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 MOTION FOR RECONSIDERATION

On March 27, 2014 this court granted the appeal of the Native Village of Ekuk having found that the annexation of Nushagak Bay was procedurally deficient. Both the Local Boundary Commission and the City of Dillingham moved separately for reconsideration. Addressing their arguments together, the court now DENIES both motions for reconsideration.

FACTS

A city may annex territory by two primary means: local action and legislative review. To proceed by the local action method at issue here, a majority of voters in both the annexing municipality and the territory to be annexed must vote in favor of the annexation. Proceeding by legislative review does not require a vote, but does require the municipality to hold two public hearings on the annexation petition, one before the petition is filed, and the second after. Here, the City proceeded by local action, even though the lack of a voting population in the Bay meant the City could not hold the two statutorily required votes. In its March 27 order, the court found that the Commission

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had abused its discretion in allowing annexation to proceed by local action when doing so violated the statute; that the annexation was invalid because there had not been two votes; and that the city had to proceed instead by legislative review. The court also found that the Commission could not simply submit the petition, as is, to the legislature, because the City had not held the pre-filing hearing that is a prerequisite for legislative review. The twin procedural deficiencies – the failure to hold two votes and the failure to hold a pre-filing hearing – amounted to a significant notice violation because they curtailed village residents' opportunities for public participation. Therefore, the court remanded the petition to the Commission, so that it could direct the City to refile the petition following a public hearing. These motions for reconsideration followed.

DISCUSSION

The Commission and the City take issue with different aspects of the court's March 27 order. The Commission asks the court to validate the local action annexation by allowing a letter of non-objection to stand in for a vote, while the City asks for the current petition to be submitted to the legislature, arguing that pre-filing meetings about annexation were equivalent to a public hearing and that the failure to hold a hearing violated neither notice requirements nor procedural due process standards. The court reaffirms its previous holdings. There is no precedent for treating a letter as a vote, and the law is clear that two votes are required, so Dillingham's annexation of Nushagak Bay with one vote was invalid. Similarly, the City's pre-filing meetings and workshops did not amount to a hearing because they failed to satisfy the requirements for pre-filing hearings under 3 AAC 110.425. Given the importance of a pre-filing hearing in ensuring that the villages had an adequate opportunity for comment, the Commission may not

simply submit the existing petition to the legislature. Rather, the City must refile the petition after holding a hearing and meeting the other procedural requirements for legislative review.

I. THE COMMISSION'S MOTION

Annexation by local action may take place by three different means: first, by ordinance if the territory is owned by the annexing municipality;[1] second, by city ordinance and a petition signed by all the voters and property owners of the territory;[2] and third, by approval of a majority of votes among voters in both the annexing municipality and the territory to be annexed.[3] Here, the City purported to proceed by the third method and held a vote in Dillingham on the question of annexation. However, because no one lives in Nushagak Bay, no vote could be held in the territory to be annexed. As the court stated in its March 27 order, the lone vote in Dillingham did not satisfy local action procedures. Therefore, the court found that the annexation was invalid, and ordered that the petition be filed according to legislative review procedures.

Now, the Commission asks the court to reconsider its decision, arguing that a letter of non-opposition from the Department of Natural Resources, the agency that manages the waters of Nushagak Bay, was either "analogous to a vote," making the annexation valid under 3 AAC 110.150(3); or amounted to a "petition signed by all the... property owners of the territory," making the annexation valid under 3 AAC 110.150(2). The court rejects both of these arguments, and reiterates its previous decision that the only proper way to annex the Bay was by legislative review.

A. The letter of non-objection is not "analogous to a vote."

[1] 3 AAC 110.150(1).
[2] 3 AAC 110.150(2).
[3] 3 AAC 110.150(3)(A)-(B).

Nothing in the case law or legislative history indicates that an agency can avoid the democratic process by obtaining assurances that another agency does not object to the proposed action. Indeed, the Commission cites no authority for this proposition. Neither the local action statute, AS 29.06.040, nor the local action regulation, 3 AAC 110.150(3), allow substitutions or alternatives to voter approval for municipal annexations by local action. By contrast, changes to the Commission's local action regulations, as well as the legislative history of AS 29.06.040, strongly support the conclusion that annexations under 3 AAC 110.150(3) may only take place after two separate votes.

The elimination of provisions for annexing uninhabited territories with *one* vote supports the conclusion that two votes are now always required. An earlier version of 3 AAC 110.150 allowed for local action annexation of uninhabited areas with only one vote. Thus, former 3 AAC 110.150(5) provided that a municipality could annex uninhabited territory with "approval by a majority of the voters who vote on the question within the annexing city...."[4] However, subsection (5) was dropped from the current version of 3 AAC 110.150, which no longer specifically addresses annexations of uninhabited areas, nor lists equivalents to a vote where a vote is not possible. Therefore, under the current version of 3 AAC 110.150, a municipality may only annex territory by means of a vote if voters in *both* the municipality and in the territory to be annexed approve the annexation.

The legislative history of AS 29.06.040 underscores the conclusion that two separate votes are essential to validating an annexation. The version of the local action statute in effect prior to 2006 allowed for aggregation of votes cast in both the annexing

[4] 3 AAC 110.150(5) (July 2002).

municipality and the territory to be annexed.[5] Concerned that aggregation would allow pro-annexation municipalities (generally with larger populations than the territories they were annexing) to overwhelm any opposition by voters in areas to be annexed,[6] the legislature eliminated provisions for aggregate votes.[7] The current version of the statute requires two votes to validate an annexation, and does not make exceptions for annexations of uninhabited territories.[8] Because, by definition, uninhabited areas do not have a voting population, AS 20.06.040 has the effect of requiring most annexations of uninhabited territory to proceed by legislative review.[9] This result is consistent with the legislature's concern about municipalities acquiring territory by force of numbers, as well with the longstanding preference in Alaska for making significant boundary decisions at the state level.[10]

In light of the legislative and regulatory history of eliminating alternatives to the two-vote requirement, the court declines to accept a letter of non-objection as a substitute for one required vote, especially when there is no precedent for such a course of action.

B. The letter of non-objection does not validate the annexation under 3 AAC 110.150(2), either.

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[5] *See also* 3 AAC 110.150(4) (July 2002).
[6] *See, e.g., Hearing on H.B. 133 Before the Senate Committee on Regional Affairs* 7 (May 1, 2006)(comments of Rep. John Coghill).
[7] AS 29.06.040(c)(1)-(2).
[8] AS 29.06.040.
[9] The exceptions would be when the uninhabited territory is owned by either a municipality (and can be annexed by ordinance under 3 AAC 110.150(1)) or by people who unanimously approve of the annexation (and can be annexed by petition plus and ordinance under 3 AAC 110.150(2)).
[10] *Fairview Public Utility District, No.1 v. City of Anchorage*, 368 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).

The Commission never argued in the proceedings below that DNR's letter was the equivalent of a petition that would, in conjunction with a city ordinance under 3 AAC 110.150(2), allow the annexation to take place without any vote at all. Certainly, the Commission never suggested that the vote in Dillingham was entirely incidental, or that the annexation would have been valid in its absence. Parties may not generally raise arguments for the first time on appeal, so the court will not consider the Commission's arguments now. The court does observe, however, that DNR is not the owner of the Bay, but merely the manager of it; that the agency's letter does not take the form of a petition, but expressly states that the agency is not is "not taking a position in support of the annexation;"[11] and that the City never enacted an ordinance in conjunction with or in response to the letter. Without the property owner, signed petition, or ordinance required by 3 AAC 110.150(2), the court fails to see how the annexation could be valid under this provision.

C. Conclusion

The court rejects the Commission's arguments that DNR's letter of non-objection was equivalent to a vote or a petition. Because the City held only one vote on the question of annexation, its attempt to annex the Bay by local action violated 3 AAC 110.150(3) and AS 29.06.040. The Local Boundary Commission abused its discretion in allowing the City's petition to proceed by an annexation method that violated the law, and the annexation itself was invalid.

II. THE CITY'S MOTION FOR RECONSIDERATION

Prior to filing a petition for processing by legislative review, a municipality must hold a hearing that addresses the details of the petition and at which the public is allowed to

[11] Thomas E. Erwin, DNR Commissioner, "Non-Objection for Dillingham Annexation," at 1 (May 14, 2010).

comment.[12] The city did not hold such a hearing, but contends that workshops and city council meetings held in 2009 and 2010 provided equivalent opportunity for public comment. Only two of these meetings were held after copies of the petition were made public, but notice for both of them fell short of that required under 3 AAC 110.550, and the City neither provided information about the items presented or discussed at the meetings, nor furnished the Commission or the court with an audio recording or transcript of the proceedings. The court therefore finds that neither meeting was an adequate substitute for a full pre-filing hearing.

The failure to hold a pre-filing hearing and the decision to proceed by a deficient local action process significantly curtailed the ability of village residents to participate in the annexation process. As the court stated in its March 27 order, they did not have adequate opportunity to comment on the petition but were also unable to vote on it. The court in that order used "due process" and "notice" violations interchangeably. The court finds that it need not decide whether the failure to hold a pre-filing hearing violated procedural due process because notice violations alone can invalidate administrative decisions.[13] Thus, the court reiterates that without a pre-filing hearing, villages received inadequate notice of the annexation and opportunity to comment on it. Therefore, before the petition can properly be submitted to the legislature for review, it must be refiled following a full public hearing.

A. The City's pre-filing process was not the functional equivalent of a hearing under 3 AAC 110.425(a).

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[12] 3 AAC 110.425.
[13] *See City of St. Mary's v. St. Mary's Native Corp.*, 9 P.3d 1002, 1010 (Alaska 2000); *Lake and Peninsula Borough v. LBC*, 885 P.2d 1059, 1062-1063 (Alaska 1994).

Under 3 AAC 110.425, a municipality that annexes territory by legislative review must hold a hearing on the petition prior to filing the petition with the Commission. The hearing must be publicly noticed pursuant to 3 AAC 110.550 – that is, the date, time and location of the hearing must be advertised in a newspaper at least three times, announced over the radio, and posted in multiple locations around town. In addition, the "prospective annexation petition and the summary must be made available to the public on or before the first publication of notice of the hearing."[14] The hearing itself must address the details of the prospective annexation petition, including the "appropriate annexation standards and their application to the annexation proposal, legislative review annexation procedures, the reasonably anticipated effects of the proposed annexation, and the proposed transition plan."[15] The public must be allowed to comment on the proposal at the hearing. Following the hearing, the petitioning municipality must submit evidence that it has properly noticed the hearing, as well as "a written summary or transcript of the hearing, a copy of any written materials received during the hearing, and an audio recording of the hearing."[16]

Here, the City concedes that it did not hold a hearing on the petition, which was published in Dillingham on June 14, 2010, prior to filing it with the Commission on July 9, 2010.[17] Instead, the city argues that city council and "Public Outreach Committee" meetings and a series of annexation workshops in 2009 and 2010 are the equivalent of the pre-filing hearing under 3 AAC 110.425. The court disagrees.

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[14] 3 AAC 110.425(c).
[15] 3 AAC 110.425(d).
[16] 3 AAC 110.425(h).
[17] The City did not provide copies of the annexation petition to the villages until July 26, 2010, after the petition had already been filed.

Of all the meetings to which the City refers, only two – an annexation workshop held June 23, 2010[18] and a city council meeting held June 17, 2010[19] were held after the publication of the annexation petition. Thus, only these two meetings could potentially have provided the community an opportunity to review the petition and comment on it equivalent to that offered by a pre-filing hearing under 3 AAC 110.425. However, despite their timing, these meetings are still a far cry from public hearings.

First of all, the City did not notice these meetings as extensively as required pursuant to 3 AAC 110.425: while it advertised them over the radio, it did not publish notice in any newspaper.[20] Second, the meetings took place before the villages had even received the petition, which was not until late July. Third, there is no evidence that either meeting addressed the petitions in the same depth that a hearing would have. The city council meeting only addressed annexation as part of the council's "unfinished business."[21] The city does not describe the content of the June 23 annexation workshop at all, except to say that the workshops generally were held "to discuss the developing petition and answer questions."[22] The city did not provide an audio record or transcript or even a summary of either meeting, as would have been required under 3 AAC 110.425(h). In the absence of compliance with notice requirements, evidence that the petition and the implications of the annexation were discussed in detail at the meetings, or evidence that the Commission considered the comments made at the meetings in evaluating the city's petition, the court declines to find that either the city

[18] Dillingham Consultation Report, at 4 (Nov. 15, 2011).
[19] *Id.*, at 5.
[20] *Id.*
[21] *Id.*
[22] *Id.*, at 4.

council meeting or the annexation workshop was the functional equivalent of a pre-filing hearing.

B. Without a pre-filing hearing, village residents did not have an adequate opportunity for public participation.

The City makes much of the post-filing process, including a comment period and a public hearing held on the eve of the Commission's decisional meeting, and argues that residents of the villages had ample opportunity to voice their opinions before the Commission approved the annexation. However, this emphasis on post-filing process glosses over the significance of adequate pre-filing process. As explained above, legislative review regulations require a pre-filing hearing, and the City did not have one. This shortcoming is significant. The standards for procedural due process – which require notice and a hearing *before* a person is deprived of a protected property interest – reinforce the court's conclusion on this point. As the Alaska Supreme Court noted *DNR v. Greenpeace,* "if the right to notice and a hearing is to serve its full purpose, then, it is clear that [the hearing] must be granted at a time when the deprivation can still be prevented."[23]

Here, village residents faced a significant economic burden – one that the neither the City nor the Commission has discounted – associated with the annexation. Their best opportunity to mitigate – for instance, by proposing revenue sharing options, tax breaks, altered boundaries that excluded, e.g., set-net sites used by villagers from the territory to be annexed – was before the petition had been submitted to the Commission. Pre-filing meetings that were not adequately advertised and that did not discuss the proposed petition or its specific implications did not provide this same

[23] *DNR v. Greenpeace*, 96 P.3d 1056, 1064 (Alaska 2004).

opportunity. By contrast, a full pre-filing public hearing, which is required by regulation, would have offered an irreplaceable opportunity for residents' specific suggestions to be incorporated into the petition that was submitted to the Commission. Because there was no such hearing, the respondents denied adequate opportunity for public participation.

C. Conclusion

Because the pre-filing process failed to satisfy the requirements of 3 AAC 110.425, the Commission may not submit the current petition to the legislature until a pre-filing hearing has been held.

III. CONCLUSION

For the foregoing reasons, the Commission's and the City's motions for reconsideration are DENIED.

Signed this 16 day of May, 2014 at Dillingham, Alaska.

Patricia Douglass, Superior Court Judge

I certify that on 5/19/14 a copy of this document was faxed to the attorneys of record or other

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