LOCAL BOUNDARY COMMISSION

STATE OF ALASKA

In the matter of the Petition of the City)
Of Manokotak for Annexation of Land and)
Nushagak Commercial Salmon District Waters)

CITY OF MANOKOTAK'S RESPONSIVE BRIEF TO REQUEST FOR RECONSIDERATION BY EKUK, ET. AL.

In accordance with 3 AAC 110.580(f), the City of Manokotak hereby files this responsive brief opposing the request for reconsideration by Ekuk, et. al. and supporting the LBC's decision of December 1, 2016 and its written Statement of Decision of December 20, 2016. The Commission's original decision should not be changed because (1) there was no legitimate basis for reconsideration of the decision under 3 AAC 110.580(e) and (2) the material facts and controlling principles of law, upon which the Commission relied in its decision to approve Manokotak's proposed annexation, were well-established and fully consistent with the LBC's prior decisions.

I. There is No Legal Basis for Reconsidering the Commission's Decision.

Although the Commission has granted the reconsideration requested by Ekuk, et.al., Manokotak has not until now had the opportunity to present its full arguments against such reconsideration, nor has the Commission had the opportunity to consider these arguments. As this is Manokotak's first opportunity to fully brief the reconsideration issue, the Commission should not view reconsideration as a closed issue, and should now find that reconsideration is not authorized under LBC regulation.

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It has now been clearly established that the *only* grounds upon which the Commission can reconsider a decision previously made are spelled out in its own regulation, 3 AAC 110.580(e):

> The commission will grant a request for reconsideration or, on its own motion, order reconsideration of a decision only if the commission determines that
>
> (1) a substantial procedural error occurred in the original proceedings;
>
> (2) the original vote was based on fraud or misrepresentation;
>
> (3) the commission failed to address a material issue of fact or a controlling principle of law; or
>
> (4) new evidence not available at the time of the hearing relating to a matter of significant public policy has become known.

Ekuk's request for reconsideration was made on the basis of grounds (1) "substantial procedural error" and (3) that the "commission failed to address material issues or fact or a controlling principle of law". The Commission's reconsideration decision purports to be based upon these grounds.

The grounds for reconsideration identified in the Commission's January 10 Order Granting Requests for Reconsideration do not meet the regulatory requirements for reconsideration, and a change to the Manokotak annexation decision on these stated grounds would itself constitute a "substantial procedural error" requiring later correction by the Commission itself (with loss of the 2017 Legislative window) or by a court after appeal of the reconsideration decision. The obvious defects in the stated grounds for reconsideration are separately examined below.

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A. Commissioners' Lack of Awareness of the Finality of Its Manokotak Annexation Decision, and Limited Function of Its Written Decision Does Not Constitute a "Substantial Procedural Error".

The Commission's written order granting reconsideration first asserts that there was a "substantial procedural error" because some Commissioners were not aware that the Commission could not reconsider or otherwise change its December 1 decision when it would later meet to adopt a written statement of its decision. This is a uniquely inventive basis for an assertion of "substantial procedural error"; if such an argument were raised by one of the parties on its own behalf, it would justifiably be laughed off by the Commission. Parties are charged with "constructive knowledge" of the Commission's regulations, such that the adage "ignorance is no excuse" applies; it applies with equal force to the Commission itself.[1] The undersigned is unaware of any precedent - - in this agency or any other - - in which the agency's purported failure to comprehend its own, clear regulation constituted a "substantial procedural error".

The "substantial procedural error" ground was intended only for an extraordinary circumstance wherein the Commission's overt procedural actions substantially failed to follow procedures prescribed by statute or regulation, or as are mandated by the Constitution. A substantial procedural error was not intended to include unstated thoughts in a Commissioner's mind at the time of decisional action. If the regulation were to be understood to authorize such reconsideration, it would open the floodgates to second thoughts by Commissioners after a decision had been made, asserting that they silently misunderstood something when they voted. This is exactly what the

[1] In this regard, we note that in this proceeding, as in other recent Commission proceedings, the draft and final statements of decision reviewed and approved by the whole Commission typically conclude with a full recitation of the Commission regulations governing reconsideration

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regulation prescribing only limited grounds for reconsideration was intended to prevent. The regulation was intended to establish the *finality* of a Commission decision which was reached after months of adversarial briefings and days of adversarial hearings, during which the parties have gone to substantial expense and effort to present facts and arguments in favor of their respective positions. Absent some glaring and substantial error in the process, which was absolutely lacking in this case, the Commission's December 1 decision was final.

That some Commissioners now claim to have misunderstood their own regulation is perplexing. The regulation, 11 AAC 110.570(a), provides that, after the Commission's hearing on a proposed boundary change, the Commission will "reach a decision" regarding the proposed change. Subsection (f) provides that, after the date of "its decision...the commission will issue a written decision explaining all major considerations leading to the decision." What could be clearer? As stated in the very next regulation, Section .580(e), reconsideration is only held *after* a written decision is adopted, and is granted "only" if the Commission then determines that one of the four grounds for reconsideration applies. There is no procedure for reconsideration during adoption of the written decision, and no reasonable basis for Commissioners to think that their December 1 decision would not be final, or that it could be changed for any reason whatever.

At its January 10 meeting, the Commission voted 3 – 2 for reconsideration. In its prior meeting on December 20, at least one of the Commissioners who later voted for reconsideration acknowledged that none of the regulatory grounds for reconsideration apply to a circumstance where some Commissioners later have second thoughts as to

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the size of the annexation approved. In responding to the Commission's legal counsel's review of the regulatory grounds, he asked:

> COMMISSIONER HARRINGTON: So we can't say, oops, we made a mistake?
>
> MS. MASCALKA (sic): Only if it falls under one of these four grounds. Then you can say you made a mistake, but it would have to fall within one of those.
>
> CHAIR CHRYSTAL: Did that answer your question, Commissioner Harrington?
>
> COMMISSIONER HARRINGTON: Well, it does. It says to me that we have - - none of those grounds seem to make sense for reconsideration, and I am opposed to both of these annexations; but we have by - - I don't see any way whereby we can actively reconsider those motions. .... I don't know how to get out of this. [2]

Later, Commissioner Harrington further remarked that

> I would really like to see how the Department of Law can address it in some way we can get out of this pickle. So I'm just going to kick the ball over to them and see if there is any way they see us getting out of this under the understanding this is a LBC problem in which we said, oops, we made a mistake.[3]

Because an after-the-fact assertion of Commissioners' misunderstanding of their own regulations cannot, by any stretch, be deemed a "substantial procedural error", reliance upon this ground to change the Manokotak decision would itself constitute "substantial procedural error", subject to later reversal by the Commission itself or by a court.

B. There Was No "Failure to Address a Controlling Principle of Law".

In its discussions on December 20, 2016 and January 10, 2017, it was

[2] Transcript of LBC meeting of December 20, 2016, at pp. 21 – 22; see excerpt from transcript attached hereto as Exhibit "B".
[3] Id. at pp. 28 – 29.

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clear that the other basis for reconsideration offered by a majority of the Commission was that the Commission "did not adequately address" the question as to the *size* of the Manokotak annexation it had approved in its decision. This second basis for reconsideration is as unsubstantiated as the first basis.

First, the reconsideration standard is not that the Commission did not *adequately* address the annexation standards; Section .580(e)(3) authorizes reconsideration only if the Commission completely "failed to address" a controlling principle of law. This standard was quite obviously not satisfied; the issues as to the size of the annexation and resulting city boundaries were fully discussed and considered. At the January 10 meeting, wherein Commissioners sought to clarify the basis for the pending motion for reconsideration, Commissioner Harrington deferred to Commissioner Wilson to state these. When he addressed the standard that the Commission failed to address a controlling principle of law, Commissioner acknowledged that the Commission had not *ignored* the standards regarding "community" and the size of the annexation "because they *did* discuss it." Yet the Commission voted 3 - 2 to seek reconsideration on this ground.

Commissioner Wilson was correct. Attached hereto as Exhibit "B" are excerpts from the transcript of the Commission's December 1 decisional meeting, reflecting extensive discussions of the concern that the Manokotak annexation might be too large, in the context of various regulatory standards that were being considered, including standards for boundaries, community and others.[4] In fact, it is fair to say that this single issue was the subject of *most* of the Commission's discussion of the

[4] *Cf.* pp. 11 – 12, 17 – 18, 20 – 21, 22 – 24, 27 – 33, 34 – 36, 39, 47 – 49, 54 – 62, 68 – 69 of the December 1 transcript, see excerpt of transcript, Exhibit "C" hereto.

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proposed Manokotak annexation, during its December 1 decisional meeting.

During that meeting, with the assistance of a step-by-step document drafted by staff for use in annexation decisions, the Commission's chair walked the Commission through each of the annexation standards; none were left out. The question as to whether the proposed Manokotak annexation was too large was examined by Commissioners from every angle, and there is no assertion that their debate on this issue was cut short by the chair.

The suggestion that the Commission failed to consider its annexation standards, particularly with respect to the size of the proposed annexation, is demonstrably false, as Commissioner Wilson acknowledged when describing the grounds for the reconsideration motion.

C. Summary of Grounds for Reconsideration.

The LBC's own regulations require it to make final decisions on annexations while the hearings are fresh in Commissioners' minds, based upon what they recently heard, saw and thought in connection with testimony from community residents. Such final decisions are to be upended only under the extraordinary circumstance described in the reconsideration regulations, and are not to be reversed later based upon lawyers' arguments that could/should have been made at the hearing, nor on the basis of some Commissioners' second thoughts.

It is reasonable to assume that one purpose of the regulation's limitations on reconsideration is to sustain respect and acceptance of LBC decisions by the affected public. The LBC's hearings on proposed annexations are, as Commissioners know, ultimately local, bringing the decision making process "up front and personal", often

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with rural Alaska communities who rarely experience such contact with State bodies charged with decisions directly affecting them. When a decision is made following extensive local testimony, it is an understatement to note that a later decision to undo the original decision is disheartening to the affected community, in this case, Manokotak. A letter from Mayor Melvin Andrew expressing Manokotak residents' reaction to the Commission's reconsideration decision, is attached as Exhibit "A".

Because there is no legitimate regulatory basis for reconsideration of the Commission's decision after hearing, Manokotak respectfully requests that the original Manokotak annexation decision, as embodied in the Commission's December 20 written decision, stand unaltered, and that it be timely submitted to the Alaska Legislature.

II. The Manokotak Annexation Was Not Too Large.

Even if the LBC's Manokotak annexation decision is reconsidered, the central basis for such reconsideration - - that the annexation is too large - - is contrary to the evidence and contrary to the Commission's precedents in prior city and corporation annexation decisions.

The central concern with the prior, December 1 decision voiced by some Commissioners at the December 20 and January 10 meetings were *not* new concerns; these same Commissioners had raised these same concerns at the December 1 meeting, before the Commission voted to approve the annexation petition. The concern was with the total square mileage of the area of water - - primarily in the Igushik Section of Nushagak Bay, denominated Tract "B" of the proposed annexation area. The suggestion was made that inclusion of this commercial fishing statistical area,

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which is strongly associated with the Igushik River that runs alongside the community of Manokotak, would create some startling new precedent, particularly for second class cities.

This is simply not true. Manokotak has provided the Commission and its staff with substantial evidence to the contrary, which apparently had not been reviewed or was forgotten by Commissioners when they discussed reconsideration. In its initial petition, at p. 24, Manokotak provided a Table 9 listing a number of other western Alaska cities whose boundaries were previously approved by the LBC through either incorporation or annexation. Most of these included a greater water area than the City of Manokotak, with its proposed annexation, would include. That table is reprinted here:

Table 9
Population and Water Area, 6 Cities with Largest Water Area, and Manokotak with Proposed Annexation

City	Water Area	Population July 2014
Saint Paul	255.2	436
Togiak	183.3	876
Saint George	147.6	92
Pilot Point	115.1	78
Manokotak (if approved)	113.0	500
Unalaska	101.3	4,689
Egegik	101.2	106

Sources: U.S. Bureau of the Census; Research and Analysis, Alaska Department of Labor and Workforce Development.

The four cities whose boundaries enclose larger water areas than Manokotak's proposed boundary were all second class cities, including Saint Paul, whose boundaries include over twice as much water area as Manokotak's would.

In Manokotak's July 14, 2016 Comment to the Preliminary Report to the Local Boundary Commission, Manokotak presented another chart, demonstrating that, in

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terms of population-to-square mileage of cities, Manokotak with its annexation would have a higher density (more square miles per resident) than five other cities whose boundaries were approved by the LBC - - all of which were second class cities. In several cases, city boundaries included three to five times more square mileage per city resident than would Manokotak's boundaries including the proposed annexation areas:

City	Population	Sq. Miles	Population Per Sq. Mile
St. George	82	182.4	.45
Pilot Point	76	140.5	.54
Egegik	104	134.0	.77
St. Paul	427	295.5	1.45
Adak	275	127.3	2.16
Manokotak	482	190.7	2.52

Source: DCRA Online Community Information Database, containing square mile land/water information, and 2015 DCCED Commissioner certified population figures.[5]

Again, all five cities with more square mileage per resident than Manokotak's were second class cities.

For the Commission to suddenly reverse field, under a decision it had already made, to deny Manokotak's annexation on grounds that it was "too large", would be so contrary to the LBC's prior decisions as to appear arbitrary and capricious.

Although not explicitly discussed, it was apparent at the January 10 meeting that at least one Commissioner was concerned with the potential effect of the Manokotak annexation upon a newly pending petition for city incorporation by Nikiski residents. That petition proposes to incorporate approximately 5,400 square miles and extend

[5] See Manokotak Comment on Preliminary Report at p. 24.

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from the Kenai Peninsula all the way across Cook Inlet. Such boundaries would dwarf the Manokotak annexation, and result in a city 30 times larger in area than Manokotak, after annexation. The Commission's December 1 Manokotak decision is not precedent for, but would rather be highly distinguishable from, the Nikiski proposal.

Finally, some Commissioner comments suggested that Manokotak's proposed annexation would not meet regulatory standards because LBC staff suggested as much in their Preliminary or Final Report. The Local Boundary Commission has never been constrained by its staff's reports, which are only recommendations from which the Commission has frequently departed in past decisions. Particularly in this case, where staff reports demonstratively resulted from a heavy-handed influence by DCRA and DCCED officials favoring an unwanted borough at the expense of city annexations, the LBC should continue to act as the independent Commission established by the Alaska Constitution.

III. If the Commission Acts to Alter Its December 1 Decision, It Should Approve a Manokotak Annexation That Retains the Set Netting Waters Of the Igushik Section.

The comments of two of the three Commissioners who voted in favor of reconsideration of the Manokotak annexation decision indicated that they would nevertheless probably favor a smaller annexation, which would reduce the size of Tract B of the proposed annexation, so as to continue to include set net fishing areas but exclude the remainder of the Igushik Section of Nushagak Bay. As a practical matter, this would operate to preserve the ability of Manokotak to impose a raw fish tax upon salmon harvested by set netters in the Igushik Village area on the western shore of

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Nushagak Bay, but would prevent it from taxing the drift net fishery offshore in the Igushik Section.

At the December 1, 2016 decisional meeting, Commissioner Wilson suggested that, rather than excluding all of Tract B, the Commission could allow annexation of a three-mile-wide corridor from the mouth of the Weary River down to the bottom of Tract B, following the coastline, which would "protect their set net fishery three miles out and also give them a corridor for transportation".[6] When another Commissioner questioned him as to the purpose of reducing the size of Tract B, Commissioner Wilson stated that "their basic need is along the shore, not way out in the Bay...their main concern was the set netters and the need for a corridor."[7] When it became time for a vote on the full annexation proposed by Manokotak, Commissioner Wilson stated:

> I'm going to vote no. I'm in favor of the petition, but not to include Tract B. So I'll vote no.[8]

Commissioner Harrington indicated similar thinking:

> ...if we are allowing them to have that area of the water where these residents have set nets, then there would be a potential for some income that would help out. I just have a problem with the rest of the water.[9]

He stated that he "would seriously consider having the boundaries of such a city include the natural set net area" but that it was the "massive inclusion of the Bay that I have problems with."[10] When the matter came to a vote, he stated

> If it were not contiguous, and if we were to declare that Section C [*sic*; should be "B"] with the area in front of that section consisting of 300 – or 400 feet out into the Bay where the set netters are was appropriate for annexation to

[6] Transcript of LBC Decisional Meeting of December 1, 2016, pp. 17 – 18.
[7] Id. at pp. 46 – 47.
[8] Id. at p. 113.
[9] Id. at p. 30.
[10] Id. at p. 35.

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> Manokotak, and in all other ways it met the requirements of annexation, I could support the petition. Anything more than that, I cannot. [11]

These comments suggest that at least three and possibly four of the Commissioners would have favored Manokotak's annexation if Tract B were reduced in size such as to include only the set net areas being fished.

The City of Manokotak wants to state its position clearly on this matter. First, and foremost, Manokotak expects the Commission's December 1 decision, approving its annexation petition as written, to be upheld. As described in previous sections of this brief, reconsideration and change of this decision, based upon the grounds stated at its January 10 meeting, would be both illegal and contrary to the Commission's own precedents in approving inclusion of water areas in second class city boundaries.

Notwithstanding this, it is vitally important to Manokotak that annexation be approved for at least part of the area sought in its petition. As previously noted, this community has poured a substantial amount of effort and expense into annexation of its ancestral village of Igushik and of the fishing area closely associated with the Igushik River, which would supply a tax base enabling the City of Manokotak to provide essential, long-sought municipal services in the Igushik area. Inclusion in the annexation of part of Tract B would at least partially serve these goals.

As for the extent of the offshore area of western Nushagak Bay that would be necessary to assure the taxability of all areas in which set net fishing occurs, this would be something less than the three-mile corridor discussed by Commissioner Wilson but more than the 400 foot offshore boundary suggested by Commissioner Harrington. Set net fishing is sometimes authorized by ADF&G from offshore sand

[11] Id. t p. 112.

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bars which emerge from time to time. In consulting with local set net fishermen, the City has determined that an annexation that includes all set net activities should extend 1,500 feet offshore from the MHW (mean high water) line of the shoreline.

If the Commission amends Manokotak's annexation petition to encompass such area, its decision will need to reference a revised metes and bounds description of the City boundaries after the annexation. Attached hereto is draft descriptive language which would facilitate modification to the legal description Manokotak furnished with its Annexation Petition.[12] The modification would occur in the description at page 47 of the Petition, substituting for five paragraphs of that description, as shown in the attachment. Basically, the Tract B description would start at the Northeast corner of Tract B and run across the mouth of the Snake River, south on Nushagak Bay across the mouth of the Igushik River, then further south along Nushagak Bay to go around the tip of Nichols Spit at the southern end of Tract B, to then rejoin the previous legal description; in all cases extending 1,500 feet seaward from the mean high water (MHW) mark.

Previous City incorporations and annexations approved by the LBC have referenced "meander" lines along shores of water bodies; see certificates issued by the State to the cities of Clark's Point, Shaktoolik and Egegik. A boundary description 1,500 feet seaward from a MHW shoreline meander line is appropriate where it is intended to encompass fishing areas and taxation thereof, particularly where the natural meander line may vary over the years due to the effects of erosion, sediment buildup, tectonic activity or other natural dynamics which are known to alter the mean

[12] See Exhibit "E" hereto, a metes and bounds legal boundary description which could be utilized in lieu of a portion of the metes and bounds description provided at pp. 46 – 50 of Manokotak's annexation petition.

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high water mark in this and other parts of Alaska.

While Manokotak does not favor modification of the Commission's decision, it has furnished a description of a reduced sized annexation, which is consistent with the comments of Commissioners Wilson and Harrington, recognizing that a partial annexation would be better than none at all.

IV. Recent Developments Concerning Potential Breach of the Igushik River Bank Underscore the Need for Annexation.

An additional important concern has arisen which merits approval of annexation of all or part of Tract B. As described in the hearing testimony of Manokotak Mayor Melvin Andrew, ongoing erosion threatens to ultimately breach the east bank of the Igushik River, causing it to flow directly through an existing isthmus into Nushagak Bay where the river makes a 180 degree, "oxbow" turn approximately eight miles upriver from the river mouth. This is in an area immediately adjacent to, but not within the Tract B area proposed for annexation, whose western boundary would be at the mean high water mark of Nushagak Bay and therefore on the east side of the narrow isthmus. As discussed in the letter from Manokotak Mayor Melvin Andrews, attached hereto, if the ongoing erosion results in a breach of the Igushik River banks so as to create a new channel into Nushagak Bay, the current set net fishery located south of the mouth of the Igushik River may be destroyed, taking with it both the commercial and subsistence economy of the Mankotak community.

Manokotak has engaged in discussions with the U.S. Army Corps of Engineers about a prospective study and resulting project to reinforce and protect the subject riverbank from further erosion. This would require co-funding by the federal government and the local entity, which in this case could likely obtain financing from

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Bristol Bay regional funding sources. Recently, Corps representative Jeffrey A. Herzog notified Manokotak of a change in federal law which substantially enhanced the potential for co-financing of this study and project.

On January 17, 2017, Mr. Herzog sent a message[13] indicating that the prospects for federal approval of such a study and project would be enhanced if the City of Manokotak annexed the subject area and therefore gained site control necessary to assure federal access rights for study and construction of the project. If the current annexation proposal is approved, this would enable a relatively simple later annexation of this small, adjacent area by Manokotak.

The importance of the risks to Manokotak presented by this ongoing erosion cannot be overstated, and annexation of all or part of Tract B would facilitate an additional annexation which would empower Manokotak to exercise eminent domain, if necessary, to acquire site control.

V Designation of Representative.

The City of Manokotak designates the following person as its representative for purposes of this Responsive Brief: James T. Brennan, Brennan and Heideman, 619 E. Ship Creek Ave., #310, Anchorage Alaska 99501; Email: jbrennan@law-alaska.com. Phone Number: (907) 279-5528; Fax Number: (907) 278-0877.

I hereby certify that a copy of this brief was sent on January 19, 2017 by email to: Brooks Chandler, James Baldwin and Lea E. Filippi.

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[13] A copy of the January 17 email from Corps representative Jeffrey Herzog is Exhibit "D" hereto.

VI. Conclusion.

For the foregoing reasons, the City of Manokotak respectfully requests that the Local Boundary Commission retain its December 1, 2016 Decision approving Mankotak's petition for annexation as filed, and that the Commission timely submit this Decision to the Alaska Legislature for consideration during its current session.

Dated this 19th day of January, 2017.

James T. Brennan, Attorney for
the City of Manokotak

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