

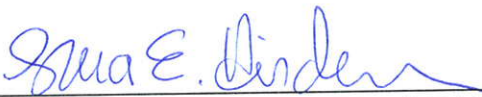
IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
FIRST JUDICIAL DISTRICT AT JUNEAU

CITY AND BOROUGH OF JUNEAU, )  
 )  
Appellant, )  
 )  
vs. )  
 )  
STATE OF ALASKA, LOCAL BOUNDARY )  
COMMISSION, AND THE PETITIONERS )  
FOR INCORPORATION OF THE )  
PETERSBURG BOROUGH, )  
 )  
Appellees. )

Case No. 1JU-12-00900 CI

ON APPEAL FROM THE LOCAL BOUNDARY COMMISSION

**BRIEF OF APPELLEE, PETITIONERS FOR  
INCORPORATION OF THE PETERSBURG BOROUGH**

  
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Filed in the Superior Court of the  
State of Alaska this \_\_\_\_ day of  
\_\_\_\_\_, 2013.

By: \_\_\_\_\_  
Clerk

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## Constitutional Provisions, Statutes and Regulations Principally Relied Upon

### Alaska Constitution

#### Constitution of the State of Alaska, Article X, section 3

The entire State shall be divided into boroughs, organized or unorganized. They shall be established in a manner and according to standards provided by law. The standards shall include population, geography, economy, transportation, and other factors. Each borough shall embrace an area and population with commons interests to the maximum degree possible. ... Methods by which boroughs may be organized, incorporated, merged, consolidated, reclassified, or dissolved shall be prescribed by law.

### Alaska Statutes

#### A.S. 29.05.031. Incorporation of a borough or unified municipality.

(a) An area that meets the following standards may incorporate as a home rule, first class, or second class borough, or as a unified municipality:

(1) the population of the area is interrelated and integrated as to its social, cultural, and economic activities, and is large and stable enough to support borough government;

(2) the boundaries of the proposed borough or unified municipality conform generally to natural geography and include all areas necessary for full development of municipal services;

(3) the economy of the area includes the human and financial resources capable of providing municipal services; evaluation of an area's economy includes land use,

property values, total economic base, total personal income, resource and commercial development, anticipated functions, expenses, and income of the proposed borough or unified municipality;

(4) land, water, and air transportation facilities allow the communication and exchange necessary for the development of integrated borough government.

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## Alaska Administrative Code

### 3 AAC 110.045. Relationship of interests.

(a) On a regional scale suitable for borough government, the social, cultural and economic characteristics and activities of the people in a proposed borough must be interrelated and integrated in accordance with AS 29.05.031(a)(1) and art. X, sec. 3, Constitution of the State of Alaska. In this regard, the commission may consider relevant factors, including the

- (1) compatibility of urban and rural areas within the proposed borough;
- (2) compatibility of economic lifestyles and industrial or commercial activities;
- (3) existence throughout the proposed borough of customary and simple transportation and communication patterns;
- (4) extent and accommodation of spoken language differences throughout the proposed borough; and
- (5) existence throughout the proposed borough of organized volunteer services such as fire departments or other emergency services.

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(c) The communications media and the land, water, and air transportation facilities throughout the proposed borough must allow for the level of communications and exchange necessary to develop an integrated borough government in accordance with AS 29.05.031(a)(4) and art. X, sec. 3, Constitution of the State of Alaska. ...

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### 3 AAC 110.060. Boundaries.

(a) In accordance with AS 29.05.031(a)(2) and art. X, sec. 3, Constitution of the State of Alaska, the boundaries of a proposed borough must conform generally to natural geography, must be on a regional scale suitable for borough government, and must include all land and water necessary to provide the full development of essential municipal services on an efficient, cost-effective level. In this regard, the commission may consider relevant factors, including

- (1) land use and ownership patterns
- (2) ethnicity and cultures;

- (3) [repealed];
- (4) existing and reasonably anticipated transportation patterns and facilities;
- (5) natural geographic features and environmental factors;
- (6) [repealed];
- (7) existing and reasonably anticipated industrial, commercial, and resource development within the proposed borough. ...

### 3 AAC 110.430. Consolidation of petitions.

If two or more petitions pending action by the commission affect all or some portion of the same boundaries, the chair of the commission may consolidate the informational session, briefing schedule, department reports, commission hearing, decisional meeting, or other procedure under this chapter for one or more of the petitions. The commission may consider relevant information from concurrent or conflicting petitions during the process of rendering its decision on any one petition.

### 3 AAC 110.640. Scheduling.

- (a) The chair of the commission shall set or amend the schedule for action on a petition.
- (b) In a schedule under (a) of this section, and except as provided by 3 AAC 110.590 for certain local action annexations, the chair of the commission shall allow at least
  - (1) 49 days after the date of initial publication or posting of notice of the filing of a petition, whichever occurs first, for receipt by the department of a responsive brief or written comments concerning the petition;
  - (2) 14 days after the date of service of a responsive brief on the petition for the receipt by the department of a reply brief from the petitioner. Contemporaneously with notice to the petitioner of the date for filing its reply brief, the department shall provide notice to respondents and commentators of that date;
  - (3) 28 days after the date of mailing of a departmental preliminary report for receipt of written summary comment to the department; and
  - (4) 21 days between the date of mailing of a final report and the commission hearing on the petition.
- (c) As provided under 3 AAC, the commission may postpone proceedings on a petition that has been accepted for filing to allow concurrent consideration and action on another petition that pertains to some or all of the same boundaries and that has either been accepted for filing or is anticipated to be filed. The commission may postpone the proceedings for an anticipated competing petition only if the anticipated competing petition is received by the department no later than 90 days after the date of the first publication of notice of the earlier petition under 3 AAC 110.450.



(d) The chair of the commission will adjust the schedule in (b)(1) – (4) of this section to accommodate the procedures under 3 AAC 110.475 if a request for summary determination is filed on the petition.

## Statement of the Case

The efforts of the petitioners to form a Petersburg Borough began some years ago, in 2006, when the petitioners first began drafting a petition to incorporate a borough, which had as its northern boundary the existing southern boundary of the City and Borough of Juneau (CBJ). [Exc. 251-252; R. 479-480]. These efforts were well-known to CBJ, which had itself earlier established an Annexation Study Commission to consider potential annexation down to the model borough boundaries, just south of Hobart Bay on the mainland.<sup>1</sup> [*Id.*]. The Commission's report expressly

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<sup>1</sup> In 1989-1991, the Local Boundary Commission (LBC) initiated and conducted a model borough boundary project, to determine the "model boundaries" of a number of different existing and potential boroughs throughout the state. See, Model Borough Boundary Study, pages 1-2. As part of that project, the LBC adopted model borough boundaries for CBJ, which extended to just south of Hobart Bay. *Id.* at page 14. After the project was completed, LBC regulations thereafter contained a prohibition against approval of a borough which did not comply with the model boundaries "[a]bsent a specific and persuasive showing to the contrary." See, 19 AAC 10.060(b), Boundaries (Eff. 10/12/91, Register 120).

Subsequently, a number of boroughs were formed which did not follow the "model" boundaries established through that project, but which were otherwise found to meet the requirements for incorporation, and the concept that the boundaries of the "model boroughs" should be presumptively followed fell into disfavor, on the basis that it did not serve to promote the goal of borough formation. See, Local Boundary Commission Annual Report, January 2007, pages 87-91. The LBC regulations were ultimately amended to remove that prohibition, instead merely allowing the LBC to "consider" those model borough boundaries, at its discretion, along with various other administrative boundaries, such as boundaries for regional educational attendance areas, federal census areas, ANCSA established boundaries and National Forest boundaries. See, 3 AAC 110.060, Boundaries (am 1/9/2008; Register 185).

CBJ's repeated reference in its brief to the area which was in dispute here as CBJ's "unorganized remnant" refers to those outdated model borough boundaries, and is used to erroneously suggest that the CBJ somehow has first interest in the area over Petersburg. It is noteworthy that when CBJ finally filed an annexation petition in

referenced Petersburg's expected borough incorporation petition:

The City of Petersburg intends to petition for the incorporation of a home rule borough some time early in 2007. The proposed northern boundary of this borough would abut the existing southern CBJ boundary near Tracy Arm... .

[Exc. 252]; CBJ Annexation Study Commission Report, January 10, 2007, page 3.

The CBJ Commission decided against filing an annexation petition at that time, deeming an annexation "not now necessary or warranted". [Id.]; CBJ Annexation Study Commission Report, January 10, 2007, page 12. CBJ continued to take no action when that anticipated Petersburg petition was circulating for signatures.<sup>2</sup>

Unable to obtain sufficient signatures on their first petition, the Petersburg petitioners began circulating a second petition for incorporation in October of 2010, which again was well-publicized during the signature-gathering stage. [Exc. 252; R. 1711-1714]. On April 6, 2011, that petition, with the requisite signatures, was filed with the LBC. [R. 1536, 1658-1848]. During the time the signed petition underwent technical review by the department for almost four months thereafter, the fact that the

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November of 2011, it included lands located south of Hobart Bay which were located within the Petersburg-Wrangell "model borough" boundaries (see fn. 5 below). See, Model Borough Boundary Study, page 25; Exc. 23. Thus a portion of the area in dispute could just as easily be referred to as an "unorganized remnant" of a Petersburg borough.

<sup>2</sup> [Id.]. Under A.S. 29.05.060, a borough formation petition must be signed by at least 15% of voters, based upon the last general election, residing in the home rule/first class cities located within the proposed borough, and, separately, 15% of voters residing in the area outside of those cities. Signatures are effective for a one year period. See, 3 AAC 110.415(a)(2). Conversely, a CBJ-initiated annexation petition has no signatory requirements. See, 3 AAC 110.410(a)(4).

Petersburg petitioners were pursuing the petition was known to CBJ, prior to formal acceptance of the petition on August 5, 2011.<sup>3</sup> [Exc. 252]. Upon formal acceptance, the LBC established extensive publication and notice requirements, and set a hearing date of May 30-31, 2012 for the Petersburg petition. [R. 1531; 1536-1541].

More than five years after CBJ became aware of Petersburg's efforts (and decided not to file its own annexation petition), a year after the second Petersburg petition began circulating, nearly six months after the filing of the Petersburg petition with the LBC, and almost two months after formal public notice was given for the Petersburg petition and a hearing date set, CBJ finally filed its first document with the LBC regarding this matter. It was not, in fact, an annexation petition, but rather a request for additional time to file an annexation petition. It was entitled "Notice of Intent to File Competing Annexation Petition and Request for Relaxation of Procedural Deadlines", and sought to postpone all proceedings in the Petersburg petition (under 3 AAC 110.640) to consolidate the as-yet-to-be-filed CBJ petition with the Petersburg petition (under 3 AAC 110.430), and to "relax" the regulations to provide CBJ an 45 additional days to file its petition.<sup>4</sup> [Exc. 21-22]. The Notice was

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<sup>3</sup> The filing of the Petersburg petition was on the agenda of the May 24, 2011 LBC meeting, and discussed. [R. 1629, 1639-1644; 1656].

<sup>4</sup> Under 3 AAC 110.640(c), a petition must be filed with the Department within 90 days of a conflicting petition in order for the Commission to exercise its discretion to postpone proceedings in an earlier filed petition. CBJ was requesting that it receive another 45 days, over and above the 90 days, in order to file a petition to be considered for consolidation and/or postponement.

taken up by the Commission at its meeting of October 13, 2011. [Exc. 28-31]. It determined that it was not necessary to relax the rules, or postpone proceedings, in order to make a fully informed decision on the area in dispute, with the Chairman noting as follows:

[W]e don't need any relaxation of regulation, we don't need to postpone the Petersburg petition. But what we can do is we can go forward with the Petersburg petition, no delays. Juneau can certainly apply to petition if they wish. And when we have our hearing in Petersburg next spring we will know what Juneau wants if in fact they do petition. This way we will not have to relax our rules or we will not have to postpone but we would certainly know the wishes of both parties and act accordingly when we're down there....

[Exc. 29]. Thereafter, CBJ waited another month to actually file a petition, waiting until the last possible day – 90 days after the date of first publication of notice of the Petersburg petition – to file a competing petition which might be eligible for consolidation under 3 AAC 110.640(c).<sup>5</sup> [Exc. 32].

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<sup>5</sup> As noted earlier, CBJ's petition sought to annex lands extending all the way to Cape Fanshaw, significantly south of the 'model' CBJ boundary identified by the LBC circa 1990. Per the Division of Elections, there is one registered voter in this entire disputed area, who is believed to be an on-site caretaker for Goldbelt, Inc., an ANCSA village corporation landowner in the area which in 2012 opposed inclusion of its land in either borough. [Exc. 284]. The lack of registered voters in the disputed area is relevant here because of the unusual method of annexation chosen by CBJ – the local option method, as opposed to the more commonly utilized legislative review method. [Id.; [www.commerce.state.ak.us/dca/lbc/2012\\_City\\_and\\_Borough\\_of\\_Juneau\\_Annexation/Petition/#FolderHead](http://www.commerce.state.ak.us/dca/lbc/2012_City_and_Borough_of_Juneau_Annexation/Petition/#FolderHead)]. See, A.S. 29.06.040(b) and .040(c)(2). Under the local option method, if the Commission approves the annexation, then the voters in the affected area are required to approve the annexation by majority vote. Under the legislative review method, no voter approval is required. Here, this means that if the Commission had approved the CBJ annexation as requested, then one voter, likely employed by a corporation which opposes inclusion of its lands in the CBJ, could nix the entire annexation.

CBJ did not serve its Notice relating to the Petersburg petition upon the Petersburg petitioners, who only learned of its existence some five weeks later, in mid-November. [Exc. 249-250]. The LBC elected to take up CBJ's Notice again in December, so as to provide formal notice and an opportunity for all to be heard. [Exc. 32; R. 1061]. After extensive comment and discussion, the LBC unanimously exercised its discretion to deny CBJ's request to postpone all proceedings on the Petersburg petition, which would have mandated cancellation of the hearing scheduled months earlier. [Exc. 257-277]. It did however assure CBJ that its interests would be seriously considered as this matter went forward:

Chairman Chrystal: ... I don't think we should either postpone or consolidate at this time. I don't think it would be fair to the folks at Petersburg who have worked very hard for many, many months to all of a sudden at the last minute change anything on them. ...

Commissioner Harcharak: ... I intend to vote down this motion for the same reasons you gave. That the City of Petersburg has done a massive amount of work, they've got their petition in in a timely fashion and I believe it would be unfair to them either to consolidate the petitions or to postpone it. ...

Commissioner Harrington: ... I'm also going to be opposing this motion but at the same time I want to reassure the folks in Juneau that we will be taking all of their requests, interest and involvement in this very seriously....

Commissioner Chrystal: Absolutely, Commissioner Harrington. I agree totally. ...

[Exc. 258-259]. Commissioner Semmens asked for and received specific confirmation from LBC staff that the Commission could consider Juneau's position at the hearing

and amend the boundary in dispute from that proposed in Petersburg's petition if it deemed it appropriate.

Commissioner Semmens: ... The attorney ... from Petersburg implied the Commission[] certainly would be able to consider Juneau's position and request at that time – and I just wanted to hear that from you, that that's correct. That the Commission can adjust the boundaries of the Petersburg petition at the time that we're working on it. Is that correct?

[LBC Staff person] Mr. Williams: Yes. At the hearing the Commission may amend the new petition under its fairly broad powers statutory and under 110.578. ...<sup>6</sup>

[Exc. 270-271].

CBJ complains that LBC staff commented during the discussion that the Petersburg petition had been filed seven months earlier than CBJ's. Appellant brief, page 3. While this staff comment is clearly accurate, CBJ asserts that the filing date of the Petersburg petition is irrelevant, and that the Commission should only have considered the date the Petersburg petition was accepted for filing, several months later. In fact, if one compares dates of acceptance for the two petitions, versus filing dates, the gap is even larger, as CBJ's petition was not accepted for filing until April of 2012, some eight months after acceptance of the Petersburg petition. [Exc. 89]. In any event, it is clear from the December 4, 2011 discussion of the Commission that it did not decline to exercise its discretion to cancel and postpone proceedings in the Petersburg petition because it viewed CBJ's request as "untimely" filed under 3 AAC 110.640(c), as CBJ suggests. Rather, a postponement and consolidation would have

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<sup>6</sup> The transcript erroneously refers to 110.578. The citation should be [3 AAC] 110.570(c).

unnecessarily delayed the Petersburg petition since Juneau's position, evidence and filings could be considered at the Petersburg hearing. CBJ's filing of its petition on the last day of a 90-day period simply made the petition "eligible" for concurrent consideration; it did not in any way mandate it. That is left to the discretion of the Commission, which it reasonably exercised under the circumstances presented. In this appeal, CBJ does not claim that the LBC abused its discretion in not consolidating the petitions, and postponing the Petersburg proceedings.

CBJ responded vigorously to the merits of the Petersburg petition, and to the reports issued by LBC staff, both the preliminary report and the final report. First, CBJ filed an extensive 70 page Responsive Brief to the petition, in accordance with 3 AAC 110.480.<sup>7</sup> [R. 1229-1300]. In that brief, CBJ presented lengthy information regarding its alleged closer ties to the disputed area, including subsistence and guide use, commercial fishing, historical connections, and most extensively, tourism connections. The Petersburg petitioners countered CBJ's information with substantial evidence of their own, demonstrating Petersburg's greater economic ties with the area, most notably through its historical and present domination of commercial fishing in the area, and through its tourism connections. [Exc. 180-247]. The information presented by Petersburg also showed that CBJ's tourism connection to the area was substantially overstated in its filings, and mostly confined to Tracy Arm. [Exc. 190-194, 233-237].

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<sup>7</sup> As a respondent in the petition proceedings, as is discussed further below, CBJ was also able to make opening and closing statements at the Petersburg hearing, and to present witnesses and evidence at that hearing. See, 3 AAC 110.560(b)(3), (b)(5), and (b)(9).



In short, the Petersburg petitioners demonstrated that:

- The disputed area is a local Petersburg fishery ground. In the relevant statistical areas in the disputed area, Petersburg fishermen dominate the fisheries, earning over 93% of the value of all species caught in relevant years, versus Juneau fishermen, and that this value produces significant revenues for the Petersburg's economy and its five processing plants, which process 89% of the fish harvested in the disputed area. [Exc. 185-190, 223-232].
- The tourism information presented by CBJ substantially overstated its connection to or support for tours and guided hunts into the contested area, and included a number of operators whose connections with Petersburg were equal to or greater than their connections with CBJ. CBJ's tourism revenue is centered on trips to Tracy Arm (which was ultimately excluded from the Petersburg Borough by the LBC), rather than the majority of the contested area south of Tracy Arm to Cape Fanshaw. [Exc. 190-194, 233-237].
- Petersburg had greater transportation and communication links with the disputed area. [Exc. 194-196].
- Petersburg had greater recent historical connections with the area in dispute, including fox farming operations and support for timber harvest. [Exc. 197-200].

- The ‘administrative’ boundaries which CBJ asserted supported their claim to the area in dispute (i.e., voting districts, USFS Ranger Districts, recording districts, etc.) bore little relevance to existing borough boundaries in Southeast Alaska, or Alaska as a whole. [Exc. 183-185, 204-222].

While the Petersburg petitioners have interests in Tracy Arm, they acknowledged that CBJ likely has greater connections to that area. [Exc. 202].

LBC staff issued a preliminary report in the Petersburg proceedings in February of 2012. [R. 964 - 1013]. The report discussed the contested area, notably going into some length in regard to fisheries in the disputed area, but also discussing other noncommercial fishing items.<sup>8</sup> [Exc. 42-43; 44; 54; 55-57]. That report recommended to the Commission that the Petersburg Borough be approved, but that its northern boundary be amended from what was set forth in the petition to exclude the whole of Tracy Arm and its watersheds, as well as the Whiting River watershed, eliminating from the proposed Petersburg Borough some 500 square miles of land and water. The report noted that the proposed northern border of the Petersburg Borough, which would have abutted the existing southern boundary of the CBJ, “neither makes sense [n]or confirms to natural geography.” [Exc. 58]. The evidence presented by CBJ, and acknowledged by the Petersburg petitioners, demonstrated its greater ties in regard to

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<sup>8</sup> The report does not purport to list or discuss all information submitted in the public comment period, noting that such information can be found in the briefs and comments submitted. [Exc. 41].

Tracy Arm, and the staff recommendation in this regard is in accord with that evidence.

CBJ and the Petersburg petitioners filed extensive responses to the preliminary report, which were fully read and considered by LBC staff in issuance of its final report. [Exc. 89; R. 893-906, 907-952]. In that report, staff reaffirmed its recommendation to the Commission to remove the Tracy Arm and Whiting River watersheds from the proposed Petersburg Borough, but recommended including the remainder of the disputed area in a Petersburg Borough. [Exc. 96]. The staff discussed the constitutional standard, found in Article X, section 3, which mandates that a borough “embrace an area and population with commons interests to the maximum degree possible”, and correctly noted that this means that “boroughs should comprise an area and population that/who have as much in common as possible” and that “a borough should be integrated and interrelated as much as possible.” [Exc. 91]. In regard to the Petersburg Borough, the report noted that compliance with the common interests standard was demonstrated by

the spread and impact of fishing. Much of the fishing throughout the proposed borough is caught by Petersburg fishermen, or processed in Petersburg. This common bond not only pertains to the relationship of interests under 3 AAC 110.045, but also pertains to the boundaries of the proposed borough. It shows that there are common relationships and bonds in the entire proposed borough.

Further, the entire proposed borough has other relationships, including cultural, commercial, recreational, and historical common interests. For example, Petersburg was active in the 1980s Hobart Bay timber harvest. Petersburg provided supplies and support for the enterprises. Goldbelt has large holdings in Hobart Bay. In 2007, Goldbelt’s then president

and CEO expressed Goldbelt's then desire to be part of the proposed Petersburg Borough because of "a great many reasons including geography, historical ties, the abilities of the CBJ and the proposed Petersburg Borough to provide services, and past support by the City of Petersburg and the support of Petersburg businesses of our past logging operations at Hobart Bay.

Also, some tourism or guiding companies originate their trips from Petersburg, or their clients arrive by air to Petersburg, or supply in Petersburg. In the words of commenter Dennis Rodgers, co-owner of Alaska Sea Adventurers, '[t]he area from Holkham Bay including Endicott Arm is used extensively by Petersburg based commercial fishing, charter and guides and Petersburg residents for recreation.'

[Exc. 92]. The CBJ's claim, at page 9 of its brief, that the report didn't make findings specific to the disputed area is not correct.

Prior to the hearing, the Commission met to go over a staff-prepared checklist for the upcoming hearing in Petersburg, setting out the constitutional, statutory and regulatory standards for incorporation, and to discuss the LBC's power to amend the Petersburg petition, specifically in the context of the Petersburg/CBJ dispute regarding the overlapping boundaries. [R. 823, 834, 863]. At that meeting, counsel for CBJ sought clarification of staff comments regarding the hearing, which she had erroneously understood to mean that the Petersburg petition, specifically in regard to the issue of the location of the northern boundary, would be decided "in a vacuum" since the only petition technically before the Commission at the hearing would be that of Petersburg. The Commission Chair (Lynn Chrystal), the Commission's legal counsel (Assistant Attorney General Erling Johansen) and staff member Brent Williams all reassured CBJ that this was not the case, and that the entirety of the

information submitted, including input from CBJ, would be considered in determining whether the Petersburg borough met the requisite standards:

Ms. Mead (CBJ counsel): ... And I'm understanding [staff member] Mr. Williams to say that you pretty much need to decide [the] Petersburg petition in a vacuum according to whether or not Petersburg standing alone meets the standards of incorporation. Is that what he's saying?

Chairman Chrystal: I don't believe so. I'll let Mr. Williams speak for himself but that's not my understanding. I think that we can only finalize two decisions on that day [of the Petersburg decisional meeting]. Either the Petersburg one or the one amended by staff. But we could in fact change and then come back after adequate public notice and do it over again. Mr. Williams?

Mr. Johansen: This is Erling Johansen.

Chairman Chrystal: Okay. Mr. Johansen, can you answer Ms. Mead's question, or comment?

Mr. Johansen: Certainly. The Commission is entitled to take into consideration testimony by parties, submittals by parties, and presumably the information that Juneau – Ms. Mead is concerned about has been submitted, or will be submitted somehow. And in that manner the Commission would be considering that type of information. So I don't see what the concern is.

Chairman Chrystal: Okay. Ms. Mead?

Ms. Mead: Our concern is Mr. Williams['] comment just now that you will only be looking at the Petersburg standards and whether it meets the standards of incorporation. And my understanding is that the constitution requires you to make decisions of these standards to the maximum degree possible. That you must make findings that wherever you're going to place this boundary the final municipality will have and share common interests with the area and population to the maximum degree possible. And I'm not – I just want to make sure that my understanding is the same as what is being stated by Mr. Williams as

your task.<sup>[9]</sup>

Mr. Williams: This is Mr. Williams. What I'm trying to articulate is that at that May hearing the Commission is going to decide whether to approve, amend or deny the Petersburg borough. In the course of making that decision it can take many things into account. It can take the petition, the comments on the petition, the briefs submitted, and it can take anything that has been spoken about at that hearing. But what it is doing is it is determining – and as Ms. Mead pointed out, the constitutional standard that does the Petersburg petition meet that standard or not? But what the Commission is tasked with determining, since the two petitions are not consolidated, is looking at the Petersburg petition and whether it does or does not meet the standards, taking into account all of the information that it has already been given.

[Exc. 295-297]. In other words, the matter before the Commission at the Petersburg hearing was the Petersburg petition, not the Juneau petition, but that in making decisions on the Petersburg petition, including the location of the northern boundary line, the Commission could utilize all of the information submitted in the process, whether submitted by CBJ or another party, and in whatever form – written comment, written briefs, witness testimony, exhibits, etc., – and amend the boundaries of the proposed borough from those requested in the petition, depending upon the LBC's consideration of that evidence. This included CBJ's extensive assertions that the contested area should be reserved for inclusion in CBJ. A thorough consideration of appropriate boundaries would be undertaken, but it would occur in the context of the Petersburg petition.

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<sup>9</sup> In fact, the first item on the checklist discussed at this meeting, and utilized by the Commission at the Petersburg hearing, was the question "Does the proposed borough embrace an area and population with common interests to the maximum degree possible?" [Exc. 172]. In order to approve the borough, the answer to this question was required to be 'yes.'

The LBC hearing on the Petersburg petition occurred over a three day period, on May 30-June 1, 2012. (R. 148-662]. CBJ and the petitioners were provided the same opportunity for opening and closing statements [R. 703; 705], and CBJ was allowed to call all of its proposed witnesses at the hearing. [R. 698-699, 704]. As outlined in its briefing (Appellant brief, page 10), these included a mining historian, a commercial fisherman, a hydrologist, a cultural anthropologist, a USFS employee, an engineer, others knowledgeable with hunting, guiding and sport fishing in the disputed area, and the then-current CBJ Mayor.<sup>10</sup> [R. 228-290]. CBJ also presented numerous maps and other demonstrative evidence. [R. 696-697]. Since CBJ had almost ten months' notice of the hearing, and it was fully aware that the hearing was its opportunity to persuade the Commission that an alternative borough boundary from that requested by the petitioners, or suggested by staff, was most appropriate, it presumably put forth its best and most persuasive evidence and information to demonstrate its connections to and interests in the contested area.

The Petersburg petitioners also put on substantial evidence regarding their use of the disputed area, north of Cape Fanshaw and up to Holkham Bay.<sup>11</sup> [Exc. 308-422, 423-441]. This included testimony from numerous fishermen, including long-liners

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<sup>10</sup> Notably, CBJ presented no individual from the Juneau Economic Development Council, the entity which had prepared the tourism chart supposedly demonstrating Juneau's economic ties to the entire area [R. 1288], and which had been significantly debunked by the Petersburg petitioners. [Exc. 190-194, 233-237].

<sup>11</sup> This was in addition to evidence and information submitted in regard to other areas, services and populations throughout the proposed borough.

(halibut and black cod), seiners (salmon), gillnetters (salmon), crab fishermen (king crab and dungeness crab), shrimpers, and herring fishermen, and owners/managers of the fish processing plants in Petersburg, who uniformly testified to Petersburg's absolute and total dominance in the fisheries conducted in the disputed area, both historically and to the present, as well as the importance of the adjacent uplands to those fisheries. [Exc. 308-310, 313-314, 354-356, 380-398, 402-410, 423-426, 430-431, 442-443, 446, 448, 449-454]. Current and former management biologists of the Alaska Department of Fish and Game also testified regarding fisheries in the area, and State Commercial Fisheries Entry Commission (CFEC) statistics were presented to substantiate the dominance of Petersburg fishers and processors in harvests in the contested area. [Exc. 314-316, 375-379, 398-402]. Others testified as to Petersburg's ties to the timber activities at Hobart Bay, Petersburg-related historical fox farming in lower Stephens Passage, Petersburg-based tourism activities in the area, including sport fishing charters, and emergency services provided in the area by Petersburg EMS personnel. [Exc. 310-312, 317-322, 331-337, 410-415, 418-422, 427-428, 436-439, 444-445]. A Petersburg Economic Development employee also gave an analysis regarding CBJ's purported tourism ties to the disputed area, demonstrating that the current economic ties of CBJ to the disputed area were largely confined to Tracy Arm, and not to areas south, where Petersburg has equal or greater tourism connections. [Exc. 352-353]. The Petersburg petitioners also put on evidence demonstrating the inadvisability of relying upon other various administrative boundaries as a basis for



borough boundaries, as well as a mapping technician to discuss the conformity of the proposed boundaries to natural geography, including watersheds, as required by statutory standards for boroughs. [Exc. 433-436, 440-441]. In short, the Petersburg petitioners put forth considerable substantive and compelling evidence demonstrating its use of, reliance upon, and considerable economic interest in, the area in dispute.

The LBC held a decisional meeting on June 1 and approved a Petersburg Borough. However, after considering Juneau's claims to the disputed area, the Commission amended the proposed northern boundary line so as to exclude Tracy Arm and its watersheds and the Whiting River watersheds. [R. 139, 142]. The Commission discussed the disputed area [R. 111-119, 127-132], noting that "[w]e are here to do what is best and establish the best boundaries possible." [R. 119 (emphasis added)]. In amending the northern boundary of the Petersburg Borough, the Commission discussed the evidence which had been put forth, and noted that "Juneau made a good case for how much they use Tracy Arm...." [Exc. 468].

The Commission's decision is memorialized in the written Petersburg Borough Incorporation Decision [Exc. 1-16]. which again notes consideration of all of the evidence and testimony submitted:

The commission concludes that all of the relevant standards and requirements for incorporation of the Petersburg Borough are met. The commission reaches that conclusion after fully considering [] all of the parties' arguments, as well as the public comments, and the rest of the record in this proceeding. That record includes the borough incorporation petition and supporting materials, written comments received on the petition, the responsive briefs, the Petitioners' reply brief, Commerce's preliminary report, comments received on

Commerce's preliminary report, Commerce's final report, and testimony, opening and closing statements, and comments received at the LBC's May 30 – June 1 public hearing on the petition.

The staff had recommended that the commission amend the petition to exclude Tracy Arm and Whiting River watersheds from the proposed borough. Commissioner Harcharek made a motion to amend the petition to go back to the staff recommended boundaries, with the caveat that a final northern line of the proposed borough will be set by the cartographers following the natural boundaries. That has been done.

After considering Juneau's claim to that area, the commission unanimously voted to amend the petition. The commission then approved the amended petition by a 4-1 vote.

[Exc. 13 (emphasis added)]. This consideration of Juneau's claims is also noted under the separate section of the decision addressing boundaries:

The proposed borough partly overlaps the area that Juneau seeks to annex by a separate petition. The commission considered Juneau's claim to the overlapping area. The LBC also considered Juneau's advocacy of its ties to the area containing the Goldbelt Inc. and others' holdings. The commission further considered Juneau's claim to Tracy Arm, and that Juneau has tourism and other ties to Tracy Arm.

[Exc. 9].

Following approval by the LBC, the matter was put to a vote of the residents of the area, in a December 18, 2011 election conducted by the State of Alaska, Division of Elections, certified on January 3, 2013. The borough was approved by 182 votes (Yes: 782/No: 600). [Exc. 472]. As part of that election, the voters approved the borough home rule charter, and filled seats on the Borough Assembly and Borough School Board and the Petersburg Hospital Board. [R. 13]. The Borough Planning and Zoning Commission will also be an elected body. Id. Based upon voter registration

records, two members of those municipal bodies live outside the previous city limits of Petersburg. See, affidavit of Kathy O'Rear, Borough Clerk, attached to Motion to Supplement the Record, filed contemporaneously herewith, at para. 2.

Since borough incorporation, the borough has commenced the exercise of municipal powers over the new borough, and the elected boards have met and undertaken their duties and responsibilities. Much has transpired, and many borough-related expenses have been incurred. The borough is to start property taxation in the area outside the previous city limits as of January 1, 2014, and thus the borough assessor has begun researching those lands.<sup>12</sup> See, affidavit of Kathy O'Rear, at para. 5. Hundreds of hours have been spent to date researching status plats, researching individual plats and deeds, and setting up spreadsheets and assessment records. Id. Commencing this month, the assessor will undertake on-site visits to each and every parcel located within the newly incorporated area, after which each property will be entered into the borough's geographical information system (GIS). Id. Initial work has also commenced on the required borough comprehensive plan. Each parcel in the borough will be assigned a parcel number and its needs identified. Once that is completed, maps are compiled and provided to the Planning and Zoning Commission, so that the technical work of drafting a comprehensive plan can be undertaken. Id.

The Borough Assembly has met as required by the borough charter, and the

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<sup>12</sup> The former City of Petersburg was approximately 46 square miles in size. [R. 1661]. The Petersburg Borough contains 3829 square miles of land and water. [Exc. 13].

review and application of ordinances planned for borough-wide application has commenced.<sup>13</sup> See, affidavit of Kathy O'Rear, at paras. 3 and 4. These include the sales and transient room taxation ordinances, which became effective April 1, 2013, and collection of sales taxes has begun borough-wide. Id. at para. 4.

Additionally, the former city's banking and investment account institutions have been notified of the change, as has the Internal Revenue Service and a myriad of other federal agencies. See, affidavit of Kathy O'Rear, at para. 6. A borough land selection committee has been formed (two members of which reside outside the prior city limits), and work begun on selecting and applying for municipal entitlement lands. See, affidavit of Kathy O'Rear, at para. 2. The \$600,000 state organizational grant set forth in AS 29.05.190 has been included in the departmental legislative request and approved. The first installment, in the amount of \$300,000, has already been received by the Borough. The second installment, in the amount of \$200,000, is included in anticipated revenues in the first full-year Borough budget, which will be considered and approved by the Borough Assembly on June 3. See, affidavit of Kathy O'Rear, at para. 6. Bid awards and contracts have been issued/executed by the Borough since formation, totaling over \$7,500,000, and a collective bargaining agreement approved by the Assembly. See, affidavit of Kathy O'Rear, at para. 3.

Many smaller changes have also occurred. Borough informational meetings

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<sup>13</sup> Under the Borough Charter, sec. 19.06, the ordinances of the former City of Petersburg apply, upon borough formation, only within Service Area 1, which has as its boundaries the former city limits. [R. 1791]. Thus, ordinances to be applied on a borough-wide basis are being taken up individually by the Assembly.

have been held for the community; traffic citation booklets for the borough police department have been modified and ordered; the city website has been modified so as to reflect borough creation and the code on-line feature has been revised to include the borough charter and new borough ordinances; new email addresses have been created for all borough employees; all city vehicles have now been retitled in the name of the borough; borough letterhead has been produced and new name plates and business cards ordered; city forms have been converted to borough forms; and new tax exemption identification forms created and issued. See, affidavit of Kathy O'Rear, at para. 7.

In short, many changes and projects, big and small, have been undertaken or occurred, and continue to occur, as a result of borough formation and commencement of exercise of required borough functions. To date, in the four months since borough formation, expenses relating to borough formation, including property taxation outside of the former city limits, drafting and implementation of borough ordinances, including sales and transient room tax now being collected, and the innumerable other tasks and necessary to implement formation of a new municipal government, total over \$56,000.00. See, affidavit of Kathy O'Rear, at para. 8.

### **Standard of review**

When an administrative action involves the formulation of basic fundamental policy or involves expertise regarding complex subject matter, the appropriate standard of review is whether the agency action has a reasonable basis. Keane v. Local

Boundary Com'n, 893 P.2d 1239, 1241 (Alaska 1995); Mobil Oil v. Local Boundary Com'n, 518 P.2d 92, 98 (Alaska 1974):

A determination whether an area is cohesive and prosperous enough for local self-government involves broad judgments of political and social policy. ... [T]he Local Boundary Commission has been given a broad power to decide in the unique circumstances presented by each petition whether borough government is appropriate. Necessarily, this is an exercise of delegated legislative authority to reach basic policy decisions. Accordingly, acceptance of the incorporation petition should be affirmed if we perceive in the record a reasonable basis of support for the Commission's reading of the standards and its evaluation of the evidence.

518 P.2d at 98-99, quoted in Valleys Borough Support v. Local Boundary, 863 P.2d 232, 234 (Alaska 1993). The court will exercise its independent judgment when interpreting a statute which does not implicate an agency's special expertise or determination of fundamental policies, or when interpreting the Constitution of the State of Alaska. Keane, 893 P.2d at 1241. In so doing, they "should be given a reasonable and practical interpretation in accordance with common sense." 893 P.2d at pages 1241-42, quoting Arco Alaska, Inc. v. State, 824 P.2d 708, 710 (Alaska 1992).

### **Argument**

- I. THE LBC'S DECISION ON THE PETERSBURG BOROUGH IS IN FULL ACCORD WITH THE APPLICABLE CONSTITUTIONAL, STATUTORY AND REGULATORY MANDATES.

In this appeal, CBJ claims that the LBC "shirked" its constitutional mandate under Art. X, sec. 3, and violated the Alaska Supreme Court's ruling in Yakutat v. Local Boundary Com'n, 900 P.2d 721 (Alaska 1995). Appellant Brief, page 17. It

reaches this conclusion by largely ignoring the facts, and misconstruing the position taken by the LBC and its staff in response to CBJ's repeated demands that it postpone consideration of the Petersburg petition.

Art. X, sec. 3 of the Alaska Constitution, reads, in relevant part, as follows:

The entire State shall be divided into boroughs, organized or unorganized. They shall be established in a manner and according to standards provided by law. The standards shall include population, geography, economy, transportation, and other factors. Each borough shall embrace an area and population with commons interests to the maximum degree possible. ... Methods by which boroughs may be organized, incorporated, merged, consolidated, reclassified, or dissolved shall be prescribed by law.

The Local Boundary Commission is the entity expressly created by the Alaska Constitution (Art. X, sec. 12) to fulfill this objective, and to provide an impartial administrative body to make state-level decisions regarding local boundary changes. Port Valdez Company, Inc. v. City of Valdez, 522 P.2d 1147, 1150, fn. 7 (Alaska 1974).

As contemplated by the constitution, the Alaska Legislature adopted borough incorporation standards, most currently codified at A.S. 29.05.031(a), as follows:

(a) An area that meets the following standards may incorporate as a home rule, first class, or second class borough, or as a unified municipality:

(1) the population of the area is interrelated and integrated as to its social, cultural, and economic activities, and is large and stable enough to support borough government;

(2) the boundaries of the proposed borough or unified municipality conform generally to natural geography and include all areas necessary for full development of municipal services;

(3) the economy of the area includes the human and financial resources capable of providing municipal services; evaluation of an area's economy includes land use, property values, total economic base, total personal income, resource and commercial development, anticipated functions, expenses, and income of the proposed borough or unified municipality;

(4) land, water, and air transportation facilities allow the communication and exchange necessary for the development of integrated borough government.

The incorporation must also be found to be in the best interests of the State. See, A.S. 29.05.100(a).

The LBC has in turn enacted regulations to implement these constitutional and statutory requirements (see, 3 AAC 110.045 (Relationship of Interests), .050 (Population), .055 (Resources), and .060 (Boundaries)), and these regulations set forth many factors which may be considered in determining compliance with these requirements. The LBC also imposes standards regarding a best interests of the state finding (3 AAC 110.065), a mandatory transition plan (3 AAC 110.900), nondiscrimination (3 AAC 110.910), identification of essential municipal services (3 AAC 110.970), and determination of maximum local self government and minimum number of local governmental units (3 AAC 110.981 and .982).

As is set out clearly in the checklist utilized by the LBC at its decisional meeting [Exc. 172-177], the constitutional and statutory standards are interwoven into and throughout the regulations.<sup>14</sup> For example, 3 AAC 110.045, Relationship of

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<sup>14</sup> CBJ's apparent criticism, at page 11 of its brief, of the LBC's use of the six page



Interests, and 3 AAC 110.060, Boundaries, read as follows (emphasis added):

3 AAC 110.045. Relationship of interests. (a) On a regional scale suitable for borough government, the social, cultural and economic characteristics and activities of the people in a proposed borough must be interrelated and integrated in accordance with AS 29.05.031(a)(1) and art. X, sec. 3, Constitution of the State of Alaska. In this regard, the commission may consider relevant factors, including the

- (1) compatibility of urban and rural areas within the proposed borough;
- (2) compatibility of economic lifestyles and industrial or commercial activities;
- (3) existence throughout the proposed borough of customary and simple transportation and communication patterns;
- (4) extent and accommodation of spoken language differences throughout the proposed borough; and
- (5) existence throughout the proposed borough of organized volunteer services such as fire departments or other emergency services.

...

(c) The communications media and the land, water, and air transportation facilities throughout the proposed borough must allow for the level of communications and exchange necessary to develop an integrated borough government in accordance with AS 29.05.031(a)(4) and art. X, sec. 3, Constitution of the State of Alaska. ...

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3 AAC 110.060. Boundaries. (a) In accordance with AS 29.05.031(a)(2) and art. X, sec. 3, Constitution of the State of Alaska, the boundaries of a proposed borough must conform generally to natural geography, must be on a regional scale suitable for borough government, and must include all land and water necessary to provide

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checklist is nonsensical. Its assertion that the list fails to recognize “Art. X, sec. 3 as a general condition that should apply to the entirety of its analysis” is contradicted by the list itself, which cites to the constitutional provision throughout the document in conjunction with the applicable regulations. Furthermore, given the myriad of constitutional, statutory and regulatory factors to discuss and decide, a concise listing of each requirement provides a helpful framework to ensure that all factors are discussed, and is no doubt of substantial assistance to the Commissioners.

the full development of essential municipal services on an efficient, cost-effective level. In this regard, the commission may consider relevant factors, including

- (1) land use and ownership patterns
- (2) ethnicity and cultures;
- (3) [repealed];
- (4) existing and reasonably anticipated transportation patterns and facilities;
- (5) natural geographic features and environmental factors;
- (6) [repealed];
- (7) existing and reasonably anticipated industrial, commercial, and resource development within the proposed borough. ...

At its decisional meeting regarding the Petersburg petition, the Commission discussed each of these constitutional, statutory and regulatory standards, and determined that each was met in connection with the proposed borough, except in conjunction with the proposed northern boundary, which the Commission amended from that sought in the petition to remove some 500 square miles which were being sought by CBJ's annexation petition. [Exc. 106-171].

A. The LBC Considered CBJ's Arguments and Evidence.

CBJ raises several arguments against the LBC's decision. First, it asserts that the LBC erred by not considering the evidence that CBJ submitted in the petition proceedings when the Commission determined the appropriate boundaries for the Petersburg Borough. This assertion is repeated frequently in CBJ's brief, and is the predominant underpinning of its brief. See, pages 11-12 ("The Commission declined to consider evidence presented by the CBJ...."); pages 15-16 ("[T]he LBC utterly refused to consider any of it."); page 16 ([T]he LBC inexplicably failed to consider

any of it.”). The problem with this argument however is that it is abundantly clear that the Commission did in fact consider CBJ’s evidence.

As set out above, this issue arose months before the hearing commenced, when CBJ first demanded that the Petersburg petition be postponed. At its December 4, 2011 meeting, during which the Commission declined to exercise its discretion to postpone all Petersburg proceedings to accommodate the recently filed CBJ petition, it specifically assured CBJ that it would be taking its “requests, interest and involvement in this very seriously”, and it confirmed that it had the power to amend the boundaries of the proposed Petersburg Borough after considering “Juneau’s position and request at that time....” [Exc. 259, 270]. This assurance was reiterated at a pre-hearing meeting, where the Commission Chair, LBC staff personnel, and the LBC’s attorney again all confirmed that written submittals and witness testimony and evidence submitted during the proceedings, including at the hearing itself, would be considered by the Commission.<sup>15</sup> [Exc. 295-297].

In accord with these assurances and its regulations, the Commission heard, considered and discussed CBJ’s evidence, both at the decisional meeting and in the decision itself.

Commissioner Harrington: ... I think it’s probably appropriate for us to take a moment and talk about this entire section of – that’s under dispute. We’ve heard comments and testimony having to do with the

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<sup>15</sup> As set out above, at the hearing CBJ took full advantage of its status as a respondent in the proceedings, where it presented extensive documentary evidence and witness testimony.

whole area from Cape Fanshaw to Tracy Arm, and all the rest. We have three competing bodies that have expressed in this area. We have Petersburg, we have the City of Juneau, we have Goldbelt and the discussion of a possible borough that would encompass Kake, and a lot of the unincorporated areas of central southeast Alaska. And I think we need to recognize that [--] all of that testimony and at least comments, and some detail about why or if we want to change these boundaries, and speak to those issues that were brought up to us. ...

...

The Goldbelt's interest in the central part of this contested area, I can see that tie that Juneau is talking about with Goldbelt to the Juneau people. Yet Goldbelt initially was saying they'd rather be with Petersburg and then they basically backed away and said they don't want to be a part of any of it. ...

I was not persuaded that we should [hold] it back for some future potential borough coming into the central southeast Alaska. And although there clearly is ties with Juneau, with Petersburg and with the Kake and the rest of central, at this point I think we need to make a decision, and I'm coming down on the side that says this should be in the area of Petersburg.

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Commissioner Semmens: ... I am convinced that for the area of Tracy Arm that there is a connection to Juneau, that there is tourism that's happening there outside of Juneau. ...

\* \* \*

Commissioner Chrystal: ... I do think that Juneau made a good case for how much they use Tracy Arm....

[Exc. 462-465, 468]. Noting that its mandate was to "do what is best and establish the best boundaries possible" [R. 119, emphasis added], the Commission went on to amend the petition to exclude Tracy Arm and its watersheds from the boundaries of the Petersburg Borough.

Consideration of CBJ's evidence and position was reiterated in the formal LBC

decision:

The commission considered Juneau's claim to the overlapping area. The LBC also considered Juneau's advocacy of its ties to the area containing the Goldbelt Inc. and others' holding. The commission further considered Juneau's claim to Tracy Arm, and that Juneau has tourism and other ties to Tracy Arm.

[Exc. 9 (emphasis added)].

The LBC obviously did not “fail to consider” the evidence when it included within the Petersburg Borough a portion of the contested area. Rather, after a discussion regarding the parties' claims, it included within Petersburg the portion of the disputed area that Petersburg had greater connections with, namely an overwhelming historical and present economic interest in commercial fishing in eastern Stephens Passage and its bays and uplands, and excluded the portion of the disputed area that it determined had greater connections with Juneau, namely its tourism connections with Tracy Arm. CBJ's entire argument in this regard is based upon a patently false premise.

Furthermore, the evidence presented by CBJ as to the entire disputed area was anything but “uncontradicted” as it absurdly claims. (Appellant brief, page 15). As set out above, scores of residents and officials testified at the hearing in regard to Petersburg's substantial interests in the area, and many pages of written documents demonstrating those interests were submitted. The evidence demonstrated that CBJ's claims to having a more significant economic interest in the entire area due to tourism were greatly exaggerated, and that its tourism ties were confined mainly to Tracy Arm.

The LBC, as the administrative body tasked with making such decisions, was in the best position to weigh that evidence and the testimony of the witnesses, and, in doing so, reach its decision as to the most appropriate boundaries. There is clearly a more than reasonable basis for the decision to include Endicott Arm and the eastern portion of Stephens Passage and adjacent uplands within the Petersburg Borough, and substantial evidence supports that decision.

B. The LBC's Decision is consistent with Yakutat v. Local Boundary Com'n.

Secondly, CBJ claims that the LBC's decision violated the holding of Yakutat v. Local Boundary Com'n, 900 P.2d 721 (Alaska 1995). In fact, the LBC's decision is in full accord with the dictates of that decision.

In Yakutat, the petitioners had submitted a petition requesting formation of a Yakutat Borough running from Cape Spencer to the south, and Cape Suckling to the north. LBC staff, in its preliminary report, recommended against approving borough formation, and instead recommended that Yakutat be combined with a contemplated Prince William Sound model borough. In its final report, LBC staff reaffirmed their recommendation, but in the alternative recommended that if the Commission approved the petition that the northern boundary be amended by moving it to the southeast, to the 141<sup>st</sup> Meridian. After the hearing and decisional meeting, the Commission approved the petition, adjusting the southern boundary slightly (to include Cape Fairweather) and amending the northern boundary by moving it southward as recommended. The Yakutat petitioners appealed the decision of the LBC to alter the

northern boundary.

In their appeal, the petitioners asserted that the Commission had no discretion to alter the boundaries of a proposed borough unless and until it initially found that the borough, as proposed, failed to meet applicable standards of incorporation. The Alaska Supreme Court agreed, however further held that such a finding of noncompliance was implicit in its amendment of the boundaries:

The findings contained in ... the LBC's Statement of Decision in this case make it plain that the LBC shifted the northwest boundary of the proposed Yakutat Borough from Cape Suckling to the 141<sup>st</sup> Meridian because the commission believed that the affected area lacked sufficient cohesiveness to the remaining area of the borough and enjoyed greater ties and common interests with the Prince William Sound area. ... Because the LBC based its decision that the 141<sup>st</sup> Meridian was the most appropriate boundary for the proposed borough on criteria reflecting the common interests of the area and its population, and because the LBC plainly meant its decision to ensure that the area and population to be included in the approved borough would be maximally cohesive, the decision itself was tantamount to a declaration that the originally proposed boundaries did not comply with the standards for incorporation – that they failed to “embrace an area and population with common interests *to the maximum degree possible*.”

900 P.2d at pages 726-27 (emphasis in original, fns. omitted), citing to Art. X, sec. 3 of the Alaska Constitution. The Court ultimately upheld the boundary determination made by the LBC as the “exercise [of] its discretionary power to redraw the original proposal” (900 P.2d at 725), holding that the Commission was authorized to consider alternative boundaries whether or not a competing petition was on file, in order to decide what boundaries would be most best and most appropriate.<sup>16</sup> Id.

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<sup>16</sup> Two years later, the Yakutat petitioners filed an annexation petition, seeking to

This consideration of alternative boundaries is exactly what occurred here. The Petersburg petitioners, CBJ and others, notably the City of Kake, the Kake Tribal Council, and Goldbelt Inc. (a large ANC landowner in the Hobart Bay area), all presented evidence as to their interests in the area and what they believed the appropriate northern boundary of the Petersburg Borough should be. The Petersburg petition sought boundaries up to the existing CBJ border, and put on substantial evidence supporting that request. [Exc. 308-441]. CBJ objected to including land down to Cape Fanshaw in the Petersburg Borough, and presented evidence as to that position. [R. 228-289]. The Kake parties objected to any of the disputed area being placed into either a Petersburg Borough or being annexed by CBJ, and Goldbelt requested that a portion of the disputed area be carved out of the contested area to reserve it for inclusion into a potential Kake-Angoon-Hoonah borough (after earlier stating its support for inclusion of its lands in a Petersburg Borough). [R. 221-228, 351-357]. The LBC, noting its responsibility to “establish the best boundaries possible” [R. 119 (emphasis added)], ultimately amended the requested northern boundary of the Petersburg petition to exclude some 500 square miles of land, based upon its more significant ties to Juneau.

Commissioner Semmens: ... I am convinced that for the area of Tracy Arm that there is a connection to Juneau, that there is tourism that's happening there outside of Juneau. ...

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include in the Borough the land from the 141st Meridian north to Cape Suckling, as originally sought in its earlier incorporation petition. That annexation was approved. No Prince William Sound borough has ever been sought or formed.



Commissioner Chrystal: ... I do think that Juneau made a good case for how much they use Tracy Arm....

[Exc. 464-465, 468]. Thus, the LBC explicitly engaged in consideration of alternative boundaries, as contemplated by the Yakutat case, and it specifically amended the Petersburg boundaries to exclude the area which it found CBJ had made a “good case for”, i.e. that had more significant ties with Juneau.

The flip side of this is that Juneau did not make a “good case” for the remainder of the disputed area, and the Petersburg petitioners did, a finding supported by substantial, substantive and compelling evidence. If CBJ had made a persuasive showing on other lands in the area in dispute, the LBC could and undoubtedly would have also excluded those lands from the Petersburg Borough as well. By explicitly finding that the Petersburg Borough, as amended, met the “common interests to the maximum degree possible” standard, as required by Art. X, sec. 3 of the Alaska Constitution [Exc. 6-7] and discussed in Yakutat, the LBC implicitly found that the portion of the contested area which was included in the Petersburg Borough enjoyed greater ties, connections and common interests with the Petersburg area and residents.<sup>17</sup> It is clear that that Commission did not view its job as to simply “rubber stamp any minimally acceptable petition”, as CBJ claims (Appellant brief, page 16), since it considered CBJ’s evidence and amended the boundaries in response to it.

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<sup>17</sup> In Yakutat, the LBC had made no express findings regarding the petition’s noncompliance with the ‘maximum degree possible’ standard when it amended the boundaries. The Court held that such a finding can be made either expressly or by implication. 900 P.2d at 726, citing to Valleys Borough, *supra*.

C. The ‘maximum degree possible’ standard does not limit the LBC to identifying only one, perfect borough.

CBJ further suggests in its brief, with no support provided, that the constitutional “maximum degree possible” language can apply only to one borough – in other words, there is one, and only one, borough for land to be included in, and the Commission is authorized to include land only in this perfectly drawn borough. (Appellant brief, page 16). Such a rigid and unachievable standard would likely render every existing and proposed borough in Alaska subject to judicial scrutiny and rejection, and it is not supported by the case law. In Mobil, *supra*, the court interpreted the Alaska Constitution as “upholding organization of boroughs by the Local Boundary Commission whenever the requirements for incorporation have been minimally met.” 518 P.2d at 99. Yakutat, *supra*, does not overturn or criticize the holding in Mobil, and in fact cites favorably to it. The holding in Yakutat makes it clear that the Commission is not required to approve incorporation simply because the minimum standards alone have been met, but that it has the authority and discretion to consider alternative boundaries in order to make its determination, and that such a determination will be upheld if there is a “reasonable basis of support” for the Commission’s evaluation of the evidence. 900 P.2d at 728. There is no suggestion that the Court was interpreting the constitutional mandate as requiring the Commission to determine the one, and only one, perfect borough for each region of Alaska.

CBJ criticizes the LBC and its staff, claiming that they “look[ed] no further than the four corners of the Petersburg petition standing alone” (Appellant Brief, page

13), and that the staff erroneously set out the applicable law in their final report, informing the Commission that it need not draw boundaries that are maximally cohesive, and that the only requirement it need follow was to “avoid creating ‘disparate boroughs.’” (Appellant brief, page 15). This misconstrues those staff comments, and ignores the actions taken by the Commission in considering alternative boundaries.

After finally filing its petition, the CBJ repeatedly urged the staff to “analyze the Juneau petition in concert with the Petersburg petition.” Staff declined to do so, noting that

[t]he effect of this is analogous to consolidating the petitions, and/or postponing the Petersburg petition. The LBC unanimously voted against granting either of those requests in its December 14, 2011 meeting.

[Exc. 91]. After quoting from Art. X, sec. 3 of the Constitution, noting that it required that a borough embrace an “area and population with common interests to the maximum degree possible”, and in response to CBJ’s assertion that there is only one borough which could satisfy that constitutional standard, staff went on to state as follows:

Art. X, sec. 3 means that boroughs should comprise an area and population that/who have as much in common as possible. In other words, the constitution says that disparate boroughs should not be formed.

Neither the constitution, the statutes, nor the regulations call for areas to be part of the best possible borough. AS 29.05.031(a) states that ‘the population of the area is interrelated and integrated as to its social, cultural, and economic activities...’ In other words, a borough should

be integrated and interrelated as much as possible.

Regulations expand upon the statutes. 3 AAC 110.045 is entitled “Relationship of Interests.” It states that ‘the social, cultural, and economic characteristics and activities of the people in a proposed borough must be interrelated and integrated in accordance with AS 29.05.031(a)(1) and art. X, sec. 3...’ Again, a borough should be integrated and interrelated as much as possible. None of this language – constitutional, statutory, or regulatory – implies a comparison of separate boroughs.

[Exc. 91]. These staff comments correctly set out the constitutional, statutory and regulatory common interest standards. These comments do not erroneously advise the LBC that it could form a borough which does not have common interests “to the maximum degree possible”, as suggested by CBJ, nor do they suggest that consideration of the “best boundaries” for a Petersburg Borough was not appropriate or would not be undertaken, or that CBJ’s evidence would not be taken into account.<sup>18</sup> Rather, staff was merely pointing out in the report, correctly, that the two petitions did not need to be analyzed ‘head to head’ with each other, with the LBC comparing the two boroughs. The analysis of the best boundaries would be taken up by the LBC in the context of the Petersburg petition, when, after considering all of the evidence submitted, it would determine whether the petition met the constitutional standards, or could met those standards by amendment. As discussed above, the petition here was approved, after amending the boundaries to exclude a portion of the area in dispute

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<sup>18</sup> Nor did staff advise the LBC that it should only consider the “four corners” of Petersburg petition, as CBJ claims; conversely, LBC staff and counsel advised the Commission to consider everything that had been submitted, including written briefs, exhibits and witness testimony.

based upon its greater ties to Juneau, effectively reserving the area for CBJ annexation. CBJ's argument in this regard is mere semantics.

While CBJ does not specifically claim in this appeal that the LBC abused its discretion in not consolidating the petitions and postponing consideration of the Petersburg petition, that is the underlying suggestion of its entire brief<sup>19</sup> -- that the process was somehow flawed because the Petersburg petition was allowed to proceed, without being delayed by CBJ's long inaction. As noted above, there is more than a substantial basis to support the LBC's decision on this point.<sup>20</sup> CBJ knew of the considerable efforts of the Petersburg petitioners and chose to do nothing for years.<sup>21</sup> Most importantly however, CBJ was provided a full and fair opportunity to present any and all evidence of its interests in the contested area in the Petersburg petition, thus making delay unnecessary and unwarranted. CBJ presented many pages of documentary evidence, and presented substantial witness testimony and exhibits. If CBJ had further evidence, which it now seems to be suggesting, it is difficult to understand why that evidence wasn't presented, given that it was fully aware that the

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<sup>19</sup> In fact, at the hearing, CBJ twice again requested that the Commission postpone a decision on the disputed area until a hearing on its petition. [R. 173, 459].

<sup>20</sup> As noted above, it is discretionary on the part of the LBC as to whether to postpone and/or consolidate competing petitions. See, 3 AAC 110.430 and .640(c).

<sup>21</sup> If CBJ had such significant ties to the entire area, it is difficult to understand why it failed to annex the land earlier, at any point in the last 40 years prior to the filing of the Petersburg petition. Even when it finally filed its petition, seven months after the Petersburg petitioners filed theirs, and five years after the petitioners began the process, CBJ's efforts were half-hearted, in that it chose the "local option" annexation method, which could be rejected by a single voter.

Petersburg hearing was its opportunity to do so. After trying, and failing, to convince the LBC of its greater ties to the portion of the disputed area included within the Petersburg Borough, CBJ, through this appeal, is requesting a “do over”, at the substantial expense of the Petersburg petitioners and at a tremendous disruption to municipal government in the Petersburg area, as discussed below. This request should be rejected.

II. THE DE FACTO INCORPORATION DOCTRINE PREVENTS CHALLENGE TO THE PETERSBURG BOROUGH’S EXISTENCE AND BOUNDARIES ABSENT PLAIN ERROR SO SUBSTANTIAL AS TO RESULT IN INJUSTICE.

While CBJ purports to seek amendment of the Petersburg Borough’s northern boundary from Endicott Arm southward to Cape Fanshaw, such an amendment would in fact require 1) a new evaluation by the LBC to determine whether the resulting (“remnant”) Petersburg Borough would meet the constitutional, statutory and regulatory standards for borough incorporation and 2) resubmission of the remnant borough to the voters to determine whether or not they approve formation of such a reduced-sized borough. There is no legal basis upon which to assume ongoing existence of a smaller, remnant borough which has been approved by neither the LBC nor the electorate. A decision by this court reversing the LBC’s boundary decision would therefore, of necessity, result in the undoing of the Petersburg Borough previously approved by both the LBC and the voters, requiring later approval by the

Commission and the voters of a remnant borough.<sup>22</sup> The consequences of such a decision would be far-reaching, disruptive, confusing and chaotic. There is, in fact, a substantial question as to whether such a reduced-sized Petersburg Borough, even if approved by the LBC, would be approved by the voters.<sup>23</sup> CBJ could have, but chose not to, sought a stay of the borough election and/or borough incorporation pending appeal.

The chronology of events was as follows:

LBC approval at hearing of Petersburg Borough incorporation	June 1, 2012
LBC adoption of written decision approving incorporation of Petersburg Borough	August 22, 2012
CBJ appeal from LBC decision	October 19, 2012

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<sup>22</sup> The Petersburg Borough petition which was approved by the LBC and the voters also included a provision for dissolution of the existing City of Petersburg contemporaneous with the formation of the Petersburg Borough.

<sup>23</sup> The remaining disputed area, which is the subject of CBJ's appeal, encompasses approximately 1460 square miles. See, City and Borough of Juneau's petition at [www.commerce.state.ak.us/dca/lbc/2012\\_City\\_and\\_Borough\\_of\\_Juneau\\_Annexation/Petition/#FolderHead](http://www.commerce.state.ak.us/dca/lbc/2012_City_and_Borough_of_Juneau_Annexation/Petition/#FolderHead). If the Petersburg Borough was reduced by this amount, it would leave a remnant borough with approximately 2370 square miles, which would roughly be only 62% of the size of the present Petersburg Borough. The Petersburg Borough was adopted by a vote of 782 in favor, 600 opposed (approximately a 13% margin). [Exc. 472]. It is not at all clear that borough incorporation would have been approved by the voters had the entire eastern Stephens Passage area between Cape Fanshaw to Holkham Bay been excluded from the Borough, as a substantial amount of testimony favoring borough formation at the LBC's Petersburg hearing focused on the economic importance of the various commercial fisheries in this area to Petersburg residents, and the concomitant importance of adjacent upland activities there.

Final date for mail-in of ballots on Borough incorporation measure	December 18, 2012
Certification of election results	January 3, 2013
Effective date of dissolution of City of Petersburg	January 3, 2013
Effective date of incorporation of Petersburg Borough	January 3, 2013
First meeting of Petersburg Borough Assembly	January 7, 2013

Even assuming that this court renders a decision on this appeal in July, 2013, six months will have transpired since dissolution of the former City of Petersburg and commencement of operations by the Petersburg Borough. What would be the consequences, at that point, of a judicial decision which effectively disincorporates the Petersburg Borough? Would the dissolution of the City of Petersburg be invalidated, resulting in resurrection of that entity? What would be the legal effect of actions taken during the interim by newly elected borough officials, who are different from the former city officials? What would be the legal effect of interim actions by the Petersburg Borough to enter into contracts, collect sales taxes (both inside and outside the former city limits), assess and levy property taxes, make expenditures, and take other municipal actions affecting individuals?

In Port Valdez Company, Inc. v. City of Valdez, 522 P.2d 1147, 1153 (Alaska 1974), the Alaska Supreme Court grappled with these issues in the context of a challenge to an annexation by the City of Valdez. Even though that case involved only



an annexation, and not a legal challenge whose effect would be to disincorporate an entire city or borough, the court held that

...an annexation is a corporate reorganization of sufficient dignity so that an attack upon it challenges the corporate essence in a manner justifying the application of the doctrine of de facto municipal incorporation.

522 P.2d at page 1153. The court addressed the nightmarish results of a judicial decision undoing the legal existence of a functioning municipality:

Disincorporation of a municipality substantially disrupts the life and livelihood of anyone associated with the municipality. Among the deleterious consequences of a disincorporation are the disselection of public officials, invalidation of corporate actions (possibly creating individual liability on the part of public officials or unjustly depriving employees, contractors and other creditors of claims against the corporate body), and voiding of actions taken under the police, taxation and eminent domain powers.

Id. The court concluded that,

[W]here the doctrine of de facto incorporation applies, private parties may not successfully bring a suit challenging the legality of corporate existence.

Id.

In holding that the doctrine of de facto municipal incorporation also applies to annexations in Alaska, the court stated the four elements which must be present in order for a prime facie voidable annexation to “escape challenge”:

(1) A constitutional or a statutory provision under which the annexation might lawfully have been accomplished; (2) an attempted compliance in good faith with the provision(s); (3) a colorable compliance with the provision(s); and (4) an assumption in good faith of municipal powers over the annexed territory.

522 P.2d at page 1154. As the Supreme Court has equated an annexation with a

disincorporation for purposes of application of the de facto incorporation doctrine, these standards also apply to the disincorporation of the Petersburg Borough which would necessarily result from a judicial reversal or remand of the LBC's decision. All four elements regarding application of the de facto incorporation doctrine are met here.

1. There exists a constitutional or statutory provision under which incorporation of the Petersburg Borough might lawfully have been accomplished.

Borough incorporation by the Local Boundary Commission and the affected voters is expressly authorized by Art. X, sec. 3 of the Alaska Constitution, AS 29.05.031, AS 29.05.060 and regulations promulgated thereunder, including 3 AAC 110.045-.067 and 3 AAC 110.400-.700.

2. The petitioners have demonstrated attempted compliance in good faith with the provisions for incorporation of the Petersburg Borough.

The Petersburg petitioners undertook a lengthy and extensive process to comply with the myriad of requirements of constitution, statute and regulation, including preparation and circulation for requisite signatures of a petition for incorporation, presentation of briefs and written evidence to the LBC and presentation of witnesses and argument during a 3-day LBC hearing on the petition. There is no evidence that the petitioners attempted to circumvent or ignore any requirement for petitioning to incorporate a borough, and the LBC diligently addressed all of the substantive and procedural requirements in approving the proposed borough.

3. Petitioners and the LBC demonstrated colorable compliance with the borough incorporation provisions.

The LBC and its staff thoroughly reviewed the Petersburg petition and evidence submitted by petitioners in written briefs and testimony at hearing, and found no constitutional, statutory or regulatory provision with which petitioners failed to comply. CBJ's argument is essentially that the LBC erred in determining that the Petersburg Borough petition satisfied constitutional and statutory standards, particularly those relating to boundaries. As previously discussed, the LBC has broad discretion in these areas, carefully considered these decisions, and, at the very minimum, demonstrated "colorable compliance" with the constitutional, statutory and regulatory standards for borough incorporation.

In Port Valdez Company, Inc. v. City of Valdez, *supra* at page 1152, the LBC had failed, prior to its annexation hearing and decision, to adopt regulatory standards for annexations as required. The Court noted that the LBC's failure occurred notwithstanding the fact that the court had previously ruled in another case<sup>24</sup>, nearly a year earlier, that the failure of the Commission to adopt such standards prior to annexation hearings made that annexation voidable. When the LBC later repeated the same violations in Port Valdez Company, the court held that,

The continued failure to have promulgated standards makes the Valdez

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<sup>24</sup> In United States Smelting, Refining, & Mining Co. v. Local Boundary Commission, 489 P.2d 140 (Alaska 1971), the court held that the LBC's failure to promulgate statutorily mandated annexation standards resulted in a denial of substantive due process under the Alaska Constitution.

annexation *a fortiori* voidable and prime facie illegal. Therefore, the present annexation is null and void unless validated by some overriding doctrine. (Emphasis added.)

Id. at page 1152. The court then held that the failure of the LBC to adopt any standards for annexation prior to its hearing and decision, previously held to be constitutionally defective, was nevertheless overridden by the de facto incorporation doctrine. Id. at pages 1152-56.<sup>25</sup>

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<sup>25</sup> The Court stated as follows regarding the “colorable compliance” component of the doctrine:

Courts have often interpreted the colorable compliance requirement to mean that a defect, in order to render an incorporation or annexation void, must be material, as opposed to technical. The unique Alaska annexation procedures present problems different from those encountered by other courts in determining whether a defect is material or not. Courts in other jurisdictions ordinarily must review only the actions of the municipality in assessing the validity of the annexation; annexations effected through Local Boundary Commission procedures receive a full administrative hearing, followed by legislative review, before they are subjected to judicial scrutiny. The complex social, political and economic judgments leading to the decision as to whether an annexation is wise fall more properly within administrative and legislative competence; ordinarily those decisions will be overturned only when they involve an abuse of discretion. The more common challenge to Local Boundary Commission action, that made here by the company, attacks the procedures by which the substantive decisions were made. Where the other elements of the de facto incorporation doctrine exist, a procedural challenge following both administrative and legislative review should succeed only where it is clear that the defective procedures prevented the opponents of annexation from fully and fairly presenting their case to the reviewing bodies. The proper test to determine whether a procedural defect is so material that it vitiates colorable compliance with the applicable statute and thereby strips the annexation of de facto municipality protection parallels the test of plain error in civil cases: whether the error is so substantial as to result in

By contrast, in the case now on appeal, the LBC has promulgated extensive regulations implementing the constitutional and statutory standards for borough incorporation, and it weighed the evidence before determining that these standards had been satisfied by the Petersburg petitioners. The petitioners and the LBC thus demonstrated substantially greater “colorable compliance” with the borough incorporation provisions than the LBC did in connection with the annexation standards at issue in the Port Valdez Company case. Because the de facto incorporation doctrine was sufficient to override such shortcomings in the Port Valdez Company case, the doctrine would certainly override any lesser defects here, as asserted by CBJ in this appeal.

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injustice. In this instance the injustice, if any, would be caused by preventing the full and fair expression of opposing viewpoints.

522 P.2d at pages 1154-55 (citations omitted and emphasis added). In Port Valdez Company, wherein the LBC had failed to develop annexation standards to “objectify the criteria of decision-making and delineate the battleground for a public hearing”, the court stated that

...we cannot perceive how the absence of such delineation in any manner prevented full and fair expression of the company’s position at the hearing on the Valdez annexation. The failure to promulgate standards for annexations was not an error so substantial as to result in injustice.

Id. at 1155-56. In the present appeal, CBJ cannot demonstrate that there is no reasonable legal or factual basis for the LBC’s determination that the Petersburg Borough, with its northern boundary, met constitutional and statutory standards for borough incorporation. To the extent CBJ raises a procedural challenge, the CBJ cannot show that it was prevented from fully and fairly presenting its boundary case to the LBC.

4. The Petersburg Borough has in good faith assumed municipal powers.

As discussed above, the remedy sought by CBJ herein, if granted by the court, would effectively undo the entire Petersburg Borough, not just the contested northern boundary. Once Borough incorporation had been approved by the LBC and then by the electorate, and not judicially stayed at the behest of CBJ, borough incorporation became effective upon certification of the election. Under AS 29.05.120(e), the initial elected borough officials took office on the first Monday following certification of the election, January 7, 2013. Despite the fact that CBJ had appealed from the LBC decision, in the absence of any judicial stay the residents of Petersburg had no choice but to proceed with the dissolution of the former city of Petersburg and commencement of operation of the new borough.

Since January 3, 2013, the Petersburg Borough, at considerable expense, has assumed full municipal powers, both within and outside the former city limits. (See, pages 17-20, *supra*). Within the former city limits, the Borough has undertaken all of the activities and function of the former city in what is now Service Area 1 of the Borough. Outside of Service Area 1, the Borough has extended its authority, including imposition of sales taxes, and undertaking assessment work for the imposition of property taxes. See, affidavit of Kathy O'Rear. The former city of Petersburg has, since January 3, become nonexistent and has exercised no authority or functions.

In summary, all four elements necessary for application of the de facto municipal incorporation doctrine, as set forth in Port Valdez Company, *supra*, have

been fully satisfied here.

The de facto incorporation doctrine is not dependent upon a showing that the party challenging the new municipality, in this case CBJ, delayed in seeking a judicial remedy. The “de facto” doctrine arises from the “fact” of formation of the new municipality and the undertaking of its municipal authority. However, to the extent CBJ complains that this is unjust, it must be noted that (1) CBJ was on constructive notice of the law of Alaska, in which the de facto municipal incorporation doctrine exists and (2) CBJ had the option of seeking a stay pending appeal and/or expedited review, prior to either the election or the effective date of borough incorporation, to delay the election or the borough incorporation until judicial resolution of this appeal.

CBJ was aware of the LBC’s decision to approve borough formation as of June 1, 2013, six months before commencement of the mail-in ballot election and seven months before borough incorporation. While it could not appeal until the LBC entered its August 22 decision, there was no requirement that it delay until October 19 to file its appeal. In any case, upon filing its appeal, CBJ could have sought expedited review; or it could have sought a stay, pursuant to Appellate Rule 603(a)(2)(A). A stay pending appeal could have been sought any time prior to the December 18 election or even prior to the January 3, 2013 date when the Petersburg Borough came into existence.<sup>26</sup>

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<sup>26</sup> CBJ would have been exempt from a supersedeas bond requirement, under Appellate Rule 603(a)(2)(F).

The fact that CBJ timely filed its appeal and otherwise met a statutory deadline for filing its appeal does not preclude the defense of de facto municipal corporation. In Lake and Peninsula Borough v. Local Boundary Commission, 885 P. 2d 1059 (Alaska 1994), the villages challenging borough incorporation did not file an appeal from the LBC's decision, but instead filed an independent action two months prior to the election approving the petition. Id. at pages 1061, 1064. The case then lay dormant for eighteen months, during which time it was converted to an appeal. Id. at 1064. The Borough raised laches as a defense, but the court held that the six month statute of limitations for challenging municipal incorporation (AS 29.05.150) established a "sole line of demarcation" which precluded a laches defense. Id. at 1064-65.

However, the statute of limitations did not preclude application of the de facto incorporation doctrine in Lake and Peninsula Borough.<sup>27</sup> The Court separately addressed application of the de facto municipal incorporation doctrine, at p. 1064, fn. 20 of the opinion, where it notes that there was some question as to whether the doctrine had been abolished when the Legislature had abolished the de facto doctrine with respect to private corporations in AS 10.06.218. The Court went on to note that it did not need to decide that question<sup>28</sup>, because the Court had found that the borough

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<sup>27</sup> The de facto incorporation doctrine is separate and distinct from the equitable defense of laches. Similarly, the equitable principle of estoppel "...is entirely separate and distinct from the doctrine of de facto incorporations." McQuillan, 1 Municipal Corporations §3.50 at 395 (3<sup>rd</sup> ed. rev vol. 2002)

<sup>28</sup> Any argument that AS 10.06.218 abolished the de facto municipal incorporation doctrine would be, in any event, specious. The language abolishing the doctrine of "de



failed to meet the third element of the de facto municipal incorporation doctrine, in that it had failed to establish colorable compliance with a provision requiring notice of the filing of its petition. See, Lake and Peninsula Borough, *supra*, at page 1064, n. 20, and at pages 1063-64, wherein the court held that the notice violations were “substantial.” The court therefore viewed the de facto municipal incorporation doctrine as potentially applicable, notwithstanding the six month statute of limitations, but held that the defendant borough had not satisfied the “colorable compliance” element of the de facto standard.

In its Lake and Peninsula Borough decision, the court noted that

[I]f Villages had properly appealed LBC’s boundary decision pursuant to AS 29.05.100(b), then the case could have been resolved prior to the incorporation election.

Id. at page 1064. More generally, the Alaska Supreme Court has favored resolving legal issues prior to elections. In Ulmer v. Alaska Restaurant and Beverage Association, 33 P. 3d 773 (Alaska 2001), an appeal challenging the constitutionality of an initiative petition, the court noted that

[A]lthough such appeals typically must be decided by election day to

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facto corporations” in that section is embodied in a chapter (AS 10.06) which is exclusively addressed to private corporations, and is contained in a section (.218) which only addresses the effect of issuance of a certificate of incorporation upon a private corporation. Neither of these have any application to municipal corporations, which are entities entirely separate and distinct from private corporations, lacking shareholder ownership, boards of directors or other features of private corporations, and whose formation and existence are instead addressed under Title 29, Chapter 5 of the Alaska Statutes.

avoid becoming moot, there is no reason to believe that we cannot resolve such appeals in a timely fashion. Indeed we have frequently done that.

Id. at page 778. The court noted that it had on occasion ordered that an election be stayed pending final appeal (Id. at page 778, fn. 21, citing Faipeas v. Municipality of Anchorage, 860 P.2d 1214 (Alaska 1993)), and at fn. 22 it cited two other cases in which appeals were resolved in a timely fashion, prior to an election (McAlpine v. University of Alaska, 762 P. 2d 81 (Alaska 1988), expedited appeal before November election; and Burgess v. Miller, 654 P. 2d 273, 277 at asterisk (\*) (Alaska 1982), wherein the decision was announced in advance of November election).

Application of the de facto municipal corporation doctrine to this appeal would therefore not work any injustice on CBJ, which could have sought either expedited review or a stay pending appeal, but was instead content to allow the borough election to occur, along with the resulting dissolution of the City of Petersburg, and the incorporation and exercise of municipal powers by the Petersburg Borough. CBJ has not and cannot meet the heightened standard for reversal of the LBC decision which results from application of the de facto incorporation doctrine.

### **Conclusion**

In a process spanning over a year, encompassing numerous public notices, public meetings and public hearings, as well as two staff reports and public comments and responsive briefs to those reports, the LBC and its staff extensively and thoroughly reviewed and analyzed a petition for a Petersburg Borough, that had itself been four years in the making, and the written comments and reply briefs filed in

conjunction with that petition. Those who participated in the process, including CBJ, had full and complete opportunity to present evidence regarding the proposed borough and its boundaries, including written documentation, public testimony, and the presentation of witnesses and exhibits. At the conclusion of this laborious and expensive process, the LBC approved the Petersburg Borough, but amended its northern boundary, in response to CBJ's requests and evidence, to exclude Tracy Arm. Far from "shirking" its responsibilities, as alleged by CBJ, the LBC carefully followed and applied the applicable constitutional, statutory and regulatory mandates.

A review of the record demonstrates that there is more than substantial evidence to support the LBC's decision. The documentation and testimony submitted showed Petersburg's strong connections with the portion of the disputed area included within the Petersburg Borough, especially related to fisheries. CBJ's ties were strongest with Tracy Arm and tourism related activities occurring there, and that area was excluded from the Borough for potential annexation by the CBJ. It is beyond serious dispute that the LBC considered CBJ's evidence in reaching its decision.

Lastly, CBJ failed to obtain a stay or seek an expedited ruling in this matter, and the Petersburg Borough has been in existence since January, conducting borough business in accordance with its charter and ordinances. Disincorporation of the borough would create substantial and significant disruption and confusion. All factors of the de facto incorporation doctrine are met here, and application of that doctrine further supports upholding the LBC's decision.