

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

NATIVE VILLAGE OF EKUK,)
Appellant,)
v.)
LOCAL BOUNDARY)
COMMISSION; CITY OF)
DILLINGHAM)
Appellees.)
_____)

Case No. 3DI-12-22CI

ORDER ON APPEAL

The Native Village of Ekuk appeals the Local Boundary Commission's approval of the City of Dillingham's petition to annex 396 square miles of Nushagak Bay for the purposes of collecting a tax on the fish caught there. The petition, initially filed in June 2010, received final approval from the Commission in December 2011. Voters in Dillingham ratified the annexation in an election held on April 10, 2012. The court now GRANTS Ekuk's appeal in part, VACATES the Commission's December 14, 2011 decision approving the annexation, and REMANDS the petition to the Commission for processing by legislative review.

FACTS

Nushagak Bay is an enormously productive fishing ground. In 2013, 3.7 million fish, a fifth of the total harvest of sockeye, king, pink, and chum salmon in all of Bristol Bay, were caught in the Nushagak fishing district.¹ For centuries, the culture and livelihoods of the people in the region have revolved around fishing. Today, fishing

¹ Cora Campbell & Jeff Regnart, 2013 Bristol Bay Salmon Season Summary, ADFG, at 5 (Sept. 23, 2013).

remains the primary economic activity in all the communities located on the Nushagak Bay or in the watershed.

However, the biggest portion of the catch (and the biggest portion of the revenue from the catch) is netted by fishers from out of state or other parts of Alaska. Of the 2010 catch, only 19% was harvested by Dillingham residents, who make up 19% of the fishing fleet; and 10% was harvested by fishers from other parts of Bristol Bay, who made up 13% of the fishing fleet.² Moreover, the profit margins of local fishers are slimmer than those of their out-of-town counterparts. Citing a 2009 study by the Bristol Bay Economic Development Corporation, Robert Heyano, the president of Ekuk Village Council, stated that "the watershed resident fisherman on average earns less money from the fishery than other Alaskans and non-residents," in part because "he earns less money from employment outside of fishing, and resides in an area with a significantly higher cost of living."³

In 2010, Dillingham decided to annex a large portion of Nushagak Bay in order to impose a 2.5% raw fish tax on all salmon caught and sold from the bay. Arguing that it supplied most of the infrastructure for commercial fishing in the bay, the City wished to recapture some revenues from non-resident fishermen, who do not contribute to the town's coffers by paying property tax or any considerable portion of sales tax. Despite this rationale, the tax would, of course, apply to Dillingham and village fishermen, too.

Annexations of large, uninhabited bodies of water for the purpose of imposing fish taxes are not unusual in Southwest Alaska. Several other communities have effected similar annexations in the past, including Egegik, which annexed part of the

² Pub. Hearing Transcript, at 201 (April 26, 2011)(comments of Barbara Sheinberg).

³ Pub. Hearing Tr., at 106 (April 25, 2011)(comments of Robert Heyano); see also Pub. Hearing Tr., at 153-154 (April 26, 2011)(comments of Nick Johnson).

adjacent bay in 1991; Togiak, which annexed Togiak Bay in 1985; and the City of St. Paul, which annexed its surrounding waters in 1986.⁴

However, the annexation of Nushagak Bay is unique in that a large number of communities other than Dillingham not only use the Bay but directly adjoin it. Thus, Clarks Point and Ekuk are, like Dillingham, on the shores of the Bay. Meanwhile, five villages are situated on rivers that empty into the bay: Ekwok, New Stuyahok, and Koliganek are not far from the estuary on the Nushagak River; Aleknagik is a few miles up the Wood River; and Manokotak is a few miles up the Igushik River. The culture and economies of Dillingham and the villages are inextricably tied to fishing.⁵

Ekuk itself has only two year-round residents. However, it supports a more robust summer population, who come from Aleknagik, Dillingham, and other communities to operate approximately 60 set-net sites. Because there is a cannery at Ekuk, and because large fishing vessels are not necessary to run a set-net operation, Ekuk set-netters do not have to make heavy use of Dillingham's harbor and other fishing infrastructure in order to commercial fish.⁶

On June 14, 2010, the City of Dillingham first posted its petition in several public locations around town, including on Dillingham's website. On July 9, Dillingham formally filed its petition with the Local Boundary Commission. It was not until July 26 that Dillingham provided copies of the petition to the villages. The City accepted written comments until October 4, 2010, and the Village of Ekuk timely filed its responsive brief on that day. In addition to Ekuk, Aleknagik, Manokotak, Ekwok, New Stuyahok and

⁴ Annexation Petition, at 8 (June 14, 2010).

⁵ Pub. Hearing Tr., at 89-95 (April 25, 2011)(comments of Molly Chythlook, natural resource director for BBNA).

⁶ Pub. Hearing Tr., at 99-100 (April 25, 2011)(comments of Robert Heyano).

Clarks Point submitted comments opposing the annexation.⁷ Koliganek did not submit comments. The City also filed its response to comments on October 4.

The Department of Commerce scheduled two public informational meetings to discuss the annexation in January 2011 – one in Dillingham and one in Manokotak. Both were cancelled due to inclement weather, and neither was rescheduled. In late January, the Department distributed a preliminary report on the annexation; public comments were accepted until late February. Both the City of Dillingham and the Village of Ekuk timely filed comments. On April 4, 2011, the Department issued its final report on the annexation, and a public hearing was scheduled for April 25. The hearing began on April 25 and continued until late on April 26, and the Commission held its decisional meeting immediately after public comments closed. At 1:00 AM on April 27, 2011, the Commission approved annexation.

The Commission attached a condition to its approval, requiring the City of Dillingham to attempt to consult with the villages to try to work out a revenue sharing agreement and to file a report on its efforts by November 30, 2011. There was some discussion as to whether approval of the annexation was final, or whether it would not be final until the Commission had received the report. The Commission seemed to decide that the report was merely pro forma, and that the approval was final as of April 27.

On June 10, 2011, the Village of Ekuk filed for reconsideration of several aspects of the annexation, including the Commission's determination that it could not allow the petition to proceed by legislative review, and its decision not to condition approval of the annexation on fulfillment of the consultation requirement. The Commission only granted

⁷ LBC Decision, at 3 (May 26, 2011).

the reconsideration on the second point, so final approval of the annexation was postponed until after Dillingham had submitted its consultation report. On November 30, 2011, the Commission found that the City had satisfied its consultation obligations, and thus that approval of the annexation could take place.⁸ On December 14, 2011 the Commission formally approved the annexation.

The Village of Ekuk appealed in early 2012 and this court held oral arguments on October 7, 2013.

DISCUSSION

The respondent raises a number of points on appeal, arguing that the Commission abused its discretion in allowing the petition to proceed by local action, rather than legislative review; that the Commission had redefined the terms "unpopulated," "large geographical area," and "existing community," thereby developing new annexation standards in violation of the Administrative Procedure Act; and that the Commission had abused its discretion in determining that the annexation was in the best interests of the state. After much deliberation, the court finds that it need only address the first point. The court agrees that the petition should have been processed by the legislative review method, and REMANDS the petition to the Commission for further proceedings consistent with this finding. The court finds that it need not reach Ekuk's remaining arguments because they pertain to a petition that may change once the legislative review process is commenced on remand.

STANDARD OF REVIEW

⁸ Pub. Meeting Tr., at 27 (Nov. 30, 2011)

The Commission's decisions involve agency expertise, so the court must uphold them as long as they have a reasonable basis.⁹ Specifically, "the policy decision as to the mode of annexation is an exercise of lawfully vested administrative discretion, which [the court] will review only to determine if administrative, legislative, or constitutional mandates were disobeyed or if the action constituted an abuse of discretion."¹⁰ Here, the court concludes that the Commission disobeyed legislative mandates and abused its discretion in allowing the petition to proceed by the local action method, so the court VACATES the Commission's approval of the annexation.

I. BACKGROUND

Alaska law allows cities to annex adjacent territory by two methods: legislative review and local action. Before beginning its analysis, the court finds it useful to provide a brief description of the key features of each method.

A. Legislative Review

The process for annexation by legislative review is outlined in Alaska's Constitution.¹¹ No vote is required to annex territory by legislative review; instead, the annexing municipality must hold a public hearing "within or near boundaries proposed for annexation" before submitting its petition to the Commission.¹² The Commission must then hold a one or more additional hearings "within or near the boundaries of the proposed change" before rendering its decision.¹³ Upon approving the annexation, the Commission presents the petition to the state legislature during the first ten days of any

⁹ *Mobil Oil Corp. v. LBC*, 518 P.2d 92, 98 (Alaska 1974).

¹⁰ *Port Valdez Co., Inc. v. City of Valdez*, 522 P.2d 1147, 1151.

¹¹ ALASKA CONST. art. X, § 12.

¹² 3 AAC 110.425(a),(d).

¹³ 3 AAC 110.550(a).

regular session.¹⁴ Unless the legislature disapproves of the proposed annexation "by a majority of the members of each house," the annexation will "become effective forty-five days after presentation or at the end of the session, whichever is earlier."¹⁵ The upshot of this process is that the Commission's approval of an annexation almost always means the annexation will take place.

Because it requires such limited public input, annexation by legislative review has been called "forced annexation" by its critics.¹⁶ However, the framers of Alaska's Constitution created the legislative review procedure expressly to insulate boundary-making from one-sided or purely political considerations. As the Alaska Supreme Court found in *Fairview Public Utility Dist. No. 1 v. City of Anchorage*, the rationale for legislative review, and for the creation of the Commission generally, was "that local political decisions do not usually create proper boundaries and that boundaries should be established at the state level."¹⁷ The litigation often attending Commission determinations (including this one) indicates that politics are hardly absent from boundary-making today, but legislative review nonetheless remains the most common method of annexation.¹⁸ The legislature has likewise affirmed the preference for legislative review, providing that a boundary change by legislative review "prevails over a boundary change initiated by local action, without regard to priority in time."¹⁹

¹⁴ AS 29.06.040(b).

¹⁵ *Id.*

¹⁶ Vi Jerrel and Doris Cabana, "Opposition to Annexation," in *Homer News* (April 24, 2003). Accessed at http://homernews.com/stories/042403/let_20030424024.shtml on March 21, 2014).

¹⁷ *Fairview Public Utility District, No. 1 v. City of Anchorage*, 388 P.2d 540, 543 (Alaska 1962)(citing Alaska Constitutional Convention, Committee on Local Government, Nov. 28 and Dec. 4, 1955); see also *LBC Regulations & Powers: Hearing on H.B. 133 before the H. Jud. Comm.*, 24th Leg. 36 (April 18, 2005).

¹⁸ *LBC Regulations & Powers: Hearing on H.B. 133 Before the H. Comm. on Cmty. & Reg'l Affairs*, 24th Leg. 8 (Feb. 24, 2005)(statement of Dan Bockhorst).

¹⁹ AS 29.06.040(d).

B. Local Action

The framers did, however, envision some circumstances where annexations would be approved by voters, rather than legislators. Thus, the Alaska Constitution also provides that the Commission "may establish procedures whereby boundaries may be adjusted by local action."²⁰ First, the Commission must, following a public hearing, approve the annexation.²¹ Then, the Commission's approval may be ratified or rejected by one of three local action methods: first, by "city ordinance if the territory [to be annexed] is wholly owned by the annexing city; second, by city "ordinance and a petition signed by all the voters and property owners of the territory;" and third, with "approval by a majority of votes....cast by voters residing in the territory and the annexing city."²² AS 29.06.040 sections (c)(1) and (c)(2) make clear that the votes of residents of the annexing municipality and the territory to be annexed may not be aggregated, but that a majority of votes from *each* area must approve the annexation before it can take place.

II. THE COMMISSION ABUSED ITS DISCRETION IN ALLOWING THE PETITION TO PROCEED BY LOCAL ACTION

At the decisional meeting, Commission Chair Chrystal opined that the Commission could not direct the City to switch the annexation method from local action to legislative review. Commission staff member Brent Williams seconded him, asserting that under 3 AAC 110.610 "you could go from legislative review to local action" but not "the reverse."²³ Thus, the Commission concluded that it could not send the petition back to the city to make the annexation more palatable to the villages and found that it had to

²⁰ ALASKA CONST. art X, § 12.

²¹ 3 AAC 110.150.

²² 3 AAC 110.150(1)-(3).

²³ Pub. Hearing Tr., at 302 (April 26, 2011).

rule on the petition in its present form. This stunted interpretation of the Commission's authority to change annexation methods does not have a reasonable basis: the interpretation is contradicted by case law and legislative history, and counterbalanced by regulations affirming the Commission's authority to alter petitions and to proceed by legislative review. Here, in fact, the particularities of Dillingham's petition required the Commission to change the annexation method to legislative review: proceeding by local action violated the respondents' due process rights.

A. The Commission has authority to specify the method of annexation.

Although the municipality makes the initial selection of annexation method when it prepares its petition, the Commission has authority to change the annexation method as it sees fit.²⁴ In *Port Valdez Co. v. Valdez*, the Alaska Supreme Court rejected the contention that the Commission had to proceed by "step annexation," finding instead that the Commission had discretion to choose, and that "the selection of annexation method made by the Commission... [was] controlling."²⁵ The Supreme Court's holding is supported by more recent legislative history. Testifying on behalf of the Commission at a hearing on a 2005 bill that prohibited aggregate votes in local action elections, Commission staff member Dan Bockhorst explained that "the petitioner... makes the initial determination as to the process it wants to pursue. However, in the course of considering the petition, that process can be amended."²⁶ Thus, both case law and

²⁴ See *Valdez*, 522 P.2d at 1151; *LBC authority to amend petition for municipal boundary change*, OAG, File No. J-66-585-81, *1, n.2 (Oct. 25, 1982); *Hearing on H.B. 133 Before the H. Comm. on Cmty. & Reg'l Affairs*, 24th Leg. 8-9 (Feb. 24, 2005)(statement of Dan Bockhorst, Staff, LBC); see also *LBC Public Meeting 7*, 15 (Jan. 11, 2007)(where Commissioners concluded they had authority under 3 AAC 110.660 to allow the City of Soldotna to annex a 1.6 acre lot "using the least controversial" and the "easiest method").

²⁵ *Valdez*, 522 P.2d at 1151.

²⁶ *Hearing on H.B. 133*, 24th Leg 8-9 (statement of Dan Bockhorst, Staff, LBC).

legislative history firmly support the Commission's authority to choose among annexation methods.

Nor is the Commission's authority to choose an annexation method limited by regulation. 3 AAC 110.610(a), the provision that the Commission claims supports its position, does not disallow conversion of local action petitions to petitions for legislative review at all. Rather, 3 AAC 110.610(a) *authorizes* converting petitions from legislative review to local action in certain circumstances, and says nothing about the reverse. Contrary to the Commission's assertions, this silence does not mean that local action to legislative review conversions are prohibited. Indeed, the Commission's discretion to guide and effectuate boundary changes in the absence of explicit authority has been regularly affirmed.²⁷ Moreover, the Commission's broad authority to alter petitions and to proceed by legislative review includes the authority to switch annexation methods.²⁸

a. The Commission's authority to alter petitions enables it to switch annexation methods.

The Commission may alter the annexation method by which a petition proceeds under 3 AAC 110.440(c) and 3 AAC 110.570(c)(1). 3 AAC 110.440 gives the Commission chair oversight over the Department of Commerce's technical review of a petition. Where "the petition or supporting materials are deficient in form or content," the department, with approval from the Commission, "shall determine whether the

²⁷ *Petitioners for Incorporation of Yakutat v. LBC*, 900 P.2d 721, 725-726 (Alaska 1995) (affirming LBC's power to redraw boundaries upon determination that boundaries in petition do not satisfy statutory requirements); *Oesau v. Dillingham*, 439 P.2d 180, 183-184 (Alaska 1968) (upholding LBC's authority to dissolve the City of Wood River in the absence of express authority); *LBC authority to detach an area from an organized borough*, OAG, File NO. 368-034-86, at *1-*2 (July 23, 1985) (concluding that the LBC has the authority to condition a detachment petition upon subsequent incorporation of a new borough); *LBC authority to amend petition for municipal boundary change*, OAG, File No. J-66-585-81, *1 (upholding LBC's authority to amend boundaries of proposed area to be annexed).

²⁸ See 3 AAC 110.140; 3 AAC 110.440(c); 3 AAC 110.570(c)(1).

deficiencies are significant enough to require new authorization for the filing of the corrected or completed petition."²⁹ Thus, 3 AAC 110.440(c) enables the Commission to rectify not only minor flaws in a petition, but also errors serious enough to require the petition to be refiled. If a petition is "deficient in form or content" because it followed the incorrect annexation method, then 3 AAC 110.440(c) authorizes the Commission to send the petition back to be refiled according to the proper method.

Even after the technical review of a petition has taken place, the Commission still has the opportunity to correct errors in the petition. Under 3 AAC 110.570(c)(1), if the commission determines that a proposed municipal annexation "must be altered or a condition must be satisfied before the proposed change can take effect, the commission will include that condition or alteration in its decision." Certainly, requesting the petitioner to recommence his petition according to an alternate method would be a significant alteration. However, the Commission is not limited to imposing minor alterations or conditions.³⁰ Indeed, the Commission may reconsider a prior boundary change if there was a "substantial procedural error in the original proceeding."³¹ The court sees no reason why the Commission could not, under 3 AAC 110.570(c)(1), correct an analogous procedural error, such as the choice of the wrong annexation method, before the boundary change becomes final.

b. The Commission's authority to proceed by legislative review also includes the authority to switch annexation methods.

²⁹ 3 AAC 110.440(c).

³⁰ See *LBC authority to detach an area from an organized borough*, OAG, File NO. 366-034-86, at *1-*2 (July 23, 1985)(concluding that the LBC could condition approval of detachment upon subsequent voter approval of incorporation of a new borough).

³¹ 3 AAC 110.580(e)(1).

The legislative review regulations reinforce the Commission's authority to change a petition's annexation method. 3 AAC 110.140 makes clear that *any* "territory that meets the annexation standards specified in 3AAC 110.090 – 3AAC 110.135 may be annexed to a city by the legislative review process," if the Commission determines that one of nine enumerated circumstances exists. The Commission's authority is *not* contingent on the petitioner having first specified a particular annexation method. Considered in light of the Commission's authority under *Valdez* and 3 AAC 110.440(c), 3 AAC 110.140 enables the Commission to switch a local action petition to one for legislative review if the petition is up to standards and falls within one of the nine circumstances. Here, the Commission did not even consider whether the requirements of 3 AAC 110.140 were met. Therefore, the Commission's conclusion that it could not convert the City's local action petitions to one for legislative review lacked a reasonable basis.

In fact, if the Commission had looked at 3 AAC 110.140(9) it would have found strong justification for proceeding by legislative review in Dillingham's case. 3 AAC 110.140(9) allows territory to be annexed by legislative review when "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."³² Here, the petition violated the statute governing local action elections – set forth in AS 29.06.040 – because no voters (or people at all) resided in the territory to be annexed. Thus, the "specific policies set out in... AS 29.06" would unquestionably be served by proceeding by legislative review.

³² 3 AAC 110.140(9).

B. Indeed, the violation of AS 29.06.040 required the Commission to convert the petition to legislative review.

Because the petition could not satisfy the dual election provisions of AS 29.06.040, the city's choice to proceed by local action was improper, and the Commission abused its discretion in *not* requiring the petition to proceed by legislative review. Agency action taken without first complying with a statutory requirement is invalid.³³ As explained above, AS 29.06.040 provides that local action annexations are only valid if a majority of votes from both the annexing municipality *and* the territory to be annexed approve of the annexation.³⁴ Aggregating the votes from both areas is not allowed.³⁵ Here, it is uncontested that no one resides permanently in the annexed portion of Nushagak Bay.³⁶ A vote, certainly, was never held in that area. Thus, only one of the two statutorily required votes could even take place. Because compliance with the local action requirements was impossible, the local action annexation was invalid and the petition should have proceeded by legislative review.

Holding otherwise would permit the City to manipulate the local action process to require less public involvement, rather than more. Where both the annexor and annexe are populated areas, local action elections ensure that both areas support the annexation. However, where the territory to be annexed is unpopulated, proceeding by

³³ See *State v. Eluska*, 725 P.2d 514, 516 (Alaska 1986)(acknowledging that Board of Game's failure to regulate subsistence hunting may have been invalid, but finding it did not constitute a defense to unregulated hunting); *United State Smelting, Refining & Mining Co. v. LBC*, 489 P.2d 140, 141-142 (Alaska 1971)(finding LBC's approval of boundary change invalid where it had first failed to comply with statutory mandate).

³⁴ AS 29.06.040(c)(1)-(2).

³⁵ *Id.*; see also *Hearing on H.B. 133 Before the Senate Committee on Regional Affairs 7* (May 1, 2006)(comments of Rep. John Coghill).

³⁶ To the extent that the Commission suggests that seasonal fishers may "populate" the bay (see e.g., Pub. Hearing Tr., at 320 (April 27, 2011)(comments of Chair Lynn Chrystal)), the court rejects this argument. Fishers do not spend enough time in the bay to establish residency for voting purposes, no procedures are in place to allow "residents" of Nushagak Bay to vote, and it is uncontested that no vote ever took place there.

local action avoids both the additional hearing required by the legislative review process and a meaningful election. This is exactly what happened here. The people whom the annexation would affect most seriously had inadequate opportunities for public comment, yet were also unable to vote.

C. Proceeding by local action violated the respondents' due process rights.

As explained above, the hearing requirements for annexation by local action differ from the hearing requirements for annexation by legislative review. Whereas a municipality wishing to annex by local action need not hold a hearing prior to submitting its petition to the Local Boundary Commission,³⁷ a pre-filing hearing *is* required for annexation by legislative review.³⁸ 3 AAC 110.425(a) provides that "*before* a petition for annexation by the legislative review process may be submitted to the department... [t]he prospective petitioner shall also conduct a public hearing on the annexation proposal" (emphasis added). Only after the hearing may the municipality file the petition with the Commission: the municipality must "submit evidence of compliance" with the hearing requirement along with its petition.³⁹

Here, the City chose to proceed by local action, so it did not hold a public hearing prior to filing the annexation petition.⁴⁰ Rather, the City merely placed copies of its proposed petition in three physical locations in Dillingham and on Dillingham's website, several weeks before filing the petition on July 2, 2010. It was not until late July that the city even provided copies of the petition to the villages.⁴¹ Written comments on the petition were allowed until October, 2010, but the only public hearing on the petition was

³⁷ 3 AAC 110.420

³⁸ 3 AAC 110.425(a),(d)-(e).

³⁹ 3 AAC 110.425(h).

⁴⁰ LBC Decision, at 1-2.

⁴¹ LBC Decision, at 3.

in Dillingham on April 25, 2011, almost ten months after filing and only a day before the Commission approved the petition.⁴² Thus, by the time local citizens were able to express their views on the petition, the petition had already been finalized, and, indeed, the Commission was about to render its decision. The Commission itself was uneasy with the timing of the public comment period. As Commissioner Harcharak observed at the decisional meeting, "I believe [the people who testified from the villages] should have been contacted prior to filing this petition, when the petition was being considered and drafted. Because right now it seems to be after the fact, and my concern is that the impact that it's going to have on those communities... it's going to have a negative impact on every one of them."⁴³ Having found that the City should have proceeded by legislative review, the court concludes that the failure to hold a pre-filing hearing violated the respondents' due process rights.

a. The notice violation was substantial.

The lack of a pre-filing hearing was a substantial due process infringement because the villages were not able to contribute to (nor, indeed, were even aware of) the preparation of the annexation petition. "Failure to adequately inform and include the public in decision-making is a matter of public importance."⁴⁴ Here, the City failed to include the outlying villages in its decision to annex a huge swath of a shared resource. Even though the disposition of the bay affected village residents directly, they were denied a chance to have their suggestions incorporated into the petition. By the time of the April 25 hearing, the LBC had only blunt tools with which to modify the annexation: it

⁴² LBC Decision, at 3-4 (two informational meetings had been scheduled for January 2011, but they were cancelled due to inclement weather).

⁴³ Pub. Hearing Tr., at 170 (April 26, 2011).

⁴⁴ *Mullins v. LBC*, 226 P.3d 1012, 1018-1019 (Alaska 2010)(discussing *Lake and Peninsula Borough v. LBC*, 885 P.2d 1059 (Alaska 1994)).

could either reject the petition, or it could attach conditions to approval. However, as the Chair noted, the Commission could not impose the types of conditions – such as tax exemptions for local fishermen – that the respondents were requesting.⁴⁵ By contrast, earlier participation by the respondents and other affected individuals at a pre-filing hearing might have enabled the City, whose taxation authority is not so restricted, to have included such suggestions in the petition itself. Thus, the erroneous decision to allow the petition to proceed by local action substantially infringed on the ability of the respondents to participate in the annexation process.

The subsequent vote by Dillingham residents did not rectify the failure to hold a pre-filing hearing. As the transcript of the April 25-26 hearing makes clear, the people who objected most strongly to the annexation are not Dillingham residents, but residents of outlying communities who are now obliged to pay taxes to Dillingham. Because they are not Dillingham residents, they were not able to participate in the vote.⁴⁶ However, they would have been able to participate in the pre-filing hearing. Hearing attendance under 3 AAC 110.425(a) is not limited to residents of the municipality doing the annexation, and the hearing need not even be held in that municipality. Rather, the hearing may be held “within or near the boundaries proposed for annexation.” Thus, presumably, the City could have scheduled the hearing (or hearings) in one of the affected communities, further facilitating public participation.

b. The remedy for the notice violation is remand.

⁴⁵ Pub. Hearing Tr., at 339 (April 27, 2011).

⁴⁶ Ekuk itself has only two permanent residents, but neither party presented concrete evidence about where the summer residents live during the rest of the year.

Where a government entity provides deficient notice of proposed boundary changes, and the notice violations are substantial, the boundary change is invalid.⁴⁷ In *Lake and Peninsula Borough v. LBC*, the school district filed a local action incorporation petition proposing to change the boundaries of the Lake and Peninsula Borough. Although the choice of annexation method was proper, the district failed to notify villages whose subsistence hunting and fishing grounds would be excluded from the new Borough. Later telephonic hearings on the proposed changes did not include the villages.⁴⁸ Determining that these violations were substantial, the court remanded to the Local Boundary Commission to reconsider the boundary change after complying with the statutory notice requirements.⁴⁹ Here, too, the notice violations were substantial, so the annexation was invalid. Therefore, the court remands the petition and orders the Commission to direct refiling in accordance with the requirements for legislative review.

CONCLUSION

The court finds that the Commission abused its discretion in not requiring the City of Dillingham to process its annexation petition according to the legislative review method. Because proceeding by local action caused a substantial violation of the respondents' due process rights, the court VACATES the annexation and REMANDS to the Commission to process the petition by legislative review.

Signed this 27th day of March, 2014 at Dillingham, Alaska.



Patricia Douglass

Patricia Douglass, Superior Court Judge

⁴⁷ *Mullins*, 226 P.3d at 1019 (finding that "public participation claims remain live and can be adjudicated where the public votes for adjudication"); *Lake and Peninsula Borough*, 885 P.2d at 1067.

⁴⁸ *Lake and Peninsula Borough*, 885 P.2d at 1060.

⁴⁹ *Lake and Peninsula Borough*, 885 P.2d at 1067.

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