

LOCAL BOUNDARY COMMISSION

STATE OF ALASKA

IN THE MATTER OF THE )  
LEGISLATIVE REVIEW PETITION OF )  
THE CITY OF DILLINGHAM FOR )  
ANNEXATION OF NUSHAGAK )  
COMMERCIAL SALMON DISTRICT WATERS )  
AND WOOD RIVER SOCKEYE SALMON )  
HARVEST AREA WATERS, TOGETHER )  
CONSISTING OF APPROXIMATELY 396 )  
SQUARE MILES OF WATER AND 3 )  
SQUARE MILES OF LAND )

RESPONDENTS NATIVE VILLAGES OF EKUK, CLARK'S POINT, AND PORTAGE CREEK, AND THE CITY OF CLARK'S POINT REQUEST FOR RECONSIDERATION OF A STATEMENT OF DECISION DATED DECEMBER 20, 2016 IN THE MATTER OF THE 2016 PETITION OF THE CITY OF DILLINGHAM

**A. GROUNDS FOR RECONSIDERATION**

Respondents Native Villages of Ekuk, Clark's Point, and Portage Creek, and the City of Clark's Point respectfully request the Local Boundary Commission under the authority granted by 3 AAC 110.580 to reconsider its approval of the City of Dillingham's annexation petition. The decision was made December 1, 2016 and set forth in a written decision dated December 20, 2016 and mailed to the parties on December 27, 2016. Respondents request reconsideration for the following reasons:

**1. Prohibiting the commission from reconsidering its December 1, 2016 tentative decision on the consolidated petitions constituted a procedural error and was incorrect as a matter of law.**

A substantial procedural error and an error of law was committed by the commission on December 20, 2016 when, on the advice of counsel, it failed to allow three members of the commission to reconsider the decision made by the commission on December 1, 2016. At the December 20, 2016 meeting, a majority of the commission stated on the record that it desired to reconsider its tentative decision made at the decisional meeting and to vote again on the question of whether to approve the consolidated annexation petitions.<sup>1</sup> They were advised that the commission was constrained by administrative regulations to vote only on the form and content of a decisional document that they no longer supported, and that they could not reconsider until after a written decision had been approved, requiring the body to approve a written decision that a majority of the commission stated on the record they believed to be a mistake. Respondents believe counsel's advice was wrong procedurally and substantively.

The December 1, 2016 decision was not a final agency decision. According to the commission's regulations, "a decision by the commission is final on the day that the written statement of decision is mailed, postage prepaid, to the petitioners and the respondents."<sup>2</sup>

Moreover, it was error to state that Robert's Rules of Order only permitted reconsideration on the day the decision was voted upon (December 1, 2016). Robert's Rules are adopted as a procedural convenience to the commission; they are not

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<sup>1</sup> The Manokotak decisional document was taken up first and all the discussion regarding reconsideration occurred around that petition. However, three commissioners made it plain that they would vote to disapprove both petitions. After being advised they could not seek reconsideration, that issue was apparently considered foreclosed and not discussed regarding the Dillingham petition.

<sup>2</sup> 3 AAC 110.570(f).



substantive law, and they do not override the commission's own regulations.<sup>3</sup> The commission was not advised of and thus failed to consider and invoke its broad power reserved in 3 AAC110.660 to relax or suspend a procedural regulation:

The purpose of the procedural requirements set out in 3 AAC 110.400 - 3 AAC 110.700 is to facilitate the business of the commission, and will be construed to secure the reasonable, speedy, and inexpensive determination of every action and proceeding. Unless a requirement is strictly provided for in the Constitution of the State of Alaska, AS 29, or AS 44.33.801 - 44.33.849, the commission, by a vote of at least three members, may relax or suspend a procedural regulation if the commission determines that a strict adherence to the regulation would work injustice, would result in a substantially uninformed decision, or would not serve relevant constitutional principles and the broad public interest.<sup>4</sup>

The commission's regulations governing the decisional meeting and reconsideration, 3 AAC 110.570 - 110.580, fall squarely within the regulations that may be relaxed or suspended. The commission could have suspended the requirement of 3 AAC 110.570(f) that it issue a written decision within 30 days explaining its December 1 decision;<sup>5</sup> it could have suspended the requirement of 3 AAC 110 110.580(b) that it may order reconsideration within 30 days after issuing a written decision;<sup>6</sup> and it certainly could have relaxed or suspended a procedural rule set out in Robert's Rules that notice of reconsideration could be sought only on the day the vote was taken.

Relaxation or suspension of the rules and permitting reconsideration at the December 20, 2016 meeting would have advanced the goals of a speedy and inexpensive

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<sup>3</sup> Even if reconsideration was not timely, it would have been appropriate under Robert's to rescind the earlier approval of the consolidated annexations. According to counsel, reconsideration could only be brought up at a later meeting. However, there was no later meeting scheduled and if the commission does not schedule such a meeting, the decision becomes final. Robert's provides that when reconsideration cannot be called up, a motion to rescind would be in order. See Rule 37, Robert's Rules of Order, (Revised, Fourth Ed).

<sup>4</sup> 3 AAC 110.660.

<sup>5</sup> The commission was repeatedly informed that it had an absolute duty to adopt a written decision within 30 days.

<sup>6</sup> Under a common sense reading of the commission's regulations, the 30 day period for the commission to order reconsideration on its own sets an outer limit. It does not foreclose the commission's ability to reconsider before a written decision is issued.



determination. The refusal to permit reconsideration has slowed the process, and required additional briefing, and meetings.

Suspension of the regulation limiting reconsideration also would have served the constitutional principle that the commission “may consider any proposed local government boundary change.”<sup>7</sup> It would be unjust to adopt and give public notice of a decision that a majority of the commission believes is not in the state’s best interest. The decision statement adopted does not serve the broad public interest of preventing unnecessary confusion regarding decisions of the commission and would cause the public to mistrust the decision- making process.

Additionally, it should be noted that Commissioner Hargraves gave clear notice on December 1, 2016 that he might seek reconsideration:

COMMISSIONER HARGRAVES: Mr. Chairman?

CHAIR CHRYSTAL: Yes, sir.

COMMISSIONER HARGRAVES: I'd like to point out that the previous motion can be reconsidered up to the time that the written decision is put out, within a certain number of days that the Chair would have to research and get. But this vote can be called for reconsideration by an affirmative vote of the petition.

CHAIR CHRYSTAL: Right.

MS. MASCALKA: Are you talking about -- you're talking about Manokotak, the decision just made on Manokotak?

COMMISSIONER HARGRAVES: Yes.

MR. WILLIAMS: Sorry, sir. Can you repeat that, please? This is Brent Williams here.

COMMISSIONER HARGRAVES: Commissioner Hargraves. I just want to point out that there can be a call for reconsideration of the previous motion by an affirmative vote –

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<sup>7</sup> Alaska Const. Art. X, Sec. 12 (emphasis added).



MS. COLLINS: I got it.

COMMISSIONER HARGRAVES: -- subject to some time lines that are in our regulations.

CHAIR CHRYSTAL: I would hope we wouldn't do that, but I know it's legally possible.<sup>8</sup>

Commissioner Hargraves gave notice that he might seek reconsideration of his affirmative vote before a written decision was adopted. The Chair agreed that he could do so legally, and counsel for the commission clarified that he was talking about the decision to approve the Manokotak petition. She did not disagree with or correct Commissioner Hargraves' or Chair Chrystal's understanding of the rules. No one advised that the opportunity to seek reconsideration of the approval was limited to *after* a written decision had been adopted.

While it is regrettable that the commission was not permitted to reconsider on December 20, 2016, it may do so now by a vote of three commissioners. The following constitute additional bases for the commission's reconsideration.

**2. The commission ignored the controlling principle of law set out in its own regulations that boroughs, not cities, are the appropriate governmental unit for a region.**

The decision should be reconsidered because the commission failed to address a controlling principle of law in that it assumed it was appropriate for a city to provide government to a region of the state. In this regard, the commission fails to address the distinction required by the law between cities and boroughs. The effect of the decision would be to allow a city to govern a region of the state, rather than only the area encompassing a present existing community associated with the city. By allowing a first

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<sup>8</sup> Transcript of December 1, 2016 decisional meeting, pp. 118- 119.



class city to annex nearly 278 square miles of unpopulated territory within which several other communities of the region also have direct and significant political and socio-economic connections, the commission would create a municipality that exceeds the scale appropriate for a city. In effect, the decision would create a putative borough government that lacks the responsibility to govern in the best interests of all the communities of the region. The commission should reconsider its decision, correctly apply the legal distinction between a city and a borough, and deny the City of Dillingham's annexation petition.

**3. The commission committed a substantial procedural error when it ignored the requirement in its regulations that territory added by annexation must contain a community consisting of permanent residents.**

Under regulations of the commission, a community consists only of permanent residents, not persons who lack intent to be domiciled in the community.<sup>9</sup> If the commission believes that it is appropriate to consider a transient fishing fleet for purposes of establishing a community, it must amend the regulations in the manner required by AS 44.62.180 – 44.62.290 of the Administrative Procedure Act. To apply a new definition of “community” and “permanent resident” without first amending the administrative regulations constitutes a substantial procedural error that requires reconsideration. The commission is requested to reconsider the decision and deny the petition for failure to meet the boundary standard set out in 3 AAC 110.130.

**4. The commission failed to address a controlling principle of law when it misapplied 3 AAC 110.130(c).**

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<sup>9</sup> 3 AAC 110.130(c)(1), 3 AAC 110.920, and 3 AAC 110.990(5).



In the decision, the commission concluded that the territory included within the annexation was on a scale suitable for city government. The decision is deficient because it fails to determine that the territory is on a scale suitable for a city. In making this finding the commission must consider whether the petition includes enough territory to cover reasonably predictable growth, development and public safety needs during the 10 years following the effective date of the annexation.” The commission failed to take a hard look at whether there were facts in support of its conclusion that the annexation was on a scale suitable for city government. The annexation of 287 square miles of territory by a first -class city is excessive to cover future growth, development and public safety needs, and far beyond what should be considered a part of Dillingham’s community. The commission’s conclusion in the statement of decision that this standard is satisfied is not supported by the record because Dillingham implicitly admits that the annexation is excessive because it disavows any plan to exercise police power in the annexed territory, and has been unsuccessful in reaching agreement with the Alaska Department of Public Safety to provide for transition of police protection there. The commission is requested to reconsider the decision that the annexation is on a scale suitable for city government and deny the petition.

**5. The regulatory exception to the prohibition of a city annexing large unpopulated areas was not properly applied, constituting both a procedural error and ignoring a controlling principle of law.**

The record of the decisional meeting reflects that the commission decided that it need not consider whether the boundaries of the territory identified for annexation contained entire geographical regions or large unpopulated areas. The commission



instead simply concluded that “[t]he boundaries . . . are justified by the application of the rest of the annexation standards in 3 AAC 110.090 – 3 AAC 110.135.<sup>10</sup>

The regulations provide that the proposed new boundaries

may not include entire geographical regions or large unpopulated areas, except if those boundaries are justified by the application of standards in 3 AAC 110.090 – 3 AAC 110.135 and are otherwise suitable for city government.<sup>11</sup>

While some on the commission believed that seasonal population could suffice to avoid calling the areas “unpopulated,” others opined that such a view was not consistent with the regulations. The statement of decision approved by the commission attempts to avoid the issue by invoking the exception clause – “except if those boundaries are justified by the application of standards in 3 AAC 110.090 – 3 AAC 10.135 and are otherwise suitable for city government.” Without serious discussion or consideration of how these standards were applied as a means of justification, the commission failed to do what is required to meet that exception; apparently the commission would simply deem it met.

But the regulation requires a finding that is higher than that the petition meets the other standards for annexation. It requires that the boundaries be *justified* by these other standards. The commission failed to take a hard look at what is meant by its own rule against city annexation of large unpopulated areas, and also failed to consider what must be established to fall within the exception. Simply stating that the exception is met by applying other standards which are met is an example of an exception swallowing a rule. All annexations must meet all standards. Under the commission’s application of the exception, there is no prohibition against a city annexing entire geographical regions or

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<sup>10</sup> Statement of Decision at 4.

<sup>11</sup> 3 AAC 110.130(c)(2).



large unpopulated areas. This cannot be the correct reading of the commission's own regulations. Something more must be required.

The decision announced by the commission contains justifications which were never contemplated and which the commission must address as a controlling principle of law. For this reason, the question of annexing over 287 square miles of an unpopulated region must be reconsidered by correctly applying the standard imposed by regulation.

The commission must take a hard look at the salient issues, and must consider whether the proposed boundaries containing 287 square miles of territory are for some reason justified by the goals of the standards. The commission must explain *why* the general rule is not applicable, and *how* the exception applies. The commission made no such inquiry or findings. It was also required to find that the boundaries of large, unpopulated areas "are otherwise suitable for city government." It made no such finding. This is a procedural error, and also a failure to address a controlling principle of law (the meaning of its own standard).

**6. The votes taken by some commissioners were based on a mistaken interpretation of a controlling principle of law in that they believed they were bound by precedent set by decisions on other petitions.**

The Dillingham decision should also be reconsidered because the record is not clear that there was a majority of commissioners finding that all standards had been met. Unless a majority of commissioners finds that a standard was met, based on the evidence presented to them, the commission cannot approve the annexation petition. The transcript suggests that Commissioner Harrington voted "yes" on more than one standard not



because he believed that the standard was met by the petition, but because he believed he was required to vote “yes” based on precedent established in the commission’s approval of the Manokotak petition.

Moreover, Commissioner Hargraves and Chair Chrystal may have had the same understanding. The commission’s regulations provide:

If the commission determines that a proposed change fails to meet the standards contained in the Constitution of the State of Alaska, AS 29.04, AS 29.05, AS 29.06, or this chapter, or is not in the best interests of the state, the commission will reject the proposed change. If a motion to grant a proposed change receives fewer than three affirmative votes by commission members, the proposed change is rejected.<sup>12</sup>

The Alaska Supreme Court recognized that “the Local Boundary Commission has broad power to decide in the unique circumstances presented in each petition whether [a proposed boundary change] is appropriate.”<sup>13</sup> If votes were based on a misunderstanding of the commission’s obligation to make findings based on the petition before it, then the decisions should be reconsidered with clear instructions that each standard must be met based on the record before the commission. The following excerpts from the Transcript of the December 20 meeting illustrate the concern and justify reconsideration:

Vote on the Need standard:

COMMISSIONER HARRINGTON: Using the precedent -- this is Harrington. Using the precedent of the last hearing, then, yes; otherwise, no.

CHAIR CHRYSTAL: Okay. In other words, you got a maybe there. Okay.<sup>14</sup>

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<sup>12</sup> 3 AAC 110.570(d).

<sup>13</sup> *Mobil Oil Corp. v. Local Boundary Commission*, 518 P.2d 92, 98 (Alaska 1974).

<sup>14</sup> Transcript at 125.



Vote on the Boundaries standard:

COMMISSIONER HARRINGTON: I know this is going to get redundant, and I apologize. But consistent with the Manokotak decision, the answer must be yes.

CHAIR CHRYSTAL: Okay. Well thought out, I agree.

COMMISSIONER HARGRAVES: Mr. Chairman?

CHAIR CHRYSTAL: Yes, sir.

COMMISSIONER HARGRAVES: Commissioner Hargraves. Excellent example of what this Commission does that sets precedent. Just point out that we're already setting precedents with previous action.

CHAIR CHRYSTAL: Well, you know, that's what the Commission was set up for under the Constitution. It was a tremendous amount of power that was invested, that we don't use hardly ever. And I think that's our job.<sup>15</sup>

**7. The commission's regulatory requirement that the petitioner provide a transition plan was not properly applied, constituting both a procedural error and ignoring a controlling principle of law.**

The decisional statement finds that there was a practical plan for transition to the enlarged City of Dillingham. This finding contradicts the commission's staff report, which found that the city declared that it has no intention of providing police services within the territory to be annexed. The staff report also documented the Alaska Department of Public Safety's objections to the city's plan to leave the obligation to provide police services with the Alaska State Troopers. It is also apparent from the petition and the staff report that there is no agreement between the city and state as to the

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<sup>15</sup> Transcript at 134-35.



transition of these services upon annexation. The commission must follow 3 AAC 110.900 (a) and (b) and require the petitioner to amend its petition to provide a practical plan for the provision of public safety services in the territory to be annexed and for the assumption of powers presently exercised there by the state. It must also ensure that this plan has been adopted as a part of the city's petition so that the state's best interests in ensuring a functioning city government are protected. In the absence of a practical transition plan as required by 3 AAC 110.900 (a) and (b), the commission's approval of the petition of the City of Dillingham should be reconsidered and denied.

## **B. CONCLUSION**

The commission should have been allowed on December 20, 2016, to reconsider the decisions made orally at its December 1, 2016 decisional meeting. This error alone is grounds for reconsideration. The commission may abbreviate the reconsideration process by electing to order reconsideration on its own, and reconsider any of its previous findings. Additionally or in the alternative, the commission should grant respondents' request for reconsideration for the reasons identified herein. Respondents believe that a closer look at the material issues of fact in the record and the controlling law set out in statute and regulation will lead to a rejection of the petition.

## **C. DESIGNATION OF REPRESENTATIVE.**

The Native Villages of Ekuk, Clark's Point, and Portage Creek, and the City of Clark's Point designate the following person as their representative for purposes of this



request for reconsideration and any proceedings regarding the Dillingham Annexation

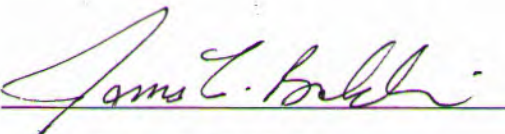
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The respondents request that courtesy copies of all correspondence be also provided to the following person:

Robert Heyano  
President  
Native Village of Ekuk  
PO Box 530  
Dillingham, Alaska  
99576

Dated this 3<sup>rd</sup> day of January, 2017.

By: 

James L. Baldwin  
Counsel for Native Villages of Ekuk, Clark's Point, and  
Portage Creek, and the City of Clark's Point