

January 19, 2017

Lynn Chrystal, Chair
Local Boundary Commission
c/o Brent R. Williams, Local Government Specialist
Alaska Dep't. of Community, Commerce and Econ. Development
550 West 7th Ave., Suite 1640
Anchorage, AK 99501

Re: January 24, 2017 decisional meeting to
reconsider approval of the Manokotak and
Dillingham annexation petitions.

Dear Chair Chrystal:

At the January 10, 2017 LBC meeting, staff and counsel to the LBC determined that petitioners Dillingham and Manokotak, but not respondents Native Villages of Ekuk, Portage Creek, Clark's Point and the City of Clark's Point (hereinafter "Respondents") would be permitted to file briefs "describing in detail the facts and analyses that support or oppose the decision being reconsidered."¹

Respondents note that no responses to a request for reconsideration are permitted unless and until the commission orders reconsideration. Notwithstanding their stated understanding of the rule, counsel for both petitioners wrote directly to Chair Chrystal, in care of Mr. Williams, stating their legal objections to Ekuk's request for reconsideration and also their requests that the commission move expeditiously. Respondents did not object or move to strike these letters, and have learned that the rules were indeed relaxed and that the letters were distributed to all commissioners.

Now that reconsideration has been granted and petitioners are permitted to file briefs, Respondents ask that they be granted the same courtesy extended to petitioners, allowing this letter to be distributed to commissioners. Our letter is not a brief arguing against the petitions, but addresses primarily Respondents' thoughts and concerns regarding procedure and a possible amendment to Manokotak's petition.

¹ 3 AAC 110.580(f).

A. Whether the commission properly granted reconsideration is not relevant to the purpose of the January 24, 2017 decisional meeting.

Respondents anticipate that petitioners may submit briefing arguing that the commission addressed all the material issues of fact and controlling principles of law, and did not have grounds for reconsideration. Any such arguments would be irrelevant at the decisional meeting.² Reconsideration has been granted and a new decisional meeting ordered and scheduled. In other words, the January 24, 2017 decisional meeting is not an occasion to reconsider the January 10 order granting reconsideration. The commissioners are reconsidering legal standards applicable to each petition identified in the order granting reconsideration. The grounds for reconsideration will not be relevant to that deliberation.³

B. The annexation standards set out in the commission's regulations implement certain statutes in the Alaska Municipal Code, and must be read in a way that is consistent with those statutes

The Alaska Municipal Code requires that a city be incorporated to serve a community, not an area of land or water.⁴ The commission's regulations define and make specific the term "community" as being "a social unit comprised of 25 or more permanent residents."⁵ These permanent residents should live "in a geographical proximity that allows frequent personal contacts and interaction."⁶ To ensure the distinction between city and borough government the commission's regulations impose a limitation of community on the ability of a city to annex new territory.⁷ Under this limitation a city must be of suitable scale.⁸ The commission

² If responding to such an argument, respondents would contend that a brief mention of a subject is not enough to show that it was addressed. According to the Merriam-Webster Dictionary, the verb "address" means to "deal with". Alaska Appellate Rule 506(a) uses other words to convey the same meaning: rehearing will be granted if "the court has overlooked, misapplied or failed to consider a statute, decision or principle directly controlling. . . ." A failure to correctly apply, (*i.e.* "address") one or more of the controlling provisions in the annexation standards qualifies as a proper ground for reconsideration.

³ Respondents' believe the commission had a reasonable basis for its decision to order reconsideration. Other parties may disagree. But reconsideration has been granted, so this is not the time for revisiting that decision.

⁴ AS 29.05.011; See also 3 AAC 110.005 "Territory proposed for incorporation as a city must encompass a community".

⁵ 3 AAC 110.990(5). A permanent resident is someone who is domiciled within the boundaries proposed for change. 3 AAC 110.990(10).

⁶ 3 AAC 110.920.

⁷ 3 AAC 110.130(c).

must determine whether the proposed city annexation is of a suitable scale, consistent with all these principles and the authorizing statute.

The legislature also imposed, through statute, the additional annexation standard that the boundary change will be in the best interests of the state.⁹ The commission's regulations implement this requirement by providing that the commission may consider relevant factors bearing on this important statewide consideration. The regulations suggest three factors, two of which are very relevant to instant annexations -- whether the annexation would promote maximum local self-government¹⁰ and whether it will relieve state government of the responsibility of providing local services. The commission may consider other relevant factors including whether it is consistent with the state's interest to have cities include vast amounts of territory in which other nearby communities also have socio-economic connections.

The Final Report to the Local Boundary Commission regarding the consolidated annexation petitions prepared by your staff on October 28, 2016 develops a detailed analysis of all of the foregoing annexation standards and provides an excellent basis upon which to find whether or not these standards have been met.

C. The commissioners must follow their statutory mandate.

The commission's statutory mandate is clear:

If the commission determines that the proposed change, as amended or conditioned if appropriate, meets applicable standards under the state constitution and commission regulations and is in the best interests of the state it may accept the proposed change. Otherwise it shall reject the proposed change.¹¹

⁸ The annexation "may include only that territory comprising an existing local community, plus reasonable predictable growth, development, and public safety needs during the 10 years following the effective date of annexation." 3 AAC 110.130(c)(1).

⁹ AS 29.06.040(a).

¹⁰ Under the regulations, the commission determines whether maximum local self-government is promoted by considering "for city incorporation or annexation in the unorganized borough whether the proposal would extend local government to territory and population of the unorganized borough where no local government currently exists. . . ." 3 AAC 110.981(7).

¹¹ AS 29.06.040(a).

Note the legislature's use of "may" and "shall." If the commission determines that standards are met and annexation is in the state's best interests, the commission may accept the proposed change. Otherwise, it shall reject the proposed change.

The commission's regulations cannot be read in a way that conflicts with this statutory mandate. Unless a majority of the commission determines that each standard was met and that the annexation is in the best interests of the state, the commission must reject the proposal. This applies to both petitions.

D. Each commissioner is required to decide for himself whether or not a standard has been met.

The commission is created by the constitution to make boundary change decisions. All the advice and assistance of staff, all the evidence and argument presented by the petitioners and respondents and members of the public, and all the advice of the commission's own counsel may be (and we hope will be) considered. Ultimately, however, each commissioner performs his own analysis and forms his own opinion on whether a standard has been met. They vote on that basis to determine whether annexation standards have been met and what is in the best interests of the state.

E. Procedures at the decisional meeting should ensure that all commissioners are assisted in their efforts to fulfill their constitutional and statutory duties.

The commission's decision is not final until in writing and mailed to the parties.¹² On December 20, 2016, a majority of commissioners wished to reconsider or rescind the non-final vote taken on December 1, 2016 on the question whether to approve the pending petitions on (having previously given notice that it might do so). Had they been permitted to reconsider their votes as they desired, the decision would not have become final until after a new vote was recorded.

The majority was advised, however, that *it could not reconsider a non-final decision, but could reconsider a final decision* (but only on certain grounds). The majority was informed that they had a duty to make final in written form a decision that they did not support. As illogical as it seemed, the majority reluctantly acquiesced and adopted a written decision it did not agree with.

Then at the January 10, 2017 meeting to determine whether to grant reconsideration, counsel for the petitioners argued that reconsideration is not a vehicle to review or revisit a final decision –without considering the important fact that the majority had sought mightily on December 20, 2016 to reconsider *before*

¹² 3 AAC 110.570(g).

the decision became final. This situation is not consistent with the commission's statutory and regulatory scheme, nor is it good public policy to prevent members of a quasi-legislative commission from reconsidering their vote on a measure within their power.

To the extent that a majority of the commission is attempting to perform its duties, they should be assisted and not hindered in taking the actions they consider to be consistent with those duties. Respondents hope that the upcoming meeting will be straight forward and that the commissioners will be able to fulfill their constitutional and statutory duties. If a majority of the commission finds that one or more of the standards in a petition is not met, or that the annexation is not in the best interests of the state, then the petition cannot be granted.

F. The staff's report and the previous written decision provide opportunities to make the upcoming decisional meeting more efficient.

Counsel for the commission properly advised that the commission will reconsider each petition in its entirety. This could be a time-consuming process. Hopefully, staff, counsel and the Chair may have ideas to make this process more efficient. Towards that end, Respondents offer the following suggestions.

For those standards that a majority of the commission finds were met, the commission could state on the record that the standard was met for the reasons reflected in the original decision. If staff, counsel and the chair find it proper, it might also be possible to affirm a group of standards together if it was thought that the group of standards will again be found to have been met.

For those standards that a majority of the commission finds were not met, the commission could orally provide a statement of relevant factors considered, or adopt the reasoning set out in the staff's report for each of those standards, if a majority of the commissioners based their decision on the staff's analysis and recommendation. Respondents suggest this would save time in the hearing process and also be an aid to staff in drafting the decisional document in the time allotted.

At the last meeting of the commission, the City of Manokotak raised the possibility that it may amend its petition to reduce the amount of water area. Respondents would support this proposal if it knew more about the new boundaries that are being considered and if Saguyak Corporation is notified and consulted before any change is adopted by the commission. Saguyak is opposed to having its lands around the mouth of the Snake River included in Manokotak's annexation. It should be possible for Manokotak to redraw its proposed boundaries to exclude these lands while still maintaining connection to the site of

its traditional village and summer fish camp, which do not affect Saguyak Corporation lands. The commission is respectfully requested to consider these concerns if it decides to amend Manokotak's petition boundaries.

Finally, a decision making no boundary change need not be forwarded to the legislature. Thus, if a majority of the commission finds that one or more standards have not been met and the proposed boundary change by annexation is not approved, there is no urgency in adopting the final written decision.¹³ The staff should be granted additional time to draft the written decision and the commission should be permitted additional time to review the decision before making it final. The one-day turn around for such a decisional statement would not be necessary.

Thank you for your consideration of Respondents' comments.

Sincerely,



James L. Baldwin
Counsel for Respondents

¹³ The commission has up to 30 days after the decisional meeting to issue a statement of decision. 3 AAC 110.570(f).