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LOCAL BOUNDARY COMMISSION

STATE OF ALASKA

IN THE MATTER OF THE PETITION OF)
NIKISKI TO INCORPORATE AS THE CITY)
OF NIKISKI,)
_____)

OPPOSITION TO PETITIONER'S EX PARTE REQUEST TO EXTEND PUBLIC COMMENT AND SUSPEND THE LOCAL BOUNDARY COMMISSION

I. INTRODUCTION

The Tyonek Native Corporation and the Native Village of Tyonek (collectively "Tyonek" or the "Tyonek Group") hereby oppose the August 10, 2017 *ex parte* request submitted by the primary petitioner for the Nikiski Petition to Incorporate as a Home Rule City (the "Petition"). Both the manner the request was submitted and its substance constitute a violation of the Alaska Constitution, state statute, applicable regulations, legislative intent, past Commission actions and procedures, and perhaps most alarmingly, basic tenets of justice and equity.

II. BACKGROUND

The Ex Parte Request for Suspension

On August 21, 2017, Tyonek was notified by the Local Boundary Commission (the “Commission” or the “LBC”) that on August 10, 2017, Stacey Oliva, the named representative for petitioners seeking incorporation as the City of Nikiski (the “Petitioner”) requested an extension of the public commentary period and suspension of the incorporation administrative process. On that same day, the LBC provided Tyonek with the Petitioner’s August 10th request, which was sent directly to the Chair of the LBC without service or notice to Tyonek. Despite the Petitioner’s failure to provide Tyonek notice, the letter states that it was copied to Senator Pete Micciche, Representative Mike Chenault, the Peninsula Clarion, Radio Station KDLL, and KTUU. In response to the Petitioner’s request, the Commission Chair extended public commentary period to September 22, 2017 and scheduled a hearing on August 31, 2017 to consider her request for suspension of the incorporation process. Thankfully, the LBC notified Tyonek, the other respondents, and the public of the extension and upcoming hearing prior to ruling on the request to suspend the incorporation process.

The Petition Process

Although the Commission undoubtedly has knowledge of the Petition, in the interest of clarity, the following provides a brief overview of the Petition process to date. The petitioners developed a local option petition to incorporate a home rule city with a population of 5,985 and area of 5,480 square miles – roughly the size of Connecticut.¹ This

¹ Petition at p. 13.

proposed city inexplicably reaches across Cook Inlet to encompass the Native Village of Tyonek.

In October 2016, after having gathered the requisite number of voter signatures as required by AS 29.05.060(11), the Petition was submitted to the LBC for technical review, which LBC staff performed and found the Petition to be “technically complete.”² The Petition was accepted for filing on December 30, 2016.

Once the Petition was accepted, Tyonek dedicated numerous resources to analyze the Petition and determine the impact it would have on its community. This involved numerous meetings, information and knowledge gathering efforts, and dedicated staff time. Once Tyonek analyzed the Petition and determined its shareholders and Tribal members would be negatively impacted by it, Tyonek retained legal counsel to represent its interest and assist Tyonek in filing a written response to the Petition, which it timely filed.

On May 10, 2017, the LBC staff issued its Preliminary Report to the Local Boundary Commission Regarding the Petition (the “Preliminary Report”). The Preliminary Report was approximately 100 pages and included a comprehensive review and analysis of the Petition, carefully considering the Petition as well as the challenges raised by respondents. The Preliminary Report was also accompanied by a letter from Chris Hladick, the Commissioner of the Department of Commerce, Community, and Economic Development, which encouraged readers to review the Preliminary Report carefully and offer comments by June 12, 2017. Commissioner Hladick also notified readers that the final report was

² Preliminary Report at 9.

tentatively scheduled for July 26, 2017 with the LBC Petition hearing tentatively scheduled for August.

Tyonek, which accepted and adhered to the procedural guidelines and laws adopted by the LBC, reviewed the Preliminary Report and engaged in exhaustive efforts to educate its leaders, shareholders, Tribal members, and other interested parties. Tyonek's efforts are exemplified by its public comment filings as well as the letters of opposition to the Petition filed by various Tribal members and shareholders of Tyonek. Tyonek flew undersigned legal counsel to Tyonek to meet with the joint land use committee and to educate Tyonek's leaders on the LBC incorporation process. Tyonek worked diligently to ensure it represented the interests of its Tribal members and shareholders timely and in full compliance with law. In August alone, Tyonek organized and held two shareholder meetings during which it provided updates and information to Tyonek Corporation shareholders regarding the Petition and Tyonek's opposition efforts.

While the repeated public comment extensions required Tyonek to invest additional resources in updating its community members, Tyonek did not oppose the Petitioner's first two requests to extend the public commentary period as it intrinsically values the public's ability to express its opinion, even when that opinion differs from that of Tyonek. However, the Petitioner's request for a third extension to the public comment period would have likely resulted in an objection from Tyonek if such an opportunity to object had been extended due to the delay imposed by the Petitioner's request and the financial harm the repeated deviations from the anticipated schedule raise. Although the Petitioner's request for an extension frustrated Tyonek, this opposition focuses only on Petitioner's request to suspend or relax the regulations.

Tyonek does, however, challenge the Petitioner's *ex parte* attempt to completely evade the LBC incorporation process and regulations at great harm to Tyonek and the public at large and in direct violation of law and equity.

III. ARGUMENT

Tyonek respectfully requests that the Commission deny the Petitioner's attempt to sidestep the incorporation process and, instead, urges the Commission to direct the Petitioner to comply with the incorporation process. The Petitioner's request:

- A) Violates 3 AAC 110.660, unjustly delaying the incorporation process, incentivizing an uninformed incorporation decision, creating significant waste of financial and human resources by the LBC and respondents, namely Tyonek;
- B) Unlawfully ignores the appropriate amendment and/or withdrawal processes provided in the regulations;
- C) Undermines the purpose and intent of the laws and regulations governing the incorporation process; and
- D) Violates fundamental procedural and substantive due process protections afforded under Alaska and federal law.

A. Petitioner's Request Violates 3 AAC 110.660, Causing Unjust Delay and Creating Significant Waste of Financial and Human Resources by the LBC and Respondents

The Petitioner's attempt to rely upon 3 AAC 110.660 to justify her request fundamentally misapplies this regulation. Instead, it is this very regulation that necessitates denial of the Petitioner's request. Pursuant to 3 AAC 110.660, entitled "Purpose of procedural regulations; relaxation or suspension of procedural regulations:"

The purpose of the procedural requirements set out in 3 AAC 110.400 - 3 AAC 110.700 is to facilitate the business of the commission, **and will be**

construed to secure the reasonable, speedy, and inexpensive determination of every action and proceeding. Unless a requirement is strictly provided for in the Constitution of the State of Alaska, AS 29, or AS 44.33.810 - 44.33.849, the commission, by a vote of at least three members, may relax or suspend a procedural regulation if the commission determines that a strict adherence to the regulation would work injustice, would result in a substantially uninformed decision, or would not serve relevant constitutional principles and the broad public interest. (Emphasis added.)

The relaxation or suspension of the regulations to permit the Petitioner to withdraw or change the Petition without following the regulations would undoubtedly result in an unreasonable, delayed, and costly process. Tyonek has made every effort to comply with the incorporation rules and regulations and has invested its time and financial resources in doing so. It retained counsel to work with it to draft a response opposing the Petition and has held numerous meetings with its shareholders and Tribal members to educate its community regarding the Petition and its opposition to the Petition. Tyonek staff and its corporate and community leaders have dedicated long hours and knowledge-gathering efforts to understand the process, the Petition, and the Preliminary Report and to communicate this to the community as a whole. The Petitioner's request has already resulted in a thirty day delay in the already stalled petition process.

In addition to causing unreasonable delay, redundant and exorbitant costs, and significant harm to Tyonek, relaxation, suspension or withdrawal of the regulations would result in injustice for the voters who signed the Petition. Unlike amendments or withdrawals subject to the regulations, the "do-over" requested by the Petitioner would excuse the Petitioner from obtaining the signatures of her fellow petitioners in order to make substantial changes to the Petition. In essence, relaxation or suspension of the

rules would potentially remove the other petitioners from the Petition process. See *additional discussion below*.

The integrity of the incorporation process would also be substantially threatened if the Petitioner prevailed in her request. Again, Tyonek relied on the validity and effectiveness of the LBC regulations governing the incorporation process and thus made every effort to follow that process. If the Petitioner's request is granted, any petitioner would have the ability to avoid a final or even preliminary decision on a proposed incorporation, without answering to his or her fellow petitioners or any named respondents. This would most certainly stifle public involvement in the incorporation process and the willingness of those opposing a petition to invest the time and effort in filing written responses or participating in the incorporation proceedings. This result would turn 3 AAC 100.660 on its head.

B. Petitioner's Request Unlawfully Ignores the Appropriate Amendment and/or Withdrawal Processes Provided in the Regulations

In addition to the Petitioner's clearly erroneous reliance on 3 AAC 110.660, her request also violates the express amendment and withdrawal procedures mandated by law without a viable explanation for departure from these laws. More specifically, Petitioner's request that the Commission rewind the clock on the Petition without requiring that it be withdrawn or amended ignores the clear statutory intent and regulatory mandate for approval of the Petition's content by the registered voters who signed it.

It is a well accepted principle that an agency "must follow its own regulations until it amends or revokes them" and that agencies "are under an obligation to follow their own regulations, procedures, and precedents or provide a rational explanation for their

departure. See 2 Am. Jur. 2d Administrative Law § 229 (citations omitted). Here, no such explanation exists.

Among the requirements of AS 29.05.060, a petition for a home rule city must include, based on the number who voted in the area in the last general election, the signatures and resident addresses of 50 voters in the proposed city or of 15 percent of the voters in the proposed city, whichever is greater. (This requirement is echoed by 3 AAC 110.410.) In requiring a voter “buy-in,” the legislature and the LBC ensures that a given petition has a certain level of support within the community, and ostensibly requires a certain level of collaboration and input prior to filing for a petition. This also ensures that the LBC, as well as interested respondents and members of the public, do not dedicate resources and effort to researching a petition with little-to-no community awareness or support. Perhaps most imperative, the incorporation regulations protect the public, respondents, residents, and the LBC from unilateral changes to a proposed city that may deviate from the boundaries or characteristics upon which a given petitioner’s support was based. To this end, before a petitioner can withdraw a voter-initiated petition under 3 AAC 110.545, it must file a statement withdrawing the petition containing the dated signatures of at least 30 percent of the voters residing within the boundaries of the proposed change and must include at least a majority of the same voters who signed the original petition. Under 3 AAC 110.540(c), if voters initiated the petition, the amended petition must contain “the dated signatures of the same number of voters required by AS 29.04, AS 29.05, AS 29.06, or this chapter for the original petition and must include the dated signatures of at least a majority of the same voters who signed the original petition.” The amended petition then has similar notice and service requirements as an original petition, and (if the

amendments are significant enough) undergoes another informational session, opportunity for further responsive briefing, an additional public meeting by the LBC Staff, or a repeat of any other step or process specified in 3 AAC 110.410 - 3 AAC 110.700. Here, by asking the LBC to “rewind the process,” Petitioners avoid collecting required signatures for a withdrawal or amendment. Consequently, the Petitioner’s request serves only to silence the other petitioners as well as the respondents and even the LBC and its staff.

Ultimately, courts encourage the consistent enforcement of an agency’s regulations. See *Davis Wright Tremaine LLP v. State, Dep’t of Admin.*, 324 P.3d 293, 299 (Alaska 2014) (“We also will evaluate an agency’s interpretation of regulations for consistency with the statute on which it is based.”) In general, if two statutes conflict, the specific controls over the general. *Allen v. Alaska Oil & Gas Conservation Comm’n*, 147 P.3d 664, 668 (Alaska 2006). Here, the LBC’s withdrawal and amendment regulations are consistent with AS 29.05.060, which requires a petition’s input and support by the affected voters prior to its filing; to require likewise support for a petition’s withdrawal or amendment is consistent with the statute’s purposes. And, contrary to Petitioners’ position that 3 AAC 110.440 “anticipates and allows” their request, the regulations have a specific process and remedy for those in the Petitioner’s position: withdraw or amend.

Even if the Commission was willing to consider permitting deviation from its withdrawal and amendment regulations, the Petitioner’s request does not permit such deviation as a matter of law. The Petitioner did not present any concrete basis for her request to deviate from the regulations. Perhaps deviation would be justified if the request stemmed from an inconsequential revision such as the removal of an inadvertent typo or mathematical miscalculation. Conversely, suspension of the amendment and withdrawal

requirements where the Petitioner seeks to change the city boundaries or the services the proposed city intends to provide would directly contradict and violate the regulations and the enabling statutes. In sum, any suspension or relaxation of the process without specific details regarding the basis for such a request cannot stand.

C. The Petitioner's Request Undermines the Purpose and Intent of the Laws and Regulations Governing the Incorporation Process

The Petitioner's accusations against the LBC Staff also appear to be an evasive maneuver that does not support or permit suspension or relaxation of the applicable regulations. The Petitioner argues that a relaxation of the rules is warranted due to certain alleged violations of AS 29.05.070 and 3 AAC 110.440(c) by the LBC staff. Essentially, Petitioners allege that the LBC staff should have rejected the Petition after it completed its technical review on December 30, 2016. This argument fundamentally misunderstands the purpose of a technical review and attempts to impute the petitioner's responsibility for the substance of a petition onto the LBC Staff; a nonsensical and dangerous supposition.

In order to be considered by the LBC, a petition must meet certain specific technical requirements. For instance, under AS 29.05.060, along with the voter signatures, a petition must include the class, name, boundaries, maps, composition and appointment by governing body, and a budget of income and expenditures through the first fiscal year. Such requirements are more thoroughly delineated in 3 AAC 110.420.

Under AS 29.05.060 (one of the statutes Petitioners allege the LBC violated), "the department shall review an incorporation petition for content and signatures and shall return a deficient petition for correction and completion." Similarly, under 3 AAC 110.440, which the Petitioner alleges LBC Staff violated, the LBC is required to return the "defective

petition” only “if it determines that the petition or supporting materials are deficient in form or content.” The Petitioner’s interpretation of this regulation to require a substantive review by LBC Staff and to mandate approval of a petition by LBC Staff if the petition survives technical review is nonsensical. There is no way for the LBC Staff to make a determination that a petition is substantively complete and warrants approval until it has fully reviewed the demographic, financial, legal, and governmental aspects of a petition and heard from affected parties such as Tyonek. In this case, the LBC Staff specifically incorporated and relied on the input that Tyonek provided to determine whether the proposed Petition met the requirements of the Standards for Incorporation of Cities under 3 AAC 110.005-042 and similarly relied on other respondents to make determinations regarding other criteria affecting incorporation.

D. The Petitioner’s Unilateral and Ex Parte Request Violates Fundamental Procedural and Substantive Due Process Protections Afforded Under Alaska and Federal Law

Perhaps most alarming, the Petitioner’s request ignores blatant violations of due process of law afforded under federal and state law. These due process violations arise both from the *ex parte* manner in the Petitioner submitted her request to the Commission and in her request that the regulations be suspended. This reason alone makes the Petitioner’s request untenable.

A “suspension/relaxation” of the administrative regulations would result in an ad hoc deviation from clear and established administrative procedures directly relating to the public’s ability to be afforded notice and an opportunity for comment: a classic violation of due process under administrative law. The Alaska Constitution, art. I § 7 states, “no person shall be deprived of life, liberty, or property, without due process of law. The right of all

persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.” The requirements of the Alaska Constitution’s due process clause, Article I § 7, apply in an administrative setting. *Balough v. Fairbanks North Star Borough*, 995 P.2d 245, 266 (Alaska 2000).

The Alaska Constitution clearly contemplated the municipal incorporation process to be governed with procedural due process safeguards. After all, the boundaries of a city and municipality have far-reaching taxation and property consequences which go to the heart of the Alaska constitutional protections. The Alaska Const. art. X, § 7 requires, “Cities shall be incorporated in a manner prescribed by law, and shall be a part of the borough in which they are located.” And Article X, section 12 of the Alaska Constitution provides that “[t]he [LBC], subject to law, may establish procedures whereby boundaries may be adjusted by local action.”

Such constitutional protections, which require the adoption of regulations in conformity with due process guarantees under the law, are designed specifically to avoid due process issues such as the one here, where the Petitioner seeks to deny voters, the public, and named respondents, the right to participate meaningfully in an administrative process guaranteed by law. By way of example, Tyonek has a clear, vested interest in the process and outcome of the Petition, as it strongly objects to its incorporation into the proposed city of Nikiski. Yet, without further information from the Petitioner as to her intent at this juncture, Tyonek has been left completely in the dark.

IV. CONCLUSION

The Petitioner may dislike the Preliminary Report, but at this point in the proceedings, the relevant regulations, statutes, and even the Alaska Constitution, demand that the petitioners commit to one of three paths forward: 1) continue with the incorporation process; 2) withdraw the Petition; or 3) amend the Petition. To the extent that the Petitioner wants to recommend a condition or amendment to the boundaries by the LBC directly, that is also an option under the applicable laws. Although Tyonek certainly reserves the right to object to any condition or boundary revision the Petitioner proposes to the LBC, it does not object to the act of submitting such a request in and of itself. Of course, this presumes that any such request is properly served.

For all of the reasons stated above and numerous others Tyonek does not have adequate time to brief due to the expedited consideration of this matter, Tyonek respectfully urges the Commission to deny the Petitioner's request.

DATED this 30th day of August, 2017.

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