated areas, except if those boundaries are justified by the application of the standards in 3 AAC 110.090 - 3 AAC 110.135 and are otherwise suitable for city government.

3 AAC 110.140. Legislative Review.

Territory that meets the annexation standards specified in 3 AAC 110.090 - 3 AAC 110.135 may be annexed to a city by the legislative review process if the commission also determines that any one of the following circumstances exists:

(1) the territory is wholly or substantially surrounded by the annexing city;

(2) the health, safety, or general welfare of city residents is or will be endangered by conditions existing or potentially developing in the territory, and annexation will enable the city to regulate or control the detrimental effects of those conditions;

(3) the extension of city services or facilities into the territory is necessary to enable the city to provide adequate services to city residents, and it is impossible or impractical for the city to extend the facilities or services unless the territory is within the boundaries of the city;

4) residents or property owners within the territory receive, or may be reasonably expected to receive, directly or indirectly, the benefit of city government without commensurate tax contributions, whether these city benefits are rendered or received inside or outside the territory, and no practical or equitable alternative method is available to offset the cost of providing these benefits;

(5) annexation of the territory will enable the city to plan and control reasonably anticipated growth or development in the territory that otherwise may adversely impact the city;

(6) repealed 5/19/2002;

(7) annexation of the territory will promote

(A) maximum local self-government, as determined under 3 AAC 110.981;
and

(B) a minimum number of local government units, as determined under 3 AAC 110.982 and in accordance with art. X, sec. 1, Constitution of the State of Alaska;

(8) annexation of the territory will enhance the extent to which the existing city meets the standards for incorporation of cities, as set out in the Constitution of the State of Alaska, AS 29.05, and 3 AAC 110.005 - 3 AAC 110.042, and is in the best interests of the state;

(9) the commission determines that specific policies set out in the Constitution of the State of Alaska, AS 29.04, AS 29.05, or AS 29.06 are best served through annexation of the territory by the legislative review process, and that annexation is in the best interests of the state.

3 AAC 110.150. Local Action.

Territory contiguous to the annexing city, that meets the annexation standards specified in 3 AAC 110.090 - 3 AAC 110.135 and has been approved for local action annexation by the commission, may be annexed to a city by any one of the following actions:

(1) city ordinance if the territory is wholly owned by the annexing city;

(2) city ordinance and a petition signed by all the voters and property owners of the territory;

(3) approval by a majority of votes on the question cast by voters residing in

(A) the territory; and

(B) the annexing city;

(4) repealed 1/9/2008;

(5) repealed 1/9/2008.

3 AAC 110.425. Legislative Review Annexation Petitions.

(a) Except as provided in (i) of this section, before a petition for annexation by the legislative review process may be submitted to the department under 3 AAC 110.420, the prospective petitioner shall prepare a complete draft of the prospective annexation petition and a

summary of the prospective petition. The prospective petitioner shall also conduct a public hearing on the annexation proposal in accordance with (d) - (e) of this section.

(b) The prospective annexation petition required under (a) of this section must be prepared using forms provided by the department under 3 AAC 110.420. The summary required under (a) of this section must include a map of the area proposed for borough annexation or territory proposed for city annexation, a synopsis of the views of the prospective petitioner regarding the application of applicable standards to the proposed annexation, a summary of the reasonably anticipated effects of annexation, and an abstract of the transition plan required under 3 AAC 110.900.

(c) The prospective annexation petition and the summary must be made available to the public on or before the first publication or posting of the notice of the hearing required under (e) of this section. The prospective petitioner shall make one copy of the prospective petition available for public review at a convenient location within or near the boundaries proposed for annexation for every 500 individuals reasonably estimated to reside within those boundaries. However, the prospective petitioner need not provide more than five copies of the prospective petition for public review regardless of the population within the boundaries proposed for annexation. The prospective petitioner shall make the summary of the annexation proposal available for distribution to the public without charge at a convenient location within or near the boundaries proposed for annexation.

(d) The public hearing required under (a) of this section must address appropriate annexation standards and their application to the annexation proposal, legislative review annexation procedures, the reasonably anticipated effects of the proposed annexation, and the proposed transition plan required under 3 AAC 110.900. The hearing must be held at a convenient location selected by the prospective petitioner within or near the boundaries proposed for annexation. The hearing must allow a period for comment on the proposal from members of the public. If the prospective petitioner is a municipality, the governing body shall conduct the hearing.

(e) In the manner provided for a hearing of the commission under 3 AAC 110.550, a prospective petitioner shall give public notice and a public service announcement of the public hearing required under (a) of this section.

(f) The department shall specify the text of the public notice required under (e) of this section, to ensure that the notice contains the following information:

(1) the title of the notice of the hearing;

(2) the name of the prospective petitioner;

(3) a brief description of the nature of the prospective legislative review annexation proposal, including the size and general location of the boundaries under consideration;

(4) information about where and when the prospective petition is available for public review;

(5) information about where the public may receive, without charge, a summary of the prospective petition;

(6) a statement concerning who will conduct the hearing;

(7) a statement of the scope of the hearing;

(8) notification that public comments will be accepted during the hearing, and a statement of any time limits to be placed on individuals who offer comments;

(9) the date, time, and place of the hearing;

(10) a statement of compliance with 42 U.S.C. 12101 - 12213 (Americans with Disabilities Act);

(11) the name and telephone number of a representative of the prospective petitioner to contact for additional information.

(g) The department shall specify the text of the public service announcement required under (e) of this section, to ensure that the announcement contains the following information:

(1) the title of the public service announcement;

(2) the period during which the public service announcement is requested to be broadcast;

(3) the name of the prospective petitioner;

(4) a description of the prospective legislative review annexation proposal;

(5) a statement of the size and general location of the boundaries being considered for annexation;

(6) information about where and when the prospective petition is available for public review;

(7) information about where the public may receive, without charge, a summary of the prospective petition;

(8) a statement concerning who will conduct the hearing;

(9) the date, time, and place of the hearing;

(10) the name and telephone number of a representative of the prospective petitioner to contact for additional information.

(h) When filing a petition with the department under this section, the prospective petitioner shall submit evidence of compliance with the requirements of (e) of this section, a written summary or transcript of the hearing, a copy of any written materials received during the hearing, and an audio recording of the hearing.

(i) This section does not apply to a petition for annexation that is submitted at the request of the legislature.

3 AAC 110.990. Definitions.

(5) a "community" means a social unit comprised of 25 or more permanent residents as determined under 3 AAC ~~110.920~~; (5) a "community" means a social unit comprised of 25 or more permanent residents as determined under 3 AAC 110.920;

(32) "territory" means the geographical lands and submerged lands forming the boundaries in a petition regarding a city government or forming the boundaries of an incorporated city;

3 AAC 110.920. Determination of Community.

(a) In determining whether a settlement comprises a community, the commission may consider relevant factors, including whether the

(1) settlement is inhabited by at least 25 permanent residents;

(2) the permanent residents live in a geographical proximity that allows frequent personal contacts and interaction; and

(3) the permanent residents at a location are a discrete and identifiable social unit, as indicated by such factors as resident public school enrollment, number of sources of employment, voter registration, precinct boundaries, permanency of dwelling units, and the number of commercial or industrial establishments, community services, and service centers.

(b) Absent a specific and persuasive showing to the contrary, the commission will presume that a population does not constitute a community if

1) public access to or the right to reside at the location of the population is restricted;
or

2) repealed 1/9/2008;

(3) the location of the population is provided by an employer and is occupied as a condition of employment primarily by persons who do not consider the place to be their permanent residence.

(c) A city that absorbs one or more municipalities through merger comprises a single community. A city that is formed through the consolidation of one or more municipalities comprises a single community.

I. INTRODUCTION

Appellees City of Dillingham and the Local Boundary Commission argue, essentially, that the LBC had discretion to make its decision approving Dillingham's annexation petition, that the decision was reasonable, and that this court should not disturb the agency's decision. Appellant Native Village of Ekuk replies that the LBC's discretion is not unlimited; it must be exercised consistent with its statutory and regulatory authority. It is this court's duty and responsibility to determine whether the decision was within that authority and remand to the agency if it was not.

Ekuk responds to certain inaccurate statements of the law and the facts related to (1) the Commission's allowance of the local action method of annexation; (2) the Commission's application of new standards without compliance with the Administrative Procedure Act;¹ and (3) the Commission's errors in applying the best interests of the state standard.

II. THE LOCAL ACTION/LEGISLATIVE REVIEW ISSUE.

A. Under existing statutes and regulations, uninhabited territory cannot be annexed to a city by the local action method of annexation.

Under AS 29.06.040(c) and 3 AAC 110.150(c)(3), an annexation of territory by local action must be approved by the majority of voters residing and voting *in the territory to be annexed* and also by the majority of voters residing and voting in the annexing city. As explained more fully below, Dillingham's petition for annexation of Nushagak Bay did not and could not meet the statutory requirement that "the proposed annexation be approved by a majority of votes on the question cast by voters residing in the annexing municipality[.]"²

¹ AS 44.62.010 – 44.62.305 hereinafter "the APA".

² AS 29.06.040(c)(2).

or the similar regulatory requirement that the proposed annexation have the “approval by a majority of votes on the question cast by voters residing in the territory[.]”³

1. The proposed annexation was not approved by a majority of the votes on the question cast by voters residing in the area proposed to be annexed.

The legislature provided that the Local Boundary Commission “shall . . . adopt regulations providing standards and procedures for . . . annexation[.]”⁴ It required that “the regulations providing standards and procedures are subject to AS 29.04 – AS 29.10,”⁵ and further mandated that “the Local Boundary Commission shall establish procedures for annexation and detachment of territory by municipalities by local action.”⁶

Article 3 of the LBC’s regulations is labeled “Standards for Annexation to Cities” and includes 3 AAC 110.090 – 3 AAC 110.150. Under 3 AAC 110.140, the LBC identified eight justifications permitting an annexation to proceed through the legislative review option, if the LBC finds that any one of them exists.

The standards under 3 AAC 110.150 for local action petitions are more limited. To proceed by local action, territory must be contiguous to the annexing city; must meet the annexing standards in 3 AAC 110.090 – 110.135; *and* must have been approved for local action annexation by the commission.⁷ Further, if those standards have been met, annexation by local *action* requires that one of the following three *actions* must occur to make a proposed annexation final:

(1) city ordinance if the territory is wholly owned by the annexing city;

³ 3 AAC 110.150(c)(3)(A).

⁴ AS 44.33.812(a)(2).

⁵ *Id.*

⁶ AS 29.06.040(c).

⁷ 3 AAC 110.150 (emphasis added).

- (2) city ordinance and a petition signed by all the voters and property owners of the territory;
- (3) approval by a majority of votes on the question cast by voters residing in
 - (A) the territory; and
 - (B) the annexing city[.]⁸

Ekuk argues that the proposed annexation was not “approved for local action annexation by the commission[.]”⁹ Even if it had been so approved, however, Dillingham was unable to complete any one of the three actions necessary to effect the annexation by local action. Dillingham attempted to effect its annexation by the third method but it could not complete the required “local action” because there are no inhabitants in the territory to be annexed. A vote of zero to zero cannot produce the requisite “approval by a majority.”

This argument is not a catch-22. The “local action” method is well named. It applies when purely local action can effectuate the annexation (once the LBC has ensured compliance with all of the substantive and procedural requirements). Local action petitions can proceed without an election when the city already owns the territory; without an election when a petition is signed by all the voters and property owners *in the territory*; and with an election if a majority of the voters *in the territory* and a majority of voters in the annexing city approve.

What these three actions have in common is that all or at least a majority of the property owners and voters in the territory to be annexed agree to the annexation. If these conditions do not exist, legislative approval is the available and appropriate method, with its expanded pre-filing notices and hearings and submission to the legislature if the petition is approved by the LBC.

⁸ 3 AAC 110.150(c).

⁹ See Ekuk’s Opening Br. at 20-21.

A 2006 amendment to AS 29.06.040(c) underscores the importance of the requirement of approval by the majority of voters in the territory proposed to be annexed. Until 2006, the statute required only that “a proposed annexation and detachment must be approved by a majority of votes on the question cast by voters residing in the area proposed to be annexed or detached[.]”¹⁰ According to the sponsor statement, the LBC had been applying a regulation that:

“...expands that requirement to “an aggregate vote of the people in the borough and the people in the area to be annexed.” This is a requirement above and beyond what the legislature had in mind and dilutes the voting rights of those voters in the area to be annexed.”¹¹

The 2006 amendment required approval both of the majority of voters in the territory to be annexed and in the annexing city, restored “veto power” to a territory voting against annexation, and underscores that the method applies where there are voters. Dillingham’s and the LBC’s new interpretation would eliminate the basic requirement of a local action petition – that there must be a local population and its voters must approve the annexation by a majority vote.

2. The Department of Natural Resources’ Letter of non-objection did not satisfy the requirement that a majority of voters in the territory to be annexed approve the proposed annexation.

In its Brief of Appellee, the LBC concedes that AS 29.06.040(c) (requiring the LBC to establish procedures for annexation of territory by municipalities by local action) is silent concerning no voters in the annexed territory, but argues that:

¹⁰ See Enrolled HB 133 and Sponsor Statement by Representative John Coghill. This legislative history can be found at the following web address:

http://www.juneau.org/clerk/boards/Annexation_Study_Commission/2006-06-07_HB_133_and_related_information.pdf

¹¹ *Id.* Sponsor Statement p. 1.

the LBC's inherent ability to discretionarily interpret their regulations in such a reasonable manner, is appropriate, and a *proper substitute for a traditional election* in that situation.¹²

In fact, both AS 29.06.040(c)(2) and 3 AAC 110.150(3)(A) require that a majority of voters in the territory to be annexed must vote for a local action annexation. The LBC argues that “a traditional election in an area of no residents and no voters would be impractical.”¹³ If by “impractical” the LBC means the annexation would fail, Ekuk agrees, because it is impossible for a majority of voters in the territory to approve the annexation.

According to the LBC's brief, the LBC abandoned the statutory and regulatory requirement for approval of voters in the territory and instead “determined that an ‘election’ in the form of a non-objection letter from the State as landowner, accompanying the petition, would suffice under these circumstances.”¹⁴ This abandonment of a regulatory requirement is not entitled to deference by the reviewing court, and must fail.

First, the record is devoid of any discussion by the Commission on this issue. There is no citation to the record to support the statement that the LBC *determined* that the DNR's letter of non-objection would suffice or that it even considered that rationale. This court cannot affirm as reasonable a decision that it cannot even review. The argument is an after-the-fact attempt to justify the LBC's failure to require compliance with the local action required by 3 AAC 110.150(c)(3) to finalize an annexation by the local action method.

Second, there is nothing ambiguous or requiring interpretation in the statutory and regulatory requirement that the proposed annexation “must be approved by a majority of

¹² LBC Br. at 26-27 (emphasis added).

¹³ LBC Br. at 26.

¹⁴ *Id.*

votes on the question cast by voters residing in the area proposed to be annexed.” There is no basis for the LBC to interpret either the legislature’s statute or its own regulation mandating a vote by residents to include an alternative to that majority vote in the form of a letter of non-objection by the Department of Natural Resources.

Third, even if the DNR could be deemed to be a voter residing in the area, a state agency’s letter of non-objection does not represent “local action” under any common sense definition of the phrase, and cannot under even the most generous of interpretations be considered a proxy vote approving the annexation. The last sentence of the letter reads: “we are *not* taking a position in support of the annexation.”¹⁵

3. Even if the constitution and statutes do not preclude the annexation of uninhabited territory by the local action method, such an annexation cannot occur in the absence of standards and procedures required by AS 29.06.040(c).

In contrast to the LBC’s interpretation argument, Dillingham argues that “[t]here is nothing to ‘interpret’ or ‘construe’ about the language used in AS 29.06.040 and restates the requirement that the local option process must include both approval by residents of the annexing municipality and approval of residents of the area to be annexed.¹⁶ Ekuk agrees with Dillingham on this point. The statutory mandate is clear: The LBC:

shall establish procedures for annexation and detachment of territory by municipalities by local action. The procedures **must** include a provision that . . . (2) a proposed annexation or detachment **must** be approved by a majority of votes on the question cast by voters residing in the area proposed to be annexed or detached[.]¹⁷

¹⁵ Exc. 68 (emphasis added).

¹⁶ Dillingham Br. at 24.

¹⁷ AS 29.06.040(c)(2) (emphasis added).

The statute requires the LBC to promulgate regulations setting out standards and procedures for annexation by local action. Regulations addressing local action are set out at 3 AAC 110.150 (describing the three separate local actions, one of which must be taken to finalize a local action annexation if all other required elements of annexation have been met); 3 AAC 110.590 (describing a modified and simpler procedure for local action annexations under AS 29.06.040(c)(3) and (4)); and 3 AAC 110.600 (describing the commission's steps in facilitating a required election after it has approved a local action annexation).

None of these regulations provides for a local action annexation in which there are no residents or voters in the territory to be annexed. In Ekuk's view, regulations to annex uninhabited territory by local action would never be appropriate, fair, or consistent with the constitutional and statutory principles, but this court need not decide that issue because the LBC has not adopted standards and procedures for a city to annex uninhabited territory by local action.

In 1971 the Alaska Supreme Court held that the LBC's development of standards was mandated by statute and was a precondition to the exercise of its discretion in approving boundary changes. The appellants argued that "the failure of the commission to set standards vitiated the annexation of its properties" and the Court agreed. "To do otherwise would be to condone the commission's nonobservance of a valid legislative prerequisite to the exercise of the commission's discretion in matters of local boundary changes."¹⁸

¹⁸ *United States Smelting, Refining and Mining Company v. Local Boundary Commission*, 489 P.2d 140, 142 (Alaska 1971).

Two years later the Alaska Supreme Court considered what it called “an analogous situation.”¹⁹ In a transfer proceeding, the Alaska Transportation Commission (ATC) first ordered that it would hold an evidentiary hearing, and later decided to employ a “modified procedure” that would allow written submissions and depositions in lieu of an evidentiary hearing. Appellant appealed to the superior court, arguing that the agency had failed to comply with its statutory mandate to adopt regulations, took actions without complying with the APA, and effectively denied it due process of law.²⁰ The superior court found that the ATC had the discretionary authority to use the modified procedure, but held that appellant should have been given additional time to prepare. The Alaska Supreme Court reversed.

First, the Supreme Court examined the appropriate standard of review of the ATC’s action. The appellees argued that reasonable basis should apply in determining whether the ATC abused its discretion in adopting the modified procedure. But the Court noted that the issues involved only:

construction or interpretation of legislative enactments[.] . . . Since the question is a matter of legal concern, we conclude that the proper standard of review requires independent judicial resolution unhampered by any prior agency determination.²¹

The Court found the legislature had given the ATC both discretionary and mandatory duties, and the duty to adopt regulations to govern practice and procedure were mandatory. Thus, as in *United States Smelting*, the adoption of standards and procedures was a necessary precondition to applying the agency’s discretion and the court held that the standards were

¹⁹ *Mukluk Freight Lines, Inc. v. Nabors Alaska Drilling, Inc.*, 516 P.2d 408, 413 (Alaska 1973).

²⁰ *Id.* at 410-11.

²¹ *Id.* at 413.

significant and expressed the legislature's policy requiring compliance with due process guarantees."²²

Similarly, this court must find that the LBC's approval of an annexation of uninhabited territory by local action is invalid because there are no procedures established in regulation for such an annexation. The required local action (majority of votes in the annexing territory) was not met and could not be met, and there are no other standards in place to apply. Under *United States Smelting and Mukluk*, it would be a denial of due process for the LBC to be permitted to apply modified or *ad hoc* procedures that were not adopted under the APA.

The current regulations for local action set out at 3 AAC 110.150 either apply to the annexation of uninhabited territory or they do not apply. If they apply, the annexation must fail because the territory to be annexed literally cannot approve the annexation by a majority vote. If the procedures for local action annexations set out at 3 AAC 110.150 do not apply, the annexation must fail because the LBC has failed to adopt standards and procedures for such an annexation by local action and under binding precedent, the annexation is void and must be remanded to the LBC.

The statutory and regulatory requirements for annexation of Nushagak Bay by local action were not and could not be met. As Ekuk has argued from the outset, this is an annexation petition that should be conducted by the legislative review process, including the 3 AAC 110.425 procedures, and be presented to the legislature for review.

²² *Id.* at 414.

B. The LBC had the authority and constitutional duty to determine whether Dillingham’s annexation petition would proceed as a local action or legislative review petition.

In its opening brief Ekuk provided numerous examples of the LBC’s authority to convert a local action petition to one for legislative review.²³ Additional examples are provided herein.

The LBC’s authority to consider any proposed boundary change and to submit any boundary change to the legislature derives not from the legislature or from the LBC’s regulations, but from the constitution itself.²⁴ Under the constitution, the commission “may present proposed changes to the legislature.” Neither the legislature nor the commission may amend this constitutional grant of authority.

The LBC also has regulatory authority to determine whether a petition can proceed by local action. According to its regulation, territory to be annexed by local action must be contiguous to the annexing city, meet the standards in 3 AAC 110.090 – 3 AAC 110.135 and the petition must have been “approved for local action annexation by the commission.”²⁵ Thus, a local action annexation cannot occur without being “approved for local action by the commission.”

Of course a petitioning city may in the first instances decide if it will seek annexation through the legislative review method or the local action method. Whether the petition continues through that method, though, is determined by the LBC. Appellees have not cited

²³ See Ekuk’s Opening Brief, pp. 18-23.

²⁴ Alaska Const. Art X, Sec. 12 (“[t]he commission . . . may consider any proposed local government boundary change” and “present proposed changes to the legislature”).

²⁵ 3 AAC 110.150 (emphasis added).

to a single regulation or other authority that delegates to a petitioning city the authority to determine whether an annexation can be effectuated by local action or by legislative review.

The LBC's regulation, 3 AAC 110.140, addresses when a petition may proceed by the legislative review method:

territory that meets the annexation standards specified in 3 AAC 110.090 – 3 AAC 110.135 may be annexed to a city by the legislative review process if the commission also determines that any one of the following circumstances exists:

...
(9) the commission determines that specific policies set out in the Constitution of the State of Alaska, AS 29.04, AS 29.05, or AS 29.06 *are best served through annexation of the territory by the legislative review process*, and that annexation is in the best interests of the state.²⁶

This regulation permits the LBC to evaluate any petition against these standards to determine whether the legislative review process would be appropriate. The regulation contains no language limiting its application to only those petitions designated by the petitioner for legislative review. The regulation expressly authorizes the LBC to convert a local action petition to a legislative review petition when constitutional and statutory policies will be best served.

In 1993, just a year after the regulation's adoption, the LBC observed that the "newly implemented regulations provide guidance concerning *which process is best for final approval of an annexation (i.e., election or legislative review)*["²⁷ and quoted the above language of 3 AAC 110.140. Thus, not only does the plain language of the regulation provide the LBC

²⁶ 3 AAC 110.140(9) (emphasis added).

²⁷ In the Matter of the June 4, 1992 Petition of the City of Cordova for Annexation of Approximately 180 Square Miles (Decision date January 8, 1993), attached as Exhibit 1. This decision was cited in Appellant's opening brief at pp. 22-23 and at the time of filing the brief was publicly available on the LBC's website. It has since been removed from the web without explanation.

with authority, but an LBC decision made almost contemporaneously with the regulation's adoption confirmed that authority. The LBC must determine "which process is best for final approval of an annexation,"²⁸ whether a petition should remain as originally filed (either legislative review or local action) or whether the interests of the state would be best served by converting to the other method. In fact, the Commission determined that it had not just the authority, but "*a constitutional duty*"²⁹ to perform the balancing required by this regulation to consider the needs and interests of the parties, affected residents and property owners and the State of Alaska.

Another example of the LBC's authority to select the best method for finalizing an annexation can be found at 3 AAC 110.590. This regulation prescribes simplified procedures for local action annexation under AS 29.06.040(c)(3)-(4). Under that statute, municipally owned property adjoining a municipality may be annexed by local action, and an area adjoining a municipality may be annexed by ordinance if all property owners and voters in the area petition the governing body. Yet even in these cases, which are far more "local" in effect and impact than an annexation of all of Nushagak Bay, the LBC has discretion to convert a local action petition to legislative review:

if the commission determines that the balanced best interests of the locality and the state are enhanced by statewide participation, the commission may convert such a local action petition for annexation . . . to a legislative review petition.³⁰

Dillingham and the LBC ask this court to accept the notion that the LBC has authority to require a legislative approval petition to instead follow the local action method,

²⁸ *Id.*

²⁹ *Id.* at 19.

³⁰ 3 AAC 110.590(e).

and has authority to require two of the three types of local action petitions to instead follow the process for legislation review (3 AAC 110.150(1)-(2)), but has no authority to require a 3 AAC 110.150(3) local action petition to proceed instead by legislative review. Further, appellees argue that although the LBC has no discretion to require a 3 AAC 110.150(3) local action petition to go through the legislative review method, it does have discretion to substitute a letter from a state agency for the required voter approval of annexation by a majority of voters in the area to be annexed. These arguments are inconsistent with the plain language of the regulations, inconsistent with each other, and inconsistent with the LBC's interpretation of its regulations soon after those regulations were adopted.

Dillingham relies on the statutory construction principle *expressio unius est exclusio alterius* for the proposition that because the regulations specify that a legislative review petition may be converted to one for local action but not local action to legislative review, that its omission should be understood as an exclusion.³¹ This maxim is not applicable where regulations are unambiguous. The regulations in this context expressly authorize the commission to determine that any petition may be treated as one for legislative review, including even local action petitions for annexation of municipally owned property or adjacent property by unanimous consent of voters and property owners.³²

³¹ Dillingham Br. at 27, n.84.

³² The maxim can appropriately be applied, however, to the LBC's regulation listing the actions that will effect an annexation through the local action method. "Territory contiguous to the annexing city . . . may be annexed to a city by any one of the following actions[.]" and only three are listed. Two are by ordinance in situations not applicable here, and the third is "approval by a majority of voters on the question cast by voters residing in (A) the territory; and (B) the annexing city[.]" This is a conjunctive requirement – both must occur or the action required to effectuate the annexation has not occurred. And under the principle cited by Dillingham, the absence of any other actions to effectuate the annexation

The LBC misunderstands Ekuk's appeal when it observes that "the constitution provides that the LBC may consider 'any proposed [] boundary change' and the city's boundaries may be adjusted by 'local action.'"³³ Ekuk agrees. Ekuk did not appeal Dillingham's decision to file a local action petition, or the LBC's consideration of the petition, or the proposition that city boundaries can, under certain circumstances, be adjusted by local option. Ekuk appealed the LBC's decision not to convert the petition to one for legislative approval when that issue was raised by Ekuk.

The fundamental reason that Nushagak Bay cannot be annexed by local action (or, as Ekuk argues in section II of this brief, cannot be annexed to a city at all) is that the regulation wasn't written to accommodate such an annexation. The LBC, in its discretion, identified three and only three actions that will effectuate an annexation through the local action method.³⁴ The LBC's decision to provide for these and only these actions is a decision entitled to a deferential standard of review. The LBC's failure to apply those standards in its decision approving annexation is not.

Both the LBC and Dillingham quote the Alaska Supreme Court's language that "the mode of annexation is an exercise of lawfully vested administrative discretion which [courts] will review only to determine if administrative, legislative or constitutional mandates were

must be understood as an exclusion of other actions. The legislative review method is the annexation procedure to be used if none of the three "local actions" can be accomplished.

³³ LBC Br. at 24.

³⁴ These include (1) city ordinance, if the territory is wholly owned by the annexing city; (2) city ordinance and a petition signed by all the owners and property owners of the territory; and (3) approval of the majority of votes on the question cast by voters residing in the territory and in the annexing city. 3 AAC 110.150.

disobeyed or if the action constituted an abuse of discretion.”³⁵ The administrative discretion referred to is the LBC’s discretion, not the petitioner’s discretion. The case underscores the LBC’s authority to make the determination of “the mode of annexation.” The LBC relies on *Port Valdez* to support its argument that the petitioner determines the method of annexation.³⁶ There the court said that a step annexation would “. . . be commenced by a municipality’s petition specifically requesting that alternative” but the LBC omits the court’s very next phrase: “although presumably the commission could require the municipality to annex by the step method.”

On page 25 of its brief, the LBC offers a series of statements regarding the LBC’s discretion which are difficult to harmonize:

The mode of the petition as presented was squarely within the discretion of the LBC.

The mode of petition, whether ‘local action/local option’ or ‘legislative review,’ is determined by the submitting petitioner. Whether or not it continues that way is addressed in law (legislative review to local action) and it is vested in the discretion of the LBC.

[C]onversion from local action to legislative review as appellant calls for in this appeal is not provided for.

In this case neither the LBC staff nor the LBC commissioners deemed it necessary or desirable to change the local action petition to one of legislative review, though that option is not provided for in law[.]³⁷

What these internally inconsistent statements highlight is that appellees are walking a tightrope. They essentially seek a deferential standard of review for deciding that they have

³⁵ LBC Br. at 24; Dillingham Br. at 29, citing *Port Valdez Co., Inc. v. City of Valdez*, 522 P.2d 1147, 1151 (Alaska 1974).

³⁶ LBC Br. at 24.

³⁷ LBC Br. at 25.

no authority to enforce their own regulations by finding that Dillingham's petition must proceed by legislative review. Denial of one's own authority cannot reasonably be considered an exercise of that authority.

As discussed in Ekuk's opening brief, LBC Chair Chrystal specifically asked who selects the method of annexation and was informed by Mr. Williams that it was the petitioner, and that "you could go from legislative review to local action, but I'm not seeing the reverse."³⁸ This record evidence flatly contradicts the LBC's argument that "neither the LBC staff nor the LBC commissioners deemed it necessary or desirable to change the local action petition to one of legislative review, though that option is not provided for in law[.]"³⁹ The LBC did not do the balancing of interests required by 3 AAC 110.140 because it was advised it didn't have the authority and by default abandoned its own regulatory and statutory requirement that a local action petition cannot be finalized unless a majority of voters in the territory to be annexed approve the annexation. The LBC's failure to comply with its own regulation is not entitled to deference by this court.

Dillingham makes a related argument, claiming that the Commission was interpreting its own regulations when it said it didn't have authority to convert to legislative review, and that deference must be afforded to the Commission's interpretation.⁴⁰ Then Dillingham explained that Mr. Williams (who is not the Commission and whose opinion is not entitled to deference by this court):

reasoned that the presence of a specific provision allowing conversion of a legislative review petition to a local option petition, coupled with the absence

³⁸ Ekuk's Br. at 19.

³⁹ LBC's Br. at 25.

⁴⁰ Dillingham Br. at 26.

of a mirror image provision in the regulations that would allow conversion of a local option petition to a legislative review petition, meant the Commission did not intend for the latter “conversion” to be part of the local option procedures.⁴¹

As set forth above, however, there is clear authority for the LBC to make such a determination. 3 AAC 110.140 establishes standards for when it is appropriate for *any territory* to be annexed by the legislative review process:

Territory that meets the annexation standards specified in 3 AAC 110.090 – 3 AAC 110.135 may be annexed to a city by the legislative review process if **the commission also determines** that any one of the following circumstances exists[.]

More than one of the eight listed circumstances may have been applicable to the Dillingham petition. The last one – “the commission determines that specific policies set out in the Constitution of the State of Alaska, AS 29.04, AS 29.05, or AS 29.06 are best served through annexation of the territory by the legislative review process, and that annexation is in the best interests of the state” – certainly provided the LBC with discretion to convert the Dillingham petition to one for legislative review.

The appellees make several other arguments in an attempt to justify using a local action petition to annex all of Nushagak Bay. Dillingham argues that the annexation process is an administrative process subject to veto by either the LBC or the voters.⁴² Actually, the LBC is the administrative review body for *all* petitions, and must determine that *all* petitions meet the statutory and regulatory standards including that annexation is in the state’s best interests.

⁴¹ Dillingham Br. at 26-27.

⁴² Dillingham Br. at 28.

In local action petitions, a territory to be annexed can “veto” an annexation if the majority of the voters do not approve the annexation. The “veto power” held by the territory to be annexed explains why a local action petition may be filed without all of the pre-filing notice and hearing procedures set out in 3 AAC 110.425 that are required for a legislative review petition: the territory to be annexed needs less notice when it has an opportunity to vote down the annexation altogether. Typically an annexing city will not file its petition as one for local action if the territory to be annexed does not support annexation, and can avoid the local “veto” by filing under the legislative review method.⁴³

In this case, Dillingham avoided the time-consuming pre-filing notice and hearing procedures by filing as a local action petition, thinking that it had also avoided the risk of a “veto” by the territory to be annexed, since it carefully drew the proposed new boundaries to include nearly 400 square miles and not a single resident or voter.⁴⁴ The LBC should have determined that the local action method could not proceed where there were no voters in the territory to be annexed. It should have seen that where the territory to be annexed could not exercise the “veto power” that is the essence of a 3 AAC 110.150(3) local action annexation, Dillingham should have been required to provide the region with the notice and hearing procedures required by 3 AAC 110.425.

C. Appellants and others in the region have been prejudiced by the LBC’s failure to convert the petition to one for legislative review.

⁴³ Of course if the LBC in its discretion determined that the “the balanced best interests of the locality and the state are enhanced by local participation” the LBC can convert the petition to one for local option anyway. 3 AAC 110.610(a).

⁴⁴ Dillingham avoided annexing Clark’s Point and the territory that city includes within the Nushagak Fishing district. There can be little doubt that if there was one person opposed to annexation living in the territory to be annexed, the city would have filed its petition as one for legislative review.

Ekuk and other communities and residents were prejudiced by the failure of the Commission to require that Dillingham engage in the legislative review process with the additional procedures of 3 AAC 110.425. Actual hearings held out in the affected areas would have provided the primarily Yupik residents with an opportunity to engage more directly in the process and be far more informed about the petition process before the petition was actually filed with the commission (which under the legislative review method does not occur until after the recorded hearings have been held). It is apparent that information and additional time to engage in the proposal, consider its ramifications, and communicate with neighboring communities would have given the region's residents a much greater opportunity to mobilize a defense or an alternative to the petition and to object as a respondent. That opportunity was foreclosed by the decision to avoid the 3 AAC 110.425 procedures by filing as a local action petition. The LBC's recitation of the public process provided⁴⁵ is not a substitute for the procedures to which the communities, including Ekuk, were entitled.

One example of the harm is the city of Clark's Point. Although the LBC alleged as fact that no other municipality desires to provide essential municipal services for the territory,⁴⁶ the evidence shows that Clark's Point tried to file an annexation petition similar to the one it filed in 1986, but the department declined to process the petition, or assist them

⁴⁵ LBC Br. at 7-8.

⁴⁶ *Id.* at 6.

in their efforts as is its constitutional duty.⁴⁷ Had the petition been considered one for legislative review, the notice and hearing procedures occurring in advance of filing the petition may well have allowed Clark's Point to be prepared to file its petition or otherwise affect the course of the proceedings.

In another attempt to minimize the harm to Ekuk and other communities in the region, Dillingham observed what Ekuk previously has pointed out to this court: that "3 AAC 110.425 contains specific additional procedures to be used when a city selects the legislative review option."⁴⁸ According to Dillingham, this extra process "reflects a Commission concern for adequate public process – a concern the Commission implemented in Dillingham's annexation by the inclusion of the additional consultation condition."⁴⁹

The "consultation condition" only required Dillingham to "attempt to meet" with affected groups and communities and to "file a report of the meeting attempts, whether or not held, and meetings held, if any[.]"⁵⁰ The condition was woefully inadequate to address the failures of the petition to meet the best interests of the state standard.⁵¹ And certainly it was not an adequate substitute for the 3 AAC 110.425 notice and hearing mandated:

before a petition for annexation by the legislative review process may be submitted to the department . . . at a convenient location . . . within or near the boundaries proposed for annexation[.]⁵²

⁴⁷ Alaska Const. Art. X, Sec. 14 ("An agency shall be established by law to advise and assist local government."). *See* Ekuk's Opening Br. at 6 and Exc. 362-63 for evidence of Clark's Point's contributions to the region and efforts to participate in the process.

⁴⁸ Dillingham Br. at 25.

⁴⁹ Dillingham Br. at 26.

⁵⁰ Exc. 249.

⁵¹ *See* Ekuk's Opening Br. at 43-48.

⁵² 3 AAC 110.425(a) and (d).

The argument that the LBC intended the condition to provide “adequate public process” comparable to that provided by 3 AAC 110.425 is specious. It is yet another example of appellees’ misguided impression that the LBC can ignore its regulations and make *ad hoc* substitutions for required actions and procedures.

The Alaska Supreme Court does not condone such a practice. In 1994 it held that the notice requirements of a borough incorporation had not been satisfied, and agreed with the superior court that the “notice violations had prejudiced Villages by abbreviating the time they had in which to voice opposition to the Borough’s boundaries[.]”⁵³ The Supreme Court invalidated the incorporation and remanded it back to the LBC.

The residents of the region to whom Dillingham as “hub city” purports to provide services have been similarly prejudiced. They are entitled to the procedures of 3 AAC 110.425. They are entitled to have the petition submitted to the legislature for review. They do not have the “veto power” that is the hallmark of a 3 AAC 110.150(3) local option petition because they have been excluded from the territory to be annexed, but they are entitled to all the procedures set out in regulation for legislative review petitions. There is no question that the failure to be given the procedures of 3 AAC 110.425 hampered the villages’ ability to mobilize and present a combined, robust objection or alternative to the petition. The prejudice to Ekuk and other residents of the region is discussed in Ekuk’s opening brief.⁵⁴ The prejudice can only be remedied by a remand to the LBC with direction to provide the required due process.

⁵³ *Lake and Peninsula Borough v. Local Boundary Comm’n.*, 885 P.2d 1059 (Alaska 1994).

⁵⁴ See Ekuk’s Opening Br. at 26-28.

III. THE LBC ACTED UNREASONABLY IN APPLYING NEW ANNEXATION STANDARDS WITHOUT COMPLYING WITH THE APA.

Apparently there is a sea change underway in the regulation of local boundaries. In its brief, the LBC described “boundary change efforts [for the Western Bristol Bay Region], including borough incorporation...” as characterized by “detrimental inaction” and “multi-decade negative inertia.”⁵⁵ The LBC’s response is a new annexation standard permitting a previously unrecognized class of city known as a “regional hub city” to annex territory so that it may exercise powers and provide services to a region. For the purpose of this appeal Ekuk does not argue that the LBC lacks power to make such a policy change, but rather that such a policy cannot be applied without following the public process established under the APA (AS 44.62). The LBC should be ordered to follow the APA to avoid making an important change in annexation standards on an *ad hoc* basis.

A. The court must apply its independent judgment in determining whether the LBC complied with its own regulations.

Both Dillingham and the LBC contend that the court is faced only with policy determinations and interpretations of administrative regulations made by the LBC. There are two types of administrative decisions that regularly come before the court. The first is the kind calling for a deferential standard of review urged by the state and Dillingham.

The other kind of case presents questions of law in which knowledge and experience of the industry affords little guidance toward a proper consideration of the legal issues. These cases usually concern statutory interpretation and other analysis of legal relationships about which courts have specialized knowledge and experience. ⁵⁶

⁵⁵ Dillingham’s Br. at 14.

⁵⁶ *Kelly v. Zamarello*, 486 P.2d 906, 916-17 (Alaska 1971).

In these cases the court substitutes its judgment for that of the agency.⁵⁷ Whether the LBC has correctly adopted a regulation in accordance with the APA is reviewed under the independent judgment standard.⁵⁸ Additionally, even under the reasonable basis standard, the Alaska Supreme Court has held that when the agency's interpretation "is inconsistent with the language of the regulation . . . it is unreasonable and will not be upheld."⁵⁹

B. The LBC is required to follow the existing statutory and regulatory standards for cities – not newly created standards for a “regional hub city.”

“General law municipalities are of five classes: first class boroughs; second class boroughs; third class boroughs; first class cities; and second class cities.”⁶⁰ There is no recognition in statute or regulations for what is apparently a new, hybrid “regional hub city.” Notwithstanding this lack of statutory authority, the LBC created the classification as a means to attribute services and facilities provided within the existing boundaries of Dillingham to a 400 square mile area within which other communities in the region also share social, cultural, and economic connections. This was done even though in an earlier decision the LBC concluded that this same territory was not suitable for annexation to a city but was an area of regional scale and concern.⁶¹

Alaska case law takes an extremely broad view of what constitutes a regulation, requiring compliance with the APA's notice and hearing provisions whenever a regulation is

⁵⁷ *Id.*

⁵⁸ *Madison v. Alaska Dep't of Fish & Game*, 696 P.2d 168, 173 (Alaska 1985)(quoting *Earth Resources Co. v. State Dep't of Revenue*, 665 P.2d 960, 965 (Alaska 1983)).

⁵⁹ *Diaz v. Silver Bay Logging, Inc.*, 55 P.3d 732, 736 (Alaska 2002).

⁶⁰ AS 29.04.030.

⁶¹ *See* Exc. 160-62.

required to enable official action.⁶² The APA defines a “regulation” as follows:

every rule, regulation, order, or standard of general application or the amendment, supplement or revision of a rule, regulation, order or standard adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it . . . [w]hether a regulation, regardless of name, is covered by this chapter depends in part on whether it affects the public or is used by the agency in dealing with the public.⁶³

This definition compels the conclusion that the announcement and application of a new category of municipal government and new standards for its annexation of large, unpopulated areas is a regulation that must be adopted consistent with the APA.

The requirement that only regulations adopted under the APA may be applied serves at least two important purposes. First, it provides notice to those petitioning for annexation and those opposing the petition as to what standards must be satisfied, thus providing the opportunity to prepare accordingly. This notice is the essence of the due process requirement. Second, the standards permit a reviewing court to determine whether a decision reasonably meets the established standards. *Mukluk Freight Lines, Inc. v. Nabors Alaska Drill, Inc.*⁶⁴ is again instructive. There the court found the appellant had no advance notice that the agency would apply a new modified procedure and was prejudiced by the lack of notice.⁶⁵

The legislative policy behind AS 42.07.141(b), which requires the adoption of regulations in conformity with due process guarantees . . . clearly suggests that

⁶² See *Kenai Pen. Fisherman's Co-op Ass'n v. State*, 628 P.2d 897, 904-05 (Alaska 1981). See also *Gilbert v. State*, 803 P.2d 391, 396 (Alaska 1990)(legislature has "broadly defined what constitutes a regulation" under state APA); *Mukluk Freight Lines, Inc. v. Nabors Alaska Drilling, Inc.*, 516 P.2d 408, 415 (Alaska 1973)(legislative policy clearly suggests that agency should not conduct its procedures on an ad hoc basis).

⁶³ AS 44.62.640(a)(3).

⁶⁴ 516 P.2d 408 (Alaska 1973).

⁶⁵ *Id.* at 414.

the Commission should not conduct its procedures on an ad hoc basis. A consistent application of these regulations would preclude ad hoc considerations and create standards that could be judicially reviewed in accordance with the due process guarantees anticipated in AS 42.07.141(b).⁶⁶

There are no regulations setting new standards describing what “community,” “territory” and “unpopulated” mean in the context of “hub cities.” Ekuk and other regional groups had no opportunity to prepare for and respond to whether Dillingham’s petition fit those standards, since they were first announced in the final decision. Similarly, the reviewing court has no basis to determine whether the LBC correctly applied its new standards, since those standards do not appear in the existing regulations.

The Alaska Supreme Court has held that a state agency’s interpretation defining the statutory word “population” used to compute a tax limitation applicable to the North Slope Borough amounted to inappropriate *ad hoc* rulemaking.⁶⁷ The court stated that the department’s interpretation of ‘population’ is a regulation because it makes specific a law which the agency administers and because it is used by the agency in dealing with a segment of the public.”⁶⁸ The LBC is required by law to adopt annexation standards in the form of regulations, removing any argument that it has discretion to amend a standard by interpretation. Gauging by the amount of public comment addressed to the LBC regarding this annexation, there can be no doubt that the new regional hub annexation standard affects the public.

In another case with relevance to this appeal, the court was faced with the question of whether a policy determination concerning procurement should have been adopted by

⁶⁶ *Id.* at 414-15.

⁶⁷ *Matanuska-Susitna Borough v. Hammond*, 726 P.2d 166, 182 (Alaska 1986).

⁶⁸ *Id.*

regulation.⁶⁹ The Alaska Supreme Court held that an agency's interpretation of an existing regulation did not itself constitute a regulation, but based its decision in part on the fact that the agency had consistently interpreted the existing regulation the same way earlier and that “such an interpretation of an existing, valid regulation, on the facts of this case, does not trigger the procedures mandated by the APA.”⁷⁰

These cases provide guidance on two actions by the LBC that should have been undertaken through the adoption of administrative regulations. What have been characterized as interpretations of existing regulations actually constitute a new regional hub city annexation standard. The manner in which this new standard was developed in the present case is comparable to the agency action found to be a regulation in *Matanuska - Susitna Borough*. The holding in *Northern Bus* is instructive because the LBC cannot claim that its “interpretations” applied to the territory identified for annexation are the product of a consistent course of conduct. The record discloses that the LBC’s present determination that Nushagak Bay is a community departed from its previous interpretation applied to the same territory concluding that the territory was regional in character and not appropriate for annexation to a city.⁷¹

C. The LBC’s decision approving annexation departed from the plain meaning of the regulations and longstanding interpretations by redefining the regulatory terms “territory,” “unpopulated” and “community.”

In order to approve Dillingham’s petition to annex nearly 400 square miles of unpopulated territory, the LBC had to find that all the regulatory requirements were met.

⁶⁹ *State v. Northern Bus Co., Inc.*, 693 P.2d 319, 323 (Alaska 1984).

⁷⁰ *Id.*

⁷¹ Exc. 161.

The proposed annexation did not readily fit a regulatory scheme written to apply to city annexations, as distinguished from borough annexations. To cure these problems, the LBC essentially ignored regulatory definitions and supplied new meanings to the terms.

1. The definition of “territory”

Dillingham argues that “territory” as defined in 3 AAC 110.990(32) refers to both the territory to be annexed and the territory of the annexing city.”⁷² This interpretation makes no sense when it is applied to the regulatory standards. For example, 3 AAC 110.090 requires that “[t]he territory must exhibit a reasonable need for city government.” If “the territory” included both the territory to be annexed and the annexing city, this standard would mean nothing because the annexing city will always be able to show its need for city government. Likewise, 3 AAC 110.100 requires that “[t]he territory must be compatible in character with the annexing city.” Again, the annexing city can always show compatibility with itself. The court should use its independent judgment and determine that “territory” as used in the city annexation regulations refers to the territory to be annexed.

2. The definition and limitation of “community”

Interpreting “territory” as applying to both the territory to be annexed and the annexing city was a necessary predicate to the next new regulatory pronouncement that allowed an unpopulated area to be considered a “community.” The LBC’s regulations provide that “[t]o promote the limitation of community, the proposed expanded boundaries of the city . . . may include only that territory comprising an existing local community[.]”⁷³ The plain meaning is that the territory to be annexed must itself be a community. Following

⁷² Dillingham Br. at 34.

⁷³ 3 AAC 110.130(c).

the statutory distinctions between cities and boroughs, the existing regulations require that a *city* provide government to “that territory comprising an existing local community” rather than a geographic area for which *borough* government is more appropriate.⁷⁴ The regulations further the doctrine of limitation by prohibiting a city from annexing entire geographical regions or large unpopulated areas.⁷⁵

The LBC’s definition section provides that a community is “a social unit comprised of 25 or more permanent residents as determined under 3 AAC 110.920[.]”⁷⁶ Dillingham provided evidence of the residency of those fishing in Nushagak Bay:

[Q]uite specific data regarding the residency of commercial fishermen fishing in each district is readily obtainable. Nineteen percent of the Nushagak commercial fishing permits are held by residents of Dillingham, including Appellant’s tribal members. Thirteen percent of permits are held by residents of other Bristol Bay communities. The remaining 2/3 of permits are held by out of state residents or Alaskans who live outside Bristol Bay.⁷⁷

Dillingham’s evidence makes clear that 100% of the permit holders reside outside of the territory to be annexed. They are members of other communities. It strains credulity to argue that the water of Nushagak Bay constitutes a “social unit comprised of 25 or more permanent residents.”

In addition to these two regulations, the importance of a finding of community is expressed in 3 AAC 110.130(c). While stated as “non-exclusive factors” that “may” be considered by the LBC, the mandatory words of limitation that are used must be given

⁷⁴ Title 29 of the Alaska Statutes (Municipal Government) provides that “a community” may incorporate as a city. AS 29.05.011(a). The code further provides that “an area” may incorporate as a borough. AS 29.05.031(a).

⁷⁵ There is an exception to this limitation if inclusion of such territory is justified by application of the annexation standards. This exclusion is discussed below.

⁷⁶ 3 AAC 110.990(5).

⁷⁷ Dillingham Br. at 7.

meaning. A reasonable interpretation of the regulation is that the territory to be annexed must itself be a community by having permanent residents. This interpretation is the only one that is consistent with 3 AAC 110.920 which determines the existence of community by reference to a “settlement of permanent residents” in “geographical proximity” that are a “discrete and identifiable social unit.” This regulation is entirely based on determining whether “a settlement” comprises “a community.” The factors are whether (1) the settlement is inhabited by at least 25 *permanent residents*; (2) whether the *permanent residents* live in a geographical community; and (3) whether the *permanent residents* are a discrete and identifiable social unit. Each of the three factors contemplates the presence of permanent residents. The regulation also creates a presumption that a population does not constitute a community if “public access to or the right to reside at the location of the population is restricted.”

The pronouncement that permit holders who reside outside of Nushagak Bay and fish seasonally in Nushagak Bay can constitute a community for purposes of annexation by a city constitutes a new definition of the “community.” This new definition cannot be applied unless enacted through the procedures of the APA.

3. The definition of “unpopulated”

The existing regulations also do not support the notion that seasonal fishermen who are domiciled elsewhere may change an area from “unpopulated” to populated for purposes of the limitation on community, but this is what the LBC found.⁷⁸ In Dillingham’s words,

⁷⁸ Exc. 248.

“[t]he newly annexed territory is not an ‘unpopulated’ area. It is a seasonally populated area.”⁷⁹

The case that both Dillingham and the state make for upholding the LBC decision is that Dillingham is a city that provides services and facilities used by persons who historically fish in the territory identified for annexation. These services and facilities are located and delivered exclusively within the pre-existing boundaries of the city. Ekuk assumes that the LBC, in its judgment, believed that annexation was good for Dillingham, the region and the state. But whether the LBC was correct in its judgment is not the subject of this appeal. The LBC is not entitled to approve a petition solely because it believes it’s a good idea; it may do so only if it finds that regulatory standards have been met.

Because the facts of the petition did not satisfy existing annexation standards, the LBC made certain adjustments. It determined the existence of community by attributing the conditions within Dillingham to the territory to be annexed. The LBC also changed the meaning of the term “unpopulated” by considering the presence of a seasonal (nonpermanent) population as being sufficient to establish a community even if a significant part of that population did not all originate in the city but came from other communities and places in the region. The upshot was that the limiting elements of community were relaxed and redefined to provide for a new standard applicable to Dillingham.

“Territory,” “community,” and “unpopulated” were all given new meaning in order to justify the LBC’s decision approving Dillingham’s petition. Dillingham’s argues it was a

⁷⁹ Dillingham Br. at 32, n.89.

reasonable application of the definition of “territory” set out in 3 AAC 130.990(32),⁸⁰ contending that so long as it (Dillingham) constitutes a community, any territory annexed to it would also satisfy the community requirement. This interpretation effectively nullifies any concept of limitation intended by the regulation and should be rejected as arbitrary and unreasonable.

There is nothing in the record to show that the LBC followed its regulations requiring the territory to exhibit some attributes of a permanent community with the annexing city or by establishing a presumption of no community in the territory because of lack of permanence caused by the transient nature of persons who are there temporarily. It also did not impose any enhanced level of proof of community to overcome the presumption that is required by 3 AAC 110.920(b). These provisions of the regulations were effectively repealed or amended by implication so that a relaxed limitation of community would accommodate annexation by a regional hub city. Dillingham attempts to dispose of the regulatory requirement of the limitation of community simply by averring it doesn't apply to them: “Whatever the ‘limitation of community doctrine’ is, it obviously was not intended to prohibit the Commission from approving Dillingham’s annexation petition.”⁸¹ Dillingham provides no authority for its insight into the purpose of the doctrine.

The Alaska Supreme Court discussed the limitation of community doctrine in a case challenging the LBC’s approval of the incorporation of the North Slope Borough.⁸² In that case appellants cited a series of cases striking down city annexations and incorporations

⁸⁰ Dillingham’s Br. at 34.

⁸¹ Dillingham’s Br. at 32, n.89.

⁸² *Mobil Oil Corporation v. Local Boundary Commission*, 518 P.2d 92 (Alaska 1974).

based on the limitation of community doctrine that could be inferred from constitutions and statutes, but the Alaska court found those authorities “unpersuasive when applied to borough incorporation” and noting that “aside from the standards for incorporation in AS 07.10.030, there are no limitations in Alaska law on the organization of borough government. . . . [a]nd boroughs are not restricted to the form and function of municipalities.”⁸³ Underscoring the differences between cities and borough, the court observed that the limitation of community “requires that *the area taken into a municipality* be urban or semi-urban in character.”⁸⁴

There must exist a village, a community of people, a settlement or a town occupying an area small enough that those living therein may be said to have such social contacts as to create a community of public interest and duty[.]⁸⁵

This doctrine is reflected in the differentiations made between cities and boroughs in Alaska’s constitution and statutes, and the LBC included the doctrine in its regulations as well. The application of new standards for hub cities blurs this important distinction.

D. The regulatory exception to the prohibition of a city annexing large unpopulated areas was not properly applied.

The regulations as adopted provide that the proposed new boundaries “may not include entire geographical regions or large unpopulated areas, except if those boundaries are justified by the application of standards in 3 AAC 110.090 – 3 AAC 110.135 and are otherwise suitable for city government.”⁸⁶ After finding that the expanded boundaries of the city did not fit the definition of either “region” or “area” because they do not describe a

⁸³ *Id.* at 100-101.

⁸⁴ *Id.* at 100 (emphasis added).

⁸⁵ *Id.*, quoting *State ex rel. Davis v. Town of Lake Placid*, 109 Fla. 419, 147 (So. 468, 471 (1933)).

⁸⁶ 3 AAC 110.130(c)(2); Exc. 248.

borough, the LBC invoked the exception clause, ducking the issue of annexing “large unpopulated areas.”⁸⁷ The LBC did this because it found that the petition “meets the annexation standards of 3 AAC 110.090 – 3 AAC 110.135.”⁸⁸ But the LBC failed to implement the exception in the regulation which requires the proposed boundaries be *justified* by the application of all the other annexation standards set out in 3 AAC 110.090 – 3 AAC 110.135.⁸⁹ The LBC effectively repealed the regulatory prohibition against inclusion of large geographic areas as applied to this annexation requested by a regional hub city.

The appellees essentially argue that entire geographical regions or large unpopulated areas may not be annexed unless they meet the other annexation standards. This is an example of an exception swallowing a rule. Any annexation must satisfy those standards, so under Dillingham’s and the LBC’s construction, there *is* no prohibition against annexing entire geographical regions or large unpopulated areas.

It is an accepted rule of statutory construction that the same phrases are presumed to have the same meaning when used in different parts of a statute.⁹⁰ In this case the opposite should be presumed because different words are used. The LBC’s regulations are full of

⁸⁷ Exc. 248.

⁸⁸ *Id.*

⁸⁹ The LBC attempts to provide the justification missing from the decisional document at 20-23 of its brief. Perhaps the LBC may wish to use this argument as a template for its deliberations upon remand.

⁹⁰ *O’Callaghan v. State*, 826 P.2d 1132, n.4 (Alaska 1992) (citing *Alaska Chugach Natives v. Doyon, Ltd.*, 588 F.2d 723, 725 (9th Cir. 1978)). The court has also observed: “one of the prime directives of statutory construction is to avoid interpretations that render parts of a statute inoperative or superfluous, void or insignificant.” *Champion v. State*, 908 P.2d 454, 464 (Alaska App. 1995), quoting *22, 757 Square Feet, more or less v. State*, 799 P.2d 777, 779 (Alaska 1990). It is not reasonable for the LBC to make the words used in its regulation, inoperative, or consider them insignificant.

instances requiring that a petition “meets the annexation standards.”⁹¹ The 3 AAC 110.130(c)(2) regulation, however, permits an exception only if the *boundaries* – not the petition – are “justified by the application of the standards.” It is reasonable to assume the regulations require something beyond meeting the standards.

If the LBC desires to change the substance of a regulation to remove a specific requirement to find justification, it must follow the amendment process mandated by the APA so that this reformulated annexation standard is set out in law. It is unreasonable and arbitrary to ignore the plain wording of the regulation. Because the LBC decision did not find *justification*, the current requirement was not met. This court need not decide what would constitute justification, or whether a new standard would be appropriate. The decision should be remanded for the LBC to take appropriate steps, whether applying existing language or adopting a new regulation.

Dillingham points to other areas of Bristol Bay to support its claim that the annexation was a good idea. It attempts to bolster the merits of the decision by alleging that the Nushagak district is the sole remaining fishing district within which there is not a tax on

⁹¹ See 3 AAC 110.140 and 150 (Annexation to Cities): “meets the annexation standards specified in 3 AAC 110.090 – 3 AAC 110.135”; 3 AAC 110.220(a)(1) (Annexation to Boroughs): “meets the annexation standards specified in 3 AAC 110.160 - 3 AAC 110.195”; 3 AAC 110.220(a)(1) (Merger of Municipalities): “meets the standards in 3 AAC 110.220 - 3 AAC 110.235”. It is this wording that the LBC uses when it applied the exception in 3 AAC 110.130(c)(2) rather than the requirement to justify the addition of a large geographic area by application of the annexation standards. See Exc. 248.

the sales of raw fish, as if this constituted grounds for annexation. The claim is false as well as irrelevant.⁹²

E. Appellants were denied due process by the application of new standards.

The LBC failed to follow its own regulations and instead applied a new set of standards and definitions for which there had been no public notice, no opportunity for public comment, and no public discussion and formal action by the LBC. This denial deprived Ekuk and others in the region the opportunity to present a meaningful opposition to the petition. The harm can only be remedied by this court remanding the decision to the LBC to either apply its regulations as currently written or to adopt new regulations through the APA. The choice should be left to the discretion of the LBC.

IV. LBC'S BEST INTERESTS OF THE STATE DETERMINATION.

The decisional document reflects that the LBC considered the factors set out in 3 AAC 110.135 in deciding whether the annexation is in the best interests of the state, which is a requirement established by the legislature.⁹³ In its opening brief Ekuk argued that the LBC erred in its application of the best interests of the state. Specifically, Ekuk argued (1) that the LBC imposed a condition on the petition that did not remedy the financial hardships that the commission found would be imposed on residents of the regions; and (2) that a substantial basis for the LBC's decision was Dillingham's dire financial plight – a

⁹² All sales of raw fish in Bristol Bay, including sales in Nushagak Bay are subject to a one percent fishery marketing tax on the sales of raw fish levied under AS 43.76.350 – 43.76.399. The tax operates exactly the same as the raw fish sales tax levied by Dillingham.

⁹³ AS 29.06.040(a).

finding not supported by the evidence.⁹⁴ Ekuk continues to rely on these arguments and will not repeat them here, but replies here to some of the Appellees' arguments on this point.

A. Ameliorating the fiscal effect of annexation on residents of the region.

Dillingham attempts to undermine the evidence in the record of the harsh effect that the new raw fish tax will have on residents of the region. It asks why Ekuk has not demonstrated similar ill effects on the residents of other fishing communities of the Bristol Bay Region that have imposed a similar tax. Ekuk produced direct evidence of its own harm, and many others from the region testified to the negative effects the tax would have on them. Ekuk was not required to investigate and produce evidence of harm from taxes in other regions. It is irrelevant for the purposes of this appeal what happens in other fishing districts. In response, however, Ekuk points to Dillingham's own evidence in the record that there is a statistically significant reduction in rural limited entry permit holders in the Bristol Bay Region – evidence that may well represent a possible ill effect on the residents of other places in which a sales tax on raw fish is levied.⁹⁵

Dillingham introduced evidence not in the record of a tax refund ordinance passed as a part of the city's process to ratify the annexation. The apparent purpose of this new evidence is to suggest that the tax relief bolsters the LBC's best interest determination or corrects any perceived deficiency.⁹⁶ This ordinance contains exemptions to two classes of

⁹⁴ See Ekuk's Opening Br. at 42-50.

⁹⁵ See Exhibit Z to Dillingham's Reply Brief to Ekuk's Responsive Brief, R. 1216, which documents the statistically significant reduction (28.4% of all transferable and nontransferable permits originally issued) in rural limited entry permit holders in the Bristol Bay Region. This is poignant proof that the local drift and set net fishers are not prospering in other districts.

⁹⁶ Dillingham's Br. at 21.

taxpayers: residents of Dillingham and residents of the region. All residents of Dillingham who pay raw fish taxes have a portion of the tax “refunded” through a reduction in their property tax. Residents of the region, however, receive a refund of a part of their tax only if they either qualified for food stamps or obtained a reduced fee limited entry permit because they were qualified for food stamps.⁹⁷

The ordinance was passed after the LBC issued its decision and was not a part of the record in this case. Based on the record in this appeal, Ekuk, the LBC, and the court are unable to evaluate the effect of this form of tax relief on state interests. The LBC has a statutory duty to complete its consideration of whether annexation is in the state’s best interest before approving a petition for annexation. If the LBC fails to consider an important factor in making its decision, the decision will be regarded as arbitrary.⁹⁸ Dillingham is inviting this court to usurp the LBC’s responsibility of determining if the state’s interests are served by the tax relief offered. The court should decline the invitation, ignore the new evidence, and find that the petition does not meet the best interest standard imposed by law. It would show proper deference to the administrative agency for the court to remand this case back to the LBC so that it could make additional findings regarding the solution for the region proposed by the city.⁹⁹

⁹⁷ At the risk of looking a gift horse in the mouth, it is worth wondering why residents of Dillingham receive a refund with the sole requirement that they own property, while those residing outside the city qualify only if they are welfare recipients. It is not known how income eligibility for food stamps compares with seasonal earnings of permit holders who reside outside of the city. It might be that the ordinance provides little practical relief for those who need it.

⁹⁸ *State v. 0.644 Acres, More or Less*, 613 P.2d 829, 833 (Alaska 1980).

⁹⁹ See *Hammond v. North Slope Borough*, 645 P.2d 750, 757 (Alaska 1972).

B. The fiscal harm to the city to be remedied by annexation.

Dillingham makes the point that “[e]stablishing that Dillingham was in financial need was not a specific standard per LBC regulation.”¹⁰⁰ However, the financial health of the city and the region was asserted by the LBC as the central justification for why the annexation is in the best interests of the state. The best interest standard is imposed by statute and implemented by 3 AAC 110.135.¹⁰¹ Ekuk joined issue with the staff of the LBC on the facts supporting the assertion of financial necessity. The LBC included this justification in the final decision even though the record shows that Dillingham did not claim that it was in financial difficulty. The best that could be said is that the record shows that the annexation will result in new tax revenues making Dillingham more sustainable than it already is. The evidence also showed that Dillingham generates surplus revenue through its present tax structure, the most prolific tax being the general sales tax.

Dillingham apparently concedes that the LBC’s finding went well beyond the evidence in the record. It correctly observes that the “commission’s staff posited . . . only that if services to the commercial fishing fleet continued to be provided without appropriate compensation the City would be tipping toward a gradual decline”.¹⁰² However the LBC stated its finding in the decisional document in emphatic terms when it concluded that without the annexation and accompanying new revenue source, “the state would be forced to step in and assist Dillingham in order to maintain the economic integrity of the city and

¹⁰⁰ Dillingham’s Br. at 21.

¹⁰¹ Sec. 135 authorizes the LBC to “consider relevant factors...” when determining whether annexation to a city is in the best interests of the state under AS 29.06.040(a).

¹⁰² Dillingham’s Br. at 22 (emphasis added and internal quotation marks omitted).

region.”¹⁰³ This finding predicts the imminent bankruptcy of the city without any supporting evidence in the administrative record. Inconsistency between the findings and the administrative record should be resolved by the LBC not the court. Such inconsistency also provides a strong signal that the LBC has not taken a hard look at an important basis for its decision.

V. RESPECT FOR THE LBC’S AUTHORITY REQUIRES THAT THE DECISION BE REMANDED.

Ekuk focused on the LBC’s decisional document in arguing that the LBC failed to follow its own regulations, or has unreasonably applied or amended them. That document is the best evidence of the LBC’s findings and determinations. That document plainly shows the factors the LBC considered in arriving at its decision that Nushagak Bay could be annexed to Dillingham. Even though the record contains a transcript of the sworn testimony of witnesses, unsworn testimony in the form of public comment at the time of the hearing, a transcript of the deliberations of the LBC, and a transcript of a decisional meeting during which a decisional document was approved by the LBC, the appellees must search through the administrative record to find other support to explain away a finding or correct outright omissions in the decisional document.

Unlike the decisional document, the staff reports were not expressly approved by the commission, were prepared by others before the hearing, and provide a confusing record.¹⁰⁴ When the reports of the staff are used to contradict an express finding of the LBC, or supply a glaring omission of important factors, the court would show proper respect by remanding

¹⁰³ Exc. 250.

¹⁰⁴ Exc. 219 (staff continues to maintain that territory proposed for annexation need not itself qualify as a community).

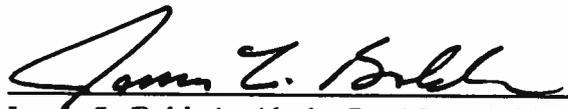
the matter to the agency to permit clarification of the basis for decision. That is the solution favored by the Alaska Supreme Court and would be an appropriate outcome here.¹⁰⁵

As discussed in sections II and III above, a remand is also required to correct the errors with respect to the Local Option/Legislative Review issue, and to permit the LBC to either apply its regulations as written or to undertake regulatory changes consistent with the requirements of the APA.

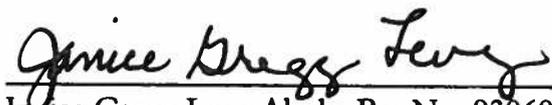
VI. CONCLUSION

For all the reasons set out in its opening brief and this reply, Ekuk asks this court to vacate the LBC's December 14, 2011 decision, and remand the matter to the LBC with the directions to correct its errors, explain the basis for its findings, follow its existing regulations and, in its discretion, to adopt new regulations to establish new policies.

Respectfully submitted this 15th day of April, 2013.



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¹⁰⁵ *Keane v. Local Boundary Commission*, 893 P.2d 1239, 1245 (Alaska 1995).

**STATE OF ALASKA
LOCAL BOUNDARY COMMISSION**

STATEMENT OF DECISION

IN THE MATTER OF THE JUNE 4,
1992 PETITION OF THE CITY OF
CORDOVA FOR THE ANNEXATION
OF APPROXIMATELY 180 SQUARE
MILES }

**SECTION I
INTRODUCTION AND DESCRIPTION OF AREA**

In June of 1992, the City of Cordova petitioned the Local Boundary Commission to annex an estimated 180 square miles. The topic of annexation in general had been a matter of public discussion and planning in Cordova off and on during a period of more than 15 years preceding the filing of the petition. Newspaper accounts indicate that public discussions by the Cordova City Council leading up to the current annexation effort took place as early as January 22, 1992.

The territory proposed for annexation lies within the unorganized borough, outside the jurisdiction of any municipal government. The 180 square mile area generally extends north past Deep Bay into Nelson Bay, south to Point Whitshed, the mouth of the Eyak River and parts of the Copper River Delta. The area extends east past the Cordova Airport. A map showing the boundaries of the territory proposed for annexation appears in Section IV of the Statement of Decision.

The City of Cordova estimates that the area proposed for annexation is inhabited by 469 residents living in some 90 - 95 homes. Notable features in the area include:

- *Shepard Point:* This area is the site of a proposed new deep water port and staging area.
- *Channel Island:* An existing log transfer facility is located in this area. A new log transfer facility for the area is proposed.
- *Deep Bay:* Limited residential development is found in this area.
- *Humpback Creek:* This area is the site of a recently constructed hydroelectric plant. The Cordova Electric Cooperative facility supplies up to 20 percent of Cordova's electrical power.
- *Power Creek:* A hydroelectric power generation facility has been proposed for this area.
- *Whitshed Road:* This area includes clustered residential development adjacent to the roadway. The area also includes sites suitable for development, including a number of parcels near Nicolet Creek which are planned for sale by the University of Alaska. Whitshed Road is paved to approximately mile 2.5.
- *Planned U of A Subdivision:* The University of Alaska has proposed a new 30 lot subdivision adjacent to Whitshed Road. This proposed development is different than the U of A land noted earlier which is located near Nicolet Creek. City officials have indicated that the University favors annexation of its property and is also exploring the formation of a local improvement district to fund the extension of water and sewer utilities to the subdivision.
- *Heney Creek Area:* This area includes clustered commercial development. There is significant commercial activity in the area, including boat repair facilities and an existing marina. A new marina is also proposed in this area.

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- *Hartney Bay:* A 350-lot subdivision is located on Hartney Bay. Lots in the subdivision are platted and held by individual owners in fee simple status. The subdivision is largely undeveloped due to platting problems, the lack of utilities, limited road access and other problems.
- *Point Whitshed:* A small lodge is located at this site.
- *North Shore Eyak Lake:* Dispersed residential development is found in the area north of the lake.
- *Eyak Lake:* This is a "Class A" water source, one of four serving residents of the City. Part of the lake is currently within the boundaries of the City, however, two-thirds of the lake and much of its watershed are located outside the boundaries of the City.
- *5 1/2 Mile Development:* This area is the site of clustered residential and commercial development along the Copper River Highway.
- *6 1/2 Mile Development:* This area is the site of clustered residential subdivisions and commercial development along the Copper River Highway. This area has a very high water table and no central sewage disposal system, making proper wastewater disposal difficult.
- *Cordova Airport Reserve:* This area includes FAA housing and facilities, Coast Guard hanger and facilities, Alaska Department of Transportation and Public Facilities maintenance station, GCI facilities and city sludge dump.
- *Sheridan Glacier:* This area encompasses a glacial lake, U.S. Forest Service campground and trails. The area has potential for development as a tourist attraction.
- *Eccles Lagoon:* This area currently contains five residential dwellings.
- *Saddle Point Subdivision:* This area currently contains nine residential dwellings.
- *Heney Range Municipal Watershed.*
- *Copper River Delta Critical Habitat Area.*

SECTION II PROCEEDINGS

On June 3, 1992, the Council of the City of Cordova adopted Resolution 92-26, authorizing the filing of the annexation petition. The petition was submitted to the Department of Community & Regional Affairs (DCRA) on June 5, 1992. A copy of the petition and supporting materials were made available for public review at the Cordova City Hall.

On June 8, 1992, DCRA made a determination that the form and content of the petition were in substantial compliance with the requirements of law. Consequently, DCRA notified the City of Cordova on June 8 that its petition had been accepted for filing.

Also on June 8, 1992, DCRA mailed notice of the filing of the petition to nearly 50 parties, including newspapers and radio stations serving Cordova. Major property owners and other potentially interested parties were also provided notice. On June 10, 1992, the Cordova City Clerk posted the notice conspicuously at the following fourteen locations:

Cordova City Hall
Cordova Post Office
Cordova Library
Cordova District Fishermen United Union Hall
Cordova Electric Cooperative
Davis' Grocery Store
Cordova Harbormaster's Office
Orca Book & Sound Store
Alaska Airlines Terminal in Cordova

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**Markair Terminal in Cordova
Alaska Ferry Terminal in Cordova
City Airport Taxi Services
Ketchum Air Terminal
Cordova Air Terminal**

Notice of the filing of the petition was also published by the City of Cordova as follows:

Anchorage Daily News

- June 12, 1992
- June 14, 1992

Cordova Times

- June 24, 1992
- July 1, 1992
- July 8, 1992

Additionally, DCRA arranged for publication of the notice in the *Alaska Administrative Journal*.

The City of Cordova placed an abbreviated version of the notice of the filing of the petition on the local television scanner operated by Cablevision. This notice ran from June 11 to June 18, 1992. The City also arranged for public service announcements concerning the filing of the petition to be broadcast on KCHU-FM and KLAM-AM, the two radio stations serving Cordova. The radio public service announcements were requested to be broadcast "as often as reasonably possible for the next three days and at least once each week for the next four weeks" beginning June 10.

The notice of the filing of the petition invited parties to file briefs or written comments concerning the petition by August 3, 1992. Although no formal briefs were filed, approximately 50 letters commenting on the annexation proposal were submitted in a timely manner. Most of the letters were from residents of the area proposed for annexation, although a few came from individuals living within the boundaries of the City. Virtually all of the letters expressed opposition to the annexation proposal.

In addition to the letters, more than 110 postcards expressing opposition to the annexation were submitted prior to the August 3 deadline. The postcards carried the identical message which read: "I am a property owner within the City of Cordova's proposed annexation area and would like to go on record as being opposed to the annexation."

The City of Cordova filed a written response to the local comments on August 26, 1992.

After reviewing the petition and considering the written comments, DCRA published its draft report on the matter. The report and an appendix which included a copy of all of the letters responding to the petition were distributed to 91 individuals on September 23, 1992. Copies were sent to an additional eight parties on September 25. The 99 parties to whom the report and appendix were sent included the news media serving Cordova, individuals who had written comments concerning the annexation proposal and other interested parties. Multiple copies were provided to the Cordova public library and the City of Cordova.

Parties were invited to review and comment on the draft report by October 23, 1992. Timely comments were filed by three parties.

After considering the comments on the draft report, DCRA released its final report on the matter on October 28, 1992. Copies of the final report were provided to some 104 parties.

In the interim, the Local Boundary Commission had scheduled a public hearing on the annexation to be held on November 21 at the Cordova Elementary School. Details of the date, time and place of the hearing had been provided in DCRA's September 23 draft report as well as its October 28 final report.

In addition to publishing details of the hearing in its reports, DCRA sent notice of the hearing to 98 parties on October 13, 1992. DCRA also requested that KCHU-FM and KLAM-AM broadcast notice of the hearing from October 31 through November 21.

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Notice of the hearing was also posted by the Cordova City Clerk's office on October 30, 1992, at the following locations:

Cordova City Hall
Cordova Post Office
Cordova Library
Cordova District Fishermen United Union Hall
Cordova Electric Cooperative
Davis' Grocery Store
Cordova Harbormaster's Office
Orca Book & Sound Store
Alaska Airlines Terminal in Cordova
Markair Terminal in Cordova
Alaska Ferry Terminal in Cordova

Further, notice of the hearing was published by DCRA as follows:

Cordova Times

- October 22, 1992
- October 29, 1992
- November 5, 1992

Anchorage Daily News

- October 19, 1992

Alaska Administrative Journal

The Commission held its hearing on the date and at the time and place scheduled.¹ Approximately 80 persons attended the hearing. Many of those in attendance testified at the hearing. The hearing lasted approximately four and one-half hours. Although there were no formal respondents in this proceeding, the Commission treated Lee Wyatt as a respondent during the hearing. Mr. Wyatt was thus able to organize and facilitate testimony on the part of those who were critical of the annexation proposal.

At the close of the hearing, the Commission announced that it would accept additional written comments concerning the matter until December 17, 1992. The Commission also announced that it would hold a decisional session on January 4, 1993 to act on the petition. Notice to this effect was posted by the City of Cordova at ten of the eleven locations noted earlier for the posting of the notice of the November 21, 1992 hearing.² A copy of the notice was also sent to Lee Wyatt, Diane Wiese (another organizer of parties critical of the petition), KCHU-FM, KLAM-AM, the Cordova Times and the Alaska Administrative Journal.

Two days after the hearing (November 23), the Chairman of the Commission wrote to officials of the City of Cordova asking them to further address matters relating to the delivery of services and the prospect for differential tax zones. The letter also encouraged City officials to conduct further public meetings to address a number of issues of a local policy nature which had been raised during the hearing.

In response to the November 23 letter from the Commission, officials of the City of Cordova held four additional public meetings. These occurred on December 7, 10 (two meetings), and 11, 1992.

By December 17, forty-eight letters had been filed during the 26 day period in which the record was left open following the hearing. The written materials included letters from the City of Cordova responding to the November 23 letter from the Chairman of the Commission.

¹ Commission members Hargraves, Dugan, Hallgren and Johnson were present at the hearing. Although Commissioner Cotten was not present, he reviewed DCRA's tape recording of the hearing and also reviewed all of the written material submitted to the Commission prior to the Commission's decisional session on the petition.

² The exception being the Alaska Ferry Terminal in Cordova, which had since closed for the winter season.

Copies of all of the letters were made available for public review in Cordova and Anchorage. Notice of the opportunity to review these comments was published in the December 23 issue of the Cordova Times. The notice was also posted in the same ten places where notice was posted of the December 17 deadline and January 4 decisional meeting. A copy of the notice was also mailed to 8 representatives of parties critical to the annexation. The notice invited any party to comment if they felt that new and potentially misleading information had been submitted in any of the forty-eight letters filed during the 26-day comment period ending December 17. Four letters were filed in response to this notice.

The Commission met on January 4, 1993 to act on the petition.³ After due consideration of the matter, the Commission voted unanimously among the members present to approve the petition with reduced boundaries.

SECTION III FINDINGS AND CONCLUSIONS

On the basis of the petition and brief of the City of Cordova, the report and recommendation of the Department of Community and Regional Affairs, the extensive written comments, and the testimony received at its November 21 hearing, the Local Boundary Commission makes the following findings and conclusions.

1. REGARDING THE WILLINGNESS AND ABILITY OF THE CITY OF CORDOVA TO EXTEND "FULL MUNICIPAL SERVICES" TO THE AREA PROPOSED FOR ANNEXATION AS REQUIRED BY FORMER 19 AAC 10.080.⁴

It must be shown to the satisfaction of the Local Boundary Commission that the City of Cordova is both willing and able to extend "full municipal services" to the area proposed for annexation. Those services are defined as "all of the services that a municipality is providing to its residents with revenues raised from the municipality's general mill levy or sales or use taxes" (former 19 AAC 10.840(9)). It does not include services funded by user fees. Neither does it require the City to build roads, sidewalks, utility service extensions or other capital projects to the area proposed for annexation. Further, allowances are permitted if the City is willing to implement differential property tax rates to reflect lesser levels of service.

Because the law allows parties other than a city government to petition for annexation of territory, it is necessary to ensure that the City of Cordova is willing to extend services. In this instance, the City of Cordova initiated the petition for annexation. Throughout the proceedings, the Council of the City of Cordova has expressed its full support for the annexation of territory. These circumstances create a very strong presumption that the City is indeed willing to serve the area. The Commission has found nothing to indicate that this presumption is incorrect.

Consideration of the City's ability to provide full municipal services logically begins by identifying those services to which the standard applies (i.e., those funded by property and sales taxes). It is understood that these consist of the following:

- Public Schools
- Museum
- Swimming Pool
- Bidarki Recreation Center

³ Commissioners Hargraves, Dugan, Hallgren and Cotten were present. Commissioner Johnson was absent.

⁴ Due process considerations compel the Commission to use the standards for annexation set out in former 19 AAC 10.065 - 090 while acting on this petition (as opposed to the standards set out in the new regulations which took effect September 14, 1992). The former regulations were in place at the time the petition was prepared and filed by the City of Cordova. They were also in place during the period of public review and comment on the petition. Further, those standards were used by the Department of Community & Regional Affairs to evaluate the petition and to make its recommendation to the Commission.

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- Ski Hill
- Fire Protection
- Emergency Rescue
- Emergency Medical Services
- Emergency Services Dispatch
- Jail
- Police Protection (including Trooper assistance)
- Road Maintenance
- Economic Development
- Planning, platting and land use regulation
- Library
- General Government

A determination of the extent to which the City of Cordova is capable of extending these full municipal services warrants consideration of the following factors:

- A. The extent to which the services are already being provided to the territory;
- B. Geographic features which might limit the City's ability to serve the territory; and
- C. The financial impacts that annexation might reasonably be expected to have on the City.

A. Services currently being provided

The vast majority of the residents of the territory proposed for annexation currently receive, at least on some level, nearly all of the services provided by the City of Cordova which are funded wholly or partially by local sales and property taxes. These include the Cordova public schools (in which some 90 non-City students are educated), the Cordova museum, swimming pool, Bidarki Recreation Center, Ski Hill, fire protection, road maintenance (in that residents outside the City use the 11.1 miles of City-maintained streets and roads within the existing City limits), emergency rescue, emergency medical services, emergency services dispatch, jail, emergency police protection/State trooper assistance, library, general government, planning and economic development.

A limited number of these services are, however, provided to the residents of the territory proposed for annexation at various levels which are less than the levels of service provided to the in-City residents. Most notable among these are road maintenance (in that there are an estimated 2.5 miles of platted roadway in the territory proposed for annexation which are maintained exclusively by property owners and residents), police protection, planning and general government services. Further, because the territory proposed for annexation is more distant from the City's fire station and also lacks developed water utility systems with fire hydrants, it can be argued that the level of fire protection provided to this area is also somewhat less than that provided to the residents within the current City limits.

Further, a very limited number of the services funded in whole or part by sales and property taxes are not provided at any level to the residents of the territory proposed for annexation. These appear to be limited to platting and land use regulation.

B. Limiting Geographic Features

Large portions of the 180 square miles petitioned for annexation are remote and undeveloped, with limited access. In its report to the Commission, DCRA recommended the exclusion of 101 square miles in large part because the geographic characteristics of those areas limit the ability of the City of Cordova to effectively serve the territory.

The City of Cordova has subsequently endorsed DCRA's recommendation, except that it now suggests a further reduction of an estimated 10.82 square miles encompassing the Hartney Bay area.

C. Financial Impacts

This is an issue over which there has probably been more debate and less agreement than any other aspect of the annexation proposal. Many who are critical of the annexation proposal insist that revenue projections prepared by DCRA and the City of Cordova are grossly overstated. Others critical of the annexation proposal argue that the expense of serving the territory in question will be prohibitive.

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The estimate of the taxable value of real property in the territory proposed for annexation was prepared by Michael C. Renfro of Appraisal Company of Alaska. Mr. Renfro has served under contract as the Assessor of the City of Cordova for the past several years. He currently serves in a similar capacity for a number of other municipalities in Alaska, including the Bristol Bay Borough, City of Unalaska, City of Dillingham, City of Nome, City of Valdez, City of Wrangell and the North Slope Borough. Mr. Renfro has extensive education in the field and is certified by the State of Alaska as a real estate appraiser. He is qualified as an expert witness regarding property appraisals for the State Superior Court and the federal court.

Mr. Renfro's estimates of the value of improved real property in the territory were prepared on the basis of "drive-by exterior inspections."⁵ Values were then assigned based upon market sales data. The value of unimproved real property was also estimated on the basis of available market sales data.

Mr. Renfro has acknowledged that these estimates are not as exact as performing a complete appraisal, however, he states that it should be "within acceptable parameters."⁵ The State Assessor, employed by DCRA, carefully examined Mr. Renfro's methodology in this matter and concurred that it was reasonable.

Documents submitted to the Commission by the City of Cordova show that Mr. Renfro's estimates of the value of taxable real property in the territory ranged from \$43,117,500 to \$34,494,000. For purposes of the petition, the City of Cordova used the figure of \$36,083,000. That figure is 16.3 percent below Mr. Renfro's high-range estimate and 4.6 percent above his low-range estimate.

Some critics have noted that no apparent allowance was made for the required exemption from taxes of real property owned and occupied as the primary residence and permanent place of abode of a resident 65 years of age or older. Some claim that the value of such property in the territory proposed for annexation is substantial. One critic wrote that he disagreed with the Cordova City Manager's estimate that 6 properties would be exempt under that provision. The critic put the number of such properties at 20, which he estimated had a value of \$5,000,000.⁶

Under current law, the State of Alaska reimburses municipal governments for a portion of the loss incurred from the mandatory exemption of property of senior citizens. Under the current level of funding, the reimbursement amounts to about 17 percent of the loss. While Governor Hickel's Fiscal Year 1994 proposed State Operating Budget calls for the elimination of any reimbursement for the senior citizen property tax exemption, it is uncertain whether the cut will be made by the legislature. It has been reported that Governor Hickel will introduce and support legislation to make the now-mandatory exemption a local option.

Having carefully considered all of the critics' arguments concerning the issue of the taxable value of property in the territory, Gary Lewis, the Cordova City Manager, remains confident that the estimate of \$36,083,000 is reasonable. In taking this position, he stressed that Mr. Renfro was instructed to be "conservative" when preparing the estimate.

The Commission notes that Mr. Lewis is also an expert in the field of property tax assessment. Mr. Lewis began working in the office of the Assessor of Matanuska-Susitna Borough in 1978. Some four years later, Mr. Lewis was appointed to the post of Borough Assessor, a job he held for some eight years when he became the Cordova City Manager in early 1992. Mr. Lewis is certified by the Alaska Association of Assessing Officers as a Certified Assessor/Appraiser, Level III (highest level attainable). Mr. Lewis' level of certification is identical to that held by Mr. Renfro.

Thus, the Commission finds that \$36,083,000 estimated value of taxable property in the territory proposed for annexation is reasonable.

Another major point of contention is the estimate of the sales tax revenues which are likely to be generated in the territory proposed for annexation. In a memorandum dated

⁵ Letter from Michael Renfro to Dan Bockhorst dated September 24, 1992.

⁶ Undated letter from Ken Roemhildt received by fax on December 17, 1992.

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September 10, 1992 officials of the City of Cordova estimated such potential revenues at \$231,500 annually.

In preparing the estimate, City officials first identified businesses in the area proposed for annexation using the State of Alaska business license directory for the greater Cordova area. Documents filed by the City in December listed approximately 50 businesses in the area. City officials indicated that they used data on sales taxes collected by individual businesses within the existing boundaries of the City of Cordova to estimate potential revenues for what they believed were comparable businesses in the territory proposed for annexation. Details of these comparisons were not made available to DCRA because sales tax data are confidential under the terms of the Cordova City Code.

Theoretically, the methodology used by the City of Cordova to develop its sales tax estimate appears both reasonable and sound. However, criticisms of the manner in which the theory has been applied have gone largely unrefuted by the City of Cordova. These include criticisms that certain of the businesses no longer exist, a number of the businesses would be exempt from taxation and many others are very small operations which would generate little in the way of sales taxes.

One critic of the City's sales tax revenue estimate identified 17 of the 50 businesses as rentals, most of which were single or double family units.⁷ This same critic noted that 8 of the businesses identified by the City were unknown and had no telephone listing in either the Cordova telephone directory or "Alaska Telephone Directory Assistance." This person went on to state the belief that a more realistic estimate of sales tax revenues would be \$37,000.

In December, officials of the City of Cordova acknowledged that "[A]t the present time, until actual gross sales tax reports are filed or tax returns are audited, the actual amount of sales tax revenues [to be generated in the territory proposed for annexation] is, at best, a guess." The City also notes that "numbers ranging from \$36,000 to \$380,000 have been mentioned."⁸

In the absence of greater assurances from the City of Cordova with respect to the validity of its sales tax estimate, the Commission is unable to find that the \$231,500 figure is a reasonable estimate. However, almost no one disputes that the actual figure will be at least \$37,000. It is possible the figure will be higher.

DCRA originally estimated that, based upon current funding levels, the City would gain \$27,300 in State Municipal Assistance program funding; \$8,556 in State Revenue Sharing funding, \$13,500 in federal payments for education in lieu of taxes (PL 81-874) and \$8,000 in miscellaneous revenues.

The entitlement for State Revenue Sharing will decrease somewhat if the sales tax revenues in the area proposed for annexation are less than first estimated by the City. On the other hand, the figure will increase with the assumption of responsibility for the maintenance of the estimated 2.5 miles of roads in the area. With both adjustments, DCRA now estimates that annual Revenue Sharing funding to the City will increase by \$6,033 as a result of annexation.

The Commission is aware that Governor Hicke's Fiscal Year 1994 State Operating Budget calls for a 25 percent reduction in funding for the State Revenue Sharing and Municipal Assistance programs. However, funding levels will be determined by the legislature, in concert with the Governor.

⁷ Letter from Diane E Wiese and John Paul Wiese, Rural Alaskans to the End, received by fax December 17, 1992.

⁸ City of Cordova -- Information Related to City Finances, dated December 10, 1992.

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Thus, it appears reasonable to estimate that the City of Cordova will gain at least the following revenues as a result of annexation:

Property Taxes ⁹	\$396,913
Sales Taxes	37,000
Miscellaneous	8,000
State Mun. Assist.	27,300
State Rev. Sharing	6,033
PL 81-874 (schools)	<u>13,500</u>
TOTAL REV.	\$488,746

With respect to the cost of extending services to the territory proposed for annexation, it is again noted that nearly all of the services are already provided on some level to the area outside the City's boundaries. Many of the services are provided to residents outside the City to the same extent they are provided to residents within the City.

One major "expense" resulting from annexation will be the loss of an estimated \$164,000 annually in education foundation aid beginning in Fiscal Year 1996. One additional significant expense will be incurred in the maintenance of the estimated 2.5 miles of platted local roads in the territory proposed for annexation.

There is little consensus locally over the potential cost of such road maintenance. A 1985 study commissioned by the City of Cordova examined the potential cost of maintaining these roads. DCRA reported that adjusting the 1985 figure for inflation would result in a contemporary cost figure of \$4,000 per mile (\$4,000 X 2.5 miles = \$10,000). One critic of annexation who claimed expertise in estimating the cost of snow removal dismissed the inflation-adjusted 1985 figure, as well as a figure of \$5,000 per mile reportedly offered by the City.¹⁰ This critic estimated the cost of snow removal alone at \$8,000 per mile.

Beyond education and road maintenance, expenses will be incurred in the assessment of property taxes, the collection of sales and property taxes, platting, land use regulation, elections and other general governmental functions.

Certain of the services such as police protection may be carried out without any increase in staff or equipment. Officials of the City of Cordova are currently examining existing City staff levels as they undergo financial planning for the delivery of future services. In other cases, City officials are weighing alternative methods of enhancing services to the outlying area. For example, in the case of fire protection, options being explored include the provision of additional staff and equipment, or installing residential sprinkler systems.

The Commission finds that it is reasonable to estimate that annexation will increase education costs by \$164,000 and road maintenance costs by up to \$25,000 (at \$10,000 per mile). However, the Commission is unable to make findings with respect to specific estimates of the cost of extending other services to the territory proposed for annexation. This is not uncommon in annexation proceedings, nor does it limit the Commission's ability to make necessary conclusions regarding the standard at issue.

It is stressed that the estimated revenues (\$488,746) exceed the estimated costs of education and road maintenance (\$189,000) by nearly \$300,000. Three hundred thousand dollars reasonably seems more than is necessary to provide other services to the level required to meet the standard set out in former 19 AAC 10.080. The actual costs of extending the other services will depend in large measure on future decisions to be made at the local level regarding the delivery of services. The City of Cordova, like the vast majority of Alaska's 165 municipal governments, is faced with growing financial challenges in serving their local residents. In all likelihood, the revenues will exceed the cost of extending full municipal services to the area in question, in which case the balance of funds can be used to underwrite the cost of providing existing services to the territory.

Resolution 92-56, adopted by the Council of the City of Cordova on December 16, 1992, is of paramount importance to the deliberations of the Commission regarding the standard at issue. That Resolution adopted an "Annexation Services Operation Plan"

⁹ Based upon current property tax levy of 11 mills.

¹⁰ Letter from Christine Honkola dated December 17, 1992.

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which commits the City to provide full municipal services or to institute "differential property taxation for non-deliverable services." The resolution also commits the City to providing snow removal and maintenance of constructed and dedicated [non-State-maintained] rights-of-way in the area to be annexed. Prior to the adoption of the Resolution, City officials had indicated that they would not maintain the roads in question because those roads were not constructed in accordance with standards set by the City. This was an issue of concern raised in the November 23, 1992 letter from the Commission Chairman to City officials.

Some critics viewed Resolution 92-56 as a "shallow promise" and even went so far as to fault the City for using the word "will" instead of "shall" in its commitment to deliver services and/or to institute differential property tax rates.¹¹ However, the Commission finds that the Resolution is made in good faith and adequately expresses the commitment of the City of Cordova to extend services in a fair and equitable fashion to the residents of the territory proposed for annexation.

CONCLUSION: Because the City of Cordova initiated the annexation proposal, the Commission concludes that the City is willing to serve the area proposed for annexation. Further, the Commission concludes that the geographic characteristics of the remote and inaccessible portions of the territory proposed for annexation limit the City of Cordova's ability to serve those areas. The Commission also concludes that the City of Cordova has the financial capacity to extend full municipal services to the territory proposed for annexation. Finally, the Commission concludes that a smaller annexation than that petitioned by the City would encompass the financial resources necessary to provide essential city services on an efficient, cost-effective level. Thus, the standard set out in former 19 AAC 10.080 is satisfied.

2. REGARDING WHETHER THE CITY OF CORDOVA PROVIDES SERVICES TO THE RESIDENTS AND PROPERTY OWNERS OF THE TERRITORY WITHOUT COMMENSURATE PROPERTY TAX CONTRIBUTIONS.

The standard set out in former 19 AAC 10.070(a)(8) is met if *"residents or property owners within the territory receive or may be reasonably expected to receive, directly or indirectly, the benefit of city government without commensurate property tax contributions, whether city services are rendered or received inside or outside the territory."*

Individuals who live inside as well as those who live outside of the City boundaries contribute in support of City services in significant ways through the payment of sales taxes and user fees. The Fiscal Year 1991 audit of the City of Cordova shows that the City collected \$1,493,566 in sales taxes from July 1, 1990 through June 30, 1991. During the same period, the City also collected \$3,515,624 in enterprise fund revenues, including \$1,988,585 in hospital enterprise fund revenues.

However sales tax revenues and user fees fall far short of the resources needed to fund services provided by the City of Cordova. To bridge the gap, the City of Cordova levies an ad valorem tax on real property. The property tax rate currently in place is 11 mills (1.1 per cent of the true value of the property). The tax is expected to generate \$827,420 during the current fiscal year.

As noted in the discussion of the previous standard, the City's property tax (and sales tax) provides partial funding for a multitude of services. These include:

- Public Schools
- Museum
- Swimming Pool
- Bidarki Recreation Center
- Ski Hill
- Fire Protection
- Emergency Rescue
- Emergency Medical Services

¹¹ Letter from Lee A. Wyatt dated December 31, 1992.

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- Emergency Services Dispatch
- Jail
- Police Protection (including Trooper assistance)
- Road Maintenance
- Economic Development
- Planning, platting and land use regulation
- Library
- General Government

In the examination of the previous standard, the Commission previously noted that nearly all of these services are provided to some extent to the residents and property owners of the territory proposed for annexation.

In addition to the services listed, DCRA reported that the City's Fiscal Year 1991 audit showed that several enterprise services of the City (all of which are available to residents of the territory proposed for annexation) required nearly \$280,000 in local subsidies. Since FY 91, the City has increased refuse collection fees with the intention of reducing, but not eliminating, the subsidy for that service.

Further, DCRA reported that the local hospital, which is owned by the City of Cordova, operated at a loss of \$668,334 during the fiscal year ending June 30, 1991 (excluding depreciation, the loss was \$106,252). The City does not currently provide direct financial support to the hospital, although it does pass-through State Revenue Sharing funds to the hospital.

Notwithstanding current conditions, the City may be compelled to provide financial support to the hospital at some point in the future. It is noted again that the Governor's Fiscal Year 1994 budget calls for a 25 percent reduction in State Revenue Sharing funds. If the cut comes about, it would reduce the pass-through funds for the hospital.

The current lack of the need for City support of the hospital is due in large measure to the modern nature of the hospital building and facilities. As these age, the pressure for some level of financial support by the City is likely to increase. DCRA reported that a number of municipal hospitals in Alaska receive subsidies from their local governments.

During the halcyon days of the early 1980's, high levels of State financial assistance allowed the City of Cordova to limit its local participation in the funding of services. Local funding was limited largely to sales taxes and user fees. During Fiscal Years 1981, 1982, 1983 and 1984, the City's property tax rate was only 1 mill.

As State funding for local governments has steadily declined, the property tax rates of the City of Cordova have steadily increased. Currently, the tax rate stands at 11 mills. More significantly, the current tax rate is heavily subsidized by an infusion of cash from the principal of the City's "rainy day fund." City officials indicate that without that subsidy, the current property tax rate would stand at approximately 17 mills.

CONCLUSION: The Commission concludes that residents and property owners within the territory proposed for annexation receive many services and benefits from the City of Cordova directly and indirectly. While those residents and property owners contribute substantially in support of those services through the payment of sales taxes and user fees, such contributions fall far short of the actual cost of providing the services. The gap is closed only by the City of Cordova's ad valorem tax on real property. While the City's ad valorem tax was minimal a decade ago, today it stands at 11 mills. Without the subsidy from the City's declining "rainy day fund", the tax would be about 17 mills. Thus, the Commission concludes that the standard set out in former 19 AAC 10.070(a)(8) is met.

3. REGARDING THE NEED FOR SERVICES WHICH CAN BE PROVIDED MOST EFFICIENTLY BY THE CITY OF CORDOVA.

If the territory proposed for annexation needs municipal services and the City of Cordova can provide those services more efficiently than another municipality, the standard set out in former 19 AAC 10.070(a)(4) is satisfied.

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The discussion of the previous standard addressed services which the City is currently providing to the area proposed for annexation. This standard concerns whether there are unfulfilled needs for services in the area proposed for annexation. If such needs do exist, the standard also requires consideration of whether the City of Cordova could satisfy those needs more efficiently than another municipality.

The City notes in its petition that "[T]he territory to be annexed, particularly the developed areas along Whitshed Road and the Copper River Highway, is in need of additional services that the City of Cordova can provide. There are no other municipalities in the immediate vicinity which can offer these services." The petition goes on to identify the unfulfilled service needs as follows:

- water and sewer utilities,
- road maintenance,
- planning, platting and land use regulation,
- improved fire protection, and
- possibly, police protection.

Cordova City Manager Gary Lewis stated that "it appears that of all the services the city could provide, water and sewer are the ones that residents in the area to be annexed are most interested in."¹²

The City of Cordova's Eyak Lake AMSA Cooperative Management Plan (March, 1985) states that "[T]here is evidence of fecal contamination in nearly all peripheral inhabited areas of the lake (ADEC). The presence of fecal coliforms in water is a good indication that fecal material and possibly disease germs may also be present. The higher the coliform count, the greater the danger in untreated water. Fecal coliform were found at each of the twenty sample sites ranging to a high of 245 f.c./100 ml. based on a minimum of 5 samples taken in a period of 30 day for both drinking water, seafood processors and contact recreation (swimming, etc.). . . ." (page 41).

DCRA reported that an official of the Alaska Department of Environmental Conservation (DEC) confirmed that there continues to be a need to address water and wastewater issues in the area of Mile 6 of the Copper River Highway. It was reported that the Eyak Estates and Pebo subdivisions in this area generally have high water tables which create difficulties in the proper disposal of wastewater. It is believed that the two subdivisions contain roughly 60 lots, some of which are vacant.

Additionally, the DEC official indicated that potential problems may exist in the residential development in the vicinity of 4.5 - 5 Mile area of the Copper River Highway. It was estimated that this area has some 25 - 35 homes, many of which have septic tanks located 50 feet or less from Eyak Lake. Eyak Lake is a "Class A" water source, one of four serving the residents of the City of Cordova. For new construction, current laws require that septic systems be set back at least 200 feet from a Class A water source.

The DEC official indicated that recent tests have shown relatively high levels of chlorine in Eyak Lake. The source of the chlorine has not been determined, but it was speculated that it may be from individual wastewater treatment systems in the area. Eyak Lake is reportedly the City's only source of water which has the filtering equipment necessary to comply with new U.S. Environmental Protection Agency standards concerning drinking water.

The City has indicated that it has no plans for the immediate extension of water and sewer services to the area in question.¹³ However, the extension of water and sewer utilities to a planned University of Alaska Subdivision along Whitshed Road has been discussed. The City of Cordova would qualify for 50% funding from the State of Alaska for the extension of sewer facilities. Only municipal governments are eligible for such funding. Additionally, City officials have indicated they will use other means available to the City (e.g. legislative grants, sale of low-interest municipal bonds, et cetera) to further support the construction of water and sewer utilities. However, any local share would

¹² Letter from Gary Lewis dated August 26, 1992.

¹³ As noted in the discussion of the first standard, however, this is not required since water and sewer utilities are funded by user fees and the extension of services would require capital improvement funding.

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typically be paid by the owners of the property which benefits from the utility extension through the establishment of a local improvement district.

With respect to municipal planning, platting and related services, the area proposed for annexation is presently part of the unorganized borough. As such, it has no local planning, platting or land use regulation authority. The Alaska Department of Natural Resources (DNR) does exercise limited platting authority in this area presently (replats of existing subdivisions and vacations of rights-of-way only). DCRA reported that DNR indicated that the area proposed for annexation "is fairly active" with respect to such matters.

The need for and plans relating to road maintenance and fire protection in the territory proposed for annexation were discussed previously.

The City states that the need for police services in the area would arise in the event that the State Trooper position stationed in Cordova is eliminated. Officials of the Alaska Department of Public Safety confirmed that discussions have occurred at both legislative and executive branch levels regarding the future of the Cordova Trooper position.

Consideration of the question of whether there is another municipality which can provide needed services more efficiently than the City of Cordova is easily addressed. Neither the City of Cordova nor the area proposed for annexation are within an organized borough. Thus, there is no regional municipal government which might provide needed services.

Forming an independent city government to serve the area proposed for annexation would not appear to be an option, given provisions of the State Constitution and Statutes. These include Article X, Section of the Constitution which prescribes a "minimum of local government units" and AS 29.05.021(a) which provides that "[A] community in the unorganized borough may not incorporate as a city if the services to be provided by the proposed city can be provided by annexation to an existing city."

CONCLUSION: The residents outside the City boundaries receive no platting services, land use regulation, water & sewer utilities, enhanced fire protection or City police protection. It seems reasonable to conclude that most or all of those services are needed by many of the residents and property owners in the territory proposed for annexation. For example, in the absence of a full platting, planning and land use authority, substantial development can and has occurred in the area proposed for annexation without the benefit of formal local control.

Problems resulting from the lack of land use regulation are evident in certain of the wastewater disposal problems along Eyak Lake which were noted earlier. Additionally, there seems to be a need for improved methods of wastewater disposal in the area of 4.5 - 6 Mile of the Copper River Highway. Although the City has no immediate plans to address those needs, it is the most logical entity to assume responsibility to deal with the matter. Only a municipal government would qualify for 50% sewer construction aid available from the Alaska Department of Environmental Conservation.

As the State's ability to provide direct local services continues to decline because of falling revenues, there is some possibility that Trooper service in the area outside the City of Cordova may be curtailed. A draft study by the State Office of Management and Budget calls for the Department of Public Safety to "[E]stablish a task force to review the issue of state vs. local responsibilities for provision of police services."¹⁴ The City of Cordova would clearly be best able to extend police services in such an event. So too is the City of Cordova best able to provide other services needed in the area proposed for annexation. Constitutional and statutory provisions would not allow residents of this area to form an independent city government.

¹⁴ Draft Report, Governor Hickey's Organizational Efficiency Task Force, July 1, 1992 (page IV-64).

Considering these factors as a whole, the Commission concludes that there are unfulfilled service needs in the developed portions of the territory proposed for annexation and that the City of Cordova could serve those needs more efficiently than another municipality. Thus, the standard set out in former 19 AAC 10.070(a)(4) is satisfied.

4. REGARDING WHETHER THE TERRITORY IS "URBAN" IN CHARACTER.

The standard set out in former 19 AAC 10.070(a)(3) is met if the Local Boundary Commission concludes that the area proposed for annexation is "urban" in character. Factors to be considered in this regard include, without limitation, whether:

- the property is platted;
- the property is suitable for residential or commercial purposes;
- the population density approximates that of the annexing city;
- the population stems from actual growth of the city beyond its legal boundaries;
- whether the property is valuable by reason of its suitability for prospective urban purposes.

The City states in its petition that "the road area in particular is very integrated socially and economically with the City of Cordova. It is served by both the Cordova Electric Cooperative and the Cordova Telephone Cooperative. These areas are also very similar in character to Cordova. They consist of commercial and industrial areas, residential subdivisions, and dispersed residential development. Virtually all developed areas have been platted by their owners or the State of Alaska. The growth in these areas is largely attributable to economic activity in Cordova and the lack of suitable land for development in Cordova proper."

The population densities of the developed areas do not equal the nearly 400 residents per square mile found within the existing boundaries of the City. Much of the territory proposed for annexation is remote and uninhabited. However, many of the residents of the territory proposed for annexation reside in platted subdivisions. These subdivisions and other inhabited and developed portions of the territory proposed for annexation seem to be sufficiently similar in character to the area within the existing boundaries of the City of Cordova to consider them urban.

More importantly, the Commission finds that the developed portions of the territory proposed for annexation are clearly part of the compact community of Cordova. Apart from the invisible corporate boundaries of the City of Cordova, the developed portions of the area proposed for annexation share many social, economic, political, religious, governmental, scholastic, recreational and other interests with residents and property owners inside the boundaries of the City of Cordova.

CONCLUSION: The Commission concludes that portions of the area proposed for annexation are similar in character to the territory within the current boundaries of the City of Cordova. For purposes of the standard in question, these areas are considered "urban" in character. Thus, the Commission concludes that the standard set out in former 19 AAC 10.070(a)(3) is satisfied for portions of the territory proposed for annexation.

5. REGARDING THE LIKELIHOOD FOR FUTURE GROWTH AND DEVELOPMENT IN THE TERRITORY AND THE ABILITY OF THE CITY TO PLAN FOR AND CONTROL THAT DEVELOPMENT.

The standard set out in former 19 AAC 10.070(a)(5) is met if *"there is a reasonable likelihood that future growth and development will occur within the territory and that annexation of the territory will enable the city to plan for and control that development."*

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The City's petition states that the "area proposed for annexation is expected to experience significant growth in the next few years, especially if the Copper River Highway, the proposed deep water port, and the Power Creek Hydroelectric Project are constructed"

While Governor Hickel's Administration strongly supports the completion of the Copper River Highway, the project is on hold pending environmental impact studies. However, funding was recently secured for the construction of a road to Shepard Point, site of Cordova's proposed deep water port. It was reported by City officials that under the terms of a settlement with Alyeska Pipeline Service Company concerning the Exxon Valdez oil spill, \$6 million will be made available for the rehabilitation of two miles of existing road and the construction of an additional 4 miles of road to Shepard Point. Funding for the construction of a dock at the site is not yet available. Once constructed, a dock at Shepard Point would reportedly allow deep draft vessels, including cruise ships, to dock at Cordova. Local officials hope that this, in turn, would promote tourism development and other economic diversification in the community.

Aside from these larger projects, the territory outside the boundaries of the City is experiencing moderate and somewhat routine growth and development. For example:

- The Eyak Corporation is implementing its Shareholder Homesite Program which will result in scattered development, particularly around Eyak Lake;
- The University of Alaska is planning the development of a 30 unit subdivision near Heney Creek;
- An individual has applied for a permit from the U.S. Army Corps of Engineers to dredge Heney Creek to construct a new marina;
- Private concerns are planning to construct a new log transfer facility at Channel Island.

The Commission also notes that the entire Eyak Lake area is formally designated as an "Area Meriting Special Attention" under the City of Cordova's Coastal Management plan. This further supports the a finding that municipal planning and control is needed in the territory proposed for annexation.

CONCLUSION: The Commission concludes that moderate and routine growth and development is occurring in portions of the territory proposed for annexation. Because there is no municipal planning, platting and land use regulatory authority in this area, the Commission further concludes that annexation will enable the City of Cordova to plan for and control that development. Thus, the standard set out in former 19 AAC 10.070(a)(5) is met.

6. REGARDING THE HEALTH, WELFARE AND SAFETY OF CITY RESIDENTS.

The standard set out in former 19 AAC 10.070(a)(6) is met if "the health, welfare, or safety of city residents is endangered by conditions existing or developing in the territory and annexation will enable the city to remove or relieve those conditions." ¹⁵

¹⁵ The phrase "health, welfare, and safety" is very broad. In recent decisions of the Commission, the terms have been defined as follows:

HEALTH. State of being hale, sound, or whole in body, mind or soul, well being. Freedom from pain or sickness; the most perfect state of animal life. Not synonymous with "sanitation". The right to the enjoyment of health is a subdivision of the right of personal security, one of the absolute rights of persons (Black's Law Dictionary, 1968).

PUBLIC WELFARE. The prosperity, well being, or convenience of the public at large, or of a whole community, as distinguished from the advantage of an individual or limited class. It embraces the primary social interests of safety, order, morals, economic interests, and non-material and political interests. In the development of our civic life, the definition of "public welfare" has also developed until it has been held to bring within its purview regulations for the promotion of economic welfare and public convenience (Black's Law Dictionary, 1968).

SAFETY. Freedom from danger, injury or damage; security (Webster's New World Dictionary, 1962).

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Officials of the City of Cordova point to the water and sewer problems noted earlier as their greatest concern over public health. These include concerns over the contamination of Eyak Lake, one of the City's sources of potable water.

DCRA reported that officials of the Alaska Department of Environmental Conservation knew of no specific instance in which the water and sewer problems in the outlying area have resulted in sickness or disease in Cordova. However, they did acknowledge that there is potential for such to occur.

City officials are also concerned that the Eyak Lake watershed will be logged which, in turn, may adversely affect the water quality of Eyak Lake. The Commission notes that State Statutes permit a city to "adopt an ordinance to protect its water supply and watershed, and may enforce the ordinance outside its boundaries" (AS 29.35.020). Such extraterritorial powers, however, are more limited than if the City were to gain full jurisdiction over the watershed.

CONCLUSION: Because Eyak Lake is one of the City of Cordova's sources of potable water, the Commission concludes that the wastewater disposal problems along Eyak Lake represent a potential threat to the health of residents of the City of Cordova. Further, the Commission concludes that the City of Cordova is capable of addressing this threat. As was noted previously, the City of Cordova would be eligible for partial State funding for the construction of a proper wastewater disposal system to serve the area. Bringing the Eyak Lake watershed under the full jurisdiction of the City of Cordova will also help to protect the future quality of that source of potable water. Thus, the Commission concludes that the standard set out in former 19 AAC 10.070(a)(6) is met, particularly with respect to the area from 4.5 to 6 Mile of the Copper River Highway, Power Creek Road on the north side of Eyak Lake and the Eyak Lake watershed.

7. REGARDING THE NEED FOR ANNEXATION IN ORDER TO PROPERLY SERVE RESIDENTS WITHIN THE EXISTING CITY LIMITS.

If the City needs to include any of the territory proposed for annexation in order to extend services to the area currently within its boundaries, the standard set out in former 19 AAC 10.070(a)(7) is satisfied.

City officials indicate that within the next 15 months or so, Cordova's sanitary landfill will have to be replaced. The City is currently studying alternative sites for the new landfill. According to City officials, it is virtually certain that the new landfill site will be located within the territory proposed for annexation.

The potential for development of the Shepard Point deep water port was previously addressed. While State law allows a city to operate a port outside its boundaries, full jurisdiction by the City over any future port at Shepard Point would be preferred.

City officials indicate that they are also exploring the potential for additional sources of water for the community. Among the sites being considered is Middle Arm of Eyak Lake, located within the territory proposed for annexation.

CONCLUSION: The Commission concludes that this standard is met, particularly with respect to Eyak Lake, Shepard Point, and the yet unknown site of the City's future sanitary landfill site.

8. REGARDING WHETHER ANY OF THE PROPERTY IN THE TERRITORY IS OWNED BY THE CITY.

If the City owns property within the territory proposed for annexation, the standard set out in former 19 AAC 10.070(a)(2) is met with respect to that property. The Commission has found no indication that the City of Cordova currently owns any property within the area proposed for annexation. However, it was noted several times during the annexation proceedings that the City of Cordova has yet to receive any lands for future community development from the Eyak Corporation under the terms of 14(c)(3) of the Alaska Native Claims Settlement Act. Under such provisions, the City could receive up to 1,280 acres of land. Presumably, this land would be located within the territory proposed for annexation.

CONCLUSION: The Commission concludes that this standard is not met in any part of the territory proposed for annexation since the City owns no property there. At the same time, the Commission is aware that the future settlement of ANCSA 14(c)(3) claims with the Eyak Corporation will lead to the transfer of up to 1,280 acres of land to the City, most or all of which will presumably be within the territory proposed for annexation.

9. REGARDING WHETHER THE TERRITORY IN QUESTION IS AN ENCLAVE.

If the territory proposed for annexation is surrounded by property already within the corporate limits of the City, the standard set out in former 19 AAC 10.070(a)(1) is satisfied. The Commission finds that none of the territory proposed for annexation is an enclave within the existing boundaries of the City of Cordova.

CONCLUSION: The Commission concludes that this standard is not met.

10. REGARDING OTHER VALID PUBLIC PURPOSES SUPPORTING ANNEXATION.

The standard set out in former 19 AAC 10.070(a)(9) is satisfied if the Commission determines that the annexation proposal serves some legitimate public purpose other than that covered by the standards previously addressed.

The Commission finds that annexation would serve two vitally important public purposes not addressed elsewhere. First, it would enfranchise residents of the territory proposed for annexation. Currently, the 469 residents of the territory proposed for annexation have no formal means of participating in the making of decisions concerning local government operations which affect their everyday lives. For example, the parents of the 90 or so non-resident students who attend the Cordova City schools are ineligible to serve on the Cordova School Board. Those parents lack even the right to vote for school board candidates. Yet, the School Board makes critical decisions affecting the future of their children.

Annexation would extend the following voting rights to qualified residents of the area proposed for annexation:

1. The right to seek office as Mayor, member of the City Council or School Board;
2. The right to seek appointment to standing or special City commissions (e.g. planning commission; board of equalization and board of adjustment);
3. The right to vote for candidates for the office of Mayor, Council and School Board; and
4. The right of referendum, the right of initiative, and the right to vote on propositions of the City of Cordova.

A second valid public purpose is that annexation would extend the boundaries of the City of Cordova to include the entire area served by the City. In the Commission's view, this is highly desirable from the standpoint of a number of public policies. Paramount among these are principles of equity and the need to address State vs. local responsibilities for the delivery of services, particularly in light of declining State revenues.

With respect to the equity issue, a recent study by the State Legislature specifically identified the area which is now proposed for annexation (along with certain others in Alaska) as an example of circumstances which cause *"problems of equitable distribution of decision making authority, of efficiency of daily operation and prudent expenditures of financial resources, and the capacity to make programmatic changes that might lead to improved school performance."*¹⁶

¹⁶ New Directives in School Performance: The Legislature as Advocate and Guarantor, January, 1991 (p.43).

This same study also noted inequities in the manner in which school funding is provided by the State of Alaska. In the Commission's view, it is clearly inequitable to require property owners within the boundaries of the City of Cordova to contribute substantially to the support of local schools, but to impose no identical requirement upon the property owners of the other side of the invisible corporate boundary line whose children attend the same schools.

The legislative study cited earlier noted that such inequities may obstruct Article I, Section 1 of Alaska's Constitution which stipulates that: "... all persons are equal and entitled to equal rights, opportunities and protection under the law."¹⁷ Education is not the only area in which these inequities exist.

With respect to declining State revenues, the Commission believes that it is becoming increasingly necessary for individual citizens and local governments to assume a greater portion of the burden for the delivery of local services. This view is formally reflected in the recently completed report by the "Task Force on Governmental Roles" Among the findings of the Task Force was the conclusion that "[A]ll citizens should bear a fair portion of the cost for basic health, education and public protection services."¹⁸

Similarly, a draft study by the State's Office of Management and Budget calls for "having all non-organized areas of the state organized" in an effort to trim State operating costs and provide for greater efficiencies in the delivery of services.¹⁹

CONCLUSION: The Commission concludes that there are "other valid public purposes" for this annexation. These consist of the enfranchisement of the residents of the area proposed for annexation and the extension of the City's boundaries to encompass its actual service area (carrying with it substantial policy benefits such as greater equity and reduced reliance on the State of Alaska for the delivery of local services).

OTHER CONSIDERATIONS

VOTE ON ANNEXATION

Alaska's Constitution places a duty on the Local Boundary Commission to judge an annexation proposal on its merits rather than its political appeal. After carefully examining the purpose and role of the Commission, the Alaska Supreme Court concluded that those who reside or own property in an area to be annexed by a municipality have no vested right that annexation take place only with their consent.²⁰ Specifically, the court stated:

Article X [of the Alaska Constitution] was drafted and submitted by the Committee on Local Government, which held a series of 31 meetings between November 15 and December 19, 1955. An examination of the relevant minutes of those meetings shows clearly the concept that was in mind when the local boundary commission section was being considered: that local political decisions do not usually create proper boundaries and that boundaries should be established at the state level. The advantage of the method proposed, in the words of the committee —

... lies in placing the process at a level where areawide or statewide needs can be taken into account. By placing authority in this third-party, arguments for and against boundary change can be analyzed objectively.

¹⁷ *Ibid*, pp. 55 - 56.

¹⁸ Task Force on Governmental Roles, Final Report, July 10, 1992, (p. 13). The Task Force on Governmental Roles was established by a concurrent resolution of the 1991 Legislature to sort out federal, state and local roles in providing public services.

¹⁹ Draft Report, Governor Hicke's Organizational Efficiency Task Force, July 1, 1992 (page IV-16).

²⁰ Fairview Public Utility District Number One v. City of Anchorage, 368 P.2d 540 (Alaska, 1962).

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We cannot assume that they [the delegates to the Constitutional Convention] were insensitive to the inadequacies inherent in a system where needed municipal expansion could be frustrated if the electors in a single urban area outside of municipal boundaries did not agree to annexation.

Those who reside or own property in the area to be annexed have no vested right to insist that annexation take place only with their consent. The subject of expansion of municipal boundaries is legitimately the concern of the state as a whole, and not just that of the local community.

The Commission's newly implemented regulations provide guidance concerning which process is best for final approval of an annexation (i.e., election or legislative review). These regulations state:

Territory that meets all of the annexation standards specified in 19 AAC 10.090 — 19 AAC 10.130 may be annexed to a city by the legislative review process if the commission also determines that annexation will serve the balanced best interests of the state, the territory to be annexed, and all political subdivisions affected by the annexation.

CONCLUSION: In every case, allowing voters in an area proposed for annexation to give final approval to any annexation has strong political appeal. However, the Commission has a constitutional duty to balance the obvious political appeal of such against the needs and interests of the parties involved. As is so evident in this particular case, the interested parties are not limited strictly to the residents and property owners of the territory proposed for annexation. They also include the residents and property owners within the current boundaries of the City of Cordova, the Cordova City government and the State of Alaska. The balanced interests of all of these parties warrant the use of the legislative review process.

SECTION IV ORDER

On the basis of the foregoing findings and conclusions, the Commission determines that annexation of a smaller territory than that originally petitioned by the City of Cordova has strong merits. Therefore, the Local Boundary Commission hereby orders as follows:

1. That the June 4, 1992 annexation petition of the City of Cordova is approved with amended boundaries described as follows:

Beginning at the northeast corner of protracted Section 4, T15S, R2W, Copper River Meridian (CRM);

thence, south to the southeast corner of protracted Section 28, T15S, R2W, CRM;

thence, east to the northeast corner of the northwest 1/4 of the northeast 1/4 of protracted Section 33, T15S, R1W, CRM;

thence, south to the southeast corner of the southwest 1/4 of the southeast 1/4 of protracted Section 21, T16S, R1W, CRM;

thence, northwesterly, in a straight line, to the northwest corner of protracted Section 1, T16S, R3W, CRM;

thence, west, along the north boundary of protracted Section 2, T16S, R3W, to a point on the divide along the Heney Range separating the drainage into Orca Inlet from the drainage into the Copper River Delta and the Gulf of Alaska;

thence, southwestery along said divide to Heney Peak;

thence, westerly in a straight line to the beginning of Hartney Creek;

thence, westerly along the thread of Hartney Creek to the point where it enters Hartney Bay;

thence, northerly and westerly along the line of mean high tide of the north shore of Hartney Bay to Bluff Point;

thence, meandering along the line of mean high tide to the intersection with the east boundary of protracted Section 1, T16S, R4W, CRM;

thence, north to a point in Orca Inlet at the northwest corner of the southwest 1/4 of the southwest 1/4 of protracted Section 31, T15S, R3W, CRM;

thence, northeasterly, in a straight line, to a point in Orca Inlet at the northwest corner of the southeast 1/4 of protracted Section 24, T14S, R3W, CRM;

thence, east to the line of mean high tide on Nelson Bay;

thence, meandering southwestery along the line of mean high tide of Nelson Bay to the intersection with the west boundary of protracted Section 19, T14S, R2W, CRM;

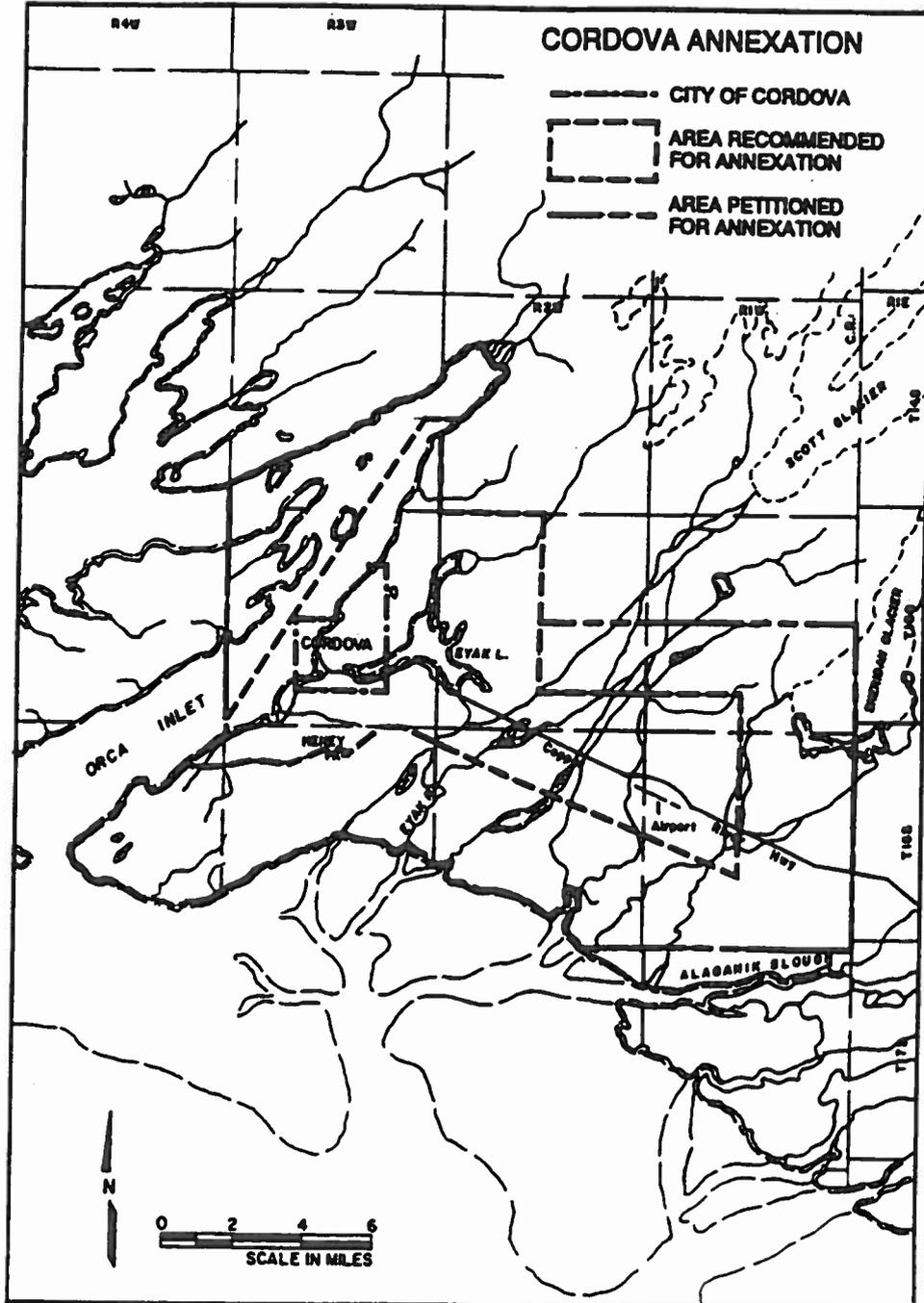
thence, south, to the southeast corner of protracted Section 36, T14S, R3W, CRM;

thence, east to the northeast corner of protracted Section 4, T15S, R2W, the point of beginning; containing 74.58 square miles, more or less, all in the Cordova Recording District, Third Judicial District, State of Alaska.

Excluding therefrom, the territory currently within the boundaries of the City of Cordova, comprising 6.35 square miles, more or less. The net territory approved for annexation comprises 68.23 square miles, more or less.

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The territory petitioned for annexation and the amended boundaries approved for annexation are shown on the following map:



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2. That a formal recommendation for the annexation of the territory in question be submitted in accordance with Article X, § 12 of the Alaska Constitution to the next regular session of the legislature. That is, the recommendation is to be submitted to the First Regular Session of the Eighteenth Alaska Legislature on or before January 20, 1993.
3. That, the annexation take effect only upon:
 - (a) The passage of forty-five days from the date of presentation of the Commission's recommendation to the legislature (or the adjournment of the session, whichever is earlier) without disapproval of the recommendation by the legislature; and
 - (b) The filing of documentation with the Department of Community and Regional Affairs showing that the City of Cordova has complied with 42 U.S.C. 1973c (Voting Rights Act of 1965) regarding this annexation.

APPROVED IN WRITING THIS 8TH DAY OF JANUARY, 1993.

LOCAL BOUNDARY COMMISSION


By: Darroll Hargraves, Chairperson

Attest:


Dan Bockhorst, Staff

RECONSIDERATION BY THE COMMISSION

Within 20 days after this written statement of decision has been mailed to the petitioner and any respondents, a person may file a request for reconsideration of the decision.²¹ The request must describe in detail, the facts and analyses that support the request for reconsideration. If the Commission takes no action on a request for reconsideration within 30 days after the date that this written decision was mailed to the petitioner and any respondents, the request for reconsideration is automatically denied. If the Commission grants a request for reconsideration, the petitioner or any respondents opposing the reconsideration is allotted 10 days from the date the request for reconsideration is granted to file a responsive brief describing in detail the facts and analyses that support or oppose the request for reconsideration.

JUDICIAL APPEAL

A judicial appeal of this decision may also be made under the provisions of the Alaska Rules of Appellate Procedures, Rule 601 *et seq.* An appeal to the Superior Court must be made within thirty days from the date this written decision was mailed or delivered.

²¹ However, once the Local Boundary Commission submits a formal recommendation to the legislature for the annexation of the territory in question, it no longer has jurisdiction to reconsider or rescind its decision.