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FROM THE DESK OF:
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September 21, 2015

LBC Distribution List (via electronic mail)

Local Boundary Commission
Alaska Department of Community,
Commerce, and Economic Development
550 West 7th Ave., Suite 1640
Anchorage, AK 99501

Re: Local Boundary Commission Meeting of September 25, 2015;
Proposed Designation of DCRA to Prepare Borough Petition;
Consolidation of Manokotak Annexation Petition with Dillingham
Annexation Petition and/or With Borough Petition

Dear Commissioners:

On behalf of the City of Manokotak, I submit the following comments regarding the notice of the LBC's upcoming September 25, 2015 meeting. The notice indicates that the meeting will address (1) authorization for DCRA to submit a borough incorporation petition, as a "person" under 3 AAC 110.410(d) and (2) potential consolidation of the Dillingham and Manokotak city annexation petitions with such borough incorporation petition. LBC staff has explained that, even though these two topics were raised at the Commission's prior (September 16, 2015) meeting, they will be revisited in the upcoming meeting due to technical problems with the Commission's teleconferencing of the prior meeting. The following comments will update comments from my letter to the Commission dated September 15.

Borough Petition.

Manokotak has been opposed to prior proposals for a borough in the Nushagak Bay region, as have other villages in the area. No borough petition featuring the requisite number of petitions signers under A.S. 29.05.060(7) has been brought forward.

Nevertheless, it is premature for Manokotak to take a position in opposition to a borough petition brought by DCRA. The draft petition the agency recently submitted is incomplete and presumably subject to change. Pending completion of a final DCRA petition, Manokotak will reserve judgment as to whether to support or oppose it.

However, Manokotak is skeptical that DCRA will prepare a borough petition sufficiently beneficial to Manokotak because (1) it appears that the borough would be dominated by Dillingham, with insufficient assurances of benefits to Manokotak and (2) as clarified by the Commission's staff at the September 15 meeting, the borough incorporation procedure would feature no election by residents of the proposed borough. While the legislature has, during the initial stages of borough development in the early 1960's, formed "mandatory" boroughs, such legislative actions have not occurred since then, and the Commission itself has never adopted a process to impose borough formation on any region. There is no good cause to initiate such a "top down" process now.

Additionally, the process urged by DCRA is fraught with confusion and legal risk that any resulting borough might be struck down. While Manokotak is not threatening to bring any legal challenge, many individuals and entities will have standing to do so, and it is in the Commission's interest to have the process fully vetted by its own counsel (if this has not already occurred) before appointing DCRA to prepare a petition.

Discussion of the potential legal issues here is necessarily technical.

LBC staff made clear that the procedure proposed by DCRA would *not* involve a vote or election. It would therefore not involve the petition procedure heretofore used by the LBC, wherein a petition with requisite voter signatures is filed under A.S. 29.05.060, and an election is held under A.S. 29.05.110.

An alternative, but never before used procedure arguably exists under a 2006 statute, A.S. 29.05.115, wherein the LBC can "submit a proposal for borough incorporation" to the legislature, but this same statute states that this "may not be construed as granting authority to the Local Boundary Commission to propose borough incorporation." Nevertheless, Manokotak had previously understood that this was the statutory authority under which a DCRA petition would instead proceed, but LBC staff stated unequivocally at the Commission's September 15 meeting that this was *not* the case. Staff suggested that the DCRA petition would instead proceed under authority and Title 44, but the only conceivable statute that might apply in that Title is A.S. 44.33.812(a)(3), which authorizes the LBC to consider a "local government boundary change" requested of it by the Commissioner of DCCED; however that statute states that "'boundary change' may not be construed to include a borough incorporation".

At the LBC's recent meeting, staff also made clear that the DCRA-proposed borough petition would be pursued under the "legislative review" method. This further implied that the DCRA proposal was to be considered under A.S. 29.05.115, concerning incorporation with a legislative review, rather than under the procedure for voter-initiated borough petitions under A.S. 29.05.060, which involves an

election, not a legislative review. Again, however, staff denied that section .115 was being relied upon.

The current notice states only that the petition would proceed under the Commission's regulation, 3 AAC 110.410(d). Regulation section .410 identifies various parties who may bring a petition for proposed action by the Commission. These include voters initiating a petition for municipal incorporation, under section .410(10)(B), and a "person designated by the Commission," under subsection .410(d). The regulation does not go further to describe the procedure to be followed once a petition is initiated. Again, there are only two procedures established by statutes: (1) a voter-initiated petition under A.S. 29.05.060, which must follow the "normal" LBC procedures for borough incorporation, up to an including a voter election, and (2) incorporation with legislative review under A.S. 29.05.115, which requires at least two public hearings in the area proposed for incorporation. Article X, Section 3 of the Alaska Constitution states that boroughs ". . . shall be established in a manner and according to standards provided by law." The regulation, section .110 does not identify any procedure or standards different from those described in A.S. 29.05.060, which requires an election.

As stated by the undersigned at the Commission's last meeting, Manokotak seeks only to bring these substantial questions to the attention of the Commission before it proceeds. Manokotak requests that with the assistance of its counsel, the Commission clarify, for the benefit of the public, the legal authority for proceeding with an evaluation a DCRA-sponsored petition, and describing the procedures and standards by which this would be evaluated.

Consolidation of Dillingham and Manokotak Annexation Petitions;
Consolidation of Annexation Petitions with Borough Petition.

If No Borough Petition Is Authorized:

Regardless of whether the Commission chooses to authorize filing of a DCRA-sponsored borough petition, the Dillingham and Manokotak city annexation petitions should be consolidated. Manokotak requested such consolidation prior to the Commission's September 15 meeting; however, there was no motion to approve this request and it was therefore neither granted nor denied. Manokotak's annexation petition seeks portions of the same boundaries sought by Dillingham's petition. Consolidated procedures on the two petitions, including the Commission's hearings, will greatly enhance the affected public's participation in both matters, resulting in a reasoned, balanced and defensible Commission decision. Such consolidation should not delay the final processing of the first-filed Dillingham annexation. Manokotak's petition was filed September 1, and its request for consolidation was filed September 9. Assuming a normal staff and Commission timetable, a consolidated process would still result in final decisions, exhausting reconsideration times, significantly prior to the January, 2017 legislative session - - which is the earliest Dillingham could proceed even without consolidation.

Dillingham's counsel opposed consolidation of the city annexation petitions by letter dated September 14, but offered no good reasons why consolidation should be denied. Dillingham argues that the Manokotak petition is not now "pending action by the Commission" under 3 AAC 110.430, because the Commission's staff has not yet completed technical review and accepted the petition. This circumstance is directly addressed by 3 AAC 110.640(c), which states that

. . . the commission may postpone proceedings on a petition that has been accepted for filing to allow concurrent consideration and action on another petition that pertains to some or all the same boundaries and that has either been accepted for filing or is anticipated to be filed. (Emphasis added.)

This same regulation then goes on to state that the Commission may postpone proceedings "for an anticipated competing petition" if the latter is received by the department within 90 days after first publication of notice of the earlier petition. Manokotak's petition certainly is "anticipated to be filed", and was submitted to LBC staff well in advance of the 90 day deadline. As for the request for consolidation, the Commission can grant this, conditional upon DCRA acceptance for filing of Manokotak's petition after technical review and receiving any corrections of deficiencies; or it may act to postpone the Dillingham petition actions until Manokotak's annexation petition is either accepted or rejected by the department.

Dillingham seeks a "rush to judgment" by the Commission. Based upon its own faulty prior petition - - which it now blames on the department and the Commission - - Dillingham now opposes any delay on its own borough-like¹ annexation. Dillingham seeks to have its city annexation approved now, arguing that its boundaries can be "adjusted in the future" to accommodate either a Manokotak annexation or Dillingham census area borough, if approved later.

Such a rush to judgment is not warranted. If, as Dillingham asserts, the department's technical review may reveal any deficiencies in the Manokotak petition, Manokotak commits to promptly remedying these, such as to allow the Commission's handling of both annexation petitions well in advance of the 2017 legislative session.

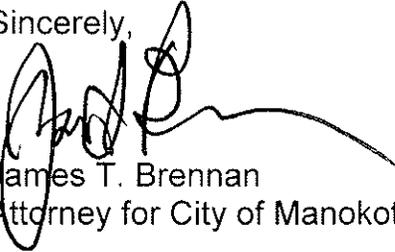
If a DCRA-Sponsored Borough Petition Is Authorized:

If the Commission approves DCRA's preparation of a borough petition, under 3 AAC 110.410(d) or otherwise, then the Dillingham annexation and Manokotak annexation petitions should be consolidated with this. A borough petition and the two city

¹ In many of its arguments, Dillingham's annexation petition is supported by the logic that Dillingham is a "hub" for Nushagak Bay.

annexation petitions present strongly interrelated questions, such that simultaneous examination of these by the Commission will assure consistency and promote fairness in its treatment of each petition. If a DCRA petition is filed, the City of Manokotak supports consolidation of the three petitions.

Sincerely,

A handwritten signature in black ink, appearing to read 'James T. Brennan', with a long horizontal flourish extending to the right.

James T. Brennan
Attorney for City of Manokotak

JTB;mb
3854/012