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Local Boundary Commission

Reconsideration Decision

In the matter of the June 10, 2011, request by respondent Native Village of Ekuk for the LBC to reconsider its decision approving the petition by the City of Dillingham to annex approximately 396 square miles of submerged land and 3 square miles of land

PROCESS AND PROCEEDINGS

3 AAC 110.580 (Reconsideration) states that:

“(a) Within 18 days after a written statement of decision is mailed under 3 AAC 110.570(f), a person may file an original and five copies of a request for reconsideration of all or part of that decision, describing in detail the facts and analyses that support the request for reconsideration.

(b) Within 30 days after a written statement of decision is mailed under 3 AAC 110.570(f), the commission may, on its own motion, order reconsideration of all or part of that decision.”

On April 26, 2011, in accordance with 3 AAC 110.570, the LBC held a duly noticed decisional meeting regarding the City of Dillingham’s annexation petition. The commission voted 5 to 0 to conditionally approve the annexation petition, as allowed under 3 AAC 110.570(c)(1).

On June 10, 2011, the respondent Native Village of Ekuk filed a request for reconsideration. The reconsideration request was received within the 18 day period outlined in 3 AAC 110.580(a). The request had seven points. LBC staff (staff) notified the commissioners of the request.

A commissioner requested an analysis and recommendations from staff and counsel. Staff wrote an analysis and recommendation for LBC outlining all the points mentioned in the reconsideration request. The staff recommended that reconsideration of points 1 and 2 be granted. Staff recommended that the commission not reconsider its decision based on points 3 - 7.

The commission met on June 24, 2011, to discuss the requested reconsideration. Both parties were given the opportunity to speak (only the respondent was present and spoke). The LBC approved by a 4-0 vote to reconsider the annexation decision to address matters of a controlling principle of law concerning points 1 and 2 only.

The LBC voted 4-0 to relax the rules to allow either party to provide a brief concerning reconsideration within 10 days after receiving the minutes. Both parties’ briefs were timely received. The staff then wrote a report analyzing the briefs and sent the report to the commission on September 28, 2011. The report recommended that the LBC approve reconsideration on points 1 and 2. The report said that:

Staff believes the intent of the commission in placing the conditional approval on the petitioner needs to be clear to all parties. The condition's intent must be adhered to in order for any approval of the petition to meet the needs of the petitioner, respondent, and ultimately the affected communities and individuals. If the petitioner truly puts forth a good faith effort to satisfy the condition, as indicated in the respondent's brief,

"... it may come to pass that the respondent will no longer be aggrieved by the annexation and an appeal will no longer be necessary. Therefore, it makes good sense and promotes judicial economy, for the commission to retain jurisdiction until after the parties go through the process mandated by the commission."

We recommend that the LBC approve the point 1 reconsideration request to make the petition final upon determining whether the condition is met or not. We recommend that the LBC meet after the petitioner submits its report, in order to determine whether the petitioner met the condition. We further recommend that the LBC grant the point 2 reconsideration request by making the condition part of 3 AAC 110.135. We recommend that the LBC limit the reconsideration of points 1 and 2 to those grounds.

On October 4, 2011, the LBC met to discuss whether or not to approve the reconsideration. The LBC voted to approve reconsideration of point 1 by a 5 – 0 vote. The LBC voted to approve reconsideration of point 2 by a 5 – 0 vote.

FINDINGS

3 AAC 110.580 (e) outlines the following grounds for reconsideration:

"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 proceeding;
- (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."

If the commission finds one of the above mentioned circumstances has been determined, it will grant reconsideration. 3 AAC 110.580 (f) further outlines that,

"If it [LBC] orders reconsideration or grants a request for reconsideration within 30 days after the decision was mailed under 3 AAC 110.570(f), the commission will allow a petitioner or respondent 10 days after the date reconsideration is ordered or the request for reconsideration is granted to file an original and five

copies of a responsive brief describing in detail the facts and analyses that support or oppose the decision being reconsidered. The petitioner or respondent shall provide the department with a copy of the responsive brief in an electronic format, unless the department waives this requirement because the petitioner or respondent lacks a readily accessible means or the capability to provide items in an electronic format.”

Per 3 AAC 110.580 (g),

Within 90 days after the department receives timely filed responsive briefs, the commission, by means of the decisional meeting procedure set out in 3 AAC 110.570(a) - (f), will issue a decision on reconsideration. A decision on reconsideration by the commission is final on the day that the written statement of decision is mailed, postage prepaid, to the petitioner and the respondents.

The following seven reasons were outlined in the respondent’s request for reconsideration:

Point # 1 Procedural Error/Appeal & Language Clarification

There may have been a substantial procedural error committed by the commission in advising the parties of the deadline for an appeal in order to preserve any claims arising out of the decision. It is not made clear in the decision that it is intended to be a final agency decision and whether the appeal deadline is measured from the mailing date of the decision or some other date in the future. There are statements made in the decision that indicate that the decision is not a final agency action on this matter. The decision states that the commission voted 5 to 0 to conditionally approve the annexation petition. The condition imposed by the commission requires that Petitioner shall attempt to meet with [the] cities of Aleknagik, Clark's Point,

New Stuyahok, Ekwok, and Manokotak, and the entities of New Koliganek Village Council (DBA Native Village of Koliganek) and respondent Native Village of Ekuik regarding post-annexation financial matters affecting such parties due to the annexation [;] and file a report of the meeting attempts, whether or not held, and meetings held, if any, with the LBC by [no later than] 11/30/2011.

The Commission's order states:

. . . the uniqueness of the territory proposed for annexation coupled with the longstanding tribal, cultural, and economic relationships that persist in this region demand that additional conversation among the villages, tribal entities, municipalities, and the City of Dillingham be held. The conditional approval of the petition coupled with the finding that the facts presented to the commission demand that further discussion be held by a clear deadline are not statements consistent with finality, nor should they be. Confusion is further compounded by the notice regarding appeal rights contained in the decision which does not

provide that it is this decision that is final or whether it refers to a later decision occurring after satisfaction of the condition. The commission is requested to reconsider its decisional statement and correct it to make it clear that it will be considered a final decision only after the condition has been satisfied.

The conditional approval of the petition coupled with the finding that the facts presented to the commission demand that further discussion be held by a clear deadline are not statements consistent with finality, nor should they be. Confusion is further compounded by the notice regarding appeal rights contained in the decision which does not provide that it is this decision that is final or whether it refers to a later decision occurring after satisfaction of the condition. The commission is requested to reconsider its decisional statement and correct it to make it clear that it will be considered a final decision only after the condition has been satisfied.

Finding

The LBC approves reconsideration on point 1. We approve respondent's request that the decision will be considered final only after the condition is satisfied.

The condition reads:

“Petitioner shall attempt to meet with the cities of Aleknagik, Clark’s Point, New Stuyahok, Ekwok, and Manokotak, and New Koliganek Village Council (dba Native Village of Koliganek) and the respondent Native Village of Ekuk regarding post-annexation financial matters affecting such parties due to the annexation[;] and file a report of the meeting attempts, whether or not held, and meetings held, if any, with the LBC by [no later than] 11/15/2011.”

The due date for motion was later changed per both parties' request, to reflect a report due date of November 30, 2011.

The decision has been mailed. Per 3 AAC 110.570(g) the decision is final when it is mailed (unless reconsideration is requested or ordered). But, respondent states on page 11 of its brief that “[o]nce the commission is presented with the petitioner’s report, there is a possibility that the parties will be affected by a voiding of the petition . . .” The decision could indeed be voided, and we consider that in this decision.

The LBC will hold another meeting after the petitioner submits its report. The meeting’s purpose would be for the LBC to review the report and determine if the condition has been met. Originally, the staff would report to the LBC if the petition had been received. It is more appropriate for the commission to consider whether the condition has been met, rather than the staff reporting whether the report has been received. The decision would need to be reissued to reflect whether or not the petitioner met the condition.

Approving this reconsideration request will help all concerned. It would, in effect, add “teeth” to the condition because now the LBC itself would review the report and determine if the condition was satisfied. This would benefit the respondent because there is the possibility that the petitioner would not meet the condition. It is also possible that the discussions would result in a financial agreement between the parties (although not required by the condition). The respondent (and the other entities and communities specified in the condition) would further benefit because the petitioner would possibly go to further lengths in meeting and discussing with the specified communities and entities. Such efforts would be consistent with the intent of the condition. While the petitioner would no doubt independently exercise good faith efforts, having the condition undergo commission review would be an incentive to further those efforts.

We find that approving the reconsideration request for point 1 will promote even more dialogue. We predict that the specified communities and entities, while still presumably unhappy with the annexation, will feel more satisfied because they have been heard out. This will help the petitioner because the more satisfied that the communities and entities specified in the condition are, the more likely it is that the voters will approve the annexation.

Making the petition’s finality depend upon the LBC determining if the condition was met would not unduly delay the petition. A LBC meeting can be arranged soon after the petitioner submits its report to determine if the condition was met. The appropriate venue is a meeting, and not a hearing, as respondent suggests.

The LBC approves the reconsideration of point 1. The LBC will not consider the petition final until the LBC has determined in a future meeting whether the condition was met. If the LBC determines in that meeting that the condition was met, then the decision would be final (upon the mailing of the decision).

Point # 2 Procedural Error/Decisional Meeting & Decisional Statement Differences

There has been a substantial procedural error committed by the commission in that the statement of decision does not reflect a full and fair rendition of the decision announced during the decisional meeting. Admittedly, the decisional meeting was held under unusual circumstances and as a result there may be confusion as to what transpired. It began late in the evening following the conclusion of two days of hearings on the merits of the City's petition. The decisional meeting extended until 1 AM of the following day.

Respondent believes that proper administrative procedure requires that the statement of decision contain a discussion of the salient issues considered. This is reinforced by a regulation adopted by the commission which provides: Within 30 days after the date of its decision, the commission will issue a written decision explaining all major considerations leading to the decision.

Based on information and belief, the decisional statement issued on May 26 does not accurately reflect the contentions of respondent made regarding salient issues and what was decided regarding those contentions by the commission during the meeting. It is a violation of procedure for the decisional statement to omit any of the major considerations that led to the commission's decision.

The commission imposed a condition on the approval of the petition. The condition was imposed because there was reluctance on the part of a majority of the membership of the commission to determine that the annexation was in the best interests of the state.

Respondent recalls that at least three members of the commission expressed concerns that the annexation would unduly harm residents of the Nushagak River watershed who are dependent on the fishery for their income. Evidence of this harm was a salient issue raised by respondent's claim that the annexation was not in the best interests of the state. But none of these major contentions are mentioned or considered in the decisional statement. The condition adopted by the commission was the result of a compromise which permitted the concerned members to vote to find that the petition was in the best interest of the state.

The decisional statement declares that the commission finds that the petition as presented is in the best interests of the state without discussion of the issues and contentions of the parties and the department regarding that mandatory statutory standard. The decision makes it seem that the condition imposed on the petitioner was unrelated to the best interest determination and was only added so that the parties could hold additional conversations about longstanding tribal, cultural and economic relationships. This is in variance with the way in which the decisional meeting unfolded and does not faithfully record that the condition was a major consideration for the best interest finding of the commission.

The decisional statement does not accurately record the nature of the condition as understood by respondent. Upon conclusion of the decisional meeting, respondent believed that the condition imposed would require the City of Dillingham to meet with the communities of the region to attempt to agree on a plan to lessen the financial impact of a raw fish tax on residents of the Nushagak River watershed. Respondent understood that the petition would not be considered approved until after a report of the meeting was filed with the commission. It was understood by respondent that because the commission has the duty to determine whether the petition is in the best interests of the state, it was retaining the ability to undertake further proceedings if it believed the meetings did not provide a remedy that would make the annexation serve the best interests of the state. The commission is requested to reconsider the statement of decision and to accurately and faithfully include all of the major considerations leading to the decision as required by regulation.

Finding

The condition had been placed as part of 3 AAC 110.900(c) (Transition) in the decision. The appropriate place for the condition is instead 3 AAC 110.135 (Best Interests of the State). The condition has been, and remains, a requirement that petitioner must meet.

3 AAC 110.570(c) concerns the LBC's power to place conditions as part of approving a petition. In taking a closer look at 3 AAC 110.570(c), it seems that the LBC can add a condition only to enable a defective petition to meet the standards and be in the best interests of the state.

Reconciliation can be within the best interests of the state standard of 3 AAC 110.135. In placing the condition, the LBC's goal was for the petitioner to meet with the specified entities and communities regarding post-annexation financial matters affecting such

parties. While an agreement to share tax resources is possible, the condition does not call for it. It does say that the petitioners shall attempt to meet with the specified communities and entities regarding post-annexation financial matters affecting such parties and file a report of the meeting attempts, whether or not held.

We do not agree with respondent's suggestion that the condition be amended "so that the petitioner is required [emphasis added] to consult. . . ." Such a modification seems to us to be beyond the grounds for reconsideration. Even if it were within the grounds, we made it clear at the decisional meeting that we sought a good faith attempt, not a rigid requirement. Imposing such a requirement would effectively increase the condition's requirements by imposing a rigid checklist of officials consulted which the petitioner would have to meet. That does is not part of the condition's letter or spirit. We make the condition part of 3 AAC 110.135, but do not change the condition's wording.

We reject respondent's argument that the LBC has delegated to the petitioner oversight of whether the condition is met. The state, through the LBC, always had oversight of the condition because it had required that a report be submitted. By meeting after the report is submitted to determine if the condition was met, the LBC further increases its oversight.

We approve the reconsideration of point 2 by placing the condition under 3 AAC 110.135.

Point # 3 Delegation of Powers

If it was the commission's determination that it did not intend to retain any power to review compliance with the condition imposed on the petitioner, then respondent requests reconsideration on the alternative ground that the commission failed to address a controlling principle of law. The effect of imposing a non enforceable, non reviewable condition to resolve a mandatory standard for annexation is that the commission made an unlawful delegation to the petitioner of the power of determining a means to satisfy the requirement that the annexation be in the best interests of the state. In making this delegation, the commission failed to address the provision of any explicit or implicit standards for the exercise of the delegated power. The Alaska Supreme Court has stated:

Review of our decisions which have addressed delegation issues leads to the observation that whether one employs explicit or implicit standards, ' {t}he basic purpose behind the non delegation doctrine is sound: Administrators should not have unguided and uncontrolled discretionary power to govern as they see fit.

If the decision stands as presented in the statement, the city would have complete discretion to determine whether to provide relief to the residents of the region. The decision provides no oversight of the public interest to determine if the city has properly exercised the discretion granted.

Respondent does not believe that the duty imposed by law to determine whether the annexation is in the best interest of the state should be left entirely in the hands of an interested party. This would violate the intent of the framers of the Alaska Constitution who intended that the Local Boundary Commission would be the final arbiter of local government boundary disputes. The commission must remedy its failure by reconsidering its decision and addressing the legal principle of whether the commission's power to determine whether the annexation of territory is in the best of the state can be delegated to the city, and if that power can be delegated, under what standards the delegation will be exercised.

Finding

On June 24, 2011, we voted to consider reconsideration of points 1 and 2 only by a 4-0 vote.

Point # 4 Petition change from Local Action to Legislative Review

Respondent alleges that the commission's decision failed to address a controlling principle of law in that the commission was under the mistaken belief that the choice of the local action annexation method for the city's annexation petition was entirely in the hands of the petitioner. During final argument, respondent asked the commission to reject use of the local action annexation method so that petitioner would be required to process the petition according to the legislative review annexation method. Respondent objected to the local action method because only voters of the city would be entitled to vote on the question thereby leaving residents of the region who testified as to their connection to the territory without any say in the matter. By requiring legislative review, residents of the region would have another forum in which to air their grievances. The chairman advised respondent that the commission could not grant this relief because the choice of the form of the petition was entirely in the hands of the petitioner, not the commission. However, the regulations of the commission provide:

Territory contiguous to the annexing city, that meets the annexation standards specified in 3 AAC 110.090 - 3 AAC 110.135 and has been approved for local action annexation by the commission, may be annexed to a city by . . . approval by a majority of votes on the question cast by voters residing in

- (A) the territory; and
- (B) the annexing city

The foregoing regulation provides that use of the local action method is subject to the approval of the commission. Nowhere in the documents filed in the docket for this petition has respondent located evidence that the commission expressly approved of the use of the local option method for this annexation. Such approval is required. The regulation plainly contradicts the ruling of the chair in that it provides that it is the commission, not the petitioner that has the power to determine whether the local action method may be used. There was substantial creditable testimony during the hearing that the residents of the communities in the region were not adequately informed about the effect of the requested annexation. Respondent submits that the more rigorous notification process required by 3 AAC 110.450 for annexation by legislative review would possibly have given the local communities a better notice and understanding of the contents of the petition and its possible effects. The commission is requested to reconsider its decision in order to correct its failure to address this controlling principle of law regarding the proper exercise of the power to determine the appropriate method of annexation to be used. The commission must first remedy the absence of a determination regarding the method to be used. The commission is then requested upon reconsideration of this issue to take action to disapprove use of the local action method and thereby allow petitioner to proceed with the legislative review method to effect the annexation. This action, if implemented, could provide the communities of the region with the notice and other due process to which they are entitled.

Finding

On June 24, 2011, we voted to consider reconsideration of points 1 and 2 only by a 4-0 vote.

Point # 5 Region of the State - Controlling Principal of Law

The decision should be reconsidered because the commission failed to address a controlling principle of law in that it assumed it was appropriate for a city to provide government to a region of the state. In this regard, the commission fails to address the distinction required by the law between cities and boroughs. The effect of the decision, if finally approved by the voters of the city, would be to allow a city to govern a region of the state, rather than only the area encompassing a present existing community associated with the city. By allowing a city to annex over 400 square miles of unpopulated territory within which several other communities of the region also have direct and significant political and socio-economic connections, the commission would create a municipality that exceeds the scale appropriate for a city. In effect, the decision would create a putative borough government that lacks the responsibility to govern in the best interests of all the residents of the region. In this regard, the commission should reconsider its decision and consider whether the creation of a new borough, or annexation to an existing borough should provide government to the territory identified for annexation.

Finding

On June 24, 2011, we voted to consider reconsideration of points 1 and 2 only by a 4-0 vote.

Point # 6 Existing Community - Procedural Error

The commission committed a substantial procedural error when it determined that there was a present existing community included within the territory identified for annexation. The commission accepted as fact that the territory identified for annexation contained a population of transient fishers and that these persons constituted a present existing community identified with the petitioner. Under regulations of the commission, a community consists only of permanent residents, not persons who lack intent to be domiciled in the community. If the commission believes that it is appropriate to consider transient persons for purposes of establishing a community, it must amend the regulations in the manner required by AS 44.62.180 - 44.62.290 of the Administrative Procedure Act. To apply a new definition of "community" and "permanent resident" without first amending the administrative regulations constitutes a substantial procedural error which requires reconsideration. The commission is requested to reconsider the decision and either apply the regulations as written or suspend action on the petition until the regulations are amended as required by law.

Finding

On June 24, 2011, we voted to consider reconsideration of points 1 and 2 only by a 4-0 vote.

Point # 7 Misapplication of Regulation - Controlling Principle of Law

The commission failed to address a controlling principle of law when it misapplied its own regulation. In the decision, the commission concluded that it need not consider whether the boundaries of the territory identified for annexation contained entire geographical regions or large unpopulated areas. The commission reasoned that it need not disapprove the petition on this basis because it concluded

The petition meets the standards of 3 AAC 110.090 - 3 AAC 110.135.

The regulations permit a petition to include unpopulated areas and geographical regions if the boundaries are "justified" by application of those standards. 3 AAC 110.130(c)(2). This regulation requires a finding that is higher than simply that the petition meets the other standards for annexation. It requires that the boundaries be justified by these other standards. The decision announced by the commission does not contain the required justification, which absence was presumably based on a failure of the commission to address this controlling principle of law. For this reason, respondent requests that the question of annexing over 400 square miles of an unpopulated region be reconsidered using the correct standard imposed by regulation.

Finding

On June 24, 2011, we voted to consider reconsideration of points 1 and 2 only by a 4-0 vote.

CONCLUSION

The LBC approves the reconsideration of point 1, in that the LBC would not consider the petition final until the LBC has determined in a future meeting whether the condition was met. If the LBC determines in that meeting that the condition was met, then the decision would be final. We approve the reconsideration of point 2 by placing the condition under 3 AAC 110.135.