

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

CITY AND BOROUGH OF JUNEAU, )

Appellant, )

v. )

STATE OF ALASKA, )

LOCAL BOUNDARY COMMISSION, )

AND PETITIONERS FOR THE )

INCORPORATION OF THE )

PETERSBURG, )

Appellees. )

Case No.: 1JU-12-00900 CI

APPEAL FROM THE DECISION OF THE LOCAL BOUNDARY COMMISSION OF  
THE STATE OF ALASKA DATED AUGUST 22, 2012, TO THE SUPERIOR COURT,  
FIRST JUDICIAL DISTRICT AT JUNEAU  
HON. LOUIS J. MENENDEZ, SUPERIOR COURT JUDGE

**APPELLEE'S BRIEF**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
AUTHORITIES PRINCIPALLY RELIED UPON .....	v
STANDARD OF REVIEW .....	1
I.    The Applicable Standard of Review of a Decision of The Local Boundary Commission is The Reasonable Basis Test.....	1
A.    Review of Decision Involving Agency Expertise / Fundamental Policy Formulation is Reasonable Basis.....	1
B.    Review of LBC’s Regulations and The Interpretation of Its Own Regulations is Reasonable Bases .....	3
C.    Substitution of Judgment Does Not Apply to Issues Raised .....	5
JURISDICTIONAL STATEMENT.....	5
ISSUES.....	6
STATEMENT OF FACTS.....	6
ARGUMENT .....	12
I.    Introduction .....	12
II.   The LBC Is A State-Wide Commission Comprised of Experienced Commissioners Who Review the Evidence and Make Difficult Decisions In The Best Interest of The State.....	13
III.  The Underlying Premise of CBJ’s Issue Statement is Invalid, Rendering the Argument Invalid.....	15
IV.   Findings of Fact Are Not Required of The LBC .....	21
V.    The LBC Is Not Bound By Its 1997 Model Borough Study .....	21
VI.   The LBC’s Actions Complied With The <i>Yakutat</i> Case .....	25
VII.  The Record Supports the LBC’s Approval of the Petersburg Borough Incorporation Petition and the Boundaries It Set.....	26
A.    No Taxation Without Representation .....	33
CONCLUSION .....	35

## TABLE OF AUTHORITIES

### ALASKA CASES

<i>City of Douglas v. Borough of Juneau</i> , 484 P.2d 1040 (Alaska 1971) .....	15
<i>City of Valdez v. State, Dept. of Community &amp; Regional Affairs</i> 793 P.2d 532 (Alaska 1990).....	5
<i>Earth Resources v. State, Dept. of Revenue</i> , 665 P.2d 960 (Alaska 1983).....	5
<i>Fairview Public Utility Dist. No. 1 v. City of Anchorage</i> , 368 P.2d 540 (Alaska 1962).....	15
<i>Green v. Kake Tribal Corp.</i> , 816 P.2d 1363, 1366 (Alaska 1991).....	16
<i>Hammond v. North Slope Borough</i> , 645 P.2d 750 (Alaska 1982).....	2
<i>Hodges v. Alaska Constructors, Inc.</i> , 957 P.2d 957 (Alaska 1998).....	4
<i>Jager v. State</i> , 537 P.2d 1100 (Alaska 1975).....	2
<i>Keane v. Local Boundary Commission</i> , 893 P.2d 1239 (Alaska 1995).....	1, 2, 5, 21
<i>Kelly v. Zamarello</i> , 486 P.2d 906 (Alaska 1971).....	4
<i>Lake and Peninsula Borough v. Local Boundary Commission</i> , 885 P.2d 1059 (Alaska 1994).....	1, 4
<i>Matanuska-Susitna Borough v. Hammond</i> , 726 P.2d 166 (Alaska 1986).....	1
<i>Mobil Oil Corp. v. Local Boundary Commission</i> , 518 P.2d 92 (Alaska 1974).....	1, 2, 21
<i>Oesau v. City of Dillingham</i> , 439 P.2d 180 (Alaska 1968).....	2, 15
<i>Petitioners for Incorporation of City and Borough of Yakutat v. LBC</i> , 900 P.2d 721 (Alaska 1995).....	16, 25, 26
<i>Port Valdez Co., v. City of Valdez</i> , 522 P.2d 1147 (Alaska 1974).....	2

<i>Rose v. Commercial Fisheries Entry Comm’n</i> , 647 P.2d 154 (Alaska 1982).....	1
<i>Simpson v. State, Commercial Fisheries Entry Comm’n</i> , 101 P.3d 605, 614 (Alaska 2004).....	16
<i>State v. Weidner</i> , 684 P.2d 103 (Alaska 1984).....	3
<i>Stevens v. State</i> , 135 P.3d 688, 692-93 (Alaska App., 2006).....	16
<i>Stosh’s I/M v. Fairbanks North Star Borough</i> , 12 P.3d 1180 (Alaska 2000).....	1, 4
<i>Tesoro Alaska Petroleum Co., v. Kenai Pipe Line Co.</i> , 746 P.2d 896 (Alaska 1987).....	2, 5
<i>United States Smelting, Ref. &amp; Mining Co. v. LBC</i> , 489 P.2d 140 (Alaska 1971).....	3

## ALASKA STATUTES

AS 22.10.020(d).....	5
AS 29.05.110.....	12
AS 29.05.031.....	3, 25, 26, 27
AS 29.05.060(7).....	5
AS 29.06.040.....	3
AS 39.05.055.....	13
AS 39.05.060.....	13
AS 44.33.812.....	3
AS 44.62.180 - AS 44.62.290 .....	<i>passim</i>

## ALASKA ADMINISTRATIVE CODE

3 AAC 110.045 - .067.....	24, 25
3 AAC 110.060 .....	27, 29
3 AAC 110.400 - .700 .....	3
3 AAC 110.430 .....	7, 9, 17
3 AAC 110.570 .....	11

3 AAC 110.600 .....	12
3 AAC 110.660 .....	8
3 AAC 110.900 - .990 .....	3, 28
19 AAC 010.060(b).....	22
19 AAC 010.190(c).....	22

**MISCELLANEOUS**

Alaska Constitution Art. X, Sect. 12.....	<i>passim</i>
Alaska Appellate Rule 601.....	5

## **AUTHORITIES PRINCIPALLY RELIED UPON**

### **ALASKA STATUTES:**

#### **AS 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.

(b) An area may not incorporate as a third class borough.

#### **AS 44.62.180. Effective date.**

A regulation or an order of repeal filed by the lieutenant governor becomes effective on the 30th day after the date of filing unless

(1) otherwise specifically provided by the statute under which the regulation or order of repeal is adopted, in which event it becomes effective on the day prescribed by the statute;

(2) it is a regulation prescribing the organization or procedure of an agency, in which event it becomes effective upon filing by the lieutenant governor or upon a later date specified by the state agency in a written instrument submitted with, or as part of, the regulation or order of repeal;

(3) it is an emergency regulation or order of repeal adopted under AS 44.62.250, in which case the finding and the statement of the facts constituting the emergency shall be submitted to the lieutenant governor, together with the emergency regulation or order of repeal, which, in that event only, becomes effective upon filing by the lieutenant governor or upon a later date specified by the state agency in a written instrument submitted with, or as part of, the regulation or order of repeal;

(4) a later date is prescribed by the state agency in a written instrument submitted with, or as part of, the regulation or order of repeal.

**AS. 44.62.190. Notice of proposed action.**

(a) At least 30 days before the adoption, amendment, or repeal of a regulation, notice of the proposed action shall be

(1) published in the newspaper of general circulation or trade or industry publication that the state agency prescribes and posted on the Alaska Online Public Notice System; in the discretion of the state agency giving the notice, the requirement of publication in a newspaper or trade or industry publication may be satisfied by using a combination of publication and broadcasting; when broadcasting the notice, an agency may use an abbreviated form of the notice if the broadcast provides the name and date of the newspaper or trade or industry journal and the Internet address of the Alaska Online Public Notice System where the full text of the notice can be found;

(2) furnished to every person who has filed a request for notice of proposed action with the state agency;

(3) if the agency is within a department, furnished to the commissioner of the department;

(4) when appropriate in the judgment of the agency,

(A) furnished to a person or group of persons whom the agency believes is interested in the proposed action; and

(B) published in the additional form and manner the state agency prescribes;

(5) furnished to the Department of Law together with a copy of the proposed regulation, amendment, or order of repeal for the department's use in preparing the opinion required after adoption and before filing by AS 44.62.060 ;

(6) furnished by electronic format to all incumbent State of Alaska legislators, and furnished to the Legislative Affairs Agency;

(7) furnished by electronic format, along with a copy of the proposed regulation, amendment, or order of repeal, as required by AS 24.20.105(c).

(b) If the form or manner of notice is prescribed by statute, in addition to the requirements of filing and furnishing notice under AS 44.62.010 - 44.62.300, or in addition to the requirements of filing and mailing notice under other sections of this chapter, the notice shall be published, posted, mailed, filed, or otherwise publicized as prescribed by the statute.

(c) The failure to furnish notice to a person as provided in this section does not invalidate an action taken by an agency under AS 44.62.180 - 44.62.290.

(d) Along with a notice furnished under (a)(2), (4)(A), or (6) of this section, the state agency shall include the reason for the proposed action, the initial cost to the state agency of implementation, the estimated annual costs to the state agency of implementation, the name of the contact person for the state agency, and the origin of the proposed action.

(e) Notwithstanding (a) of this section, if a person who is to receive a notice under (a) of this section requests that the state agency mail the notice, the state agency shall furnish the notice to the person by mail.

**AS 44.62.195. Fiscal notes on regulations.**

If the adoption, amendment, or repeal of a regulation would require increased appropriations by the state, the department or agency affected shall prepare an estimate of the appropriation increase for the fiscal year following adoption, amendment, or repeal of the regulation and for at least two succeeding fiscal years.

**AS 44.62.200. Contents of notice.**

(a) The notice of proposed adoption, amendment, or repeal of a regulation must include

(1) a statement of the time, place, and nature of proceedings for adoption, amendment, or repeal of the regulation;

(2) reference to the authority under which the regulation is proposed and a reference to the particular code section or other provisions of law that are being implemented, interpreted, or made specific;

(3) an informative summary of the proposed subject of agency action;

(4) other matters prescribed by a statute applicable to the specific agency or to the specific regulation or class of regulations;

(5) a summary of the fiscal information required to be prepared under AS 44.62.195 .

(b) A regulation that is adopted, amended, or repealed may vary in content from the summary specified in (a)(3) of this section if the subject matter of the regulation remains the same and the original notice was written so as to assure that members of the public are reasonably notified of the proposed subject of agency action in order for them to determine whether their interests could be affected by agency action on that subject.

(c) An agency that issues a notice under this section shall assure that the notice is prepared in a form adequate for posting on the Alaska Online Public Notice System.

(d) When a state agency, other than the Regulatory Commission of Alaska, the Board of Fisheries, or the Board of Game, posts, furnishes, or otherwise provides a notice of the proposed adoption, amendment, or repeal of a regulation under AS 44.62.190 , a brief description of the changes made by the proposed adoption, amendment, or repeal must accompany the notice. However, if, under AS 44.62.190 (a), the notice is published in a newspaper or trade or industry publication or is broadcast, this subsection does not require that the brief description otherwise required by this subsection accompany the publication or the broadcast. To the extent practicable, the brief description shall be written in clear, easily readable language that a person without a legal background is able to understand. Notwithstanding AS 44.62.300 , an action may not be brought for failure



of the brief description to comply with the requirements of this subsection relating to the description of the changes or its clarity and readability.

**AS 44.62.210. Public proceedings.**

(a) On the date and at the time and place designated in the notice the agency shall give each interested person or the person's authorized representative, or both, the opportunity to present statements, arguments, or contentions in writing, with or without opportunity to present them orally. The state agency may accept material presented by any form of communication authorized by this chapter and shall consider all factual, substantive, and other relevant matter presented to it before adopting, amending, or repealing a regulation. When considering the factual, substantive, and other relevant matter, the agency shall pay special attention to the cost to private persons of the proposed regulatory action.

(b) At a hearing under this section the agency or its authorized representative may administer oaths or affirmations, and may continue or postpone the hearing to the time and place which it determines.

**AS 44.62.215. Record of public comment.**

In the drafting, review, or other preparation of a proposed regulation, amendment, or order of repeal, an agency, other than a board or commission, the office of victims' rights, and the office of the ombudsman, shall keep a record of its use or rejection of factual or other substantive information that is submitted in writing as public comment and that is relevant to the accuracy, coverage, or other aspect of the proposed regulatory action. Sec. 44.62.218. Regulations affecting small businesses. [Repealed, Sec. 2 ch 91 SLA 2005].

**AS 44.62.220. Right to petition.**

Unless the right to petition for adoption of a regulation is restricted by statute to a designated group or the procedure for the petition is prescribed by statute, an interested person may petition an agency for the adoption or repeal of a regulation as provided in AS 44.62.180 - 44.62.290. The petition must state clearly and concisely

- (1) the substance or nature of the regulation, amendment, or repeal requested;
- (2) the reasons for the request;
- (3) reference to the authority of the agency to take the action requested.

**AS 44.62.230. Procedure on petition.**

Upon receipt of a petition requesting the adoption, amendment, or repeal of a regulation under AS 44.62.180 - 44.62.290, a state agency shall, within 30 days, deny the petition in

writing or schedule the matter for public hearing under AS 44.62.190 - 44.62.215. However, if the petition is for an emergency regulation, and the agency finds that an emergency exists, the requirements of AS 44.62.040 (c) and 44.62.190 - 44.62.215 do not apply, and the agency may submit the regulation to the lieutenant governor immediately after making the finding of emergency and putting the regulation into proper form.

**AS 44.62.240. Limitation on retroactive action.**

If a regulation adopted by an agency under this chapter is primarily legislative, the regulation has prospective effect only. A regulation adopted under this chapter that is primarily an "interpretative regulation" has retroactive effect only if the agency adopting it has adopted no earlier inconsistent regulation and has followed no earlier course of conduct inconsistent with the regulation. Silence or failure to follow any course of conduct is considered earlier inconsistent conduct.

**AS 44.62.245. Material incorporated by reference.**

(a) In adopting a regulation that incorporates a document or other material by reference, a state agency may incorporate future amended versions of the document or other material if the adopted regulation identifies or refers to the document or other material followed by the phrase "as may be amended," the phrase "as amended from time to time," or a similar provision and the

- (1) document consists of a regulation of another agency of the state; or
- (2) incorporation of a future amended version of the document or other material is explicitly authorized by a statute.

(b) When the amended version of a document or other material incorporated by reference in a regulation as described in (a) of this section becomes available, the state agency shall

- (1) make the amended version of the document or other material available to the public for review; and
- (2) post on the Alaska Online Public Notice System and publish in a newspaper of general circulation or trade or industry publication or in a regularly published agency newsletter or similar printed publication, not later than 15 days after the amended version of the document or other material becomes available, a notice that describes the affected regulation, the effective date of the amended version of the document or other material, and how a copy of the amended version may be obtained or reviewed.

(c) The state agency shall also send the notice described in (b)(2) of this section to

- (1) a person who has placed the person's name on a distribution list kept by the agency that lists persons who want to receive the notice; the agency may allow a person to request that distribution of the notice be by electronic means and shall honor that request if appropriate means are available; and

- (2) the regulations attorney in the Department of Law.

(d) A change in the form, format, or title in a future amended or revised version of a document or material incorporated by reference in a regulation under this section does not affect the validity of the regulation or the state agency's ability to enforce or implement the regulation. The state agency shall notify the regulations attorney in the Department of Law if the title of the document or other material changes. The regulations attorney shall correct the title in the Alaska Administrative Code under AS 44.62.125 .

#### **AS 44.62.250. Emergency regulations.**

A regulation or order of repeal may be adopted as an emergency regulation or order of repeal if a state agency makes a written finding, including a statement of the facts that constitute the emergency, that the adoption of the regulation or order of repeal is necessary for the immediate preservation of the public peace, health, safety, or general welfare. The requirements of AS 44.62.040 (c), 44.62.060, and 44.62.190 - 44.62.215 do not apply to the initial adoption of emergency regulations; however, upon adoption of an emergency regulation the adopting agency shall immediately submit a copy of it to the lieutenant governor for filing and for publication in the Alaska Administrative Register, and within five days after filing by the lieutenant governor the agency shall give notice of the adoption in accordance with AS 44.62.190 (a). Failure to give the required notice by the end of the 10th day automatically repeals the regulation.

#### **AS 44.62.260. Limitation on effective period of emergency regulations.**

(a) A regulation adopted as an emergency regulation does not remain in effect more than 120 days unless the adopting agency complies with AS 44.62.040 (c), 44.62.060, and 44.62.190 - 44.62.215 either before submitting the regulation to the lieutenant governor or during the 120-day period.

(b) Before the expiration of the 120-day period, the agency shall transmit to the lieutenant governor for filing a certification that AS 44.62.040 (c), 44.62.060, and 44.62.190 - 44.62.215 were complied with before submitting the regulation to the lieutenant governor, or that the agency complied with those sections within the 120-day period. Failure to so certify repeals the emergency regulation; it may not be renewed or refiled as an emergency regulation.

#### **AS 44.62.270. State policy.**

It is the state policy that emergencies are held to a minimum and are rarely found to exist.

#### **AS 44.62.280. Purpose of AS 44.62.180 - 44.62.290.**

It is the purpose of AS 44.62.180 - 44.62.290 to establish basic minimum procedural requirements for the adoption, amendment, or repeal of administrative regulations.

Except as provided in AS 44.62.250 , AS 44.62.180 - 44.62.290 apply to the exercise of quasi-legislative power conferred by a statute, but nothing in AS 44.62.180 - 44.62.290 repeals or diminishes additional requirements imposed by the statute. AS 44.62.180 - 44.62.290 are not superseded or modified by subsequent legislation except to the extent that the legislation does so expressly.

**AS 44.62.290. Limits of the application of AS 44.62.180 - 44.62.290.**

(a) AS 44.62.180 - 44.62.290 do not apply to a regulation not required to be submitted to the lieutenant governor under AS 44.62.010 - 44.62.320.

(b) Only this section and AS 44.62.180 apply to a regulation that prescribes the organization or procedure of an agency.

**ALASKA ADMINISTRATIVE CODE:**

**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 1/9/2008;
- (4) existing and reasonably anticipated transportation patterns and facilities;
- (5) natural geographical features and environmental factors;
- (6) repealed 1/9/2008; and
- (7) existing and reasonably anticipated industrial, commercial, and resource development within the proposed borough.

(b) When reviewing the boundaries proposed in a petition for borough incorporation, the commission may consider

- (1) model borough boundaries for the area within the proposed borough;
- (2) regional boundaries, including
  - (A) boundaries of one or more regional educational attendance areas existing in that proposed borough area;
  - (B) federal census area boundaries;
  - (C) boundaries established for regional Native corporations under 43 U.S.C. 1601 - 1629h (Alaska Native Claims Settlement Act); and
  - (D) boundaries of national forests;

- (3) whether the proposed borough will embrace an area and population with common interests to the maximum degree possible;
- (4) whether the proposed borough promotes maximum local self-government, as determined under 3 AAC 110.981;
- (5) whether the proposed borough promotes a minimum number of local government units, as determined under 3 AAC 110.982 and in accordance with art. X, sec. 1, Constitution of the State of Alaska; and
- (6) whether the proposed borough boundaries are the optimum boundaries for that region in accordance with art. X, sec. 3, Constitution of the State of Alaska.

(c) Repealed 1/9/2008.

(d) Absent a specific and persuasive showing to the contrary, the commission will presume that an area proposed for incorporation that is noncontiguous or that contains enclaves does not include all land and water necessary to allow for the full development of essential municipal services on an efficient, cost-effective level.

(e) If a petition for incorporation of a proposed borough describes boundaries overlapping the boundaries of an existing organized borough, the petition for incorporation must also address and comply with all standards and procedures for detachment of the overlapping boundaries from the existing organized borough. The commission will consider that petition for incorporation as also being a detachment petition.

(f) The boundaries of a borough may not include only a portion of the territory of an existing city government.

(g) Requirements relating to limitation of community, as set out in 3 AAC 110.040(b), do not apply to boroughs.

### **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 those 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 110.900. Transition.**

(a) A petition for incorporation, annexation, merger, or consolidation must include a practical plan that demonstrates the capacity of the municipal government to extend essential municipal services into the boundaries proposed for change in the shortest practicable time after the effective date of the proposed change. A petition for municipal detachment or dissolution under AS 29.06, or a city reclassification under AS 29.04, must

include a practical plan demonstrating the transition or termination of municipal services in the shortest practicable time after detachment, dissolution, or city reclassification.

(b) Each petition must include a practical plan for the assumption of all relevant and appropriate powers, duties, rights, and functions presently exercised by an existing borough, city, unorganized borough service area, or other appropriate entity located within the boundaries proposed for change. The plan must be prepared in consultation with the officials of each existing borough, city, and unorganized borough service area and must be designed to effect an orderly, efficient, and economical transfer within the shortest practicable time, not to exceed two years after the effective date of the proposed change.

(c) Each petition must include a practical plan for the transfer and integration of all relevant and appropriate assets and liabilities of an existing borough, city, unorganized borough service area, and other entity located within the boundaries proposed for change. The plan must be prepared in consultation with the officials of each existing borough, city, and unorganized borough service area wholly or partially included within the boundaries proposed for change and must be designed to effect an orderly, efficient, and economical transfer within the shortest practicable time, not to exceed two years after the date of the proposed change. The plan must specifically address procedures that ensure that the transfer and integration occur without loss of value in assets, loss of credit reputation, or a reduced bond rating for liabilities.

(d) Before approving a proposed change, the commission may require that all boroughs, cities, unorganized borough service areas, or other entities wholly or partially included within the boundaries of the proposed change execute an agreement prescribed or approved by the commission for the assumption of powers, duties, rights, and functions, and for the transfer and integration of assets and liabilities.

(e) The transition plan must state the names and titles of all officials of each existing borough, city, and unorganized borough service area that were consulted by the petitioner. The dates on which that consultation occurred and the subject addressed during that consultation must also be listed.

(f) If a prospective petitioner has been unable to consult with officials of an existing borough, city, or unorganized borough service area because those officials have chosen not to consult or were unavailable during reasonable times to consult with a prospective petitioner, the prospective petitioner may request that the commission waive the requirement for consultation with those officials. The request for a waiver must document all attempts by the prospective petitioner to consult with officials of each existing borough, city, and unorganized borough service area. If the commission determines that the prospective petitioner acted in good faith and that further efforts to consult with the officials would not be productive in a reasonable period of time, the commission may waive the requirement for consultation.

### **3 AAC 110.910. Statement of nondiscrimination.**

A petition will not be approved by the commission if the effect of the proposed change denies any person the enjoyment of any civil or political right, including voting rights, because of race, color, creed, sex, or national origin.

### **3 AAC 110.920. Determination of community.**

(a) In determining whether a settlement comprises a community, the commission may consider relevant factors, including whether the

(1) settlement is inhabited by at least 25 permanent residents;

(2) the permanent residents live in a geographical proximity that allows frequent personal contacts and interaction; and

(3) the permanent residents at a location are a discrete and identifiable social unit, as indicated by such factors as resident public school enrollment, number of sources of employment, voter registration, precinct boundaries, permanency of dwelling units, and the number of commercial or industrial establishments, community services, and service centers.

(b) Absent a specific and persuasive showing to the contrary, the commission will presume that a population does not constitute a community if

(1) public access to or the right to reside at the location of the population is restricted; or

(2) repealed 1/9/2008;

(3) the location of the population is provided by an employer and is occupied as a condition of employment primarily by persons who do not consider the place to be their permanent residence.

(c) A city that absorbs one or more municipalities through merger comprises a single community. A city that is formed through the consolidation of one or more municipalities comprises a single community.

### **3 AAC 110.970. Determination of essential municipal services**

(a) If a provision of this chapter calls for the identification of essential municipal services for a borough, the commission will determine those services to consist of those mandatory and discretionary powers and facilities that

(1) are reasonably necessary to the area; and

(2) promote maximum local self-government.

(b) The commission may determine essential municipal services for a borough to include

(1) assessing the value of taxable property if the proposed or existing borough proposes to levy or levies a property tax;

(2) levying and collecting taxes if the proposed or existing borough proposes to levy or levies taxes;

(3) establishing, maintaining, and operating a system of public schools on an areawide basis as provided in AS 14.14.065 ;

(4) planning, platting, and land use regulation; and

(5) other services that the commission considers reasonably necessary to meet the borough governmental needs of the residents of the area.

(c) If a provision of this chapter calls for the identification of essential municipal services for a city, the commission will determine those services to consist of those mandatory and discretionary powers and facilities that

(1) are reasonably necessary to the community;

(2) promote maximum, local self-government; and

(3) cannot be provided more efficiently and more effectively by the creation or modification of some other political subdivision of the state.

(d) The commission may determine essential municipal services for a city to include

(1) levying taxes;

(2) for a city in the unorganized borough, assessing the value of taxable property;

(3) levying and collecting taxes;

(4) for a first class or home rule city in the unorganized borough, establishing, maintaining, and operating a system of public schools within the city as provided in AS 14.14.065 ;

(5) public safety protection;

(6) planning, platting, and land use regulation; and

(7) other services that the commission considers reasonably necessary to meet the local governmental needs of the residents of the community.

### **3 AAC 110.980. Determination of best interests of the state.**

Repealed.

### **3 AAC 110.981. Determination of maximum local self-government.**

In determining whether a proposed boundary change promotes maximum local self-government under art. X, sec. 1, Constitution of the State of Alaska, the commission will consider

(1) for borough incorporation, whether the proposal would extend local government on a regional scale to a significant area and population of the unorganized borough;

(2) for borough annexation, whether the proposal would extend local government to portions of the unorganized borough;



(3) for merger or consolidation of municipalities, whether the proposal would expand or diminish the level of local government currently provided by the municipalities being merged or consolidated;

(4) for borough detachment, whether the

(A) proposal would

(i) diminish the provision of local government to the area and population being detached; or

(ii) detrimentally affect the capacity of the remnant borough to serve the local government needs of its residents; and

(B) local government needs of the detached area can be adequately met by an existing local government;

(5) for borough dissolution, whether the proposal substantiates that the provision of local government is no longer necessary or supportable for the area;

(6) for deunification, whether the proposal substantiates that the provision of local government is not diminished by deunification or that deunification could lead to better local government by incorporation of other local governments better suited to needs of the area and population;

(7) for city incorporation or annexation in the unorganized borough, whether the proposal would extend local government to territory and population of the unorganized borough where no local government currently exists;

(8) for city incorporation or annexation in an organized borough, whether the proposal would extend local government to territory or population of the organized borough where local government needs cannot be met by the borough on an areawide or nonareawide basis, by annexation to an existing city, or through an existing borough service area;

(9) for city detachment in an organized borough, whether the

(A) proposal would

(i) diminish the provision of local government to the territory and population being detached; or

(ii) detrimentally affect the capacity of the remnant city to serve the local government needs of its residents; and

(B) local government needs of the territory and population to be detached can be adequately met by the borough;

(10) for city detachment in the unorganized borough, whether the

(A) proposal would

(i) diminish the provision of local government to the territory and population being detached; or

(ii) detrimentally affect the capacity of the remnant city to provide local government services; and

(B) local government needs of the detached territory and population can be adequately met by another existing local government;

(11) for city dissolution in an organized borough, whether the proposal substantiates that the

(A) provision of local government is no longer necessary or supportable for the territory; or

(B) local government needs of the territory could be better provided by the borough;

(12) for city dissolution in the unorganized borough, whether the proposal substantiates that the

(A) provision of local government is no longer necessary or supportable for the territory; or

(B) local government needs of the territory could be better provided by a governmental organization other than the city;

(13) for city reclassification, whether the proposal would expand or diminish the provision of local government to the territory being reclassified;

(14) whether the petition proposes incorporation of a home rule municipality.

### **3 AAC 110.982. Minimum number of local government units.**

Among the factors to be considered in determining whether a proposed boundary change promotes a minimum number of local government units in accordance with art. X, sec. 1, Constitution of the State of Alaska, the commission will consider

(1) for borough incorporation, whether a new borough will be created from the unorganized borough and whether the proposed boundaries maximize an area and population with common interests;

(2) for borough annexation, whether the jurisdictional boundaries of an existing borough are being enlarged rather than promoting the incorporation of a new borough and whether the proposed boundaries maximize an area and population with common interests;

(3) for borough merger or consolidation, whether the merged or consolidated borough minimizes the number of local government units and whether the boundaries of the merged or consolidated borough maximize an area and population with common interests;

(4) for borough detachment, whether the detached area by itself is likely to be incorporated as an organized borough;

(5) for deunification of a unified municipality, whether

(A) incorporation of one or more new cities is likely to occur as a result of the proposed action, and, if so, the reasons why a new incorporation is or will be needed; or

(B) the action is proposed as an alternative to detachment of area and incorporation of one or more new boroughs;

(6) for city incorporation, whether incorporation of a new city is the only means by which residents of the territory can receive essential municipal services;

(7) for city annexation, whether the jurisdictional boundaries of an existing city are being enlarged rather than promoting the incorporation of a new city or creation of a new borough service area;

(8) for city merger or consolidation, whether the merged or consolidated city minimizes the number of local government units;

(9) for city detachment, whether the detached area, by itself, is likely to be incorporated as a new city.

### **3 AAC 110.990. Definitions.**

Unless the context indicates otherwise, in this chapter

(1) "borough" means a general law borough, a home rule borough, or a unified municipality;

(2) repealed 1/9/2008;

(3) "commission" means the Local Boundary Commission;

(4) "commissioner" means the commissioner of commerce, community, and economic development;

(5) a "community" means a social unit comprised of 25 or more permanent residents as determined under 3 AAC 110.920;

(6) "contiguous" means, with respect to area, territory, or property, adjacent, adjoining, and touching; contiguous area, territory, or property includes area, territory, or property separated by public rights-of-way;

(7) "department" means the Department of Commerce, Community, and Economic Development;

(8) "mandatory power" means an authorized act, duty, or obligation required by law to be performed or fulfilled by a municipality in the course of its fiduciary obligations to citizens and taxpayers; "mandatory power" includes one or more of the following:

(A) assessing the value of taxable property, and levying and collecting taxes;

(B) providing education, public safety, public health, and sanitation services;

(C) planning, platting and land use regulation;

(D) conducting elections; and

(E) other acts, duties, or obligations required by law to meet the local governmental needs within the boundaries proposed for change;

(9) "model borough boundaries" means those boundaries set out in the commission's publications

(A) Model Borough Boundaries, revised as of June 1997 and adopted by reference; and

(B) Unorganized Areas of Alaska That Meet Borough Incorporation Standards: A Report by the Alaska Local Boundary Commission to the Alaska Legislature Pursuant to Chapter 53, Session Laws of Alaska 2002, dated February 2003 and adopted by reference;

(10) "permanent resident" means a person who has maintained a principal domicile within the boundaries proposed for change under this chapter for at least 30 days immediately preceding the date of acceptance of a petition by the department and who

shows no intent to remove that principal domicile at any time during the pendency of a petition before the commission;

(11) "political subdivision" means a borough or city organized and operated under state law;

(12) "property owner" means a legal person holding a vested fee simple interest in the surface estate of any real property including submerged lands;

(13) "regional educational attendance area" means an educational service area established in the unorganized borough under AS 14.08.031 by the department; "regional educational attendance area" includes the territory within the boundaries of a

(A) home rule city in that area;

(B) first class city in that area; or

(C) federal transfer regional educational attendance area formed under ch. 66, SLA 1985 in that area;

(14) "witnesses with expertise in matters relevant to the proposed change" means individuals who are

(A) specialists in relevant subjects, including municipal finance, municipal law, public safety, public works, public utilities, and municipal planning; or

(B) long-standing members of the community or region that are directly familiar with social, cultural, economic, geographic, and other characteristics of the community or region;

(15) "area" means the geographical lands and submerged lands forming the boundaries described in a petition regarding a borough government or forming the boundaries of an incorporated borough;

(16) "boundary change" means the type of action the commission takes to create, alter, or abolish a municipal government; "boundary change" includes

(A) annexation, consolidation, detachment, dissolution, incorporation, and merger of boroughs or cities; and

(B) reclassification of cities if jurisdictional boundaries for public school districts are affected;

(17) "city" has the meaning given in AS 29.71.800 ;

(18) "consolidation" has the meaning given in AS 29.71.800 ;

(19) "debt" means an obligation or alleged obligation of a municipality to pay money; "debt" includes funded debt and floating debt;

(20) "deunification" and "deunify" mean to change a unified municipality into a non-unified home rule borough;

(21) "floating debt" means a municipal obligation that is payable on demand;

(22) "funded debt" means a municipal obligation

(A) evidenced by bonds payable at a time beyond the current fiscal year of their issue, with periodic payment of interest; and

(B) for which provision is made for payment by future taxation;

(23) "merger" has the meaning given in AS 29.71.800 ;

(24) "numerical identifier" has the meaning given in AS 15.80.010 ;

(25) "non-unified home rule borough" means a home rule borough in which a city government does or could exist;

(26) "person" has the meaning given in AS 01.10.060 ;

(27) "public right-of-way" means a public easement or public property that is or may be used for a street, an alley, or another public purpose;

(28) "region"

(A) means a relatively large area of geographical lands and submerged lands that may include multiple communities, all or most of which share similar attributes with respect to population, natural geography, social, cultural, and economic activities, communications, transportation, and other factors;

(B) includes a regional educational attendance area, a state house election district, an organized borough, and a model borough described in a publication adopted by reference in (9) of this section;

(29) "regional" means having the characteristics of a region;

(30) "remnant city" means the portion of a city that will remain if a petition to detach territory from that city is approved under AS 29.06.040 ;

(31) "remnant borough" means the portion of a borough that will remain if a petition to detach area from that borough is approved under AS 29.06.040 ;

(32) "territory" means the geographical lands and submerged lands forming the boundaries in a petition regarding a city government or forming the boundaries of an incorporated city;

(33) "unified municipality" has the meaning given in AS 29.71.800 ;

(34) "unorganized borough" has the meaning given in AS 29.03.010 .

## STANDARD OF REVIEW

### **I. The Applicable Standard of Review of a Decision of The Local Boundary Commission is The Reasonable Basis Test**

#### **A. Review of Decision Involving Agency Expertise/Fundamental Policy Formulation is Reasonable Basis**

It is well-settled that the appropriate standard of review exercised by a court considering an appeal of a decision by the Local Boundary Commission (“LBC”) pertaining to a boundary change petition is the reasonable basis test. *See Keane v. Local Boundary Commission*, 893 P.2d 1239, 1241 (Alaska 1995) (when an administrative decision involves expertise regarding either complex subject matter or fundamental policy formulation, the court defers to the decision if it has a reasonable basis); *Lake and Peninsula Borough v. Local Boundary Commission*, 885 P.2d 1059, 1062 (Alaska 1994); *Mobil Oil Corp. v. Local Boundary Commission*, 518 P.2d 92, 97-98 (Alaska 1974) (where agency action involves formulation of a fundamental policy the appropriate standard on review is whether the agency action has a reasonable basis; LBC exercises delegated legislative authority to reach basic policy decisions; acceptance of the incorporation petition should be affirmed if court perceives in the record a reasonable basis of support for the LBC's reading of the standards and its evaluation of the evidence); *Rose v. Commercial Fisheries Entry Comm'n*, 647 P.2d 154, 161 (Alaska 1982) (review of agency's exercise of its discretionary authority is made under the reasonable basis standard) *cited in Stosh's I/M v. Fairbanks North Star Borough*, 12 P.3d 1180, 1183 nn.7-8 (Alaska 2000); *see also Matanuska-Susitna Borough v. Hammond*, 726 P.2d 166, 175-76 (Alaska 1986).

Therefore, in this case, the reasonable basis standard requires the reviewing court to affirm the decision of the LBC approving the petition for incorporating the Petersburg Borough if it finds in the record a reasonable basis of support for the LBC's decision.

*Hammond v. North Slope Borough*, 645 P.2d 750, 758 (Alaska 1982).

In *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987) the Court stated:

It [the reasonable basis test] is applied in two circumstances; First, . . . where the agency is making law by creating standards to be used in evaluating the case before it and future cases. Second, . . . when a case requires resolution of policy questions which lie within the agency's area of expertise and are inseparable from the facts underlying the agency's decision.

Further, the Alaska Supreme Court has held that the LBC is not required to make findings of fact. *Keane v. Local Boundary Commission*, 893 P.2d at 1245 (the LBC is not required to set forth findings of fact; the court will determine the basis of a decision of the LBC from its own review of the entire record), *citing Mobil Oil*, 518 P.2d at 97.

Article X, Section 12 of the Alaska Constitution creates the LBC and gives it exclusive authority to determine all state level boundary changes. *See, Port Valdez Co. v. City of Valdez*, 522 P.2d 1147 (Alaska 1974); *Oesau v. City of Dillingham*, 439 P.2d 180 (Alaska 1968). A decision of the LBC to accept or reject a petition for a boundary change inherently involves fundamental policy and broad judgments of political and social policy. The appropriate standard of review to be applied by a court in considering an appeal of an administrative decision on a question of law involving agency expertise is the reasonable basis standard of review. *Jager v. State*, 537 P.2d 1100, 1007 n.23 (Alaska 1975); *see also*

*State v. Weidner*, 684 P.2d 103, 108 (Alaska 1984) (where questions of fact and law involve agency expertise and/or broad policy considerations, court should apply reasonable basis test).

Additionally, based upon the provisions of Article X, Sec. 12, and the overwhelming authority of the LBC as delegated by the legislature in statute in AS 29.06.040 and AS 44.33.812, it is apparent that a determination of the adequacy of whether an incorporation petition meets the applicable standards is a matter committed to the discretion of the LBC. These kinds of issues are squarely within the LBC's particular expertise.

**B. Review of LBC's Regulations and the Interpretation of Its Own Regulations is Reasonable Basis**

Under Article X, Section 12 of the Alaska Constitution, questions of local government boundary change are committed to the discretion of the LBC, and the Commission may consider any local government boundary change. And, under authority delegated by the legislature, the LBC adopted regulations establishing the standards and procedures pertaining to incorporation petitions, including boundaries adjusted by local action. *See* AS 29.05.031 and AS 44.33.812(a)(2).<sup>1</sup> (See also 3 AAC 110.045-.067, 3 AAC 110.400-700 and 3 AAC 110.900-990.)

Where an administrative regulation has been adopted in accordance with the procedures set forth in the Administrative Procedures Act (AS 44.62.180 - .290), and it

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<sup>1</sup> In fact, AS 44.33.812(a)(2) mandates that the LBC to “*adopt regulations providing standards and procedures for municipal incorporation, annexation, detachment, merger, consolidation, reclassification, and dissolution.*” (Emphasis added). Development of standards through regulation is a precondition to the LBC's exercise of its discretion. *United States Smelting, Ref. & Mining, Co. v. Local Boundary Comm'n*, 489 P.2d 140 (Alaska 1971).



appears that the legislature intended to commit to agency discretion as to a particular matter that forms the subject of the regulation, the court will review the regulation in the following manner:

- (1) the court will ascertain whether the regulation is consistent with and reasonably necessary to carry out the purposes of the statutory provisions conferring rule-making authority on the agency; and
- (2) the court will determine whether the regulation is reasonable and not arbitrary.

*Kelly v. Zamarello*, 486 P.2d at 911.

And, when reviewing an agency's interpretation of regulations, it is well established that the standard applied to review of an agency's interpretation of its own regulations is again the reasonable basis standard. *Lake and Peninsula Borough v. Local Boundary Commission*, 885 P.2d at 1062 (citations omitted); *Stosh's I/M v. Fairbanks North Star Borough*, 12 P.3d at 1183 (where an agency interprets its own regulation a deferential standard of review properly recognizes that the agency is best able to discern its intent in promulgating the regulation at issue); *Hodges v. Alaska Constructors, Inc.*, 957 P.2d at 960 (scope of review for agency's application of its own regulations to facts is limited to whether agency's decision was arbitrary, unreasonable or an abuse of discretion).

Accordingly, this court should apply the reasonable basis standard of review as to all issues in this appeal, and specifically to issues that relate to (1) the LBC's decision and exercise of discretion as to the adequacy of incorporation petition and the setting of the boundary, (2) questions of law involving agency expertise, (3) the review of the applicable incorporation regulations, and (4) the LBC's interpretation of its own regulations.

### **C. Substitution Of Judgment Does Not Apply to Issues Raised**

The substitution of judgment standard is applied where questions of law presented do not involve agency expertise or where the agency's specialized knowledge and experience would not be particularly probative as to the meaning of a statute. *Keane v. Local Boundary Comm'n*, 893 P.2d at 1241-42 (court exercises independent judgment when interpreting a statute which does not implicate an agency's special expertise or determination of fundamental policies) *citing City of Valdez v. State, Dept. of Community & Regional Affairs*, 793 P.2d 532, 533 n.6 (Alaska 1990); *see also Tesoro* 746 P.2d at 903. And, as observed by the Court in *Earth Resources*:

The standard is appropriate where the knowledge and experience of the agency is of little guidance to the court or where the case concerns statutory interpretation or other analysis of legal relationships about which the courts have specialized knowledge and experience.

665 P.2d at 965.

The Substitution of Judgment standard of review does not apply to any issues in this appeal. All issues raised are subject to the reasonable basis standard of review.

### **JURISDICTIONAL STATEMENT**

This is an appeal from an administrative decision of the Local Boundary Commission ("LBC") Statement of Decision dated August 22, 2012 [Exc. 1], approving the Petersburg Borough incorporation petition submitted by qualified voters of the proposed borough who signed the incorporation petition [R. 1658-1848] according to AS 29.05.060(7) and which was, after LBC action, verified by voter election. This court

has jurisdiction over this appeal pursuant to AS 22.10.020(d) and Appellate Rule 601 *et. seq.*

## **ISSUES**

As stated by the appellant, City and Borough of Juneau (CBJ), the issue is “Did the LBC abuse its discretion by creating a borough that fails to embrace an area and population with common interests to the maximum degree possible, in violation of Art. X, Sec. 3 of the Alaska Constitution, when it failed to consider the CBJ’s competing claims with respect to overlapping territory identified in both the CBJ’s petition for annexation and the Petersburg Petitioner’s petition to incorporate?”

The LBC’s issue is whether or not its decision to approve the Petersburg Borough incorporation is supported by the record. It is.

## **STATEMENT OF FACTS**

Petersburg’s petition (PETITION TO THE LOCAL BOUNDARY COMMISSION FOR INCORPORATION OF PETERSBURG BOROUGH, A HOME RULE BOROUGH and DISSOLUTION OF THE HOME RULE CITY OF PETERSBURG) was dated October 6, 2010, and was submitted to the LBC staff for technical review April 6, 2011. [R. 1658-1848] Following technical review and an update based thereon it was accepted for filing by the LBC staff August 5, 2011. [Exc. 3] The proposed borough was comprised of 4,347 square miles of which 982 square miles was water and 3,365 square miles was land. [R. 1659] As *proposed*, the northern boundary of the Petersburg borough connected to the established southern boundary of the City and Borough of Juneau (CBJ). [R. 1671, 1678] The revised northern boundary

of the Petersburg Borough, as ultimately approved by the LBC following extensive testimony and briefing, tracked natural geography *south of the southern boundary of CBJ, between Tracy Arm (north of the line) and Endicott Arm (south of the line)*. [Exc. 2] The City and Borough of Juneau filed an annexation petition which overlapped a massive part of Petersburg's proposed borough. (See, Petersburg Borough Proposal – Juneau Response Exhibit 1 contested area [10/25/11] [Exc. 248.]) That overlapping area is often referred to in the transcripts as the “contested” or “disputed” area or territory. Following acceptance of Petersburg's petition by the LBC, the petitioners complied with law and regulation<sup>2</sup> and deposited petition copies as required, posted notice of the proposed incorporation within the proposed area for incorporation and published public notice of the petition in the Juneau Empire and other papers and on other Juneau media, KTOO and KINY, among others. [Exc. 3-6] On August 8 and 15, 2011 a Notice of Petition was served on the City and Borough of Juneau and other municipalities and on August 15, 2011 City and Borough of Juneau and other municipalities received complete copies of the petition. [Exc. 4] The City and Borough of Juneau, among others, filed a responsive brief to the petition. [R. 1229-1300] The responsive briefs were followed by petitioner's Reply Brief which was filed November 15, 2011. [R. 1074-1219] At about this time the CBJ filed a “request” with the LBC to either consolidate its annexation petition with Petersburg's incorporation petition to delay Petersburg's incorporation petition until CBJ's annexation petition could catch up. [Exc. 21-22] Both requests were discretionary with the LBC (“Consolidation of Petitions”-3 AAC 110.430 /

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<sup>2</sup> The LBC Proceedings are outlined at 3-6 of the Decision. [Exc. 3-6]

“Postponement of proceedings”-3 AAC 110.640 (c)), which was acknowledged by CBJ [Exc. 22]. Both requests were denied [Exc. 273-77] at the Commission’s December 14, 2011 meeting in the interest of facilitating the business of the commission and in promoting the “reasonable, speedy, and inexpensive determination of every action and proceeding” (3 AAC 110. 660). The Petersburg incorporation petition was already well on its way through the process and Juneau’s time frame was indeterminate since at that point no annexation petition had been accepted for filing. That vote came following testimony and argument both by Juneau and Petersburg representatives, filings and debate among the Commissioners. [See generally, Exc. 257-277]

LBC staff thereafter prepared and distributed to the parties, on February 24, 2012, a ‘Preliminary Report to the Local Boundary Commission Regarding the Local Action Petition to Incorporate a Home Rule Borough of Petersburg and Dissolve the Home Rule City of Petersburg’. [Exc. 39-63] On March 14, 2012, the LBC staff followed the Preliminary Report with a ‘Supplemental Notice To Public Notice of February 23, 2012 of Public Comment Period on the Preliminary Report Concerning the Petersburg Borough Incorporation Petition’ relating to staff’s recommendation to revise the northern most border of the proposed Petersburg borough. [Exc. 281-82] That notice concerned Staff’s recommendation to revise the northern Petersburg Borough proposed boundary based on comments received on staff’s preliminary report and in responsive briefs. Staff recommended excluding the Tracy Arm and watersheds and Whiting River watersheds from the Petersburg Borough. [Exc. 281] During this process, on April 9, 2012, the LBC accepted the City and Borough of Juneau’s annexation petition for lands overlapping

(1977 Square miles) those in Petersburg's incorporation petition.

([http://www.commerce.state.ak.us/dca/lbc/2012\\_City\\_and\\_Borough\\_of\\_Juneau\\_Annexation/Petition/4-9-12%20Juneau%20Petition%20Acceptance%20Letter.pdf](http://www.commerce.state.ak.us/dca/lbc/2012_City_and_Borough_of_Juneau_Annexation/Petition/4-9-12%20Juneau%20Petition%20Acceptance%20Letter.pdf)) Accordingly, Juneau's annexation petition was with the LBC by that time and some seven weeks before the May 30-June 1 hearing and decisional meeting at Petersburg. Having not postponed the Petersburg petition or consolidated the Juneau petition with the Petersburg petition the commission could consider Juneau's petition within the Petersburg proceedings as it did, since the "...commission may consider relevant information from concurrent or conflicting petitions during the process of rendering its decision on any one petition." (3 AAC 110.430).

On April 19, 2012, the LBC conducted a duly noticed meeting at Anchorage relating to procedures and requirements for the upcoming public hearing and decisional meeting to be held at Petersburg concerning the Petersburg Borough incorporation petition. Juneau representatives participated. [Exc. 294]

Following the Preliminary Report, and after reviewing and considering all comments submitted on the Preliminary Report [Exc. 39-63], the LBC staff during May of 2012 prepared and served their Final Report. [Exc. 88-96] That report recommended approval of the Petersburg Borough as did the preliminary report. [Exc. 96] Respondents, including CBJ, were served a copy of the Final Report on May 7, 2012. [Exc. 5] The public hearing on Petersburg's incorporation petition was subsequently held at Petersburg and lasted for two and one half days, May 30-June 1, 2012. Dozens of witnesses commented during the public meeting portion of the agenda. The City and

Borough of Juneau and Petersburg Petitioners presented numerous sworn witnesses each in presenting their cases. CBJ's sworn witnesses were: 1. Wayne Regelin (Former President of Territorial Sportsmen, Former Director, Alaska Division of Wildlife Conservation, Former Deputy Commissioner of Alaska Department of Fish & Game who testified on hunting (guiding and sport) and sport fishing practices in the area north of Farragut Bay); 2. David Stone, (Mining Historian) who testified about mining history of the region; 3. Jev Shelton (Commercial Fisherman) who testified about commercial fishing practices in the region; 4. Malcolm Menzies, P.E. who testified about the logging efforts at Hobart Bay; 5. Chuck Smythe, Ph.D (Cultural Anthropologist) who testified on Tlingit culture and native history in the area, as well as subsistence use (based upon his work studying subsistence harvest and use in Petersburg for the Alaska Department of Fish and Game; 6. Eran Hood, Associate Professor of Hydrology (UAS) professor Hood testified about the proposed boundaries and their connection to the natural geography and watershed boundaries; 7. Mark Kaelke, (Southeast Alaska/Tongass Project Director-Trout Unlimited) his subject was sport fishing activities in the area in general, as well as his own experiences; 8. Bruce Botelho, (Mayor, City and Borough of Juneau) who testified in general as to the CBJ's connection to portions of the disputed territory and background regarding to CBJ's annexation petition and the delay in filing it; 9. Bruce Simonson (GIS Manager-City and Borough of Juneau) testified as to relationship of the proposed boundaries with respect to a number of administrative and political boundaries; 10. Marty Marshall, as Representative of Juneau Ranger District-U.S. Forest Service, Department of Agriculture, testified about the agency's permitting of various

activities in the region, in order to illustrate use of the area related to tourism, in particular. [Exc. 104-105] All five Commissioners were present and heard CBJ's sworn witnesses, public comments and Juneau's arguments.

Petersburg Petitioners presented several dozen sworn witnesses all of whom supported the borough incorporation and northern boundary<sup>3</sup>. [See generally R. 473-641] The five commissioners heard all of them too, public comments and Petersburg Petitioner's arguments.

Following the Public Hearing, on the afternoon of June 1, 2012, the LBC convened its Decisional Meeting as required by 3 AAC 110.570. Lengthy debate and review (beginning at R. 77) of the applicable constitutional, statutory and regulatory requirements ensued. A checklist [Exc. 172-177] was used to assist the LBC in analyzing approval or rejection of Petersburg's incorporation petition. The commissioners voted unanimously to amend the petition as allowed by 3 AAC 110.570(c)(2) to adjust the northern boundary line from that which Petersburg proposed. The amendment was to follow staff's recommended northern boundary revision [Exc. 167-69], with one condition, that the final boundary line be prescribed by the Department of Commerce cartographers, following natural features which was something Juneau's witness, Professor Hood, discussed (natural geographic features). That amended boundary gave CBJ some of what they wanted and excluded from the Petersburg Borough Tracy Arm and the Whiting River watershed. Petersburg's borough incorporation petition, with the LBC amended northern boundary, was approved by majority vote, 4/1. [Exc. 171]

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<sup>3</sup> More detail about Petersburg Petitioner's witnesses will follow later in this brief.



A local action election (AS 29.05.110 & 3 AAC 110.600) was thereafter held December 18, 2012, on the question of “Shall the Home Rule Petersburg Borough be incorporated?” [Exc. 472] The question was carried by a vote of 782-600. [Exc. 472] By letter dated December 26, 2012 the State was informed by the U.S. Department of Justice, Civil Rights Division, that it had no objection to the proposed actions, incorporation of the borough, dissolution of the city, staggering of officials’ terms and related matters. [Exc. 471]

## **ARGUMENT**

### **I. Introduction**

The LBC properly exercised its expertise and discretion in approving incorporation of the Petersburg Borough as it considered each applicable constitutional, statutory and regulatory term. The LBC heard, viewed, read and considered respondent City and Borough of Juneau’s evidence, witnesses, exhibits, pleadings, annexation petition and more but simply reached a different decision than CBJ preferred.

The Petersburg Borough embraces an area and population with common interests to the maximum degree possible consistent with Art. X Sec. 3 of the Alaska Constitution. The LBC considered the CBJ’s competing claims with respect to the overlapping (or disputed) territory (1977 square miles). The CBJ disputed territory was clearly identified in CBJ’s pleadings [Exc. 248], and witness testimony and their petition for annexation which the LBC had received well prior to the Petersburg hearings. Based on the evidence the LBC elected to re-cast the northern Petersburg boundary from Juneau’s southern boundary line to geographic features between Tracy Arm and Endicott Arm, south of

Juneau's southern border removing about 500 square miles from the Petersburg Borough. Based on the evidence presented the LBC elected not to remove about half of the Petersburg Borough as CBJ advocated.

The LBC's decision approving the Petersburg Borough incorporation and its boundaries is wholly supported by the record and should in all respects be affirmed.

## **II. The LBC Is A State-Wide Commission Comprised of Experienced Commissioners Who Review the Evidence and Make the Difficult Decisions In The Best Interest of The State**

The City and Borough of Juneau (CBJ) appeals the August 22, 2012 decision by the State of Alaska's Local Boundary Commission (LBC), approving incorporation of the Petersburg Borough (and dissolution of the City of Petersburg). The LBC is a single, state-wide commission with a constitutional mandate to set local government boundaries in the best interest of the state as a whole. The Local Boundary Commission is comprised of five Commissioners all appointed by the Governor and generally serving staggered terms. (AS 39.05.055 and AS 39.05.060) The Commissioners each hail from one of Alaska's four judicial districts and one at-large member. [Exc. 278 - 80] The constitutional convention addressed commission representation. As delegates to the constitutional convention discussed, commissioners from districts throughout the state decide the petition, which raises it from a parochial issue to the statewide issue that it is.

BOSWELL: I wanted to refer to Section 12 and the local boundary commission. I wondered if that would be a statewide commission or would it be a commission within the borough?

ROSSWOG: That would be a statewide commission, necessarily, because if it were just on a local level then each one would be trying to get their part they wanted and not the others. It would have to be on a statewide level.

Minutes of the proceedings of the Constitutional Convention, January 19, 1956, day 58.

When a city or borough petitions to change its boundaries, the LBC provides a lengthy comment, study and hearing period before rendering a decision. (See generally [Exc. 3-6] (proceedings)). The Petersburg Borough Incorporation was a reasoned deliberative process. In addition to countless staff hours inherent in the analysis and reports (Final Report R. 706-822; Preliminary Report R. 964-1013) and meetings (5/24/2011; 10/13/2011; 12/14/2011; 4/19/2012; 5/30-6/1/2012; 8/31/2012) the commissioners spent hours reviewing the issues before arriving at Petersburg, and then two and one half days in Petersburg hearing testimony, reviewing demonstrative aids and debating issues before making their decision. The LBC took a hard look and applied reasoned decision making to the Petersburg petition and all input from City and Borough of Juneau (and other respondents<sup>4</sup>).

Just because the commissioners didn't agree with CBJ's position doesn't mean the commissioners didn't give the issues a hard look or consider CBJ's concerns in a reasoned decision making process. If CBJ's mere disagreement with the LBC's boundary decision meant no boundary change could happen, the boundary change process in Art. X, Sec. 12 of the Alaska Constitution would be destroyed.

And thus the Commissioners apply a statewide perspective to their petition evaluation, and weigh the issues and concerns, since "... the process [is] at a level where area-wide or state-wide needs can be taken into account. By placing authority in this

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<sup>4</sup> Other respondents before the LBC were Tom Cole, George Cole and Bob Lynn but none of them appealed the LBC's decision.

third-party [LBC], arguments for and against boundary changes can be analyzed objectively.” *Fairview Pub. Util. Dist No. 1, v. City of Anchorage*, 368 P.2d 540, 543 (Alaska 1962). *Fairview* further noted that relevant minutes of the local government committee show the concept that was in mind when section 12 of Art. X was being considered-local political decisions do not usually create proper boundaries and that boundaries should be established at the state level. (*Id.*) (*See also, Oesau v. City of Dillingham*, 439 P.2d 180 (Alaska 1980) and *City of Douglas v. Borough of Juneau*, 484 P.2d 1040 (Alaska 1971)).

Accordingly, CBJ’s self-interest in annexing land from the unorganized borough south of CBJ’s existing southern border in competition with Petersburg Petitioner’s incorporation petition covering the same lands, is one thing for the LBC to consider. But it is not the determinative factor in the LBC’s Borough incorporation analysis. Setting local government boundaries in the best interest of the state as a whole is. And CBJ presented extensive testimony, briefing, evidence and argument for its position, but from the state-wide position of the commissioners, they were not persuaded that the Petersburg Petitioners should be denied about half of their borough lands so Juneau might have them. The LBC’s decision should be affirmed.

### **III. The Underlying Premise Of CBJ’s Issue Statement is Invalid, Rendering the Argument Invalid**

CBJ’s issue statement states in part that the LBC “...failed to consider the CBJ’s competing claims with respect to overlapping territory identified in both the CBJ’s petition for annexation and the Petersburg Petitioner’s petition to incorporate.”

And at pages 9-12 of its brief it reiterated in part that the LBC "...in fact, refused to consider any of CBJ's evidence"; "The Commission declined to consider evidence presented by the CBJ..." and page 16 of CBJ's opening brief asserts that the commission "utterly refused to consider any of it" [CBJ's evidence] and then cited the case of *Petitioners for Incorporation of City and Borough of Yakutat v. Local Boundary Commission*, 900 P.2d 721 (Alaska, 1995) for the proposition that the LBC did not consider enough of CBJ's evidence. Nothing could be farther from the record. As the Alaska Supreme Court has noted in a worker's compensation case, "This argument would be persuasive if the underlying premise-...[ ]...-were true. Because that premise is not true, the argument is irrelevant." *Green v. Kake Tribal Corp.* 816 P.2d 1363, 1366 (Alaska 1991).<sup>5</sup>

The underlying premise of CBJ's argument, that the LBC did not consider CBJ's evidence is false, rendering the conclusion unsupported and false too and the argument meritless. The LBC has had prior experience with this type of situation, two communities vying for the same piece of the unorganized borough. At the October 13, 2011 Public Meeting Chairman Chrystal noted, in relation to competing claims for the same land, that the commission could do the same as they had done in the case of Ketchikan and Wrangell petitioning for overlapping areas. They were dealt with one at a time but we knew "...what was happening with the other petition. So, when we met in the Wrangell issue we voted knowing what Ketchikan wanted and what Wrangell

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<sup>5</sup> A related concept is a Non Sequitur which is an argument that does not follow from its premises. *Stevens v. State*, 135 P.3d 688, 692-93 (Alaska App., 2006); *Simpson v. State, Commercial Fisheries Entry Comm'n*, 101 P.3d 605, 614 (Alaska 2004).

wanted. And I think we can do the same thing with this.” [Exc. 178-79]<sup>6</sup> And by the time of the hearing in Petersburg (May 30-June 1, 2012), the LBC knew exactly what CBJ “wanted” because CBJ had by then filed their petition to annex (April 9, 2012). CBJ’s annexation petition was expressly recognized in the Staff’s Final Report to the LBC [R. 708] So even though the LBC in its reasoned discretion (3 AAC 110.430) did not consolidate CBJ’s later petition with Petersburg’s, or postpone proceedings on Petersburg’s petition (3 AAC 110.640(c)) so CBJ’s might catch up, the LBC was still aware of what CBJ “wanted.” That is because CBJ’s petition had been filed with the LBC nearly eight weeks prior to the Petersburg hearing, and their witnesses, exhibits and pleadings in the Petersburg matter hammered their position home.

The Petersburg decision was not decided in a vacuum. In addition to the Staff’s Final Report, the LBC Commissioners were fully aware of CBJ’s petition “wants” at the time of the Petersburg hearings and decision as reflected in the following statements by COMMISSIONER HARRINGTON:

Does that mean that the existing petition that Juneau has before the LBC would remain or would they need to do a new petition for removing this, should this pass? [Exc. 469-70]

And CHAIRMAN CHRYSTAL:

But we do know that Juneau has in fact petitioned for that area.  
[Exc. 466].

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<sup>6</sup> Chairman Chrystal continued “I think that if we disallow this to go forward we 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.” [Exc. 179]

The LBC was aware of CBJ's filed petition to annex. At the Petersburg Borough Incorporation public hearing (and later the decisional meeting) it was clear that the commissioners were fully aware of what CBJ "wanted". It was CBJ's burden to present their position as respondent. They did it well. The CBJ presented at least ten sworn witnesses. And all testified in favor of CBJ capturing land south of its southern border, and the Commissioners were all present and heard it all.

During the decisional meeting the commissioners referred to Juneau's evidence during debate. For instance:

COMMISSIONER HARRINGTON said: "I was struck by Juneau's comment, in a way, as he drew some of the interrelated nature of Petersburg and Juneau with the fact that they all work together, they have cultural and business ties constantly. We're Alaskans. We're southeast Alaskans, . . . " [Exc. 457]

And COMMISSIONER HARRINGTON further noted: 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. We have to make a decision. And at this point my mind sense is this needs to be in the proposed area, or the borough of Petersburg. 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*. [Exc. 463-64]

COMMISSIONER SEMMENS in an exchange with the chair said:

..... natural geography-- conform generally to natural geography. Well, the current CBJ boundary apparently does not conform to natural geography. Well, does that mean that we should maybe during the meeting amend Juneau's boundary so that it does conform? I don't think so. I think we'd have a revolt. And on the other hand, *I heard testimony*

*from the City and Borough of Juneau, one of their witnesses said that the boundary that the staff is proposing and has advertised does not meet the standard.* Well -- okay. Then maybe what we should do is let it butt up to the current CBJ boundary because clearly, although that may not meet the natural geography, it has been in place for a long, long time. And we take little risk in my mind by adopting that. However, 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. We've heard representatives of Petersburg say that they're willing to go with that boundary, that it does make some sense. *So a part from the fact that Juneau's testimony was that that boundary does not meet the standard,* I would be willing to go with that boundary. But it concerns me that their own -- that testimony from a person with a doctorate in such matters says that it doesn't meet the standard. So .....

(emphasis added)

CHAIRMAN CHRYSTAL: See, I didn't get that from him. I know he tried to insinuate that it didn't meet the standards per se ....

COMMISSIONER SEMMENS: I thought he frankly said those words.

CHAIRMAN CHRYSTAL: Well -- but he was talking about bays rather than a ridge line. How Endicott Arm and Tracy Arm interacted at the mouth (ph). That's what I thought he was referring. Because he really talked about the different bays, I thought.

COMMISSIONER SEMMENS: Well, Mr. Chairman, he did do that. But I believe that he had his finger on this boundary and said that this does not -- this does not meet the standard of following natural geography. Now we can all disagree. Obviously what the representative of Petersburg said well, you know, when you got a ridge line, that's a pretty good natural geographic feature. [Exc. 464-66]

And later, with yet another reference to Juneau's witness testimony CHAIRMAN CHRYSTAL said:

And I guess I would -- I mean I don't want to put you on the spot too much. You don't have to answer this, Mr. Williams, if you don't want to. But *in light of all the testimony you've heard from Juneau about their interaction up around Tracy Arm, Endicott Arm, would you change your recommendation and location to that boundary up there, knowing what you know today?* [Exc. 572] (emphasis added)



And in addition COMMISSIONER HARRINGTON said:

“... 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 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 the 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. So I'll jump ahead.”  
(emphasis added) [Exc. 462-63]

CHAIRMAN CHRYSTAL made another point: I myself would support -- would still support the staff's recommendation rather than the entire -- *I do think that Juneau made a good case for how much they use Tracy Arm*, and Petersburg has no objections to removing the Tracy Arm section. (emphasis added) [Exc. 468]

And so, by these limited examples, it is clear that the commissioners considered Juneau's testimony and evidence, pleadings, argument, and petition concerning the disputed area and many other issues Juneau raised. The record does not support Juneau's assertion in its briefing that the LBC “declined to consider any of CBJ's evidence” (Appellant's brief at 11) Since CBJ's underlying premise is invalid, its argument about maximum degree possible must fail. That is because the record indicates that LBC considered CBJ's evidence, witness testimony and pleadings, and the CBJ annexation petition was with the LBC prior to the Petersburg hearing which assumes their familiarity with it. But the LBC and CBJ simply disagreed on which entity the “disputed” territory should go, to CBJ in its own parochial view or to the Petersburg Borough in the LBC's best interest of the state, statewide view. The LBC should be affirmed.

#### **IV. Findings of Fact Are Not Required of The LBC**

The LBC is not required to make findings of fact in incorporation decisions such as this. CBJ's brief at p. 17 states the "LBC failed to make any findings whatsoever. . . ." but as the Alaska Supreme Court noted in *Keane v. Local Boundary Com'n*, 893 P.2d 1239,1245 (Alaska,1995) citing *Mobil Oil Corp. v. Local Boundary Comm'n*, 518 P.2d 92, 97 (Alaska 1974).

"The LBC is not required to set forth findings of fact in its incorporation decisions. *Mobil Oil Corp. v. Local Boundary Comm'n*, 518 P.2d 92, 97 (Alaska 1974). In *Mobil Oil*, we stated that "[t]he special function of the [LBC], to undertake a broad inquiry into the desirability of creating a political subdivision of the state, makes us reluctant to impose an independent judicial requirement that findings be prepared." *Id.* We stated that we were able to determine the basis of the LBC's decision from our own review of the entire record. *Id.*"

This record is replete with support for the LBC's decision to approve the Petersburg Borough incorporation petition and should be affirmed.

#### **V. The LBC Is Not Bound By Its 1997 Model Borough Study**

The CBJ acknowledged the Petitioners of Petersburg's right to incorporate a borough, the actual incorporation was not disputed, just the territory. CBJ's Assistant Borough Attorney, Ms. Mead, pointed out that the CBJ's objection was limited to a section of territory that they felt was more appropriately theirs.

"I want to start out by saying the City and Borough of Juneau has no objection to the City of Petersburg seeking incorporation, and understands it's the right of the residents to seek incorporation. [ ] The only part of this process that the CBJ objects to is to the extent that the petition seeks to incorporate a portion of land that has been identified as the City and Borough of Juneau's unorganized remnant. A piece that is more appropriately annexed to the CBJ." [Exc. 307]

The reference to “remnant” arises from the 1997 Model Borough Study. The LBC is not restricted or bound by its previous model borough study or prior decisions concerning the “disputed area”. Times change, and a CBJ borough model boundary that may have been practical, or simply theoretical, some twenty years ago, may be neither now in light of an actual pending petition before the LBC. The Model Borough Boundaries (study) revised June 1997 at page three supports the foregoing assessment when it states,

“[t]he provisions in the regulation make it clear that the model borough boundaries are not rigid or unchangeable. Petitioners for borough incorporation or alteration of existing borough boundaries can successfully propose different boundaries if they make a specific and persuasive showing to the commission why other boundaries are more appropriate.”

[http://www.commerce.state.ak.us/dca/lbc/pubs/Model\\_Boro\\_RPT.pdf](http://www.commerce.state.ak.us/dca/lbc/pubs/Model_Boro_RPT.pdf) referring to former 19 AAC 010.060(b) and 19 AAC 010.190(c). And that assertion is valid considering that the CBJ left what they call the “remnant” unclaimed for some twenty years after the Juneau model borough boundaries were drawn, and Petersburg made a compelling case that its new borough should encompass most of that territory.

In adjusting Petersburg’s proposed northern boundary based on evidence Juneau presented, the LBC excised some 500 square miles of territory from Petersburg’s proposed northern boundary. That territory is significant but from the Commissioner’s perspective Juneau justified having it due to its current tourism and other activity in that area. The excised area nonetheless today remains part of the unorganized borough, as Juneau has not annexed it. CBJ’s annexation petition remains pending, and ultimately

may result in that excised territory being added to Juneau's southern border. Juneau made a good case for the excised area while the Petersburg petitioners made a good case for the balance of the "disputed" territory, being included in their new borough. It is generally recognized that Petersburg is a fishing and natural resources based community, while Juneau is generally recognized as the seat of Alaska government. Juneau does have some other activities according to their witnesses, such as fisheries and tourism, but neither are as significant to Juneau as government or as significant to Petersburg as commercial fishing. Commercial fishing, all the way north from Petersburg to Stephens Passage and Frederick Sound is Petersburg's "breadbasket". The LBC took those concerns into account in setting the borders. The LBC's final decision in one subsection, expressed it as follows:

"The proposed northern border does not follow not [sic] natural geography, but instead is a straight line. The northern border of the proposed borough is also the southern border of the City and Borough of Juneau. The LBC staff had recommended a different border that excluded the Tracy Arm and Whiting River watersheds from the proposed borough. The commission considered the testimony from the City and Borough of Juneau indicating that the staff recommended northern border did not follow natural geography.

*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."* (emphasis added). [Exc. 9]

After all the pleadings, evidence and witness testimony CBJ presented, the LBC was not persuaded that the CBJ should extend further south than roughly between

Tracy Arm and Endicott Arm. A reach south to Hobart Bay or Cape Fanshaw was considered excessive for Juneau and potentially detrimental to the new Petersburg Borough. And Petersburg fishing witnesses called the areas from Petersburg north, to Frederick Sound, Stephens Passage and Endicott Arm, Petersburg's "bread basket". And as for the issue CBJ raised, Article X, Section 3 of the state constitution, does the proposed borough embrace an area and population with common interests to the maximum degree possible, the commissioners debated it and concluded that it did. [See generally Exc. 455 - 461] The August 22, 2012 written decision [Exc. 1-16], following the decisional meeting of June 1, 2012, reiterates the LBC's determinations. In the August 22, 2012 written decision the commission determined that:

"The City and Borough of Juneau ("Juneau" or "CBJ") asserted that the proposed Petersburg borough must be compared to the existing City and Borough of Juneau in order to determine which borough would have common interests to the maximum degree possible with the overlapping area. After considering that claim, the LBC determines that that the question is instead whether the proposed borough has an area and population with common interests to the maximum degree possible. The commission finds that the proposed borough does embrace an area and population with common interests to the maximum degree possible.

"Maximum degree possible" means to come as close as possible to finding common interests. This means that there might not be 100 percent common interests. Although the people might differ philosophically, there are still common interests. After considering all of the record and arguments, the commission finds that the standard is met. The area and population in the proposed borough do have common interests to the maximum degree possible." [Exc. 6]

This is a classic case of an agency interpreting its own regulations, i.e.

Relationship of Interests, 3 AAC 110.045. This regulation requires that the proposed borough government, on a regional scale, be suitable for borough government,

considering the social, cultural and economic interests and activities of the people, which must be interrelated and integrated. This regulation is based upon AS 29.05.031(a)(1) and Art. X, sec. 3 of the Alaska Constitution. The regulation addresses compatibility of urban and rural areas within the borough, economic lifestyles, industrial and commercial activities, and transportation and communication patterns throughout the borough. Also existence of volunteer organizations throughout the borough, such as fire and rescue, among other factors; other factors, because the regulation states “may” consider such factors. At Exc. 7 the LBC determined that the requirements of 3 AAC 110.045 were met, and that is consistent throughout their analysis. The territory Juneau “disputed,” other than the excised 500 square miles, was properly included in the Petersburg Borough. The LBC’s decision should be affirmed.

#### **VI. The LBC’s Actions Complied With The *Yakutat* case**

The LBC did precisely what the *Yakutat* case called for. *Petitioners for Incorporation of City and Borough of Yakutat v. Local Boundary Commission*, 900 P.2d 721 (Alaska 1995). The LBC considered the northern border which Juneau questioned. They factored in interests of three competing bodies, Petersburg, City of Juneau, Goldbelt and even “discussion of a *possible* borough that would encompass Kake...” and more territory. [Exc. 462-63] [Exc. 9]. The LBC considered all these interests and consistent with the *Yakutat* case excised some 500 square miles from Petersburg’s northern border on the grounds that, at least as of the current time, Juneau had a closer connection to that area than Petersburg did.

Such analysis by the LBC established optimal boundaries for the Petersburg Borough which is consistent with *Yakutat*.<sup>7</sup> The LBC's decision should be affirmed.

## **VII. The Record Supports the LBC's Approval of the Petersburg Borough Incorporation Petition and the Boundaries It Set**

Since Petersburg Petitioner's right to incorporate a borough is undisputed by Juneau [Exc. 307] again the sole issue is whether or not the boundary set by the LBC is correct. It is. And the only boundary at issue is the northern boundary of the Petersburg borough.

A borough needs to be cohesive. Cohesiveness is determined by standards, including population, geography, economy, transportation and other factors. (Alaska Const. Art X sec. 3) And to facilitate cohesiveness each borough shall embrace an area with common interests to the maximum degree possible. (Alaska Const. Art. X, sec. 3) This requirement was implemented in statute as AS 29.05.031 (Incorporation of a borough or unified municipality). AS 29.05.031(a) states:

(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;

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<sup>7</sup> "An informed decision as to whether boundaries proposed in a petition for incorporation maximize the common interests of the area and population and thus meet the applicable statutory standards presupposes a thorough consideration of alternative boundaries and a decision as to what boundaries would be optimal." *Yakutat*, 900 P.2d at 925-6. That is what the LBC did.

(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.

And 3 AAC 110.060 (Boundaries) implements the foregoing statute and constitutional provision concerning boundaries. 3 AAC 110.060(a) provides in part that:

(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....<sup>8</sup>

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<sup>8</sup> 3 AAC 110.060 (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 1/9/2008;
- (4) existing and reasonably anticipated transportation patterns and facilities;
- (5) natural geographical features and environmental factors;
- (6) repealed 1/9/2008; and
- (7) existing and reasonably anticipated industrial, commercial, and resource development within the proposed borough.

(b) When reviewing the boundaries proposed in a petition for borough incorporation, the commission may consider

- (1) model borough boundaries for the area within the proposed borough;
- (2) regional boundaries, including



As stated with the regulation itself, the factors that the commission may consider are discretionary due to “may” in the regulation concerning factors. As such, all enumerated factors in the regulation are not required, nor are other relevant factors foreclosed. And

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- (A) boundaries of one or more regional educational attendance areas existing in that proposed borough area;
  - (B) federal census area boundaries;
  - (C) boundaries established for regional Native corporations under 43 U.S.C. 1601 - 1629h (Alaska Native Claims Settlement Act); and
  - (D) boundaries of national forests;
  - (3) whether the proposed borough will embrace an area and population with common interests to the maximum degree possible;
  - (4) whether the proposed borough promotes maximum local self-government, as determined under 3 AAC 110.981;
  - (5) whether the proposed borough promotes a minimum number of local government units, as determined under 3 AAC 110.982 and in accordance with art. X, sec. 1, Constitution of the State of Alaska; and
  - (6) whether the proposed borough boundaries are the optimum boundaries for that region in accordance with art. X, sec. 3, Constitution of the State of Alaska.
  - (c) Repealed 1/9/2008.
  - (d) Absent a specific and persuasive showing to the contrary, the commission will presume that an area proposed for incorporation that is noncontiguous or that contains enclaves does not include all land and water necessary to allow for the full development of essential municipal services on an efficient, cost-effective level.
  - (e) If a petition for incorporation of a proposed borough describes boundaries overlapping the boundaries of an existing organized borough, the petition for incorporation must also address and comply with all standards and procedures for detachment of the overlapping boundaries from the existing organized borough. The commission will consider that petition for incorporation as also being a detachment petition.
  - (f) The boundaries of a borough may not include only a portion of the territory of an existing city government.
  - (g) Requirements relating to limitation of community, as set out in 3 AAC 110.040(b), do not apply to boroughs.

[AUTHORITY: Art. X, sec. 1, Ak Const. Art. X, sec. 3, Ak Const. Art. X, sec. 12, Ak Const. AS 29.05.031 AS 44.33.812]

the record is replete with factors demonstrating cohesiveness of the Petersburg Borough. In the August 22, 2012 decision [Exc. 9-10] the LBC determined that the requirements of 3 AAC 110.060 Boundaries were met as well as the Best Interest of the State. [Exc. 10-11] In light of the forgoing authority both the LBC staff and the LBC commissioners determined that the Petersburg borough "...embrace[d] an area with common interests to the maximum degree possible" (Alaska Const. Art. X, sec.3). (Staff final report to the LBC [Exc. 96] (Commissioners' discussion on the record, decisional meeting [R. 71-147, generally] and final written decision [Exc. 1-16], among others.

Factors supporting that determination include:<sup>9</sup>

Testimony from Tom Abbott station manager of KSKA public radio at Petersburg. He testified that the Petersburg station is licensed to reach throughout the proposed Petersburg borough, which would include Stephens Passage and Endicott Arm areas with local news, weather, music, emergency alert services and public information for the local and state emergency planning committee. [Exc. 415-18] In response to a question from a commissioner, he further clarified that none of the Juneau radio stations broadcast south into the "disputed" area, they broadcast more north and west towards Yakutat. [Exc. 418] So Petersburg is the only community that serves the northern Petersburg borough with radio, tying the population together.

John Jensen, Petersburg fisher, testified that the contested area has always been "... Petersburg's bread basket fishery wise." [Exc. 398] It is also Petersburg's

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<sup>9</sup> In addition to the Petersburg Petitioner's testimony specifically related here, there was another couple of dozen or so witnesses whose testimony supported Petersburg's petition and boundaries. That additional testimony is transcribed in the record.

“playground”, subsistence area, part of our heritage and part of our culture. “It’s been in our blood for a hundred years”. [Exc. 398] Dan Hickman, a troller with 36 years of experience pointed out that fishing, both commercial and recreational, in the “disputed territory” waters is a big part of Petersburg’s economic health. [Exc. 391-94] That was further reinforced by Jeff Pfundt, a retired Petersburg commercial fisherman, who for years fished at Stephens Passage (and ADF&G area 10) along with the Petersburg fleet, as well as Holkham Bay, Tracy Arm, Hobart Bay and throughout the disputed area waters seining for salmon, longlining halibut and some crabbing. He reiterated that the northern waters of the area Juneau disputes are and have been Petersburg’s fishery area.

[Exc. 380-82] Alan Otnes and Robert Leekley, both Petersburg fishers, both fished the northern waters of the proposed borough, the area Juneau disputes. [Exc. 382-88]

Mr. Worhatch, a gillnetter for 32 years fished the disputed area, including Holkham Bay and Hobart Bay. [Exc. 388-91] Ladd Norheim, another Petersburg fisher, testified that he has been commercially fishing since 1971 and that his fishing has been at Stephens Passage, Cape Fanshaw to Holkham Bay, Endicott Arm and Frederick Sound. In his opinion these fishing areas belong to Petersburg. Mr. Norheim testified that “I’ve been around where there has been million dollar crab seasons for our fleet in Tracy and Endicott Arms, and not a Juneau boat in sight.” [Exc. 394-96, 423-25] Ron Buschman, commercial fisher for 25 years, has crabbed at Endicott Arm and Tracy Arm, along with six other boats all from Petersburg, and his point was that as fisherman “...this is our bread basket and we feel that this should be part of our borough.” [Exc. 396-97]

Randy Lantieque, Fleet Manager for Icicle Fisheries [Exc. 407-410] at Petersburg

explained how the ADF&G District 10 or the “disputed” area was used by Petersburg fishers and benefitted the Petersburg economy using 2010 figures.

“In 2010 we had 592 landings out of that area. These landings came from 152 different fishermen and the X [ex] vessel value of these landings was \$5 million. So these landings consisted of multiple species and were brought to us by different gear groups from that area. The species purchased were tanner crab, golden king crab, dungeness crab, roe herring, halibut, and all five species of salmon. The gear groups included troll, seine, long liners, crabbers and herring gill netters.”  
[Exc. 408-09]

These fishery products came to the Petersburg plant from the northern fishery district, district 10, within the disputed area, again thereby tying the disputed area, and the northern most areas of it, to Petersburg.

Tour boat operators from Petersburg also testified as to their use of the disputed area. Mr. Barry Bracken [Exc. 410-13] stated:

One thing I would like to state, and I'll state it emphatically, is that all of my years of operating in that area I have never seen a day boat whale watching operation out of Juneau. I think virtually all of them are going north or west of Juneau and not down into this area. Talking to some of our other multi day boats, they've started going into Endicott Arm more readily than Tracy Arm simply because Tracy Arm has become so overcrowded by Juneau tour operators. I think we can clearly show a connection between Petersburg operators as far north at least as Endicott and possibly into Tracy [Arm]. [Exc. 412]

Dennis Rogers testified that his Petersburg tour boat business spends most of the time touring passengers in the disputed area, including Frederick Sound, Stephens Passage, but also Hobart Bay, Port Houghton and Endicott Arm.<sup>10</sup> [Exc. 418-422] David Berg testified that his firm, Viking Travel, represents about ten tour boat operators, and they ply the

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<sup>10</sup> Mr. Rogers testified by videotape because at the time of the hearing he in fact was in the Stephens Passage area on his tour boat. [Exc. 422]

waters of the disputed area for whale watching and sightseeing all the way north to Endicott Arm and Tracy Arm. [Exc. 413-15].

Stephen Giesbrecht, City Manager of Petersburg addressed the equity of the municipality providing services and taxation to pay for those services.

One of the things with a borough is that it really, with a larger tax base, becomes a fairer approach to funding the services that are being made available that you've heard about all afternoon. The fishing fleet is by far the big picture here. But we're providing services -- public services to folks, and that tax base, by the expansion of the borough, makes that a fairer approach to pay for those very things that are making this community and the outlying areas possible. [Exc. 422]

And those services, provided within and without the City of Petersburg include, but are not limited to, fire and EMS (Sandy Dixson Fire/EMS Director for the City of Petersburg, [Exc. 331-36]), response to helicopter crashes in the “disputed area” (Tom Laurent [Exc. 336-37]), Police work and Alaska State Trooper assistance in the disputed area (Mr. Agner, Petersburg Police Chief [Exc. 337-41]), and harbor facilities and vessel support for vessels using the disputed area (Gloria Ann DeVore Wollen, Harbormaster [Exc. 344-350]), road services (Mr. Hagerman [Exc. 322-30]), health care facilities at Petersburg (Jennifer Bryner, Chief Nursing Officer at Petersburg Medical Center [Exc. 342-43] and educational opportunities (Robert Thomason, Petersburg Schools Superintendent and Mr. Schwartz, School Board Member [R. 559-569] [Partial Exc. 358-61])). In fact Mr. Thomason pointed out that school revenue is expected to increase by about \$100,000 with borough formation while at present the city school

district is educating students from outside the city at a cost of about \$75,000. [Exc. 359]

With regard to finances, the City of Petersburg's Finance Director pointed out that with borough formation state shared revenues are expected to increase by about \$300,000.

Those funds include liquor tax, state revenue sharing and state fisheries tax. [Exc. 365]

**A. No Taxation Without Representation**

Fisheries taxes in the disputed area, imposed by a borough, on the Petersburg fishing fleet became a concern to the Commissioners too. Commissioner Semmens raised the issue with the City's Finance Director Jody Tow:

COMMISSIONER SEMMENS: So -- okay. Fish tax, now you talk about fish tax here that comes into the general fund, the excess goes to the harbor fund. I understand that, I think. But is there a separate city fish tax?

MS. COWELL [sic Tow]: No.

COMMISSIONER SEMMENS: No separate city fish tax whatsoever?

MS. COWELL [sic Tow]: No. There's just that state fish tax that we have. And our auditors want to put it all in the general fund and then show it as a transfer out, so more transfer fees.

COMMISSIONER SEMMENS: Has there been any discussion of an area wide fish tax in the borough formation?

MS. COWELL [sic Tow]: Not that I'm aware of.

COMMISSIONER SEMMENS: Could be scary if you had that but -- in this community. But I just wanted to hear if there had been any discussion. That's all my questions. [Exc. 373]

And separately in the discussions Commissioner Wilson raised the same concern:

COMMISSIONER WILSON: Yeah, I got a question. If the boundary was to change over *what the Juneau wants, clear down to Cape Fanshaw, and that went into the Juneau borough*, you would still fish that area, right, even though it was in the Juneau borough?

MR. OTNES: Yeah.

COMMISSIONER WILSON: You'd still use it?

MR. OTNES: Oh, sure.

COMMISSIONER WILSON: Would there be any financial loss involved if that happened?

MR. OTNES: We don't know.

COMMISSIONER WILSON: You don't know.

MR. OTNES: *We wouldn't have much to say about it. We wouldn't have much to say if they [Juneau] wanted to tax the area.*

COMMISSIONER WILSON: Well, yeah. Like a fish tax or something?

MR. OTNES: Yeah. That would go to *Juneau* instead of *Petersburg* where it should be.

COMMISSIONER WILSON: Right. Because the Fish & Game is regulated by the state, not the borough, so it wouldn't make any different there. Okay. Thank you.

COMMISSIONER HARCHARAK: *Unless they [Juneau] put a fish tax on it.*

COMMISSIONER WILSON: *Yeah.* [Exc. 387-88]. (Emphasis added).

“‘No taxation without representation’ is a slogan originating during the 1750s and 1760s that summarized a primary grievance of the British colonists in the Thirteen Colonies, which was one of the major causes of the American Revolution. In short, many in those colonies believed that, as they were not directly represented in the distant British Parliament, any laws it passed taxing the colonists (such as the Sugar Act and the Stamp Act) were illegal under the Bill of Rights 1689, and were a denial of their rights as Englishmen.”

[http://en.wikipedia.org/wiki/No\\_taxation\\_without\\_representation](http://en.wikipedia.org/wiki/No_taxation_without_representation)

The concept proves as current today as it was 250 years ago. The Petersburg fishery products from waters in the “disputed area” that CBJ seeks to claim could be taxed by the City and Borough of Juneau, and the Petersburg fleet who live in Petersburg but fish up north would have no say, and would derive little or no benefit from those taxes that would accrue to Juneau rather than Petersburg. And Petersburg uses public monies, including fisheries taxes, to support the fisheries and maritime infrastructure according to Ms. Wollen, Petersburg’s Harbormaster. [Exc. 350] She also noted that the “City of Petersburg has served as the hub for over a century with the harbor department at the center.” [Exc. 350] Any municipal fishery tax assessed on catches north of Petersburg where so many Petersburg fishers fish, belongs with Petersburg, not Juneau.


## CONCLUSION

The Local Boundary Commission is a statewide commission constitutionally charged with determining municipal boundaries throughout the state. They take a statewide view of petitions and determine them in the best interest of the state. They specialize in these activities, it is all they do. The LBC's decision of August 22, 2012 [Exc. 1-16] should be affirmed as it is wholly supported by the record and there is a reasonable basis for their decision. The concern raised by Juneau is meritless since the underlying presumption, that the LBC did not consider Juneau's evidence, is incorrect. The LBC considered evidence submitted by all parties(including those who did not appeal) and reached a reasoned decision. Appellant may not agree with the LBC's decision but it is in the best interest of the State and should be affirmed.

DATED: May 31, 2013.

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