

Agenda

Local Boundary Commission Work Session

May 12, 2022

9 a.m. to 4 p.m.

Room 1536, Atwood Building

550 W. 7th Avenue

Anchorage, AK 99501

Join Zoom Meeting

<https://us02web.zoom.us/j/89554450322?pwd=Szh4bDRKckhaWmVxaE9nNnM1MEpVdz09>

or 833 548 0282 US Toll-free

Meeting ID: 895 5445 0322

Passcode: 225179

9:00 – 9:15	Welcome and Introductions	Larry Wood, <i>LBC Chair</i>
9:15 – 10:00	<u>LBC Roles and Responsibilities:</u> Alaska Statutes (Title 29 & 44); Administrative Code (3 AAC 110.xxx); Caselaw; Hearings and Decisional Meetings; etc.	Jedediah Smith, <i>LBC Staff</i>
10:00 – 10:30	<u>Open Meetings and Procedures</u>	Lynn Kenealy, <i>LGS IV</i>
10:30 – 10:45	Break	
10:45 – 11:30	<u>Judicial Standards of Review for LBC</u> <u>Actions; Rule-Making Procedures: Updates</u>	Gene Hickey, <i>Assistant Attorney General</i>
11:30 – 12:45	LUNCH	(on your own)
1:00 – 2:30	<u>LBC Framework and History,</u> <ul style="list-style-type: none">• Constitutional Convention• Mandatory Borough Act of 1963• Nature of Boroughs and Cities• Disincentives to Borough Formation• Status of Local Government in Alaska: Where are we today?	Jed
2:30 – 2:45	Break	
2:45 – 4:00	<u>Case Study: Analyzing Procedural and</u> <u>Substantive Issues in LBC Decision Making</u> Highlights from the Statement of Dissent in Skagway Borough Formation Decision (2007)	Larry, Jed, All

Arch

Mr. Victor Fischer
Alaska Housing Authority
Box 179
Anchorage, Alaska

February 20, 1959

Mr. Thomas B. Stewart
Box 1371
Juneau, Alaska

Dear Tom:

In accordance with your request, I am setting down some of my thoughts on the purposes and functions of a department of local affairs. This is going to be a stream of consciousness type letter, so that you may have to pick and choose to find anything worthwhile. I am sorry that I do not have more time to prepare this.

The initial thought behind the establishment of the local government agency was to help in the establishment of healthy local governments and to assist these local governments in the provision of necessary local functions. It was the belief of the constitutional convention delegates who worked on this that effective local government is particularly important in Alaska due to the large geographic separation between communities.

The need for organizational assistance for local governments was considered of primary importance. This need was not deemed to be one of short duration, as it was believed that the future of Alaska is not static and that we will see a continuous development and resulting growth of new communities and the establishment of new local government bodies.

The organizing function was not thought of so much as an aid to major cities. Most of these have the ability and often local man-power to take care of their primary needs in this field. We have proof already that a number of cities such as Anchorage, Juneau, Kodiak and Sitka deem themselves capable of proceeding now with the preparation of home rule charters.

The primary need is to assist smaller communities, newly organized communities and boroughs.

We have throughout Alaska a pattern of many small towns and villages, most of them never having had any formalized form of local self government. Rule if any has been exercised through informal and frequently ineffective local organizations or through the paternal exercise of authority by federal officials and sometimes local traders. Some of these communities obviously have been ready for self government, and the relatively quick reaction to the new authority granted by the 1957 village incorporation act certainly shows a desire on the part of the people to take care of their own needs. While such incorporations have recently taken place in some of the larger unorganized communities, preparation of many others for self government will have to be greatly assisted if it ever is to come about and be successful.

The establishment of local self government in these communities cannot be simply brought about by the enactment of legislation for specific classes of cities or other types of communities. It will require educational programs, actual aid in organizing and primarily a large amount of flexibility to allow the adaptation to local conditions.

Tim, here's one I should have mentioned in the beginning, and this is in part the underlying philosophy to the whole thing. In establishing the local government units and preparing the local government article, the constitutional convention committee made a thorough analyses of functions performed by the state, functions performed by the localities and functions performed by the state on the local level. It was the general consensus that in order to practice true democracy, the people of each area should have maximum say in the handling of their own affairs. This can be brought about best through the establishment of self government units. In addition, it was held that by strengthening local governments and endowing them with the necessary organizational and authoritative structure, the inevitably increasing growth of state government agencies could be arrested. The pattern has generally been that whenever some one desires a service to be performed wither the federal government or the state government or both find that the basis for the establishment of new bureaus and the hiring of additional personnel. Thus, one underlying thought was that local government should be made to carry out all possible functions on the local level, where necessary even performing state functions that the local unit is better capable of handling.

It was believed that the establishment of the local government agency would materially assist in the provision of the type of units that would help keep down the state bureaucracy and the long run hold down state expenditures. Thus, while the Local government agency itself would have to be created and staffed, the overall effect should be one of long range economy.

Aside from the assistance in promoting effective local government units, the agency would also be in a position to best evaluate what state functions could be performed locally and could act as a coordinator and go-between in the handling of transfers of functions or the establishment of new services on the local level.

Back to initial organization. One of the prime functions of the local government agency will be to assist in the establishment of boroughs. This task will not be a brief one. Initially, the job will be one of determining the scope of functions and services to be performed by boroughs, classification of boroughs and the preparation of boundary studies. It will then be necessary to establish the first organized boroughs. There will be major questions of state as well as local policy involved in the determination which boroughs should be organized and how the organization should take place. The maximum degree of self government will be achieved in boroughs through home rule. Again, it will be necessary to pioneer the application of home rule to a unit such as the new borough.

It is not likely that for quite a few years to come there will be more than a handful of organized boroughs. Probably only a few of these will have home rule. The remainder, covering most of Alaska, will be unorganized boroughs.

The handling of unorganized boroughs and provision of services therein will be one of the most vital aspects of the whole state-local relationship and will in effect determine whether local government in Alaska will ever become successful on an area wide basis. The transition from unorganized to organized boroughs will be one of long duration and will require material assistance. However, unless the transition is made in all possible cases, the state will be saddled forever with the performance of local functions throughout the bulk of Alaska.

So much for government organization. Now to the provision of other services, primarily operating aids.

As in the case of operation, the primary need for assistance will be on the part of the smaller, the newer communities. To provide services to their citizens, these towns have to delve into many specialized fields requiring technical expertness. At the same time, one must recognize that in Alaska we do not have a major city, having all necessary resources, within a stones throw of every community and hamlet. Therefore, the local pattern has generally been that needed services were poorly or improperly handled, if at all. We have many instances all over Alaska of improper property assessment practices, frequently totally inconsistent with existing statutes. Most communities however are unable to afford the personal services of a full time qualified assessor and frequently do not have the finances necessary to import one from Seattle or elsewhere. Through the services of the department of local affairs, a qualified assessor could be made available, probably on a reimburseable basis, to serve a large number of Alaskan communities. In this instance, the service could assist in compliance with meeting the standards for appraisal of property as prescribed by law in accordance with the provision of the constitutional

Similar types of centralized consulting services could be provided in such fields as local fiscal management and establishment of financing programs. The steps necessary for the issuance of local government bonds are extremely involved, and the experience has shown that the small communities in Alaska pay an exorbitant interest rate on bonds, if they are able to issue them at all, simply because they are unable to get themselves into a position of being looked upon favorably in the bond market. This can be done successfully only with experienced personnel in this field. One or two such people could probably serve all communities in Alaska. In addition, there is much need for improvement in local tax collection and other financing procedures. Here again central assistance could serve all communities, where otherwise no assistance could be afforded.

Planning is a good example. For many years, many cities in Alaska desired to have comprehensive plans prepared to assist in their growth and development.

Only Anchorage and Fairbanks however were able to afford direct services by either staff or consultants to carry out this technical work. Various proposals were made at times for a number of cities in Southeastern or Central Alaska to get together and jointly engage the services of a planner or planning consultant, but lacking proper coordination this never worked out. It was only after the 1957 legislature authorized the Alaska Housing Authority to provide planning assistance that planning for such towns as Ketchikan, Juneau, Douglas, Palmer and Seward became practical. (This work by the way is being carried out through both a limited staff and the utilization of consultants).

Other functions of the Alaska Housing Authority, urban renewal and housing, would also logically fit into this department. These functions likewise are of a continuing nature, and with increased development of Alaska will, if anything, increase in scope.

There are probably many additional functions that the state department and local government could perform. One that comes to mind is in connection with the "Area Redevelopment Law" that is currently in the U.S. Senate, and is being co-sponsored by Bartlett and Gruening. This same bill passed the Senate last year but was held up in the House. Enactment in this session is quite possible. This bill would be directed towards assisting in the improvement of conditions in depressed areas. It is something that could certainly be of value to many communities in Alaska, be they fishing villages, interior communities or even cities like Seward. In Seward for example this bill would make possible the provision of assistance to private or public enterprises for both financing of factories and similar facilities and of public improvements such as water and sewer or streets as may be required to develop new industries to relieve unemployment conditions. Other communities such as those in Bristol Bay could also receive aids for the provision of new employment opportunities. These functions, insofar as they relate to local conditions and community improvements could best be handled through a department of local affairs.

I hope the above generally covers the field. If there are any blanks, please let me know.

I believe that it is inconceivable to imagine that any of the operations proposed for the local government department, be it organizational or in the field of providing assistance or in performing services in unorganized boroughs could be considered of a transitional nature. Certainly, I would think it very undesirable to lodge something like this in the office of the governor. It could easily be the first step towards the piling up of separate functions in that office similar to the many agencies attached to the office of the president and lying outside the purview of any federal department. I believe that one consideration in much of this may be that no parallel exists for the establishment of a department of local government. It is somewhat inconceivable that simply for this reason or even in partial consideration of this reason people might be scared off from attempting something new. Certainly all modern thought has been in the provision of such a department and even on the federal level efforts have been made to establish a parallel type of activity on a departmental basis.

I know that the house local affairs committee has also discussed the services

-5-

to be performed by the local affairs department and by the boundary commission. I would suggest that you talk to Doug Gray about this. Oral Freeman is also very interested in this subject, particularly in seeing the department established.

I hope this will be of some aid to you and is not so long as to overwhelm. Am enclosing a copy, in case you wish to give it to John Rader or some one else. If you wish to make broader use of this, you might blank out any personal passages and make copies on a Thermo-fax or other duplicating machine (that is assuming that you think it is worthwhile).

Best wishes to you and all my hope for success in your efforts.

Sincerely yours,

Victor Fischer

In 1935, the Territorial Legislature authorized additional types of local governments - small independent school districts and small public utility districts. In doing so, it began a course practiced in other parts of the country by providing for the establishment of small single-purpose or limited-purpose governmental units with overlapping boundaries. The following is a brief summary of activities beginning with the Constitutional Convention that shaped the regional governmental structure in Alaska today.

1955	<ul style="list-style-type: none"> Alaska Constitutional Convention convened.
1956	<ul style="list-style-type: none"> Constitutional Convention delegates adopted constitution (2/5/56). Delegates decided that "although voluntary incorporation would be preferable, organized boroughs could be created without the approval of the people within the area." (Borough Government in Alaska) Alaska voters ratified the constitution (4/24/56)
1959	<ul style="list-style-type: none"> Alaska's constitution took effect (1/3/59). Art. X, § 3 requires legislature to determine procedures and standards for establishment of organized and unorganized boroughs. Art. X, § 15 required legislature to provide for integration of independent school districts and public utility districts into boroughs.
1961	<ul style="list-style-type: none"> Legislature adopted standards and procedures for incorporation of boroughs by local action. The law created a single unorganized borough encompassing all of Alaska outside organized boroughs. The new law also provided that independent school districts and public utility districts must be integrated by July 1, 1963.
1962	<ul style="list-style-type: none"> Bristol Bay Borough incorporated
1963	<ul style="list-style-type: none"> LBC rejected proposal to incorporate 1,400 square mile "Homer-Ninilchik Borough." Residents of Kenai-Soldotna area withdrew petition to incorporate a borough roughly the size of the Kenai Recording District (approximately 2,500 square miles) after LBC rejects Homer-Ninilchik Borough proposal. Representative Rader introduced House Bill 90 mandating incorporation of nine regions into boroughs. Stated objectives included: (1) promotion of maximum local self-government with a minimum of local government units, (2) elimination of special districts not recognized by constitution, and (3) tax equity. Boundaries are based on House election districts. The nine regions encompassed all independent school districts. House Bill 90 was enacted by a single vote in the Senate after it was amended to exclude the Lynn Canal Ice Straits Election District. It extended the deadline for integration of independent school districts into borough to July 1, 1964. It required boroughs to form in the following regions: <ol style="list-style-type: none"> 1. Ketchikan, 2. Sitka, 3. Juneau, 4. Kodiak Island, 5. Kenai Peninsula, 6. Anchorage, 7. Matanuska-Susitna valleys, and 8. Fairbanks.
1964	<ul style="list-style-type: none"> 11,054 square miles detached from the southeast portion of the Fairbanks North Star Borough (including Delta Junction and Tok) 1,333 square miles annexed to the northwest portion of the Fairbanks North Star Borough LBC approved a proposal to form a first class borough in Haines in March; voters rejected the proposal The Haines Independent School District was dissolved on July 1, 1964, in accordance with the provisions of the 1963 Mandatory Borough Act

	<ul style="list-style-type: none"> Commissioner of the Department of Education formed the Haines-Port Chilkoot Special School District under an obscure statutory provision
1966	<ul style="list-style-type: none"> Legislature repealed authority for operation of special school districts under which the Haines-Port Chilkoot Special School District had been formed; notwithstanding, the district continued to operate
1967	<ul style="list-style-type: none"> LBC approved a petition to incorporate a second class borough in Haines; voters rejected the proposal The State Attorney General advised the Department of Education to discontinue funding for the Haines-Port Chilkoot Special School District because it had no legal basis Following the action by the State Attorney General's office, the City of Haines and second class City of Port Chilkoot each organized school districts; the State school district served students outside the two cities; thus, three school districts served a total of 346 students in the Haines area in 1967 A third proposal to form a Haines Borough - again, a second class borough - was prepared shortly after voters rejected the second proposal in October of 1967; that proposal was also defeated by the voters
1968	<ul style="list-style-type: none"> Legislature enacted laws establishing a third class borough In May, voters in Haines petitioned to incorporate a third class borough; the LBC subsequently approved the proposal; voters did like establishing the third class Haines Borough
1970	<ul style="list-style-type: none"> The City of Juneau, City of Douglas, and the Greater Juneau Borough unified into a borough named the City and Borough of Juneau
1971	<ul style="list-style-type: none"> The City of Sitka and Greater Sitka Borough unified into a borough named the City and Borough of Sitka
1971	<ul style="list-style-type: none"> The North Slope Borough incorporated.
1974	<ul style="list-style-type: none"> Alaska Legislature detached Eagle River-Chugiak from the Greater Anchorage Area Borough; litigation later reversed the action on constitutional grounds
1975	<ul style="list-style-type: none"> The City of Anchorage, City of Girdwood, City of Glen Alps, and Greater Anchorage Area Borough unified into a borough named the Municipality of Anchorage
1985	<ul style="list-style-type: none"> The State Legislature enacted laws prohibiting the formation of new third class boroughs
1986	<ul style="list-style-type: none"> 3,298 square miles detached from North Slope Borough on condition the area is included in another borough Northwest Arctic Borough incorporated including the 3,298 square miles detached from the North Slope Borough
1987	<ul style="list-style-type: none"> Aleutians East Borough incorporated
1988	<ul style="list-style-type: none"> Annexation to Fairbanks North Star Borough approved by Local Boundary Commission; rejected by Legislature
1989	<ul style="list-style-type: none"> Model borough boundaries project initiated Lake and Peninsula Borough incorporated Shelikof Strait and portion of Alaska Peninsula annexed to Kodiak Island Borough
1990	<ul style="list-style-type: none"> Denali Borough incorporated; Valleys Borough incorporation petition (proposal competing with Denali Borough incorporation) rejected Matanuska-Susitna Borough annexation petition (proposal competing with Denali Borough incorporation) rejected Petition for annexation of a proximately 140 square miles to the City and Borough of Juneau approved
1992	<ul style="list-style-type: none"> City and Borough of Yakutat incorporated Model borough boundaries project completed
1996	<ul style="list-style-type: none"> Petition to detach 5,400 square miles from the Fairbanks North Star Borough and incorporate that area plus an additional 3,950 square miles of unorganized area as the North Pole Borough denied
1997	<ul style="list-style-type: none"> City and Borough of Yakutat annexed 3,199 square miles Petition to detach 993 square miles from the Matanuska-Susitna Borough and annex the same area to the Denali Borough denied

	<ul style="list-style-type: none"> Petition to detach Lake Louise from the Matanuska-Susitna Borough denied
1998	<ul style="list-style-type: none"> Petition for consolidation of the City of Haines and Haines Borough approved by Commission; rejected by voters
1999	<ul style="list-style-type: none"> Petition to annex 5,524 square miles to the Ketchikan Gateway Borough rejected
2001	<ul style="list-style-type: none"> Petition to consolidate the City of Fairbanks and Fairbanks North Star Borough approved by Commission; rejected by voters Petition to consolidate the City of Ketchikan and Ketchikan Gateway Borough approved by Commission; rejected by voters
2002	<ul style="list-style-type: none"> City of Haines and Haines Borough consolidate into a new borough Skagway Borough Incorporation petition denied (appealed)
2003	<ul style="list-style-type: none"> Department of Community and Economic Development delivers a report to the Legislature on Unorganized Areas of Alaska that Meet Borough Incorporation Standards.
2004	<ul style="list-style-type: none"> Ketchikan Gateway Borough and City of Ketchikan Consolidation approved by LBC but rejected by voters. Naukatik City Incorporation approved by LBC pending conditions; 5% sales tax and 3.5 mill property tax was rejected by voters.
2007	<ul style="list-style-type: none"> LBC approves formation of Skagway Borough on remand from the Superior Court; voters approve
2010	<ul style="list-style-type: none"> Dillingham annexation approved by LBC and by voters, but decision was appealed and overturned
2013	<ul style="list-style-type: none"> LBC approves Second Class City Incorporation Petition for Edna Bay (pop. 58)
2015	<ul style="list-style-type: none"> LBC rejects Dillingham annexation petition on reconsideration; approves Manokotak annexation petition
2016	<ul style="list-style-type: none"> LBC approves Second Class City Incorporation Petition for Whale Pass (pop. 65)
2020	<ul style="list-style-type: none"> Local Boundary Commission approves Soldotna annexation petition, converting to local action.

It's Time to Fully Implement the Local Government Provisions of Our Constitution.

By Arliss Sturgulewski and Victor Fischer

January 2005

On the eve of the 50th anniversary of Alaska's Constitutional Convention and the beginning of our 46th year of statehood, it is fitting to reflect on how we have implemented our Constitution. For the most part, it seems we have done quite well, with one major exception – fully implementing the local government article.

Framers of Alaska's Constitution provided for a system of boroughs. Boroughs were a new concept, envisioned to provide self-government and public services on an areawide basis. Since statehood, 16 boroughs have been organized in regions as diverse as Anchorage, Kodiak Island, and the North Slope. Half were organized by legislative mandate, while the others formed voluntarily. Organized areas encompass about forty percent of Alaska.

The Constitution requires that the entire state be divided into boroughs – organized or unorganized. Each was to encompass a large, natural region reflecting social, cultural, economic, geographic, and other characteristics. But rather than dividing the state into boroughs, the 1961 legislature simply grouped all non-organized areas into a one unorganized borough, which forms a meaningless glob that stretches from one end of Alaska to the other. Subsequent legislatures have shirked their responsibility to make the system work.

“Thirty years ago, the late Eben Hopson . . . stated: ‘If I were governor, organization of regional borough government would become one of my primary goals.’ Wise words.”



Constitutional provision for unorganized boroughs was made to allow for transition to organized status, and to recognize that some regions might lack the fiscal and administrative capacity to operate boroughs. In either case, the State was to provide services in unorganized boroughs, use them as regional planning units, and allow for maximum local participation and responsibility. It is time for the State to initiate establishment of unorganized boroughs, as required by Alaska's Constitution.

A number of unorganized areas have the capacity to operate boroughs, but their residents have not initiated action to do so. There are serious disincentives to incorporation as a borough.

Continued on back

They include mandates to pay a portion of school operations, inadequate money for organizational planning, lack of assessment data, and concern over school district consolidation.

There are many public policy reasons to promote borough formation. Boroughs provide (1) maximum local self-government, (2) a legal framework for regional services, (3) stable administrative capacity, (4) local responsibility and control over local affairs, (5) accountability to the public, (6) increased local and private land ownership, (7) greater control over education and ability to supplement state school funding, (8) consolidation of school districts, (9) the means for regional alcohol control, (10) ability to promote economic development, (11) a proper role for State government, and (12) greater taxpayer equity.

Boroughs are Alaska's vehicle for regional self-rule. They have proven effective both when they cover urban areas and when they encompass exclusively rural populations. Today, seven out of every eight Alaskans live in organized boroughs, as do two-thirds of all Alaska Natives. Many reside in boroughs where citizens have adopted home rule charters, exercising the ultimate level of self-government.

Action is way overdue to divide this amorphous mass into regional units that make sense. Some years ago, after thorough study and extensive hearings, the Alaska Local Boundary Commission divided the state into "model boroughs." In accordance with the Constitution, the models encompass large, natural regions and reflect social, cultural, economic, geographic and other characteristics.

The time has come to create a series of organized and unorganized boroughs in the rest of the state as set out in the Constitution.

Both State and local leadership will be required to carry out the Constitution's stated purpose "to provide for maximum local self-government". The effort of creating boroughs will be worthwhile, for it will give the people of local communities a real voice in how government touches their lives, as well as pursuing the general public interest.

Thirty years ago, the late Eben Hopson – territorial legislator, State senator, and first mayor of the North Slope Borough – stated: "If I were governor, organization of regional borough government would become one of my primary goals." Wise words.

Arliss Sturgulewski is a Republican, and Victor Fischer is a Democrat. Both have expertise in matters of local government; both have distinguished records in terms of public service at the local and state levels, including the Alaska State Senate. Victor Fischer was a delegate to Alaska's Constitutional Convention, where he served as Secretary of the Local Government Committee.

STATE OF ALASKA

LOCAL BOUNDARY COMMISSION

Upon Remand in the Matter of the)
Petition for Dissolution of the City of)
Skagway and Incorporation of a)
Skagway Borough)

STATEMENT OF DISSENT BY
COMMISSIONERS ROBERT HICKS AND ANTHONY NAKAZAWA

I. INTRODUCTION

We are saddened to admit that, with the exception of one repeated example of dissimulation, the Statement of Decision accurately reflects the thoughts and opinions expressed earlier by one and another of the majority Commissioners. That Statement of Decision is, however, replete with omitted deliberations, inaccurate assertions of deliberations that never occurred, ignored facts, fanciful speculations, unsupported reasoning, specious rationalizations, misunderstandings of law, and erroneous applications of law. The majority decision is, in a word, a travesty.

At 11 locations in the draft Statement of Decision, the narrative glossed over¹ admitted **failures by the majority to consider significant factors** required by law to reach their final decision.² In a legal opinion publicly discussed during the

¹ In the draft Statement of Decision the majority alleged that it had “impliedly” found no enclave; “impliedly considered” ethnicity and culture; “impliedly concluded” an absence of concern by the Commissioner of DEED; “impliedly determined” that a size different from the REAA was in the public interest; admittedly did not “expressly address” but “impliedly concluded” dissolution standards were met; “impliedly found” that all powers would become areawide powers; “impliedly concluded” the Petition meets dissolution standards; admittedly “did not expressly address” but “impliedly concluded” the Petition meets transition standards; admittedly “did not expressly address” but “impliedly concluded” that the civil and political rights standard was met.

² In this regard, it should be noted that a petitioner for incorporation of a borough must meet *all* standards in law. Failure to meet any one standard prevents incorporation. This Statement of Dissent

(continued . . .)

January 11, 2007, meeting, legal counsel for the Local Boundary Commission advised the majority to delete such glossing and hedging words as “impliedly considered” and “impliedly determined.”

The dissenting Commissioners then suggested that the majority should not perfunctorily delete the word “impliedly” without first actually considering, discussing, and analyzing those 11 substantive factors overlooked in the earlier deliberations. The dissenting Commissioners further recommended that the majority should open the matter for reconsideration, not only to correct these prior failures but also to allow representatives of the majority and minority to review drafts of our respective Statements and collaborate in an effort to achieve opinions and decisions less embarrassing to the overall credibility of the Local Boundary Commission.

The majority voted against reopening their deliberations. Instead, they instructed the staff to edit their final Statement of Decision to mechanically delete hedging words like “impliedly considered,” and to add “Jesuitical”³ rationalizations claiming that deliberations occurred when in fact no evidence in the official Record or transcripts supports any such claim. We dissenting Commissioners now have no choice but to candidly document where the majority utterly and completely failed to consider, analyze, and deliberate upon important elements of their decision, and where they instead summarily and mechanically changed their draft opinion to delete earlier hedging adverbs

(. . . continued)

discusses only some of the standards, any one of which leads to a decision denying the incorporation of Skagway. However, a statement of decision granting incorporation must include discussions and deliberations on all standards, with findings of compliance for each and every standard.

³ Statement of Decision at 47. On December 13, 2006, one Commissioner in the majority wryly referred to the elaborate and precise review and analyses of facts and legal standards by the minority as “Jesuitical.” Another Commissioner in the majority laughed amusedly. We dissenting Commissioners
(continued . . .)

1 that revealed the fatal weaknesses in the deliberative process of this Commission. A
2 summary of these editorial expediencies appears at Appendix A.

3 There also are two extremely fundamental misconceptions of law in the
4 Statement of Decision that require discussion here. “For the first time, the LBC not only
5 cites, but places great weight on, the principles set out in **Art. I, sec. 2 of the Alaska**
6 **Constitution** as a basis for local government boundary determinations.”⁴ Specifically,
7 the majority states,
8

9 We take the view that Art. X, the Local Government Article, sets up the
10 structure for the establishment of boroughs under the principles set out in
11 Art. I, sec. 2.⁵

12 Art. I, sec. 2 refers to the “source” of government, not the administration of
13 government. Art. I, sec. 2 correctly declares,

14 All political power is inherent in the people. All government originates with
15 the people, is founded upon their will only, and is instituted solely for the
16 good of the people as a whole.

17 The fact that the *genesis* of political power is “inherent in the people,” and
18 “originates with the people,” and “is founded upon their will only,” does not mean that
19 the subsequent *administration* of government thusly created continues to be determined
20 by the will of a local population or even by the pressures of a majority of the people.

21
22
23
24 (. . . continued)

25 confidently defer to the public and to history for the final decision as to where in these decisional docu-
26 ments one truly finds the casuistry, speciousness, and dissembling logic that defines “Jesuitical.”

27 ⁴ Statement of Decision at 9, n. 3.

28 ⁵ Statement of Decision at 19.

1 Indeed, to avoid the errors in good government that come from biased lo-
2 cal political opinions, from the tyrannies of a majority, and from the “mobocracy” our
3 federal Founding Fathers feared from the word “democracy,” Art. I, sec. 2 contains the
4 carefully crafted qualifier and safeguard that this government originating in the people
5 “is instituted solely for the good of the people *as a whole*.” (Emphasis added.)
6

7 We do not live in a “direct democracy,” and never have. We live in a “re-
8 public,” and always have. A “republic” is a form of government in which supreme power
9 rests in all of the citizens entitled to vote, but that power is delegated to and exercised
10 by elected representatives and appointed boards, commissions and courts. The voters
11 are carefully insulated from many decisions in the republican form of government, spe-
12 cifically to ensure that these decisions are made “for the good of the people as a whole”
13 and not to placate local political opinions.
14

15 Thus, the Framers of the Alaska Constitution not only qualified Art. 1,
16 sec. 2 to limit government to the good of the people “as a whole,” but also insulated lo-
17 cal government boundary decisions from local politics and from legislative political pres-
18 sures by placing these decisions in a statewide commission. As the 1962 Alaska
19 Supreme Court stated in its earliest opinion pertaining to the Local Boundary Commis-
20 sion:
21

22 Art. X was drafted and submitted by the Committee on Local Government,
23 which held a series of 31 meetings between November 15 and December
24 19, 1955. An examination of the relevant minutes of those meetings
25 shows clearly the concept that was in mind when the local boundary
26 commission section was being considered: that local political decisions do
not usually create proper boundaries and that boundaries should be es-
tablished at the state level. The advantage of the method proposed, in the
words of the committee ---

27 ... lies in placing the process at a level where areawide or
28 statewide needs can be taken into account. By placing
29

1 authority in this third-party, arguments for and against
2 boundary change can be analyzed objectively.⁶

3 That same principle has been endorsed repeatedly and consistently over
4 the years, by all of our Alaska courts, and all of our local boundary commissioners – un-
5 til now.

6 The Statement of Decision “places great weight on” the erroneous legal
7 claim that Art. X merely “sets up the structure for the establishment of boroughs under
8 the principles set out in Art. I, sec. 2.”⁷ If that principle were a correct basis for a legal
9 boundary decision, why would this majority need to assert it “for the first time” 48 years
10 after Statehood?⁸ If it were a correct basis for the majority decision, why have all courts
11 and legal experts failed to discover that principle for the past 48 years? If it were a cor-
12 rect basis for a legal boundary decision, why did the assistant attorney general advise
13 on January 11, 2007, that it should be deleted from the draft Statement of Decision?
14 The answers are quite simple: The most fundamental underlying assumption used by
15 the majority to reach its Statement of Decision is categorically incorrect.
16

17 A more accurate statement of law is that Alaska government does indeed
18 originate with the people, but that this elegant principle is stated with the caveat that
19 Alaska government subsequently will be administered for the good of the people “as a
20 whole.” One way the Framers of our Constitution (who were elected “by the people” of
21

22
23 ⁶ *Fairview Public Utility Dist. No. One v. City of Anchorage*, 368 P.2d 540, 543 (Alaska 1962).

24 ⁷ Statement of Decision at 9, n. 3 and 19.

25 ⁸ In his testimony before the Local Boundary Commission on November 28, 2006, Delegate Jack
26 Coghill read Art. I, sec. 2 into the Record and relied upon it to argue that this Local Boundary Commission
27 should follow the will of the Skagway citizenry. It should be noted, however, that Delegate Coghill was
not a part of the Committee on Local Government during the Constitutional Convention. When Art. X
(continued . . .)

1 the Territory) chose to safeguard the good of the people “as a whole” was to insulate
2 local boundary decisions. Another way was to create courts with judges appointed indi-
3 rectly and functioning relatively free of direct local political and legislative pressures.
4 There is nothing unusual or extraordinary about the principle of insulating government
5 decisions from the pressures of popular democracy.

6
7 That being said, it is a sad day when the Local Boundary Commission ca-
8 pitulates to the heavy and sometimes unethical⁹ local and regional political pressures
9 that we suffered in this Skagway matter, rather than applying clear facts with reasoned
10 analyses to existing law. The fact that “no hotter hot-potato could have been handed to
11 this Commission” is no cause for the majority to capitulate to political pressures un-
12 ashamedly in a candid confession admitting “lack of political will on the part of the cur-
13 rent ... Local Boundary Commission” to steel-up to political pressures and to comply
14 with our sworn oaths to uphold the Constitution and the laws (including regulations) of
15 the State of Alaska.¹⁰ We Commissioners in this dissent want to set the record abso-
16 lutely clear: We did not “lack political will.” We did not succumb to political pressures
17 and threats. As the reader will see below, we reviewed the facts thoroughly, we applied
18
19
20
21
22

23 (. . . continued)

24 came to the full Convention for a vote, he voted against it. His opinion of Art. X was rejected by the dele-
25 gates of the Alaska Constitutional Convention, and that opinion is no more valid as law today.

26 ⁹ In at least two established instances, Commissioners were lobbied ex parte by legislators. In
27 one such instance, the legislator bluntly threatened to cut the Local Boundary Commission budget if a
28 Skagway borough was not approved. These incidents are described in greater detail below.

29 ¹⁰ Statement of Decision at 12.

1 clear reasoning to how these facts fit the principles of law (including regulations) we are
2 sworn to apply, and we reached the only legally correct decision an impartial reviewer
3 could conclude in this matter.

4 The second fundamental misconception of law in the Statement of Deci-
5 sion is the misplaced **relegating of the Alaska Administrative Code to “tertiary-level**
6 **guidelines** in a hieratical order of the constitutional, statutory, and regulatory standards
7 applicable to borough incorporation (as opposed to viewing the Alaska Administrative
8 Code standards as being critical to interpret and implement broad constitutional and
9 statutory standards).¹¹ The Statement of Decision guilelessly proclaims, “Thus, in our
10 view, the Alaska Administrative Code standards are the least weighty among the three
11 sets of borough incorporation standards.”¹²

12 The majority explained its misunderstanding more elaborately during the
13 meeting of January 11, 2007, when the assistant attorney general again suggested de-
14 leting such misplaced reliance. The majority correctly admitted on the record that in-
15 deed this erroneous “principle” had in fact governed their decision, and hence, it would
16 not be deleted from the final Statement of Decision.

17 Statutes expound “law” in accordance with the Constitution. If a statute
18 violates constitutional law, it is void. They are hierarchical in that sense only. But when
19 statutes comply with constitutional law, they are *equally enforceable* with that constitu-
20 tional law.

21
22
23
24
25
26 ¹¹ Statement of Decision at 9, n. 3.

27 ¹² Statement of Decision at 20.

1 Regulations are “laws” elaborating upon and explaining to the public how
2 an agency, board, or commission will apply the constitutional and statutory law. If a
3 regulation exceeds the authority delegated by the statute or if it violates constitutional
4 law, the regulation is void. When regulations comply with constitutional law and do not
5 exceed delegated statutory authority, *they constitute enforceable “law” every bit as*
6 *compelling and authoritative as any statute or the Constitution itself.* Stated another
7 way, regulations and statutes and the Constitution are hieratical only when they are in
8 conflict. In every other instance, every one is as compelling and enforceable as the
9 others.
10

11 We did indeed see evidence in these proceedings that the majority has
12 been discounting and even disdainfully ignoring some Local Boundary Commission
13 regulations found in the Alaska Administrative Code. At one point in the December 12,
14 2006, meeting, a Commissioner in the majority stated, with regard to a duly promul-
15 gated regulation,
16

17 Now I think that this requirement is a little – oh, I’m trying to think of a nice
18 word to use, but I think it’s ridiculous.¹³

19 Even in the published Statement of Decision, the majority arbitrarily and
20 summarily spurns the legal standard in 3 AAC 110.920(b)(2), calling it, “an unreason-
21 able measure of a community.”¹⁴
22

23 ¹³ Dec. 12, 2006, Tr. at 42.

24 ¹⁴ Statement of Decision at 26. In fact, these same majority Commissioners have voted to retain
25 that standard in the redraft of Local Boundary Commission regulations, which we have been reviewing for
26 the past year. It is a very reasonable standard, providing in relevant part that a population dependent
27 upon an adjacent “community” for its existence cannot claim to be a separate community. The proposi-
28 tion is perfectly logical, that an “adjacent” and “dependent” population is not a separate community, how-
29 ever in this Skagway proceeding, it belies Dyea’s claim to be a separate community from Skagway, and
30 hence, it is unreasonably rejected with disdain in the Statement of Decision.
31

During the public hearing in Skagway, a Commissioner in the majority engaged in the following dialogue showing contempt for the law:

Q. ... was there ever occasion that your council, your local government unit, adopted something that you knew somebody could sue you and win on and you did it anyway because you knew nobody was going to sue you?

A. Well, I don't know that I – that – I don't know whether we ever had that – that....

Q. Or maybe even an administrative decision or a

A. Oh, yeah, we made

Q. platting or a

A. ... several.

Q.zoning....

A. Yeah.

Q. ... a zoning decision or a platting decision, a decision that you knew was in the best interests of the public, but the law in your books said different and you said, but this is the right thing to do so we're going to do it?

A. And we've done that. I have done that, yes, I have done that several times.

UNIDENTIFIED VOICE: I think most old time Alaskans have.

A. Yeah. Pardon?¹⁵

In another example of questionable respect for the rule of law (described in detail at page 58 below), one of the Commissioners in the majority noted that Skagway was violating the educational disparity tests of Public Law 874, and promptly endorsed cooking the books with a "hooray for you."

We live in a nation of "laws." Men and women cannot substitute their personal opinions for "the law." That is what makes America truly great. A Local Boundary Commissioner cannot ignore a regulation because that Commissioner finds it personally "ridiculous." A Local Boundary Commissioner cannot ignore a regulation because that

¹⁵ Nov. 27-29, 2006, Tr. at 340.

Commissioner “knew [a contradictory decision] was in the best interests of the public, but the law in your books said different.” A Local Boundary Commissioner cannot ignore a regulation “because you knew nobody was going to sue you.” A Local Boundary Commissioner cannot ignore a regulation because that Commissioner decided personally, “this is the right thing to do, so we’re going to do it.”

The standards for Local Boundary Commission decisions in the Alaska Administrative Code are critically compelling interpretations of the broad statutory and constitutional standards governing the decisions of this Commission.¹⁶ They stand *equal in law* with the statutes and the Constitution. The public has a right to expect predictability from Local Boundary Commission decisions, the right to assume that this Commission will render its decisions in full compliance with all of those standards in the Alaska Administrative Code including the many subsets of factors in those regulations. If a Commissioner does not “like” a regulation, s/he should initiate action to change it lawfully in accordance with due process, when functioning in a quasi-legislative capac-

¹⁶ The Alaska Supreme Court in *United States Smelt., R. & M. Co. v. Local Bound. Com’n*, 482 P.2d 140, 142 (Alaska 1975), outlined the overarching need for the Commission to adopt regulatory standards when reviewing boundary changes. The Court observed that the requirement for the Commission to adopt such standards was mandatory not discretionary. The court stated in pertinent part:

Since under AS 44.19.260(a)[] the legislature required the commission to develop standards in order to recommend boundary changes, and the commission had not developed standards prior to the Nome . . . proceedings, we hold that the commission lacked the power to recommend the Nome boundary changes in question. To do otherwise would be to condone the commission’s nonobservance of a valid legislative prerequisite to the exercise of the commission’s discretion in matters of local boundary changes.

In addition to the mandatory requirements under AS 44.33.812 for the adoption of boundary change standards, including borough incorporation, AS 29.05.100(a) provides in pertinent part:

If the commission determines that the incorporation . . . meets applicable standards under the state constitution *and commission regulations*, meets the standards for incorporation under AS . . . 29.05.031, and is in the best interests of the state, it may accept the petition. Otherwise it shall reject the petition. [Emphasis added.]

1 ity. S/he has no legal right to ignore, violate, or discount that regulation when function-
2 ing in a quasi-judicial context.

3 In summary, our regulations cannot be demeaned and relegated to “terti-
4 ary-level guidelines in a hieratical order.” As enforceable law, they are every bit as
5 compelling as statutes and the Constitution. Prioritizing law so that regulations are
6 relegated for purposes of analyzing the Skagway Petition has created a fatal legal flaw
7 in the Statement of Decision.

8
9 In the last analysis of general principles, we dissenters believe that the
10 Framers of our Constitution rightly concluded that local politics do not result in good
11 boundary decisions. The statewide Local Boundary Commission was created in our
12 Constitution to ensure that broader viewpoints and interests enter the evaluation of local
13 government units. Local Boundary Commissioners are responsible to step back from
14 local advocacy and to view the bigger picture of not only the consequences of their ac-
15 tions but also the precedent they establish. Commissioners are not elected officials.
16 Commissioners are local government experts engaged in a well-grounded and precise
17 application of legal standards to the creation of local government units.

18
19 We Commissioners took an oath to uphold the laws and the Constitution
20 of the State of Alaska. We have no legal or ethical right to suggest that practicality
21 sometimes requires one to ignore the law. We have no legal or ethical right to ignore
22 the application of a regulation because we do not like that standard or because we do
23 not agree with a standard. We have no legal right to relegate some laws to mere “terti-
24 ary-level guidelines.” The greatness of America lies in the fact that we are governed by
25 the rule of law, not by the rule of men and women. Our laws are published beforehand
26 for all to see, to know, and to anticipate. There is no room in a properly functioning fed-
27
28

1 eral or state government for the arbitrary and capricious application of personal emo-
2 tions and personal opinions to legal analyses and equitable decisions.

3 In this Statement of Dissent, we embark upon a relatively simple (but
4 sometimes tedious) process of sorting facts from opinions and advocacy, evaluating
5 which facts are relevant to the written standards set forth in law, and applying logic and
6 reasoning to reach impartial conclusions and decisions. With all due respect for our col-
7 leagues in the majority, we believe that the facts, analyses, and law below establish
8 conclusively that Skagway should not be incorporated as a borough.
9

10 II. POPULATION

11 The provisions of 3 AAC 110.050 require the Local Boundary Commission
12 to evaluate whether the population in the area proposed for borough incorporation is
13 sufficiently large and sufficiently stable to support borough government. The regulation
14 includes a rebuttable presumption that an area is *not* sufficiently large and stable if it
15 contains fewer than 1,000 permanent residents. In such instances, the Petitioner must
16 make “a specific and persuasive showing” to the contrary. Stated another way, the Lo-
17 cal Boundary Commission lawfully must be wary and skeptical when evaluating a
18 lesser-populated area proposed for borough incorporation.
19

20 When evaluating the sufficiency of a population, our regulations tell the
21 public that they are legally entitled to expect that we Commissioners will consider such
22 factors as total census enumeration, duration of residency, historical population pat-
23 terns, seasonal population changes, and age distributions within the area proposed for
24 incorporation.
25
26
27
28
29

1 **“Census enumerations”** show that a Skagway population of 862 in the
2 year 2000 has declined to 834 by 2005.¹⁷ This 3.5 percent decline in five years is quite
3 different from the speculative opinion of the Petitioner in 2000 that the Skagway popula-
4 tion would grow at a rate of 2 percent per year to reach 1,035 people by 2010.¹⁸ At the
5 time this Local Boundary Commission made its decision in December 2006, the popula-
6 tion in the Skagway area could not possibly reach 1,000 people by 2010 unless (a) the
7 present declining population trend reversed for some unapparent and unknown reason,
8 and (b) the local population then grew by approximately 20 percent over the next three
9 years.
10

11 For those Commissioners in the majority who have, on the Record and in
12 the Statement of Decision, renounced our clear legal duty in the regulations to apply
13 “census enumerations” because of their personal, experiential¹⁹ biases against the ac-
14 curacy of those officially endorsed and universally recognized numbers, the self-interest
15 of local Skagway residents to obtain a Permanent Fund Dividend (PFD) should provide
16 a more compellingly accurate index of local people willing to stand for the count and as-
17 sert their presence in Skagway: From 2000 to 2005, PFD applications from persons
18
19

20 ¹⁷ R. 72; Staff Supp. 49. If this census enumeration is not accurate, it is probably too high a num-
21 ber. At Exhibit D to the January 2001, Petition, the Petitioner tells us that the present, permanent year-
22 round population is only 814. (R. 22) The 1999 Department of Labor population data indicate 825 per-
23 manent residents. (R. 22) At another location in its materials, the Petitioner states that the estimated
24 population is 825 year-round residents. (R. 6, 27)

25 ¹⁸ R. 22.

26 ¹⁹ “[W]e find that DCCED’s estimates are not always reliable.” Statement of Decision at 31. This
27 statement is a conclusory rationalization supported by no evidence. It is used to not only reject the
28 DCCED population numbers, but also the PFD information showing at most 818 people, and the U. S.
29 Census count showing at most only 862 people, and the Petitioner’s own admissions in the sworn Petition
30 of only 814, and the Department of Labor count of only 825, as shown in note 17 above. It is absurd, pre-
31 posterous, and unsupportable to assert, as the Statement of Decision does at page 31, that voter regis-
trations are a better reflection of the true population number for Skagway.

claiming Skagway as their residence declined even more dramatically than “census enumerations,” from 854 to 818.²⁰ PFD applications therefore show an even lower population in Skagway, and PFD applications show an even greater population decline during the past five years.

“**Historical population patterns**” show that a Gold Rush population of 3,117 in 1905 plummeted to 872 by 1910 and continued its decline through 494 in 1920 to 492 in 1930.²¹ It then began a modest increase to 634 by 1940 and 758 by 1950, before declining again to 659 in 1960.²² It began a very slight increase to 675 in 1970 and another significant increase to 814 in 1980, before falling again to 692 in 1990.²³ By the year 2000, the population had increased to 862 again, only to drop to 834 by 2005.²⁴ This is hardly a history of stability or growth.

“**Historical population patterns**” among youth in recent years show student enrollment remained relatively stable at 144-45 during the 5-year period from FY 1988 through FY 1992,²⁵ peaking at 153 in FY 1993, and then declined through 143 in FY 1994 to 127 in FY 1995.²⁶ In FY 1996 it increased slightly to 131, and increased slightly again in FY 1997 to 137.²⁷ In FY 1998 it declined again to 132, and continued

²⁰ Staff Supp. 50.

²¹ Figure 21 at R. 222.

²² Figure 21 at R. 222.

²³ Figure 21 at R. 222.

²⁴ Figure 21 at R. 222; Staff Supp. 49.

²⁵ R. 221, n. 32 and Figure 22 at R. 222.

²⁶ Figure 22 at R. 222.

²⁷ Figure 22 at R. 222.

1 that decline in FY 1999 to 129.²⁸ In FY 2000 it experienced a slight increase to 131,
2 and in FY 2001 another increase to 137.²⁹ But in FY 2002 it plummeted fully 12 percent
3 to a new low of 120.³⁰

4 The statewide count of student enrollment (“average daily membership” or
5 “ADM”) occurs during the last three weeks of October. Despite the fact that, since
6 2004, the Department of Education and Early Development (“DEED”) has allowed an
7 earlier, more favorable, September count for the official Skagway ADM, the local num-
8 bers continue to decline.³¹ The *Skagway News* reported after interviewing the superin-
9 tendent of schools, “Without this waiver, Skagway would have seven or eight students
10 less than if it counted in October like the rest of the state.”³²

11 By FY 2006, the Skagway enrollment had dropped to 109.25.³³ In
12 FY 2007, that number dropped again to 98.75 students.³⁴ Between 2001, when this Pe-
13 tition was filed, and the date of the final public hearing by the Local Boundary Commis-
14 sion on November 27, 2006 – five school years – the Skagway student population has
15 dropped an alarming 28 percent. Without the early September count allowed by DEED,
16 the decline would be even greater and more alarming.
17
18
19
20

21 ²⁸ Figure 22 at R. 222.

22 ²⁹ Figure 22 at R. 222.

23 ³⁰ R. 221, n. 32 and Figure 22 at R. 222; Staff Supp. 49.

24 ³¹ Tr. 188-89, 192; *Skagway News* Sept. 21, 2006; Staff Supp. 53.

25 ³² Tr. 194; *Skagway News* Sept. 21, 2006.

26 ³³ Staff Supp. 49; Tr. 188-89, 192.

27 ³⁴ *Skagway News* Nov. 22, 2006.

Absent some significant change in the present low numbers of students in lower grade levels, the present enrollment of 12-14 students in the Class of 08 drops to 7 students in the Class of 09 and remains at similar low levels thereafter.³⁵ FY 2006 School Enrollment from the DEED Internet site shows a total of 105 enrolled students in Skagway, with the student numbers distributed from Kindergarten to 12th Grade as follows: 6, 7, 8, 5, 5, 8, 9, 9, 11, 7, 12, 12, 6.³⁶ In his sworn, expert testimony to this Commission, Superintendent Dickens conceded reluctantly that this official DEED data were "roughly correct."³⁷ Shifting the numbers to delete the 6 who graduated in the Class of 06, Superintendent Dickens said he thought that there might be 8-9 new Kindergarteners not reflected in the above numbers.³⁸ Moreover, he stated that the 12 students reflected by DEED FY 2006 statistics for the Class of 07 has actually declined to only 5 students during this past year.³⁹

There were 20 to 24 students being home-schooled in Skagway in 2006.⁴⁰ The Superintendent stated under oath that these students are new families coming from Utah, Texas, and Illinois who have chosen to *continue* their prior programs of home schooling.⁴¹ They do not represent a migration out of the brick-and-mortar school, and

³⁵ Tr. 194-95.

³⁶ <<http://www.eed.state.ak.us/stats/DistrictEnrollment/2006DistrictEnrollment.pdf>>; Tr. 186.

³⁷ Tr. 186.

³⁸ Tr. 197.

³⁹ Tr. 184-85.

⁴⁰ Tr. 177-78.

⁴¹ Tr. 178-79.

1 hence, do not explain the clear and consistent decline in the student population these
2 many years.

3 PFD statistics corroborate this “historical population pattern” of abnormally
4 low and steadily declining numbers of young people residing in Skagway. In the year
5 2000, fully 179 of 854 PFD applications (20.9 percent) were filed for residents of Skag-
6 way under 18 years of age.⁴² In the year 2005, only 144 of 818 applications (17.6 per-
7 cent) were filed for residents of Skagway under 18 years of age.⁴³ In the year 2000,
8 31 percent of PFD applications statewide were filed for children under 18 years of age.⁴⁴
9 That same year, only 21 percent of Skagway applications were for children under 18.⁴⁵
10 In the year 2005, 29 percent of PFD applications statewide were filed for children under
11 18 years of age.⁴⁶ That same year, only 17 percent of Skagway applications were for
12 children under 18.⁴⁷ These data also indicate that the significant decline in young peo-
13 ple in Skagway is a local phenomenon, not a statewide trend.
14
15
16
17
18
19
20

21
22 ⁴² Staff Supp. 51.

23 ⁴³ Staff Supp. 51.

24 ⁴⁴ Staff Supp. 52.

25 ⁴⁵ Staff Supp. 52.

26 ⁴⁶ Staff Supp. 52.

27 ⁴⁷ Staff Supp. 52.

Despite all the above evidence of declining populations in Skagway, the Statement of Decision expresses “particular confidence that both the general population and student enrollment for Skagway will grow in the foreseeable future.”⁴⁸ This Pollyannaish optimism is founded in “adding diverse industries to its economic base (e.g. shipment of coal and minerals),” “sale of municipal lands in Dyea,” and “recruiting home-schooled students.”⁴⁹ In discussions below, we will show categorically that no such new industries are remotely apparent on the future economic horizons of Skagway, and that the few high-priced/low-density parcels in Dyea will not draw people in the future any better than the present high percentage of “vacant land” in the City of Skagway is drawing people today. (At 133 parcels, “vacant” land constitutes the third largest category of Skagway land today.⁵⁰)

Applying the regulatory standard of “**seasonal population changes**” to the facts in the area proposed for borough incorporation, one cannot ignore the conclusion that Skagway represents the most radical seasonal population swing of any city in Alaska.

In 2000, the Skagway winter population of 862 rocketed to 2,587 by summer.⁵¹ That huge upward swing in seasonal summer population is augmented by

⁴⁸ Statement of Decision at 32.

⁴⁹ Statement of Decision at 32.

⁵⁰ R. 210 and Figure 16.

⁵¹ R. 6, 22, 23, 27, 119, 221. The *Skagway Economic Impact Study* of February 23, 2000, by Southeast Strategies, estimated the seasonal population of Skagway at 1,725 people in 1999. (R. 119) The permanent winter population is unclear, but certainly no higher than 862, according to the Petitioner. (R. 72)

another 1,000 to 10,000 daily summer visitors.⁵² The rental vacancy rate in Skagway at the time of the 2000 census (winter) was 14.8 percent, which is nearly twice the statewide figure of 7.8 percent.⁵³ Vacant housing units comprised 20.1 percent of the 502 housing units in Skagway at the time of the 2000 census – one-third higher than the statewide average.⁵⁴

The Statement of Decision offers the puzzling, unexplained conclusion, “We view the significant seasonal population changes as a positive characteristic in terms of the Population Standard.”⁵⁵ That conclusion certainly is not supported by the Mayor of Skagway, who laments that a “multitude” of property owners do not reside in Skagway.⁵⁶ That view by the majority is totally contradictory to the opinion of the director of the Skagway Chamber of Commerce who writes, “The extreme population fluctuations from summer to winter challenge those businesses that are trying to sustain year-round operations. The school suffers severely from reduced State funding due to the small number of families staying in Skagway through the winter.”⁵⁷ That view of the majority is also not shared by the Skagway school superintendent who indulges his own fanciful thinking that a new industry will bring a larger winter population to Skagway. In

⁵² R. 22.

⁵³ R. 221.

⁵⁴ R. 221.

⁵⁵ Statement of Decision at 35.

⁵⁶ R. 119.

⁵⁷ R. 204 *quoting* Skagway Chamber of Commerce Director, November 2001.

1 short, that conclusion in the Statement of Decision is unfounded, unreasonable, factually
2 ally incorrect, and unsupported by the local people of Skagway.

3 Considering the facts pertaining to “**age distribution**,” one notes first that,
4 at a median age of 39.2, Skagway residents are 6.8 years (21 percent) older than the
5 comparable statewide figure of 32.4 years of age.⁵⁸ Only 25.6 percent of the Skagway
6 population was under the age of 25, while 39.6 percent of the statewide population was
7 under the age of 25.⁵⁹

8
9 Not only is Skagway a relatively old population, but it is constantly losing
10 youth and therefore getting older: Between 2000 and 2005, the proportion of Skag-
11 way’s students among its general population dropped from 136.75 in a population of no
12 more than 862 to 109.25 in a population of 834.⁶⁰ Between FY 2000 and FY 2007, the
13 average daily student membership in the Skagway schools dropped from 136.75 in a
14 population of no more than 862 to 98.75 in a population of 834.⁶¹ Between 2000 and
15 2005, the number of PFD applications from Skagway residents under 18 dropped from
16 179 of 854 to 144 of 818.⁶² Comparisons between statewide applications from children
17 and Skagway applications from children indicate 32 percent fewer children in Skagway
18 in 2000 and 41 percent fewer children in Skagway in 2005.⁶³

21
22 ⁵⁸ R. 223.

23 ⁵⁹ R. 223.

24 ⁶⁰ Staff Supp. 51.

25 ⁶¹ Staff Supp. 51 and *Skagway News*, Nov. 22, 2006.

26 ⁶² Staff Supp. 51.

27 ⁶³ Staff Supp. 52.

1 In conclusion, there are fewer than 1,000 people in the census enumera-
2 tion, and it is specifically the census enumeration that the law requires us to apply.
3 Therefore, we Commissioners must review and analyze the Skagway population facts
4 and statistics with heightened wariness and with skepticism that the area proposed
5 could ever be sufficiently large and sufficiently stable to support a borough government.

6 The historical population shifts in Skagway look like a roller coaster when
7 plotted on a line graph, erratically swinging by two-figure percentages most decades of
8 the City's existence. The only consistency in the graph is the total absence of any evi-
9 dence of long-term growth. In nearly 100 years, the population has never risen above
10 the 872 people living in Skagway at the end of the Gold Rush in 1910, and the numbers
11 are declining now.

12 Even during the pendency of the Petition, the population declined by
13 3.5 percent, thereby disproving the earlier predictions of the Petitioner that the Skagway
14 population would be rising during these years to over 1,000 by 2010. Moreover, it is the
15 younger people who are leaving Skagway. The student population has plummeted to
16 72 percent of average daily membership just since the Petition was filed. It has plum-
17 meted to 65 percent of the number of students in FY 1993.

18 It is now quite apparent why the Petitioner opposed so vehemently the Lo-
19 cal Boundary Commission visiting Skagway in November. On a dark winter afternoon,
20 Skagway looks like Knott's Berry Farm any midnight: storefronts locked, windows dark,
21 streets empty, silence – a portentous ghost of its summer seasonal tourist flurry. Even
22 the director of the local Chamber of Commerce admits that businesses in Skagway can-
23 not sustain year-round operations. The winter vacancy rate for residential rentals in
24
25
26
27
28
29

1 Skagway is more than double the statewide figure. The summer population of this little
2 town rockets to three times its winter population.

3 We Commissioners must look at trends as well as at history. The trend in
4 Skagway indicates a fluctuating historical population. The trend in Skagway indicates a
5 small population still declining in numbers. The trend in Skagway reflects a radically
6 large and unstable seasonal population. The trend in Skagway shows an increasing
7 disparity between the numbers of young people and older people. We are not confirm-
8 ing a first-class city here; we are evaluating the creation of a new and different form of
9 government, which in its essence is regional⁶⁴ rather than local. Stated another way,
10 the question before this Commission is not whether this small and erratic population-
11 base can run a little city, but whether it is reasonable for the Local Boundary Commis-
12 sion to create here a new and permanent regional form of government, namely a bor-
13 ough. Therefore, the fact that Skagway – like every first-class city in the unorganized
14 borough – presently provides⁶⁵ the services of a borough government does not create
15 an end-all fait accompli that Skagway is or should be a borough government.
16
17
18
19
20
21
22
23

24 ⁶⁴ The majority, in the Statement of Decision at 12-13, endorses the correct statement of the first
25 Local Boundary Commission to the First Alaska State Legislature in 1960 that “the borough is an inter-
26 mediate unit of local government” and that “a borough was designed to be a form of regional govern-
27 ment.”

28 ⁶⁵ Facts pertaining to Resources, discussed below, will suggest that Skagway’s economic re-
29 sources and human resources are extremely precarious, and that this one-industry town may not be ca-
30 pable of supporting even modest first-class city services in the near future.

1 Skagway is a community with a very small population, with no evidence of
2 future growth, and with possibly the most radically unstable population of any commu-
3 nity in Alaska. More ominously for the future of this community, the major decline in
4 population is not cross-sectional by age but rather among youth, indicating (as the
5 Skagway school superintendent suggested) “a dying community.”⁶⁶ Faced with such a
6 foreboding trend, the Local Boundary Commission should not be approving permanent
7 isolation of this unstable population-base. Rather, the Local Boundary Commission
8 should be encouraging the local people to combine and cooperate⁶⁷ with other popula-
9 tion centers in the provision of their regional government services.
10

11 Even without the skepticism that the rebuttable presumption brings to our
12 analysis, the Skagway population facts and statistics do not suggest any measure of the
13 steadiness, the permanence, the balance, or the predictability that one can reasonably
14 call “stability” in a population. If one truly applies reasoning to facts, there is no escap-
15 ing the conclusion that this Petition does not meet the legal requirements of having a
16 population sufficiently “large” and sufficiently “stable” for incorporation as a borough.
17

18 III. RESOURCES

19 The provisions of 3 AAC 110.055 require that the Local Boundary Com-
20 mission must determine that the economy of the area includes the human resources
21 necessary to provide borough services efficiently and cost effectively.
22

23
24 ⁶⁶ Tr. 193; *Skagway News*, Sept. 21, 2006

25 ⁶⁷ During our visit to Skagway, we heard pithy aphorisms suggesting an extremely unhealthy local
26 isolation and pseudo-independence in the Skagway population: “The wind doesn’t blow in Skagway.
27 Haines sucks.” “There’s the right way, the wrong way, and the Skagway.” The Framers of our Alaska
28 Constitution wisely concluded that such parochial political biases should not govern boundary decisions
29 for local government in Alaska.

Likewise, 3 AAC 110.055 requires that the Local Boundary Commission must determine that the economy of the area includes the financial resources necessary to provide borough services efficiently and cost effectively.

This regulation distinguishes between what the Commission “will” consider, and what the Commission “may” consider. In a nation and a state governed by the rule of law, the public has a right to expect that this Commission “will” consider all of the following factors:

- Reasonably anticipated functions,
- Reasonably anticipated expenses,
- Ability to generate/collect revenue and reasonably anticipated income,
- Feasibility and plausibility of anticipated capital and operating budgets,
- Economic base of the proposed borough,
- Property valuations,
- Land use, and
- Existing and reasonably anticipated industrial, commercial, and resource development.

Addressing first the facts pertaining to “**reasonably anticipated functions**,” no one can deny that public education is one of the most fundamental and essential borough functions that an area’s economy and human resources must be capable of ensuring on an “efficient and cost effective” basis.

The fact is that the “economy of the area” proposed for Skagway borough incorporation is presently facing (in FY 2007) a budgetary shortfall of \$137,000⁶⁸ in the

⁶⁸ *Skagway News*, Nov. 22, 2006.

1 provision of educational services, clearly and simply because it lacks the “human re-
2 source” of students⁶⁹ for an efficient and cost-effective school “district.”

3 Student enrollment in Skagway has been dropping for the past 14 years,⁷⁰
4 and has now declined below the two-school State funding level to a final enrollment of
5 only 98.75 students.⁷¹ During an August 29, 2006, meeting of the Skagway community
6 to discuss the concerns of declining school enrollment, Skagway School Board member
7 Joanne Korsmo admonished, “Does the community realize how close we are, how dan-
8 gerous the water is”?⁷²

10 Superintendent Dickens admitted during his expert testimony to the Local
11 Boundary Commission that after next year the situation would be worse, as a drop is
12 expected after graduation of the large Class of 2008.⁷³ Moreover, federal grants that
13 have funded a couple of teaching positions in Skagway also are ending.⁷⁴ Dickens said
14
15
16
17

18 ⁶⁹ Some Commissioners have argued that the “human resources” required by 3 AAC 110.055 are
19 nothing more than a measure of whether there is a sufficient supply of qualified personnel to administer a
20 borough government. However, if the regulation is interpreted so narrowly in this broader reference to
21 “human resources,” there would be no need to assert again, among the discretionary factors the Local
22 Boundary Commission “may” consider, the “need for and availability of employable skilled and unskilled
23 persons to serve the proposed borough.” The latter quote would be a meaningless redundancy. There-
24 fore, assuming with the courts that laws should be construed when possible to avoid meaningless redun-
25 dancies, the broader reference to “human resources” must be something more than these qualified
26 personnel necessary to administer the new government.

27 ⁷⁰ R. 221, n. 32 and Figure 22 at R. 222; Staff Supp. 49.

28 ⁷¹ *Skagway News*, Nov. 22, 2006.

29 ⁷² *Skagway News*, Sept. 21, 2006.

30 ⁷³ Tr. 194-95.

31 ⁷⁴ *Skagway News*, Sept. 21, 2006.

1 that he worries that with the lack of winter work for many parents, the enrollment drop
2 could be a “precursor of a dying community.”⁷⁵

3 Money in a timber reserve account that had been anticipated for the
4 school’s music program and other future program priorities is now earmarked for the
5 budgetary shortfall in basic educational costs caused by the plummeting student popu-
6 lation.⁷⁶ Following a second, November 14, 2006, meeting of the Skagway community
7 to deliberate this school-funding crisis, the *Skagway News* reported, “With budgetary
8 problems looming, questions were posed about the future of various school programs
9 and whether they will be sustainable in the coming years.”⁷⁷

11 When evaluating whether the “human resources” are adequate to provide
12 the borough service of public education efficiently and cost-effectively, the Local
13 Boundary Commission cannot ignore the fact that the Alaska Legislature has deter-
14 mined at AS 14.12.025 that a school district of fewer than 250 students presumptively
15 does not serve the best interests of the state unless the Commissioner of DEED deter-
16 mines otherwise.⁷⁸ Skagway had fewer than half this minimum number of students in
17 2002⁷⁹ (and fewer than 40 percent by 2006). In fact, Skagway in 2002 was in the tenth
18
19
20

21
22 ⁷⁵ Tr. 193; *Skagway News*, Sept. 21, 2006.

23 ⁷⁶ *Skagway News*, Nov. 22, 2006.

24 ⁷⁷ *Skagway News*, Nov. 22, 2006.

25 ⁷⁸ R. 225; Staff Supp. 50. AS 14.12.025 states in relevant part that a Skagway borough school
26 district cannot be formed unless the Commissioner of DEED determines that, “formation of a new school
27 district with less than 250 pupils would be in the best interests of the state and the proposed school dis-
28 trict.”

29 ⁷⁹ R. 225.

percentile in terms of enrollment among Alaska school districts.⁸⁰ Given the present age distribution of Skagway permanent residents, the overall population must rise to nearly 1,800 before Skagway can meet the statutory threshold required by the Alaska Legislature.⁸¹

In a letter dated July 1, 2002, the Local Boundary Commission staff pointedly⁸² invited the Commissioner of DEED to comment on this specific circumstance in Skagway, where the proposed Petition would incorporate a new⁸³ borough school district with a newly elected board of education for a student body of fewer than half the 250 student minimum required by the policy stated in the statute.⁸⁴ The Local Boundary Commission has never received any response from either the Commissioner of DEED

⁸⁰ R. 297 and Figure 30 at R. 298.

⁸¹ R. 225.

⁸² The letter is quoted at R. 496-97, n. 15. A copy of the letter appears in the Record with the Local Boundary Commission meeting of December 13, 2006.

⁸³ Some Commissioners in the majority espouse the specious argument that changing a first-class city in the unorganized borough into a borough following the same boundary lines is not creating a "new" school district because it performs the same functions in serving the same students. That is a legally incorrect rationalization. If Skagway becomes a borough, the existing city corporation is dissolved; a new borough corporation governed by different laws is created; a new governing assembly and a new school board is immediately elected. The school district is just as "new" in law as when any corporation dissolves and transfers its functions to a different corporation run by a newly elected board of directors.

In the Statement of Decision, at page 33, the majority "acknowledge[s] that borough formation will technically result in the creation of a new school district....However we view such as a mere formality...." It is unfathomable that Local Boundary Commissioners can brush aside the clear and mandatory application of a state statute, AS 14.12.025, with the cavalier pronouncement that the formation of a new legal corporation is "a mere formality." The Legislature wrote no such exception into AS 14.12.025. The Legislature gave no such exemption from compliance to the Local Boundary Commission. Brushing aside the new school district as a "mere formality" in order to avoid the impact of AS 14.12.025 is akin to brushing aside a regulation in the Alaska Administrative Code because it is "ridiculous," or, "the law in your books said different and you said, but this is the right thing to do so we're going to do it."

⁸⁴ R. 225, n. 34; R. 283, n. 88; R. 297, n. 95; R. 496-97, n. 15. The substance of the letter is set forth at R. 496-97, n. 15, and a copy of the letter appears in the Record of the Local Boundary Commission meeting of December 13, 2006.

1 or the expert educational staff of that department, confirming that the creation of this
2 grossly undersized borough school district would be “in the best interest of the state and
3 the proposed school district.”⁸⁵ The Statement of Decision concludes, “the lack of re-
4 sponse from the Commissioner of Education reflects a lack of concern over the issue.”⁸⁶
5 That is a totally unfounded and illogical conclusion. Silence could indeed mean indiffer-
6 ence, but it also could mean opposition. We cannot know. More importantly, the stat-
7 ute does not say that the Local Boundary Commission is authorized to form an
8 undersized school district if the Commissioner of DEED is silent. The statute requires
9 *affirmative approval* from the Commissioner *before* such a school district is created. In
10 a nation ruled by laws rather than men and women, this Local Boundary Commission
11 has no legal right to read into AS 14.12.025 language the statute does not contain,
12 namely, authority to create by fiat an undersized borough school district if the Commis-
13 sioner of DEED is silent on the issue.
14
15

16 We believe that the Legislature’s statutory presumption against creating
17 school districts with fewer than 250 students prohibits the Local Boundary Commission
18 from substituting its lay opinions in place of the special educational-policy expertise that
19 AS 14.12.025 recognizes in, and requires from, the Commissioner of DEED. We be-
20 lieve that this approval from DEED is a statutory prerequisite to creating such a prepos-
21 terously miniscule school “district” with fewer than 100 students in a single building,
22 particularly when that “superintendent” is warning local citizens that the steadily declin-
23 ing student enrollment may be a “precursor of a dying community.” With the enactment
24
25

26 ⁸⁵ AS 14.12.025.

27 ⁸⁶ Statement of Decision at 34.

1 of AS 14.12.025, the Legislature has proclaimed that neither the Local Boundary Com-
2 mission nor any other board or commission possesses the delegated legal authority to
3 authorize creation of an undersized borough school district in Alaska, without first ob-
4 taining the approval of the Commissioner of DEED.

5 In the same vein, in 2003 the Alaska Legislature directed the Local
6 Boundary Commission to identify opportunities for consolidation of schools with empha-
7 sis on school districts containing fewer than 250 students.⁸⁷ That same Resolution di-
8 rected the Local Boundary Commission to perform this work in consultation with DEED.
9 We cannot ignore the fact that this recent directive from the Alaska Legislature to the
10 Local Boundary Commission is a reaffirmation of a legislated public policy that perpetu-
11 ating undersized school districts is neither efficient nor cost-effective for the State of
12 Alaska. Nor can we ignore this recent directive from the Legislature as being a reaf-
13 firmation that the Commissioner of the DEED possesses the exclusive expertise to
14 make decisions pertaining to undersized school districts.
15

16 We Commissioners are also legally responsible to determine the “**feasibil-**
17 **ity and plausibility of anticipated capital and operating budgets**” presented by the
18 Petitioner. However, in the present case of the Skagway Petition, we have received
19 from Petitioner only inaccurate and incomplete three-year projections of expenditures
20 and revenues. The projections of expenditures from the Petitioner do not include school
21 expenditures other than the local contributions.⁸⁸ They do not include information about
22
23
24
25

26 ⁸⁷ Chapter 83, SLA 2003; Staff Supp. 53-54.

27 ⁸⁸ R. 16.

1 the Garbage Fund, Water/Sewer Fund, or Port Fund.⁸⁹ It does not include complete in-
2 formation about debt service requirements of the local government.⁹⁰

3 Despite the fact that the Department of Commerce, Community, and Eco-
4 nomic Development (“DCCED” or “Department,” which serves as staff to the Commis-
5 sion) pointed out these errors very early in these proceedings (in the Preliminary
6 Report), and despite the fact that the Commission staff made attempts to correct the er-
7 rors and partially ameliorate the deficiency with information from a subsequent audited
8 statement for the City of Skagway,⁹¹ the Petitioner has never amended its Petition or
9 otherwise supplied⁹² the Local Boundary Commission with accurate and complete fi-
10 nancial projections for the proposed borough, nor has it offered any explanation for this
11 major shortfall. It has rendered the Local Boundary Commission incapable of determin-
12 ing the “feasibility and plausibility of anticipated ... budgets” from accurate and complete
13 budgetary information about anticipated expenditures.
14
15

16 In the same context, the three-year projections of revenues in the Petition
17 are also inaccurate and incomplete. The projections do not include total revenues for
18 the school district.⁹³ They do not include revenues from the enterprise funds (port, and
19
20
21

22 ⁸⁹ R. 197.

23 ⁹⁰ R. 197.

24 ⁹¹ R. 197-98 and Figures 5 & 6.

25 ⁹² The Record is replete with subsequent argument and even supplemental briefing by the Peti-
26 tioner, yet accurate and complete projections of revenues and expenditures for the Local Boundary
Commission to evaluate are totally missing from this Record.

27 ⁹³ R. 199.

1 water/sewer/garbage utilities).⁹⁴ Although advised⁹⁵ of these deficiencies early in the
2 proceedings, the Petitioner has neglected many opportunities to supplement this defi-
3 ciency with accurate and complete revenue projections, and this neglect to provide fun-
4 damental financial projections renders impossible and incorrect any claim by the
5 majority of the Local Boundary Commission that they performed a reasoned analysis of
6 the “feasibility and plausibility of anticipated ... budgets.”
7

8 The fragmented and deficient pro forma budgets submitted by Petitioner in
9 support of incorporating the Skagway area as a borough showed positive cash flows for
10 each of the three years projected.⁹⁶ However, during FY 2001, the first of the actual
11 years in the pro forma budgets, audited expenditures by the City of Skagway exceeded
12 audited revenues by 26.95 percent (\$1,922,701).⁹⁷ Excluding depreciation, the overall
13 deficit of the City of Skagway was \$1,855,544 in FY 2001, explained by City officials
14 later as resulting from a number of major capital improvement projects – none of which
15 was reflected in the inaccurate and incomplete three-year projection of anticipated
16
17
18
19
20
21
22
23

24 ⁹⁴ R. 199.

25 ⁹⁵ R. 197-99.

26 ⁹⁶ R. 16, et seq.

27 ⁹⁷ R. 200.

capital budgets submitted by the Petitioner for evaluation by the Local Boundary Commission.⁹⁸ Given these indisputable facts, it is incomprehensible that the majority of this Commission could possibly find in favor of the “feasibility and plausibility of anticipated ... budgets.” The majority simply does not have factual information available to allow any such reasoned conclusion.

The pro-forma budgets submitted by Petitioner in support of incorporating the Skagway area as a borough stated that the amount of the required Local Contribution to Education “assumes that Average Daily Membership (ADM) holds constant.”⁹⁹ The budgets also assume, for purposes of the additional voluntary local contribution Skagway donates to local education, “that beginning in FY 2001 it [the additional contribution] increases 3% per year for inflation.”¹⁰⁰ When analyzing the “feasibility and plausibility of anticipated ... budgets,” how can the majority of this Commission ignore the indisputable fact that the ADM in Skagway actually declined every year since that grossly erroneous projection was printed by Petitioner, dropping from 136.75 to 98.75 during the six years that this Petition was pending? Similarly, when considering the “feasibility and plausibility of anticipated ... budgets,” how can the majority of this Commission ignore the fact that the City of Skagway today cannot increase the additional contribution by the inflationary 3 percent each year, but rather finds itself in a predicament where they have lost \$137,000 in State funding and must tap a Timber Reserve

⁹⁸ R. 201.

⁹⁹ R. 12.

¹⁰⁰ R. 12.

1 Fund for monies that were previously planned for the additional contribution to new pro-
2 grams like music?

3 Despite the above facts that the Petitioner has not given us accurate and
4 complete information, and that the pro forma information varied so drastically from what
5 an audited statement showed as actually occurring in the projected first year, the
6 Statement of Decision concludes in one sentence, with no reasoning or citations to
7 facts, "We find the operating and capital budgets of the proposed Skagway borough
8 through the third full fiscal year of operation to be complete, reasonable, and practi-
9 cal."¹⁰¹ That conclusory statement is an astounding absurdity to any reasonable person
10 who has actually studied the financial information in the original Petition, in the Prelimi-
11 nary Report of DCCED, and in the Final Report of DCCED. There are no facts or
12 analyses supporting that conclusion in the Statement of Decision. No facts exist in the
13 Record to support such a reckless conclusion.
14
15

16 In determining whether the Skagway area contains the human and eco-
17 nomic resources to provide borough services efficiently and economically, we Commis-
18 sioners are required to evaluate the "**economic base**" of the area proposed for
19 incorporation, and the **ability of the area to generate and collect revenues**.
20
21
22
23
24
25
26

27 ¹⁰¹ Statement of Decision at 40.
28
29

1 In an historical understatement, the Petitioner admits that times have not
2 always been rosy in Skagway.¹⁰² The Petitioner then celebrates the exaggerated¹⁰³
3 conventional wisdom that Skagway is one of the “wealthiest” cities in Alaska.¹⁰⁴

4 “Wealth” implies a diversified asset base prudently secured, or, at least a
5 historically sustained cash flow. The Skagway economic base manifests neither of
6 these characteristics. Rather, the local “economic base” during the past 25 years is a
7 veritable kaleidoscope of shifting and drifting strengths and weaknesses among eco-
8 nomic sectors, with only a very recent (6 to 8 year) history of high cash flows resulting
9 from singular and total reliance upon floating and transient cruise-ship lines – an indus-
10 try as nomadic and ephemeral as the itinerant peddlers of the 19th Century.

11 This cruise-ship industry has no fixed capital investment in Skagway. Its
12 companies will respond quickly and efficiently to the whimsical “destination preferences”
13 of their type of tourist. The present cash flowing into Skagway will plummet dramatically
14 when voyages through southeast Alaska are no longer the “flavor of the day.” Skagway
15 may be flush with a recent and evanescent cash-flow, but Skagway possesses none of
16 the characteristics of diversity or sustainability in its “economic base” to warrant the
17 comfort of the claim to be “wealthy.”
18
19
20
21
22

23 ¹⁰² R. 120.

24 ¹⁰³ The Petitioner stated that the little town of Skagway had approximately \$7.5 million set aside
25 in invested savings as of May 1999. (R. 28) By the end of FY 01, however, DCCED discovered that this
26 alleged fund was reduced to \$6 million. (R. 201) Moreover, this claim to “invested savings” included
27 earmarked funds like \$2, 022,455 in Special Revenue Funds, \$109,000 in Debt Service, and \$1,341,898
28 in a Nonexpendable Trust Fund. (R. 201)

29 ¹⁰⁴ R. 121.

1 Reviewing the history of Skagway’s “economic base” over a mere quarter-
2 century, one begins with the fact that, in 1980, the Skagway economy and employment
3 bases were dominated by the transportation sector, which accounted for almost half of
4 the town’s jobs.¹⁰⁵ Five years later, this sector dropped to only 22 percent of local em-
5 ployment.¹⁰⁶

6 By 1985, total employment in Skagway was down 19 percent.¹⁰⁷ The
7 White Pass and Yukon Route Railroad shut down.¹⁰⁸ Government accounted for
8 40 percent of the town’s remaining jobs.¹⁰⁹ Public employment dominated the Skagway
9 job scene from 1983 through 1988.¹¹⁰

10 Between 1985 and 1990, employment rose over 40 percent.¹¹¹ The White
11 Pass and Yukon Route Railroad was back in operation, catering to tourists now.¹¹² But,
12 in 1990, government and transportation were still evenly split as the dominant sectors of
13 employment, at 31 percent each.¹¹³ A survey of the top three industry employers
14 (transportation, retail trade, and public administration) showed that Skagway’s economy
15
16
17
18

19 ¹⁰⁵ R. 29.

20 ¹⁰⁶ R. 29.

21 ¹⁰⁷ R. 29.

22 ¹⁰⁸ R. 29.

23 ¹⁰⁹ R. 29.

24 ¹¹⁰ R. 29.

25 ¹¹¹ R. 29.

26 ¹¹² R. 29.

27 ¹¹³ R. 29.

at that time was based on transportation, tourism, and federal/local government employment.¹¹⁴

Over the next 5 years, employment rose 9 percent.¹¹⁵ Trade became the highest sector of employment by 1995, with services and government following.¹¹⁶ (The White Pass and Yukon Route Railroad changed its employees from the transportation sector to the services sector.¹¹⁷)

Two years later, in 1997, employment had risen another 7 percent.¹¹⁸ Trade was still the dominant sector, with services and government at 25 percent each.¹¹⁹ By 1998, 23 percent of Skagway jobs were government,¹²⁰ with the City as the second largest employer in town.¹²¹ The National Park Service was the third largest employer.¹²²

In 1999, the State employed 10 people with a payroll of \$376,904.¹²³ By FY 2002, DOTPF employed only approximately half the maintenance crew it employed

¹¹⁴ R. 35-36.

¹¹⁵ R. 29.

¹¹⁶ R. 29.

¹¹⁷ R. 29.

¹¹⁸ R. 29.

¹¹⁹ R. 29.

¹²⁰ R. 30, 204.

¹²¹ R. 30 and n. 16.

¹²² R. 30 and n. 17.

¹²³ R. 31.

1 in Skagway in the 1980.¹²⁴ A year later, DOTPF cut the winter maintenance crew of five
2 to one year-round position and one winter seasonal position.¹²⁵ This was a 40 percent
3 reduction in the winter crew size, and a 70 percent reduction compared to the 1980s.¹²⁶

4 This immediately past quarter-century of volatile movement of the local
5 economy among economic sectors does not suggest that the Skagway area manifests
6 an “economic base” sufficiently stable to give reasonable assurance to a prudent person
7 that local economic resources can provide regional borough government efficiently and
8 cost effectively.

9
10 Business licenses, as a measure of the “economic base,” are declining.
11 Petitioner estimated that about 400 business licenses were issued in 1998, and that
12 369 business licenses were issued in 2000.¹²⁷ Less than two years later, by June 28,
13 2002, when the DCCED Preliminary Report was filed (and presumably the peak of the
14 tourist season in Skagway), State records showed only 208 business licenses for enter-
15 prises with mailing addresses in Skagway.¹²⁸

16
17 During the time when employment was falling and rising again in different
18 sectors, and when business licenses were increasing and more recently decreasing, the
19 number of tourists was steadily rising. In 1985, 217,687 tourists visited Skagway.¹²⁹

22 ¹²⁴ R. 260.

23 ¹²⁵ R. 260.

24 ¹²⁶ R. 260.

25 ¹²⁷ R. 30.

26 ¹²⁸ R. 203.

27 ¹²⁹ R. 30.

1 According to the Petitioner, 876,758 tourists visited Skagway in 1998.¹³⁰ However, the
2 Director of the Skagway Chamber of Commerce placed the “record” year three years
3 later, in 2001, when 750,000 visitors arrived in Skagway.¹³¹

4 Of \$63.1 million in gross taxable sales and hotel business during FY 1998,
5 fully \$55.1 million (87.3 percent) was directly related to tourism.¹³² In November 2001,
6 the Director of the Skagway Chamber of Commerce wrote,
7

8 Tourism is the economic mainstay of the town. In fact, tourism is basically
9 the *only* economy in this town besides other small commerce and busi-
nesses.¹³³

10 Contrary to the cavalier optimism in the Statement of Decision, the Director of the
11 Skagway Chamber of Commerce quite correctly expressed a prudent person's unease
12 at this total reliance upon tourism in the “economic base” of Skagway, opining, “While
13 the visitor industry is thriving, the city would like to see more year-round business op-
14 portunities develop.”¹³⁴
15

16 In summary, a quarter-century of erratic shifting among economic sectors
17 and vacillating employment statistics, recently declining local business licenses, and a
18 total and utter present reliance upon one fugitive cruise-ship industry does not suggest
19 that the Skagway area proposed for borough incorporation manifests an “economic
20 base” sufficiently stable to give reasonable assurances to a prudent person that local
21

22
23 ¹³⁰ R. 30.

24 ¹³¹ R. 203 *quoting* Skagway Chamber of Commerce Director, Nov. 2001.

25 ¹³² R. 30, 104.

26 ¹³³ R. 203 *quoting* Skagway Chamber of Commerce Director, Nov. 2001 (Emphasis in original).

27 ¹³⁴ R. 204 *quoting* Skagway Chamber of Commerce Director, Nov. 2001.
28
29

economic resources can provide regional borough government efficiently and cost effectively.

How does the majority treat this standard pertaining to the “economic base” of Skagway? It is casually approved in two sentences with no supporting thought or analysis:

Although the existing Skagway economy lacks diversity, we find that Skagway is capable of sustaining the proposed borough government. Furthermore, there is potential for expansion and development of other industries such as shipment of coal and copper ore from Canada.¹³⁵

That quote represents the full and final consideration of this important factor in the Statement of Decision. It admits lack of diversity. It finds, in a conclusory manner, a sustainable economy. It engages in gross and unwarranted speculation about potential development for which “feasibility” studies have not even been completed.

Moving along to another subsection of the Resources analysis in the regulations, what does this dependence upon a single, relatively recent, and highly transient cruise-ship industry mean in terms of whether the Skagway area possesses the human and economic resources **“to generate and collect revenue”**?

The Skagway property tax rate is set at 8 mills (decreasing in more remote tax zones).¹³⁶ The sales tax rate is 4 percent and the bed tax rate is 4 percent.¹³⁷

¹³⁵ Statement of Decision at 40.

¹³⁶ R. 7, 29.

¹³⁷ R. 7.

1 In 1998, Skagway's taxable business revenues generated \$2.5 million in
2 sales taxes.¹³⁸ By FY 2001, the sales tax generated \$3.2 million.¹³⁹ In 2005, the sales
3 tax generated \$4.2 million.¹⁴⁰ The Skagway sales tax generates 52.5 percent more on
4 a per capita basis for each 1 percent of tax levied than the next highest ranked munici-
5 pal government in Alaska, namely King Cove.¹⁴¹

6
7 Sales taxes are by far the single largest local source of revenues for the
8 municipal government.¹⁴² The Sales Tax Fund is used to make the mandatory Local
9 Minimum Contribution to schools, as well as the additional discretionary local contribu-
10 tion in Skagway.¹⁴³ That reliance on the Sales Tax Fund becomes all the more signifi-
11 cant when one recognizes that Skagway is voluntarily contributing to its single school –
12 exclusively from its Sales Tax Fund – one of the highest percentages of local contribu-
13 tions to school operating funds in the State.¹⁴⁴ For FY 2006, the City of Skagway con-
14 tributed 56 percent of the funding for operation of the school, which is the third highest
15 percentage in Alaska.¹⁴⁵
16
17
18

19
20 ¹³⁸ R. 30.

21 ¹³⁹ R. 204.

22 ¹⁴⁰ Staff Supp. 12.

23 ¹⁴¹ R. 204 and Figure 12.

24 ¹⁴² R. 199.

25 ¹⁴³ R. 196-97.

26 ¹⁴⁴ R. 120.

27 ¹⁴⁵ Supp. Brief 18. In addition to the expenditures booked for operating expenses as a part of the
28 school budget, the City of Skagway gives every student a computer from another municipal fund.
29

1 The Sales Tax Fund is used to subsidize property tax rates; to pay for
2 bonded indebtedness for water, sewer, and garbage utilities; to fund capital projects;
3 and to support tourism.¹⁴⁶

4 During FY 2001, the sales tax and the hotel tax together generated City
5 revenues equivalent to a 20.19-mill ad valorem tax on all taxable property in Skag-
6 way.¹⁴⁷ Given the present 8 mill levy on property, it would take a 28.19 mill property tax
7 for Skagway to sustain itself without the tourist industry. However, the median annual
8 household income in Skagway, at \$49,375, is already below the State median of
9 \$51,571.¹⁴⁸ The “economic base” of Skagway simply could not sustain itself at even a
10 fraction of its present revenue level without the sales tax income from the relatively re-
11 cent developments of the highly transient cruise-ship industry, and hence, there is seri-
12 ous question as to whether Skagway has the ability to generate and collect revenues on
13 a sustained basis any more secure than the predictability of its cruise-ship industry.
14

15 In determining whether this area possesses the economic resources to
16 sustain a borough efficiently and cost effectively, the Local Boundary Commission is re-
17 quired to consider “**property valuations**” in the area. Our information from the Peti-
18 tioner is contradictory and confusing. At one point, the Petition states that the 1999
19 taxable value of property was \$148,776,700.¹⁴⁹ At another point, the Petition says it
20
21
22
23

24 ¹⁴⁶ R. 196-97 and Figure 3.

25 ¹⁴⁷ R. 204.

26 ¹⁴⁸ R. 213.

27 ¹⁴⁹ R. 9.

1 was \$137,137,600.¹⁵⁰ More reliable information from the State Assessor shows that the
2 2001 taxable property values were \$187,917,800.¹⁵¹

3 It is difficult to apply “property valuations” to any meaningful comparative
4 analysis of the area’s ability to provide borough services efficiently and cost effectively
5 because so much land in Skagway is owned by people who do not live there. A “multi-
6 tude” of property owners do not reside in Skagway, according to the Mayor of Skagway
7 and the Petitioner.¹⁵² Hence, while resident-population “per capita” comparisons with
8 other small towns in Alaska show grossly disproportionate “wealth” in Skagway, those
9 attempts at comparison and contrast are really “apples and oranges” – a volatile sea-
10 sonal population in Skagway versus a stable permanent population in other communi-
11 ties.¹⁵³

12
13 However, in another sense, “property valuation” in Skagway is important to un-
14 derstand what property tax levy would be necessary to replace the tenuous dependence
15 on the Sales Tax Fund revenues from cruise ships. As noted above, that new levy
16 would be 28.19 mills,¹⁵⁴ up from the present 8-mill levy. For at least those property
17
18
19
20
21

22 ¹⁵⁰ R. 28.

23 ¹⁵¹ R. 208.

24 ¹⁵² R. 199.

25 ¹⁵³ The Statement of Decision at 40 is flawed in this respect. It compares the “per capita” value of
26 Skagway property, with high non-resident, absentee ownership to the “per capita” value of Juneau prop-
erty, without establishing whether Juneau has comparable high non-resident, absentee ownership.

27 ¹⁵⁴ R. 204.

owners who reside in Skagway, that increased tax levy would be prohibitive because their incomes are already below the state median,¹⁵⁵ and hence, property valuations suggest that Skagway does not possess human resources with sufficiently high income, and economic resources, to provide borough government efficiently and cost effectively if the unpredictable cruise-ship industry is removed from the equation.

In determining whether this area possesses the economic resources to sustain a borough efficiently and cost effectively, the Local Boundary Commission is also required to consider “**land use**” in the area. According to the 2001 Annual Report on Assessment of Taxation published by the City of Skagway, there are 684 parcels of taxable property in the area proposed for incorporation as a borough.¹⁵⁶ The largest category (392) appears to be devoted to human habitation.¹⁵⁷ The second largest category (135 parcels) is devoted to “commercial use.”¹⁵⁸ The third largest category (133 parcels) is “vacant” land.¹⁵⁹

The Mayor of Skagway contends that “The lack of available land has had a dampening affect [*sic*] on population growth” in Skagway.¹⁶⁰ However, as noted in the

¹⁵⁵ R. 213.

¹⁵⁶ R. 210 and Figure 16.

¹⁵⁷ R. 210 and Figure 16.

¹⁵⁸ R. 210 and Figure 16.

¹⁵⁹ R. 210 and Figure 16.

¹⁶⁰ R. 120.

preceding paragraph, Skagway has virtually as many “vacant” parcels as “commercial use” parcels, and the “vacant” land comprises the third largest category of private land in the area proposed for borough incorporation.

Why is no one building residential housing on this “available land”? Most likely, it is because Skagway is already glutted with vacant housing. The rental vacancy rate in Skagway, at 14.8 percent, is nearly twice the statewide rate of 7.8 percent.¹⁶¹ At the time of the 2000 Census, vacant housing comprised 20.1 percent of the 502 housing units in Skagway.¹⁶² These land-use statistics, together with the declining population and the plummeting youth-population, give ominous credence to the recent concern of the single-school Superintendent¹⁶³ that events in Skagway may be the “precursor of a dying community.”

Skagway does have land management plans and regulations that guide land use and development within the area proposed for borough incorporation, including the *Skagway Comprehensive Plan*, the *Skagway Coastal Management Plan* and four Area-Meriting-Special-Attention [AMSA] plans, the *Dyea Flats Land Management Plan*, and the Skagway municipal code.¹⁶⁴

¹⁶¹ R. 221.

¹⁶² R. 221.

¹⁶³ We fail to see how any reasonable person could rationalize that retaining a “Superintendent” of schools to oversee a one-school building with 99 students could be viewed as an “efficient and cost effective” way to administer the essential borough service of a school “district.”

¹⁶⁴ R. 31.

1 The Petitioner has clearly indicated that the *Dyea Flats Land Management*
2 *Plan* does not include new residential development, but rather calls for such preserva-
3 tion and conservation measures as protection of historical artifacts, public recreation,
4 maintenance of scenic qualities, personal and noncommercial harvesting of resources,
5 improved visitor access, and protection of biological values by managing human use.¹⁶⁵

6 Skagway recently received 932 acres of land from the State of Alaska.¹⁶⁶
7
8 Reservations of 50-foot buffers along the road, and restrictions on archeological sites
9 could reduce the useable property by as much as 200 acres.¹⁶⁷ Curiously, despite the
10 claim in these proceedings that the lack of population growth is caused by the absence
11 of available land and housing in Skagway, the present “vision” of the City of Skagway is
12 to use this newly available land primarily as a green belt and for recreation, with only
13 some “low density housing” with restricted terms of ownership to prevent subdivision or
14 resale for profit.¹⁶⁸ A 2006 date for the sale of these few parcels has already slipped,
15 and the 2007 date described in testimony during the public hearing is also extremely
16 optimistic given the fact that the subdivision of parcels for private ownership have not
17 been surveyed, no access roads have been built, and no sales program has been de-
18 veloped.¹⁶⁹

23 ¹⁶⁵ R. 33.

24 ¹⁶⁶ Staff Supp. 42-43, 45.

25 ¹⁶⁷ Staff Supp. 42-43, 45.

26 ¹⁶⁸ Staff Supp. 43.

27 ¹⁶⁹ Staff Supp. 44.

1 Indeed, there is serious question as to whether these few new parcels in this pristine
2 area will even be affordable for local people.¹⁷⁰

3 Nothing in the “land-use” category of analysis appears to alleviate the
4 problems related to economic and human resources that make this area incapable of
5 providing borough services efficiently and cost-effectively. If the human-resource defi-
6 ciencies (population declines and lack of students) are attributable to lack of available
7 land and lack of available housing for new-comers, why is there such a huge inventory
8 of vacant land in Skagway? Why is there such a high rental-housing vacancy rate?
9 Why is the City government not creating a greater number of reasonably priced residen-
10 tial lots from its own real property reserves? Neither the Mayor in his quote nor the ma-
11 jority in its Statement of Decision addresses these questions.
12

13 The truth of the matter is that there is no demand for new permanent resi-
14 dential housing. The little town of Skagway has a long history of inability to attract sus-
15 taining industry, not related to available land or land use, but related to its remoteness
16 and its isolation in a corner reach of an upper Lynn Canal district. Skagway will achieve
17 resource efficiency and resource cost-effectiveness only through partnerships, joining
18 neighboring communities, and sharing wealth in a cooperative spirit.
19

20 Finally, in determining whether this Skagway area possesses the eco-
21 nomic resources to sustain a borough efficiently and cost effectively, the Local Bound-
22 ary Commission is required to consider “**existing and reasonably anticipated**”
23

24
25
26
27 ¹⁷⁰ Staff Supp. 44.

industrial, commercial, and resource development.” As noted above, “existing” industry and commerce is wholly focused on tourism, and primarily the cruise-ship industry. We have concluded above that this single-industry concentration is economically unhealthy, does not presently create or support the student resources necessary for even a city public education system to function efficiently and cost effectively, and does not constitute an area capable of supporting regional borough government efficiently and cost effectively. Hence, the remainder of the inquiry here focuses on whether there is any “reasonably anticipated” development that will create a more diversified local economy or a more sustainable local economy. In this regard, the majority Statement of Decision summarily states – without supporting facts or analysis – “Industrial development in the form of coal and/or copper ore shipment may soon be realized.”¹⁷¹

During the public hearing of the Local Boundary Commission on November 27, 2006, School Superintendent Dickens stated that his August and September expressions of dire concern over the lack of winter work and the declining school enrollment being “a precursor of a dying community” were made:

. . . before I heard about the economic development situation that this mining -- that was taking place, so I’m very positive and happy that we have this economic development coming forward. . . . Those comments were still made prior to my understanding what was going on with the ore and then this new industry that was coming in. . . . this new mining consortium that’s going on in the Yukon and bringing that ore down and using Skagway as a port is going to really expand economic opportunities here in the city.¹⁷²

Superintendent Dickens apparently is referring to broad speculation that Skagway will, some day, become the shipping terminus for new copper ore mining in

¹⁷¹ Statement of Decision at 41.

¹⁷² Tr. 193, 195.

the Yukon Territory. Interestingly, the supplemental briefing by the Petitioner does not mention such a new industry. None of the many filings of the Petitioner mentions this new industry as something imminent on the horizon.

Two weeks before the newly found optimism expressed by Superintendent Dickens to the Local Boundary Commission, he expressed worries to the local citizenry more akin to his August and September concerns that Skagway may be “a dying community.” On November 14, 2006, the Skagway City School Board held a community forum to get input into the budgetary shortfall created by the loss of students and the loss of the two-school funding level.¹⁷³ “With the school facing inadequate enrollment in the coming years [note the plural], and a large class in 2008 that will make the numbers even lower, Dickens said that the issue was one that would have to be addressed fundamentally.”¹⁷⁴

Aside from this speculative copper ore shipping industry, the Record indicates that the Petitioner did alert this Commission of the future possibility of Skagway becoming the shipping terminus for coal mined in Canada. However, the Petitioner reports, “Currently, there are no such products moving out of the Yukon, but studies are underway to determine the feasibility of renovating the AIDEA owned terminal facility for the export of coal from the Whitehorse area.”¹⁷⁵ Without the present ability to even

¹⁷³ *Skagway News*, Nov. 22, 2006.

¹⁷⁴ *Skagway News*, Nov. 22, 2006; Tr. 194-96.

¹⁷⁵ Supp. Brief 11. The history of Skagway as a shipping terminus for Canada's Yukon Territory is not encouraging. In 1969, the owners of the White Pass & Yukon Route Railroad built an ore dock to handle large freighters carrying lead and zinc ores from Skagway. (R. 212.) That industry no longer exists. In 2000, the owners completed a \$3 million improvement to the ore dock. (R. 212.) The present economy indicates that this brought no improvement in economic development outside the cruise-ship industry. In 1994, the owners spent over \$25 million to build the present railway dock in Skagway. (R.

(continued . . .)

1 know whether renovating the shipping terminus is feasible, it is impossible to conclude
2 that the project is “reasonably anticipated” for the near future.

3 Finally, the Record indicates that there is an 80-acre former tank farm at
4 the north end of the valley that apparently could be available for development following
5 environmental clean up.¹⁷⁶ The Director of the Skagway Chamber of Commerce specu-
6 lated that it could, “be ready for the potential that construction of the proposed gas pipe-
7 line would utilize the port and need land for staging areas in the valley.”¹⁷⁷ We have no
8 evidence to indicate the level of “clean-up” required. We do not know the route of the
9 proposed gas pipeline. We have no idea whether the constructors of a Canadian pipe-
10 line would use Skagway as a terminal. We do know that actual construction of any such
11 pipeline is many years into the future. Again, this is not development that one can “rea-
12 sonably anticipate” any time in the near future.
13

14 In summary, the Resources regulation requires the Local Boundary Com-
15 mission to consider certain elements in determining whether the area proposed for bor-
16 ough incorporation possesses the human resources and the economy to provide
17 borough services efficiently and cost effectively. In performing that analysis, we find:
18

- 19 • Education is unquestionably one of the “reasonably anticipated functions” of a
20 borough, and Skagway’s tiny single-building city school is presently losing human
21 resources (students) at an unprecedented and alarming rate, to the extent that
22 this year the school system lost \$137,000 in prior State funding.

23
24 (. . . continued)

25 212.) Again, there is no improvement in the economy except the shift to tourism, which the Director of the
26 Skagway Chamber of Commerce calls, “the *only* economy in this town besides other small commerce and
27 businesses.” (R. 203. Emphasis in original.)

28 ¹⁷⁶ R. 213.

29 ¹⁷⁷ R. 213.

- The ability of the Skagway area to “generate and collect revenues” for “reasonably anticipated expenses” is extremely precarious because it is totally dependent upon one transient industry causing the director of the local Chamber of Commerce and the Mayor to publicly recognize an imminent need for diversification.
- Despite the contrived claim of the majority of this Commission that they “impliedly” considered all factors, we Commissioners could not possibly have had an opportunity to evaluate the “feasibility and plausibility of anticipated ... budgets” for the proposed borough, because the Petitioner has never supplied accurate and complete information in that regard. Although this deficiency was brought to Petitioner’s attention in the Preliminary Report of the Department, Petitioner ignored the deficiency and failed through all subsequent filings to supply any further projections of how the finances of the new borough would appear.
- The “economic base” of the area proposed for borough incorporation shows a 25-year roller-coaster history of shifting among economic sectors, and a present total reliance on a cruise-ship industry with a whimsical history of changing “destination-preferences,” such that no prudent person should rely upon this industry as a stable economic base.
- “Land valuation” as a measure of economic resources offers no reassurance that the Skagway area is capable of providing efficient, cost-effective borough services, because it would take a 28.19 mill levy to replace the present heavy reliance on the Sales Tax Fund replenished by the cruise-ship industry, and because the median annual income of Skagway residents could never sustain that tax burden.
- Contrary to assertions of the Mayor and the Petitioner, it is not the lack of available land that impedes the ability of Skagway to improve its population numbers. There are as many vacant parcels on the tax rolls as commercial parcels. The rental vacancy rate in Skagway is double the state average. The present policies of the City of Skagway are not designed to open new lands for residences. In truth, there is a glut of unused land and unused housing in Skagway. Facts pertaining to “land use” demonstrate that Skagway lacks the human resources and the economy to run a borough efficiently and cost-effectively.
- “Existing ... industrial, commercial and resource development” is limited to unhealthy reliance on tourism as “basically the *only* economy in this town besides other small commerce and businesses.” The Record provides no evidence of a copper-ore shipping terminus in the “reasonably anticipated” future. The record does not reflect a coal-shipping terminus in the “reasonably anticipated” future. There is no gas pipeline-staging terminus in the “reasonably anticipated” future.

The conclusion is inescapable for any person applying elemental reasoning to the indisputable facts: The Skagway area proposed for borough incorporation

lacks the human resources and lacks the economic resources to provide even the most fundamental borough service (education) on an efficient, cost-effective basis, and nothing in the “reasonably” foreseeable future changes that infirmity.

IV. BOUNDARIES

The provisions of 3 AAC 110.060 require the Local Boundary Commission to evaluate whether the proposed boundaries conform generally to natural geography, and whether the proposed boundaries include “all” land and water necessary for “full” development of “essential” borough services on an efficient and cost-effective level.

The provisions of 3 AAC 110.060 further require that, if the boundaries do not conform to the boundaries of the regional educational attendance area (REAA), the Local Boundary Commission must (1) consult with the Commissioner of DEED, and then (2) determine whether territory of a different size is better suited to the public interest in the full balance of borough incorporation standards.

The people of Alaska enjoy the legal right to expect that the Local Boundary Commission will not act arbitrarily or capriciously, but will follow the rule of law by considering the following factors:¹⁷⁸

- Land use and ownership patterns,
- Ethnicity and cultures,
- Population density patterns,
- Existing and reasonably anticipated transportation patterns and facilities,

¹⁷⁸ In the draft Statement of Decision, the majority said,

In reaching its conclusion, the Commission majority *impliedly considered* relevant factors such as land use and ownership patterns, ethnicity and cultures; population density patterns; existing and reasonably anticipated transportation patterns and facilities; and extraterritorial powers of boroughs. (Emphasis added.)

In truth, no Commissioner ever discussed those factors. Without any deliberations or further consideration, that italicized hedge in the draft was deleted in the final Statement of Decision which now reads in an even greater conclusory manner, “In reaching our conclusion, we consider [above enumerated factors].”

- Natural geographical features and environmental factors, and
- Extraterritorial powers of boroughs.

The boundaries of the proposed borough are identical to the boundaries of the present City of Skagway.¹⁷⁹ The Certificate of Boundaries for the City of Skagway on file with DCCED indicates that the City encompasses 443.1 square miles.¹⁸⁰ The Department's cartographer examined the boundaries more recently and calculated the area within the City at 443.35 square miles.¹⁸¹ The Petitioner claimed that the boundaries encompass 466 square miles.¹⁸² The U.S. Census Bureau reported in 1990 and in 2000 that the City of Skagway encompasses 464.3 square miles.¹⁸³

To use the term of the Petitioner, the area is "sandwiched" on all sides by other incorporated governments.¹⁸⁴ It abuts the Haines Borough on the west and south, and Canada on the east and north.¹⁸⁵ The Petitioner readily admits that geographically

¹⁷⁹ R. 1, 18.

¹⁸⁰ R. 262.

¹⁸¹ R. 262.

¹⁸² R. 6.

¹⁸³ R. 262.

¹⁸⁴ R. 2, 3.

¹⁸⁵ R. 3.

the city is an isolated area.¹⁸⁶ The visual character of this enclave¹⁸⁷ is graphically illustrated in the Public Notice maps disseminated by the Petitioner.¹⁸⁸

Retired Judge Tom Stewart writes in support of Petitioner, “In the case of Skagway bordered on the west and the south by the Haines Borough and on the east and north by the U.S. Canada International border, geography is determinative. There isn’t any question.”¹⁸⁹

We ask, “Determinative of what”? The observation of Judge Stewart is open-ended and conclusory. The fact that Skagway is a geographical remnant cannot be “determinative” of whether or not this enclave should now become a wholly separate and independent borough, because the law requires more: The law requires that it also must contain “all” land and “all” water for “full” development of efficient and cost-effective borough services. The law requires that we must draw boundaries with due consideration for land use patterns, ethnicity, cultures, population density patterns, transportation patterns, etc.

The fact that Skagway is a geographical enclave is “determinative” of nothing more than the unfortunate and embarrassing fact that some prior Local Boundary Commission created a Haines Borough leaving this isolated enclave as a

¹⁸⁶ R. 23.

¹⁸⁷ In plain English, a territory surrounded or nearly surrounded by the territory of another government is an “enclave.” San Marino is an “enclave” within Italy. Liechtenstein is an “enclave” within Switzerland. Skagway is an “enclave” “sandwiched” between Canada and the Haines Borough of Alaska. Even the Statement of Decision refers to Skagway as an “enclave” at page 15.

¹⁸⁸ R. 72-73, 113-16.

¹⁸⁹ Supp. Brief at App. A, p. 2.

1 remnant.¹⁹⁰ It is utterly unreasonable to conclude that this prior error can be corrected
2 lawfully by now dubbing that remnant “full cloth,” by now calling the tail a “dog,” by now
3 creating permanently – without analysis of all boundary factors in our regulations – a
4 borough government consisting of a mere 834 people in a one-industry town with a
5 declining population and a huge Sales Tax Fund.

6
7 Nothing in law authorizes the Local Boundary Commission to resignedly
8 create a permanent borough out of an enclave born of prior errors. Nothing in law says
9 that an artifact of a prior error qualifies ipso facto for separate borough incorporation.
10 Nothing in law says that the Local Boundary Commission has the legal authority to cor-
11 rect a prior error by further isolating a remnant or enclave as an independent regional
12 government.

13
14 In fact, our regulations presume, absent higher proof, that an area includ-
15 ing an enclave does not include “all” land necessary for full development of borough
16 services.¹⁹¹ We therefore have a stated public policy opposing enclaves, and this pre-
17 dicament created by past Local Boundary Commission mistakes demonstrates the wis-
18 dom of that public policy. We do not “correct” that prior mistake by resignedly making a
19 separate borough out of this remnant. Such a solution simply makes the earlier error
20 permanent, and exacerbates the mistake.

21
22
23
24
25 ¹⁹⁰ The majority notes in its Statement of Decision, “The boundaries approved by that LBC re-
26 sulted in three enclaves within the borough [of Haines], including Klukwan and Skagway.” Statement of
Decision at 15.

27 ¹⁹¹ 3 AAC 110.060(d).
28
29

1 The Petitioner candidly admits that these proposed boundaries are “not
2 carving-out an area, but are essentially incorporating only what is ‘left over.’”¹⁹² With
3 that admission, the Petitioner is conceding that these proposed boundaries are not ra-
4 tionally designed around regulatory and statutory standards,¹⁹³ but rather represent a
5 remnant with no delineated relationship to borough incorporation standards for bounda-
6 ries.

7
8 This acknowledgement that the proposed borough boundaries are a “left
9 over” remnant, an enclave, should cause every reasonable person to conclude that
10 none of our regulatory standards for delineating boundaries were employed by Peti-
11 tioner as the basis for the choice of these boundaries. The full regulatory litany of land-
12 use patterns, ethnicity, cultures, population density patterns, transportation patterns,
13 etc., was ignored by the Petitioner.¹⁹⁴ Instead, the Petitioner is asking this Local Bound-
14 ary Commission to capriciously recognize the remnant of Skagway as a fait accompli,
15 and to arbitrarily elevate this irrational geographical remnant to the level of a casuisti-
16 cally reasoned, permanent borough government. Nothing in law or public policy allows
17 or supports such a determination.

18
19 The Statement of Decision by the majority notes, “There is antagonism
20 between Skagway and Haines. To push Skagway and Haines together into a single
21

22 ¹⁹² R. 24, n. 8.

23 ¹⁹³ Given that candid admission from the Petitioner that it did not use our many regulatory factors
24 to delineate its proposed boundaries, how can the majority in its Statement of Decision reasonably and
25 logically claim that these artificial boundaries meet all of the factors required by our regulations? As
26 noted above, the majority did not even consider these factors in its deliberations, but instead glossed over
that unfortunate omission with a claim that they were “impliedly” considered.

27 ¹⁹⁴ Despite claims to the contrary in the Statement of Decision, these factors were ignored by the
majority of this Commission. See n. 193 above and Appendix A.

borough would be wasteful of time, money and other resources.”¹⁹⁵ We heard evidence that at least some Skagway residents are scornful toward Haines. We heard no reciprocal disrespect from Haines. Even if the two communities are feuding to the extent Petitioner’s advocates would have us believe, such quarrels between Skagway and Haines do not bring us to any Q.E.D. conclusion that Skagway should become a solitary small-town borough hoarding its assets in isolation from all of its neighbors.

Reviewing “**ethnicity and culture**”¹⁹⁶ as a factor in boundary determinations, it is noteworthy that the Skagway area is 92.3 percent “White” according to the 2000 Census.¹⁹⁷ Klukwan is 88.5 percent “American Indian or Alaska Native” according to the same 2000 Census.¹⁹⁸ Klukwan is a community located only 17 miles away from Skagway. Klukwan is the only other “enclave”¹⁹⁹ or remnant of the unorganized borough within the boundaries of the Haines Borough. The facts below establish that the proposed boundaries for the Skagway borough amount to economic gerrymandering and civil rights violations to deprive Klukwan of any share in the lucrative Skagway

¹⁹⁵ Statement of Decision at 29.

¹⁹⁶ In the draft Statement of Decision, the majority said, “In reaching its conclusion, the Commission majority *impliedly considered* relevant factors such as ... ethnicity and cultures ...” (Emphasis added.) In truth, no Commissioner ever discussed ethnicity or cultures. Without any deliberations or further consideration, that italicized hedge in the draft was deleted in the final Statement of Decision which now reads in a more conclusory manner, “In reaching our conclusion, we consider ... ethnicity and cultures” The Record and transcripts of this proceeding will show that neither ethnicity nor culture was ever considered or discussed by any Commissioner.

¹⁹⁷ <http://www.labor.state.ak.us/research/cgin/sf3profiles/skag.pdf>.

¹⁹⁸ <<http://www.labor.state.ak.us/research/cgin/sf3profiles/skag.pdf>>.

¹⁹⁹ The Statement of Decision readily admits that both Skagway and Klukwan are “enclaves” within the Haines Borough. Statement of Decision at 15.

1 Sales Tax Fund that funds Skagway's single White school beyond the statutory cap al-
2 lowed in law. Even the majority in their Statement of Decision recognizes this motive.²⁰⁰

3 The Petitioner readily admits that, in FY 1999, Skagway made not only the
4 required local contribution of \$525,021 to its school district, but also an additional volun-
5 tary local contribution of \$279,679.²⁰¹ The Petitioner readily admits that Skagway is
6 paying one of the highest percentages of school operating funds from local contributions
7 in Alaska.²⁰² All of this local contribution comes from the Sales Tax Fund.²⁰³ For FY
8 2006, the City of Skagway contributed 56 percent of the funding required for operation
9 the single school of the Skagway School District.²⁰⁴ This is the third highest percentage
10 in Alaska.²⁰⁵

11
12 During the decisional meeting of the Local Boundary Commission, one
13 Commissioner who voted in the majority favoring incorporation of a Skagway borough
14 candidly characterized the Skagway proposal for borough incorporation as the eco-
15 nomic gerrymandering that it truly is, by noting that this Petition with boundaries no lar-
16 ger than the present City of Skagway was motivated by "fear and greed."²⁰⁶ He
17 concluded that the Skagway borough Petition was born of "fear" that Skagway's flush
18
19
20

21 ²⁰⁰ Statement of Decision at 36.

22 ²⁰¹ R. 28.

23 ²⁰² R. 120.

24 ²⁰³ R. 16.

25 ²⁰⁴ Supp. Brief at 18.

26 ²⁰⁵ Supp. Brief at 18.

27 ²⁰⁶ December 13, 2006 Tr. at 178.

1 Sales Tax Fund would otherwise be shared with its neighbors in a broader borough
2 government, and born of “greed” to ensure exclusive benefits from that fortuitous cruise-
3 ship Sales Tax Fund.²⁰⁷

4 Unfortunately, that majority Commissioner failed to raise this “fear and
5 greed” motivation in any discussion of “ethnicity and cultures,” simply because this Lo-
6 cal Boundary Commission failed to discuss the standard of “ethnicity and cultures.”²⁰⁸

7 The educational welfare of the Native village of Klukwan – a similar enclave only
8 17 miles away from Skagway – was millions of miles away from the minds of the Local
9 Boundary Commission endorsing this Statement of Decision.

10 If truth be known, the full extent of Skagway’s subsidization of its single
11 school is not limited to the mandatory and additional voluntary local contributions pre-
12 scribed and permitted by State law. As one Commissioner who voted in the majority
13 stated,

14 The subtleties of what you’re doing didn’t escape me. You’re funding
15 things up to the 45% cap. And that cap was put in place so that some
16 students wouldn’t have very large advantages over other students in the
17 State. In your instance what we’re seeing in Skagway is that they’re fund-
18 ing to the cap *and then I heard testimony about buying computers for each*
19 *kid I think, the City had done that.*

20 *The City has done other things.* It was very clear that, yes, you limit the
21 cap in the budget that goes to the school district, but *those children are*
22 *the beneficiaries of quite a few things directly from the City.* And I would
commend you for that. I would say hooray for you, but I know full well

23 ²⁰⁷ December 13, 2006 Tr. at 178.

24 ²⁰⁸ In the draft Statement of Decision, the majority said, “In reaching its conclusion, the Commis-
25 sion majority *impliedly considered* relevant factors such as ... ethnicity and cultures” (Emphasis
26 added.) In truth, no Commissioner ever discussed that factor. Without any deliberations or further con-
27 sideration, that italicized hedge in the draft was deleted in the final Statement of Decision which now
reads in an even more conclusory manner, “In reaching our conclusion, we consider relevant factors such
as ... ethnicity and cultures....” The Record and transcripts will reflect that ethnicity was never discussed
by any Commissioner.

1 what was intended with that cap. And you know, there's such things as a
2 disparity test (indiscernible) 874. There's some other problems with fed-
3 eral law that you want to *be sure you do that delicately and very much be-*
4 *low the weight that the auditors make when they come into your*
5 *community. That's okay with me. I like to see that.*²⁰⁹ [Emphasis added.]

6 Klukwan, only 17 miles away, is the "neighbor" that the "fear and greed" of
7 White Skagway excludes with the gerrymandered boundaries of this new borough.
8 Education in this neighboring town of 88.5 percent American Indians and Alaska Na-
9 tives is administered by the Chatham REAA. The young students in this school district
10 are deprived of any voluntary additional local contribution to education. The young stu-
11 dents of this school district are deprived of the free computers and other legally suspect
12 City subsidies that the White students in Skagway presently enjoy. Creating a borough
13 no broader than the present City of Skagway would eliminate any future possibility of
14 equitable educational benefits in the upper region of the Lynn Canal, the Chatham
15 REAA.

16 AS 14.08.030(a) requires that the entire unorganized borough must be di-
17 vided into REAAs.²¹⁰ Therefore, contrary to the allegations of the Petitioner,²¹¹ Skag-
18 way is indeed within the Chatham REAA.²¹² The administration of the Chatham REAA
19 does not administer the school in this first-class city outside a borough; however, that
20

21
22
23 ²⁰⁹ Here is still another embarrassing example of a Commissioner not only looking askance of the
24 law, but also commending those who cook the books with a, "hooray for you." December 13, 2006 Tr. at
180.

25 ²¹⁰ R. 282.

26 ²¹¹ R. 25, 27 and Supp. Brief 17.

27 ²¹² R. 282.

1 statutory shift in administration does not change the fact that the Chatham REAA em-
2 braces the entire unorganized borough in that region of the state.²¹³

3 Stated another way, our regulations do not say that proposed borough
4 boundaries must conform to REAA boundaries *unless the proposed borough bounda-*
5 *ries are a city school district within the unorganized borough.* The majority's Statement
6 of Decision apparently agrees with this analysis, because that Statement of Decision
7 discusses the following point without questioning the applicability of the Skagway
8 boundaries to our REAA boundary regulation.
9

10 Our boundary regulation²¹⁴ says that whenever any proposed borough
11 boundaries fail to conform to REAA boundaries, the Local Boundary Commission will
12 consult with the Commissioner of DEED *before* the Local Boundary Commission makes
13 a determination of whether a different size is better suited for borough incorporation.²¹⁵
14

15 On July 1, 2002, the staff of the Local Boundary Commission sent a let-
16 ter²¹⁶ to DEED Commissioner Shirley Holloway asking for her advice and input, stating
17 in relevant part,
18

19 ²¹³ R. 282. AS 14.12.010 and AS 29.35.260(b) change only the delegated authority for local
20 school *administration* in first-class cities in the unorganized borough. Neither of these statutes changes
21 the boundaries of the Chatham REAA, which are delineated as being all the unorganized borough in the
northern Southeast Panhandle, including Skagway.

22 ²¹⁴ 3 AAC 110.060(c).

23 ²¹⁵ In the draft Statement of Decision, the majority said, "Further, the Commission majority *impli-*
24 *edly determined* that an area of different size ... is better suited to the public interest in the full balance of
25 the standards...." (Emphasis added.) In fact, no Commissioner ever discussed any such conclusion.
26 After receiving advice of legal counsel that "impliedly" should be removed from the draft, and without giv-
ing the matter any further consideration, the italicized hedge was deleted in the final Statement of Deci-
sion, which now reads in an even more conclusory manner, "We determine that an area of different size
... is better suited"

27 ²¹⁶ R. 225, n. 34; R. 283, n. 88; R. 297, n. 95; R. 496-97, n. 15. This last citation contains the
substance of the letter. The letter itself became a part of the official Record during the Decisional Meeting
(continued . . .)

3 AAC 110.060(c) provides in this regard as follows:

The proposed borough boundaries must confirm to existing regional educational attendance area boundaries unless the commission determines, after consultation with the commissioner of education and early development, that a territory of different size is better suited to the public interest in a full balance of the standards for incorporation of a borough.

This second issue is addressed in the discussion of standard number fifteen on pages 110 – 112 and 126 of the report.

Neither Commissioner Holloway nor her successor, Commissioner Sampson, has ever responded to the solicitation for consultation on whether Skagway should become borough school district with boundaries different from the Chatham REAA boundaries. Although the Local Boundary Commission never discussed this factor after seeing the letter to the Commissioner of DEED, the majority illogically reads approval into this silence.²¹⁷

The Local Boundary Commission has promulgated a regulation that recognizes the expert authority of the Commissioner of DEED in the matter of substituting other borough school district boundaries for existing REAA boundaries. That regulation says that the Local Boundary Commission will determine boundaries “*after* consultation” with the Commissioner of DEED. It does not say that the Local Boundary Commission will determine boundaries after merely sending a letter to the Commissioner of DEED. It does not say that, if the letter brings no response, the Local Boundary Commission

(. . . continued)

of December 13, 2006, after some Commissioners in the majority expressed surprise that guidance and advice actually had been specifically solicited from the Commissioner of DEED.

²¹⁷ In the draft Statement of Decision, the majority said, “The Commission majority *impliedly concluded* that the lack of response from the Commissioner of Education reflects an absence of concern over the issue.” (Emphasis added.) In fact, no Commissioner ever discussed any such grounds for conclusion. Without giving the matter any further consideration after legal counsel advised against “impliedly con-
(continued . . .)

1 can ignore this legal requirement of prior consultation. If the majority truly wanted to
2 comply with the law, we could have made an appointment to visit the Commissioner of
3 DEED, or, sent our staff to Juneau for a follow-up request in person for this expert con-
4 sultation on the matter.

5
6 This Local Boundary Commission has no legal authority to ignore its own
7 regulation, bypassing that DEED educational expertise. This Local Boundary Commis-
8 sion has no legal authority to create a new borough school district along boundaries no
9 more accurately delineated or better explained than as a “left over” remnant of a prior
10 boundary error. This Local Boundary Commission has no legal authority to create a
11 new borough school district along boundaries motivated by “fear and greed,” particularly
12 where that “fear and greed” is attributed to a “wealthy” White community hoarding local
13 revenues that otherwise might be shared with a neighboring Native American commu-
14 nity.
15

16 Like the “community of interests” standard for borough incorporation,
17 some of the factors in the boundary regulation were not designed to apply to a single
18 city corporation as a regional borough. They assume greater underlying diversity, two
19 or more communities, newly added vacant lands, and other varying characteristics
20 within the proposed borough. Reduced in application to a single city, these factors be-
21 come self-evident truisms. The **land use and ownership patterns** are almost always
22 compatible within a single existing town. The **population density patterns** are almost
23 always acceptable within a single existing town. The **existing and reasonably antici-**
24

25
26 (. . . continued)
27 cluded,” the italicized hedge was simply deleted in the final Statement of Decision which now reads in an
28 even more conclusory fashion, “We conclude”
29

1 **pated transportation patterns and facilities** are almost always sufficient within a sin-
2 gle existing town. **Natural geographical features** present no impediments in the in-
3 stant case, and **environmental factors** appear to have no bearing on the proposed
4 boundaries.

5
6 In summary, the focus of the first boundary problem in the instant case is
7 that a “left over” remnant has been presented to the Local Boundary Commission as a
8 fait accompli for borough incorporation, as though its very existence as an enclave is, in
9 itself, determinative of boundaries – without applying borough boundary standards to
10 determine whether it includes “all” land and “all” water necessary for “full” development
11 of separate and independent borough services efficiently and cost effectively.

12
13 The second boundary problem here is that Petitioner has carved out a
14 single city in economic gerrymandering motivated by “fear and greed” that would result
15 in hoarding education revenues and benefits to a single borough school including only
16 the local city students.

17
18 The third boundary problem is that our regulations require the Local
19 Boundary Commission to consult with the Commissioner of DEED *before* approving
20 borough school district boundaries different from REAA boundaries, and that has not
21 happened yet.

22
23 The fourth boundary problem is that this economic gerrymandering by a
24 racially White community invidiously discriminates against a neighboring Alaska Native
25 community, deprived forever of any possibility of sharing the financial benefits of the
26 additional local contributions that the solitary little Skagway public school enjoys.

27
28 For all of these reasons, we conclude that boundaries encompassing only
29 a declining population in a one-industry Caucasian town with a faltering single-school

“district” existing as a remnant of a prior Local Boundary Commission mistake, do not include “all” land and “all” water necessary for “full” development of essential borough services on an “efficient and cost-effective” level.

V. CIVIL AND POLITICAL RIGHTS

The provisions of 3 AAC 110.910 of our regulations require the Local Boundary Commission to ensure that creation of the proposed Skagway borough does not deny any person the enjoyment of any civil or political right, including voting rights, because of race, color, creed, sex, or national origin.

In addition, incorporation of a Skagway borough is subject to the federal Voting Rights Act of 1965.²¹⁸ The application of Section 5 of that Act results in the requirement that the U.S. Dept. of Justice or the U.S. District Court for the District of Columbia must “preclear” the proposed incorporation by determining that it does not have the purpose and will not have the effect of discrimination based on race or color. The State of Alaska carries the burden of proving that the proposed change has no retrogressive purpose or effect.

The majority of this Local Boundary Commission did not even consider the civil and political rights implications of incorporating a Skagway borough, much less deliberate and ensure that it had no such discriminatory effect.²¹⁹ A member of the majority candidly and clearly acknowledged this failure on the Record of January 11, 2007:

²¹⁸ 42 U.S.C. sec. 1973.

²¹⁹ The draft Statement of Decision by the majority originally said, “The LBC *did not expressly address this standard* during its December 13, 2006, decisional session. However, by granting the Petition, the LBC *impliedly concluded* that the standard is satisfied.” (Emphasis added.) In its conclusions regarding the Civil and Political Rights Standard, the draft Statement of Decision by the majority originally said, “Based on the foregoing, the Commission *impliedly concluded* that the standard relating to civil and political rights ... is satisfied....” (Emphasis added.) In fact, no Commissioner ever even alluded to the Civil

(continued . . .)

1 Who sitting at that table, minority or majority, considered the civil rights –
2 the political rights standard established in law? It is, in fact, law that
3 there's a statement of non-discrimination: "A petition will not be approved
4 by the Commission if the effect of the proposed change denies any person
5 the enjoyment of any civil or political right." Now, the fact that we didn't
6 bring that up and discuss it and vote on it specifically, doesn't indicate to
7 me that – that it's not – that it – that the Commission didn't view that as a
8 problem. If in fact we had found anything like this, we would have brought
9 it up. But the fact we didn't deal with it implies to me that there was no
10 problem with that point. And I don't think that anyone at the table, majority
11 or minority, had every one of these points in their mind when they voted
12 "yes" or "no" on the Petition.

13 Neither of the other two members of the majority disputed this candid admission by their
14 colleague in the vote. How, now, can the majority claim to have complied with our regu-
15 lations, and how can the State of Alaska carry its burden of proof to the federal govern-
16 ment, when a member of the majority candidly and clearly acknowledged on the Record
17 of January 11, 2007, the failure to properly consider the Civil and Political Rights Stan-
18 dard?

19 In one Alaska Supreme Court opinion, the Court said,

20 An informed decision as to whether boundaries proposed in a petition for
21 [borough] incorporation maximize the common interests of the area and
22 population and thus meet the applicable statutory standards presupposes
23 a thorough consideration of alternative boundaries and a decision as to
24 what boundaries would be optimal.²²⁰

25 (. . . continued)

26 and Political Rights Standard during the decisional session or at any other time. On the advice of legal
27 counsel that "impliedly" should be deleted, and without giving the matter any further consideration, that
28 hedging sentences were totally deleted from the final Statement of Decision, which now (at two different
29 locations) contains the confident but unreasoned assertion, "Based on the foregoing, we conclude that
30 the standard relating to civil and political rights ... is satisfied" Every reasonable person must ask,
31 "Based on the 'foregoing' what"? There never was any discussion or deliberations of civil and political
rights implications to this incorporation.

²²⁰ *Petitioners for Incorporation of City and Borough of Yakutat v. Local Boundary Com'n*, 900
P.2d 721, 725 (Alaska 1995).

1 If the Alaska Supreme Court “presupposes a thorough consideration of al-
2 ternative boundaries” in order to achieve “[a]n informed decision” that meets the “com-
3 mon interests” standard, then certainly that Court “presupposes a thorough
4 consideration of alternative boundaries” to ensure no violations of civil or political rights,
5 and no violations of the Voting Rights Act of 1965. Silence does not “imply” deliberation
6 and consideration. Assertions after-the-fact are no substitute for “thorough considera-
7 tion of alternative boundaries” in order to achieve “[a]n informed decision.”
8

9 Indeed, in the instant case, silence resulted in a small town motivated by
10 “fear and greed” sequestering and hoarding one of the most substantial property tax
11 bases²²¹ and one of the most substantial sales tax bases²²² of any municipal govern-
12 ment in Alaska. Granting borough status to Skagway will also enable it to amass and
13 hoard millions of additional dollars each year from what is reportedly the greatest cruise-
14 ship-passenger tax base of any port of call in Alaska.²²³ In its Statement of Decision,
15 the majority candidly admits that its decision “does, however, reserve the substantial
16 fiscal resources of the City of Skagway for the exclusive benefit of the residents of the
17
18
19
20
21

22 ²²¹ \$292,922 in taxable real and personal property per resident.

23 ²²² \$1,216 per capita for each 1 percent of sales tax.

24 ²²³ “No one will benefit as much as Skagway,” from the cruise ship passenger tax which “could
25 bring in \$4.5 million a year” for Skagway. *Skagway News* Aug. 11, 2006. The new law, AS 43.52.040(b)
26 provides that the State must distribute to each port of call \$5 per passenger of the tax revenue collected.
27 If the port of call is a city located within a borough not otherwise unified with the borough, the State must,
28 subject to appropriation by the legislature, distribute \$2.50 per passenger to the city and \$2.50 to the bor-
29 ough. Thus, if the City of Skagway were in a borough with Haines, half the proceeds would go to the City
30 of Skagway and the other half would go to the borough. December 13, 2006, Tr. at 96 - 98.

1 proposed borough.”²²⁴ The Statement of Decision further notes, “[W]e express particu-
2 lar confidence that Skagway’s ample financial resources will allow it to continue to offer
3 academically excellent educational facilities and programs even if enrollment dropped to
4 just 50 students, roughly half the current level.”²²⁵

5 Stated another way, incorporation as a borough allows a moneyed
6 92.3 percent-Caucasian community exceeding the maximum cap allowed by
7 AS 14.17.410(c) through sideline gifts of computers to students from the city govern-
8 ment, solidly prevents any remote chance that an 88.5 percent Alaska Native commu-
9 nity 17 miles away (another enclave²²⁶ in the Haines Borough) will ever receive any
10 supplemental funding for their school under AS 14.17.410(c). As the majority Statement
11 of Decision says in another context,
12

13 [T]he Skagway borough proposal will reserve the sizeable fiscal resources
14 of the existing City of Skagway for the exclusive benefit of the residents of
15 the proposed Skagway borough. Additionally, it will preserve the local po-
16 litical autonomy of a first-class city in the unorganized borough by granting
17 it borough status. In that regard, we candidly observe that the Petition is
motivated by a desire to prevent annexation of Skagway into an adjacent
borough.”²²⁷

21
22
23
24 ²²⁴ Statement of Decision at 9, n. 3.

25 ²²⁵ Statement of Decision at 36.

26 ²²⁶ See, Statement of Decision at 15, where, despite finding no “enclave” in the instant Petition,
the majority of this Commission admits that Skagway and Klukwan are “enclaves” in the Haines Borough.

27 ²²⁷ Statement of Decision at 50.

The Alaska Supreme Court requires the Local Boundary Commission to consider “alternative boundaries” and to delineate “optimal boundaries.” We do neither with this decision. The racial composition of Skagway and immediately surrounding affected communities compels the conclusion that the effects of the boundaries of the Skagway borough are a patent denial of civil and political rights, including voting rights, because of race.

VI. BEST INTERESTS OF THE STATE

The provisions of 3 AAC 110.980 require the Local Boundary Commission to make its determination based on

- whether the incorporation provides broad policy benefit to the public statewide, and
- whether the boundaries serve the balanced interests of the citizens in the area, and the affected local governments, and other public interests.

The provisions of 3 AAC 110.065 then require the Local Boundary Commission to measure

- whether incorporation promotes maximum local self-government,
- whether incorporation promotes a minimum number of local government units,
- whether incorporation relieves the state government of any responsibility for providing local services, and
- whether incorporation is reasonably likely to expose the state government to unusual and substantial financial risks as a successor.

This proposed incorporation provides no **broad policy benefit to the public statewide**. Quite the contrary, it is replete with damaging and regressive public policy:

- It encourages defensive formations of single-city boroughs motivated by “greed and fear.”

- It glosses over and exacerbates a past error in a borough boundary by turning a small-town remnant, an enclave, into a permanent borough government.
- It deprives neighboring communities of any share in a flush cash flow that allows local voluntary and additional contributions to education that reach and probably exceed the legal cap.
- It panders a local, provincial, political attitude disdainful of and derogatory toward neighboring communities.
- It contradicts a clear, repeatedly stated policy of the State to limit the number of school “districts” containing fewer than 250 students, without deferring to the legal authority of the Commissioner of DEED to make this determination.
- It compromises an REAA boundary without consultation with the expert Commissioner of DEED as required by law.
- It endorses bizarre “hieratical” jurisprudence for laws that should be administered with equal force and effect.
- It distorts the meaning and relationship between of Art. I, sec. 2 and Art. X of the Alaska Constitution.
- It shamelessly confesses to “lack of political will on the part of [some of] the current ... Local Boundary Commission” to steel-up to unethical political threats.

Ironically, the majority in the Statement of Decision concedes, “In that respect, we again recognize the public policy difficulties presented by the Skagway borough Petition.”²²⁸

This proposed incorporation does not serve the **balanced interests of citizens in the area proposed for change**. It serves only the unbalanced interests of a few – the ignoble interests of those citizens who would engage in ethnic discrimina-

²²⁸ Statement of Decision at 48.

tion, hoard educational funds, and defensively form a government to avoid cooperating with neighborhood communities in regional government.

This proposed incorporation does not serve other **affected local governments**. The Haines Borough loses a major community that logically and reasonably should be a part of that regional government – some day. The Alaska Native town of Klukwan and the entire Chatham REAA permanently lose the educational benefits of a share of the fortuitous cash that Skagway allocates from its Sales Tax Fund to additional local contributions and to free computers for local White students.

This proposed incorporation does not serve **other public interests**. Indeed, a decision to incorporate a Skagway borough without prior approval from the Commissioner of DEED is a shameless disregard of a very clear State law requiring such approval before “formation of a new school district with less than 250 pupils would be in the best interests of the state....”²²⁹ The Legislature expressed that same public interest again, directly to the Local Boundary Commission, in Chapter 83, SLA 2003, when it called for a study of *consolidation* of schools containing fewer than 250 students.

It is never in the public interest to grant permanence to disparities in educational funding, and yet that is precisely what occurs when Skagway incorporates as a borough. Similarly, it is never in the public interest to promote invidious racial and ethnic discrimination, and yet that is precisely what occurs when the “fear and greed” of

²²⁹ AS 14.12.025.

1 Skagway motivates boundaries that result in hoarding educational funds that could
2 benefit a Native American community 17 miles away from the new borough.

3 It is never in the public interest for any board or commission to ignore its
4 own regulations and grant borough boundaries that are admittedly a “left-over” remnant,
5 and that were never reasonably delineated using the regulatory factors as the template.
6 It is never in the public interest for this Commission to ignore its own regulation requiring
7 consultation with the Commissioner of DEED before evaluating school district bounda-
8 ries other than the REAA.
9

10 Incorporation of a Skagway borough does not **promote maximum local**
11 **self-government** except in the most pernicious and unintended interpretation, where
12 the concept of “regional” government is exploited for “greed and fear” to maximize local
13 self-interest by a small town seeking to stave off a call for regional sharing and regional
14 cooperation. The most concentrated form of local self-government is a city. Here
15 Skagway seeks to dissolve that city and replace it with a regional form of government.
16 This “fear and greed” tactic abuses the concept of regional government for the shabby
17 purpose of preventing sharing with neighboring communities.
18

19 Finally, incorporation of a Skagway borough does not **promote a mini-**
20 **mum number of local government units.** Three enclaves were erroneously left out of
21 the Haines Borough. One of these enclaves is now becoming a borough. As one of the
22 other enclaves, Klukwan would not be totally remiss to petition to become a borough.
23 Senator Coghill stated in testimony on this matter that if the Local Boundary Commis-
24 sion approved Skagway, we should expect Nenana to petition for a single-city borough.
25 Further, the Alaska Municipal League stated in its December 2006 newsletter *Touch-*
26 *stone*, “[The LBC’s Skagway] decision will have great bearing on other communities and
27
28
29

1 their future plans on borough formation decisions.” By approving this remnant as a bor-
2 ough, the majority of this Local Boundary Commission is furthering the Balkanization of
3 borough formation in Alaska, not promoting the “minimum number of local government
4 units” contemplated by the Framers of Art. X of the Alaska Constitution.²³⁰

5
6 Where a Commissioner in the majority has candidly acknowledged in the
7 Record what we all have realized, namely that this Petition is motivated by “fear and
8 greed,” it is incomprehensible to us that any Commissioner can find that this outcome is
9 in the “public interest” or in the “best interests of the State” of Alaska, particularly when
10 incorporation of this enclave occurs without the prior approval of the Commissioner of
11 DEED and where this incorporation expressly results in successfully hoarding education
12 funds against a possible sharing with a neighboring Native Alaskan community.

13 VII. EX PARTE CONTACTS AND THREATS

14
15 Following the public hearing in Skagway on November 27-29, 2006, one
16 of the undersigned dissenting Local Boundary Commissioners was standing in the de-
17 parture gate area of the Juneau airport with one of the Local Boundary Commissioners
18 in the majority on this matter. A state legislator approached the two of us, and blatantly
19 stated in a loud, blustering and threatening tone, that if the Local Boundary Commission
20

21 ²³⁰ It should be noted that our public hearings included testimony from three persons in atten-
22 dance at the Alaska Constitutional Convention in 1955 - 1956.

23 Delegate Jack Coghill testified in favor of Skagway becoming a borough. At the Constitutional
24 Convention, he was never involved with local government issues at the committee level or the drafting
25 level, but he did vote *against* adoption of the present Article X that governs local government affairs.

26 Judge Tom Stewart testified in favor of Skagway becoming a borough. At the Constitutional Con-
27 vention, he was the Secretary to the Convention, not a delegate. He neither participated on the Commit-
28 tee on Local Government nor voted on the matter.

29 Delegate Victor Fischer testified against Skagway becoming a borough. At the Constitutional
30 Convention, he was the Secretary of the Committee on Local Government, a co-drafter of Article X, and
31 the author of many subsequent books and publications explaining the meaning of that Article. Mr. Fischer
is recognized by the Alaska Supreme Court as “an authority on Alaska government.” *Keane v. Local*
(continued . . .)

1 did not vote in favor of creating the Skagway borough, he was going to totally cut the
2 budget of the Commission.

3 The undersigned dissenting Commissioner immediately walked away from
4 this legislator without comment. The other Commissioner stayed with him, and contin-
5 ued to talk for at least 10 minutes.

6 During the subsequent decisional meeting of December 13, 2006, follow-
7 ing the 3-2 vote in favor of borough incorporation for Skagway, that same legislator en-
8 gaged in dialogue with the same Commissioner whom he had previously engaged in the
9 confab at the airport. Repeatedly referring to that Commissioner on a first-name basis,
10 that legislator stated on the record,
11

12 No, I think I just – the only one I want to make, [first name], is first thank
13 you. And I did testify in favor of this, but that’s moot now then so I had all
14 these other comments that I was – *I told you that I was going to try to work*
15 *on a borough issue bill. And it was an incentive.* We had one last year,
but I think that (indiscernible) honest (indiscernible) didn’t want to really
push it, so we’re going to revamp it.

16 ... But, anyway, [first name], I will commit to you that we do have a bill that
17 we’re going to re-draft and throw out....²³¹

18 We are puzzled to know what triggered this spontaneous statement of a
19 commitment to a new bill. No one else during this Local Boundary Commission session
20 was discussing legislation. We are puzzled to know what this legislator means when he
21 says here, to the majority Commissioner he confronted, threatened, and then engaged
22

23
24
25 (. . . continued)

26 *Boundary Commission*, 893 P.2d 1239, 1244 (Alaska 1995). The Court has relied on his work in *Keane*
and in *Mobil Oil Corp. v. Local Boundary Commission*, 518 P.2d 92 (Alaska 1974).

27 ²³¹ December 13, 2006, Tr. at 190-91. (Emphasis added.)
28
29

1 in conversation at the Juneau airport, “I told you that I was going to try to work on a bor-
2 ough issue bill.” We are more puzzled to know what he means here when he says on
3 the Record that his agreement to work on a borough issue bill “... was an incentive.”?
4 Incentive for what, we ask?

5
6 During a break in the decisional meeting of December 13, 2006, following
7 the 3-2 vote of the Local Boundary Commission to approve the incorporation of Skag-
8 way as a borough, that same majority Commissioner addressed by the legislator during
9 the meeting, told one of the undersigned dissenters that, now that the Skagway matter
10 was decided, this legislator had assured him that he would enact legislation this year to
11 create boundaries throughout the rest of the unorganized borough. The undersigned
12 replied, “If that happens, I’ll buy you dinner anywhere you choose in America.”

13
14 During the January 11, 2007, meeting of the Local Boundary Commission,
15 when the undersigned reported to the full Commission the Juneau airport threat and at-
16 tempted intimidation, another Commissioner who formed the majority stated that a legis-
17 lator had approached him too, but that he immediately admonished that legislator
18 against ex parte contacts in this matter.

19 The Executive Branch Ethics Act, AS 39.52.120(e), limits contacts be-
20 tween “a public officer” and a commission.²³²

21
22 Except for supplying information requested by the hearing officer or the
23 entity with authority to make the final decision in the case, or when re-
24 sponding to contacts initiated by the hearing officer or the individual,
25 board, or commission with authority to make the final decision in the case,
26 a public officer may not attempt to influence the outcome of an administra-
27 tive hearing by directly or indirectly contacting or attempting to contact the

28
29
30
31
²³² A legislator is not a “public officer” under this Executive Branch Ethics Act, however one might reasonably expect that legislators also will abide by the spirit of this ethics law.

1 hearing officer or individual, board, or commission with authority to make
2 the final decision in the case assigned to the hearing officer unless the

- 3 (1) contact is made in the presence of all parties to the hearing or
4 the parties' representatives and the contact is made a part of
5 the record; or
6 (2) fact and substance of the contact is promptly disclosed by the
7 public officer to all parties to the hearing and the contact is
8 made a part of the record.

9 Our new Governor brings to Alaska State Government a fresh and healthy
10 regard for ensuring that the days of good ol' boy, back-slappin' back-room politics have
11 passed out of fashion in Alaska. There is a renewed interest in political ethics. There is
12 an active concern to prevent venality in government. Governor Palin leads a wave of
13 Alaskan voters who agree wholeheartedly with the advice given to her some time ago
14 by another elected official that "In politics, you either eat well or you sleep well."

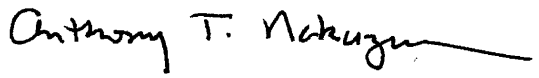
15 In a quasi-judicial proceeding, a threat by a legislator to eliminate the
16 budget of the Local Boundary Commission if the vote does not go his or her way, is akin
17 to a legislator threatening a Superior Court judge that the budget of the Judiciary will be
18 eliminated if that judge does not decide a civil case favorable to the legislator's position.
19 Our regulations prohibit such ex parte threats.²³³ It is the hope of the dissenters in this
20 unfortunate Skagway decision, that every Local Boundary Commissioner will always
21 stand firmly and courageously for the best interests of the State of Alaska whenever
22 faced with discomfiting ex parte threats from a legislator that a contrary decision may
23 mean we will not "eat well."

24 We will, assuredly, "sleep well."

25
26
27 ²³³ 3 AAC 110.500(b).

1 For all of the reasons set forth in this Statement of Dissent, we respectfully
2 disagree with the majority Statement of Decision in the matter of Skagway incorporation
3 as a borough.
4

5
6 By: 
7 Robert Hicks, Vice Chair

By: 
Anthony Nakazawa, Commissioner

APPENDIX A:

SUMMARY OF EDITORIAL CHANGES IN STATEMENT OF DECISION REFLECTING ALLEGED DELIBERATIONS THAT NEVER OCCURRED

1. In the draft Statement of Decision, the majority said, “We *impliedly found* that there are no enclaves....” (Emphasis added.) In fact, no Commissioner ever discussed that factor. Without any deliberations or further consideration, that italicized hedge in the draft was deleted in the final Statement of Decision which now reads in an even more conclusory fashion, “We find that there are no enclaves....”

2. In the draft Statement of Decision, the majority said, “In reaching its conclusion, the Commission majority *impliedly considered* relevant factors such as land use and ownership patterns, ethnicity and cultures; population density patterns; existing and reasonably anticipated transportation patterns and facilities; and extraterritorial powers of boroughs. (Emphasis added.) In truth, no Commissioner ever discussed those factors. Without any deliberations or further consideration, that italicized hedge in the draft was deleted in the final Statement of Decision which now reads in an even more conclusory manner, “In reaching our conclusion, we consider [above enumerated factors].” Most significantly here, ethnicity was never discussed by any Commissioner.

3. In the draft Statement of Decision, the majority said, “The Commission majority *impliedly concluded* that the lack of response from the Commissioner of Education reflects an absence of concern over the issue.” (Emphasis added.) In fact, no Commissioner ever discussed any such grounds for conclusion. Without giving the matter any further consideration, the italicized hedge was deleted in the final Statement of Decision, which now reads in an even more conclusory manner, “We conclude”

4. In the draft Statement of Decision, the majority said, “Further, the Commission majority *impliedly determined* that an area of different size ... is better suited to the public interest in the full balance of the standards....” (Emphasis added.) In fact, no Commissioner ever discussed any such conclusion. Without giving the matter any further consideration, the italicized hedge was deleted in the final Statement of Decision, which now reads in an even more conclusory manner, “We determine that an area of different size ... is better suited”

5. In the draft Statement of Decision, when addressing the legal standards for dissolution of the City of Skagway – a prerequisite to incorporation of this area as a borough – the majority said, “The LBC *did not expressly address this standard* during its December 13, 2006, decisional session. However, by granting the Petition, the LBC *impliedly concluded* that the standard is satisfied.” (Emphasis added.) In fact, no Commissioner even mentioned words suggesting that dissolution standards were on his or her mind. Without giving this significant topic any further substantive consideration whatsoever, the above sentences were deleted in the final Statement of Decision, which now appears like a carefully choreographed soft-shoe routine designed to lure readers away from the undeniable elephant in the theater:

We considered this standard during the course of the extensive remand proceedings. [Where? When? How?] Those proceedings were not limited just to the hearing of November 27-29, 2006, and the decisional session of December 13, 2006, but also included a review by Commissioners of the entire record in the 2002 proceedings and further discussion at the Commission's meeting of January 11, 2007.

The record will reflect that no one discussed the substance of dissolution standards on January 11, 2007.

6. In the draft Statement of Decision, the majority said, "The Commission majority *impliedly found* that all of the powers of the City ... would become areawide powers" (Emphasis added.) In fact, no Commissioner ever discussed any such grounds for conclusion. Without giving the matter any further consideration, the italicized hedge was deleted in the final Statement of Decision, which now reads in an even more conclusory fashion, "We find that all of the powers of the City"

7. In the draft Statement of Decision, the majority said, "Based on the finding above, the Commission majority *impliedly concluded* that the Petition for dissolution ... and concurrent incorporation... satisfies the City Dissolution Standard" (Emphasis added.) In fact, no Commissioner ever discussed any such "finding," much less reach a conclusion on this factor. Without giving the matter any further consideration that italicized hedge was deleted in the final Statement of Decision, which now reads in an even more conclusory manner, "Based on the finding above, we conclude"

8 - 9. With regard to the Transition Standard in 3 AAC 110.900, the draft Statement of Decision said at two different locations, "The LBC *did not expressly address* this standard during its December 13, 2006, decisional session. However, by granting the Petition, the LBC *impliedly concluded* that the standard is satisfied." (Emphasis added.) In fact, no Commissioner ever even alluded to the Transition Standard during the decisional session or any other time. Without giving the matter any further consideration, that hedging sentence was totally deleted from the final Statement of Decision, which now contains an obfuscating casuistic rationalization of the flaw:

We considered this standard during the course of the extensive remand proceedings. [When?] Those proceedings were not limited just to the hearing of November 27-29, 2006, and the decisional session of December 13, 2006, but also included a review by Commissioners of the entire record in the 2002 proceedings and further discussion at the Commission's meeting of January 11, 2007.

The record will accurately reflect the fact that no one discussed the substance of the transition standards on January 11, 2007.

10 - 11. With regard to the Civil and Political Rights Standard, the draft Statement of Decision by the majority originally said, "The LBC *did not expressly address this stan-*

1 dard during its December 13, 2006, decisional session. However, by granting the Peti-
2 tion, the LBC *impliedly concluded* that the standard is satisfied. (Emphasis added.) In
3 its conclusions regarding the Civil and Political Rights Standard, the draft Statement of
4 Decision by the majority originally said, “Based on the foregoing, the Commission *impli-
5 edly concluded* that the standard relating to civil and political rights ... is satisfied....”
6 (Emphasis added.) In fact, no Commissioner ever even alluded to the Civil and Political
7 Rights Standard during the decisional session or at any other time. Without giving the
8 matter any further consideration, that hedging sentences were totally deleted from the
9 final Statement of Decision, which now contains the confident but unreasoned assertion:
10 “Based on the foregoing, we conclude that the standard relating to civil and political
11 rights ... is satisfied” Every reasonable person must ask, “Based on the ‘foregoing’
12 what”? There never was any discussion or deliberations of civil and political rights im-
13 plications to this incorporation.
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

May 12, 2022 LBC Discussion

2007 Skagway Borough Decision and Dissent

Background

- In January 2001, a petition was submitted to the LBC to dissolve the City of Skagway and concurrently incorporate a Skagway borough.
- The proposed borough boundaries – encompassing 443.1 square miles and 862 residents - were identical to the City's boundaries.
- The powers and duties of the proposed borough were the same as those of the Skagway city government.
- In September 2002, LBC concluded that the Skagway borough proposal failed to meet several requisite standards established in law.
- Skagway appealed the Commission's decision to the Superior Court, asserting that the principles recognized by the Commission constituted de facto regulations that had not been adopted under the Administrative Procedure Act. The court agreed and remanded the matter to LBC.
- The court ruled that: "without prior notice, the Commission applied a newly-enunciated 'fundamental principle' to conclude that 443.1 square miles is not 'relatively large' enough to be a borough."
- The court added that the "Commission remains free to deny the petition. However, any decision must be based on standards adopted according to law."
- In an August 2006 Supplemental Report LBC staff advised their commissioners that: "the standards applicable to the Skagway borough incorporation proposal consist of Article X, Section 3 of the

Alaska Constitution, AS 29.05.031, 3 AAC 110.045 – 3 AAC 110.065, and 3 AAC 110.900 – 3 AAC 110.990. Those provisions include specific measures of the best interests of the State. The provisions of the federal Voting Rights Act also apply to borough incorporations....”

- LBC staff recommended that the Commission reject the petition for incorporation of a Skagway borough. These primary reasons were these:
 - The proposed Skagway Borough does not comprise an area with a population that is interrelated and integrated as to its social, cultural, and economic activities, and did not encompass at least two communities which the law presumes must be the case to meet the applicable standard.
 - The proposed borough does not comprise an area with a population that is large and stable enough to support a borough government. The population of the proposed Skagway borough was 834, well below the minimum of 1,000 permanent residents which lawfully presumes must be in place to meet the standard.
 - The borough boundaries did not conform to natural geography or include all areas necessary for full development of municipal services.
 - “The Skagway borough proposal clearly serves the parochial interests of the citizens of Skagway; however, it does not serve the broader public interests. It does not promote maximum local self-government. Neither does it promote a minimum of local government units. Lastly, it does nothing to relieve the State of the burden to provide local services.”
- Nonetheless, three LBC commissioners disregarded their staff’s recommendation and in a January 2007 Decision approved a Skagway Borough, and dissolved the City of Skagway. Two commissioners disagreed and submitted a strong Statement of Dissent.

Statement of Dissent

- Labeling the majority's decision a "travesty," dissenting Commissioners Hicks and Nakazawa wrote that the LBC's decision was: "replete with omitted deliberations, inaccurate assertions of deliberations that never occurred, ignored facts, [and included] fanciful speculations, unsupported reasoning, specious rationalizations, misunderstandings of law, and [was] erroneous."
- At Page 5 of their Dissent, the commissioners stated that "Alaska government does indeed originate with the people, but that this elegant principle is stated with the caveat that Alaska government subsequently will be administered for the good of the people 'as a whole.'"
- They wrote that "it is a sad day when the Local Boundary Commission capitulates to the heavy and sometimes unethical local and regional political pressures that we suffered in this Skagway matter." Page 6.
- LBC Regulations: "[O]ur regulations cannot be demeaned [by the Majority] and relegated to 'tertiary-level guidelines in a hieratical order.' As enforceable law, they are every bit as compelling as statutes and the Constitution. Prioritizing law so that regulations are relegated for purposes of analyzing the Skagway Petition has created a fatal legal flaw in the Statement of Decision." Page 11.
- Local Politics: "In the last analysis of general principles, we dissenters believe that the Framers of our Constitution rightly concluded that local politics do not result in good boundary decisions. The statewide Local Boundary Commission was created in our Constitution to ensure that broader viewpoints and interests enter the evaluation of local government units. Local Boundary Commissioners are responsible to step back from local advocacy and to view the bigger picture of not only the consequences of their actions but also the precedent they establish." Page 11.

- Population: “The provisions of 3 AAC 110.050 require the Local Boundary Commission to evaluate whether the population in the area proposed for borough incorporation is sufficiently large and sufficiently stable to support a borough government. The regulation includes a rebuttable presumption that an area is *not* sufficiently large and stable if it contains fewer than 1,000 permanent residents.” Page 12.
 - The regulations call for consideration of factors such as total census enumeration, duration of residency, historical population patterns, seasonal population changes, and age distributions within the area proposed for incorporation.
 - The 2000 census showed that Skagway had a population of 862 which declined to 834 by 2005. Page 13.
 - From 2000 to 2005, PFD applications from Skagway residents declined from 854 to 818. Page 14.
 - By FY 2006, Skagway student enrollment had dropped to 109.25; by FY 2007, it had dropped to 98.75 students. Page 15.
 - “Despite all the above evidence of declining populations in Skagway, the Statement of Decision expresses ‘particular confidence that both the general population and student enrollment for Skagway will grow in the foreseeable future.’” Page 18.
 - “Not only is Skagway a relatively old population, but it is constantly losing youth and therefore getting older.” Page 20.
 - “The historical population shifts in Skagway look like a roller coaster when plotted on a line graph, erratically swinging by two-figure percentages most decades of the City’s existence. The only consistency in the graph is the total absence of any evidence of long-term growth. In nearly 100 years, the

population has never risen above the 872 people living in Skagway at the end of the Gold Rush in 1910, and the numbers are declining now.” Page 21.

- “We are not confirming a first-class city here; we are evaluating the creation of a new and different form of government, which in its essence is regional rather local. Stated another way, the question before this Commission is not whether this small and erratic population-base can run a little city, but whether it is reasonable for the Local Boundary Commission to create here a new and permanent regional form of government, namely a borough. Therefore, the fact that Skagway – like every first-class city in the unorganized borough – presently provides the services of a borough government does not create an end-all fait accompli that Skagway is or should be a borough government.” Page 22.
- The LBC should be encouraging local people to combine and cooperate with other population centers in the provision of their regional government services. “[T]his Petition does not meet the legal requirements of having a population sufficiently ‘large’ and sufficiently ‘stable’ for incorporation as a borough.” Page 23.
- Resources: “The provisions of 3 AAC 110.055 require that the Local Boundary Commission must determine that the economy of the area of the area includes the human resources necessary to provide borough services efficiently and cost effectively.” Page 23.
 - “Likewise, 3 AAC 110.055 requires that the Local Boundary Commission must determine that the economy of the area includes the financial resources necessary to provide borough services efficiently and cost effectively.” Page 24.

- “The public has a right to expect that this Commission ‘will’ consider all of the following factors:
 - Reasonably anticipated functions,
 - Reasonably anticipated expenses,
 - Ability to generate/collect revenue and reasonably anticipated income,
 - Feasibility and plausibility of anticipated capital and operating budgets,
 - Economic base of the proposed borough,
 - Property valuations,
 - Land use, and
 - Existing and reasonably anticipated industrial, commercial, and resource development.” Page 24.
- “[N]o one can deny that public education is one of the most fundamental and essential borough functions that an area’s economy and human resources must be capable of ensuring on an ‘efficient and cost effective’ basis.” Student population in Skagway has been dropping for the past 14 years. Pages 24 – 25.
- “[T]he Local Boundary Commission cannot ignore the fact that the Alaska Legislature has determined at AS 14.12.025 that a school district of fewer than 250 students presumptively does not serve the best interests of the state unless the Commissioner of DEED determines otherwise.” The Commission never responded. Pages 26.and 27.
- “We believe that this approval from DEED is a statutory prerequisite to creating such a preposterously miniscule school ‘district’ with fewer than 100 students in a single building, particularly when that ‘superintendent’ is warning local citizens that the steadily declining student enrollment may be a ‘precursor of a dying community.’” Page 28.

- “We Commissioners are also legally responsible to determine the ‘feasibility and plausibility of anticipated capital and operating budgets’ presented by the Petitioner. However, in the present case of the Skagway Petition, we have received from Petitioner only inaccurate and incomplete three-year projections of expenditures and revenues.” Page 29.
- “[H]ow can the majority of this Commission ignore the indisputable fact that the ADM [Average Daily Membership] in Skagway actually declined every year since that grossly erroneous projection was printed by Petitioner, dropping from 136.75 to 98.75 during the six years that this Petition was pending?” Page 32.
- “Despite the above facts that the Petitioner has not given us accurate and complete information, and that the pro forma information varied so drastically from what an audited statement showed as actually occurring in the projected first year, the Statement of Decision concludes in one sentence, with no reasoning or citations to facts, ‘We find the operating and capital budgets of the proposed Skagway borough through the third full fiscal year of operation to be complete, reasonable, and practical.’” Page 33.
- “In summary, a quarter-century of erratic shifting among economic sectors and vacillating employment statistics, recently declining local business licenses, and a total and utter present reliance upon one fugitive cruise-ship industry does not suggest that the Skagway area proposed for borough incorporation manifests an ‘economic base’ sufficiently stable to give reasonable assurances to a prudent person that local economic resources can provide regional borough government efficiently and cost effectively.” Pages 38 and 39.
- “The ‘economic base’ of the area proposed for borough incorporation shows a 25-year roller-coaster history of shifting

among economic sectors, and a present total reliance on a cruise-ship industry with a whimsical history of changing 'destination-preferences,' such that no prudent person should rely upon this industry as a stable economic base." Page 50.

- "‘Land valuation’ as a measure of economic resources offers no reassurance that the Skagway area is capable of providing efficient, cost-effective borough services, because it would take a 28.19 mill levy to replace the present heavy reliance on the Sales Tax Fund replenished by the cruise-ship industry, and because the median annual income of Skagway residents could never sustain that tax burden." Page 50.
- "The rental vacancy rate in Skagway is double the state average. The present policies of the City of Skagway are not designed to open new lands for residences. In truth, there is a glut of unused land and unused housing in Skagway. Facts pertaining to ‘land use’ demonstrate that Skagway lacks the human resources and the economy to run a borough efficiently and cost-effectively. Page 50.
- "‘Existing ... industrial, commercial and resource development’ is limited to unhealthy reliance on tourism as ‘basically the only economy in this town besides other small commerce and businesses.’ The Record provides no evidence of a copper-ore shipping terminus in the ‘reasonably anticipated’ future. The record does not reflect a coal-shipping terminus in the ‘reasonably anticipated’ future. There is no gas pipeline-staging terminus in the ‘reasonably anticipated’ future." Page 50.
- "The Skagway area proposed for borough incorporation lacks the human resources and lacks the economic resources to provide even the most fundamental borough service (education) on an efficient, cost-effective basis, and nothing in the ‘reasonably’ foreseeable future changes that infirmity." Pages 50 and 51.

- Boundaries: “The provisions of 3 AAC 110.060 require the Local Boundary Commission to evaluate whether the proposed boundaries conform generally to natural geography, and whether the proposed boundaries include ‘all’ land and water necessary for ‘full’ development of ‘essential’ borough services on an efficient and cost-effective level. The provisions of 3 AAC 110.060 further require that, if the boundaries do not conform to the boundaries of the regional educational attendance area (REAA), the Local Boundary Commission must (1) consult with the Commissioner of DEED, and then (2) determine whether territory of a different size is better suited to the public interest in the full balance of borough incorporation standards.” Page 51.
 - In reaching its conclusion regarding boundaries of the new borough, the Commission majority said that it “impliedly” considered relevant factors such as land use and ownership patterns, ethnicity and cultures; population density patterns; existing and reasonably anticipated transportation patterns and facilities; and extraterritorial powers of boroughs. “In truth, no Commissioner ever discussed those factors.” Page 51.
 - “The boundaries of the proposed borough are identical to the boundaries of the present City of Skagway.” Page 52.
 - The area is “sandwiched” on all sides by other incorporated governments. It abuts the Haines Borough on the west and south, and Canada on the east and north. “The fact that Skagway is a geographical enclave is ‘determinative’ of nothing more than the unfortunate and embarrassing fact that some prior Local Boundary Commission created a Haines Borough leaving this isolated enclave as a remnant. It is utterly unreasonable to conclude that this prior error can be corrected lawfully by now dubbing that remnant ‘full cloth,’ by now calling the tail a ‘dog,’ by now creating permanently – without analysis of all boundary factors in our regulations – a borough government consisting of a mere 834 people in a one-industry town with a declining population and a huge Sales Tax Fund.” Pages 52 and 53.

- “Nothing in law authorizes the Local Boundary Commission to resignedly create a permanent borough out of an enclave born of prior errors.” Page 54.
- “We therefore have a stated public policy opposing enclaves, and this predicament created by past Local Boundary Commission mistakes demonstrates the wisdom of that public policy.” Page 54.
- “This acknowledgement that the proposed borough boundaries are a ‘left over’ remnant, an enclave, should cause every reasonable person to conclude that none of our regulatory standards for delineating boundaries were employed by Petitioner as the basis for the choice of these boundaries. The full regulatory litany of land use patterns, ethnicity, cultures, population density patterns, transportation patterns, etc., was ignored by the Petitioner.” Page 55.
- “Even if the two communities are feuding to the extent Petitioner’s advocates would have us believe, such quarrels between Skagway and Haines do not bring us to any Q.E.D. [as expected] conclusion that Skagway should become a solitary small-town borough hoarding its assets in isolation from all of its neighbors.”
- “Reviewing ‘ethnicity and culture’ as a factor in boundary determinations, it is noteworthy that the Skagway area is 92.3 percent ‘White’ according to the 2000 Census. Klukwan is 88.5 percent ‘American Indian or Alaska Native’ according to the same 2000 Census. Klukwan is a community located only 17 miles away from Skagway. Klukwan is the only other ‘enclave’ or remnant of the unorganized borough within the boundaries of the Haines Borough. The facts below establish that the proposed boundaries for the Skagway borough amount to economic gerrymandering and civil rights violations to deprive Klukwan of any share in the lucrative Skagway Sales Tax Fund that funds Skagway’s single White school beyond the statutory cap allowed in law. Even the majority in their Statement of Decision recognizes this motive.” Pages 56 and 57.

- “[O]ne Commissioner who voted in the majority favoring incorporation of a Skagway borough candidly characterized the Skagway proposal for borough incorporation as the economic gerrymandering that it truly is, by noting that this Petition with boundaries no larger than the present City of Skagway was motivated by ‘fear and greed.’ He concluded that the Skagway borough Petition was born of ‘fear’ that Skagway’s flush Sales Tax Fund would otherwise be shared with its neighbors in a broader borough government, and born of ‘greed’ to ensure exclusive benefits from that fortuitous cruise ship Sales Tax Fund. Pages 57 and 58.
- “Klukwan, only 17 miles away, is the ‘neighbor’ that the “fear and greed” of White Skagway excludes with the gerrymandered boundaries of this new borough. Education in this neighboring town of 88.5 percent American Indians and Alaska Natives is administered by the Chatham REAA. The young students in this school district are deprived of any voluntary additional local contribution to education. The young students of this school district are deprived of the free computers and other legally suspect City subsidies that the White students in Skagway presently enjoy. Creating a borough no broader than the present City of Skagway would eliminate any future possibility of equitable educational benefits in the upper region of the Lynn Canal, the Chatham REAA.” Page 59.
- “Our boundary regulation says that whenever any proposed borough boundaries fail to conform to REAA boundaries, the Local Boundary Commission will consult with the Commissioner of DEED before the Local Boundary Commission makes a determination of whether a different size is better suited for borough incorporation.” Page 60
- No response from the Commissioner of DEED was received. The LBC’s “...regulation says that the Local Boundary Commission will determine boundaries “after consultation” with the Commissioner of DEED. It does not say that the Local Boundary Commission will determine boundaries after merely

sending a letter to the Commissioner of DEED. It does not say that, if the letter brings no response, the Local Boundary Commission.” Pages 61 – 62.

- “This Local Boundary Commission has no legal authority to ignore its own regulation, bypassing that DEED educational expertise. This Local Boundary Commission has no legal authority to create a new borough school district along boundaries no more accurately delineated or better explained than as a ‘left over’ remnant of a prior boundary error.” Page 62.
- “In summary, the focus of the first boundary problem in the instant case is that a ‘left over’ remnant has been presented to the Local Boundary Commission as a fait accompli for borough incorporation, as though its very existence as an enclave is, in itself, determinative of boundaries – without applying borough boundary standards to determine whether it includes ‘all’ land and ‘all’ water necessary for ‘full’ development of separate and independent borough services efficiently and cost effectively.
- “The second boundary problem here is that Petitioner has carved out a single city in economic gerrymandering motivated by ‘fear and greed’ that would result in hoarding education revenues and benefits to a single borough school including only the local city students.
- “The third boundary problem is that our regulations require the Local Boundary Commission to consult with the Commissioner of DEED before approving borough school district boundaries different from REAA boundaries, and that has not happened yet.
- “The fourth boundary problem is that this economic gerrymandering by a racially White community invidiously discriminates against a neighboring Alaska Native community, deprived forever of any possibility of sharing the financial benefits of the additional local contributions that the solitary little Skagway public school enjoys.” Page 63.

- Civil and Political Rights: “The provisions of 3 AAC 110.910 of our regulations require the Local Boundary Commission to ensure that creation of the proposed Skagway borough does not deny any person the enjoyment of any civil or political right, including voting rights because of race, color, creed, sex, or national origin. In addition, incorporation of a Skagway borough is subject to the federal Voting Rights Act of 1965.” Page 64.
 - “The majority of this Local Boundary Commission did not even consider the civil and political rights implications of incorporating a Skagway borough, much less deliberate and ensure that it had no such discriminatory effect.” Page 64.
 - “[I]ncorporation as a borough allows a moneyed 92.3 percent-Caucasian community exceeding the maximum cap allowed by AS 14.17.410(c) through sideline gifts of computers to students from the city government, solidly prevents any remote chance that an 88.5 percent Alaska Native community 17 miles away (another enclave in the Haines Borough) will ever receive any supplemental funding for their school under AS 14.17.410(c).” Page 67.
- Best Interests of the State:
 - “The provisions of 3 AAC 110.980 require the Local Boundary Commission to make its determination based on:
 - whether the incorporation provides broad policy benefit to the public statewide, and whether the boundaries serve the balanced interests of the citizens in the area, and the affected local governments, and other public interests.
 - The provisions of 3 AAC 110.065 then require the Local Boundary Commission to measure whether incorporation promotes maximum local self-government, whether incorporation promotes a minimum number of local government units, whether incorporation relieves the state government of any responsibility for providing local services, and whether incorporation is reasonably likely to expose the state

government to unusual and substantial financial risks as a successor.” Page 68.

- The Skagway borough formation “...provides no broad policy benefit to the public statewide.”
 - “It encourages defensive formations of single-city boroughs motivated by ‘greed and fear.’
 - It glosses over and exacerbates a past error in a borough boundary by turning a small-town remnant, an enclave, into a permanent borough government.
 - It deprives neighboring communities of any share in a flush cash flow that allows local voluntary and additional contributions to education that reach and probably exceed the legal cap.
 - It panders a local, provincial, political attitude disdainful of and derogatory toward neighboring communities.
 - It contradicts a clear, repeatedly stated policy of the State to limit the number of school ‘districts’ containing fewer than 250 students, without deferring to the legal authority of the Commissioner of DEED to make this determination.
 - It compromises an REAA boundary without consultation with the expert Commissioner of DEED as required by law.
 - It shamelessly confesses to ‘lack of political will on the part of [some of] the current ... Local Boundary Commission’ to steel-up to unethical political threats.” Pages 68 and 69.
- “This proposed incorporation does not serve the balanced interests of citizens in the area proposed for change. It serves only the unbalanced interests of a few – the ignoble interests of those citizens who would engage in ethnic discrimination hoard educational funds, and defensively form a government to avoid cooperating with neighborhood communities in regional government.” Pages 69 and 70.
- “This proposed incorporation does not serve other affected local governments. The Haines Borough loses a major

community that logically and reasonably should be a part of that regional government – some day. The Alaska Native town of Klukwan and the entire Chatham REAA permanently lose the educational benefits of a share of the fortuitous cash that Skagway allocates from its Sales Tax Fund to additional local contributions and to free computers for local White students.”
Page 70.

- “Incorporation of a Skagway borough does not promote maximum local self-government except in the most pernicious and unintended interpretation, where the concept of ‘regional’ government is exploited for ‘greed and fear’ to maximize local self-interest by a small town seeking to stave off a call for regional sharing and regional cooperation. The most concentrated form of local self-government is a city. Here Skagway seeks to dissolve that city and replace it with a regional form of government. This ‘fear and greed’ tactic abuses the concept of regional government for the shabby purpose of preventing sharing with neighboring communities.”
Page 71.
- “[I]ncorporation of a Skagway borough does not promote a minimum number of local government units. Three enclaves were erroneously left out of the Haines Borough. One of these enclaves is now becoming a borough. As one of the other enclaves, Klukwan would not be totally remiss to petition to become a borough. Senator Coghill stated in testimony on this matter that if the Local Boundary Commission approved Skagway, we should expect Nenana to petition for a single-city borough. Further, the Alaska Municipal League stated in its December 2006 newsletter Touchstone, ‘[The LBC’s Skagway] decision will have great bearing on other communities and their future plans on borough formation decisions.’ By approving this remnant as a borough, the majority of this Local Boundary Commission is furthering the Balkanization of borough formation in Alaska, not promoting the ‘minimum number of

local government units' contemplated by the Framers of Art. X of the Alaska Constitution.” Pages 72 and 73.

- Ex Parte Contacts and Threats: “Following the public hearing in Skagway on November 27-29, 2006, one of the undersigned dissenting Local Boundary Commissioners was standing in the departure gate area of the Juneau airport with one of the Local Boundary Commissioners in the majority on this matter. A state legislator approached the two of us, and blatantly stated in a loud, blustering and threatening tone, that if the Local Boundary Commission did not vote in favor of creating the Skagway borough, he was going to totally cut the budget of the Commission. The undersigned dissenting Commissioner immediately walked away from this legislator without comment. The other Commissioner stayed with him, and continued to talk for at least 10 minutes.” Page 72
- “In a quasi-judicial proceeding, a threat by a legislator to eliminate the budget of the Local Boundary Commission if the vote does not go his or her way, is akin to a legislator threatening a Superior Court judge that the budget of the Judiciary will be eliminated if that judge does not decide a civil case favorable to the legislator’s position. Our regulations prohibit such ex parte threats. It is the hope of the dissenters in this unfortunate Skagway decision, that every Local Boundary Commissioner will always stand firmly and courageously for the best interests of the State of Alaska whenever faced with discomfiting ex parte threats from a legislator that a contrary decision may mean we will not ‘eat well.’” Page 75.

*Note that quotes from the text of the Statement of Dissent are sometimes highlighted by underlining.

