

1 **IN THE SUPERIOR COURT FOR THE STATE OF ALASKA**
2 **FIRST JUDICIAL DISTRICT AT KETCHIKAN**

4 **CITY OF CRAIG, ANNETTE ISLAND SCHOOL)**
5 **DISTRICT, ORGANIZED VILLAGE OF)**
6 **KASAAN, CRAIG CITY SCHOOL DISTRICT,)**
7 **CITY OF KASAAN, KLAWOCK CITY SCHOOL)**
8 **DISTRICT, NAUKATI WEST, INC., SOUTHEAST)**
9 **ISLAND SCHOOL DISTRICT, CITY OF THORNE)**
10 **BAY, PRINCE OF WALES ISLAND COMMUNITY)**
11 **ADVISORY COUNCIL, CITY OF KLAWOCK,)**
12 **HYDABURG CITY SCHOOL DISTRICT, CITY)**
13 **OF HYDABURG, HYDABURG COOPERATIVE)**
14 **ASSOCIATION,)**

10 **Appellants,**

12 **v.**

13 **STATE OF ALASKA, LOCAL BOUNDARY)**
14 **COMMISSION, and KETCHIKAN GATEWAY)**
15 **BOROUGH,)**

15 **Appellees.**

**Filed in the Trial Courts
State of Alaska
First Judicial District
at Ketchikan**

FEB 18 2010

**Clerk of the Trial Courts
By _____ Deputy**

Case No. 1KE-08-04 CI

16 **DECISION**

17 Appellants have appealed the Local Boundary Commission's (LBC) December 5,
18 2007 decision to approve, as amended, the Ketchikan Gateway Borough's (KGB) annexation
19 petition. Oral argument occurred on August 20, 2009. The court took the matter under
20 advisement pending issuance of this Decision. The LBC's decision is affirmed.

21 **I. POINTS ON APPEAL**

22 Appellants' Statement of Points on Appeal sets forth the following claims:

- 23 a. The LBC's decision was arbitrary and capricious, and constituted abuse of
24 discretion.
25

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- 1 b. The LBC's decision violated Article X, § 3 of the Alaska Constitution.
- 2 c. The LBC's decision violated Article X, § 1 of the Alaska Constitution.
- 3 d. The LBC's decision misinterpreted the Alaska Constitution.
- 4 e. The LBC's decision misinterpreted decisions of the Alaska Supreme
- 5 Court.
- 6 f. The LBC's decision violated applicable statutes and regulations inasmuch
- 7 as the annexation of uninhabited land, without Hyder, is not in the best
- 8 interest of the State.
- 9 g. The LBC's decision unfairly and improperly relied upon regulations
- 10 adopted after the KGB annexation petition was filed.
- 11 h. The LBC arbitrarily and capriciously adopted an interpretation of the
- 12 Alaska Constitution proposed by the Department of Commerce,
- 13 Community and Economic Development (DCCED) which contravened
- 14 the proper Constitutional interpretation applied by the LBC in its decision
- 15 on a nearly identical KGB annexation petition in 1999, and it did so
- 16 without any consultation or opinion from the Alaska Attorney General.
- 17 i. The LBC arbitrarily and capriciously adopted the DCCED's conclusions
- 18 and recommendations in the DCCED's Preliminary Report despite those
- 19 conclusions and recommendations being completely contrary to the LBC's
- 20 1999 decision denying a nearly identical KGB annexation petition.
- 21 j. The LBC arbitrarily and capriciously adopted the DCCED's conclusions
- 22 and recommendations in the DCCED's Preliminary Report despite the
- 23 conclusions and recommendations having come solely from one DCCED
- 24 employee, an employee who applied for and was hired by the KGB as its
- 25 Manager shortly after preparation of the Preliminary Report.
- k. The LBC denied Appellants Klawock Tribal Association, Naukati West, Inc., Craig Community Association, Hydaburg Cooperative Association, and the Prince of Wales Community Advisory Council (POWCAC) due process and equal protection by refusing the POWCAC's request that the LBC hire an independent person, not associated with the DCCED or the DCCED person who prepared the Preliminary Report, to prepare a new Preliminary Report.
- l. The LBC denied Appellants Klawock Tribal Association, Naukati West, Inc., Craig Community Association, Hydaburg Cooperative Association, and POWCAC due process and equal protection by adopting the DCCED's Final Report knowing that the DCCED employee who had

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1 applied for and been hired as the KGH Manager was the supervisor of the
2 person who prepared the DCCED's Final Report.

3 m. The LBC denied Appellants Klawock Tribal Association, Naukati West,
4 Inc., Craig Community Association, Hydaburg Cooperative Association,
5 and POWCAC due process and equal protection by adopting the
6 recommendations and conclusions of the DCCED's Final Report without
7 requiring the DCCED to comply with 3 AAC 110.530.

8 n. The LBC directed the KGB to file a petition to annex Hyder within five
9 years but the LBC arbitrarily and capriciously failed to include that
10 direction in its Order in its Statement of Decision.

11 o. The LBC's decision violated 3 AAC 110.160(a).

12 p. The LBC's decision violated 3 AAC 110.170.

13 q. The LBC's decision violated 3 AAC 110.180.

14 r. The LBC's decision violated 3 AAC 110.190.

15 s. The LBC arbitrarily and capriciously ignored the best interests of the
16 State, which constituted an abuse of discretion.

17 t. The LBC's decision violated AS 29.06.040.

18 u. The LBC's decision violated 3 AAC 110.195.

19 v. The LBC's decision was arbitrary and capricious and denied due process
20 and equal protection to Appellants Klawock Tribal Association, Naukati
21 West, Inc., Craig Community Association, Hydaburg Cooperative
22 Association, and POWCAC as the LBC found that transferring
23 approximately \$1,200,000 of annual federal funding from school districts
24 in the unorganized borough to the KGB was not "relevant in terms of the
25 applicable standards" even though the KGB would not provide
educational services to a single additional child as a result of its
annexation petition being approved.

w. The LBC's decision violated the rights of all persons living in the
unorganized borough in Southeast Alaska under Article X, § 3 of the
Alaska Constitution.

x. The LBC acted arbitrarily and capriciously as to all Appellants, and
violated the due process and equal protection rights of Appellants
Klawock Tribal Association, Naukati West, Inc., Craig Community
Association, Hydaburg Cooperative Association, and POWCAC, and of

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1 all persons living in the unorganized borough in Southeast Alaska, by
2 refusing to fully and fairly investigate the appearance of a conflict of
3 interest of the DCCED employee who prepared the Preliminary Report,
4 which the LBC adopted nearly whole, and who supervised the DCCED
5 person who prepared the Final Report, adopted nearly in whole by the
6 LBC.¹

- 7 y. The LBC acted arbitrarily and capriciously as to all Appellants, and
8 violated the due process and equal protection rights of Appellants
9 Klawock Tribal Association, Naukati West, Inc., Craig Community
10 Association, Hydaburg Cooperative Association, and POWCAC, by
11 refusing to include in the record the material and information requested to
12 be included by the City of Craig and the Prince of Wales Community
13 Advisory Committee.

14 All of the Appellants have raised certain issues. Some of the Appellants have
15 raised other issues. So there are two sets of briefing.

16 Appellants' first brief addresses claims common to all of the Appellants.

17 Appellants therein state the following points:

- 18 A. Did the LBC err in interpreting Article X, § 1 and Article X, § 3 of the
19 Alaska Constitution as encouraging the expansion of existing organized
20 boroughs in the same manner as the Constitution encourages the formation
21 of organized boroughs, regardless of the adverse consequences to persons
22 in the unorganized borough, who have equal constitutional status with
23 persons within unorganized boroughs?
- 24 B. Did the LBC act arbitrarily and capriciously, and contrary to principles of
25 stare decisis and res judicata, when it reversed its 1999 decision in which
it denied on constitutional grounds a nearly identical KGB annexation
petition?
- 26 C. Did the LBC fail to properly apply the "best interests of the state" standard
set forth in AS 29.06.040(a) and 3 AAC 110.980, thereby violating Article
X, § 3 of the Alaska Constitution, by declaring that the adverse financial
impact of the proposed annexation on the persons in the unorganized
borough was not "relevant under the applicable standards"?

¹ The City of Craig states here in Point on Appeal No. 24 that the Final Report was adopted nearly in whole by the DCCED. It appears in context that they meant to state that the Final Report was adopted nearly in whole by the LBC.

- 1 D. Does the "Order of the Commission" require the KGB to annex the 205
2 square mile Hyder enclave within five years (by December 5, 2012) and, if
3 so, does the LBC have the authority to enforce the order or void or
4 dissolve the annexation?

5 The second brief was filed by Naukati West, Inc., the Organized Village of
6 Kasaan, the Hollis Community Association, the Hydaburg Cooperative Association, and
7 POWCAC. These Appellants therein state the following points:

8 A. The LBC acted arbitrarily and capriciously when it failed and refused to
9 require the DCCED to submit a Final Report that fully and fairly complied
10 with 3 AAC 110.530, thereby denying Appellants due process.

11 B. The LBC acted arbitrarily and capriciously by deviating from its historical
12 and regulatory policy by creating the Hyder enclave and retroactively
13 applying regulations adopted after the KGB filed its annexation petition to
14 support its decision, which denied the Appellants due process.

15 C. The LBC denied Appellants and the people in the unorganized borough
16 their rights to a fair hearing and to an impartial decision-maker, thereby
17 denying them due process.

18 D. The LBC erred in holding that Article X, § 1 of the Alaska Constitution
19 requires the court to uphold LBC decisions approving annexations
20 whenever there is a reasonable basis for the decision.

21 E. Appellants have sought and are entitled to relief consistent with due
22 process.

23 Points on Appeal not briefed are deemed waived.²

24 II. JURISDICTION

25 This court has jurisdiction to review the LBC's December 5, 2007 decision per
Alaska Rule of Appellate Procedure 601(b), AS 22.10.020(d), AS 29.06.040(a), 3 AAC 110.620,
and AS 44.62.560.

1 III. STANDARD OF REVIEW

2 Alaska Supreme Court has recognized that:

3 In reviewing administrative decisions...[there] are at least four principal standards
4 of review. "These are the 'substantial evidence test' for questions of fact; the
5 'reasonable basis test' for questions of law involving agency expertise; the
6 'substitution of judgment test' for questions of law where no expertise is
7 involved; and the 'reasonable and not arbitrary test' for review of administrative
8 regulations." We review an agency's interpretation of its own regulation under
9 the reasonable basis standard, deferring to the agency unless the interpretation is
10 'plainly erroneous and inconsistent with the regulation.' We review questions of
11 law and issues of constitutional interpretation de novo under the substitution of
12 judgment standard.³

13 "Substantial evidence is evidence that a 'reasonable mind might accept as
14 adequate to support a conclusion.'"⁴ An appellate court does not "reweigh the evidence nor
15 choose between competing factual inferences,"⁵ and the court must uphold an administrative
16 agency's decision if it is support by substantial evidence "[e]ven though there are competing
17 facts that might support a different conclusion."⁶ An appellate court may reverse an agency's
18 decision "only if [it] 'cannot conscientiously find the evidence supporting [the agency's
19 decision] is substantial'."⁷

20 ² *Lyman v. State*, 824 P.2d 703, 706 (Alaska 1992); *State v. O'Neill Investigations, Inc.*, 609
21 P.2d 520, 528 (Alaska 1980).

22 ³ *Simpson v. CFEC*, 101 P.3d 605, 609 (Alaska 2004) (quoting *Jager v. State*, 537 P.2d 1100,
23 1107 n. 23 (Alaska 1975), *See also, May v. CFEC*, 175 P.3d 1211, 1215 (Alaska 2007), *Lauth v.*
24 *State*, 12 P.3d 181, 184 (Alaska 2000) (quoting *Bd. of Trade, Inc. v. State, Dep't of Labor,*
25 *Wage & Hour Admin.*, 968 P.2d 86, 89 (Alaska 1998)).

⁴ *May*, 175 P.3d at 1216 (quoting *Cleaver v. CFEC*, 48 P.3d 464, 467 (Alaska 2002) (internal
citation and quotations omitted)).

⁵ *State of Alaska, Division of Corporations, Business and Professional Licensing v. Platt*, 169
P.3d 595, 601 (Alaska 2007) (quoting *Doyon Universal Services v. Allen*, 999 P.2d 764, 767
(Alaska 2000)).

⁶ *Platt*, 169 P.3d at 601.

⁷ *Powercorp Alaska, LLC v. State, Alaska Industrial Development and Export Authority*, 171
P.3d 159, 163 (Alaska 2007) (quoting *Leigh v. Seekins Ford*, 136 P.3d 214, 216 (Alaska 2006)
(citation omitted)).

1 Appellants requested that the court expand the record by including additional
2 documents and by holding an evidentiary hearing to address their claims relating to Mr.
3 Bockhorst applying for and being hired as the KGB Borough Manager while the KGB's
4 annexation petition was pending before the LBC. The court granted the request for a hearing and
5 allowed the submission of most of the requested documents for reasons discussed in its August
6 12, 2008 Memorandum and Order. The court exercises its independent judgment based on the
7 evidence in the record in deciding these claims.⁸

8 IV SUMMARY OF DECISION

9
10 a. The court applied its independent judgment in reviewing the LBC's⁹
11 interpretations of Article X, § 1 and Article X, § 3 of the Alaska Constitution. The LBC's
12 analysis and the LBC's decision were based on a correct interpretation of the same.

13 b. The LBC did not err in interpreting or applying the standards set forth in Article
14 X, § 1 and Article X, § 3 of the Alaska Constitution to the KGB's 2006 annexation petition.

15 c. The Stare Decisis doctrine, as stated in *May v. State, Commercial Fisheries*
16 *Entry Commission*,¹⁰ applies to LBC decisions. The LBC did not violate the doctrine with
17 respect to the 2006 KGB annexation petition.

18 d. The res judicata doctrine does not apply to LBC decisions. If it did, it would not
19 apply to the 2006 KGB annexation petition.

20 e. The LBC did not err in finding that approval of the 2006 KGB annexation
21 petition, as amended, was in the best interests of the state.
22

23
24 ⁸ See, AS 44.62.570(c), (d); Alaska Appellate Rule 609(b)(1), (b)(2).

25 ⁹ The LBC's decision incorporated DCCED's analyses by reference so references to the LBC in
this context also include references to DCCED.

¹⁰ 168 P.3d 873 (Alaska 2007).

1 f. The LBC's decision to proceed with the November 7, 2007 Decisional Meeting
2 did not violate due process.

3 g. The enforceability or lack of enforceability of the LBC's direction to the KGB to
4 file a petition to annex Hyder within five years does not render the KGB's annexation void or
5 warrant the court dissolving the annexation.

6 h. DCCED's Final Report complied with the requirements of 3 AAC 110.530.

7 i. Mr. Bockhorst had a conflict of interest at the point that he became aware that the
8 KGB was soliciting applications for its Borough Manager position and he had an interest in
9 applying. This occurred after he had completed work on DCCED's 2007 Preliminary Report.
10 He recused himself. He had no further involvement with the KGB's annexation petition. He did
11 not attempt to curry favor with the KGB through the Preliminary Report. The Preliminary
12 Report set forth his long-standing professional views.

13 j. The LBC did not err by not asking the Attorney General's Office, or another
14 agency, to investigate Mr. Bockhorst's situation. The LBC did not err by not rejecting the 2007
15 DCCED Preliminary and Final Reports. The LBC did not err by not continuing the November 6,
16 2007 LBC Hearing or its November 7, 2007 Decisional Meeting.

17 k. Mr. Bockhorst's situation did not impact DCCED's or the LBC's handling of the
18 2006 KGB annexation petition as he recused himself as soon as the conflict situation arose.
19 There is no apparent conflict of interest. There is no appearance of impropriety. There is no
20 related due process violation.

21 l. The LBC did not err in finding that the Hyder enclave satisfied the requirements
22 of 3 AAC 110.190. The LBC did not act arbitrarily or capriciously with respect to the Hyder
23 enclave.
24
25

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1 m. The LBC did not violate Appellants' due process rights. It has not been shown
2 that the LBC was partial or biased. It has not been shown that Mr. Bockhorst was a "fox-in-the-
3 chicken-coop" on behalf of the KGB. Mr. Bockhorst's drafting the 2007 Preliminary Report is
4 not analagous to the situation presented in *Vaska v. State*¹¹ and does not create an appearance of
5 impropriety or otherwise warrant the relief sought.

6 V. RECORD

7
8 The court's recitation of the evidence in the record is lengthy. There are three
9 reasons. First, the original record is extensive. Second, the record has been substantially
10 enlarged to include: the LBC staff's Preliminary and Final Reports and the LBC's 1999 decision
11 on the KGB's 1998 annexation petition; other additional documents; and, testimony presented
12 during the October 2008 evidentiary hearing. Third, the evidence in the record is critical to the
13 court's decisions on the issues presented.

14 a. KGB's 1998 Annexation Petition¹²

15 The KGB submitted an annexation proposal to the LBC on February 28, 1998.¹³

16 Bill Rolfzen of the Office of the Commissioner of the Department of Community
17 and Regional Affairs (DCRA) sent Dan Bockhorst, LBC Staff member, several pages of
18 information on historical federal national forest receipt payments to the State of Alaska and
19 federal payments in lieu of taxes (PILT).¹⁴
20
21
22

23 ¹¹ 955 P.2d 943 (Alaska App. 1998).

24 ¹² The documents referenced in this section were not part of the LBC record with respect to the
25 KGB's 2006 annexation petition.

¹³ R. 1018.

¹⁴ R. 1233-46.

1 DCRA prepared a Preliminary Report on the KGB's proposal. Patrick Poland,
2 Director of the Municipal & Regional Assistance Division of the DCRA, forwarded the
3 Preliminary Report to the LBC Chair Kevin Waring on October 2, 1998.

4 Director Poland noted in his transmittal letter that: the proposed area includes
5 99.7% of the KGB's model boundary but does not include Hyder or Meyers Chuck; the proposed
6 area is largely undeveloped and inhabited by about 25 people; the annexation would increase the
7 KGB's NFR and PILT payments by some \$350,000 per year; and, this increase "would come at
8 the expense of" twenty entities in the unorganized borough in Southeast Alaska.¹⁵ He stated:

9
10 DCRA recognizes that Article X, § 1 of Alaska's Constitution promotes
11 extension of organized borough government. Further, DCRA has concluded that
12 the area in question has stronger ties to the KGB than it does to adjacent areas of
13 the unorganized borough. That conclusion is significant because Article X, § 3 . .
14 . . mandates that each borough embrace an area and population with common
15 interests to the maximum degree possible.

16
17 However, DCRA's preliminary report takes the position that the two
18 constitutional principles noted above should be given significantly diminished
19 weight in this particular case because of the nature of the KGB annexation
20 proposal. Again, the territory proposed for annexation is mostly undeveloped and
21 uninhabited Tongass National Forest lands. Further, the exclusion of Hyder and
22 Meyers Chuck suggests that the KGB annexation proposal was designed and
23 initiated to boost . . . revenues but avoided added borough service responsibilities.
24 The characteristics of the KGB annexation proposal coupled with the adverse
25 financial consequences for 20 entities in the unorganized borough led to DCRA's
preliminary conclusion that the KGB annexation proposal should be denied.

DCRA recognizes that decisions made by the LBC often have statewide
implications and that the action to be taken by the LBC in this instance may
influence future borough boundary proposals. As such, DCRA has invited
comment . . . from each organized borough . . . In addition, DCRA has asked
experts on borough government in Alaska such as Vic Fischer to review and
comment

¹⁵ R. 1257-58. Emphasis is added throughout unless otherwise noted.

1 DCRA's Preliminary Report¹⁶ included the following information:

2 "This report is preliminary in the sense that it is issued as a draft for public review
3 and comment . . . The law requires . . . issue a final report after considering
4 written comments on this draft report. Often . . . preliminary reports to the
5 [LBC] become final without modification. If such occurs in this instance, it
6 will be announced by letter that will serve to meet the requirement for a final
7 report. If circumstances warrant otherwise, DCRA will publish a separate final
8 report."¹⁷

9 And,

10 "Policy direction concerning . . . recommendations to the [LBC] was provided by
11 the following DCRA policy makers: Mike Irwin, Commissioner, DCRA, Lamar
12 Cotton, Deputy Commissioner, DCRA, Patrick Poland, Director, Municipal &
13 Regional Assistance Division, DCRA. Written by: Dan Bockhorst, Local
14 Boundary Commission Staff."¹⁸

15 DCRA noted that the KGB proposal:

16 "is nearly identical to 'model boundaries' defined for the KGB by the [LBC] in
17 1991. However, the boundaries proposed by the KGB exclude an estimated 17.9
18 square miles around Hyder and also exclude approximately 3.5 square miles
19 around Meyers Chuck, whereas the LBC's model boundaries include those two
20 unincorporated settlements. . . The KGB states that Hyder and Meyers Chuck
21 were excluded . . . because, *'neither community meets the requirement for strong,*
22 *cultural, social and economic ties to the KGB.'*"¹⁹

23 And,

24 "The proposed post-annexation boundaries . . . would encompass 99.7% of the
25 territory within its model boundaries. Model borough boundaries were defined
26 throughout the state (with emphasis on unorganized territory) by the LBC from
27 1989 through 1992. In undertaking the project, the LBC recognized that the
28 unorganized borough does not embrace an area and population with common
29 interests to the maximum degree possible as required by Art. X, § 3 of Alaska's
30 constitution."²⁰

31 ¹⁶ R. 1033-48.

32 ¹⁷ R. 1034.

33 ¹⁸ R. 1035.

34 ¹⁹ R. 1042-43 (Italics in the original).

35 ²⁰ R. 1043 n. 2.

1 DCRA noted that the proposed annexation would more than quadruple the size of
2 the KGB but the KGB “is currently a very small borough, less than one-tenth the size of the
3 average organized borough in Alaska . . . [and] is less than one-sixth the size of the median size of
4 all organized boroughs.”²¹

5 DCRA placed emphasis on two newspaper quotes: one from then KGB Planning
6 Director Bob Bright that the “primary driver” for the annexation petition was the revenues that
7 the KGB would receive; and, the other from Craig State Representative Jerry Mackie that the
8 KGB’s annexation proposal was a “land grab.”²²

9 DCRA received 24 relatively short written comments expressing opposition to or
10 concern with the KGB proposal. The commentators included POWCAC, the City of Craig, and
11 the Annette Island School District. The DCRA did not address each comment. Instead it
12 provided synopsis of the “general points expressed”. Those points included the negative
13 financial impact the annexation would have on fifteen cities in SE Alaska and the unincorporated
14 community of Metlakatla.²³

15 DCRA noted that the KGB’s rebuttal to the comments²⁴ included:

- 16 1. The LBC’s decision should not be based on its impact on the cities in the
17 unorganized borough fortuitously receiving national forest receipts.
- 18 2. The affected areas in the unorganized borough do not object to
19 governmental authority. They receive services from the State. They
20 instead object to having to pay for the services they receive. That is not a
21 valid reason for rejecting the petition.
- 22 3. Meyer’s Chuck and Hyder have greater ties with other areas, Meyer’s
23 Chuck with Prince of Wales Island and Hyder with Stewart, B.C.

24 ²¹ R. 1043.

25 ²² R. 1043-44.

²³ R. 1044-46.

²⁴ R. 1046-48.

1 4. With respect to the criticism that KGB services are not needed because
2 they are being provided by the State, the focus should be on why the State
is providing services typically provided by local government.

3 5. Annexation would extend the KGB's education, land use planning,
4 eminent domain power, emergency disaster powers, alcohol regulation,
5 parks and recreation services, voter services, economic development
powers, and animal control protection to the annexed area.

6 6. "The KGB recognizes that many of the critics wish to maintain the status
7 quo. This includes the current allocation of National Forest Receipts, and
8 have the State provide services without local taxes to pay for those
9 services. However, those concerns are not relevant reasons for denial of
10 the petition. If the area proposed for annexation is to be within a borough,
11 the KGB is the most rational choice. Further, services offered by the KGB
12 would benefit the area proposed for annexation. Annexation would better
13 allow the KGB to orchestrate planned development of mining,
14 infrastructure, and economic development of the area."²⁵

11 DCRA noted that it must analyze:

12 "the KGH annexation proposal in terms of the legal standards and associated
13 constitutional principles relating to annexation of territory to organized boroughs.
14 The legal standards encourage borough annexation proposals to be examined in
15 the context of the proposed *post-annexation boundaries* of the borough. . . The
same is true for the constitutional principles relating to boroughs."²⁶

16 DCRA first analyzed whether the KGB's proposed annexation satisfied the
17 requirements of Article X, § 1 of the Alaska Constitution. Article X, § 1 reads:

18 The purpose of this article is to provide for maximum local self-government with
19 a minimum of local government units, and to prevent duplication of tax-levying
20 jurisdictions. A liberal construction shall be given to the power of local
government units.

21 DCRA noted that, with respect to the maximum local self-government provision,
22 the Alaska Supreme Court in *Mobil Oil v. Local Boundary Commission*²⁷ had stated that: "Aside
23 from the standards for incorporation . . . there are no limitations in Alaska law on the

24
25 ²⁵ R. 1048.

²⁶ R. 1048 (italics in original).

1 organization of borough governments. Our constitution encourages their creation.”²⁸ DCRA
2 further stated that:

3 “Some might argue that the conclusion reached by the Supreme Court concerning
4 Article X, §1 applies only to borough incorporation, not borough annexation.
5 DCRA would disagree with such a rigid interpretation. Borough annexation
6 is, in effect, the incorporation of new territory into an existing borough. The
7 standards governing borough annexation are virtually identical to those relating to
8 borough incorporation.

9 In support of this view, DCRA notes that the LBC recently emphasized the
10 significance of the constitutional principle at issue with regard to an action other
11 than borough incorporation.”²⁹

12 DCRA examined the character of the territory at issue. It noted that 95.2% of the
13 land proposed for annexation is part of the Tongass National Forest. And that this:

14 “figure is comparable to the existing land use characteristics within the KGB. It
15 is also *less* than the percentage of Tongass land within both the City and Borough
16 of Juneau and the City and Borough of Sitka.”³⁰

17 DCRA also noted that:

18 “In 1974, the Alaska Supreme Court ruled that our constitution encourages
19 the extension of organized borough government. The court also noted that
20 boroughs were intended to be regional governments that include lands for which
21 there was no particular need for municipal government. . .³¹

22 “Critics and supporters of the KGB annexation proposal might offer strikingly
23 different views on this material issue. Specifically, critics may interpret the Court
24 to have meant that it may be *necessary, but not especially desirable*, to include
25 lands in a borough for which there is no municipal purpose in order to link
communities that have social, economic, cultural and other ties. . . In the context
of the KGB annexation proposal, that view suggests that as long as Hyder and

26 ²⁷ 518 P.2d 92, 101 (Alaska 1974).

27 ²⁸ R. 1050.

28 ²⁹ R. 1050-51. The referenced recent action involved a petition to detach 648 square miles from
29 the Matanuska-Susitna Borugh.

30 ³⁰ R. 1052 (italics in original).

31 ³¹ R. 1052. DCRA here is referring to the *Mobil Oil v. Local Boundary Commission* decision
(*See*, R. 1053).

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1 Meyers Chuck are excluded from the KGB annexation proposal, Article X, § 1 of
2 Alaska's constitution offers little, if any, support for the annexation.

3 In contrast, supporters of the KGB annexation may argue that the Court indeed
4 views Article X, § 1 . . . as encouraging the extension of borough government to
5 all parts of the unorganized borough *regardless of the need for borough*
6 *government*. This argument would stress that it is critical to harmonize Article X,
7 § 1 with Article X, § 3 . . . [which] requires that each of the 656,424 square miles
8 in Alaska – from the most developed area to the most remote part of the state – be
9 included within an organized or unorganized borough. . . This view suggests if
10 any *unorganized* area of Alaska has stronger ties to an *organized* borough than it
11 does to other unorganized areas, Article X, §§ 1 and 3 favor the inclusion of that
12 unorganized area with the organized borough, even if the need for services in the
13 unorganized area is minimal or non-existent. In the context of the KGB
14 annexation proposal, this view suggests that Article X, §§ 1 and 3 support
15 annexation of the largely uninhabited and undeveloped territory.

16 DCRA recognizes that the LBC has broad discretion in applying the
17 constitutional principles and standards. . .

18 DCRA policy makers take the position that the constitutional principle at
19 issue should be given diminished weight in this instance because the area
20 proposed for annexation is so sparsely inhabited, largely undeveloped, and
21 contains minimal privately owned lands. Further: DCRA policy makers consider
22 the constitutional principle at issue to take on diminished significance in this
23 instance as a result of the Petitioner's decision to exclude Hyder and Meyers
24 Chuck. It is incongruous to advocate annexation on the grounds that it will
25 promote 'maximum self-government', yet exclude the only significant settlements
in the immediate vicinity. While the LBC has authority to amend the annexation
petition to include Hyder and Meyers Chuck, such an action would be
unprecedented given the opposition to such both by the Petitioners and residents
of the territory in question. In DCRA's view, any proposal to expand the KGB
annexation proposal to include Hyder or Meyers Chuck would necessitate
additional study and deliberation on the part of DCRA and others."³²

DCRA concluded that:

"Based on the foregoing discussion, it is concluded that annexation of the
territory in question to the KGB is encouraged to some degree by Article X, § 1
of the Constitution of the State of Alaska. The LBC has held that 'as a matter of
pubic policy, great importance should be placed on the constitutional provision
calling for maximum self-government.' However, DCRA policy makers
consider the particular circumstances associated with the pending annexation

³² R. 1054-55 (Italics in original).

1 proposal to be an exception. In this instance, DCRA policy makers take the
2 position that the KGB annexation provides little foundation to conclude that it
3 significantly serves the constitutional principle of maximum local self-
4 government.³³

5 DCRA next analyzed the “promotion of a minimum of local government units”
6 portion of Article X, § 1. The DCRA noted that:

7 “The law does not require that a borough annexation minimize the number of
8 local government units. Instead, annexation is encouraged by the constitutional
9 policy if it reduces the number of local government units.”³⁴

10 DCRA found it highly unlikely that any new local governments would be formed
11 in the area proposed for annexation. DCRA then noted that:

12 “DCRA has, however, observed on previous occasions that the constitutional
13 policy of minimizing the number of local government units is an important factor
14 in shaping the character of borough government. Another provision of the
15 constitution, Article X, § 3 mandates that each borough embrace an area and
16 population with common interests to the maximum degree possible. Viewed
17 alone, Article X, § 3 might be construed to promote single community boroughs
18 since all communities are, to varying degrees, unique. By harmonizing Article X,
19 § 3 with the policy of minimizing the number of governments . . . boroughs
20 conceptually take on the character of larger, natural regions.”

21 DCRA observed that when the citizens of Ketchikan petitioned for incorporation they proposed
22 an area of only 75 square miles and that if that and similar petitions had been approved then there
23 would be more than the current 16 organized boroughs. “Thus, in a general sense, larger
24 boroughs result in fewer local governments.”³⁵

25 ³³ R. 1055.

³⁴ R. 1056.

³⁵ R. 1057.

1 DCRA concluded that the KGB's proposed annexation would not directly result
2 in a reduction in the number of local governments nor would it limit the creation of any local
3 governments that may be formed in the foreseeable future.³⁶

4 DCRA noted that critics of the KGB annexation proposal had claimed that the
5 lapse of time between the KGB's incorporation and the filing of the petition (35 years) should
6 result in the KGB having lost the opportunity to expand its boundaries or in the LBC applying a
7 heightened burden of proof. DCRA responded by stating that: "flexibility is a hallmark of
8 Alaska's local government structure."³⁷ This includes flexibility with respect to boundaries.³⁸

9 DCRA noted that:
10

11 "In broad terms, borough boundaries are principally changed for two reasons.
12 The first is that social, cultural, economic, and other interests have evolved in
13 some significant fashion since³⁹ the boundaries were established. . . manner. . .

14 The second principal reason for borough boundary changes is that there is an
15 opportunity to increase the extent to which existing boundaries of a borough can
16 be brought into greater conformity with the standards for borough incorporation
17 and constitutional principles for boroughs. In a number of instances, initial
18 borough boundaries may have been deemed 'acceptable', but were not necessarily
19 ideal. Variance between formal and ideal boundaries . . . is reflected in the fact
20 that five of the existing sixteen organized boroughs currently have model
21 boundaries encompassing territory within the unorganized borough."⁴⁰

22 ³⁶ R. 1057. DCRA's analysis of this standard is limited to 1 ½ pages.

23 ³⁷ R. 1057. DCRA cited Article X, § 12 and excerpts from the State Constitutional Convention.
(R. 1057-59).

24 ³⁸ R. 1058.

25 ³⁹ DCRA discussed the situation in which the area including and surrounding the new Red Dog
mine was detached from the North Slope Borough on the condition it be included in an organized
borough to be formed in the Northwest Arctic.

⁴⁰ R. 1059.

1 DCRA noted that the LBC's efforts to set model borough boundaries focused on
2 the unorganized borough and "may not fully reflect variances between current and ideal
3 boundaries of all *existing* boroughs."⁴¹ And that:

4 "Several of the borough boundary changes in the past have, at least partially, been
5 undertaken on the basis that they enhance the degree to which borough boundary
6 standards are satisfied. One example, in particular, is remarkably similar in
character to the pending KGB annexation proposal.

7 In January 1974 the Haines Borough petitioned the LBC for the annexation of
8 approximately 420 square miles. The area sought for annexation was
9 uninhabited. Nearly all of land in the territory . . . was part of [the] Tongass
National Forest. The only significant development in the territory was the
cannery at Excursion Inlet. . .

10 In its Report . . . DCRA concluded that the . . . proposal failed to meet applicable
11 standards. . . ⁴² The LBC, however, disagreed with DCRA's recommendation.
The Commission found:

12 'That there is a likelihood that future growth and development of
13 the Haines Borough will occur within the territory and annexation .
14 . . will enable the Borough to assist in meeting burdens and
15 receiving benefits of that development, notwithstanding the fact
16 that the Haines Borough as a borough of the third class is
17 precluded from formally engaging in the function of planning,
18 platting, and zoning. Additionally, the Commission finds that the
19 anticipated economic growth in the territory, particularly as it
relates to the forest and fishing industries, is inextricably tied to the
economy of the Haines Borough making it necessary that that
municipality be involved in the planning and control of future
economic growth in the territory.'

20 . . . In 1975 the Alaska Legislature concurred with the LBC's decision . . . the
21 annexation took effect March 7, 1975. As a result of the annexation, the Haines
Borough gained more than \$4 million in revenues.⁴³

22
23
24 ⁴¹ R. 1060 (italics in original). The example of the formation of the Matanuska-Susitna Borough
was discussed.

25 ⁴² R. 1062-63.

⁴³ R. 1062-64 (quoting the May 5, 1974 Decisional Statement).

1 DCRA provided a Table which showed that the KGB boundaries have never been
2 altered but the boundaries of two-thirds of the other organized boroughs have been changed at
3 least once. The Table (Table 3) shows that the Anchorage Borough boundaries have been
4 changed three times, the Fairbanks Borough boundaries three times, the Haines Borough
5 boundaries twice, the Kenai Peninsula Borough boundaries three times, the Kodiak Island
6 Borough boundaries twice, and the Matanuska-Susitna Borough boundaries three times.⁴⁴
7

8 DCRA noted that the pertinent constitutional principles are self-executing, but the
9 LBC has also been charged statutorily to develop standards for borough annexation. The
10 purpose is three-fold: the standards expose the LBC's decision-making to public view; standards
11 provide guidance for local governments contemplating annexations; and, standards objectify the
12 pertinent criteria for decision-making.⁴⁵

13 DCRA concluded that the fact that the KGB has waited 35 years to attempt
14 annexation does not place a greater burden on the KGB.⁴⁶

15 DCRA next considered whether the KGB proposal satisfied the requirements of
16 Article X, § 3 of the Alaska Constitution. Article X, § 3 provided that:

17 The entire State shall be divided into boroughs, organized or unorganized. They
18 shall be established in a manner and according to standards provided by law. The
19 standards shall include population, geography, economy, transportation, and other
20 factors. Each borough shall embrace an area and population with common
21 interests to the maximum degree possible. The legislature shall classify boroughs
22 and prescribe their powers and functions. Methods by which boroughs may be
23 organized, incorporated, merged, consolidated, reclassified, or dissolved shall be
24 prescribed by law.

24 ⁴⁴ R. 1064.

25 ⁴⁵ R. 1065 (citing *Port Valdez Co., Inc. v. City of Valdez*, 522 P.2d 1147, 1155 (Alaska 1974)).

⁴⁶ R. 1066.

1 DCRA first discussed the unorganized borough. The DCRA noted that the
2 unorganized borough was established by the Legislature in 1961 and that:

3 “While the action of the 1961 Legislature may meet the letter of the law requiring
4 the state to be ‘divided’ into boroughs, **it failed to closely conform to a related**
5 **provision of the constitution.** By creating a single borough comprised of the
6 entire state, the 1961 Legislature neglected the mandate in Article X, §3 that each
7 borough embrace an area and population with common interests to the maximum
8 degree possible. . . . Today, the unorganized borough contains an estimated
9 374,843 square miles – 57% of Alaska. It ranges in a *non-contiguous* fashion
10 from the southernmost tip of Alaska to an approximately 150 miles above the
11 Arctic Circle. . . In short, the unorganized borough is comprised of a vast area
12 with *extremely* diverse interests. This is particularly evident from the fact that the
13 unorganized borough spans so many house election districts, census districts,
14 regional education attendance areas, regional Native corporations, and model
15 borough boundaries . . .”⁴⁷

16 DCRA observed that the LBC has taken the position that Article X, § 3 applies to
17 organized boroughs and the unorganized borough. So the LBC compares the ties between the
18 petitioner and the area proposed for annexation and not the ties between the area and adjacent
19 areas of the unorganized borough. In this case: “[e]ven if the LBC were willing . . . to compare
20 the ties of the territory in question to a select adjacent portion of the unorganized borough, there
21 is no question that the territory has more in common with the KGB.”⁴⁸

22 DCRA concluded:

23 “Given the extreme diversity of the unorganized borough, coupled with the
24 proximity of the territory proposed for annexation to the KGB, the territory
25 unquestionably has stronger ties to the KGB than it does to the rest of the
unorganized borough. . . However, while annexation would better satisfy the
constitutional mandate for KGB boundaries encompassing maximum common
interests than is the case currently, DCRA policy makers again conclude that
the constitutional principle at issue should be given diminished weight in this

23 ⁴⁷ R. 1067-69 (italics in original).

24 ⁴⁸ R. 1069. DCRA then considered election district boundaries, the 1963 Mandatory Borough
25 Act, the KGB’s 1963 incorporation, census area boundaries, the KGB’s relationship with the
Cleveland Peninsula, the USFS Ketchikan Ranger District, the Misty Fjords National Monument,
the Tongass National Forest, and the KGB’s model borough boundaries. (R. 1069-79).

1 instance because of the Petitioners' decision to exclude Hyder and Meyers Chuck
2 from its annexation proposal. It is incongruous to advocate annexation on the
3 grounds of common interests with largely unpopulated territory, but then exclude
4 the only significant settlements in the KGB model boundaries. It is also stressed
5 that the Hyder exclusion would create an enclave within the KGB. The
6 Commission has a formal policy to avoid enclaves within boroughs as reflected in
7 19 AAC 10.200(2)."⁴⁹

8 DCRA next considered whether the KGB proposal satisfied the requirements of
9 19 AAC 10.160(b). 19 AAC 10.160(b) provided:

10 The communications media and the land, water, and air transportation facilities
11 throughout the proposed borough or unified municipality boundaries must allow
12 for the level of communications and exchange necessary to develop integrated
13 borough or unified municipality government. In this regard, the commission will,
14 in its discretion, consider relevant factors including:

- 15 (1) transportation schedules and costs;
- 16 (2) geographical and climatic impediments;
- 17 (3) telephonic and teleconferencing facilities; and
- 18 (4) electronic media for use by the public.

19 DCRA noted that in the borough incorporation context, the Alaska Supreme Court
20 in *Mobil Oil Corp.* had found that a comparable requirement had been satisfied even though the
21 new borough would encompass some 97,121 square miles but have only 3,384 inhabitants.⁵⁰

22 The DCRA then considered the transportation links between Ketchikan and Hyder and between
23 Ketchikan and Meyers Chuck, even though neither was in the area proposed for annexation.⁵¹

24 DCRA concluded that:

25 "The territory proposed for annexation is sparsely populated. Like all parts of
Southeast Alaska except Haines, Skagway, and Hyder, marine and air
transportation provide the only means of access to the territory proposed for

⁴⁹ R. 1079. Mr. Bockhorst discussed said ties at R. 1068-79.

⁵⁰ R. 1081-82.

⁵¹ R. 1082-83.

1 annexation. Given the sparse population, communication and transportation
2 facilities are also understandably limited. Such circumstances are typical of many
undeveloped and remote portions of existing boroughs.

3 Based on the Supreme Court ruling concerning the transportation and
4 communications standard relating to the 1973 incorporation of the North Slope
5 Borough, it can be reasonably concluded that the standard is met in this case. The
6 significant technological advances and improvements to transportation and
communications infrastructure in Alaska since 1972 suggest that all regions of
Alaska satisfy this standard.⁵²

7 DCRA next considered whether the KGB proposal satisfied the requirements of

8 19 AAC 10.170. 19 AAC 10.170 provided:

9 The population of the proposed borough or unified municipality after annexation
10 must be sufficiently large and stable to support the resulting borough or unified
11 municipal government. In this regard, the commission will, in its discretion,
consider relevant factors, including

- 12 (1) total census enumerations;
- 13 (2) durations of residency;
- 14 (3) historical population patterns;
- 15 (4) seasonal population changes; and
- 16 (5) age distributions.

17 DCRA analyzed: the KGB's current population; the population (25) in the area
18 proposed for annexation; and, the population densities of the existing organized boroughs.⁵³ The
19 DCRA concluded that: the KGB has a relatively "sizeable population"; its boundaries are
20 relatively small; it has the second highest population density among the organized boroughs; its
21 population is reasonably stable; the population in the proposed area is "minimal"; and that
22 circumstance and the land use characteristics of the area "mean that there will be relatively little
23

24
25 ⁵² R. 1083.

⁵³ R. 1084-86.

1 demand for borough services in the territory proposed for annexation” so “[i]t is reasonable to
2 conclude . . . that the size and stability of the population within the proposed new boundaries of
3 the KGB is sufficient to support the proposed expanded borough.”⁵⁴

4 DCRA next considered whether the KGB proposal satisfied the requirements of
5 19 AAC 10.180. 19 AAC 10.180 provided:

6 The economy within the proposed borough or unified municipality must include
7 the human and financial resources necessary to provide essential borough services
8 or municipal services on an efficient, cost-effective level. In this regard, the
9 commission will, in its discretion, consider relevant factors, including the

- 10 (1) reasonably anticipated functions of the borough . . .
- 11 (2) reasonably anticipated new expenses of the borough . . .
- 12 (3) actual income and reasonably anticipated ability of the borough . . . to
13 generate and collect local revenue and income from the new territory;
- 14 (4) feasibility and plausibility of the anticipated operating budget of the
15 borough . . . through the third year of operation under annexation;
- 16 (5) economic base of the borough after annexation;
- 17 (6) property valuations in the territory proposed for annexation;
- 18 (7) land use in the territory proposed for annexation;
- 19 (8) existing and reasonably anticipated industrial, commercial, and
20 resource development in the borough . . .
- 21 (9) personal income of residents in the territory to be annexed and in the
22 borough . . . and
- 23 (10) the need for and availability of employable skilled and unskilled
24 people.

25 DCRA analyzed the above factors.⁵⁵ DCRA concluded that the requirements of
19 AAC 10.180 had been met.⁵⁶

⁵⁴ R. 1086.

1 DCRA next considered whether the KGB proposal satisfied the requirements of
2 19 AAC 10.190(a). 19 AAC 10.190(a) provided:

3 The proposed boundaries of the borough or unified municipality must conform
4 generally to natural geography, and must include all land and water necessary to
5 provide the full development of essential borough or municipal services on an
6 efficient, cost-effective level. In this regard, the commission will, in its
7 discretion, consider relevant factors, including

- 8 (1) land use and ownership patterns;
- 9 (2) ethnicity and cultures;
- 10 (3) population density patterns;
- 11 (4) existing and reasonably anticipated transportation patterns and
12 facilities;
- 13 (5) natural geographic features and environmental factors; and
- 14 (6) extraterritorial powers of boroughs.

15 DCRA examined the boundaries of the proposed KGB. DCRA noted that the
16 boundaries around Hyder follow the thread of the Salmon River, and there had been concerns
17 expressed that this area should be managed as a unit with another area, and not split into two
18 areas. DCRA again looked to the *Mobil Oil Corp.* decision, noting that the Alaska Supreme
19 Court had approved of the inclusion of the 23 million acre Naval Petroleum Reserve No. 4,
20 noting that the area was important to the subsistence lifestyle of the area residents which made it
21 “desirable for integrated local government so that it might fall within the new borough’s
22 planning and zoning power.”⁵⁷ DCRA concluded that:

23 “. . . Petitioner’s proposed boundaries conform generally with natural geography.
24 However, as is the case with other standards and principles, the satisfaction of the

25 ⁵⁵ R. 1087-92.

⁵⁶ R. 1092.

⁵⁷ R. 1094 (quoting *Mobil Oil Corp.* at p. 99).

1 geography standard in this instance is diminished by the exclusion of Hyder and
2 Meyers Chuck. Notwithstanding, DCRA concludes that the proposed post-
3 annexation boundaries of the KGB include all areas necessary to provide the full
4 development of essential borough services on an efficient, cost-effective level.”⁵⁸

4 DCRA next considered whether the KGB proposal satisfied the requirements of
5 19 AAC 10.190(b). 19 AAC 10.190(b) established a presumption that territory not contiguous to
6 the petitioning borough “does not meet the minimal standards required for annexation.” DCRA
7 found that the KGB proposal satisfied this requirement.⁵⁹

8 DCRA next considered whether the KGB proposal satisfied the requirements of
9 19 AAC 10.190(c). 19 AAC 10.190(c) basically created a presumption that the LBC would not
10 approve an annexation petition if the boundaries of the new borough extended beyond the
11 borough’s model boundaries set forth in the 1992 Interim Report on Model Borough Boundaries.
12 DCRA noted that the area the KGB proposed to annex did not extend beyond its model borough
13 boundaries and also that it did not extend to its model boundaries – excluding Meyers Chuck and
14 Hyder. DCRA also noted that four other organized boroughs have boundaries that do not extend
15 to their model boundaries, and that “[t]here have been instances where the LBC has approved
16 petitions that do not fully extend a borough’s corporate boundaries to its model boundaries.”⁶⁰

17
18 DCRA apparently concluded that this requirement had been satisfied.⁶¹

19 DCRA next considered whether the KGB proposal satisfied the requirements of
20 19 AAC 10.190(d). 19 AAC 10.190(d) provided that: “The commission will consult with the
21

22 ⁵⁸ R. 1095. DCRA did not discuss the exclusion of Hyder or Meyers Chuck in this section.

23 ⁵⁹ R. 1095.

24 ⁶⁰ (R. 1096) (citing the 1990 incorporation of the Denali Borough and the 1994 annexation to the
25 City and Borough of Juneau).

⁶¹ R. 1096. DCRA’s “Conclusion” simply reiterates that the proposal did not include areas
outside of the KGB’s model boundaries and it did not include areas within its model boundaries
– Meyers Chuck and Hyder.

1 Department of Education and Early Development in the process of balancing all standards for
2 annexation to a borough . . .” DCRA advised that it would consult with the Department of
3 Education and Early Development (DEED) during the comment period.⁶²

4 DRCA next considered whether the KGB’s proposal satisfied the requirements of
5 19 AAC 10.200. 19 AAC 10.200 provided:

6 Territory that meets the annexation standards specified in 19 AAC 10.160 – 19
7 AAC 10.190 may be annexed to a borough or unified municipality by the
8 legislative review process if the commission also determines that annexation will
9 serve the balanced best interests of the state, the territory to be annexed, and all
10 political subdivisions affected by the annexation. In this regard, the commission
11 will, in its discretion, consider relevant factors, including whether the

12 (1) territory manifests a reasonable need for borough or municipal
13 government that be met most efficiently and effectively by the annexing
14 borough . . .

15 (2) territory is an enclave surrounded by the annexing borough . . .

16 (3) health, safety, or general welfare of borough . . . residents is or will be
17 endangered by conditions existing or potentially developing in the
18 territory, and annexation will enable the borough . . . to regulate or control
19 the detrimental effect of those conditions;

20 (4) extension of borough . . . services or facilities into the territory is
21 necessary to enable the borough to provide adequate services to borough .
22 . . residents, and it is impossible or impractical for the borough . . . to
23 extend the facilities or services unless the territory is within the boundaries
24 of the borough . . .

25 (5) residents or property owners within the territory receive, or may be
reasonably expected to receive, directly or indirectly, the benefit of
borough . . . government without commensurate tax contributions, whether
these benefits are rendered or received inside or outside the territory, and
not practical or equitable alternative method is available to offset the cost
of providing these benefits;

⁶² R. 1097.

1 (6) annexation of the territory will enable the borough . . . to plan and
2 control reasonably anticipated growth or development in the territory that
3 otherwise may adversely impact the borough . . . and

4 (7) territory is so sparsely inhabited or so extensively inhabited by persons
5 who are not landowners, that a local election would not adequately
6 represent the interests of the majority of the landowners.

7 DCRA noted that: "This standard, in particular, provides the LBC with broad
8 flexibility in judging the merits of annexation proposals to ensure that they represent sound
9 public policy from a statewide perspective."⁶³ And that:

10 "DCRA has identified four broad interests of the State of Alaska with respect to
11 the establishment of boroughs and the adjustment of their boundaries.
12 Specifically, it is in the State's interest to:

- 13 1. Support the Constitutional policy encouraging the **extension** of organized
14 borough government;
- 15 2. comply with the Constitutional mandate that each borough embrace an
16 area and population with common interests to the maximum degree
17 possible;
- 18 3. promote financially strong political subdivisions; and
- 19 4. consider the financial impacts as to the State of Alaska.

20 DCRA has identified two principle interests of the territory proposed for
21 annexation, specifically it is in the interests of residents and property owners to:

- 22 1. receive adequate governmental services; and,
- 23 2. to advance their own direct financial interests.

24 DCRA has identified one principal interest related to the pending annexation
25 proposal on the part of the 19 political subdivisions in the Southeast Alaska
portion of the unorganized borough. Those political subdivisions have a direct
financial interest in the matter.

Lastly, DCRA has identified three principal interests of the KGB . . . Specifically:

⁶³ R. 1098.

- 1 1. The KGB has direct financial interests relating to the annexation proposal;
- 2 2. The KGB like other organized boroughs, benefits from the extension of
3 organized borough government to unorganized areas (such promotes
4 uniformity with respect to rights, duties, and obligations for the delivery of
5 local services); and
- 6 3. the KGB has an interest in complying with the Constitutional mandate that
7 it embrace an area and population with common interests to the maximum
8 degree possible.”⁶⁴

9 DCRA noted, with respect to the constitutional policy encouraging the extension
10 of organized borough government, that this principle does not mean the LBC approves every
11 annexation proposal. DCRA provided the LBC’s 3-2 vote to reject a 1989 Fairbanks North Star
12 Borough annexation petition as one of the “rare” instances where such rejection has occurred.⁶⁵

13 DCRA also noted that:

14 **“The ultimate outcome with respect to the constitutional principle at issue
15 would be the inclusion of all Alaska in organized boroughs.** However, such is
16 far from being achieved at this point. Appendix E . . . summarizes the limited
17 success on the part of the executive and legislative branches . . . in implementing
18 the borough concept. . . .

19 Appendix E documents the hope by the founders of the State of Alaska that the
20 executive and legislative branches of State government would provide *incentives*
21 for the extension of organized boroughs. However, this has not occurred. In fact,
22 as is shown in Appendix E, significant *disincentives* to the extension of borough
23 government have emerged. Such disincentives have long been recognized by the
24 LBC . . . The extent of such disincentives is growing . . .

25 As noted in . . . of this report, the LBC stated recently that: ‘as a matter of public
policy, **great importance** should be placed on the constitutional provision calling
for maximum local self-government.’ While DCRA policy makers concur with
that position generally, they conclude that this particular annexation proposal
serves the constitutional principle at issue in a largely superficial manner. The
area proposed for annexation . . . is largely uninhabited, undeveloped, and almost
exclusively owned by the federal government. Much of the territory is in national
monument status. As such the territory does not manifest a reasonable need for

⁶⁴ R. 1098-99.

⁶⁵ R. 1099-1100.

1 borough government at this time.” So the transfer of services from the State to
2 the KGB would be insignificant. “Given these circumstances, DCRA policy
3 makers conclude that the constitutional provision at issue should be given little
4 consideration in this particular instance. Further, DCRA policy makers
5 consider the KGB’s decision to exclude Hyder and Meyers Chuck . . . to be
6 irreconcilable with its expressed support for the constitutional principle at
7 issue.”⁶⁶

8 DCRA noted, with respect to the constitutional policy under Article X, § 3 that
9 boroughs embrace natural regions, that:

10 “. . . DCRA takes the view that it is generally in the best interests of the State and
11 the KGB to support the constitutional provision calling for boroughs to embrace
12 natural regions. . . DCRA concludes that the area proposed for annexation has
13 more in common with the KGB than with other boroughs (or even selected parts
14 of the unorganized borough).

15 While annexation would better serve the constitutional principle at issue than
16 is currently the case, “DCRA policy makers believe that this should also be
17 given minimal consideration in this instance. No aspect of the annexation
18 proposal suggests an immediate need for the proposed boundary change. Further,
19 the decision to exclude Hyder and Meyers Chuck . . . diminishes the extent to
20 which this principle is served. It is incompatible to argue annexation on the
21 ground of common interests with largely unpopulated territory, but then exclude
22 the only significant settlements within the KGB’s model boundaries. As noted
23 earlier, the Hyder exclusion would create an enclave within the KGB.”⁶⁷

24 DCRA then addressed the NFR situation. DCRA noted that:

25 “A great deal of the interest in the KGB annexation proposal centers on the
26 impact that annexation would have on funding for local service providers. As
27 noted . . . anticipated financial gains by the KGB were characterized by a former
28 KGB official as the driving reason for the annexation proposal.

29 On the other hand, anticipated financial losses by local governmental and quasi-
30 governmental service providers seem to be the principal reason for opposition on
31 their part to the KGB annexation proposal. For example . . . State Senator Jerry

32
33 ⁶⁶ R. 1099-1101.

34 ⁶⁷ R. 1101-02. DCRA quoted from that portion of the Alaska Supreme Court’s decision in
35 *Petitioners for Incorporation of City and Borough of Yakutat v. Local Boundary Commission*,
900 P.2d 721, 725 (Alaska 1995) in which the Court stated that the “LBC is required to
determine whether the boundaries set out in the petition embrace an area and population with
common interests to the maximum degree possible.”

1 Mackie was quoted as saying that the KGB annexation proposal is a 'land grab'
2 for financial gain by the KGB at the expense of other communities in Southeast
3 Alaska that are worse off than the KGB.

4 The views attributed to Senator Mackie seem to be shared by many critics of the
5 annexation proposal. As such, it is incumbent upon DCRA to carefully and
6 objectively examine those views in the context of the instant legal standard.

7 In brief, DCRA concurs to some extent with all of the points attributed to Senator
8 Mackie. Specifically, DCRA believes that:

- 9 - the KGB annexation proposal is largely a 'land grab';
- 10 - annexation will bring financial gain to the KGB;
- 11 - annexation will result in financial loss to other political
12 subdivisions in Southeast Alaska;
- 13 - some of those who will experience financial losses may be less
14 able to cope with those losses than would the KGB.⁶⁸

15 DCRA then explored each of the above points.

16 DCRA noted, with respect to the "land grab" point, that:

17 "As noted above, DCRA agrees with the characterization of the KGB annexation
18 as a 'land grab' in the sense that it seeks to add 5,524 square miles of largely
19 unpopulated territory in which there is little or no need for municipal services and
20 for which the KGB will receive significant revenues. However, it is likely that
21 aspects of every borough incorporation and virtually every borough annexation of
22 substance that has ever occurred in Alaska could be similarly characterized. As
23 such, 'land grabs' by organized boroughs are "not necessarily improper so long as
24 they meet the legal standards and serve the applicable constitutional principles."

25 "The controlling principles have been addressed at length previously. . . Article
X, § 1 encourages the extension of borough government, either through
incorporation or annexation. DCRA policy makers, however, take the view that
the extent to which Article X, § 1 encourages this particular annexation is
diminished by two factors (the character of the territory proposed for annexation
and the exclusion of Hyder and Meyers Chuck).

Further . . . borough boundaries are required by Article X, § 3 . . . to conform to
natural regions based on geographic, social, cultural, and economic
considerations. While the KGB annexation incrementally advances that

⁶⁸ R. 1102-03.

1 provision, DCRA policy makers believe that it does so with significant
2 compromises that should be weighed by the LBC.”⁶⁹

3 DCRA noted that the proposed annexation would result in the KGB receiving
4 some 23.5% more in NFR and PILT funding, with entities in the unorganized borough in
5 Southeast Alaska experiencing a like cumulative decrease. DCRA noted that different entities
6 received different percentages and that the total funding level fluctuates such that it is “difficult
7 to predict future levels of funding with any degree of certainty.”⁷⁰ If the annexation is approved
8 the KGB would gain \$245,452, with that sum being deleted from the total available for
9 distribution in the unorganized borough in Southeast Alaska.⁷¹ The annexation would result in a
10 reallocation of a total of \$45,742 in PILT funds to the KGB. The loss in funding to the State
11 would be partially offset by an increase in the KGB mandatory contribution to education
12 funding.⁷²

13 DCRA noted that:

14 “The KGB takes the position that the adverse financial impacts on adjacent
15 communities which would result from annexation should not be given significant
16 consideration by the LBC. . .

17 DCRA policy makers disagree with the KGB’s views . . . It is the position of
18 DCRA policy makers that the adverse impacts on other communities are vital
19 considerations in judging the instant standard. The view of DCRA policy
20 makers is such that financial implications should be considered in every instance.
21 In cases where the prospective larger local government is not taking on additional
22 responsibilities that are commensurate with the increased level of funding (as is
23 the case with the KGB), those effects become critical, perhaps controlling in the
24 outcome of the proposal. However, such would not necessarily be the case where

25 ⁶⁹ R. 1103-04.

⁷⁰ R. 1105.

⁷¹ DCRA presented a table that showed the financial impact on each of the entities in the unorganized borough in Southeast Alaska. The funding losses range from \$148 (City of Port Alexander) to \$40,770 (City of Petersburg). (R. 1106).

⁷² R. 1105-07.

1 additional responsibilities were commensurate with increased revenues or in cases
2 where overriding public policy considerations come into play . . . ”⁷³

3 DCRA then considered the relative financial capacity point by comparing the
4 relative “affluence” of the KGB with the 20 affected service providers in the unorganized
5 borough in Southeast Alaska. DCRA concluded that the DCRA is relatively more affluent.⁷⁴
6 But DCRA also found that the KGB municipalities have substantially higher taxes than all of the
7 20 entities except the City of Skagway, in part because “more is demanded by the State with
8 respect to support for its school district.”⁷⁵

9 DCRA concluded that:

10 “Article X, § 1 of Alaska’s constitution encourages the extension of borough
11 government, either through incorporation or annexation. Further, Article X, § 3
12 of Alaska’s constitution requires boroughs to conform to natural regions based on
geographic, social, cultural, and economic considerations.

13 However, **DCRA policy makers** take the position that the nature of the territory
14 proposed for annexation by the KGB (largely undeveloped and uninhabited, with
15 little demand for local government services) diminishes the significance of those
16 principles in judging the merits of the KGB annexation proposal. The KGB
annexation proposal also suffers in the context of the constitutional principles
17 from the fact that the KGB excluded Hyder and Meyers Chuck from its
annexation proposal.

18 In the view of **DCRA policy makers**, significant adverse financial impacts on
19 communities in the unorganized borough are a more important consideration
20 than the constitutional principles in this particular instance. Those adverse
21 financial impacts are viewed by DCRA policy makers as an overriding
22 consideration which compels the conclusion that annexation is not in the balanced
23 best interests of the State, the territory proposed for annexation, the KGB, and the
24 other affected political subdivisions.”⁷⁶

24 ⁷³ R. 1108-09.

25 ⁷⁴ R. 1109-1115.

⁷⁵ R. 1116.

⁷⁶ R. 1117 (italics in original).

1 DCRA next considered whether the KGB's proposed annexation would violate
2 the federal Voting Rights Act and whether the KGB plan met the requirements of 19 AAC
3 10.900. DCRA concluded that it would not and it did.⁷⁷

4 DCRA next considered whether the KGB had submitted a suitable transition plan
5 as required by 19 AAC 10.900. DCRA concluded that the KGB had done so.⁷⁸

6 DCRA's "Summary and Recommendation" section included:

7
8 "Generally, annexation or incorporation of unorganized territory is encouraged
9 by Article, § 1 of Alaska's Constitution. The LBC recently stated that, 'as a
10 matter of public policy, great importance' should be placed on that constitutional
11 principle. However, DCRA policy makers believe that the KGB annexation
12 proposal offers little foundation on which to conclude that it serves the
13 constitutional principle in any significant manner. Specifically, the area proposed
14 for annexation is largely undeveloped and uninhabited. Also, it is nearly
15 exclusively owned by the federal government. Much of the territory proposed for
16 annexation is classified as a national monument. As such, the territory in question
17 exhibits little need for local government services. Further, KGB officials
18 purposefully excluded developed and inhabited areas from the annexation
19 proposal even though those areas lie within the model boundaries of the KGB.

20 The KGB annexation does not promote the constitutional policy calling for
21 minimum numbers of local government units. Such is not required of
22 annexations, however, the prospects of annexation are enhanced whenever such
23 circumstances are present. . .

24 DCRA concludes that the territory proposed for annexation has more in common
25 with the KGB than with the remainder of the unorganized borough, or even a
selected portion of the remainder of the unorganized borough. As such,
annexation would serve the mandate of Article X, § 3 of Alaska's constitution
calling for each borough to embrace an area and population with common
interests to the maximum degree possible. However, DCRA policy makers
conclude that the KGB has acted to seriously diminish the significance of this
principle in this particular case by excluding Hyder and Meyers Chuck from its
annexation proposal.

It can reasonably be concluded that there are adequate communication and
transportation facilities throughout the proposed new boundaries of the KGB as

⁷⁷ R. 1118.

⁷⁸ R. 1119.

1 required by 19 AAC 10.160(b). This standard for annexation is relatively easy to
2 meet and there are probably no areas of Alaska where communication and
3 transportation facilities are so lacking as to preclude the successful operation of
borough government. . .⁷⁹

4 The annexation proposal fails to serve the balanced best interests of the State of
5 Alaska, the territory proposed for annexation, and affected political subdivisions
6 as required by 19 AAC 10.200. The overriding consideration which led **DCRA**
7 **policy makers** to this conclusion is the substantial adverse financial impacts that
8 annexation would have on 20 entities in the adjacent portions of the unorganized
9 borough, coupled with the fact that the KGB would gain significant revenues
10 without taking on a commensurate level of additional responsibilities. . .⁸⁰

11 In accordance with the foregoing, DCRA recommends that the petition for
12 annexation of approximately 5,524 square miles to the Ketchikan Gateway
13 Borough be denied.”⁸¹

14 There is nothing in DCRA’s Preliminary Report which reflects that DCRA (Mr.
15 Bockhorst or the “policy makers”) consulted with the Alaska Attorney General’s Office
16 concerning DCRA’s legal interpretations and conclusions.

17 Appendix A examines the concept of borough government, from territorial days
18 through the State Constitutional Convention, and after statehood, and the history of the KGB.⁸²

19 DCRA noted that:

20 “In 1961, the legislature adopted the initial laws implementing the borough
21 concept. . .

22 ⁷⁹ DCRA reiterated its findings that the KGB proposal met the requirements of 19 AAC 10.170,
23 19 AAC 10.180, 19 ACC 10.190(a) (though it would be satisfied to a greater degree if Hyder and
24 Meyers Chuck were included), 19 AAC 10.190(b), 19 AAC 10.190(c), and that the Department
25 of Education and Early Development (DEED) would be consulted per 19 AAC 10.190(d). (R.
1121).

⁸⁰ DCRA noted that the KGB would receive an estimated additional \$347,842 annually (based
on current NFR, PILT funding) while its costs would increase only some \$62,000 per year, while
the twenty affected entities would experience a total decrease of an estimated \$364,011 (based
on current NFR, PILT funding). (R. 1121). DRCA also reiterated its findings that the annexation
satisfied the requirements of 19 AAC 10.900 and did not violate the federal Voting Rights Act.
(R. 1121-22).

⁸¹ R. 1119-22.

⁸² R. 1151-67.

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1 Additionally, the 1961 Borough Act implemented the constitutional mandate that,
2 'The entire State shall be divided into boroughs, organized and unorganized.' Art.
3 X, § 3 . . . However, the legislature did so by 'dividing' Alaska in to one
unorganized borough. . .

4 The decision of the 1961 legislature . . . was arguably made to preserve flexibility
5 with respect to future boundary determinations. . . however, the legislature
6 sacrificed the opportunity to implement comprehensive statewide policy
7 concerning the size and shape of organized boroughs. The negative effects of the
8 piecemeal approach noted by Representative Rader with respect to the 1951
9 mandatory school district incorporation act, were not institutionalized as well with
respect to boroughs. Further, the division of the entire state into a single borough
also failed to faithfully adhere to the constitutional requirement that each borough
'embrace an area and population with common interests to the maximum degree
possible."⁸³

10 DCRA noted⁸⁴ in Appendix A that: Ketchikan voters petitioned the LBC for
11 formation of the KGB on January 23, 1963; the proposed area encompassed only 75 square
12 miles; five days later the legislature convened, and it enacted a Mandatory Borough law which,
13 in part, mandated a Ketchikan borough (the Annette Island Reserve was excluded); the
14 Ketchikan borough boundaries set forth in the Act included an area 95 times larger than that
15 proposed by the Ketchikan voters; the Act provided that a Ketchikan borough would be
16 established by legislative fiat if one was not formed voluntarily; DCRA's predecessor
17 recommended that the LBC enlarge the proposed KGB boundaries (which did not even include
18 all of Gravina or Revillagigedo Islands), the area within the recommended boundaries was 23
19 times that proposed by the Ketchikan voters; the LBC expanded the boundaries as
20 recommended; but, the LBC concluded that the KGB should be even larger, finding that
21

22
23 ⁸³ R. 1156-57. DCRA included (R. 1157 n. 11) a quote from Victor Fischer in which he noted
24 that the Constitutional delegates intended that boroughs would be regional in character and that
25 this concept has not been implemented, with the first violation occurring with the formation of
the very first organized borough (Bristol Bay), which included only a "tiny part" of the "real
region." He also noted that the LBC had turned its back on the regional borough concept with
the approval of the formation of the Denali Borough.

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1 Ketchikan's trading area was much larger, basically including all of Election District #1 and that
2 the KGB should be "significantly larger."⁸⁵

3 DCRA also noted in Appendix A that:

4 "If anything, the State has regressed in the manner in which the borough concept
5 has been implemented. . . Numerous disincentives to borough formation and
6 borough annexation exist, including the following:

7 Areas of the unorganized borough outside home rule and first class cities
8 have no obligation to provide financial support for their schools. Borough
9 formation or annexation results in the imposition of the requirement for
10 local contributions in support of schools amounting to the equivalent of a
11 4-mill property tax or 45 % of basic need, whichever is less.

12 The delivery of education services in the unorganized borough is
13 fractionalized . . . Consequently, 70% of Alaska's school districts are in
14 the unorganized borough. Yet, the unorganized borough accounts for less
15 than 14% of the state's population. . .

16 City School Districts in the unorganized borough receive special single
17 site funding, Borough formation would typically eliminate [it] . . .

18 Borough formation would mean the loss of eligibility on the part of certain
19 REAA's and cities for National Forest Receipts.

20 Borough formation would result in the loss of eligibility on the part of
21 cities for federal payments in lieu of taxes . . ."⁸⁶

22 ⁸⁴ R. 1159-63.

23 ⁸⁵ R. 1163.

24 ⁸⁶ R. 1165-66. Several other "disincentives" are listed. DCRA noted that the Alaska Supreme
25 Court had decided that requiring the property owners in organized boroughs to fund a portion of
the education funding in the borough but not requiring the same of property owners in a REAA
to fund a portion of the REAA does not violate the borough property owners' equal protection
rights. *See, Matanuska-Susitna Borough School District v. State*, 931 P.2d 391, 398 (Alaska
1997). DCRA noted that the Supreme Court had basically left such policy matters to the
legislature and that: "It is amply evident that public policy makers in Alaska – both as a territory
and a state – have struggled over issues of equity and fairness in the delivery of public services
with limited success for at least the past five decades." (R. 1167). DCRA noted that Alaska is
the only State that has an "unorganized" area.

1 The KGB Assembly met on October 5, 1998 The meeting minutes⁸⁷ recount
2 that: KGB Manager Georgiana Zimmerle informed the Assembly that the DCRA had
3 recommended that the LBC deny the KGB annexation petition; the KGB attorney recognized
4 several areas to which they could respond; Assembly member Jim Elkins expressed his
5 displeasure with the process; and, the Manager advised that the LBC had scheduled a
6 teleconference for October 9, 1998 to consider potential conflicts of interest among its members,
7 and that the LBC hearing would be scheduled in December. The copy in the record reflects that
8 Mr. Rolfzen faxed a copy of the minutes to Mr. Bockhorst. There is no fax date.

9
10 KGB Manager Zimmerle sent a letter to the LBC staff on October 21, 1998 in
11 which she commented on the Preliminary Report.⁸⁸ She stated that: the only basis for the DCRA
12 recommendation was the reduction in size of the unorganized borough; this is a policy shift from
13 the model boundary concept; the use of inflammatory language such as “land grab” is based on
14 information from outside the KGB’s petition and the emphasis placed on it “raises questions as
15 to the impartiality of the DCRA regarding this petition”; the financial impacts considered by
16 DCRA should not be part of the constitutional analysis; the entities in the unorganized borough
17 would still receive more per capita National Forest Receipts (NFR) revenues than the KGB; and,
18 “[i]f this is to represent the new official policy of the [LBC], it is likely that future borough
19 incorporation or boundary expansion would only be accomplished through legislative mandate.”
20

21 Metlakatla Indian Community (MIC) Mayor Tim Gilmartin’s sent a letter dated
22 October 26, 1998 to Mr. Rolfzen stating MIC’s opposition to the KGB’s Petition.⁸⁹ Mayor
23 Gilmartin claimed the KGB would take some \$1,000,000 in “new money at everyone else’s
24

25 ⁸⁷ R. 1247-49.

⁸⁸ R. 1255-56.

1 expense” and that MIC would lose \$23,000 and the Annette Island School District some
2 \$84,000.

3 Department of Education Commissioner Shirley Holloway sent a letter dated
4 November 4, 1998 letter to Director Poland advising that her Department supports DCRA’s
5 “conclusion to deny the annexation proposal of the Ketchikan Gateway Borough.”⁹⁰

6 DCRA issued it’s Final Report on November 20, 1998. Director Poland stated in
7 his transmittal letter⁹¹ to the LBC that:

8 “DCRA’s final report reaffirms the preliminary recommendation that the petition
9 be denied. The final recommendation . . . is based on three characteristics of the
10 KGB annexation proposal. First, the KGB annexation would cause adverse
11 financial impacts on 20 cities, regional educational attendance areas, and other
12 service providers in the organized borough. In a number of cases, those impacts
13 would be substantial. Second, the annexation proposal skirts Meyers Chuck (3.5
14 square miles encompassing 31 individuals) and Hyder (17.9 square miles
15 encompassing 133 individuals) while seeking to annex 5,524 square miles
16 inhabited by an estimated 25 individuals. More than 95% of the territory . . . is
17 part of the Tongass National Forest. Those circumstances give the appearance
18 that the . . . proposal was designed to enhance revenues and minimize additional
19 expenses. Lastly, Hyder and Meyers Chuck appear to have stronger ties to the
20 KGB than to other boroughs in Alaska (organized or unorganized). If that is
21 indeed the case, the exclusion . . . runs counter to constitutional principles
22 requiring the KGB to encompass an area and population with common interests to
23 the maximum degree possible.”

24 The Final Report is some 40 pages.⁹² DCRA noted at the outset that “policy
25 direction” was provided by Commissioner Irwin, Deputy Commissioner Cotton, and Director
Poland, and that it was written by staff member Mr. Bockhorst. DCRA also noted that the Final

24 ⁸⁹ R. 1253.

25 ⁹⁰ R. 1254.

⁹¹ R. 1185-86.

⁹² R. 1187-1241. The Preliminary Report by contrast is 89 pages exclusive of appendices.

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1 Report is “intended to be read in conjunction with the Department’s preliminary report issued in
2 October 1998.”⁹³

3 DCRA began the substantive portion of the Final Report by repeating the
4 conclusions stated in the Preliminary Report.⁹⁴

5 DCRA then noted that: “State law provides that DCRA’s final report must
6 include ‘due consideration’ of timely written comments addressing the preliminary report and
7 recommendation.”⁹⁵ The authors of the nine comments received are identified.⁹⁶ DCRA then
8 discussed the points raised in the comments.
9

10 DCRA first addressed KGB’s reasons for pursuing the annexation. DCRA noted
11 that the KGB disputed the characterization of its efforts as a “land grab” and that it had been
12 criticized for using such language by Mr. Fischer. DCRA reiterated its conclusion, expressly
13 relying on Mr. Bright’s statement as reported in the newspaper article, that the KGB’s primary
14 motivation was a “land grab” as discussed in the Preliminary Report. “The exclusion of Hyder
15 and Meyers Chuck by the KGB was significant in terms of DCRA’s characterization.” But
16 DCRA qualified the characterization by noting that similar aspects are present in virtually every
17 borough annexation.⁹⁷

18 DCRA next addressed Article X, § 1 of the Alaska Constitution. DCRA stated:

19 “The KGB and DCRA agree that Article X, § 1 promotes the extension of
20 organized borough government. However, there seems to be a significant
21

22 ⁹³ R. 1188.

23 ⁹⁴ R. 1193-95.

24 ⁹⁵ R. 1195.

25 ⁹⁶ The Final Report states that: copies of the Preliminary Report had been sent to more than 80
persons and organizations; the KGB’s comments totaled 346 pages; DCRA had received DEED
Commissioner Holloway’s letter; and, DCRA had provided certain additional information to
Chair Waring in response to his request for the same. (R. 1195).

⁹⁷ R. 1196.

1 difference of interpretation concerning a ruling on the matter by the Alaska
2 Supreme Court.

3 The KGB takes the position that borough annexation standards 'are more than
4 minimally satisfied' by its pending proposal. However, the KGB expresses the
5 view that 'the Alaska Constitution, as interpreted by the Alaska Supreme Court,
6 *requires* that the Local Boundary Commission lean in favor of granting the
7 annexation petition if the factors to be considered are minimally satisfied . . .' In
8 DCRA's view, the Court [*Mobil Oil Corp.*] stated that it would not overturn a
9 judgment of the LBC as long as it (the Court) could independently determine that
10 the applicable standards were at least minimally met. The Court did not say, as
11 the KGB implies, that the LBC is *required* to approve petitions that only
12 marginally satisfy the applicable standards."⁹⁸

13 DCRA next addressed the KGB's claim that there were potentially hundreds of
14 mining prospects in the area proposed for annexation. DCRA's investigation revealed that there
15 was only one major mine prospect (Quartz Hill molybdenum site) but the prospects for its
16 development were uncertain. DCRA acknowledged that there may be numerous relatively small
17 prospects in the area.⁹⁹

18 DCRA next addressed the issues concerning Hyder and Meyers Chuck. DCRA
19 noted first that the KGB claimed it had planned to submit 2 alternative proposals, with and
20 without Hyder and Meyers Chuck, but they were talked out of it by DCRA staff who advised that
21 the LBC would include them if they thought it was in the State's best interests. DCRA staff
22 "vigorously disputes" this assertion. "While the DCRA did advise that the LBC possesses the
23 legal authority to expand the boundaries of the annexation proposal, it never encouraged the
24 KGB to exclude Hyder or Meyer Chuck from its proposal, in fact, it did just the opposite."¹⁰⁰

25 DCRA next noted that the KGB's proposed annexation would create a Hyder
enclave. DCRA quoted related concerns expressed by Mr. Fischer. DCRA noted that the

⁹⁸ R. 1197. (italics in original).

⁹⁹ R. 1197-99.

1 Klukwan enclave was created when the Haines Borough was incorporated in 1968, it remains an
2 enclave, and this has resulted in a REAA headquartered in Angoon providing educational
3 services in Klukwan while the Haines Borough, which provides broader educational services, is
4 only seven miles away by road. DCRA noted that it stressed in the Preliminary Report “that the
5 laws guiding the LBC concerning borough annexation argue against the existence of enclaves
6 within boroughs (19 AAC 10.200(2)).”¹⁰¹

7
8 DCRA next addressed the KGB’s comment that one of its two primary reasons
9 for excluding Meyers Chuck and Hyder was that the residents did not want to be included with
10 the KGB. The DCRA noted that the KGB did not give similar deference to the views of persons
11 within the proposed are – for example the residents of Union Bay. DCRA noted that it:

12 “is not suggesting that local opposition is, in fact, a legitimate basis for denial of a
13 petition.¹⁰² Instead, DCRA maintains that local opposition on the part of Hyder
14 and Meyers Chuck was not a legitimate basis for the exclusion of those
15 communities on the part of the KGB.”¹⁰³

16 DCRA next addressed the other reason given by the KGB for excluding Meyers
17 Chuck and Hyder: the lack of common ties to the KGB, with Meyers Chuck having more in
18 common with Thorne Bay (Prince of Wales Island) and Hyder with Stewart, B.C. The DCRA
19 noted that many residents of Hyder and Meyers Chuck share that view. DCRA found that the
20 KGB does have strong ties to Meyers Chuck as evidenced by the number of commercial

21 ¹⁰⁰ R. 1199.

22 ¹⁰¹ R. 1200.

23 ¹⁰² R. 1201. DCRA noted at footnote 2 that: “The 40-year history of the State of Alaska is
24 replete with examples where municipal boundaries were established or altered in the face of
25 substantial opposition. The Alaska Supreme Court has long held that local boundaries should be
established on the basis of the best interests of the State using objective criteria and not [be]
unduly influenced by local policies.” Citing *Fairview Public Utility District No. One v. City of
Anchorage*, 368 P.2d 540, 543 (Alaska 1962).

¹⁰³ R. 1201-02.

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1 seaplane boardings in Meyers Chuck in 1996 (249), the vast majority of which DRCA assumed
2 were people going to Ketchikan. DCRA also noted that the KGB's statement that it understood
3 all along that there was a significant likelihood that the LBC would add Meyers Chuck and
4 Hyder to the petition contradicts the KGB's "lack of common ties" claim. DRCA also stated:

5 "DCRA recognizes that Hyder's ties to Ketchikan are more attenuated than they
6 are to Stewart, B.C. However, since Hyder is part of Alaska and Stewart is not,
7 the relationship between those two communities is irrelevant in the context of
8 Article X, § 3 of Alaska's Constitution. That constitutional provision . . . *requires*
9 that Hyder be in a borough in Alaska (organized or unorganized) with other areas
10 sharing common interests to the maximum degree possible."

11 The KGB iterated four factors that it considered to be of 'particular importance'
12 in demonstrating the close ties between the existing KGB and the territory
13 proposed for annexation. These were common boundaries for: (1) election
14 districts; (2) recording districts; (3) borough government as mandated by the 1963
15 legislature, and (4) model borough territory. . .

16 DCRA notes that every one of the four considerations . . . applies equally to
17 Meyers Chuck and Hyder."¹⁰⁴

18 The DCRA also noted that:

19 "The KGB was critical of DCRA's preliminary report for not commenting on
20 certain materials it included in its petition as justification for the exclusion of
21 Meyers Chuck and Hyder"¹⁰⁵ . . .

22 DCRA's preliminary report did address, at length, factors which the KGB
23 characterized in its latest comments as being of 'particular importance' . . . other
24 relevant and significant factors not mentioned by the KGB in its latest comments
25 were also examined . . .

26 Still the KGB's concern over the lack of comment . . . concerning the information
27 in Exhibit E of its petition is reasonable. By omitting any discussion of [KGB's]
28 Exhibit E in its preliminary report, DCRA never intended to suggest that there
29 were no common bonds between residents of Meyers Chuck and residents of

30 ¹⁰⁴ R. 1203 (italics and underling in original).

31 ¹⁰⁵ Information on the ties between Meyers Chuck and Thorne Bay and between Hyder and
32 Stewart, B.C. which the KGB believed justified their omission from its petition. The KGB stated
33 that it "went to great lengths to gather this information." (R. 1204). The court notes that the
34 KGB's petition is not in the record.

1 Prince of Wales Island. However, strong ties between Meyers Chuck and
2 Ketchikan also clearly exist.”¹⁰⁶ T

3 DCRA then devoted the next three pages to the ties between the KGB and Meyers
4 Chuck.¹⁰⁷

5 DCRA then turned to the ties between the KGB and Hyder. DCRA stated:

6 “As noted previously, DCRA acknowledges that Hyder’s ties to Ketchikan are
7 more attenuated than they are to Stewart, B.C. Again, however, in the context of
8 setting borough boundaries, those relationships are immaterial. Nonetheless,
9 Exhibit E of the petition and other documents do show certain important
10 relationships between Hyder and Ketchikan.”¹⁰⁸

11 DCRA noted that the KGB’s Exhibit E identified two such “important relationships.” The first is
12 medical care. Hyder is within the Ketchikan General Hospital’s (KGH) service area (KGH had
13 six patients from Hyder in 1995) and Hyder residents rely on EMS services from Ketchikan
14 (though if the weather is bad the EMS take the patients to medical facilities in British Columbia).
15 Second, a Ketchikan economist (Kent Miller) has developed a proposal for a municipally
16 owned/operated day ferry between Ketchikan and Hyder. Mr. Miller noted, in part, that the link
17 would “restore Ketchikan’s historical economic link to the upper Portland Canal and Cassiar
18 areas”. The ferry is included within the KGB’s legislative priorities and is among its
19 recommendations for statewide transportation funding.¹⁰⁹

20 DCRA stated that the KGB had not applied the principle of maximum local self-
21 government consistently. DCRA noted that: the State paid \$140,247 in 1998 to educate Hyder
22 students (students attend school in Stewart, which has a contract with the DEED); Hyder
23 receives state revenue sharing (\$6,225), and Hyder has received \$25,000 annually for the past

24 ¹⁰⁶ R. 1203-04.

25 ¹⁰⁷ R. 1204-07.

¹⁰⁸ R. 1207. The KGB’s 1998 petition is not in the record.

1 several years under the State's capital matching grants program for unincorporated
2 communities.¹¹⁰

3 The KGB had commented that DCRA was pressuring it to amend its petition by
4 adding Meyers Chuck and Hyder. DCRA denied pressuring the KGB.¹¹¹

5 DCRA next addressed issues concerning the financial impact of the proposed
6 annexation. DCRA included a table which showed that the affected communities and entities
7 would suffer reductions between .01% (City of Petersburg) and 3.74% (City of Coffman Cove)
8 in their total operating budgets if the annexation were approved.¹¹²

9 DCRA next addressed whether the fiscal impacts in the unorganized borough
10 should be given overriding consideration. DCRA noted that Mr. Fischer had written, in part,
11 that:

12 "The adverse impact argument is preposterous. If that argument is sustained,
13 DCRA and the LBC should back off from the concept of areawide regional
14 boroughs. . .

15 Figuring the impact . . . on Skagway, which lies in a totally unrelated model
16 borough boundary area, is as irrational as figuring the impact of the calculated
17 reduction of state revenues on Nome or Dillingham. There is no reason why
18 impact on Skagway should be considered when the issue is the establishment of
19 an areawide unit of government under the Alaska constitution. Skagway and the
20 other areas happen to benefit under a federal formula, but that shouldn't affect
21 action under Article X of the constitution.

22 Thus, my conclusion is that adverse fiscal impacts on other entities in the
23 unorganized borough are NOT legitimately or properly an overriding or any kind
24 of appropriate factor in determining whether an otherwise legitimate borough
25 should be created. If the state is concerned about fiscal impacts, the response
26 should be through fiscal policy.'¹¹³

23 ¹⁰⁹ R. 1207-08.

24 ¹¹⁰ R. 1208-09.

25 ¹¹¹ R. 1209.

¹¹² DCRA included this information at the request of Chair Waring. (R. 1212).

¹¹³ R. 1213. Capitalization of "NOT" in original.

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1 And DCRA noted that the Chair had observed that most borough incorporations and annexations
2 “redistribute revenues in favor of incorporating or annexing boroughs”, and that other borough
3 incorporations and annexations in Southeast Alaska would have the same effect, and had asked
4 whether “DCRA policy makers think adverse fiscal side-effects should count against proposed
5 incorporations or annexation in those instances?”¹¹⁴
6

7 DCRA responded that:

8 “DCRA policy makers take the view that the adverse financial implications to
9 the 20 entities serving the unorganized borough are indeed legitimate and
10 important considerations in deciding the merits of the pending annexation. The
11 LBC’s regulations (19 AAC 10.200) specifically require the LBC to weigh the
balanced best interests of the State, *affected political subdivisions*, and the
territory proposed for annexation . . .¹¹⁵

12 And the DCRA noted that its “policy makers” cite the City of Hoonah as an example of the
13 significance of NFR’s in the unorganized borough – Hoonah secured a \$1 million dollar loan to
14 build a needed new gym based on the expectation of receiving future NFR’s and the loss of
15 \$13,038 in annual NFR’s could have a significant impact on the City’s ability to repay the loan.
16 DCRA added that it “of course” recognized that the KGB: “has also incurred substantial debt for
17 school construction in the past and is likely to do so in the future.”¹¹⁶
18

19 DCRA noted that Chair Waring asked it to further address the best interest
20 standard – 19 AAC 10.200. He had noted that there are seven listed factors that the LBC may
21

22 ¹¹⁴ R. 1213.

23 ¹¹⁵ R. 1213. (italics and underling of italicized words in original). DCRA quoted from that
24 portion of its Preliminary Report in which it stated that it was the “view of DCRA policy makers
25 . . . that financial implications should be considered in every instance” and that the consideration
becomes “critical” when the annexing borough is not taking on new obligations commensurate
with the increase in the borough’s funding. (R. 1213).

¹¹⁶ R. 1215.

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1 consider, DCRA had discussed the factors in its reports for the Yakutat and Denali borough
2 annexations, but the preliminary report:

3 “omits any reference to the specific regulatory standards of 19 AAC 10.200.
4 Instead, its entire analysis is based on various other interests identified by DCRA.
5 All well and good, but can staff please assist the Commission by providing
6 additional analysis of the ‘balanced best interests’ standard that addresses the
7 regulatory factors.”¹¹⁷

8 DCRA responded:

9 “The seven factors . . . are illustrative of the types of things that the LBC *may*
10 consider . . . All of those factors may not be relevant to every annexation proposal
11 . . . and there may be other factors not listed that the LBC considers to be relevant.

12 Certain of the seven factors . . . were addressed in . . . the context of other
13 standards . . .”¹¹⁸

14 DCRA then addressed each of the seven factors.

15 With respect to the need for borough government in the territory proposed for
16 annexation, DCRA stated it had noted in its Preliminary Report that there is no immediate need
17 but that may change in the future. DCRA pointed out that the Quartz Hill development may
18 proceed and that there was the proposal for the municipally owned and operated day ferry
19 between Ketchikan and Hyder – with Ketchikan being the logical municipality to own and
20 operate the same. The DCRA also pointed out that any attempt to justify the annexation on this
21 basis is flawed due to the omission of Hyder and Meyers Chuck. DCRA concluded:

22 “Lastly, DCRA notes that State law does not require a need for borough
23 government to exist before territory may be included within an organized
24 borough. As indicated in the preliminary report, Alaska’s constitution requires
25 that all of Alaska be included within boroughs, organized and unorganized, with
each borough embracing an area and population with maximum common

¹¹⁷ R. 1216 (quoting from Chair Waring’s letter).

¹¹⁸ R. 1216-17.

1 interests. Many areas within existing organized boroughs lack the need for
2 borough government.”¹¹⁹

3 DCRA next considered whether the area proposed for annexation is an enclave.

4 DCRA noted that:

5 “The territory proposed for annexation is not an enclave. However, as the
6 proposal is presently configured it would establish Hyder as an enclave
7 surrounded by the KGB. Additionally, Meyers Chuck would be surrounded by
the KGB on three sides . . . DCRA maintains that these circumstances argue
against annexation as proposed by the KGB.”¹²⁰

8 DCRA stated that it is unaware of any threat to the health, safety, or general
9 welfare of KGB residents existing or potentially developing in the territory proposed for
10 annexation. DCRA again noted that annexation of the Quartz Hill area would enable the KGB to
11 regulate and control related potentially detrimental effects if that mine is developed.¹²¹

12 DCRA state that it was unaware of any need for KGB to extend services into the
13 proposed area in order to provide adequate services to the existing borough.¹²²

14 DCRA noted that there would be direct and indirect benefits to the areas to be
15 annexed. DCRA stated:

16
17 “DCRA recognizes that that it is reasonable to assume that the KGB’s areawide
18 economic development efforts do indeed benefit certain residents and property
19 owners in the territory proposed for annexation. Ironically, however, the KGB’s
letter of June 11 seems to include residents and property owners of Hyder among
those that benefit . . .

20 DCRA recognizes further that residents and property owners in the territory
21 proposed for annexation and other parts of Alaska’s unorganized borough
22 (exclusive of home rule cities and first class cities) benefit substantially from the
requirement that the KGB and the other 33 municipal school districts are
mandated by State law to contribute the equivalent of a 4-mill tax levy (up to 45%

23
24 ¹¹⁹ R. 1218 (emphasis on “all” in original).

25 ¹²⁰ R. 1218.

¹²¹ R. 1218.

¹²² R. 1218.

1 of basic need) on the full and true value of taxable property within those
2 municipalities.

3 The required local effort of the 34 municipal school districts in Alaska is
4 projected to generate more than \$141 million this year. . . If it were not for the
5 required local contributions . . . either the State of Alaska's annual costs of
6 education would increase by \$141 million or the level of State financial aid for
7 school districts would decline by that amount . . .

8 Clearly, the KGB's required local contributions in support of its schools directly
9 and indirectly benefit residents and property owners in the territory proposed for
10 annexation as well as those in Hyder, Meyers Chuck, and elsewhere in the
11 unorganized borough.¹²³

12 DCRA next addressed the ability of the KGB to plan and control reasonably
13 anticipated growth or development. DCRA recognized that there will be a "significant need" for
14 local government in part of the area if the Quartz Hill molybdenum deposit is developed, but that
15 is not imminent, and if it happens the KGB will have "ample opportunity" to annex that area.¹²⁴

16 DRCA next addressed population density.¹²⁵ DCRA noted that:

17 "The territory proposed for annexation is very sparsely inhabited. As such, a
18 local election may not adequately represent the interests of the majority of the
19 landowners.

20 Again, the KGB's annexation proposal excludes the only two settlements within
21 the KGB's model borough boundaries that are not within its corporate boundaries.
22 One hundred thirty-three residents live in the . . . Hyder exclusion. . . Thirty-one
23 individuals live within the . . . Meyers Chuck exclusion.¹²⁶

24 DCRA concluded with respect to its further examination of the balanced best
25 interest standard that:

26 ¹²³ R. 1219 (emphasis in original) DCRA also noted that the KGB pays \$1,667 per student
27 while the average across such school districts is \$1,220, and that KGB's total contribution in the
28 current fiscal year was \$4,552.13.

29 ¹²⁴ R. 1219-20.

30 ¹²⁵ 19 AAC 10.200(7) provided that a factor that may be considered is whether the: "territory is
31 so sparsely inhabited, or so extensively inhabited by persons who are not landowners, that a local
32 election would not adequately represent the interests of the majority of the landowners."

1 "DCRA policy makers continue to take the position that the KGB annexation
2 proposal is not in the balanced best interests of all concerned because of three
3 characteristics of the proposal.

4 The first is the adverse impacts on the affected political subdivisions . . . it should
5 be stressed that local governments in Southeast Alaska, including the KGB . . . are
6 also suffering from declines in National Forest Receipts funding generally. . . The
7 impacts of annexation would bring further unwarranted suffering . . . DCRA also
8 notes, however, that the KGB indicated that even if annexation occurs it would
9 still receive substantially less National Forest Receipts on a per capita basis than
10 communities in the unorganized borough. . .

11 The second is that the KGB proposal seeks to gain substantial revenue without
12 assuming a commensurate level of responsibility . . .

13 The third is the seriously flawed boundaries proposed by the KGB. The exclusion
14 of Hyder and Meyers Chuck is difficult to justify if the immediately adjoining
15 territory is to be annexed to the KGB. Annexation would create an enclave . . .

16 Taken together, the three noted characteristics . . . lead DCRA policy makers to
17 conclude that the annexation proposal is adverse to the balanced interests of the
18 interested parties. As a result, the annexation proposal does not represent good
19 public policy.¹²⁷

20 DCRA then addressed Chair Waring's request that it determine whether the
21 record concerning the legislation extending NFR's to the unorganized borough (Ch. 37, SLA
22 1991) included any discussion of the interplay between NFR's and incentives for municipal
23 incorporation. DCRA responded that it did. DCRA noted the following:

- 24 1. The Director of the Municipal League had submitted a memorandum to
25 the legislature stating that passage of the bill would result in communities
in the unorganized borough receiving as much as 14 times more on a
straight per capita basis than some organized boroughs.
2. DCRA's initial position on the legislation was that the payments should
only be made to home rule and first class cities in the unorganized
borough, and should not exceed the average per capita distribution to
qualifying organized boroughs. DCRA noted that REAA's are already
100% state funded and should not receive additional entitlements.

126 R. 1220.

127 R. 1220-21.

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1 3. The initial bill would have distributed 25% of the unorganized borough's
2 NFR's to city school districts or REAA's within or adjoining the national
3 forest and the remainder would have gone to State DOT to fund roads in
4 those unorganized borough areas. A committee substitute bill was
5 prepared. Representative Jerry Mackie, a prime sponsor of the bill, noted
6 that NFR's should not become an incentive for communities to become
7 boroughs as many communities did not wish to become a borough.

8 4. Debate in the Senate included a comment by Senator Frank that the bill
9 could provide a disincentive to borough formation. Representative
10 Mackie agreed, but noted that Yakutat was then trying to form a borough
11 and if it went through, it would receive a three-fold increase in NFR
12 funding.

13 5. DCRA (Commissioner Blatchford) stated that the administration
14 supported the bill.

15 6. The Senate amended the bill so that REAA's received NFR's on the same
16 basis as city school districts in the unorganized borough. The amended
17 bill easily passed both houses and was signed into law.¹²⁸

18 DCRA noted that DEED Commissioner Holloway had submitted a letter stating
19 that the DEED supports the DCRA's "conclusion to deny the annexation proposal of the
20 Ketchikan Gateway Borough."¹²⁹

21 DCRA stated that Chair Waring had noted that DCRA's list of borough boundary
22 changes in the Preliminary Report did not include those for Sitka and Yakutat. They have been
23 added.¹³⁰

24 DCRA stated that Chair Waring had asked if the excluded areas would be
25 sufficient to permit Meyers Chuck and Hyder to form cities. DCRA answered in the affirmative,
26 though it noted that it was highly unlikely that Meyers Chuck would ever become a city, and it

27 ¹²⁸ R. 1221-23.

28 ¹²⁹ R. 1224.

29 ¹³⁰ R. 1224.

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1 also noted that the KGB's inclusion of Union Bay was "difficult to comprehend" as it is similarly
2 situated to Meyers Chuck.¹³¹

3 DCRA's "Final Conclusions and Recommendation" read:

4 "Based on the analysis contained in DCRA's October 2, 1998 preliminary report,
5 coupled with the further review in this final report, DCRA reaffirms its
6 preliminary recommendation that the petition for annexation of approximately
7 5,524 square miles to the Ketchikan Gateway Borough be denied. That
8 recommendation stems from major concerns on the part of **DCRA policy makers**
9 regarding the adverse financial impacts that annexation will have on service
10 providers in the Southeast Alaska portion of the unorganized borough. The KGB
11 would gain substantial additional revenue at the expense of the cities, REAA's,
12 and others in the unorganized borough, without assuming commensurate
13 additional responsibilities. Further, the KGB annexation proposal is seriously
14 flawed in that it seeks to annex substantial amounts of largely uninhabited and
15 undeveloped territory while skirting two settlements located within its model
16 boundaries."¹³²

17 The Appendix to the Final Report included the following:

- 18 1. A November 30, 1998 letter from Commissioner Irwin to Representative
19 Torgerson in which he discussed the background of the model borough
20 boundaries and stated that the model borough boundaries are "useful in
21 deliberations over borough incorporations and boundary changes. . . [but]
22 do not carry the force of law as was envisioned . . ." He also stated that:
23 the KGB petition did not extend to its model boundaries, which is one
24 reason DCRA recommended it not be approved; and, "In the Local
25 Boundary Commission's view, the KGB annexation proposal appears to
be designed to maximize revenues while minimizing costs"; and, the
proposal would have an adverse financial impact on twenty entities in the
unorganized borough – and the impact would in some cases be
substantial.¹³³
2. A December 4, 1997 letter from Director Poland to KGB Manager
Zimmerle, responding to her letter to Commissioner Irwin and advising
that "we extend our full cooperation with respect to the Borough's desire
to explore the impacts and benefits of expanding its corporate boundaries"
and offering his "personal insights into the annexation process." He noted
that: DCRA was reviewing the KGB's draft annexation petition; the

24 ¹³¹ R. 1224-25.

25 ¹³² R. 1226.

¹³³ R. 1503-05.

1 petition had 2 scenarios – with and without Hyder and Meyers Chuck;
2 DCRA is in contact with various State agencies to assess the impact of the
3 proposed annexation; the impacts extend to those areas in the unorganized
4 borough receiving NFR funds – they estimate that 16 entities in Southeast
5 Alaska would lose 23.54% of that funding; NFR funding has been
6 significantly higher in prior years; the annexation would reduce PILT
7 funding in the unorganized borough in Southeast Alaska; they anticipate
8 “substantial opposition”, for example, from POWCAC; DCRA generally
9 supports model borough boundaries; this is a major undertaking for the
10 KGB and it would be better for it to defer the proposal if it is not prepared
11 to spend the time and resources necessary to defend its proposal; and, he is
12 trying to be up front about the level of commitment needed and is not
13 trying to discourage the KGB from pursuing the petition, and he and the
14 DCRA staff stand ready to be of assistance.¹³⁴

- 9 3. An August 18, 1998 letter from Commissioner Wasserman to the LBC
10 declaring under Article IX, Section 2(e) that 5 years earlier she had been
11 president of SISD and Secretary of the POWCAC. She stated that
12 boundary issues involving the KGB had not come up during either tenure.
13 She noted that both of those entities had taken a position on the KGB
14 petition. She advised that she resides in Pelican, has never owned
15 property on POW, in Ketchikan, or in Pelican. She stated her awareness
16 that communities in the Tongass, including Pelican, will be impacted by
17 the LBC’s decision, but noted that any LBC decision impacts many
18 communities throughout the state. She stated her belief that her past
19 involvement with those entities would not interfere with the full and
20 faithful discharge of her duties, and that she feels that any conflict she had
21 due to her residing in Pelican “is minor and inconsequential.”¹³⁵

22 There is nothing in DCRA’s Final Report which reflects that anybody with DCRA
23 (Mr. Bockhorst or the “policy makers”) consulted with the Alaska Attorney General’s Office
24 concerning DCRA’s legal interpretations and conclusions.

25 Mr. Bockhorst, in a November 27, 1998 letter to the LBC providing information
requested by Chair Waring, and responding to Commissioner Tesche’s November 24, 1998
request for comment on the applicability of 19 AAC 10.190(c), stated:

¹³⁴ R. 1496-1500.

¹³⁵ R. 1501-02. Commissioner Wasserman was not recused.

1 "Although the language . . . does not expressly indicate that it applies to borough
2 *annexation* proposals, it is my belief that 19 AAC 10.190(c) is among the
3 standards that the Commission must consider when evaluating such. The
4 provision is contained in Article 4 of the Commission's regulations which is
5 entitled "Standards for Annexation . . ." Further, other subsections of 19 AAC
6 10.190 expressly mention annexation. Lastly, a similar, but separate standard
7 exists for borough *incorporation* proposals . . .

8 In this particular case, all of the territory proposed for annexation is *within* the
9 model boundaries . . . As such, the requirement for the Commission to find that a
10 'specific and persuasive showing' exists . . . is not applicable.

11 However, as outlined in DCRA's final report . . . DCRA has taken the position
12 that exclusion of Hyder and Meyers Chuck from the . . . proposal is a serious flaw
13 in the context of Article X, Sections 1 and 3 . . . Further, the . . . proposal would
14 establish Hyder as an enclave . . . while Meyers Chuck would be surrounded . . .
15 on three sides. Further, making Hyder an enclave would add to the number of
16 non-contiguous areas within the unorganized borough. These issues are
17 addressed in more detail in DCRA's final report, at pages 1, 2, 9, 10, 20, 29, 33,
18 and 39.

19 State Senator John Torgerson recently inquired about DCRA's position
20 concerning model borough boundaries both in general terms and in terms that
21 were specific to the [KGB] annexation proposal. A copy of his letter is enclosed.
22 A copy of DCRA's response . . . will be provided to you early next week."¹³⁶

23 He copied Director Poland. His enclosures included copies of model borough boundary maps.¹³⁷

24 LBC Chair Waring, in a December 17, 1998 letter to KGB Mayor Jack Shay,
25 advised that: the public hearing was held on December 12, 1998; the Commissioners then
26 deliberated; several had concerns that the KGB petition failed to meet certain annexation
27 standards due to the omission of Hyder and Meyers Chuck; they decided to give the KGB an
28 opportunity to amend the petition to include Hyder and Meyers Chuck rather than rejecting the
29 petition; an amended petition was due March 12, 1999; the KGB should consult with the
30 residents of those communities in developing a new transition plan; the KGB should work

31 ¹³⁶ Italics in the original.

32 ¹³⁷ R. 1250-52.

1 closely with affected school entities; and, DCRA will now have an opportunity to address the
2 NFR and PILT funding situations, in that regard, DCRA will consider proposing legislation to
3 insure that such funding is allocated in a manner that does not impede the development of local
4 government.¹³⁸

5 The LBC issued its Statement of Decision on April 16, 1999. The LBC noted at
6 the outset that: the KGB seeks to expand its boundaries to include all of the land within its model
7 boundary except for 17.9 square miles around and including Hyder and 3.5 miles around and
8 including Meyers Chuck; the KGB estimates that 25 people reside in the area proposed for
9 annexation; and, the DCRA estimates that 28 people live in Meyers Chuck and 151 in Hyder.¹³⁹

10 The LBC then provided a "summary of proceedings". The LBC stated, in part,
11 that: the public hearing occurred on December 12, 1998; the decisional session followed; the
12 LBC deliberated "extensively"; several Commissioners voiced concerns that the KGB proposal
13 did not meet several annexation standards; the LBC elected not to amend the petition to include
14 Hyder and Meyers Chuck; the LBC decided to give the KGB 90 days within which to do so
15 rather than rejecting the petition outright; the KGB advised in a March 12, 1999 letter that it
16 would proceed with the original petition; and, the LBC reconvened its decisional session on
17 March 31, 1999.¹⁴⁰

18
19 The LBC found the following with respect to 19 AAC 10.160(b): the focus is on
20 the area proposed for annexation and the area within the existing borough; the proposed area is
21 sparsely populated but that is common in Alaska and the Alaska Supreme Court approved the
22

23
24 ¹³⁸ R. 1231-32.

25 ¹³⁹ R. 1018-19.

¹⁴⁰ R. 1019-1020. All five Commissioners participated in the March 31, 1999 decisional session
by teleconference.

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1 formation of the North Slope Borough in 1974; Meyers Chuck and Hyder serve as points of
2 access to areas proposed for annexation; “Hyder and Meyers Chuck **appear** to be integrated into
3 the transportation and communications system centered in Ketchikan” (i.e. the seaplane landings
4 in Meyers Chuck and 40% of the occupied homes in Meyers Chuck subscribe to the Ketchikan
5 Daily News); and, the transportation ties between Ketchikan and Hyder are “more attenuated”
6 but it has been reported that Hyder relies on Ketchikan’s EMS for emergency medical transport
7 and there is the proposed municipal ferry service, and boroughs elsewhere include communities
8 that are greater distances apart. The LBC concluded that this standard: “is satisfied, albeit
9 minimally. The exclusion of Hyder and Meyers Chuck from the annexation proposal
10 significantly diminishes the extent to which this standard is met.”¹⁴¹

12 The LBC next considered whether the KGB’s petition satisfied the requirements
13 of 19 AAC 10.170. The LBC found that: the combined population of the Borough and the area
14 proposed for annexation is large and stable enough to support borough government in those
15 areas. Thus, the standard set out in 19 AAC 10.170 is satisfied.”¹⁴²

16 The LBC next considered whether the KGB’s petition satisfied the requirements
17 of 19 AAC 10.180. The LBC found that:

18 “The size and stability of the Borough’s population, tax base, its budget, and the
19 income of Borough residents demonstrate that the proposed new boundaries of the
20 Borough encompass an economy with sufficient human and financial resources to
provide essential borough services on an efficient, cost-effective level.”

21 The LBC considered the net increase in revenue the KGB would receive from the NFR’s in
22 reaching this conclusion.¹⁴³

24 ¹⁴¹ R. 1021-22

25 ¹⁴² R. 1022.

¹⁴³ R. 1022-23.

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1 The LBC next considered whether the KGB's petition satisfied the requirements
2 of 19 AAC 10.190(a). The LBC, in part, stated:

3 "Land use and ownership patterns in the territory proposed for annexation appear
4 to be consistent and compatible with the area presently within the Borough.
5 Nearly all of the land within the Borough's existing boundaries as well as the
6 territory proposed for annexation is part of the Tongass National Forest. . .

7 Consideration of existing and reasonably anticipated transportation patterns in the
8 context of this standard raise the same concerns for the Commission that were
9 noted previously with respect to the standard dealing with the communication and
10 exchange necessary for development of integrated borough government. Here
11 again, it **appears** that Hyder and Meyers Chuck are key links to portions of the
12 territory proposed for annexation."

13 Lastly, the Commission notes that the boundaries proposed by the Borough for
14 the exclusion of Hyder followed the thread of a river. Typically, the Commission
15 considers the standard . . . best served when borough boundaries do not divide a
16 natural drainage as was proposed in this case.

17 **Conclusion:** The exclusion of Hyder and Meyers Chuck from the annexation
18 proposal precludes the satisfaction of the requirement that the Borough conform
19 to natural geography and include all areas necessary for full development of
20 municipal services on an efficient, cost-effective level."¹⁴⁴

21 The LBC next considered whether the KGB petition satisfied the requirements of
22 19 ACC 10.190(b). The LBC concluded that the petition satisfied this standard.¹⁴⁵

23 The LBC next considered whether the KGB petition satisfied the requirements of
24 19 ACC 10.190(c). The LBC noted that the area proposed for annexation did not extend beyond
25 the KGB's model boundaries, but also did not include all of the area within its model boundaries.
The LBC stated that the: "effect and significance of the failure of a borough proposal to conform
to its model boundaries must be judged in the unique circumstances presented by each petition."

The LBC noted that it has approved petitions that did not include all the area within a borough's

¹⁴⁴ R. 1023-24. (Bold print in original).

¹⁴⁵ R. 1024.

1 model boundaries (Denali, Juneau, Haines), and one instance when it approved an annexation
2 that extended beyond such boundaries (Yakutat). The LBC then stated:

3 “The Commission believes that some deference is owed to the model boundaries
4 beyond that called for in a narrow interpretation of 19 AAC 10.190(c). The
5 Borough’s annexation proposal *includes* 99.6 percent of the area within its model
6 boundaries that is not already within in its corporate boundaries; however, it
7 *excludes* 87.7% of the residents of that same area. If the annexation proposal
were approved as presented, Hyder would become an enclave surrounded by the
Borough. Meyers Chuck would become a near enclave, surrounded on three sides
by the Borough.

8 On October 21, 1998, the Borough wrote that it ‘has contemplated from
9 the beginning that there was a *significant likelihood* that the LBC would,
10 in fact, include Hyder and Meyers Chuck . . .’ The Borough also wrote in
11 the same letter that, ‘it may be reasonable in the future for . . . to join the
12 Borough, whether as a result of this petition or a subsequent annexation
13 proceeding’ . . . **While the Commission could consider the prospect**
14 **that boroughs might incrementally extend their corporate boundaries**
15 **to reach their model boundaries, it appears in this case that the**
16 **Borough’s current proposal would most likely be the terminal stage of**
17 **its boundaries.** Residents of Meyers Chuck and Hyder have expressed
18 strong opposition to being included in a borough and the Borough has
19 expressed little interest in annexing those communities. Such an
20 arrangement would poorly serve the State’s long-term interests.

21 **“Conclusion: Technically, the annexation proposal satisfies the**
22 **standard** set out in 19 AAC 10.190(c) in that it does not extend beyond
23 the Borough’s model boundaries. However, the Borough’s model
24 boundaries also reflect the application of all borough boundary standards
25 and relevant constitutional principles to the pertinent facts of the
Borough’s circumstances. **In the record, there is insufficient**
justification for deviation from those model boundaries here. If the
Borough’s annexation proposal were approved, the Borough would
have little or no incentive to further extend its boundaries to include
Hyder and Myers Chuck.”¹⁴⁶

26 The LBC next considered whether the KGB petition satisfied the requirements of
27 19 AAC 10.910. The LBC found that it did.¹⁴⁷

28 ¹⁴⁶ R. 1024-25. (emphasis in original except that which is both underlined and in bold print).

29 ¹⁴⁷ R. 1025.

1 The LBC next considered whether the KGB petition satisfied the requirements of
2 19 AAC 10.900. The LBC found that it did.¹⁴⁸

3 The LBC next considered whether the KGB petition satisfied the requirements of
4 19 AAC 10.160(a). The LBC found that it did.¹⁴⁹

5 The LBC next considered whether the KGB petition satisfied the requirements of
6 19 Article X, § 3 of the Alaska Constitution. The LBC noted that: this provision mandated that
7 the State be divided into boroughs, organized and unorganized; the legislature attempted to
8 satisfy this mandate in 1961 by “dividing” the State into one unorganized borough encompassing
9 the entire State; the 1961 legislation “may have met with the letter of the law” but it neglected
10 the mandate in Article X, § 3 that boroughs “embrace an area and population with common
11 interests to the maximum degree possible” and, the unorganized borough contains 57% of the
12 State – an area larger than Washington, California, and Oregon combined, and, it is non-
13 contiguous and contains extremely diverse interests.¹⁵⁰

14
15 The LBC also stated:

16 “In this case, the territory proposed for annexation has a great deal in common
17 with the Borough. Existing State House Election District 1 conforms closely to
18 the proposed new boundaries . . . However, Election District 1, like the Borough’s
19 model boundaries, includes Hyder and Meyers Chuck. The area proposed for
20 annexation also conforms substantially to the ‘Outer Ketchikan Census Subarea’ .
21 . . Hyder and Meyers Chuck are included in that subarea as well.

22 Further, the territory proposed for annexation includes most of the Cleveland
23 Peninsula. That area is used by the residents of Ketchikan and surrounding
24 communities for subsistence hunting, fishing, and primitive recreation. Meyers
25 Chuck is also located on Cleveland Peninsula.

24 ¹⁴⁸ R. 1025-26.

25 ¹⁴⁹ R. 1026-27.

¹⁵⁰ R. 1027.

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1 Substantial portions of the Ketchikan Ranger District and the Misty Fjords
2 National Monument are currently within the borough. The proposed annexation
3 would bring those areas wholly within the boundaries of the Borough. The
4 Ketchikan Ranger District and Misty Fjords National Monument are both
5 administered by the U.S. Forest Service staff based in Ketchikan.

6 Links between Ketchikan and the area proposed for annexation have existed for
7 many years. In 1963, the legislature determined that the territory proposed for
8 annexation, plus Hyder and Meyers Chuck, were suitable for inclusion within the
9 Borough under . . . the Mandatory Borough Act. However, smaller boundaries
10 were implemented under a local initiative that preempted the boundaries set by
11 the Mandatory Borough Act.

12 Lastly, links between the Borough and the area proposed for annexation are
13 evident in that the territory proposed for annexation is wholly within the model
14 boundaries of the Borough. Those boundaries were set by the Commission in
15 1991 using the legal boundary standards and constitutional principles established
16 in law.

17 There are strong ties between the Borough and both Hyder and Meyers Chuck.
18 Common ties concerning transportation and communication were addressed
19 previously. Beyond that, the Borough identified four factors that it considered to
20 be of 'particular importance' in demonstrating the close ties between it and the
21 territory proposed for annexation. Those factors related to: (1) election districts;
22 (2) recording districts; (3) borough government boundaries as mandated by the
23 1963 legislature; and (4) model borough boundaries. However, each and every
24 one of those four factors also links the Borough to Meyers Chuck and Hyder.
25 Other common interests linking the Borough to Hyder and Meyers Chuck include
natural geography and census sub-area boundaries. Medical care is another area
in which there are common interests since both . . . are within the 'Primary
Service Area' of the Ketchikan General Hospital.

Conclusion: Given the extreme diversity of the unorganized borough, coupled
with the social, cultural, geographic, transportation, and other ties between the
Borough and the area proposed for annexation, the territory unquestionably has
stronger ties to the Borough than it does to the rest of the unorganized borough. . .
While annexation would better satisfy the constitutional mandate for the
Borough's boundaries to encompass maximum common interests than is the case
currently, the constitution calls for boundaries to embrace an area of common
interests 'to the maximum degree' possible. Without Meyers Chuck and
Hyder, this standard cannot be met.¹⁵¹

¹⁵¹ R. 1027-28. (Bold print in original).

1 The LBC next considered whether the KGB petition satisfied the requirements of
2 19 AAC 10.200. The LBC stated:

3 “The Commission views this standard to relate principally to Article X, Sections 1
4 and 3 of Alaska’s Constitution. Section 1 promotes maximum local self-
5 government with minimum numbers of local governments. It also encourages
6 the extension of organized borough government to unorganized areas.
Section 3 requires that each borough embrace an area and population with
common interests to the maximum degree possible.

7 DCRA emphasized the adverse financial impacts that annexation would have on
8 communities within that portion of the Tongass National Forest lying outside
9 organized boroughs. Those adverse impacts would occur with regard to the
National Forest Receipts program and Payment in Lieu of Taxes program.

10 DCRA also criticized the proposal because it sought ‘to gain substantial revenue
11 without assuming a commensurate level of responsibility.’ DCRA projected that
12 the Borough would gain nearly \$350,000 . . . but would spend only about \$60,000
annually.

13 The Commission rejects the notion that State policy positions concerning borough
14 incorporation and annexation should be driven by financial considerations such as
15 those expressed by the DCRA in this proceeding. National Forest Receipt and
16 Payments in Lieu of Taxes programs are ephemeral – in a few years those
17 programs may operate in a significantly different manner or may no longer exist.
18 In contrast, the formation of a borough or extension of a borough over a large area
19 is a much more permanent action.

20 Further, it is poor public policy to suggest that each annexation or incorporation
21 proposal should be weighed to ensure that revenues and costs are somehow
22 balanced. Many areas within existing organized boroughs do not receive services
23 commensurate with revenues generated by those areas. Conversely, many areas
24 of organized boroughs receive services well beyond the level of revenue
25 generated by those areas.

**The Commission is guided by Alaska’s constitution and standards
established in law. These make little or no provision for consideration of the
fiscal effects on which DCRA placed so much emphasis.**

If there are adverse financial consequences, parties should seek legislative
remedies . . . In this particular instance, it appears from the record that the State
legislature was mindful of the possible consequence that would result from this
type of annexation proposal when it extended National Forest Receipt funding to
entities in the unorganized borough. During the deliberations . . . some legislators
expressed a hope that the legislation would not inhibit borough government.

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1 Even if financial impacts were a relevant consideration, the adverse financial
2 impacts on numerous local service providers in this particular instance would be
3 *de minimis* in terms of the percentage of operating budgets of each of the affected
4 entities. As such, the Department's concern as to the financial impact on others
5 was overstated.

6 Considering the best interests of the State of Alaska, the territory proposed for
7 annexation, and affected political subdivisions, the Commission notes that the
8 territory manifests a need for services that can be met most efficiently and
9 effectively by the Borough. While there is no substantial mining activity ongoing
10 . . . there is a reasonable likelihood that significant mineral development will
11 occur. Substantial weight should be given to the need for planning in an area that
12 has potential for significant mining activity. It is best to institute the local
13 governmental mechanisms to provide for planning before substantial development
14 occurs.

15 However, the need for municipal government is not limited to the area proposed
16 for annexation. That area includes Meyers Chuck and Hyder as well. When
17 planning is conducted around those communities, special focus should be given to
18 how activities in the adjacent regions will affect those communities. As such, the
19 Borough's annexation proposal significantly undercuts its own ability to
20 effectively address planning needs by excluding Meyers Chuck and Hyder.

21 There are no schools in the territory proposed for annexation. However, here
22 again, the Borough undermines its own annexation proposal by excluding Meyers
23 Chuck and Hyder. The State would be left with the responsibility for the
24 education of students in those communities. . .

25 It is also appropriate to observe that the Borough's annexation proposal would
26 establish Hyder as an enclave within the Borough. Additionally, Meyers Chuck
27 would be surrounded by the Borough on three sides. Enclaves typically lead to
28 diminished efficiency and effectiveness in the delivery of municipal services.

29 **Conclusion:** The petition, as presently structured, marginally serves the
30 balanced best interests of the State of Alaska, the territory proposed for
31 annexation, and affected political subdivisions. The greatest need for borough
32 services in this area is planning and education. The Borough's proposal leaves
33 out areas that are essential to those planning and educational needs, notably
34 Meyers Chuck and Hyder. The annexation proposed by the Borough creates
35 enclaves. The Commission has a formal policy to avoid enclaves within boroughs
36 as reflected in 19 AAC 10.200(2). If Hyder and Meyers Chuck were included, the
37 standard would be served to a far greater degree.¹⁵²

¹⁵² R. 1028-30. (Bold print in original).

1 The LBC next considered whether the KGB petition satisfied the requirements of
2 Article X, § 1 of the Alaska Constitution. The LBC noted, with respect to the “maximum local
3 self-government” requirement that:

4 “In one respect, the annexation proposal would advance local self-government by
5 including an area of potential significant development with the Borough’s
6 boundaries. Such would position the Borough to exert significant local self-
government powers over that area.

7 Here again, the Borough’s proposal is deficient in that it omits Hyder and Meyers
8 Chuck. As was noted earlier, the annexation proposal seeks to add 99.6 percent
9 of the area within the Borough’s model boundaries not already within . . . but
10 excludes 87.7 percent of the residents of that same area. That deficiency
11 overshadows the benefit noted in the preceding paragraph.

12 **Conclusion:** Because the annexation petition excludes Hyder and Meyers Chuck,
13 the Commission considers the proposal to fail in terms of promoting maximum
14 local self government.¹⁵³

15 With respect to whether the KGB proposal promoted a minimum of local
16 government units as favored by Article X, §1: The LBC stated that it was divided on the issue.
17 Three Commissioners were of the view that this provision encourages the LBC to consider
18 whether a proposed annexation may lead to a proliferation of local governments because the
19 petition is not “sufficiently expansive”. They believe that Hyder clearly has government needs
20 that can only be met, other than by the State, if it incorporates as a city and, including Hyder in
21 the KGB would obviate the need for it to form a city. The other 2 Commissioners “view the
22 constitutional provision in question as simply favoring changes that would not increase or might
23 even decrease the number of local governments.” They view the KGB annexation as being
24 neutral in this regard so it cannot be rejected on this basis. They do not believe that every
25

¹⁵³ R. 1030. (Bold print in original).

1 annexation proposal must be so expansive as to preclude the opportunity for city formation in
2 areas within its model boundaries not included in the proposal.¹⁵⁴

3 The LBC concluded that:

4 “Through Commissioners Wasserman, Cannington, and Walters, the Commission
5 determines that the Borough’s annexation proposal fails to meet this standard
6 because the exclusion of Hyder from the Borough would likely encourage that
7 community to form a city government, which might not be necessary if it were
8 included within the Borough. Commissioners Waring and Tesche, however,
9 consider this standard irrelevant because the Borough’s proposal neither increases
10 nor decreases the number of local government units.”¹⁵⁵

11 The LBC next considered whether it must approve an annexation petition
12 whenever the pertinent standards have been minimally met. The LBC stated that it rejects the
13 KGB’s view that *Mobil Oil Corp. v. Local Boundary Commission* requires that it must approve
14 petitions that only marginally satisfy applicable standards. The LBC instead reads the decision
15 as providing that it has the discretion to approve such petitions and that the Alaska Supreme
16 Court will uphold the LBC’s decision.¹⁵⁶

17 The LBC next considered and rejected the notion that a borough faces a higher
18 burden of proof if it waits a substantial period of time before pursuing annexation.¹⁵⁷

19 The LBC concluded, based on the above, that the KGB petition “fails to comply
20 with all requisite annexation standards in law” and that it “fails to serve all relevant principles
21 established in the Constitution of the State of Alaska.” So the LBC denied the KGB’s petition.¹⁵⁸

22
23
24 ¹⁵⁴ R. 1030-31.

25 ¹⁵⁵ R. 1030.

¹⁵⁶ R. 1031.

¹⁵⁷ R. 1031.

1 **b. KGB's 2006 Annexation Petition**

2 The KGB submitted a legislative review annexation Petition for technical review
3 to Mr. Bockhorst, Department of Commerce, Community, and Economic Development
4 (DCCED)¹⁵⁹ Local Government Specialist, on February 10, 2006. The KGB sought to annex all
5 of the area in the unorganized borough within its Model Borough Boundary, an additional 4,701
6 square miles, except a 205 square mile area around and including Hyder.¹⁶⁰ The proposed
7 annexation area included Meyers Chuck. It did not include the Annette Island Reserve. The
8 KGB's submission totaled 148 pages.¹⁶¹

9
10 The KGB stated the following "Reasons For the Proposed Boundary Change" that
11 it believes that its model boundaries:

12 "best reflect the Borough's contemporary and future sphere of regional
13 government interest and influence in southern southeast Alaska. As will be
14 explained further in Exhibit H and Exhibit K . . . the Petitioner recognizes these
15 model boundaries represent an ideal future Ketchikan borough and that they
16 accurately represent the Borough's long-term local government role. However,
17 the Petitioner also asserts that the incremental extension of local government
18 boundaries is logical and consistent with the historic growth and approval of
19 govern boundary extension throughout the State. It is necessary in this case, as in
20 previous cases elsewhere, to deviate from these ideal boundaries in the short-term
21 to make progress towards long-term goals.

19 ¹⁵⁸ R. 1031.

20 ¹⁵⁹ R. 1. DCCED is the new name for the same Department (DCRA) that dealt with the KGB's
21 prior annexation petition.

22 ¹⁶⁰ R. 4.

23 ¹⁶¹ R. 1-148. The KGB's packet included: a July 10, 2006 transmittal letter from the KGB
24 Manager, Roy Eckert, to Mr. Bockhorst, the Petition, (82 pages including exhibits) and copies
25 of: KGB Resolution No. 1949; minutes of a January 21, 2006 public hearing; the materials
presented/distributed at the January 21, 2006 public hearing (including correspondence presented
during public testimony and copies of a power point presentation made by KGB staff and KGB's
consultant); a recording of the January 21, 2006 public hearing; public notice of the hearing
provided by the KGB in Ketchikan and outlying areas (including related affidavits by those who
posted the notices); and, the PSA broadcast on the local radio station (apparently concerning the
public hearing).

1 The Borough's short and long-term annexation goals are:

- 2 - To maximize local self-government in the region;
- 3 - To promote borough boundaries that better reflect constitutional principles
- 4 regarding borough government;
- 5 - To support orderly growth and development;
- 6 - To protect and enhance the Borough's tax base; and
- 7 - To provide greater local fiscal responsibility."¹⁶²

8 The KGB stated the following with respect to maximizing local self-government:

9 "It is the Borough's belief that the unique regional economic, political, and
10 cultural interests of the Ketchikan region, as represented by the State's model
11 borough boundaries, are best managed by a system of local rather than State
government.

12 Article X, Section 1 . . . states 'The purpose of this article is to provide for
13 maximum local self-government with a minimum of local government units, and
14 to prevent the duplication of tax-levying jurisdictions.' In the years since its
15 adoption . . . this constitutional principle has been held in numerous decisions to
16 mean that the constitution encourages the creation of organized boroughs, and
17 their expansion through annexation, when consistent with specific standards. The
18 history of these judicial and administrative decisions has not shown much
19 consideration with respect to the population density or remoteness of an area for
20 annexation. To the contrary, State decisions . . . have consistently upheld the
21 concept that borough governments have a regional role and responsibility and that
22 they often encompass areas which have little or even no need for government."¹⁶³

23 The KGB stated the following with respect to promoting boundaries consistent
24 with constitutional principles:

25 "When considered within the context of Alaska's constitution, it need not be
argued whether the unorganized portion of the area within the Borough's model
boundaries should be annexed at all, but rather whether the territory should be
part of an expanded [KGB] or part of some other borough and whether specific
areas should be annexed now or incrementally phased in at a later time. It should
be noted that the LBC, while considering the Borough's previous 1998 petition,

¹⁶² R. 5.

¹⁶³ R. 6.

1 provided some policy guidance on this question. In its statement of decision, it
2 noted that the 'territory unquestionably has stronger ties to the Borough than it
3 does to the rest of the unorganized borough.' The LBC went on to say that the
4 proposed exclusion of Meyers Chuck and the community of Hyder . . . failed
5 constitutional requirements 'in terms of promoting maximum local self-
6 government.' The LBC also expressed its concerns that insufficient justification
7 was provided to deviate from the model borough boundaries . . . It noted in its
8 conclusion that '. . . the Borough's model boundaries also reflect the application
9 of all borough boundary standards and relevant constitutional principles to the
10 pertinent facts of the Borough's circumstances.' **Article X, Section 3 . . .**
11 requires, in part, that each borough embrace an area and population with common
12 interests to the maximum degree possible. This petition contends that, on
13 balance, the area proposed for annexation . . . has stronger ties to the [KGB] than
14 it does to Alaska's unorganized borough. As will be discussed later, the Borough
15 suggests that these regional ties also include the community of Hyder although
16 they are not strong enough to justify extension of local government at this time.

17 The Borough is the principal regional goods and service provider in southern
18 southeast Alaska. This role, in many respects, extends far beyond the boundaries
19 of the area proposed for annexation. For example, as discussed in Exhibit H . . .
20 Because of this obvious regional role, the Borough maintains that existing and
21 potential developments in the area proposed for annexation draw, or likely will
22 draw, the majority of their support from the urban center of the Borough more
23 than from any other organized municipality in the region . . . Such support
24 services would include marine and air transportation and transfer, and provision
25 of a variety of goods and services including retail services and health care.

Admittedly, the degree and character of this support varies within the area
proposed for annexation due to the remoteness of the territory and the presence of
other overlapping service providers. For example, the community of Hyder, in
practical terms is relatively isolated, has only nominal air service, and has
stronger local economic and social ties to Stewart, British Columbia and its
adjoining road system. It is expected that this Hyder territory, which represents
3% of the model territory, will be phased in at a later time. A full discussion
regarding the justification for postponing the annexation of Hyder and the future
circumstances which lead to its inclusion . . . is provided in Exhibit K.

It is the Borough's aim to work with all citizens and communities in the area for
annexation to extend only services required by State law or desired by these
citizens; to assist, promote, and finance economic development, infrastructure and
services desired by these citizens; to facilitate local self-rule and management to
the extent feasible; and to encourage citizens of the area . . . to participate in the
social, political and economic life of the expanded Borough.

In conclusion, the Borough suggests these areas most logically belong in the
regional system of government proposed by this petition. This petition will

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1 demonstrate that the area . . . has much stronger ties to the Borough than to the
2 balance of the unorganized borough . . . and to other prospective . . . boroughs.
3 This petition will demonstrate that while Hyder is logically a part of a future
4 [KGB] expansion, several regional links and local factors must evolve further to
5 justify local government expansion in this area. It is the [KGB's] belief that
6 annexation is in the best long term interest of developing local self-government in
7 southern southeast Alaska and will serve to enhance regional economic
8 development as well as the provision of cost-effective public services, as needed
9 and desired, to citizens throughout the area proposed for annexation."¹⁶⁴

10 With respect to supporting orderly growth and development, the KGB stated:

11 "It is the Borough's conviction that planning and managing local growth and local
12 services for local needs is best performed by local government. Within the
13 proposed annexed area, there are a number of foreseeable development
14 opportunities that most likely will directly or indirectly impact Ketchikan. Likely
15 development scenarios include:

- 16 - Mineral development at Union Bay, Duke Island, and Quartz Hill;
- 17 - Offshore oil development along the U.S./Canadian border;
- 18 - Commercial tourism development on private and public lands;
- 19 - Timber sales and other National Forest development activities; and
- 20 - Development of roads, energy infrastructure, and other public projects

21 It is likely that there will be additional unforeseen projects that might grow from
22 the resources and opportunities present within the territory . . . all of which may
23 directly or indirectly impact Ketchikan. It will be important for residents of
24 Ketchikan to have input into the terms of development activities within the
25 territory. It is also important to provide opportunities for input to those residents
within the territory but . . . not included in any organized political subdivision of
the state.

In addition, regional economic development will best occur when working in
partnership with those residents living in the unorganized and future boroughs on
Prince of Wales and Wrangell. As will be shown later . . . the character and needs
of the Ketchikan region, as depicted by its model boundaries, will continue to
change as the markets for its resources continue to grow. These Federal, State,
and private resources include timber, minerals, and fisheries; air, land and water
quality; and land for energy facilities, utility routes, roads, subsistence, and

¹⁶⁴ R. 6-8.

1 recreation and tourism activities. Through annexation, the Borough expects to
2 gain more meaningful opportunities to help manage the inter-dependence and
3 sometimes competing requirements of these resources as balanced against local
4 needs. These opportunities will include extension of its State granted planning,
5 zoning, and platting authority where appropriate and strengthening influence and
6 comments on environmental reviews during development of Federal land which
7 affect the character of the community. Because development within the territory
8 will derive most of its services from Ketchikan, it is in the community's best
9 interest to locate this territory within the community's boundaries."¹⁶⁵

10 With respect to protecting and enhancing the KGB's tax base/revenues, the KGB

11 stated:

12 "The vast majority of the . . . proposed for annexation is . . . within the Tongass
13 National Forest and Misty Fjords National Monument. The Ketchikan Ranger
14 District manages these lands and is located wholly within Ketchikan's model
15 boundaries and the area proposed for annexation. The Ranger District . . . are
16 based in . . . Ketchikan. To the extent that the Federal government develops these
17 lands according to a variety of planned and likely scenarios, it is the Borough that
18 will provide the majority of the infrastructure, goods, and services for their
19 improvement. Consequently, it is the Borough that should proportionally benefit
20 from the potential revenues associated with such development since it is the
21 community most affected by the outcome of Federal activities. For example,
22 significant, and growing, volumes of tourists transfer in Ketchikan to Misty
23 Fjords and other points of interest. Anticipated revenues include a proportional
24 share of Federal forest receipts and payments in-lieu of taxes, but also sales taxes
25 and property taxes resulting from potential mineral leases and other commercial
activities."¹⁶⁶

26 With respect to providing greater local responsibility, the KGB stated:

27 "It is incumbent upon the Borough to develop local revenue sources to help
28 provide for local needs such as schools, public facilities, and services.
29 Annexation . . . as shown in the attached budget, will provide additional revenue
30 to offset the ever present risk of additional cutbacks in State assistance and to pay
31 for required services to residents."¹⁶⁷

32 Exhibit E is the KGB's Transition Plan required by 3 AAC 110.900. The KGB

33 states therein, in part, that:

34 _____
35 ¹⁶⁵ R. 8-9.

¹⁶⁶ R. 9.

1 "Prior to preparation of the petition, Borough representatives traveled to Hyder
2 and Meyers Chuck and met with community members to discuss the Borough's
3 annexation goals, to hear from residents regarding any desire or need for services,
4 and to receive information regarding capital improvements needs . . . Community
5 residents expressed overwhelming opposition to the annexation proposal,
6 expressed no desire or need for Borough administered services (i.e. education,
7 planning, tax assessment and collection, library, regulation of fireworks, public
8 transportation, wastewater collection and disposal of septic system waste or
9 animal control), and did not express a need for capital improvements that could be
10 financed by or through the Borough.

11 The area proposed for annexation, however, is abundant in natural resources and
12 will at some time in the future be developed. Such development will directly
13 impact the existing Ketchikan Gateway Borough due to Ketchikan's economic
14 role within the region. Any development will also require a structured planning
15 and development process to assure the needs of developers are balanced with
16 desires of nearby and impacted residents.

17 The Borough proposes to initially provide only those mandatory services required
18 by State Statutes (education, planning, platting, land use regulation and
19 assessment and collection of taxes). Additional services such as economic
20 development (grants and loans) and recreation (development or maintenance of
21 facilities) or other discretionary services will be provided on an as-needed basis or
22 as desired by the residents to be annexed.

23 . . . The Borough currently exercises no formal extraterritorial jurisdiction in the
24 area proposed for annexation although some residents outside the Borough utilize
25 the Borough's library, animal control, airport, health care, and other facilities on
an as-needed, sometimes fee-based basis.

. . . The territory proposed for annexation, like most of the existing . . . Borough is
remote. The Borough presently provides services to remote developed areas such
as Loring and Moser Bay and sees no geographic features which will prevent it
from providing services to the territory.

. . . The 2005 estimated taxable value of property within the territory proposed for
annexation is \$7,020,000. Assuming an estimated 2% growth per year, the
anticipated F/Y 08/09 real and personal property taxes generated will be \$55,873
based upon a mill rate of 8.7 mills. Sales tax collections during the first year are
estimated to be \$21,224 in FY 08/09 and increasing 2% thereafter. Total
estimated gross revenues generated by the territory . . . depending on changes in
forest receipts funding, are estimated to be between \$1,235,796 and \$299,138 in
FY 08/09. Total operating expenses . . . in FY 07/08 is estimated at \$62,620. The

167 R. 9.

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1 initial year of transition, FY 07/08 is anticipated to be higher due to start-up costs
2 associated with assessment and planning.

3 Changes in national forest receipt funding, although not predictable, are inevitable
4 as Federal policy evolves over time. However, when considered over the time
5 period associated with the annexation, it is expected that additional receipts
6 generated from the forest will be sufficient to offset the costs of providing
7 services within the area proposed for annexation. This net increase in funding
will be used to off-set the costs of providing required and discretionary Borough
services and facilities not identified above (amortization of new equipment and
buildings, and economic development) among others as needs in the area
proposed for annexation change over time.

8 . . . At the present time, there does not appear to be a need or desire for Borough
9 capital funding of projects in the area proposed for annexation such as school
10 buildings, or administrative facilities. The Borough will undertake such
11 improvements and incur such costs only as capital projects have been designed
12 and adequate funding identified. The Borough expects to leverage such funding
through legislative grants, and local bond sales, and through the annual local
budgeting process. It is expected that new service areas established within the
area proposed for annexation will also contribute towards project funding.

13 . . . The territory proposed for annexation has no organized communities and is
14 located entirely within the . . . unorganized borough. The Petitioner is unaware of
15 any powers, duties, right or functions being performed by the State. Existing
Borough powers and duties. . . that are in place upon the effective date of
annexation shall apply immediately to the annexed territory.

16 Within two years of annexation, the Borough will review its ordinances, rules,
17 resolutions, procedures and orders to determine whether any changes to these
documents may be warranted as a result of annexation. . .

18 . . . The territory proposed for annexation encompasses part of a regional
19 educational attendance area known as the Southeast Island School District
20 (SISD). The Borough's public and secondary education services will be extended
21 to the territory by July 1, 2008. However, it appears that there are no school age
children residing in the territory at this time.

22 The Ketchikan Gateway Borough previously solicited the views of the SISD via
23 the Superintendent with respect to annexation of the entire model territory
24 including Hyder. In response, Borough received a resolution approved by the
25 [SISD] . . . Board of Education on April 28, 2005 opposing the proposed
annexation. In general, the SISD opposed the annexation based upon SISD's
experience and success with respect to serving children in the annexed territory
and noted opposition of Hyder and Meyers Chuck residents to the proposed
annexation. In the interim, the Borough changed its plans to phase Hyder in at a

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1 later date. In response, the SISD opposed the exclusion of Hyder based upon the
2 lost revenue to SISD that is needed to educate children in Hyder. As a result, it is
3 not clear if the SISD would support the expansion of the . . . Borough under any
4 circumstances that would diminish the SISD's revenues or its role as the
5 educational service provider in the area proposed for annexation.¹⁶⁸

6 With respect to the transfer of services and equipment, the SISD indicated that it
7 is not currently providing services in the area proposed for annexation (apparently
8 there are no children living in the area . . .) . . .¹⁶⁹

9 Exhibit H is the KGB's "Supporting Brief."¹⁷⁰

10 The KGB's analysis began with a discussion of Article X, § 3 of the Alaska
11 Constitution. The KGB noted that in 1999, the LBC had found that its prior annexation
12 proposal:

13 "would better satisfy the constitutional mandate for the Borough's boundaries to
14 encompass maximum common interests than is the case currently, [but] the
15 constitution calls for boundaries to embrace an area of common interests 'to the
16 maximum degree' possible. Without Meyers Chuck and Hyder, this standard
17 cannot be met."¹⁷¹

18 The KGB noted that the current proposal includes all of the area within its model
19 boundaries except the 205 square miles around and including Hyder. The KGB added that the
20 justification for excluding Hyder is addressed more thoroughly in its Exhibit K.¹⁷² The KGB
21 also noted that the proposed new boundaries: "would virtually match those of the
22

23 ¹⁶⁸ R. 89.

24 ¹⁶⁹ R. 43-46 (citations omitted). Exhibit A is the legal description of the area proposed for
25 annexation. R. 29-30. Exhibit B is the legal description of the proposed post-annexation KGB
26 boundaries. R. 31-32. Exhibit C consists of maps and plats. R. 33-34. The first map identifies
27 the Hyder area as an "area proposed for temporary exclusion." It also shows: the KGB's current
28 and proposed boundaries, Meyers Chuck, Metlakatla, and Quartz Hill. Exhibit D provides
29 information relating to public notice and service of the KGB's annexation petition. R. 35-41.

30 ¹⁷⁰ R. 54-77. Exhibit F describes the KGB's composition and apportionment of the Assembly.
31 R. 49. Exhibit G provides Federal Voting Rights Act information. R. 50-53.

32 ¹⁷¹ R. 54.

33 ¹⁷² R. 54-55. The KGB also noted that the Annette Island Reserve is not included in the territory
34 it proposed to annex but the Reserve is not within its model borough boundaries. R. 55.

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1 Ketchikan/Misty Fjords Ranger District”; “closely follow State census tract boundaries”;
2 ADF&G “boundaries also roughly coincide with the existing model boundaries for the area
3 proposed for annexation”;¹⁷³ and, the area is within the Ketchikan General Hospital service area
4 (as is Metlakatla and Prince of Wales Island); the area is within Alaska Senate District 1 and
5 House District 1 (though Hyder is no longer within House District 1 and Thorne Bay on Prince
6 of Wales Island is in House District 1).¹⁷⁴
7

8 The KGB next addressed the factors listed in 3 AAC 110.160(a). The KGB noted
9 that in 1999 the LBC found that this standard had been satisfied. The KGB noted that the DCRA
10 had stated in its 1998 Preliminary Report that the Alaska Supreme Court in *Mobil Oil Corp.* had
11 ruled that Alaska’s constitution encourages the extension of organized borough government and
12 that boroughs are intended to be regional governments that include land for which there is no
13 particular need for municipal government. The KGB also stated that: there are places presently
14 within the KGB where residents exhibit the rural lifestyle enjoyed by those residing in the area to
15 be annexed; the residents in said area rely on Ketchikan for social, cultural, and economic
16 activities; and, they rely on Ketchikan for their transportation needs. The KGB posited that its
17 ties with the area will increase over time as development occurs.

18
19 The KGB noted that the area proposed for annexation supports a multitude of
20 uses: tourism, timber harvest, and mining. The KGB identified: a planned timber harvest on the
21 Cleveland Peninsula; the large number of commercial use permits the USFS issues for the area
22 proposed for annexation – most of which are for commercial tourism – the USFS has

23
24 ¹⁷³ The KGB noted that 81% of the 523 deer hunters in Unit 1A were from Ketchikan and 94%
25 of the holders of subsistence salmon and personal use permits (218) who harvested resources
from within the area proposed for annexation were from Ketchikan. R. 55.

¹⁷⁴ R. 55-56.

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1 documented that approximately 10,000 tourists fly into and land on lakes in the Misty Fjords
2 National Monument annually; it is estimated that some 40,000 tourists fly over the National
3 Monument for flight-seeing and/or salt water landings, and nearly all of these flights originate in
4 Ketchikan; the mineral deposits in the area – the largest of which are in areas near Union Bay
5 where active exploration is occurring, Quartz Hill in Misty Fjords, and on Duke Island (which
6 generated some \$911,299 in local sales in Ketchikan; and, State land leases.¹⁷⁵
7

8 The KGB next addressed the relevant factors listed in 3 AAC 110.160(b). The
9 KGB noted that the LBC had found in 1999 that the requirements of this standard had been
10 minimally satisfied but the exclusion of Meyers Chuck and Hyder significantly diminished the
11 extent of the same. The KGB argued that: its current petition “strengthens the LBC’s
12 determination by including Meyers Chuck. Hyder, however, will continue to be excluded and
13 will be phased into the [KGB] at a later date as justified in Exhibit K.”¹⁷⁶
14

15 The KGB stated that its role as a regional center is underscored by the fact that:
16 the Ketchikan Daily News has a weekday circulation of 3,600 and a weekend circulation of
17 4,200; 4,800 copies of a shopper type publication are distributed each week; the newspaper and
18 shopper routinely advertise property in the territory proposed for annexation; Ketchikan has an
19 internet news site which provides news, public forums, information, and advertising for services
20 throughout the region; the proposed area is served by air transportation based in Ketchikan (jet
21
22

23 ¹⁷⁵ R. 62-65. The KGB included a map which shows the locations of the mine sites, lodges,
24 mining claims, timber harvest, flightseeing destinations, Ketchikan, Hyder, Annette Island,
25 Meyers Chuck, Union Bay, the KGB’s current boundaries, its proposed boundaries, and its
model boundaries. R. 64.

¹⁷⁶ R. 66.

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1 and floatplane); and, Ketchikan has terminals for the Inter-Island Ferry Authority and the Alaska
2 Marine Highway System.¹⁷⁷

3 The KGB next addressed the relevant factors set forth in 3 AAC 110.170. The
4 KGB noted that the LBC had found in 1999 that the KGB's prior petition, which did not include
5 Meyers Chuck, had satisfied this standard.

6 The KGB next addressed the relevant factors listed in 3 AAC 110.180 and 3 AAC
7 110.970. The KGB presented a number of financial figures in support of its claim that it has
8 human and financial resources to be able to provide services throughout the expanded
9 borough.¹⁷⁸

10 The KGB next addressed the relevant factors listed in 3 AAC 110.190(a). The
11 KGB noted that the LBC had found in 1999 that the exclusion of Meyers Chuck and Hyder
12 precluded satisfaction of the requirements that the Borough conform generally to natural
13 geography and include all areas necessary for full development of municipal services on an
14 efficient, cost-effective level. The KGB argued that its new petition addresses the LBC's
15 concerns by changing the boundary around the Hyder exclusion area. The KGB noted that the
16 continued exclusion of Hyder is addressed in Exhibit K. The KGB concluded that:
17

18
19 “. . . as the only organized borough in southern southeast Alaska, it is best suited
20 to provide the local government services listed above in a manner and scale which
21 addresses local residents' needs. There is no evidence to suggest that there are
22 similarly strong and compelling social, economic, administrative and cultural
23 links which would place any of the proposed annexed area within any other
24 prospective or future Wrangell, Wrangell/Petersburg, or Prince of Wales Island
25 boroughs. The Petitioner expects that all of the territory, including Hyder, will
eventually be brought into the Ketchikan Gateway Borough. All of the evidence
points to the fact that the Borough is not only the principal regional service center
for all of the land within its model boundaries but has an economic influence that

177 R. 66-67.

178 R. 68-70.

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1 extends well beyond its boundaries to other parts of the southern southeast region.
2 As demonstrated previously in the petition, the Borough has the population,
3 economy, and administrative means to provide these services on an efficient, cost-
effective basis.”¹⁷⁹

4 The KGB next addressed 3 AAC 110.190(b) and 3 AAC 110.970. The KGB
5 again noted that the area proposed for annexation includes all of the area within its model
6 boundaries except the 205 square mile area around Hyder and that the model boundaries reflect
7 the LBC’s application of all pertinent boundary standards and constitutional principles. The
8 KGB then refers readers to its Exhibit K wherein it explains why Hyder is excluded. The KGB
9 stated the following with respect to Hyder:

10 “The Petitioner emphasizes that Ketchikan will always be the most logical
11 provider of local government services to Hyder once the community establishes
12 stronger links (based on improved and reliable transportation) to the community
13 of Ketchikan. In addition, the Petitioner would expect that the need for local
14 government expansion there will also be based upon development of other
15 municipal needs, such as road maintenance, improved sewer and/or water
16 services, or specific economic development activities. Other variables that will
17 support either the need or ability to pay for local government will include
18 increased property valuation and increased household and per capita incomes.
19 Taken together, the Petitioner argues that that the exclusion of Hyder in the short-
20 term will neither encourage nor discourage Hyder from forming an independent
21 local government. During the normal and expected course of community
22 development in Hyder, Ketchikan will be poised and able to assume its natural
23 and logical role as the provider of local government services there including
24 education, planning, and assessment and other needs that residents there might
25 determine to be in their best interest.”¹⁸⁰

26 The KGB next addressed the requirements of 3 AAC 110.190(c) and 3 AAC
27 110.990(9). The KGB noted that its proposed annexation would include only territory within its
28 model boundaries, revised as of 1997.¹⁸¹

29 ¹⁷⁹ R. 71.

30 ¹⁸⁰ R. 72.

31 ¹⁸¹ R. 73.

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1 The KGB next addressed the requirements of 3 AAC 110.190(d). The KGB
2 asserted that its annexation proposal “offers an appropriate balance of all constitutional,
3 statutory, and administrative standards for annexation.” And that it expects this to be further
4 validated when DCCED consults with DEED.¹⁸²

5 The KGB next addressed the requirements of 3 AAC 110.190(e). The KGB noted
6 that its proposed boundaries do not overlap with those of any existing organized borough and are
7 contiguous with the boundaries of the existing KGB.¹⁸³

8 The KGB next addressed the relevant factors listed in 3 AAC 110.195. The KGB
9 argued that its petition satisfies this best interest of the State requirement because: the Alaska
10 State Constitution is “the chief expression of the State’s best interest.” The KGB claims that its
11 petitions furthers the Constitutional goals of promoting maximum local self-government;
12 promoting a minimum number of local government units; and, relieving the State of the
13 responsibility of providing local services.¹⁸⁴

14 The KGB next addressed the requirements of 3 AAC 110.200. The KGB argued
15 that several of the circumstances set forth in 3 AAC 110.200(1)-(10) apply to its petition. The
16 KGB stated:

17
18 “It is in the State’s best interest to enable the Borough to locally plan and control
19 for a reasonably anticipated growth or development in the annexed territory that
20 otherwise may adversely impact the Borough. As described earlier . . . there are a
21 number of current and likely future commercial and economic development
22 activities that would require borough services and consequent management. . . It
23 should be noted that the community of Wrangell is currently preparing a petition
which may propose to annex the Union Bay mining district, including the
community of Meyers Chuck. As the likely primary service provider in the event
of mine development, the Borough is proactively seeking to include this area . . .

24 ¹⁸² R. 72.

25 ¹⁸³ R. 73

¹⁸⁴ R. 73-74.

1 well in advance of any active mining to allow sufficient time for planning and to
2 minimize the negative impacts upon the community. . . It is also in the Borough's
3 best interest to maximize its influence over use of Federal lands in the territory as
4 a local government representative during the NEPA process. Other planning
5 issues include the gradual trend towards the development of second homes in the
6 territory . . . and development of additional resort destinations. Taken together,
7 future activities within the territory proposed for annexation will utilize Ketchikan
8 as a hub for services and supplies and will look to Ketchikan for assistance on
9 planning and land use issues.

10 Residents of the territory receive, or may be reasonably expected to receive,
11 directly or indirectly, the benefit of Borough government without commensurate
12 tax contributions. Meyers Chuck residents, like all state residents, indirectly
13 benefit from educational services provided to children. Although Meyers Chuck
14 does not currently have any school-age children, it is reasonable to believe that
15 this could change in the future. Annexation . . . would offset the cost of providing
16 this state provided service through local property taxes.

17 The Borough's proposal will maximize local self-government in the region
18 through the annexation of all territory within its model boundaries established by
19 the State. Residents of the territory will find the political expression of the local
20 community development needs and services at the local rather than at the State
21 level. These include those critical services which are best provided at the local
22 level including education, planning, assessment and other services which address
23 uniquely local needs.

24 The Borough's proposal promotes a minimum number of local government units.
25 Approximately 4,701 square miles of territory currently . . . within . . .
unorganized borough will be contained within the expanded Borough and
represented by locally elected representatives."¹⁸⁵

26 The KGB next argued that its proposed annexation did not violate the Federal
27 Voting Rights Act or 3 AAC 110.910.¹⁸⁶

28 The KGB next argued that its transition plan satisfied the requirements of 3 AAC
29 110.900.¹⁸⁷

30 ¹⁸⁵ R. 75-76.

31 ¹⁸⁶ R. 76.

32 ¹⁸⁷ R. 77.

1 Finally, the KGB argued that its proposed annexation served other Constitutional
2 principles, such as the equal-protection clause and the equal-responsibility clause.¹⁸⁸

3 Exhibit K¹⁸⁹ includes the following “justification for excluding approximately 205
4 miles near Hyder from the Model Boundaries”. The KGB began by stating:

5 “The proposed territory to be annexed . . . includes all territory of the State’s
6 model boundaries except for . . . 205 square miles of public and private land
7 surrounding and including Hyder. . . While the Petitioner agrees that this area
8 should eventually be included into the Borough, the current cultural, social,
9 economic and other ties between this area and the Borough does not justify
10 inclusion at this time. Following is: (1) a review of the State’s decision making
11 history as it relates to incremental or phased annexations; (2) a geographically
12 logical boundary established to adhere to State guidelines; (3) explanation for
13 excluding the Hyder area . . . ; and (4) discussion of context for phasing-in or
14 future annexation of Hyder.”¹⁹⁰

15 The KGB then discussed the history in Alaska of incremental annexations. The
16 KGB first pointed to its own history. It noted that the LBC’s actions and comments in 1963 with
17 respect to the KGB’s formation reflect that the remainder of the surrounding area, including
18 Hyder and Meyers Chuck, were being left to be phased in at a later time. The KGB also noted
19 in 1992 the LBC had deleted the Annette Island Reserve from the KGB’s model boundaries and
20 that in 2001, when the LBC approved a petition for the consolidation of the KGB and the City of
21 Ketchikan, the LBC had expressed the view that the lack of conformity of the resulting
22 consolidated governmental entity to the KGB’s model boundaries was not an impediment to
23 approval.¹⁹¹

24 ¹⁸⁸ R. 77.

25 ¹⁸⁹ Exhibit I is a copy of KGB Resolution No. 1949 which authorized the KGB to pursue the
annexation proposal (R. 78-81). Exhibit J is the affidavit of KGB Borough Manager Roy Eckert
concerning the source of the information in the petition (R. 82-84).

¹⁹⁰ R. 85.

¹⁹¹ R. 85-86.

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1 The KGB also pointed out that the LBC has historically allowed boroughs to
2 expand in phases. The KGB discussed the LBC's handling of boundaries for the Juneau
3 Borough in 1989 (annexed only 140 square miles), Denali Borough in 1990 (excluded
4 Nenana),¹⁹² and the 1998 Haines Borough. The KGB observed that the consolidation of the
5 Haines Borough and the City of Haines did not include all of the area in its model borough
6 boundary and resulted in an enclave that included the City of Skagway and the community of
7 Klukwan.¹⁹³

8
9 The KGB next addressed the changes it made in the Hyder exclusion boundaries
10 from its prior petition. The KGB advised that it had redrawn the boundary so that it mirrors the
11 boundary separating the Misty Fjords National Monument from the rest of the Tongass National

12
13 ¹⁹² The KGB cited the related reported decision of *Valleys Borough Support Committee v.*
14 *Local Boundary Commission*, 863 P.2d 232, 233 (Alaska 1993). In *Valleys Borough* the
15 Alaska Supreme Court affirmed the Superior Court's affirmation of the LBC's decision to
16 approve the creation of a new Denali Borough even though its "ideal" boundaries would include
17 the greater Nenana area and the new borough did not include that area. The LBC did not require
18 inclusion of Nenana at that time because it and the area in the borough were not sufficiently
19 cohesive. The Court noted that: "In reaching this conclusion, the [LBC] stressed that 'ideal'
20 boundaries are intended to represent long-term goals with respect to regional government
21 boundaries in Alaska. Further, it may be necessary and appropriate to deviate from these ideal
22 boundaries in the short-term. In this particular case, the exclusion of the Greater Nenana region
23 from the area proposed for incorporation is found to be warranted in the short-term on the basis
24 of broad political and social policy." The Court noted that there were economic, social, and
25 cultural differences and that the residents of Nenana strongly opposed being part of the borough,
which might result in a negative vote on the incorporation by the voters.

¹⁹³ R. 88-89. The LBC found that consolidation was a:

22 "highly favorable development with respect to local government. . . The positive
23 direction resulting from consolidation is more than sufficient to overcome
24 shortcomings with respect to the model boundaries of the Haines Borough. In
25 other words, the Commission recognizes that ideal municipal boundaries and
governmental structure are goals which may not be achieved in the near future,
but toward which progress may be attained incrementally over time."

R. 88 (quoting from the KBC's August 21, 1998 LBC Decision at pp. 11-12).

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1 Forest rather than following the Salmon River. The KGB stated that: "This proposed boundary
2 is based upon a long recognized boundary which conforms to natural geography as required by
3 the State guidelines."¹⁹⁴

4 The KGB next addressed its justification for the Hyder exclusion area. The KGB
5 stated:

6 "The Petitioner does not dispute that the State's model boundaries accurately
7 reflect, in the long-term, a territory of common cultural, social and economic
8 interests, however, the strength of these common interests at the present time is
9 not as strong as they should be for the successful expansion of local government
10 there. Due to the strength of Hyder's physical, economic, and social connections
11 to the immediately adjacent Stewart, British Columbia, and its isolation from [the]
12 rest of Alaska, Hyder's social, cultural, economic, and other community of
13 interest with the [KGB] does not justify annexation at this time.

14 Specifically, residents of Hyder depend on Stewart for economic services
15 including shopping and banking. Hyder merchants accept Canadian money and
16 utilize Canadian banks as there are no U.S. banks in Hyder. Transportation of
17 goods and services to Hyder is primarily through Canada via the Canadian road
18 system. Intermittent ferry service from Ketchikan to Hyder, approximately 175
19 miles, was discontinued in 2001 with the effect of further isolating the community
20 from Ketchikan. Hyder is connected to the Canadian phone and electric systems
21 and time zone. Finally, Hyder receives little local media (radio and television)
22 from Ketchikan, and receives almost exclusively Canadian television and radio
23 broadcast signals.

24 Clearly, the economic, cultural, social and other community of interests between
25 the [KGB] and Hyder is weak. In addition, the Hyder community strongly
opposes annexation and the [KGB] is not inclined to annex this territory until
such time that the physical, social, and economic ties . . . strengthen further. For
these reasons, Hyder does not justify inclusion to the [KGB] at this time."¹⁹⁵

26 The KGB next addressed the changed circumstances that it believes would
27 warrant the future annexation of the Hyder area:

28 ¹⁹⁴ R. 89.

29 ¹⁹⁵ R. 89.

1 "As mentioned above, the economic, social, cultural and other community of
2 interest ties between the [KGB] and Hyder is weak and do not justify inclusion . .
3 . at this time. While there are no indications that the strengthening of ties will
4 occur in the near term, at some future time conditions will change that will justify
5 the inclusion of Hyder . . . Following are examples of when phasing-in of Hyder
6 to the [KGB] should be reconsidered and possibly warranted. This list is not
7 meant to present specific 'triggers' for annexation but to describe the
8 circumstances and context within which annexation would be reexamined.

9 Hyder desires to create a political subdivision of the State. At some time in the
10 future, the residents may desire to create some type of political subdivision in
11 order to receive State funding or to establish a governmental entity to collect
12 money for providing community services. When such a situation occurs, the
13 Borough should petition to annex Hyder with Hyder becoming a Service Area of
14 the Borough.

15 Economic Development within the Hyder area. The most likely economic
16 development activity will be the growth of commercial tourism. This growth
17 could initiate the need for expansion, renovation, or improvement of municipal
18 infrastructure including roads, harbors, or utilities or other items to support new
19 economic opportunities. In addition, there is some possibility that mineral
20 deposits in the region may be re-examined as world markets and economics
21 change.

22 Community demand for municipal services. In the future, residents of Hyder may
23 want municipal services to address developmental concerns, address health issues
24 or to provide a service that benefits the community. . . At such time, the Borough
25 would be poised to fill local government's logical role to assist Hyder with the
planning and provisions of these services.

Increase in transportation, communication, commerce. The isolation of Hyder is
in large part due to the lack of transportation, communication and commerce
between Hyder and the Borough. Annexation of Hyder . . . will be justified or
should be pursued when there is: established regular and frequent ferry service
between Ketchikan and Hyder or other systems which would move goods,
services, and people between the community in a manner and scale consistent
with a unified region. Such transportation improvements would also lead to
strengthening sector ties in finance, insurance and real estate between the two
communities.¹⁹⁶

Mr. Bockhorst sent Mr. Eckert a letter dated February 22, 2006. He advised:

¹⁹⁶ R. 89-91.

1 "The proposal outlined in the Petition is subject to approval by the . . . LBC
2 pursuant to AS 29.06.040. If the LBC grants the Petition, annexation would then
3 be subject to legislative review under Article X, § 12 of Alaska's Constitution, AS
4 44.33.812(b)(2), and 3 AAC 110.610(b).

4 Commerce has completed the technical review of the Petition in the manner and
5 according to the deadline set out in 3 AAC 110.440. I am pleased to advise you
6 that the Petition is substantially complete and in proper form. According, the
7 Petition is hereby accepted for filing.

8 Accepting the Petition for filing marks the beginning of the formal opportunity for
9 review and comment to the LBC by interested individuals and organizations
10 regarding the Petition. As staff to the LBC, this agency is required by law to
11 "investigate" the Petition. In that regard, we are committed to a thorough,
12 independent, impartial, meaningful, and valuable analysis of the Petition. Such
13 will require careful consideration of the Petition, any timely responsive briefs and
14 comments regarding the Petition, the Petitioner's reply brief, and comments on
15 this agency's preliminary report on the matter.

16 We look forward to hearing formally from communities, individuals, and
17 organizations regarding the proposed annexation. Once the entire written record
18 has been evaluated, Commerce will conduct its formal analysis of the Petition
19 and offer its recommendations."¹⁹⁷

20 The LBC received responsive briefs opposing the KGB's Petition from: the City
21 of Wrangell;¹⁹⁸ the Hyder Community Association;¹⁹⁹ and, the Metlakatla Indian Community.²⁰⁰

22 ¹⁹⁷ R. 154-55 (footnote omitted). The remaining 5 pages of the letter outline the notice related
23 steps that the KGB was required to take.

24 ¹⁹⁸ R. 307-51. The City of Wrangell opposed the KGB proposal to the extent that it includes the
25 western watershed of the Cleveland Peninsula, including the community of Meyers Chuck/Union
26 Bay. (R. 307). The City identified the most important factor in this regard as being the strong
27 preference of the residents of that area to be in a Wrangell borough rather than the KGB. (R.
28 307). The City presented several reasons why its ties to this area are stronger than those of the
29 KGB.

30 ¹⁹⁹ R. 246-65. The author, Peter Caffall-Davis, in part, noted the negative impact the proposed
31 annexation would have on the NFR funds received by school districts in the unorganized
32 borough(R. 254) and that: "**There is absolutely no community of interest between the
33 petitioner KGB and Hyder. Residents of Hyder and the KGB have diametrically opposed
34 and fundamentally different visions of government. These two groups, one urban and one
35 rural, also have very different lifestyles, economic conditions and needs.**" (R. 256, emphasis
in original). He also claimed that there may have been inappropriate ex parte communication
between the KGB and the LBC in violation of 3 AAC 110.500(b). He provides no specifics. He

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1 It received comments from: the City of Craig;²⁰¹ POWCAC,²⁰² and, residents of Ketchikan,
2 Hyder, Meyer's Chuck, and Union Bay.²⁰³

3 The LBC received the KGB's Reply brief on June 19, 2006.²⁰⁴ The KGB Reply
4 begins with the following statement:

5 The Ketchikan Gateway Borough submitted its present proposal to the LBC on
6 February 10, 2006 following more than a year of local deliberation and
7 preparation. During this time the Borough reflected upon the basis of its prior
8 petition, withdrawn in 1998, and considered opportunities for an amended
9 approach consistent with its local government goals. These efforts resulted in the
present proposal to annex approximately 4,701 square miles of land within its
model boundaries and to exclude, at least in the short-term, annexation of

10 requested a brief internal investigation and disclosure. (R. 258-60). He characterized the
11 proposal as a "land grab", with the KGB only being interested in the NFR funds. (R. 260).

12 ²⁰⁰ R. 352-72. The Brief was written by Leroy Wilder, legal counsel for the Metlakatla Indian
13 Community. The Metlakatla Indian Community objected to the annexation because it would
14 create an enclave (Annette Island Reserve – R. 367) and requested that it be amended to delete
15 certain waters, including those around Duke Island, to which members of the Community have
16 close ties. The differences between the communities are stressed. (R. 355, 368). The
Community noted that it was in the process of seeking federal approval to expand its southern
boundaries to include the referenced waters. (R. 356-57) The economic need for this expansion
is discussed. (R. 357-62, 369). The Community expressed the view that the proposed expansion
would hinder its expansion efforts. (R. 364-65).

17 ²⁰¹ R. 373-80. The City of Craig's comment is written by Jon Bolling, Craig City Administrator.
18 He stated the City's opposition to the KGB's proposed annexation. He did not discuss the 1999
19 LBC Decision as it relates to the exclusion of Hyder in the current petition. He disputes the
20 KGB's stated reasons why the annexation is appropriate. He stresses that the KGB will receive
over a million dollars in NFR funds that would otherwise go to entities in the unorganized
borough without having to incur any related additional expenses, such as would be incurred if
Hyder were included. (R. 375). He argued that the LBC has a stated practice of rejecting
petitions being pursued to increase revenues. (R. 375-76).

21 ²⁰² R. 381. Mr. Bolling also wrote this comment, as POWCAC Chairman. This comment is
22 brief, references only the loss of NFR's, and states its concurrence with the City of Craig's
written comments.

23 ²⁰³ R. 245, 246-65, 266, 267, 273-75, 276, 277-78, 279, 280, 281-83, 284-87, 305, 306, 382,
24 383, 384, 385. The persons submitting comments all opposed the proposed KGB annexation.
The comments included a petition from Meyers Chuck/Union Bay residents – who argued, in
part, that they have more in common with Wrangell than Ketchikan (R. 272) Similar sentiments
were expressed by others from that area. (i.e. R. 274, 277, 279, 283, 305, 306, 321-29). Persons
25 writing from Hyder stressed that Hyder has nothing in common with Ketchikan. (R. 286, 303)

²⁰⁴ R. 387-425.

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1 approximately 205 square miles of public and private lands surrounding the
2 community of Hyder. The proposal otherwise would annex all unincorporated
3 territory within the LBC's previously adopted Ketchikan Model Boundaries as
4 defined by 3 AAC 110.990(9).²⁰⁵

5 The KGB responded to the comments received by the LBC. The KGB's
6 arguments included the following points.

7 The Constitutional drafters intended to create a new type of regional government
8 that would provide area-wide services and avoid the perceived problems and inefficiencies with
9 the county system used in other states. The two types of local government they selected were
10 cities and boroughs. They envisioned that at some point Cities and Boroughs would be
11 unified.²⁰⁶

12 One of the premises of the borough/city system was that locally based
13 government was preferred to state administered local affairs. So the policy question is not
14 whether rural residents need or desire local services but that such decisions should be made at the
15 local rather than the State level. The KGB is in the best position to provide such services in the
16 area proposed for annexation.²⁰⁷

17 But efforts to develop this system of regional governments has been stymied from
18 the beginning by the opposition of residents of the unorganized borough, who do not want to pay
19 for the services they do receive, and they are not required to do so as long as the services are
20 administered by the State. This is evidenced by the failure of the 1963 Mandatory Borough Act.
21 That Act provides, in part, that no area in an organized borough should be penalized as a result of
22

23 ²⁰⁵ R. 394. The first 7 pages of the Reply consist of Mr. Eckert's June 13, 2006 cover letter to
24 Mr. Bockhorst, an affidavit of service, a cover page, and a table of contents. The quote is from
25 the second paragraph on the first page of substantive discussion.

²⁰⁶ R. 398.

²⁰⁷ R. 399-400.

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1 the same. But that is what has occurred as evidenced by the disproportionate distribution of
2 State education funds.²⁰⁸

3 The KGB's present model boundaries were set some 50 years ago as Senate
4 Election District 2. The same includes Meyers Chuck/Union Bay and Hyder. The 1963
5 Mandatory Borough Act excluded the Annette Island Reserve from the Ketchikan area. The
6 State recognized in 1963 that the KGB as formed included only part of the rural portion of its
7 community of interests.²⁰⁹

8 The KGB did not include Hyder because it does not meet the requirements of 3
9 AAC 110.160. The KGB does not believe that sufficient connections between the communities
10 presently exist for Hyder to be annexed. But it recognizes that Hyder is more connected to the
11 KGB than to any other existing or potential borough, so at some point it will be included in the
12 KGB.²¹⁰

13 The areas that the KGB did include in its petition do meet the applicable standards
14 and requirements. Several reasons are given with respect to Meyers Chuck/Union Bay. It
15 argued that the inclusion of these areas within the KGB model boundaries in 1991 and 1997 was
16 not done arbitrarily, but rather was the result of considerable effort as documented in three 1991
17 reports. One report noted that "Ketchikan is the major service and supply center and principal
18 reports. One report noted that "Ketchikan is the major service and supply center and principal
19

20
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22
23 ²⁰⁸ R. 400-02.

24 ²⁰⁹ R. 402-06. The KGB then addressed a number of technical or procedural claims presented
25 by the Hyder Community Association. (R. 406-10). The KGB noted that it had "not received or
reviewed any factual basis" for the ex parte contact claim and suggested that it would be up to
the LBC Chair to address such matters. (R. 410).

²¹⁰ R. 412.

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1 transportation hub of southern Southeast Alaska.”²¹¹ The report also noted that Meyers Chuck is
2 more accessible to Ketchikan than any other major community and that:

3 “The degree of social, cultural and economic integration between Ketchikan and
4 Hyder is quite limited, given Hyder’s close proximity to Stewart, B.C. and the
5 pattern of service delivery that has developed between Stewart and Hyder. It is
6 evident that there is little or no incentive to extend the [KGB] boundaries at this
7 time. Nevertheless, if Hyder were to be included with the boundaries of a
8 regional government, Ketchikan would appear to have the strongest ties. This is
9 no reflection of the KGB-Hyder relationship but rather of the shared relationship
10 between the KGB, Hyder, and the Misty Fjords National Monument. Meyers
11 Chuck should be considered for inclusion within the KGB’s model boundaries
12 because of proximity to Ketchikan and transportation links with Ketchikan.”²¹²

13 The KGB noted that: the Annette Island Reserve has not been within its model
14 boundaries for over 40 years; is not proposed for annexation; it would not be an “enclave” for
15 purposes of an annexation analysis if its proposal is approved; the KGB has sufficient ties with
16 the Duke Island area for it to be included; and, the annexation would not prevent the Metlakatla
17 Indian Community from pursuing its expansion request.²¹³

18 The KGB noted, with respect to the NFR situation, that:

19 “A number of comments submitted expressed grave concerns regarding the fiscal
20 impact of Ketchikan’s annexation proposal on surrounding organized and
21 unorganized communities that benefit from state contributions of forest receipts to
22 local schools and roads. Specifically, the concern is that the Borough’s petition,
23 which would remove territory from the unorganized borough and place it into the
24 organized borough, would reduce the amount of education funding received by
25 those communities in the unorganized borough. While this is a true statement, it
26 is also arguable that that by happenstance state education funding programs have
27 run afoul of constitutional and statutory provisions regarding the establishment
28 and expansion of local government. The Borough adamantly disagrees that a
29 reduction of revenue to the unorganized borough has any relevance with respect
30 to the decision of whether or not Ketchikan should organize presently

31 ²¹¹ R. 417 (citing Model Boundaries Review, Ketchikan/Southeast Island, March 1991, page 5,
32 Alaska Department of Community and Regional Affairs).

33 ²¹² R. 417-18 (citing Model Boundaries Review, Ketchikan/Southeast Island, March 1991, pages
34 12-13, Alaska Department of Community and Regional Affairs).

35 ²¹³ R. 419-2, 423-24.

1 unorganized territory into a long-established system of local government as
2 envisioned by the constitution. Moreover, it could be argued that the unorganized
3 borough, especially in Southeast Alaska, has benefited from years of education
4 funding disproportionate not only to the unorganized borough elsewhere in
Alaska (due to Tongass forest receipts), but at the expense and penalty of existing
organized government elsewhere in Southeast Alaska.

5 Ketchikan understands and appreciates the concern of the Southeast Island School
6 District (SISD) with respect to the fact that they would have to bear the expense
7 of educational services to Hyder without the benefit of the corresponding forest
8 receipts. However, it is not clear, at least from prior SISD resolutions, that SISD
9 would support Ketchikan's annexation of Hyder at any time or under any
10 circumstances if that annexation removed forest receipts from the unorganized
11 borough regardless of who provides education services to Hyder. In any case,
12 while Ketchikan still does not think the time is ripe for the annexation of Hyder
13 due to the need for better communication and transportation facilities, it is
14 prepared to provide basic services to the Hyder community when necessary or
15 required.²¹⁴

16 Mr. Bockhorst's practice was to discuss boundary change petitions with a
17 DCCED policy maker. He discussed the KGB's annexation petition with Division Director
18 Michael Black in March 2007. He outlined his position for Director Black. He told Director
19 Black he thought it was a strong petition. Director Black did not disagree. This conversation
20 occurred before he drafted DCCED's Preliminary Report on the petition.²¹⁵

21 Commissioner Zimmerle sent Mr. Bockhorst an e-mail on April 6, 2007.²¹⁶ The
22 "subject" was identified as "RE: 4-05-07 LBC STAFF WEEKLY REPORT." She noted that she
23 had been recused from the KGB annexation petition. She asked what would happen if the
24 Ketchikan petition and the Wrangell petition were considered "in tandem". She stated that she
25 did not believe she had a conflict with respect to the Wrangell petition. She copied LBC Chair
Hargraves.

214 R. 421-22.

215 Tr. 415-20 (Mr. Bockhorst's October 2008 Evidentiary Hearing testimony). The court found
Mr. Bockhorst's testimony credible.

1 Mr. Bockhorst sent Commissioner Zimmerle an e-mail on April 7, 2007.²¹⁷ It
2 referenced the same "subject" as her April 6, 2007 e-mail. He noted that both petitions include
3 the 191 square-mile Meyers Chuck area and advised that: he thought there would be LBC
4 hearings in both Wrangell and Ketchikan; if she had no conflict on the Wrangell petition she
5 would be free to participate in any proceeding on that petition; and, she could not participate in
6 any proceeding relating to the KGB proposal. He copied LBC Chair Hargraves and Assistant
7 Attorney General (AAG) Vandor.

8
9 Mr. Bockhorst sent an e-mail to John Hill on June 8, 2007.²¹⁸ He stated: "John: as
10 we discussed, please clarify the four highlighted points in the attachment concerning existing and
11 proposed service delivery by the KGB." Attached is a copy of a portion of the KGB's petition
12 which identifies the KGB's existing powers and those it planned to provide within the area
13 proposed for annexation.²¹⁹

14 KGB Manager Roy Eckert submitted his resignation in a letter to Mayor Joe
15 Williams and the KGH Borough Assembly dated June 15, 2007. He stated that his last work day
16 would be October 31, 2007.²²⁰

17 The minutes of the KGB Assembly's June 25, 2007 special meeting reflect that
18 the Assembly accepted Mr. Eckert's resignation, effective October 31, 2007.²²¹

22
23 ²¹⁶ R. 1290. This e-mail was not in the LBC's record.

24 ²¹⁷ R. 1290. This e-mail was not in the LBC's record.

25 ²¹⁸ R. 1292. This e-mail was not in the LBC's record.

²¹⁹ R. 1293. This e-mail was not in the LBC's record.

²²⁰ R. 1346-47. This letter was not in the LBC's record.

²²¹ R. 1348. The minutes were not in the LBC's record.

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1 DCCED's Preliminary Report was completed by June 30, 2007.²²² It was written
2 by Mr. Bockhorst.²²³ There is no reference to DCCED "policy makers" in the Preliminary
3 Report.²²⁴ DCCED published the report on July 13, 2007.²²⁵

4 DCCED noted in the Introduction that: the Preliminary Report satisfies its
5 obligation under 3 AAC 110.530 to "investigate and analyze" a petition for legislative
6 annexation and report its related findings and recommendations; AS 29.06.040(a)²²⁶ provides
7 that the LBC may amend and impose conditions on a petition; the LBC may approve the petition
8 only if it meets applicable requirements imposed by the Alaska Constitution, Alaska statutes, and
9 administrative regulations and it is in the best interests of the State; the applicable regulations are
10 set forth at 3 AAC 110.160-.210 and 3 AAC 110.900-.990; and,

11 "It is noteworthy that on April 30, 2007, the LBC adopted amendments to its
12 regulations, including standards for borough annexation. However, those
13 modified regulations are not retroactive. . . are not formally applicable to the
14 KGB petition. Nevertheless, the newly adopted regulations offer relevant insights
15 regarding the LBC's policy views with respect to borough annexation issues.

16
17
18 ²²² R. 426. The Preliminary Report is dated June 30, 2007. This is consistent with the Mr.
19 Bockhorst's testimony during the October 2008 Evidentiary Hearing (Tr. 400-06). The court
20 found Mr. Bockhorst's testimony credible.

21 ²²³ R. 427.

22 ²²⁴ R. 427.

23 ²²⁵ Tr. 468-70 (Jennie Starkey's October 2008 Evidentiary Hearing testimony). Ms. Starkey also
24 testified that it usually takes between a couple of weeks and a month and a half for her to prepare
25 a finished report for publication once she has received it from the person who wrote it. The court
found her testimony credible.

²²⁶ Alaska Statute 29.060.040(a) provided (and provides) in part that: "The Local Boundary
Commission may consider any proposed municipal boundary change. The Commission may
amend the proposed change and may impose conditions on the proposed change. If the
Commission determines that the proposed change, as amended or conditioned if appropriate,
meets applicable standards under the state constitution and commission regulations, and is in the
best interests of the state, it may accept the proposed change. Otherwise, it shall reject the
proposed change. . .

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1 Consequently, this report cites pertinent aspects of the newly adopted
2 regulations.²²⁷

3 DCCED also noted that Wrangell had submitted a petition for incorporation of a new borough
4 and the proposed 3,465 square mile borough would include the Meyers' Chuck/Union Bay area
5 (191 square miles) that is within the area the KGB proposed to annex.²²⁸

6 DCCED then stated its Findings and Conclusions. DCCED began with an
7 analysis of the *Mobil Oil Corp.* decision. DCCED stated:

8 “The Alaska Supreme Court has held that the statutory standards for borough
9 incorporation were intended to be flexibly applied to a wide range of regional
10 conditions. The Court further stated that the Commission’s determinations
11 regarding whether such standards are satisfied should be affirmed if the Court
perceives that the LBC’s reading of the standards and its evaluation of the
evidence has a reasonable basis. Specifically, the Court stated:

12 A determination whether an area is cohesive and prosperous
13 enough for local self-government involves broad judgments of
14 political and social policy. The standards of incorporation . . .
15 were intended to be flexibly applied to a wide range of regional
16 conditions . . . The borough concept was incorporated into our
17 constitution in the belief that one unit of local government could be
18 successfully adapted to both urban and sparsely populated areas of
19 Alaska, and the Local Boundary Commission has been given broad
20 power to decide in the unique circumstances presented by each
21 petition whether borough government is appropriate. Necessarily,
22 this is an exercise of delegated legislative authority to reach basic
23 policy decisions. Accordingly, acceptance of the incorporation
24 petition should be affirmed if we perceive in the record a
25 reasonable basis of support for the Commission’s reading of the
standards and its evaluation of the evidence.

227 R. 435-36. DCCED cited AS 44.62.240 with respect to the retroactivity statement, which
read: “If a regulation adopted by an agency . . . is primarily legislative, the regulation has
prospective effect only. A regulation . . . 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.”

228 R. 436.

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1 For reasons outlined in Section A below, DCCED finds no basis to distinguish
2 between borough *incorporation* and *annexation* in terms of whether the applicable
3 standards should be flexibly applied and whether the law should be read to uphold
4 the LBC decision approving borough annexation as well as borough incorporation
5 whenever the applicable requirements have been met. Moreover, DCCED
6 concludes that borough incorporation and borough annexation of areas that meet
7 applicable standards are equally encouraged by the law.”²²⁹

8 DCCED began its discussion with the requirements of Article X, § 1 of the
9 Alaska Constitution. Article X, § 1 provides:

10 “Purpose and Construction. The purpose of this article is to provide for maximum
11 local self-government with a minimum of local government units, and to prevent
12 duplication of tax-levying jurisdictions. A liberal construction shall be given to
13 the powers of local government.”

14 DCCED first analyzed the “maximum local self-government” standard. DCCED
15 traced the history of this provision through the Constitutional Convention.²³⁰ The framers of the
16 Constitution intended that Alaska have only two types of local government – cities and boroughs
17 and that the legislature have the flexibility to establish and classify boroughs and to alter the
18 boundaries of local governmental units.²³¹

19 DCCED next considered the 1963 Mandatory Borough Act. DCCED noted that
20 the legislative history and Declaration of Intent in the Act reflect that the Act was intended to
21 implement the Constitutional directive that there be a maximum local self-government with a
22 minimum number of local government units and tax levying jurisdictions. The Declaration of
23 Intent also provided, in part, that: “No area incorporated as an organized borough shall be

24 ²²⁹ R. 438 (italics in original) (quoting *Mobil Oil Corp.*, 518 P.2d at 98).

25 ²³⁰ R. 440-42.

²³¹ DCCED noted that the framers had stated that home-rule charters provided for the highest form of self-government but subsequent development of the law (statutes and caselaw) concerning general law local governments reflect that this view also applies to the same. R. 442-43.

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1 deprived of state services, revenues, or assistance or be otherwise penalized because of
2 incorporation.”²³²

3 The Mandatory Borough Act provided that eight areas of the State could either
4 incorporate boroughs voluntarily or boroughs would be imposed. The Act specified the
5 boundaries of each borough that would be so imposed. The boundaries for the KGB coincided
6 with Alaska Senate District No. 2. The boundaries of this Senate District were roughly those of
7 the later established KGB model boundaries, except that the District included the Annette Island
8 Reserve. Ketchikan voters voluntarily petitioned for the incorporation of the KGB. The LBC
9 modified the petition by substantially enlarging the boundaries of the KGB. The KGB
10 boundaries have not since changed.²³³

12 DCCED again discussed the *Mobil Oil Corp.* decision. DCCED noted that the
13 Alaska Supreme Court had ruled therein that: it will uphold the LBC’s decision approving the
14 organization of a borough whenever the requirements for incorporation have been minimally met
15 and that Article X, § 1 encourages the formation of boroughs.²³⁴

16 DCCED next discussed the LBC’s 1999 decision on the KGB prior annexation
17 proposal. DCCED noted that the two proposals are “similar” but differ “in two notable
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19
20

21
22 ²³² R. 444.

23 ²³³ R. 444-47.

24 ²³⁴ R. 447-48. DCCED also noted that the Alaska Supreme Court had held in *Petitioners for*
25 *Incorporation of City and Borough of Yakutat v. Local Boundary Commission*, 900 P.2d 721,
727 (Alaska 1995) that the LBC is not required to approve any minimally acceptable
incorporation petition, and that the Court’s expectation is that the LBC will thoroughly consider
possible alternative boundaries and decide which boundaries would be optimal and most
appropriate.

1 respects.” First, the KGB has included the Meyers Chuck area in the current petition. Second,
2 the Hyder exclusion area is much larger in the current petition.²³⁵

3 DCCED noted that:

4 “In that decision, the LBC concluded that article X, section 1 ‘encourages the
5 extension of organized borough government to unorganized areas.’ . . . In other
6 words, the Commission made no distinction between borough incorporation and
7 borough annexation in that respect.

8 The Commission found that the extension of the KGB’s jurisdiction over the area
9 would ‘in one respect . . . advance local self-government.’ However, the LBC
10 ultimately concluded that the proposal failed to fulfill the maximum local self-
11 government principle because the proposal excluded Hyder and Meyers Chuck...

12 DCCED considers the conclusion above (i.e. that the annexation proposal fails to
13 advance maximum local self-government because it excludes some areas within
14 the KGB model boundaries) to be an unduly restrictive reading of article X,
15 section 1. Alaska’s Constitution (article X, section 3) requires the entire state to
16 be divided into boroughs. That requirement means that boroughs must encompass
17 the most remote, undeveloped, and uninhabited portions of the state as well as
18 populated and developed areas.”²³⁶

19 DCCED concluded that the KGB’s proposed annexation would provide for
20 maximum local self-government with a minimum of local government units. DCCED’s analysis
21 included:

22 “In general terms, DCCED finds no basis to distinguish borough incorporation
23 from borough annexation with respect to the application of article X, section 1. In
24 either instance, the goal articulated by the Local Government Committee for
25 ‘democratic self-government below the state level’ is realized. Further, whether
26 through incorporation or annexation, there is achievement of the Committee’s
27 goal that ‘the interests and welfare of all concerned’ are guarded ‘in a framework
28 which will foster orderly development and prevent the abuses of duplication and
29 overlapping of taxing entities.’ Thus, DCCED takes the view that article X,
30 section 1 should be read to uphold LBC decisions approving borough annexations
31 that meet the reasonable basis test. Moreover, DCCED concludes that borough
32 incorporation and borough annexation are equally encouraged by article X,
33 section 1 whenever the applicable standards are met.

235 R. 449.

236 R. 450. (italics in original).

1 As noted . . . the Commission concluded in 1999 that the earlier KGB annexation
2 proposal failed to advance the constitutional principle of maximum local self-
3 government because it excluded Hyder and Meyers Chuck. DCCED considers
4 that restricted conclusion to be an unduly narrow reading of article X, section 1.
5 Moreover, in the previously noted *Mobil Oil* case, the Court stated that boroughs
6 were intended to encompass areas in which there is no need for local government
7 services. . . Thus, DCCED takes the view that the standard in article X, section 1
is met whenever organized borough government is extended to an unorganized
area in accordance with applicable standards, regardless of any particular need for
municipal services.”²³⁷

8 DCCED noted that:

9 “[This] view is wholly consistent with the new provisions in 3 AAC 110.981
10 adopted by the LBC on April 30, 2007. . . [which] provides . . . ‘In determining
11 whether a proposed boundary change promotes maximum local self-government
12 under art. X, sec. 1 . . . the commission will consider . . . for borough annexation,
13 whether the proposal would extend local government to portions of the
14 unorganized borough.”²³⁸

15 DCCED stated that the KGB petition meets the standard set forth in 3 AAC 110.981(2), noting
16 that: the area proposed for annexation is wholly within the unorganized borough; it contains no
17 city governments; only 16 people live in the area; it has minimal development; and it appears
18 that no part of the area would qualify for municipal incorporation for the foreseeable future.²³⁹

19 DCCED next addressed whether the KGB’s proposed annexation complies with
20 the “minimum-number-of-local-government” portion of Article X, § 1. DCCED noted that the
21 Alaska Supreme Court had stated that this provision is “an express constitutional policy of
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23 ²³⁷ R. 450.

24 ²³⁸ R. 450-51. (quoting from 3 AAC 110.981(2)).

25 ²³⁹ R. 451.

1 minimizing the *number* of local government units.”²⁴⁰ And that this constraint is “an important
2 factor in the character of borough government.”²⁴¹

3 DCCED noted that: the KGB is the 2nd smallest organized borough; it is less than
4 10% of the size of the average organized borough; and, if the annexation is approved it will still
5 be the 9th smallest organized borough.²⁴²

6 DCCED noted that, in the 1963 Mandatory Borough Act, the legislature “clearly
7 endorsed boundaries encompassing large and natural regions for the eight regions listed in the . . .
8 Act.”²⁴³ DCCED noted that the average size of the boroughs formed with boundaries based on
9 the Act was 16,420 square miles.²⁴⁴

10 DCCED next addressed the LBC’s 1999 decision. DCCED stated that:

11
12 “In its 1999 decision on the previous KGB annexation proposal, the five-member
13 LBC was divided on the proper application of minimum-number-of-local-
14 government-units constraint. Three members . . . concluded that the constitutional
15 provision calls for boroughs to be maximally expansive to encompass any
16 unincorporated community that might incorporate as a city. The other two LBC
17 members rejected that view. The two members in the minority cautioned that it
18 would be inadvisable to suggest that every borough annexation proposal must be
19 maximally expansive within its model boundaries (or some other reasonable
20 boundaries) to include all areas that might form city governments. . . .”²⁴⁵

21 DCCED noted that:

22 “The newly adopted regulations of the LBC provide as follows under 3 AAC
23 110.982(2) regarding the minimum-number-of-local-government-units constraint:
24
25

26 ²⁴⁰ R. 452 (quoting *City of Douglas v. City and Borough of Juneau*, 484 P.2d 1040, 1044
27 (Alaska 1971) (italics added by DCCED)).

28 ²⁴¹ R. 452. DCCED noted that the framers of the Alaska Constitution intended that boroughs be
29 areawide governments that were large enough to prevent too many political subdivisions and
30 cover “large geographic areas with common economic, social, and political interests.” (citing and
31 quoting, Victor Fischer’s *Alaska’s Constitutional Convention* at p. 119 (1975)).

32 ²⁴² R. 452.

33 ²⁴³ R. 453.

34 ²⁴⁴ R. 454.

35 ²⁴⁵ R. 454.

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1
2 Among the factors to be considered . . . comports with the
3 minimum-number-of-local government units constraint . . .
4 the commission will consider . . . for borough annexation,
5 whether the jurisdictional boundaries of an existing
6 borough are being enlarged rather than promoting the
7 incorporation of a new borough and whether the proposed
8 boundaries maximize an area and population with common
9 interests.

10 Approval of the proposed annexation would increase the geographic size of the
11 KGB . . . an increase of 268 percent. DCCED concludes that the Alaska
12 Constitution promotes boroughs that embrace large and natural regions.

13 Based on the discussion and findings above, DCCED concludes that the KGB
14 annexation proposal would comport with the minimum-number-of-local-
15 government-units constraint in article X, section 1 of the Alaska Constitution.²⁴⁶

16 DCCED next addressed whether the KGB's proposal satisfied the standards set
17 forth in Article X, § 3 of the Alaska Constitution and in 3 AAC 110.160(a).

18 Article X, § 3 provides:

19 The entire State shall be divided into boroughs, organized or unorganized. They
20 shall be established in a manner and according to standards provided by law. The
21 standards shall include population, geography, economy, transportation, and other
22 factors. Each borough shall embrace an area and population with common
23 interests to the maximum degree possible. The legislature shall classify boroughs
24 and prescribe their powers and functions. Methods by which boroughs may be
25 organized, incorporated, merged, consolidated, reclassified, or dissolved shall be
prescribed by law.

3 AAC 110.160(a) provided:

Community of interests. (a) The social, cultural, and economic characteristics and
activities of the people in the territory must be interrelated and integrated with
the characteristics and activities of the people in the existing borough. In this
regard, the commission may consider relevant factors, including the

(1) compatibility of urban and rural areas within the proposed borough
boundaries;

²⁴⁶ R. 454-55.

1 (2) compatibility of economic lifestyles and industrial or commercial activities
2 within the proposed borough boundaries;

3 (3) existence of customary and simple transportation and communication patterns
4 throughout the proposed borough boundaries; and

5 (4) extent and accommodation of spoken language differences throughout the
6 proposed borough boundaries.

7 DCCED first considered whether the KGB's proposed new boundaries embrace
8 an area and population with common interests to the maximum degree possible. DCCED
9 reiterated that the framers of the Alaska Constitution intended that boroughs encompass large,
10 natural regions. And DCCED stated that the framers intended that the "maximum degree
11 possible" language referred to including areas with the necessary common interests within a
12 borough. DCCED noted in this regard that the Alaska Supreme Court in *Mobil Oil Corp.* found
13 that the 94,770 square mile North Slope Borough met this standard, finding that boroughs are
14 intended to encompass lands with no present need for municipal services. DCCED concluded
15 from this that this standard should be applied in a regional context.²⁴⁷

16 DCCED then addressed the LBC's 1999 conclusion that the area then proposed
17 for annexation to the KGB had a "great deal in common with the Borough" but this standard
18 could not be met if Meyers Chuck and Hyder were excluded. DCCED quoted at length from the
19 1999 decision.²⁴⁸ DCCED noted that, with the exception of the House Election District
20 Boundaries, the factors cited by the LBC then as showing such commonality between the KGB
21 and the area proposed for annexation remain.²⁴⁹ With respect to the House Election District,
22

23 ²⁴⁷ R. 457-471.

24 ²⁴⁸ R. 471-73.

25 ²⁴⁹ The factors were: Election District boundaries, model borough boundaries, the 1963
Mandatory Borough Act boundaries, census subarea boundaries, USFS Ranger Districts, and
hunting and fishing on the Cleveland Peninsula. R. 474.

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1 Hyder and much of the territory the KGB proposes to annex was placed in a different House
2 District in 2000.²⁵⁰

3 DCCED concluded that:

4 "In Section C . . . DCCED provided an extensive account reflecting the intent of
5 the framers of Alaska's Constitution that boroughs encompass large, natural
6 regions. Section 3 also summarized the 1999 LBC conclusions that a similar area
7 proposed for annexation at that time had a 'great deal in common' with the KGB.
8 Section 3 reviewed any changes to the factors that the 1999 LBC relied to make
9 that determination. DCCED also examined other common interests between the
10 greater Ketchikan area and the area proposed for annexation. Based on the
11 discussion and findings above, DCCED concludes that the KGB annexation
proposal satisfies the standards set out in article x, section 3 of the Alaska
Constitution and 3 AAC 110.160(a). Other relevant factors such as
communications and transportation links between the greater Ketchikan area and
the area proposed for annexation and general conformance with natural geography
are addressed later in this report."²⁵¹

12 DCCED next considered whether the KGB's annexation petition satisfied the
13 requirements of 3 AAC 110.160(b). 3 AAC 110.160(b) provided that:

14 The communications media and the land, water, and air transportation facilities
15 throughout the proposed borough boundaries must allow for the level of
16 communications and exchange necessary to develop an integrated borough
government. In this regard, the commission may consider relevant factors,
including

- 17 (1) transportation schedules and costs;
18 (2) geographical and climatic impediments;
19 (3) telephonic and teleconferencing facilities; and
20 (4) electronic medial for use by the public.
21

22
23
24 ²⁵⁰ DCCED noted that in 2002 the LBC had concluded that changes in Election District
boundaries and the reasons therefore are such that Election Districts no longer make for ideal
borough boundaries, though the prior references to such boundaries do provide a measure of the
25 expected geographic scale of boroughs. R. 475.

²⁵¹ R. 481.

1 DCCED stated that, for the reasons discussed above, a reasonable evaluation
2 under this standard “is most appropriately carried out in a regional context”, and also that such
3 an evaluation “should recognize the sparse population of the area proposed for annexation.”²⁵²

4 DCCED noted that 2006 State statistics reflect that only 16 people live in the
5 territory proposed for annexation, 11 of whom reside in Meyers Chuck, and 92 in Hyder.²⁵³

6 DCCED again cited the *Mobil Oil Corp.* decision, observing that there the Alaska
7 Supreme Court had found that this standard had found the communications and transportation
8 standard had been met by the proposed North Slope Borough, even though it would encompass
9 97,121 square miles and have only 3,384 inhabitants.²⁵⁴

10 DCCED noted that the LBC had found in 1999 that the KGB’s prior petition had
11 satisfied this standard, although minimally due to the exclusion of Hyder and Meyers Chuck.²⁵⁵

12 DCCED quoted from that portion of the KGB petition which discussed: the
13 KGB’s role as a regional transportation and communications hub; the Ketchikan Daily News
14 circulation; Ketchikan’s radio stations; and, the float plane traffic between Meyers Chuck and
15 Ketchikan. DCCED also cited other related data.²⁵⁶

16 DCCED concluded that:

17
18 “As noted above, DCCED maintains that it is proper to apply borough annexation
19 standards in a regional context. In the early 1970’s, the LBC and Alaska Supreme
20 Court determined that the North Slope met the communication and transportation
21 standard even though some communities were more than 300 miles from the
22 proposed borough seat. In comparison, the settlement of Meyers Chuck is 36.6

23 ²⁵² R. 482.

24 ²⁵³ The same source showed that there were 16 people living outside of Meyers Chuck and in the
25 area proposed for annexation in 2005, 11 in 2004, 11 in 2003, 27 in 2002, and 11 in 2001 and
2000. R. 482.

²⁵⁴ R. 483.

²⁵⁵ R. 484-85.

²⁵⁶ R. 485-87.

1 miles (point to point) from Ketchikan. The LBC concluded eight years ago that
2 the communication and transportation standard was met for the prior KGB
3 annexation proposal. Based on the discussion and findings above, DCCED
4 concludes that the KGB annexation proposal satisfies the standards set out in 3
5 AAC 110.160(b).²⁵⁷

6 DCCED next considered whether the KGB annexation petition satisfied the
7 requirements of 3 AAC 110.170. 3 AAC 110.170 provided:

8 The population of the proposed borough after annexation must be sufficiently
9 large and stable to support the resulting borough. In this regard, the commission
10 may consider relevant factors, including

- 11 (1) total census enumerations;
- 12 (2) durations of residency;
- 13 (3) historical population patterns;
- 14 (4) seasonal population changes; and
- 15 (5) age distributions.

16 DCCED noted that the LBC had found in 1999 that the KGB's prior annexation
17 petition had satisfied this standard. DCCED examined the 2006 statistics and determined that
18 the combined population of the KGB and the area proposed for annexation was large enough to
19 support the proposed expanded borough government.²⁵⁸ DCCED reviewed the KGB's historical
20 population figures and concluded that it was sufficiently stable to support the same.²⁵⁹ DCCED
21 noted that the "minimal population of the area proposed for annexation, coupled with the land
22 ownership of the area (93.6 percent Tongass National Forest) means that there will be relatively
23 little demand for borough services in the area proposed for annexation."²⁶⁰

24 ²⁵⁷ R. 487-88.

25 ²⁵⁸ R. 489.

²⁵⁹ R. 489-92.

²⁶⁰ R. 492.

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1 DCCED next considered whether the KGB annexation petition satisfied the
2 requirements of 3 AAC 110.180. 3 AAC 110.180 provided:

3 The economy within the proposed borough boundaries must include the human
4 and financial resources necessary to provide essential borough services on an
5 efficient, cost-effective level. In this regard, the commission may consider
relevant factors, including the

6 (1) reasonably anticipated functions of the borough in the territory being annexed;

7 (2) reasonably anticipated new expenses of the borough that would result from
8 annexation;

9 (3) actual income and reasonably anticipated ability of the borough to generate
and collect local revenue and income from the new territory;

10 (4) feasibility and plausibility of those aspects of the borough's anticipated
11 operating and capital budgets that would be affected by annexation through the
third year of operation after annexation;

12 (5) economic base of the borough after annexation;

13 (6) property valuations in the territory proposed for annexation;

14 (7) land use in the territory proposed for annexation;

15 (8) existing and reasonably anticipated industrial, commercial, and resource
16 development;

17 (9) personal income of residents in the territory to be annexed and in the borough;
18 and

19 (10) the need for and availability of employable skilled and unskilled persons to
20 serve the borough as a result of annexation.

21 DCCED noted that the LBC found in 1999 that the KGB's prior annexation
22 proposal satisfied this standard.²⁶¹ DCCED examined: the powers the KGB planned to exercise
23
24
25

²⁶¹ R. 493-94. DCCED quoted from the 1999 LBC decision at some length.

1 in the annexed area;²⁶² the anticipated KGB expenditures related to the annexation;²⁶³ the
2 anticipated KGB NFR and PILT revenues;²⁶⁴ the anticipated tax revenues from the area;²⁶⁵
3 employment figures;²⁶⁶ economic indicators for the current KGB;²⁶⁷ property values;²⁶⁸ land use
4 in the area proposed for annexation;²⁶⁹ existing and reasonably anticipated industrial,
5 commercial, and resource development;²⁷⁰ personal income data;²⁷¹ and, information concerning
6 the available work force.²⁷²
7

8 DCCED concluded:

9 “The foregoing analysis of the reasonably anticipated functions, expenses, and
10 income of the proposed expanded borough; the ability of the proposed expanded
11 borough to generate and collect local revenue; and the feasibility and plausibility
12 of the anticipated operating and capital budgets reflect a fiscally viable proposal.
13 The economic base, property valuations, land use, existing and reasonably
14 anticipated development, and personal income are evidence of an economy that is
15 fully capable of supporting the proposed expanded borough government. Lastly,
16

17 ²⁶² R. 494-95 (education, assessment and collection, planning/platting/land use regulation,
18 recreation, economic development assistance, airport, library, regulation of fireworks, animal
19 control, Wastewater Enterprise Fund, solid waste collection, and solid waste disposal).

20 ²⁶³ R. 495 (\$77,000 the 1st year, \$63,000 the next 2 years, and then \$45,000 annually).

21 ²⁶⁴ R. 496 (the 2 scenarios posited by the KGB – roughly \$1.2 million under one and \$300,000
22 under the other, depending on NFR funding and PILT revenues). DCCED projected that the
23 higher scenario would be applicable for NFR funds and that the KGB would also receive some
24 \$41,000 in PILT revenues. R. 500.

25 ²⁶⁵ R. 496-500.

²⁶⁶ R. 501.

²⁶⁷ R. 502-04.

²⁶⁸ R. 505-07.

²⁶⁹ R. 507-10. DCCED again noted that 93.6% of the territory proposed for annexation is within
the Tongass National Forest. DCCED quoted the related portion of the KGB petition at some
length. The quote included the discussion of the number of flights into and over the Misty Fjords
National Monument, the potential mines on the Cleveland Peninsula, at Duke Island, and Quartz
Hill, and State leases. DCCED noted that: “Like the area proposed for annexation, most of the
land within the existing boundaries of the KGB are part of the Tongass National Forest
[94.63%].” R. 509. DCCED also noted that: “The land-ownership characteristics reflected above
are typical for regions in southeast Alaska.” R. 510.

²⁷⁰ R. 510-12.

²⁷¹ R. 512-14.

²⁷² R. 514.

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1 the availability of employable persons to serve the proposed expanded borough
2 reflects positively on the region. Accordingly, DCCED concludes that the
3 standard set out in 3 AAC 110.180 regarding the human and financial resources is
4 fully satisfied by the Petition.²⁷³

5 DCCED next considered whether the KGB annexation petition satisfied the
6 requirements of 3 AAC 110.190. 3 AAC 110.190 provided:

7 (a) The proposed boundaries of the borough must conform generally to natural
8 geography, and must include all land and water necessary to provide the full
9 development of essential borough services on an efficient, cost-effective level. In
10 this regard, the commission may consider relevant factors, including:

11 (1) land use and ownership patterns;

12 (2) ethnicity and cultures;

13 (3) population density patterns;

14 (4) existing and reasonably anticipated transportation patterns and
15 facilities;

16 (5) natural geographic features and environmental factors, and

17 (6) extraterritorial powers of boroughs.

18 (b) Absent a specific and persuasive showing to the contrary, the commission will
19 presume that territory that is not contiguous to the annexing borough, or that
20 would create enclaves in the annexing borough, does not include all land and
21 water necessary to allow for the full development of essential borough services on
22 an efficient, cost-effective level.

23 (c) Absent a specific and persuasive showing to the contrary, the commission will
24 not approve annexation of territory to a borough extending beyond the model
25 borough boundaries developed for that borough.

(d) The commission will consult with the Department of Education and Early
Development in the process of balancing all standards for annexation to a
borough.

(e) If a petition for annexation to a borough describes boundaries overlapping the
boundaries of an existing organized borough, the petition for annexation must also

²⁷³ R. 515.

1 address and comply with the standards and procedures for detachment of the
2 overlapping region from the existing organized borough.

3 DCCED noted that the LBC in 1999 had concluded that the KGB's prior petition
4 did not satisfy the "natural geography" standard because the proposed boundary near Hyder
5 divided a natural drainage. And that the LBC had found in 1999 that: "The exclusion of Hyder
6 and Meyers Chuck from the annexation proposal precludes the satisfaction of the requirement
7 that the Borough conform generally to natural geography and include all areas necessary for full
8 development of municipal services on an efficient, cost-effective level."²⁷⁴

9 DCCED then stated that:

10 "In developing its current proposal, the KGB responded to the 1999 concerns of
11 the LBC regarding the standard at issue. Specifically, the current proposal
12 includes Meyers Chuck. Moreover, the boundaries of the Hyder exclusion have
13 been modified to conform more closely to natural geography."²⁷⁵

14 DCCED next considered whether the proposed boundaries included all land and
15 water necessary to provide the full development of essential borough services on an efficient,
16 cost-effective level. DCCED stated:

17 "DCCED maintains that it is reasonable to address the standard in the context of
18 borough government as outlined in Part II-A and Part II-C of this report. In Part
19 II-A . . . DCCED pointed out that the Alaska Supreme Court stated in *Mobil Oil*
20 that our Constitution encourages the creation of boroughs. For reasons expressed
21 earlier, DCCED takes the position that the same principle applies to borough
22 annexations. That is, DCCED views the Alaska Constitution as encouraging the
23 extension of borough government through annexations. In Part II-C of this report,
24 DCCED emphasized that Alaska's Constitution requires the entire state be

25 ²⁷⁴ R. 517.

²⁷⁵ R. 517. DCCED also noted that earlier that year the LBC had, with respect to the Skagway
incorporation petition, placed significant weight on the fact that the boundaries of that proposed
borough conform generally to the contours of a NOAA weather forecast zone, and that Meyers
Chuck, Union Bay, and Ketchikan are in the same zone but the Misty Fjords Monument area is
not. DCCED stated that the view that this did not mean that the "conformance with natural
geography" standard is violated. DCCED noted that many existing organized boroughs include
more than one forecast zone and that Wrangell, Petersburg, and Kake are together in one forecast
zone. R. 518-19.

1 divided into boroughs, organized and unorganized. . . the Alaska Supreme Court
2 stated in *Mobil Oil* that boroughs were meant to 'encompass lands with no present
3 municipal use'. Given the principles of borough government in article X, sections
4 1 and 3 of the Alaska Constitution, this aspect of the standard must be broadly
5 construed. It is notable in this regard, that the LBC refined the standard set out in
6 3 AAC 110.190(a) in the amendments adopted by the LBC on April 30, 2007. As
7 amended, the new standard in 3 AAC 110.190(a) reads (underlined text was
8 added; bracketed text was deleted):

9 The proposed expanded boundaries of the borough must conform
10 generally to natural geography[,] and must include all land and
11 water necessary to provide the [FULL] development of essential
12 municipal [BOROUGH] services [ON AN EFFICIENT COST-
13 EFFECTIVE LEVEL]

14 The 4,701 square mile area proposed for annexation is inhabited by an estimated
15 16 individuals. Overall, the area has an extremely low population density . . .
16 However, 11 individuals . . . live within the 0.8 square mile Meyers Chuck census
17 designated place . . .

18 There are limited needs for municipal service in the sparsely populated area
19 proposed for annexation, which is comprised largely of federally owned lands.
20 However, those limited needs are fairly concentrated in the Meyers Chuck area.
21 Because of that concentration, DCCED finds that services can be delivered *within*
22 *the area proposed for annexation* by the KGB in a reasonably efficient, cost-
23 effective manner. In the context of the proposed expanded boundaries of the
24 KGB (6,453 square miles), DCCED concludes that the KGB can deliver services
25 in an efficient and cost-effective manner.

The provisions of 3 AAC 110.190(b) establish a rebuttable presumption that an
annexation which would create enclaves in the annexing borough does not include
all land and water necessary for the full development of borough services on an
efficient, cost-effective level. Stated another way, the LBC lawfully must be
wary and skeptical when evaluating an annexation proposal that would create
enclaves.

As noted throughout this report, the KGB proposal would create a 205-square
mile enclave in and around Hyder. Thus, the evidentiary presumption set out in 3
AAC 110.190(b) requires a higher level of proof (i.e. 'a specific and persuasive
showing') that the proposed expanded boundaries of the KGB meet the 'all-land-
and-water-necessary' part of the boundaries standard.

The KGB takes the position that the . . . enclave 'should eventually be included
into the Borough, [but] the current cultural, economic and other ties between this
area and the Borough do not justify inclusion at this time.' . . . The KGB Petition

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1 includes a seven-page exhibit (Exhibit K) offering justification for the initial
2 exclusion of Hyder . . .²⁷⁶

3 DCCED then summarized the KGB's justifications: the LBC's four decades of
4 decisions setting a clear precedence for incremental extension of borough boundaries;²⁷⁷ the new
5 Hyder exclusion boundaries now conform to the natural geography; and, Hyder is a long-term
6 target, and appropriately within the KGB's model boundaries, but at present the cultural, social,
7 and economic ties between it and the KGB are too attenuated for it to be included now (Hyder's
8 such ties are instead with Stewart, B.C.).

9 DCCED then noted that the KGB had stated that it did not foresee the
10 strengthening of such ties between the KGB and Hyder in the near term, and that the KGB had
11 listed the developments that it believed could warrant the annexation of Hyder at a later time.²⁷⁸

12 DCCED then discussed the Haines Borough. DCCED stated:

13 "Currently, the Haines Borough is the only organized borough in Alaska in which
14 enclaves exist. Specifically, the boundaries of the Haines Borough surround a
15 892.2 acre (1.4 square mile) area encompassing Klukwan, located about 21 miles
16 north of Haines along the Haines Highway. Public policy issues relating to the
17 Klukwan enclave have been examined previously by the LBC . . .

18 Public Policy issues relating to the Klukwan enclave have been examined
19 previously by the LBC. Most notably, the LBC addressed the matter in *School
20 Consolidation: Public Policy Considerations and a Review of Opportunities for
21 Consolidation* . . .

22 ²⁷⁶ R. 518-19 (italics in original).

23 ²⁷⁷ Specifically referencing the KGB's 1963 incorporation (encompassing an area much smaller
24 than provided for in the 1963 Mandatory Borough Act), the City and Borough of Juneau's 1989
25 annexation of the Greens Creek Mine area; the 1990 incorporation of the Denali Borough (did
not include all area within its model boundaries); the 1992 KGB Model Boundaries (which
exclude the Annette Island Reserve); the 1998 approval of the consolidation of the Haines City
and Borough (did not include all territory within model boundaries); 2001 approval of the
consolidation of the City of Ketchikan and the KGB (did not include only some 27% of the
territory within the KGB's model boundaries). R. 519-20.

²⁷⁸ R. 520.

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1 The public policy issues that exist regarding the Klukwan enclave would not exist
2 with respect to the proposed Hyder enclave, at least not initially. The Klukwan
3 enclave and the proposed Hyder enclave are distinguishable in fundamental
4 respects. For example, the majority of students who attend Klukwan school live
5 in the Haines Borough. Some Klukwan students also attend schools in the Haines
6 Borough. Additionally, Klukwan, located 21 miles from Haines along the Haines
7 Highway, relies on Haines for much of its commercial services, communications,
8 and other needs. In contrast, Hyder presently has closer social, cultural, and
9 economic ties to Stewart, B.C., than it does to Ketchikan.

10 Creating a Hyder enclave would have no initial effect on the structure of delivery
11 of local services to the community of Hyder. Moreover, DCCED finds that
12 creating the 205-square mile Hyder enclave would not initially impede 'the full
13 development of essential borough services on an efficient, cost-effective level'
14 within the proposed new boundaries of the KGB.

15 However, DCCED recognizes that circumstances might arise in which the
16 existence of the enclave would trigger significant public policy concerns. In
17 particular, such concerns would arise in the context of the delivery of education
18 services in the event a Prince of Wales Island Borough were organized along the
19 model boundaries of the Prince of Wales Island area.

20 Education services are currently provided in Hyder by the Southeast Island
21 Regional Educational Attendance Area (REAA). The Southeast Island REAA
22 also provides education services to all communities with the Prince of Wales
23 model borough boundaries, except the three communities organized as home-rule
24 or first-class cities.

25 As reflected in Table 2.19 . . . school enrollment in Hyder during the 2006/2007
school year totaled 18 students, or just under 10 percent of the total enrollment in
the Southeast Island School District. If a Prince of Wales Borough were formed,
that borough would be required to provide areawide education within a single
borough school district. At that point, the 205-square mile Hyder enclave would
be the only remnant of the . . . REAA. It seems evident that the remnant . . .
would no longer meet the statutory standards for an REAA . . .

Given these circumstances, DCCED concludes that while the creation of the
enclave would not initially bring about inefficient, cost-ineffective delivery of
essential services, such would result upon formation of a Prince of Wales
Borough. It would be appropriate at that point to initiate proceedings for the
annexation of the . . . Hyder enclave to the KGB.²⁷⁹

²⁷⁹ R. 521-23.

1 DCCED stated that the KGB's proposed annexation complies with 3 AAC
2 110.190(c) as the proposed boundaries do not extend beyond the KGB's model boundaries.²⁸⁰

3 DCCED stated that, per 3 AAC 110.190(d): it provided notice of the KGB
4 Petition to the DEED Commissioner on March 9, 2006; DEED has not yet commented; and,
5 DCCED will provide it with a copy of this report and its final report and notice of the LBC's
6 public hearing, and invite DEED comment.²⁸¹

7
8 DCCED stated that the KGB's proposed annexation complies with 3 AAC
9 110.190(e) as the proposed boundaries do not overlap the boundaries of an existing organized
10 borough.²⁸²

11 DCCED concluded that:

12 "The foregoing analysis has addressed relevant factors including land use and
13 ownership patterns; population density patterns; existing and reasonably
14 anticipated transportation patterns and facilities; and natural geographical features
15 and environmental factors. The analysis also addressed whether the creation of
16 the proposed 205-square mile enclave would lead to inefficient, cost-effective
17 service delivery. Consideration was also given to the model borough boundaries
18 of the KGB. In terms of the requirement for the LBC to consult with DEED . . .
19 Lastly, the proposed boundaries . . . do not overlap the boundaries . . .
20 Accordingly, DCCED concludes that the standard set out in 3 AAC 110.190
21 regarding boundaries is fully satisfied by the Petition."²⁸³

22 DCCED next considered whether the KGB's annexation petition satisfied the
23 requirements of 3 AAC 110.195 and 3 AAC 110.980.

24 3 AAC 110.195 provided:

25 ²⁸⁰ R. 523.

²⁸¹ R. 523.

²⁸² R. 524.

²⁸³ R. 524.

1 In determining whether annexation to a borough is in the best interests of the state
2 under AS 29.06.040(a),²⁸⁴ the commission may consider relevant factors,
including whether annexation

- 3 (1) promotes maximum local self-government;
- 4 (2) promotes a minimum number of local government units; and
- 5 (3) will relieve the state government of the responsibility of providing local
6 services.

7 3 AAC 110.980 provided that:

8 If a provision of AS 29 or this chapter requires the commission to determine
9 whether a proposed municipal boundary change or other commission action is in
10 the best interests of the state, the commission will make that determination on a
11 case-by-case basis, in accordance with applicable provisions of the Constitution
of the State of Alaska, AS 29.04, AS 29.05, AS 29.06, and this chapter, and based
on a review of:

- 12 (1) the broad policy benefit to the public statewide; and
- 13 (2) whether the municipal government boundaries that are developed serve
- 14 (A) the balanced interests of the citizens in the area proposed for change;
- 15 (B) affected local governments; and
- 16 (C) other public interests that the commission considers relevant.

17 DCCED stated that:

18 “Based on the extensive analysis in Part II-A . . . DCCED concluded that the
19 KGB annexation proposal provides for maximum local self-government in
20 accordance with article X, section 1 of the Alaska Constitution.

21

22

23 ²⁸⁴ AS 29.06.040(a) provided: “The Local Boundary Commission may consider any proposed
24 municipal boundary change. The commission may amend the proposed change and may impose
25 conditions on the proposed change. If the commission determines that the proposed change, as
amended or conditioned if appropriate, meets the applicable standards under the state
constitution and commission regulations and is in the best interests of the state, it may accept the
proposed change. . . .”

1 Based on the findings and conclusions set out in Part II-B . . . DCCED determined
2 that the KGB annexation proposal comports with the minimum-number-of-local-
government-units constraint in article X, section 1 of the Alaska Constitution.

3 There are two areas in particular in which the KGB would relieve the State of the
4 responsibility of providing local services in the area proposed for annexation.
Those are education and platting.²⁸⁵

5 With respect to education, DCCED noted that: the area proposed for annexation is
6 part of SISD; SISD is a REAA; REAA's are state funded (including pass through NFR funds);
7 organized boroughs are required by AS 29.35.160 to maintain and operate schools on an
8 areawide basis; organized boroughs do receive state education funding, but are required under
9 AS 14.17.410 to provide substantial local contributions to education; the local contribution
10 results in a dollar for dollar reduction in the amount of state education funding received by the
11 organized boroughs; and, the LBC has characterized the mandated local contributions as a "state
12 tax imposed on organized boroughs and cities that operate schools."²⁸⁶

13
14 DCCED also noted that:

15 "Currently, there are no schools operating in the area proposed for annexation.
16 While it may not be necessary in the foreseeable future for the KGB to establish,
17 maintain, and operate a public school in the area proposed for annexation, the
18 KGB would, nonetheless, bear some burden relating to education in the short-
term as a result of annexation. Specifically, the provisions of AS 14.17.410(b)(2)
19 require that the KGB make a local contribution . . . that is 'the equivalent of a four
20 mill tax levy on the . . . taxable real and personal property in the district . . .' If
annexation occurred March 2008, it would increase the . . . the KGB as of
21 January 1, 2009. Thus, beginning in FY 2011, the KGB's required local
contribution for schools would increase as a result of annexation. DCCED
22 estimates that the KGB's contribution would increase by \$15,197 effective FY
2100 as a direct result of annexation.

23 While \$15,197 is not particularly significant, it is appropriate to recognize that the
KGB's current required contribution under AS 14.17.410(b)(2) equals

24
25 ²⁸⁵ R. 525.

²⁸⁶ R. 526 (quoting *Local Boundary Commission Report to the Second Session of the Twenty-
Fourth Alaska Legislature*, p. 63, January 2006).

1 \$4,529,134. Thus, the KGB provides a significant relief to the State in terms of
2 responsibility for delivery of education services.”²⁸⁷

3 With respect to platting, DCCED stated that the KGB, as a second class borough,
4 is mandated by AS 29.35.150 and AS 29.35.180(a) to provide for planning, platting, and land use
5 regulation in accordance with AS 29.40, so “following annexation, the power and duties for
6 platting within the area proposed for annexation would shift from the State to the KGB.”²⁸⁸

7 DCCED stated that the proposed KGB annexation would result in broad policy
8 benefit to the public statewide because as:

9 “DCCED has noted in multiple places in this report that Alaska’s Constitution
10 encourages the extension of borough government. For reasons underlying that
11 circumstance, DCCED finds that annexation will result in broad policy benefit to
12 the citizens of Alaska. Public policy issues favoring the extension borough
government have long been addressed by the LBC. Readers are encouraged to
review annual reports of the LBC to the Alaska Legislature.”²⁸⁹

13 DCCED next considered the factors listed at 3 AAC 110.980(2)(A)-(C). DCCED
14 noted that:

15 “Concerns have been raised . . . that annexation will have adverse financial
16 impacts on communities within that portion of the unorganized borough in and
17 adjoining the Tongass National Forest. For example, on April 27, 2006, the City
of Craig wrote in opposition to the current proposal, stating

18 The City of Craig is deeply concerned about the financial
19 impact of the proposed annexation to communities in the
unorganized borough. The City has raised these concerns
20 to you in past attempts by the KGB to annex areas . . . It is
obvious from the petition and published press reports that
21 the KGB’s sole purpose . . . is to secure substantial
increases from the [NFR and PILT] programs. Because the
22 increases . . . will come at the expense of sixteen cities,
twelve school districts, and 2,700 K-12 students, the City of
23 Craig submits that the proposed annexation is not in the

24
25 ²⁸⁷ R. 526-27.

²⁸⁸ R. 527.

²⁸⁹ R. 527.

1 best interests of the State . . . LBC staff should recommend
2 disapproval, as it has done with other annexation petitions
3 that sought principally to increase program funding.

4 The KGB addressed such concerns in its reply brief . . . Specifically, the
5 KGB stated:

6 3 AAC 110.420(5) requires the Borough to state its reasons
7 for the petition. Comments suggest that the Borough's sole
8 reason . . . contrary to its published goals . . . is a land grab
9 to increase Borough revenues. The Borough responds that
10 if approved the annexation would require the Borough to
11 pay for services, as needed, within the territory. As
12 expected, forest receipts and property tax revenues would
13 offset these projected expenses. This arrangement is part of
14 the state's long-standing design for the finance and
15 operation of local government. In Ketchikan's original
16 incorporation report, dated May 1963, the state noted that
17 'the forest service stumpage fees accruing to the borough
18 with the enlarged area . . . would provide an important
19 yearly revenue for the borough . . . Ketchikan has been, and
20 will continue to be, a major service provider to timber and
21 mineral industries in the region contrary to comments
22 received. Specifically, Ketchikan is the Forest Service
23 Headquarters for the region as well as the District Ranger
24 Headquarters for the Ketchikan/Misty Fjords Ranger
25 District. The community has an operating sawmill which
regularly and successfully bids on timber in the region. The
community also has industry support services and a trained
labor force. In addition, the majority of recent mineral
exploration services on the Cleveland Peninsula were
purchased in Ketchikan. While it's true that a number of
mineral claims have been abandoned in the Union Bay
area, it is also true that there are still 78 claims
covering 1,560 acres in the area as of May 2006. The
potential for commercially viable mineral deposits in the
Ketchikan region, and for that matter throughout Southeast
Alaska, is well known. Commercial mineral recovery is
inevitable depending upon world market forces. In
addition, the existence of oil and gas in British Columbia's
Queen Charlotte Basin (adjacent to the southern model
boundary) is also well documented and underscores the
importance of developing a local government perspective
and response to any future recovery activities.

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1 Similar concerns were raised in the 1998-1999 proceedings involving a
2 somewhat comparable proposal. However, in its 1999 decision . . . the
3 LBC clearly rejected arguments that annexation should be denied because
4 it would have adverse fiscal implications for communities in the
5 unorganized borough . . . Specifically, the Commission stated . . .

6 The Commission rejects the notion that State policy
7 positions concerning borough incorporation and annexation
8 should be driven by the financial considerations such as
9 those expressed by DCRA in this proceeding. [NFR and
10 PILT] programs are ephemeral - in a few years those
11 programs may operate in a significantly different manner or
12 may no longer exist. In contrast, the formation of a
13 borough or the extension of a borough over a large area is a
14 much more permanent action.

15 Further, it is poor public policy to suggest that each
16 annexation or incorporation proposal should be weighed to
17 ensure that revenues and costs are somehow balanced. . .

18 The Commission is guided by Alaska's Constitution and
19 standards established in law. These make little or no
20 provision for consideration of the fiscal effects on which
21 DCRA placed so much emphasis.

22 If there are adverse fiscal consequences, parties should seek
23 legislative remedies. . . In this particular instance, it appears
24 from the record that the State legislature was mindful of the
25 possible consequences that would result from this type of
annexation proposal when it extended National Forest
Receipts funding to entities in the unorganized borough.
During the deliberations . . . some legislators expressed a
hope that the legislation would not inhibit borough
government.

Even if the financial impacts were a relevant consideration,
the adverse financial impacts on numerous local service
providers in this particular instance would have been de
minimis in terms of the percentage of the operating budgets
. . . As such, the Department's concern as to the financial
impact on others was overstated.²⁹⁰

²⁹⁰ DCCED noted in a footnote (R. 529, n. 67) that "DCRA policy makers in the Knowles Administration (i.e., the Office of the Commissioner and Division Director, as contrasted the

1 The LBC has reinforced the policy expressed in its 1999 decision on
2 multiple occasions. In particular, in its annual reports to the Alaska State
3 Legislature in 2005, 2006, and 2007, the LBC has characterized the policy
4 of paying NFR aid to entities in the unorganized borough as a significant
5 disincentive to borough incorporation and borough annexation.
 Accordingly, the LBC has urged the legislature to restrict NFR aid to
 organized boroughs. . .

6 The analysis . . . above addressed relevant issues pertaining to the best
7 interests of the State. Those included the constitutional principles of
8 maximum local self-government and minimum number of local
9 government units. The analysis also addresses the manner in which
10 annexation will relieve the state government of the responsibility of
11 providing local services and how annexation will result in broad policy
12 benefit to the public statewide. While annexation will have some adverse
13 fiscal impacts on communities in the unorganized borough, those impacts
14 are not a basis to reject the proposal. DCCED concludes . . . that
15 annexation is in the best interests of the State. Accordingly, DCCED
16 concludes that the standard set out in AS 29.06.040 and 3 AAC 110.195
17 regarding the best interests of the State is fully satisfied by the Petition.²⁹¹

18 DCCED next considered whether the KGB's proposed annexation satisfied the
19 legislative review annexation standards set forth in 3 AAC 110.200. 3 AAC 110.200 provided:

20 Territory meeting the annexation standards specified in 3 AAC 110.160-.195 may
21 be annexed to a borough by the legislative review process if the commission
22 determines that any one of the following circumstances exists:

- 23 (1) the territory manifests a reasonable need for borough government that can be
24 met most efficiently and effectively by the annexing borough;
- 25 (2) the territory is an enclave surrounded by the annexing borough;
- (3) the health, safety, or general welfare of borough residents is or will be
 endangered by conditions existing or potentially developing in the territory, and
 annexation will enable the borough to regulate or control the detrimental effect of
 those conditions;

 LBC Staff Component), opposed the prior KGB annexation proposal.” And that DCRA’s 1998
 Preliminary Report reflected the policy makers’ views.

²⁹¹ R. 527-31 (citations omitted).

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1 (4) the extension of borough services or facilities into the territory is necessary to
2 enable the borough to provide adequate services to borough residents, and it is
3 impossible or impractical for the borough to extend the facilities or services
4 unless the territory is within the boundaries of the borough;

4 (5) residents or property owners within the territory receive, or may be reasonably
5 expected to receive, directly or indirectly, the benefit of borough government
6 without commensurate tax contributions, whether these benefits are rendered or
7 received inside or outside the territory, and no practical or equitable alternative
8 method is available to offset the cost of providing these benefits;

7 (6) annexation of the territory will enable the borough to plan and control
8 reasonably anticipated growth or development in the territory that otherwise may
9 adversely impact the borough;

9 (7) repealed 5/19/2002;

10 (8) annexation of the territory will promote local self-government with a
11 minimum of government units;

12 (9) annexation of the territory will enhance the extent to which the existing
13 borough meets the standards of incorporation of boroughs, as set out in the
14 Constitution of the State of Alaska or AS 29.05, and 3 AAC 110.045 – 3 AAC
15 110.065;

15 (10) the commission determines that specific policies set out in the Constitution of
16 the State of Alaska or AS 29.04, 29.05, or 29.06 are best served through
17 annexation of the territory by the legislative review process.

17 DCCED noted that the standards in 3 AAC 110.200 had "undergone significant
18 change" since the LBC's 1999 Decision. It then required that the LBC could approve an
19 annexation petition only if it served the State's best interest., and seven related factors were
20 listed. In 2002 the LBC adopted a new best interest standard in 3 AAC 110.195 and 3 AAC
21 110.200 was changed to provide that the legislative review annexation process could be used if
22 any one of nine circumstances is present. But six of the nine circumstances are virtually
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1 identical to the “factors” listed in the prior version of 3 AAC 110.200, with 3 AAC 110.200(8)-
2 (10) having been added in 2002.²⁹²

3 DCCED noted that the LBC had found in 1999 that: the area the KGB had
4 proposed to annex did manifest a need for services that can be most efficiently and effectively
5 met by the KGB; and, there was no present substantial mining activity in the proposed area but
6 there was a reasonable likelihood that such activity would occur; substantial weight should be
7 given to the need to plan for the same; and, it is best to put local government in place to provide
8 for such planning before the development occurs.²⁹³

9 DCCED further noted that in 1999 the LBC had then stated:

10
11 “However, the need for municipal government is not limited to the area proposed
12 for annexation. That area includes Meyers Chuck and Hyder . . . When planning
13 is conducted around those communities, special focus should be given to how
14 activities in the adjacent region will affect those communities. As such, the
15 Borough’s annexation proposal significantly undercuts its own ability to
16 effectively address planning needs by excluding Meyers Chuck and Hyder. There
17 are no schools in the territory proposed for annexation. However, here again, the
18 Borough undermines its own annexation proposal by excluding Meyers Chuck
19 and Hyder. The State would be left with the responsibility for the education of
20 students in those communities. The State currently contracts directly with the
21 school district in Stewart . . . for the education of Hyder students. Any students in
22 Meyers Chuck would be served by the . . . (Southeast Island REAA).²⁹⁴

23 DCCED first addressed the need for borough services in the area the KGB
24 proposed to annex. DCCED observed that: there are only 16 residents in the proposed area; it
25 has little development; and “does not presently manifest a need for services.” But DCCED noted
26 that the KGB had stated in its petition that “some residents outside the KGB utilize its library,
27 animal control, airport, health care, and other facilities on an as-needed, sometimes fee-based,
28

29 ²⁹² R. 532-33.

30 ²⁹³ R 533.

31 ²⁹⁴ R. 533-34 (quoting LBC 1999 Statement of Decision, p. 12).

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1 basis.”²⁹⁵ And that: “Notwithstanding the limited services provided to residents of the area, as
2 the LBC pointed out in 1999, it is optimum to have in place prior to significant development a
3 local government jurisdiction with authority to exercise planning, platting, and land use
4 regulation.”²⁹⁶ DCCED then quoted the following from the KGB petition:

5 “[S]everal of the circumstances outlined in 3 AAC 110.200(1) – (10) exist and
6 merit discussion. It is in the State’s best interest to enable the Borough to locally
7 plan and control for reasonably anticipated growth or development in the annexed
8 territory that may otherwise adversely impact the Borough. As described earlier
9 in the petition, there are a number of current and likely future commercial and
10 economic development activities that would require borough services and
11 consequent management. They include the possible expansion of commercial
12 tourism in the area and the likelihood of mine development in either Union Bay or
13 Duke Island during the next 20 to 30 years. Specifically, tens of thousands of
14 visitors depart Ketchikan annually for destinations within the territory (mostly
15 Misty Fjords National Monument). It should be noted that the community of
16 Wrangell is currently preparing a petition which may propose to annex the Union
17 Bay mining district, including the community of Meyers Chuck. As the likely
18 primary service provider in the event of mine development, the Borough is
19 proactively seeking to include the area within its boundaries well in advance of
20 any mining activity to allow sufficient time for planning and to minimize any
21 negative impacts on the community. In addition, the Borough expects that there
22 will continue to be private, State, and Federal land trades and disposals within the
23 annexed territory which would merit Borough planning participation. It is also in
24 the Borough’s best interest to maximize its influence over use of Federal lands in
25 the territory as a local government representative during the NEPA process. Other
planning issues include the gradual trend towards development of second homes in the territory both by state and out-of-state residents; and development of additional resort destinations. Taken together, future activities within the territory proposed for annexation will utilize Ketchikan as a hub for services and supplies and will look to Ketchikan for assistance on planning and land use issues.”²⁹⁷

20 DCCED concluded that it concurred with the LBC’s 1999 position and that of the KGB in the
21 pending petition.²⁹⁸

24 ²⁹⁵ R. 534.

24 ²⁹⁶ R. 534.

25 ²⁹⁷ R. 534-35 (quoting from p. 72 of the KGB’s petition).

25 ²⁹⁸ R. 535.

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1 DCCED next considered whether the circumstances set forth in 3 AAC
2 110.200(5) were present. DCCED noted that:

3 "The circumstances set out in 3 AAC 110.200(5) has historically been evaluated
4 in the context of whether an area proposed for annexation receives, directly or
5 indirectly, services *from the borough to which annexation is proposed*. The
6 KGB's interpretation of the circumstances has a more general application. It is
7 undeniable, as the KGB argues, that any area of the unorganized borough outside
8 of home-rule and first-class cities (which includes the entire 4,701-sqaure-mile
9 area proposed for annexation) indirectly receives benefit of borough government
10 without commensurate tax contributions. Organized boroughs and home-
11 rule/first-class cities in the unorganized borough will pay \$189,043,074 in . . .
12 required local contributions . . . to support schools. If the boroughs and cities . . .
13 did not make those contributions, the State of Alaska would have to pay that
14 additional amount or it would have to lower the funding to all schools. In that
15 regard, REAA's clearly benefit from borough government."²⁹⁹

11 DCCED next considered whether the circumstances set forth in 3 AAC
12 110.200(8) were present. DCCED stated that:

13 "The KGB takes the position that annexation will maximize local self-government
14 and minimize the number of local governments. As noted previously, DCCED
15 reached the same conclusion following the extensive analysis set out in Parts II-A
16 and II-B of this report."³⁰⁰

16 DEECED next considered whether the circumstances set forth in 3 AAC
17 1110.200(9) were present. DCCED stated that:

18 "Based on the same analysis set out in Parts II-A and II-B, DCCED takes the
19 position that annexation will enhance the extent to which the existing KGB meets
20 the standards for incorporation of boroughs as set out in the Constitution of the
21 State of Alaska, AS 29.05 and 3 AAC 110.045 – 3 AAC 110.065. As outlined in
22 this report, DCCED maintains that those standards promote boroughs that
23 encompass large and natural regions."³⁰¹

22 DCCED next stated that:

24 ²⁹⁹ R. 535-36.

25 ³⁰⁰ R. 536.

³⁰¹ R. 536.

1 "Lastly, as previously noted in this report, the Alaska Supreme Court held in
2 *Mobil Oil* that article X, section 1 of Alaska's Constitution encourages borough
3 incorporation. In terms of that holding, DCCED finds no basis to distinguish
4 between borough annexation and borough incorporation. DCCED views that
5 holding as a clear constitutional policy favoring the extension of borough
6 government whenever the applicable standards are satisfied."³⁰²

7 DCCED concluded that the following circumstances set forth at 3 AAC 111.200
8 were present with respect to the KGB petition:

- 9 " - the area manifests a reasonable need for borough government that can be
10 met most efficiently and effectively by the annexing borough;
- 11 - in a general sense, residents and property owners within the area receive,
12 or may be reasonably expected to receive, directly or indirectly, the
13 benefit of borough government without commensurate tax contributions,
14 whether these benefits are rendered or received inside or outside the area,
15 and no practical or equitable alternative method is available to offset the
16 cost of providing these benefits;
 - 17 - annexation of the area will enable the borough to plan and control
18 reasonably anticipated growth or development in the area that otherwise
19 may adversely impact the borough;
 - 20 - annexation of the area will promote local self-government with a
21 minimum number of government units;
 - 22 - annexation of the area will enhance the extent to which the existing
23 borough meets the standards for incorporation of boroughs, as set out in
24 the Constitution of the State of Alaska, AS 29.05, and 3 AAC 110.045 – 3
25 AAC 110.065; and
 - 26 - specific policies set out in the Constitution of the State of Alaska or AS
27 29.04, 29.05, or 29.06 are best served through annexation of the area by
28 the legislative review process."³⁰³

29 DCCED next considered whether the KGB annexation petition satisfied the
30 requirements of 3 AAC 110.900. 3 AAC 110.900 provided:

31 ³⁰² R. 536.

32 ³⁰³ R. 536-37.

1 Transition. (a) A petition for . . . annexation . . . must include a practical plan that
2 demonstrates the capacity of the municipal government to extend . . . essential
3 borough services into the territory proposed for change in the shortest practicable
time after the effective date of the proposed change . . .

4 (b) Each petition must include a practical plan for the assumption of all relevant
5 and appropriate powers, duties, rights, and functions presently exercised by an
6 existing borough, city, unorganized borough service area, and other appropriate
entity in the territory proposed for change. . .

7 (c) Each petition must include a practical plan for the transfer and integration of
8 all relevant and appropriate assets and liabilities of an existing borough, city,
unorganized borough service area, and other appropriate entity located in the
territory proposed for change. . .

9 (d) Before approving a proposed change, the commission may require that all
10 boroughs, cities, unorganized borough service areas, or other entities wholly or
partially included in the area of the proposed change execute an agreement . . .

11 DCCED discussed the timing of the LBC review, the upcoming legislative
12 session, and the necessary notice of compliance with the Federal Voting Rights Act from the
13 Department of Justice. DCCED reviewed the KGB's transition plan. DCCED concluded that
14 the KGB's transition plan satisfied this standard.³⁰⁴

15 DCCED next considered whether the KGB's annexation plan complied with the
16 requirements of 3 AAC 110.910 and the federal Voting Rights Act. 3 AAC 110.910 provided:
17

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

20 The federal Voting Rights Act (42 U.S.C. § 19, 28 C.F.R. Part 51) obligated the KGB to show
21 federal authorities that the proposed annexation was not being pursued for a discriminatory
22 purpose and that the boundary change would not make racial or language minority voters worse
23 off than they were before the annexation.
24

25

³⁰⁴ R. 538-41.

1 DCCED reviewed the KGB petition in light of the above-requirements. DCCED
2 found that the KGB's petition satisfied the requirements of 3 AAC 110.910 and did not violate
3 the Voting Rights Act.³⁰⁵

4 DCCED recommended that the LBC approve the KGB petition. DCCED stated:

5 "The delegates who authored the Local Government Article of the Alaska State
6 Constitution strived to create an effective structure for 'democratic self-
7 government below the state level.' They constructed broad constitutional
8 provisions for local government in a manner such that 'the interests and welfare
9 of all concerned' would be guarded 'in a framework which will foster orderly
10 development and prevent the abuses of duplication and overlapping of taxing
11 entities.' Article x, section 1 . . . promotes those ideals and encourages the
12 extension of borough government through incorporation and annexation. It is
13 DCCED's view that Article X, section 1 should be read to uphold LBC decisions
14 approving any borough incorporation and annexation that meets the reasonable-
15 basis test. Boroughs are meant to provide local government for regions as well as
16 localities and encompass lands with no present municipal use. In light of these
17 facts, DCCED takes the view that the KGB annexation proposal provides for
18 maximum local self-government in accordance with article X, section 1 of the
19 Alaska Constitution.

20 Article X, section 1 . . . also promotes boroughs that embrace large and natural
21 regions, in part, to avoid too many boroughs. Currently, the boundaries of the
22 KGB encompass the second-smallest area of any organized borough. The KGB
23 annexation proposal would significantly increase the size of . . . the KGB. The
24 1963 legislature determined that the appropriate boundaries of the KGB were
25 more on the order of those currently proposed. Given those and other facts
outlined in Part II, DCCED reaches the conclusion that the annexation proposal
comports with the minimum-number-of-local-government-units constraint in
article X, section 1 of the Alaska Constitution.

Article X, section 3 of Alaska's Constitution mandates that each borough embrace
an area and population with common interests to the maximum degree possible.
Moreover, 3 AAC 110.160(a) allows annexation of an area if, on a scale suitable
for borough government, the post-annexation boundaries . . . would embrace a
population that is interrelated and integrated with respect to social, cultural, and
economic characteristics and activities. In the context of boroughs embracing
large and natural regions, the large area and small population proposed for
annexation have many interests in common with the area and population within
the existing boundaries of the KGB. Based on the evidence in this proceeding,

³⁰⁵ R. 542-47.

1 DCCED concludes that the KGB annexation proposal satisfies the standards set
2 out in article X, section 3 of the Alaska Constitution and 3 AAC 110.160(a).

3 Again, in the context of large and natural regions, the communications media and
4 transportation facilities in the proposed expanded boundaries . . . allow for the
5 level of communications and exchange necessary to develop an integrated
6 borough government. DCCED concludes . . . that the KGB annexation proposal
7 satisfies the standards set out in 3 AAC 110.160(b).

8 Based on the most current available data, the population of the KGB is 63 percent
9 greater than the median population of all organized boroughs . . . The population
10 density of the KGB is the fourth highest of among the sixteen organized boroughs
11 . . . Although the proposed annexation would quadruple the amount of land within
12 the KGB and increase its population by only one-tenth of one percent, the
13 proposed expanded KGB would still have a population density greater than nine
14 . . organized boroughs. While the KGB experienced a moderate population
15 downturn from 1996-2004, its population has increased the past two years. Based
16 on the facts outlined in Part II of this report, DCCED concludes that the size and
17 stability of the population within the proposed new boundaries of the KGB are
18 sufficient to support the proposed expanded borough and that the standard set out
19 in 3 AAC 110.170 is satisfied.

20 In DCCED's view, the KGB annexation proposal is fiscally sound considering the
21 reasonably anticipated functions, expenses, and income of the KGB in the area
22 proposed for annexation . . . DCCED concludes, therefore, that the standards set
23 out in 3 AAC 110.180 regarding the human and financial resources is fully
24 satisfied by the Petition.

25 In the context of the boundary standard in 3 AAC 110.190, DCCED examined
land use and ownership patterns, population density patterns, existing and
reasonably anticipated transportation patterns and facilities, natural geographical
features and environmental factors, model borough boundaries, and other factors.
It is evident to DCCED that the proposed new boundaries conform generally to
natural geography, include all land and water necessary to provide the full
development of essential borough services on an efficient and cost-effective level,
and are otherwise proper. DCCED recognizes, of course, that the KGB
annexation proposal would create a 205-square mile enclave in and around Hyder.
Based on the discussion in Part II, DCCED finds that such an enclave would not
result in inefficient, cost-ineffective service delivery in the near term. However,
if a Prince of Wales Island Borough were formed, the enclave should be annexed
to the KGB. . . In DCCED's view, the KGB proposal satisfies the boundary
standard set out in 3 AAC 110.190.

An annexation proposal may only be approved if the LBC finds that it serves the
best interests of the State. Examination of that standard by DCCED included
consideration of the constitutional principles of maximum local self-government

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1 and minimum number of local government units. DCCED's view also addressed
2 the manner in which annexation will relieve the State of Alaska of the
3 responsibility of providing local services and how annexation will result in broad
4 policy benefit to the public statewide. While the KGB annexation would have
5 some adverse fiscal impacts on communities in the unorganized borough, the
6 LBC has repeatedly indicated that such circumstances are not relevant in terms of
7 the applicable standards and are no basis to deny the proposal. Based on these
8 facts DCCED takes the view that the standard set out in AS 29.60.040 and 3 AAC
9 110.195 regarding the best interests of the State is satisfied.

10 The provisions of 3 AAC 110.200 allow a legislative review annexation if certain
11 circumstances exist. Among those are several that DCCED finds to be evident in
12 the KGB proposal. For example, the area proposed for annexation manifests a
13 reasonable need for borough government that can be met most efficiently and
14 effectively by the KGB. Additionally, in a general sense, residents and property
15 owners within the proposed area receive, or may be reasonably expected to
16 receive, directly or indirectly, the benefit of borough government without
17 commensurate tax contributions. Annexation of the area will also enable the
18 KGB to plan and control reasonably anticipated growth or development in the
19 area that otherwise may adversely affect the area and population within the KGB.
20 Moreover, annexation . . . will promote maximum local self-government with a
21 minimum number of governmental units. Annexation . . . will also enhance the
22 extent to which the KGB meets the legal standards for borough incorporation.
23 Lastly, specific policies set out in the Constitution . . . are best served through
24 annexation of the area by the legislative review process. Given its findings,
25 DCCED concludes that the standard set out in 3 AAC 110.200 is satisfied.

26 The Petition presents a seven-page transition plan that demonstrates KGB's
27 capacity to extend borough services into the area proposed . . . in the shortest
28 practicable time after annexation. The document includes a practical plan for the
29 assumption of all relevant and appropriate powers, duties, rights, and functions
30 currently exercised by Southeast Island REAA and the State of Alaska. Given
31 those circumstances, DCCED concludes that a proper plan for the orderly
32 transition to borough government has been provided in accordance with 3 AAC
33 110.900.

34 . . . Those facts led DCCED to conclude that the standard set out in 3 AAC
35 110.910 is satisfied and that the proposed annexation does not violate any
36 provision of the Federal Voting Rights Act."³⁰⁶

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³⁰⁶ R 547-550. Mr. Bockhorst wrote at R. 550 n. 73 that: "As outlined in Parts II and III of this report, DCCED takes the view that the proposed 205-square mile enclave should be annexed to the KGB upon incorporation of a Prince of Wales Island Borough. However, DCCED does not believe that an obligation can be imposed by the LBC on a future KGB Assembly to petition for annexation. Similarly, DCCED does not believe that the current LBC can obligate a future LBC

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1 Appendix A to the DCCED Preliminary Report provides background on the
2 KGB.³⁰⁷ The information provided therein included the following: Ketchikan voters petitioned
3 to incorporate a 75 square mile KGB in 1963; the legislature thereafter in 1963 enacted the
4 Mandatory Borough Act; the Act mandated the formation of a Ketchikan Borough; the Act's
5 Declaration of Intent stated, in part, that no area included in an organized borough would be
6 deprived of state services or revenues or otherwise penalized; the Act provided that a Ketchikan
7 Borough based on a Senate Election District would be mandated if Ketchikan did not form its
8 own borough; the Senate District comprised an area 95 times larger than the area that the
9 Ketchikan voters had proposed; the predecessor to DCCED recommended that the LBC approve
10 an area 23 times the size of the area proposed by the voters, noting in part this would increase the
11 borough's share of NFR's; the LBC accepted staff's recommendation, but it concluded that the
12 proper boundaries of the KGB should still be substantially larger; the promise that boroughs
13 would not be deprived of State revenues or otherwise penalized has not been kept; organized
14 boroughs are required by statute to make local contributions to support schools within the
15 borough while REAA school districts have no such requirement; and, in FY 2007 alone this
16 resulted in organized boroughs receiving \$179,091.163 less in State education funding in
17 comparison to the level of funding they would have received if they had not incorporated.
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19 Appendix B describes the "constitutional foundation" of the LBC, its duties and
20 functions, the nature of its proceedings, due process³⁰⁸ requirements, limits on direct
21 communication with the LBC, LBC membership, and the role of DCCED³⁰⁹ as staff for the LBC.
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24 to initiate annexation proceedings on its own or commit to the prospective annexation of the 205-
25 square mile area in question."

³⁰⁷ R. 552-61.

³⁰⁸ R. 562-572. The comments concerning due process requirements included:

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3 In *U.S. Smelting, supra*, the Alaska Supreme Court found that due process
4 requirements apply in Commission proceedings . . . due process . . . means that
5 adequate notice be given, that a fair and impartial hearing be conducted, and that a
6 reasoned decision on the merits of the petition be set out in writing. . . A fair and
7 impartial hearing entails having the opportunity to present and examine evidence
and have that evidence judged by impartial, unbiased fact finders . . . However,
the Court also reviews fair-hearing issues to determine whether a fact finder has
shown bias such as a prejudgment of the facts or issues or a personal bias for or
against an issue or a participant in the proceeding.

8 Due process . . . also entails a written, well-reasoned decision based on the facts
9 in the record and application of pertinent boundary-change standards. Procedural
requirements for Commission decisions are set out [in] 3 ACC 110.570.

10 R. 565-66.

11 ³⁰⁹ The comments concerning the DCCED included:

12 “. . the framers provided for only one State agency or department – the local
13 government agency mandated by article X, section 14 to advise and assist local
governments. . .

14 In its capacity as staff to the LBC, DCCED is required to investigate each
15 boundary-change proposal and to make recommendations regarding such to the
16 LBC. . . the LBC staff is committed to developing its recommendations to the
17 LBC based on a proper interpretation of the applicable legal standards and a
18 rational application of those standards to the evidence in the proceeding. The
LBC staff takes the view that due process is best served by providing the LBC
with a thorough, credible, and objective analysis of every municipal boundary
proposal.

19 DCCED’s Commissioner, DCCED’s Deputy Commissioners, and the Director of
20 DCA provide policy direction concerning recommendations to the LBC.

21 The recommendations of LBC Staff are not binding on the LBC. . . While the
22 Commission is not obligated to follow recommendations . . . it has, nonetheless,
23 historically considered DCCED’s analysis and recommendations to be critical
components of the evidence in municipal boundary proceedings. Of course, the
LBC considers the entire record when it renders a decision.

24 The LBC Staff also delivers technical assistance to municipalities, residents of
25 areas subject to impacts from existing or potential petitions for creation or
alteration of municipal government, petitioners, respondents, agencies, and
others.”

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1 Appendix C describes what had occurred to that point with respect to KGB
2 annexation petition and the steps that follow after the Preliminary Report is published.³¹⁰

3 Appendix D contains election district and NOAA Weather Service maps.³¹¹

4 Appendix E is an excerpt from the DCEED's 2004 School Consolidation Study
5 dealing with policy issues concerning borough enclaves.³¹²

6 There is nothing in DCCED's Preliminary Report which reflects that DCCED
7 consulted with the Alaska Attorney General's Office with respect to DCCED's legal
8 interpretations and conclusions.

9 The KGB Assembly held a regularly scheduled meeting on July 16, 2007. The
10 minutes of the meeting reflect that the Assembly voted to form an Ad Hoc Manager Search
11 Committee.³¹³

12 The Ad Hoc Manager Search Committee met on July 20, 2007. The minutes
13 reflect that the Committee discussed the need to begin to advertise the position and other issues
14 related to the hiring process.³¹⁴

15 The Ad Hoc Manager Search Committee met on July 27, 2007. The minutes
16 reflect that: the Committee reviewed, revised, and approved a proposed advertisement for the
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22 R. 570-71.

23 ³¹⁰ R. 574-77.

24 ³¹¹ R. 578-82.

25 ³¹² R. 584-86. The excerpt deals with the Klukwan enclave.

³¹³ R. 1355-58, 1363. The minutes were not in the LBC's record.

³¹⁴ R. 1364-67. The minutes were not in the LBC's record.

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1 KGB Manager position; approved the application packet; and, agreed that the KGB would
2 advertise the position in newspapers and on-line.³¹⁵

3 The KGB Deputy Borough Clerk, Kacie Paxton, communicated by e-mail on July
4 20, 2007 and July 24, 2007 with the Ketchikan Daily News concerning advertising the KGB
5 Manager position vacancy, with the advertisements to begin on August 1, 2007.³¹⁶ Ms. Paxton
6 communicated with the AML via e-mail regarding advertising the position vacancy on July 20,
7 2007.³¹⁷ Ms. Paxton communicated with the Anchorage Daily News via e-mail on July 27, 2007
8 regarding advertising the position vacancy.³¹⁸ Ms. Paxton communicated with *County News* and
9 Jobs Online on July 24, 2007, July 27, 2007, and July 30, 2007 regarding advertising the position
10 vacancy.³¹⁹ The KGB posted the position opening with ICMA on July 30, 2007, with a run date
11 of August 31, 2007.³²⁰ There are invoices and other documents in the record which reflect that
12 the KGB advertised the position in newspapers, publications, and on-line in a manner consistent
13 with the Ad Hoc Manager's Search Committees' July 27, 2007 discussion.³²¹

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19 ³¹⁵ R. 1368-72. The minutes were not in the LBC's record. The minutes list: the Anchorage
20 Daily News, the Ketchikan Daily News, the Seattle Daily Journal of Commerce, AML fax alert,
21 MACO ("includes Jobs Online"), ICMA, and the Association of Washington Cities. R. 1369.
22 The application packet is in the record at R. 1331-45. The court notes that the Index to Volume
23 9 of the record does not reference the July 27, 2007 minutes and instead states that the July 20,
24 2007 Ad Hoc Committee meeting documents include R. 1364-72. As noted above, the July 27,
25 2007 minutes and agenda are located at R. 1368-72.

³¹⁶ R. 1383, 1385. None of the e-mails referenced in this paragraph were in the LBC's record.

³¹⁷ R. 1390-91.

³¹⁸ R. 1379.

³¹⁹ R. 1395.

³²⁰ R. 1396.

³²¹ R. 1376-97.

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1 Julia Bockmon of the Alaska Department of Law sent Mr. Bockhorst an e-mail
2 (1:54 p.m.) in which she advised that she was attaching thereto the advisory opinion that they
3 discussed.³²²

4 Mr. Bockhorst sent an e-mail on July 31, 2007 (4:31 p.m.) to Mark Davis. He
5 cc'd Julia Bockmon of the Department of Law. Mr. Bockhorst wrote:

6 "Mr. Davis: As I stated to you this afternoon, I may apply for the position of
7 Borough Manager for the Ketchikan Gateway Borough. My interest in doing so
8 arose this morning after I read online (at home) that the Ketchikan Gateway
9 Borough is soliciting applications for the position. Given that the Ketchikan
10 Gateway Borough has a petition for annexation pending before the LBC and that
11 voters in Wrangell have a competing petition for incorporation, I sought guidance
12 from you (DCCED Ethics Supervisor) regarding the matter. I noted that I drafted
13 DCCED's preliminary report to the LBC regarding the annexation proposal. That
14 report was published and released on July 13, 2007, prior to my interest in
15 applying for the position.

16 At your suggestion, I spoke with Assistant Attorney General Judy Bockmon. Ms.
17 Bockmon provided me with a copy of her September 6, 2006 memorandum
18 (edited in handwriting to reflect the 2007 amendments to State laws governing
19 ethics) dealing with similar circumstances. A copy of that memorandum is
20 attached to this note.³²³

21 Ms. Bockmon said that I should make a formal disclosure of the circumstances to
22 you. Based on her advice, until you make a determination, I will refrain from any
23 action that might be reasonably perceived even remotely, as benefitting the
24 Ketchikan Gateway Borough.³²⁴

25 ³²² R. 1416. Neither the e-mail nor the referenced advisory opinion were in the LBC's record.

³²³ The memorandum, as edited, is in the record at R. 1477-83. Ms. Bockmon stated therein, in part, that the Ethics Act is not violated if a State employee uses the contacts developed as a State employee to seek employment in the private sector provided that the employee does not do or say anything that would constitute or imply that the employee is offering, or has the ability to offer, to grant some benefit to the prospective employer related to the employee's State employment. She advised that a State employee who wishes to enter into employment discussions with an entity that conducts business with the State that the employee is in a position to take official act with respect thereto should immediately submit a Notification of Potential Violation to the employee's designated ethics supervisor. This process will, in part, assure that duties are reassigned so as to avoid a problem.

³²⁴ R. 1416 (emphasis of "may" in original). The e-mail was not in the LBC's record.

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1 Mr. Bockhorst sent an e-mail to Mr. Davis on August 1, 2007.³²⁵ He forwarded
2 therewith a Confidential Request for Ethics Determination and Attachment thereto.³²⁶ He noted
3 in the e-mail that he was following up on their discussion of July 31, 2007 regarding the issues
4 discussed in the Request. The Request and Attachment included:

5 "I request advice regarding the application of the Executive Branch Ethics Act
6 (AS 39.52.010 - .960) to my situation, which involves the following:

7 My interest in applying for the position of Borough Manager of the
8 Ketchikan Gateway Borough (KGB) and that fact that the KGB
9 has a petition for annexation of 4,701 square miles pending before
10 the Local Boundary Commission. It is also noted that a petition
overlapping a small part (191 square miles, or 4 percent of the total
area) has been filed voters in the Wrangell area.

11 Details and additional information are provided in the attachment.³²⁷

12 I believe the following provisions of the Ethics Act may apply to my situation:

13 AS 39.52.120, Misuse of Official Position . . .³²⁸

14 AS 39.52.180, Restrictions on Employment after Leaving State Service ...

15 **I understand that I should refrain from taking any official action relating to**
16 **this matter until I receive your advice.** If the circumstances I described above
17 may result in a violation of AS 39.52.110 - .190, I intend that this request serve as
my disclosure of the matter in accordance with AS 39.52.210 or AS 39.52.220.

18 I certify to the best of my knowledge that my statement is true, correct, and
19 complete. In addition to any other penalty or punishment that may apply, the
20 submission of a false statement is punishable under AS 11.56.200 – AS
11.56.240.³²⁹

22 ³²⁵ R. 1266. Neither the e-mail nor the attachment were in the LBC's record.

23 ³²⁶ R. 1267-71.

24 ³²⁷ The Form is a pre-printed form. It appears that this sentence and the preceding paragraph
were typed in.

25 ³²⁸ There are eight options listed. These two options were checked.

³²⁹ Mr. Bockhorst signed directly below the certification. The Form is dated August 1, 2007.
The Form reflects that it was signed in Anchorage, Alaska.

1 ATTACHMENT TO CONFIDENTIAL REQUEST FOR ETHICS DETERMINATION³³⁰

2 The . . . (KGB) has petitioned the . . . (LBC) for annexation of 4,701 square miles
3 to the KGB. Additionally, voters in the greater Wrangell area have petitioned the
4 LBC for incorporation of a 3,465 square mile borough. The two petitions overlap
a 191-square mile area in and around Meyers Chuck and Union Bay.

5 Under AS 44.33.020(a)(4) . . . (DCCED) has a duty to serve as staff for the LBC.
6 I am employed as a Local Government Specialist V and serve as a supervisor of
7 the component within DCCED's Division of Community Advocacy (DCA) that
8 provides staff to the LBC. My supervisor is the Director of the DCA.
9 Additionally, Kathy Atkinson is employed as a Local Government Specialist IV
10 under my supervision in the LBC Staff component.

11 DCCED has a duty under 3 AAC 110.530 to "investigate and analyze" petitions
12 to the LBC and to prepare preliminary and final reports of that investigation and
13 analysis. For the purpose of obtaining broad policy direction, I discussed the
14 KGB annexation proposal and the Wrangell incorporation proposal with the DCA
15 Director during the week of March 26, 2007. Subsequently I authored DCCED's
16 *Preliminary Report* . . . That report was substantially completed by June 30 and
17 was published on July 13, 2007. The preliminary report concludes that the KGB
18 petition meets all of the applicable standards and recommends that the LBC
19 accept the petition.

20 Ms. Atkinson is drafting DCCED's preliminary report regarding the Wrangell
21 borough incorporation proposal. She anticipates that the report will be complete
22 and published within approximately two weeks. It is my understanding that the
23 Wrangell report will recommend that the LBC approve the Wrangell petition after
24 amending it to exclude the 191-square mile area common to the KGB and
25 Wrangell petitions.

More than two months ago, Ms. Atkinson and I independently concluded with
respect to borough boundary standards that the area and population within the . . .
area common to both petitions have stronger ties to the greater Ketchikan area
than they do to the greater Wrangell area. . . .

Public comments on the preliminary report regarding the KGB proposal are being
accepted until September 4, 2007. DCCED will then prepare its final report on
the matter. Subsequent to the publication of DCCED's final report, the LBC will
hold a hearing on the matter. After evaluating all of the evidence . . . the LBC
will render its decision.

³³⁰ "DB 8/1/07" is hand written at the bottom right corner of each page of the Attachment.

1 It is important to recognize that the LBC is free to adopt, modify, or reject
2 DCCED's recommendations regarding the matter. DCCED's reports constitute
3 one part of the evidence that the LBC will consider. Sometimes one or more
4 members of the LBC may differ with DCCED in terms of their interpretation of
particular regulations, statutes, or constitutional standards or the application of the
evidence in the matter. . .

5 The KGB is inviting applications for the position of KGB Manager. I became
6 aware of this after publication of the preliminary report. In fact, I first read the
7 KGB's invitation for applications yesterday, July 31, 2007. I anticipate that I will
8 apply for this position. The deadline for applications is September 15, 2007. The
9 existing manager is expected to leave his position at the end of October of this
10 year.

11 Although my interest in applying for the position of KGB Manager would not
12 have any influence on my work as LBC Staff supervisor, I recognize that
13 circumstances outlined above may give the appearance of impropriety if I
14 continued to work on the KGB annexation proposal. Therefore, I have recused
15 myself from any further action regarding the KGB annexation petition during the
16 application and review process for the KGB Borough Manager position.

17 I request the following determinations:

- 18 1. Whether my seeking of employment as the KGB Manager would
19 constitute a violation of AS 39.52.190(b)(1). If so, I will not submit my
20 application . . . or will immediately withdraw my application if the
21 determination is made following my application.
- 22 2. Whether AS 39.52.180(a) would prohibit me, if I were employed as KGB
23 Manager, from representing, advising, or assisting the KGB regarding the
24 annexation petition after leaving my current position. I understand that the
25 provisions of AS 39.52.180(a) are to be narrowly applied. . . Given that
the DCCED recommendations are not binding on the LBC and the Alaska
State Legislature must independently approve of the proposal in order for
it to take effect, I do not perceive that such post-employment
representation, advice, or assistance would be adverse to the public
interest even if a determination is made that the limitation of AS
39.52.180(a) would apply. Thus, if such a determination is made and I am
employed as KGB Manager, I would seek a waiver.
3. Whether the circumstances described above would bar me from working
with Ms. Atkinson regarding the Wrangell borough incorporation
proposal. I do not believe that my recusal in that matter is warranted;
however, I will not take any significant act in the Wrangell proposal until
this requested ethics act determination is made. Please note that LBC
Commissioner Gerogianna Zimmerle, a current resident of Ketchikan and

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1 former KGB Manager has, with advice from the State Attorney General's
2 Office, been recused by the LBC from the KGB annexation proceeding.
3 However, she has not been recused from the Wrangell Borough
4 incorporation proceeding. In fact, the Wrangell Borough Petitioner's
5 Representative has taken the position that Commissioner Zimmerle should
6 not be recused . . ."

7 Mr. Davis sent Mr. Bockhorst an e-mail on August 1, 2007 in which he stated:

8 "Will review".³³¹

9 Jeanne McPherren (LBC Staff), in an August 2, 2007 letter to Eddy Jeans of the
10 DEED stated: she is following up on Mr. Jeans' conversation the previous week with Mr.
11 Bockhorst concerning the KGB's petition; 3 AAC 110.190(d) requires that the LBC consult with
12 the DEED; one way for this to occur would be for DEED to submit written comments; he had
13 expressed a concern to Mr. Bockhorst that the Hyder enclave might continue indefinitely; she is
14 providing the KGB's justifications for not including the Hyder area and a copy of that portion of
15 the KGB's Petition; and, the DCCED discusses Hyder at pp. 86-90 of its preliminary report and
16 in Appendix E.³³²

17 Ms. McPherren sent Mr. Bockhorst an e-mail on August 3, 2007 in which she
18 provided a draft provision (apparently for the DCCED Final Report) concerning his conversation
19 the previous week with Mr. Jeans and asked "How's this re KGB?"³³³

20 The Ad Hoc Manager Search Committee submitted an Assembly Agenda
21 Statement dated August 6, 2007, in which it: provided a synopsis of its recommendation for the

22
23 ³³¹ R. 1272. The e-mail was not in the LBC's record.

24 ³³² R. 593-601.

25 ³³³ R. 1295. The e-mail was not in the LBC's record. The court issued orders that compelled the
LBC to provide Appellants with copies of certain e-mails. The e-mails would have included any
e-mail response by Mr. Bockhorst to Ms. McPherren. The record does not contain any e-mail
response by Mr. Bockhorst.

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1 selection process; advised that its full report would subsequently be forwarded; and, requested
2 that Dr. Bruce Borup and Renee Schofield be named as the public members of the Committee.³³⁴

3 DCCED received a comment on the Preliminary Report from Dan Eichner on
4 August 15, 2007.³³⁵ He stated that he owns property near Meyers Chuck and opposes the KGB's
5 annexation proposal to include said area within the KGB.

6 Mr. Johns responded to Ms. McPherrin in a letter dated August 22, 2007. He
7 advised that the EED did have a particular concern that the Hyder enclave may remain
8 indefinitely; it appeared that the KGB had addressed EED's concerns in the Petition; and, the
9 EED did not oppose the proposed annexation.³³⁶

10
11 Ingrid Zaruba sent Mr. Bockhorst an e-mail on August 29, 2007 in which she
12 expressed her surprise at learning that morning that he had applied for the KGB Manager
13 position. He responded in an e-mail that date that: he used to live in Southeast Alaska; he and
14 his wife find Ketchikan one of the nicest spots in Alaska; the job opportunity was too good to
15 pass up; "Of course, I have recused myself from any further involvement at this end with the
16 pending KGB annexation proposal;" and, the application deadline was two weeks away and they
17 would see what happens.³³⁷

18 The MIC responded to the Preliminary Report with an August 30, 2007 letter³³⁸
19 from its attorney, Mr. Wilder, to the LBC "staff" in which it reiterated its objection to the
20 annexation to the extent that it includes Duke Island and the waters south of the Annette Island
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23 ³³⁴ R. 1373-75. The Agenda Statement was not in the LBC's record.

24 ³³⁵ R. 602.

25 ³³⁶ R. 603. Mr. Jean refers therein to the DEED as the EED.

³³⁷ R. 1294. Ms. Zaruba's e-mail address reflects that at that time she was a Research Analyst
with the Census & Geographic Information Network under the Alaska Department of Labor &
Workforce Development. Neither e-mail was in the LBC's record.

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1 Reserve. Mr. Wilder also complained that the Preliminary Report made only one passing
2 reference to the concerns raised in MIC's April 26, 2006 Responsive Brief.

3 Ms. Vandor sent Mr. Bockhorst a memo on August 30, 2007 regarding "Mums'
4 the word?". She stated that she had just seen an Associated Press article in which he was listed
5 as one of five applicants for the KGB Manager's position. He responded by e-mail the same date
6 (6:03 p.m.) that: he had not attempted to keep confidential the fact that he had applied; he had
7 disclosed his interest in the job before he applied to the LBC Chair, DCA Director, DCCED
8 Deputy Commissioner, and DCCED Ethics Supervisor; and "At the same time, I recused myself
9 from any involvement in the pending KGB annexation proceedings."³³⁹

10 Ms. Vandor sent Mr. Bockhorst a memo on August 31, 2007 in which she
11 expressed the hope that he gets the position but noted that for them "it would be a huge chasm in
12 the institutional knowledge and dedication to the LBC's Mission!" She also asked about
13 appointments to a Bylaws Subcommittee. He responded by e-mail that date. He thanked her for
14 her support and discussed the subcommittee appointments.³⁴⁰

15 On August 31, 2007 Jennie Starkey sent an e-mail transmitting the MIC's
16 response to Mr. Bockhorst, Kathy Atkinson, and Lynette Ortolano. Ms. Starkey forwarded the
17 response a few minutes later to Ms. McPherran, and she stated in the transmittal e-mail that:
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23 ³³⁸ R. 604-26. The letter was accompanied by a copy of its Response Brief. See also, R. 1296.

24 ³³⁹ R. 1493. He also stated that: he thinks Ketchikan is a nice place to live/work; the job was an
25 exciting opportunity that he did not want to let pass by; the application period was open for two
more weeks; and, his guess was that the selection would be made by early to mid-October.
Neither e-mail was in the LBC's record.

³⁴⁰ R. 1494. Neither the memo nor the e-mail were in the LBC's record.

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1 “Jeanne, sorry I didn’t forward this to you . . . although I haven’t been formally informed that
2 Dan wasn’t on Ketchikan any more, I have heard it through the grapevine. . .”³⁴¹

3 The Meyers Chuck Community Association filed a lengthy comment on the
4 Preliminary Report on August 31, 2007.³⁴² The Association requested that Meyers Chuck and
5 Union Bay be excluded from the KGB Petition or that the Petition be amended to create an
6 enclave for them. The Association argued that: the KGB’s grounds for excluding Hyder also
7 apply to Meyers Chuck; Hyder is more in need of borough services than Meyers Chuck; the
8 creation of the Hyder enclave conflicts with LBC policy and the LBC’s 1999 Decision; and, if
9 Meyers Chuck were excluded it would accept the same annexation triggers the KGB had
10 identified for Hyder.

11
12 The City of Wrangell filed a Comment on the Preliminary Report on September 4,
13 2007.³⁴³ Wrangell objected to the inclusion of Meyers Chuck and the western Cleveland
14 Peninsula area in the proposed annexation area.³⁴⁴ Wrangell provided a detailed explanation of
15 why those areas should be included in its proposed borough.

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18 ³⁴¹ R. 1296. These e-mails were not in the LBC’s record.

19 ³⁴² R. 627-56.

20 ³⁴³ R. 657-92.

21 ³⁴⁴ Wrangell noted that: A substantial portion of the [Preliminary Report] contains a dissertation
22 regarding the history and interpretation of the Alaska Constitution’s Article X . . . The point of
23 this lengthy discussion is to argue in favor of generally larger rather than smaller boroughs – a
24 point which does not appear to be in issue regarding the KGB proposal . . . The discussion
25 appears to be more of an argument by Department staff voicing disagreement with the LBC’s
recent (January 18, 2007) decision approving the relatively small Skagway Borough, a decision
with which staff evidently disagreed . . . What is noteworthy is that the KGB annexation Report
spends in excess of 30 pages constructing a constitutional argument against too small boroughs,
while it dedicates no discussion whatever to the factually specific suggestions of the City of
Wrangell and Meyers Chuck/Union Bay residents who filed public comment in opposition to
Ketchikan’s annexation of the western Cleveland Peninsula.” Record at p. 660 n. 4.

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1 The City of Craig and the POWCAC filed comments on the Preliminary Report
2 on or about September 4, 2007.³⁴⁵ They argue that:

- 3 1. The LBC found in 1999 that a “functionally identical” annexation
4 proposal excluding Hyder did not satisfy the Constitution’s annexation
5 principles;
- 6 2. The LBC found in 1999 that the functionally identical annexation proposal
7 violated its historic policy against creating enclaves;
- 8 3. The Preliminary Report reverses the 1999 decision without articulating a
9 reasonable basis for doing so. The DCCED’s constitutional theory that
10 Article X, §§ 1, 3 encourage borough annexation is new and has no legal
11 support;
- 12 4. “It is apparent that the LBC found it significant that the 1998 annexation
13 proposal did not include Hyder. The LBC gave the KGB the opportunity
14 to amend the petition to include Hyder. It refused. Seven years later it
15 files another petition deliberately excluding Hyder. The reality is that the
16 KGB will never voluntarily annex Hyder. Given the expense that would
17 be involved . . . why would it if it can annex the uninhabited lands, receive
18 approximately an addition \$1,200,000 in Nation Forest receipt revenues,
19 and not have to provide services? LBC staff’s conclusion that the LBC’s
20 interpretation of Article X, Section . . . is ‘unduly restrictive’ is wrong,
21 biased, and indefensible. . . In the absence of changed facts, which there
22 are none, and none were identified in the 117 page Preliminary Report, the
23 LBC should not change its interpretation of the Constitution solely
24 because of an unsupported new legal opinion offered by LBC staff.”³⁴⁶
- 25 5. The DCCED improperly focused on the circumstances in the entire KGB
after the annexation as opposed to the circumstances in the area to be
annexed.³⁴⁷
6. “The ‘principle’ embodied in Article X, Section 3 has not changed. The
only thing that has changed is that the same LBC staff person recommends
ignoring the Constitutional principle of Article X, Section 3 for reasons
not explained anywhere in the report.”³⁴⁸

345 R. 693-719.

346 R. 697-98. At footnote 2, the City asks that any Department of Law opinion received by the
LBC concerning this constitutional interpretation be added to the record.

347 R. 700.

348 R. 706.

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1 7. In a footnote it is stated: "As addressed below, the Preliminary Report
2 was written by . . . Dan Bockhorst. Mr. Bockhorst has applied for the
3 position of [KGB] Manager. Without question he has a substantial
4 conflict of interest. It cannot escape the scrutiny of the LBC, nor will it
5 escape the scrutiny of the Alaska courts, that the Preliminary Report
6 authored by Mr. Bockhorst recommends that the LBC reverse its historical
7 policy on enclaves, which will benefit the KGB directly by allowing it to
8 receive an additional \$1,200,000 annually without the provision of any
9 services at all in the annexed area because of the creation of the Hyder
10 enclave. As [sic] a minimum, the LBC should, in fairness to the people of
11 the State as a whole, and the people in the Southeast communities in the
12 unorganized borough hire an independent staff person, who has never
13 worked for DCCED or Mr. Bockhorst, to prepare a new preliminary
14 report."³⁴⁹

15 8. "The LBC is a 'quasi-judicial' body according to the preliminary report. . .
16 The LBC must provide a fair hearing and review of petitions, according to
17 the preliminary report. . .

18 A judge is required not only to avoid bias and avoid any impropriety, a
19 judge must avoid the appearance of bias and the appearance of
20 impropriety. For example, it would be an unquestionable appearance of
21 impropriety if a judge's law clerk prepared a memorandum for the judge
22 with a recommended decision in favor of one party in a case where the law
23 clerk was seeking employment with that party. The LBC is no different
24 situation.

25 The author of the Preliminary Report wants to be employed by the KGB
as the Borough Manager. The Preliminary Report was completed June 30,
2007. The Borough position became open in June of 2007, when the KGB
Borough Manager resigned.

It cannot be disputed that the Preliminary Report represents a complete
reversal of the recommendation of the same LBC staff in its preliminary
report in 1998. It also cannot be disputed that nothing has changed except
this petition includes Meyers Chuck – a totally inconsequential change . . .
The Preliminary Report fails to offer any distinguishing Constitutional or
factual reason for the reversal of the LBC staff position. If the LBC
considers this Preliminary Report and approves the Petition, the
appearance of bias and impropriety will undoubtedly result in judicial
review of the decision.

³⁴⁹ R. 709, n. 9.

1 The LBC has two choices. It can reject the recommendation of the LBC
2 staff, and deny the Petition because that would be the factually and legally
3 correct decision. The denial . . . would be consistent with Constitutional
4 principles the LBC is obligated to uphold and apply. The denial . . . will
5 be consistent with the 1999 Decision.

6 The second choice is for the LBC to remove the Preliminary Report from
7 the record and retain an independent consultant to prepare a report not
8 tainted with the appearance of bias and conflict of interest enveloping this
9 Preliminary Report.

10 We urge the LBC to carefully scrutinize this problem. The people of this
11 State are entitled to a decision that all can feel is free from any potential
12 bias or conflict. Under the circumstances presented by the author of the
13 Preliminary Report having applied to be the KGB borough manager, and
14 having recommended the approval of this Petition – a complete reversal
15 from the same author’s position in 1998 on annexation of this area without
16 Hyder – the people of this State cannot have any confidence in a decision
17 being free of bias if the LBC relies on the Preliminary Report and
18 approves the Petition;”³⁵⁰ and,

- 19 9. “LBC staff offers no justification at all for recommending the transfer of
20 nearly \$1,200,000 per year in academic funding presently shared by
21 sixteen cities and twelve school districts . . . to the [KGB] with absolutely
22 no increase in either the number of students to serve or education services
23 in the [KGB]. LBC staff offers no justification at all for not only
24 recommending that the KGB be the recipient of this additional \$1,200,000
25 at the expense of all other Southeast Communities in the unorganized
borough, but in addition recommending the exclusion of Hyder from the
annexation even though Hyder is with the model borough boundaries and
Hyder does have education services presently provided and paid for by the
State. The LBC must carefully scrutinize why LBC staff has so
dramatically changed its recommendation from 1998, even though the
annexation petition is essentially identical, and neither the facts supporting
the denial nor the reasons supporting the denial by the LBC have
changed.” The proposed annexation is not in the State’s best interest.
Approval would result in the KGB receiving \$1,200,000 in new revenues
at the expense of several entities in the unorganized borough and it would
not be required to provide any new services.”³⁵¹

³⁵⁰ R. 711-12.

³⁵¹ R. 718.

1 The City of Craig and POW CAC did not explicitly request a formal investigation, by the LBC
2 or anybody else. Nor did they request that the LBC ask the Attorney General's Office to review
3 DCCED's constitutional analysis.

4 Lynn Kolund, District Ranger for the Ketchikan-Misty Fjords Ranger District, in
5 a September 18, 2007 letter to the LBC, stated support for including the Meyers Chuck area in
6 the KGB Petition and for an amendment excluding it from Wrangell's petition.³⁵²

7
8 ~~Ms. McPherrren sent an e-mail to the KGB Manager's Office on September 19,~~
9 2007. She copied the KGB Clerk and Mr. Hill. She advised where they could find the link to
10 the public comments DCCED had received on the preliminary report and asked that they take
11 certain steps to assure that the comments are available for public review.³⁵³

12 Mr. Hill sent Ms. McPherrren an e-mail on September 24, 2007 in which he asked:
13 "When you have a chance, could you please provide me a transcript, or a link to one, of a recent
14 LBC meeting that provides a good example of Borough witness testimony?" She responded via
15 e-mail that date. She advised that she was attaching transcripts for a hearing that lasted one day
16 and a hearing that lasted three days, she hoped he found them helpful, and she asked if he had
17 found out what happened to the KGB's response to their Preliminary Report.³⁵⁴

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23 ³⁵² R. 720.

24 ³⁵³ R. 1320. The e-mail was not in the LBC's record.

25 ³⁵⁴ R. 1320-23. The court ordered that Ms. McPherrren's September 24, 2007 e-mail be added to
the record. It does not appear that it was added. The e-mail is in the court file and was discussed
in the court's decision on the Appellants' motion to expand the record. These e-mails were not
in the LBC's record.

1 Ms. McPherren sent an e-mail on October 2, 2007 to Lynette Ortolano regarding
2 public notice, apparently for the LBC's Public Hearing on the KGB petition. The e-mail is
3 copied to Ms. Starkey, Mr. Bockhorst, Ms. Atkinson, and Lynette Schroeder.³⁵⁵

4 Kathy Atkinson sent an e-mail on October 4, 2007 to Diane Somers (DCCED).
5 Ms. Atkinson noted that only she and Ms. McPherren were in the office. She provided
6 information concerning the posting of notice on the DCCED web-site of the Wrangell and
7 Ketchikan Public Hearings. She copied Ms. McPherren, Mr. Bockhorst, and Ms. Ortolano. Ms.
8 Somers responded by e-mail that date, advising that she had received clarification from Ms.
9 McPherren and there was no need to return to her phone call. This e-mail is copied to Ms.
10 McPherren, Mr. Bockhorst, and Ms. Ortolano.³⁵⁶

11
12 Mr. Bockhorst sent Ms. McPherren an e-mail (from his personal e-mail address)
13 on October 5, 2007, which identified the subject as "List of major activities since 2/2006", and
14 which read:

15 "Jeanne: As requested, here's a list of major LBC staff activities that I recall since
16 the filing of the KGB annexation proposal. It doesn't include such activities as
17 technical assistance to others, matters relating to the legislature, orientation of
new LBC members, Local Government Forum, etc.

- 18 - Skagway Borough Incorporation
- 19 - Consolidation of the City of Ketchikan and the Ketchikan Gateway
Borough
- 20 - Deltana Region Borough Incorporation
- 21 - Wrangell Borough Incorporation

22
23 ³⁵⁵ R. 1324-25. The e-mail was not in the LBC's record.

24 ³⁵⁶ R. 1326. The court ordered that Ms. Somers' October 4, 2007 e-mail be added to the record.
25 It does not appear that it was added. The e-mail is in the court file and was discussed in the
court's decision on the Appellants' motion to expand the record. These e-mails were not in the
LBC's record.

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- 1 - City of Petersburg Annexation
- 2 - City of Wasilla Annexation
- 3 - City of Soldotna Annexation
- 4 - LBC Annual report to the Alaska Legislature
- 5 - Appeal of Apportionment of Aleutians East Borough Assembly
- 6 - Comprehensive Revisions to LBC Regulations and Bylaws
- 7 - City of Naukati Incorporation³⁵⁷

8 On October 5, 2007, Ms. McPherran issued the notices for the November 6, 2007

9 LBC public hearing on the KGB's Petition.³⁵⁸

10 Mr. Eckert and the KGB signed an Agreement To Continue Participation In
11 Borough Litigation on October 9, 2007.³⁵⁹ The Agreement references litigation concerning the
12 Schoenbar Middle School construction.

13 Mr. Bockhorst and the KGB entered into a written employment contract on
14 October 13, 2007.³⁶⁰ The contract reflects that Mr. Bockhorst would begin his duties as the KGB
15 Borough Manager on November 1, 2007.

16 The DCCED issued its Final Report in October 2007.³⁶¹ It was prepared by Ms.
17 McPherran. DCCED incorporated the Preliminary Report by reference.³⁶² DCCED listed the

18
19 ³⁵⁷ R. 1327-28. Ms. McPherran forwarded the same to Ms. Starkey by e-mail on October 5,
20 2007. R. 1327. These e-mails were not in the LBC record.

21 ³⁵⁸ R. 721-28.

22 ³⁵⁹ R. 1398-1400. The Agreement was not in the LBC's record. The record includes August 22,
23 2008 certifications from Harriet Edwards, KGB Borough Clerk, that the KGB records in the
24 record are true and correct copies of the originals. R. 1401-03. The record also contains copies
25 of Mr. Brandt-Erichsen's September 11, 2008 affidavit and Mr. Blasco's September 8, 2008
letter to Mr. Brandt-Erichsen concerning documents sought from and produced by the KGB for
the evidentiary hearing. R. 1404-09. None of those documents were in the LBC's record.

³⁶⁰ R. 1265(A)-(D). The contract was not in the LBC's record.

³⁶¹ The Final Report is simply dated "October 2007." The Affidavit of Service of copies of the
Final Report states that copies were mailed on October 15, 2007. R. 950. So it appears that the
Final Report was issued on or very shortly before October 15, 2007.

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1 comments on the Preliminary Report it had received, and included copies in an appendix.³⁶³

2 DCCED noted that it had “carefully considered all comments”.³⁶⁴ DCCED noted that:

3 “For the most part, the comments reiterate those made in response to the public
4 notice of the KGB annexation proposal and, thus, were addressed by DCCED
5 when analyzing the merits of the annexation proposal and making findings and
6 recommendations regarding it.”³⁶⁵

6 DCCED further noted that there were some concerns that required response in the Final Report,

7 but she would not be summarizing or commenting on every comment or brief because: DCCED

8 is not required by 3 AAC 110.530(a) to do so; its workload prevents her from being able to do

9 so; DCCED has considered and analyzed the comments; the Preliminary Report addressed all of

10 the concerns; and, the KGB’s Reply Brief “cogently responded to the comments and briefs.”³⁶⁶

11 DCCED first addressed the concern that Hyder had been excluded from the KGB
12 petition. DCCED stated:

13 “The issue of the proposed enclave is addressed on pp. 86-90 and in Appendix E
14 of DCCED’s Preliminary Report. Staff reaffirms its findings and conclusions
15 regarding that issue. Although creation of a Hyder enclave, even in the short
16 term, may not be ideal, it is certainly not inconsistent with the State’s 48-year
17 policy of incremental extension of borough government. KGB’s proposal
18 adequately rationalizes the exclusion at this time, and DCCED believes that
19 overall, the annexation proposal satisfies borough annexation standards and is in
20 the balanced best interests of the State. At whatever point Hyder becomes part of

19 ³⁶² R. 738.

20 ³⁶³ R. 739.

21 ³⁶⁴ R. 740.

22 ³⁶⁵ R. 740.

23 ³⁶⁶ R. 741. DCCED noted that an outline setting forth DCCED’s major activities since February
24 2007 was attached as Appendix D and stated that: “DCCED believes that outline adequately
25 demonstrates that the workload of the LBC and its staff during this period was extremely heavy
given the limited size of staff, the volunteer nature of the Commission, and the recent
appointment of three new members to the LBC. Nonetheless, that workload did not prevent
DCCED from fulfilling its duty to evaluate the proposal and make appropriate recommendations
to the LBC. DCCED has seriously considered the criticisms and assures all interested persons
that in every boundary-change proceeding, the merits of the petition, all comments and briefs,
and the law are considered and scrutinized.”

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1 an organized borough, DCCED, DEED, the KGB, and the LBC are on record that
2 it should be part of the KGB.”³⁶⁷

3 DCCED next addressed the City of Wrangell’s comments concerning whether the
4 west side of the Cleveland Peninsula was in Election District 2. DCCED concluded that the
5 Election District No.2 map did not accurately reflect the intent of the framers of Alaska’s
6 Constitution, which was to place the area which includes Meyers Chuck in the same Election
7 District as Ketchikan.³⁶⁸

8 DCCED next addressed the comments concerning the inclusion of Meyers Chuck
9 and Union Bay in the KGB’s petition. DCCED noted that residents of that area had initially
10 wanted to be included in the proposed Wrangell borough, but their latest request was to be made
11 an enclave like Hyder. DCCED provided the following response to this request:

12 “To DCCED, the rationale for Hyder’s being an enclave in the short-term simply
13 is not applicable to the Meyers Chuck/Union Bay area. The KGB Petition and
14 reply brief; DCCED’s Preliminary Report; the LBC’s Model Borough Boundary
15 study; and its 1999 decision mandating the KGB’s inclusion of Meyers Chuck,
16 Union Bay, and Hyder . . . manifestly demonstrate the close ties between those
17 areas and the KGB. While an acceptable argument for a short-term exclusion of
18 Hyder . . . has been made, such a case is not supportable for Meyers Chuck and
19 Union Bay, which have amply demonstrated historic ties to the Ketchikan area,
20 from pre-statehood to today. DCCED strongly disagrees with the assertion that
21 Meyers Chuck/Union Bay presents a stronger case for ‘enclave status’ than does
22 Hyder. It is clearly unsupported by the facts.”³⁶⁹

23 ³⁶⁷ R. 740 (footnote omitted).

24 ³⁶⁸ R. 742-45.

25 ³⁶⁹ R. 746. DCCED also noted at fn. 8 that: “DCCED also believes that the KGB comments
filed in response to the notice of the Wrangell borough incorporation more accurately reflect the
community of interest between Meyers Chuck and Union Bay than do comments made by
supporters of Meyers Chuck being in the Wrangell Borough. A copy of those KGB comments is
included in this report as Appendix F.”

1 DCCED also noted that Meyers Chuck is not simply a single-family residential area as
2 represented in the comments as: it also has a U.S. Post Office and a well-used state seaplane
3 dock and base; and, an Internet search reflects that Meyers Chuck has many visitors.

4 DCCED next addressed the request of the City of Craig and POWCAC that the
5 LBC reject the KGB's petition. DCCED noted that the grounds for their request were addressed
6 by the KGB in its reply brief and were addressed by DCCED in the *Preliminary Report*.
7 DCCED further noted that one issue did merit further discussion – that the KGB would receive
8 more National Forest Receipts (NFR), and other areas less, if the annexation is approved and that
9 this will have an adverse affect on education funding in those other areas. DCCED stated that:
10 this circumstance will occur anytime there is an annexation in SE Alaska; it is **one factor that**
11 **must be considered in consultation with DEED and when considering the best interests of**
12 **the State;** and, the LBC expressly rejected this argument as a basis for denying an annexation
13 petition in its 1999 Decision on the KGB's prior petition. DCCED also pointed out that the State
14 is obligated to fund education in those areas in accordance with the formula for education
15 funding. Finally, DCCED also pointed out that these same arguments apply to the proposed
16 incorporation of a 3,465-square-mile Wrangell borough and the prospective incorporation of a
17 4,450-square-mile Petersburg borough and that its position “with regard to the effect on NFR’s
18 on education funding in those areas will be the same.”³⁷⁰

19 DCCED next addressed MIC's comments. DCCED noted that MIC opposed the
20 KGB Petition only to the extent it includes Duke Island and the surrounding waters. DCCED
21 reaffirmed that it had carefully considered all comments and briefs. DCCED stated that it “fully
22 agreed” with the KGB's statements in its Reply brief, which were quoted at length, concerning
23
24
25

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1 MIC's position.³⁷¹ DCCED stated its position that the KGB annexation should not be delayed
2 pending the outcome of MIC's boundary expansion request as the two (annexation and
3 expansion) are not mutually exclusive.

4 DCCED restated its findings and conclusions from the Preliminary Report.³⁷²
5 DCCED then stated that: "DCCED reaffirms those conclusions."³⁷³ DCCED recommended that
6 the LBC approve the KGB's Petition "without condition or amendment."³⁷⁴
7

8 DCCED's final report did not mention DCCED "policy makers." There is
9 nothing in DCCED's Final Report which reflects that DCCED consulted with the Alaska
10 Attorney General's Office with respect to DCCED's legal interpretations and conclusions.

11 DCCED attached the following to the Final Report: Appendix A (copy of the
12 Table of Contents from the Preliminary Report); Appendix B (copies of the written comments
13 received on the Preliminary Report); Appendix C (copies of Ms. McPherrren's 8/2/07 letter to
14 Mr. Jeans of DEED and his 8/22/07 letter to her); Appendix D (a list of the major activities of the
15 LBC and staff from February 2006); Appendix E (a copy of the February 1956 Alaska State
16 Constitution Election Districts Map); Appendix F (copy of the KGB's Comments filed in the
17 Wrangell Borough incorporation proceedings); Appendix G (a copy of the Decision of Interior
18 Board of Land Appeals 127 IBLA 1); and, Appendix H (SE Alaska regional facilities and
19 services).³⁷⁵
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23 ³⁷⁰ R. 751.

24 ³⁷¹ R. 755.

25 ³⁷² R. 758-63.

³⁷³ R. 763.

³⁷⁴ R. 763.

³⁷⁵ R. 766-949.

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Appendix D³⁷⁶ states, in pertinent part, that:

1. DCCED employees work 50-70 hours a week;
2. DCCED employees must also travel to public meetings or hearings;
3. "Following LBC hearings or meetings, LBC staff is required to ensure that decisional statements are drafted, revised, and issued . . .;"³⁷⁷
4. "Other staff duties include training and orientation of new LBC Commissioners (three of the five current LBC Commissioners were appointed in 2007) and ensuring that they each have the information required to adequately perform their duties. In addition to providing fundamental constitutional, statutory, and regulation training to the Commissioners, LBC staff frequently provides Commissioners education in public-meeting and adjudicatory laws, including the concepts of due process, *ex parte* contact, ethics laws, evidence, precedence, collegial decisionmaking, and public/confidential records."³⁷⁸
6. "In addition to Staff's other responsibilities as set above, [below] is a list of other major activities of LBC staff in the period it has had [the]Ketchikan annexation proposal for review and analysis:
 - Skagway Borough Incorporation
 - Consolidation of the City of Ketchikan and the Ketchikan Gateway Borough
 - Deltana Region Borough Incorporation
 - City of Petersburg Annexation
 - City of Wasilla Annexation
 - City of Soldotna Annexation
 - LBC Annual report to the Alaska Legislature
 - Appeal of Apportionment of Aleutians East Borough Assembly
 - Comprehensive Revisions to LBC Regulations and Bylaws
 - City of Naukati Incorporation"³⁷⁹
7. "LBC Commissioners are uncompensated 'volunteers.' As noted . . . Commerce is required under AS 44.33.020(4) to serve as staff to the LBC. Because of the volunteer, part-time nature of the LBC, the Commissioners

³⁷⁶ R. 911-12.

³⁷⁷ R. 911.

³⁷⁸ R. 911-12.

³⁷⁹ R. 912.

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1 rely heavily on the services and assistance provided by Commerce
2 staff.³⁸⁰

3 Mr. Davis, in a Quarterly Report Memorandum³⁸¹ to Kamie Willis (Litigation
4 Assistant, Department of Law) dated October 17, 2007, stated that: he is the DCCED's
5 designated Ethics Supervisor; he has received two notifications of potential violations of the
6 Ethics Act; he sought advice on both from the State Ethics Attorney; and, he has provided notice
7 with respect to both to the Attorney General and been instructed to investigate both.

8 The City of Craig and the Craig Community Association sent a letter to Governor
9 Palin dated October 19, 2007.³⁸² The letter was signed by Jon Bolling (Craig City
10 Administrator) and Millie Stevens (Craig Community Association Tribal President). They
11 wrote:

12 "We write you with the utmost concern for the appearance of impropriety that
13 pervades the Local Boundary Commission process related to the Ketchikan
14 Gateway Borough Annexation Petition. We write to you because we sincerely
15 believe that the people of this State, and in particular the small communities and
16 school districts of Southeast Alaska, are being denied due process and fair
treatment directly resulting from an apparent conflict of interest involving Mr.
Dan Bockhorst.

17 Mr. Bockhorst is the senior local government specialist in your administration
18 assigned to the Local Boundary Commission. On June 30, 2007, Mr. Bockhorst
19 completed a 117 page Preliminary Report recommending that the LBC approve
20 the KGB Annexation Petition. Shortly after completing his report, Mr. Bockhorst
applied for the vacant KGB Borough Manager position. On October 13, 2007,
KGB hired Mr. Bockhorst . . .

21 . . . On April 19, 1999 the Local Boundary Commission denied the Annexation
22 Proposal of the Ketchikan Gateway Borough because 'the proposal fails to serve
all the relevant principles established in the Constitution of the State of Alaska'

23 ³⁸⁰ R. 912, n. 1.

24 ³⁸¹ R. 1422. Mr. Davis does not identify Mr. Bockhorst in the Memorandum but this document
25 was part of his ethics file regarding Mr. Bockhorst. The Quarterly Report Memorandum was not
in the LBC's record.

³⁸² R. 1259-61. The letter was not in the LBC's record.

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1 (Statement of Decision, 1999, p. 14). The reason the Petition violated the Alaska
2 Constitution was because the Petition sought to annex a large area of uninhabited
3 land, while not annexing the only community in that area – Hyder. The reason for
4 annexing the uninhabited land in 1999 was to obtain a significant increase in
5 forest receipts from the federal government. By excluding Hyder, KGB would
6 obtain the forest receipts and not have to provide any services to anyone actually
7 living in the area being annexed.

8 Mr. Bockhorst prepared the Preliminary Report in 1998 recommending that the
9 LBC reject the KGB petition because it excluded Hyder, and he specifically
10 pointed out the unfairness of KGB obtaining a significant increase in forest
11 receipts without having to provide any services. The unfairness directly impacts
12 the City of Craig, sixteen communities, and twelve school districts in the
13 unorganized borough in Southeast Alaska, who stand to lose a combined \$1.2
14 million each year if the annexation is approved . . . Mr. Bockhorst also stated in
15 his 1998 recommendation . . . that the annexation without Hyder would violate the
16 Alaska Constitution.

17 KGB submitted the pending petition in 2006. As it did in 1998, this petition
18 excludes Hyder. If the Petition is approved by the LBC, KGB will receive an
19 additional \$1,200,000 in forest receipts per year.

20 After KGB announced the vacancy of its Borough Manager position, Mr.
21 Bockhorst submitted his report to the LBC completely reversing his
22 recommendation of 1998. Although nothing had changed, he now stated to the
23 LBC that the Constitution had sufficient ‘flexibility’ to allow KGB to annex the
24 uninhabited land and exclude Hyder. Shortly after submitting the report he
25 applied for the KGB Borough Manager position.

The LBC scheduled the public hearing on the KGB Annexation Petition for
November 6, 2007, and scheduled the decisional meeting on that Petition for
November 7, 2007. We respectfully request that you immediately:

1. Direct the LBC to cancel the public hearing until the Attorney General can
conduct a full investigation into the apparent conflict of interest;
2. Direct the Attorney General to conduct a full, thorough, and open
investigation of the conflict of interest.

. . . We trust that you will recognize the seriousness of this situation and honor
your commitment to the people of the State. This is especially true when you
consider that the final report on the proposed annexation does not address the
concerns we raised about the preliminary report.

We truly cannot believe that you will allow the LBC to go forward on this
Petition without conducting a full investigation into these circumstances. We

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1 request that you consider the devastating impact on the school children in the
2 unorganized borough of the loss of \$1,200,00 per year in school funding, which
3 cannot be allowed constitutionally or under the unquestionable appearance of a
4 direct and serious conflict of interest.

5 We look forward to your prompt action and response in light of the pending LBC
6 hearing on November 6, 2007.”

7 The letter was not cc'd to the LBC or the DCCED.

8 The Ketchikan Daily News published a story on October 30, 2007 on the KGB's
9 annexation efforts which included a statement attributed to former DCRA Deputy Commissioner
10 Lamar Cotton that it was he who had made the decision in 1998 that DCRA would not
11 recommend approval of the KGB's annexation petition.³⁸³

12 Tara Jollie, Director of the Division of Community and Regional Affairs of the
13 DCCED, sent a letter to Mr. Bolling dated October 31, 2007.³⁸⁴ She advised that she was
14 responding to his October 19, 2007 letter to Governor Palin. She stated:

15 I carefully reviewed DCRA records to compare the actions on record with
16 allegations made in your letter in order to provide you with a thoughtful reply. I
17 also wanted to determine if DCRA had anything in our records that supports the
18 statements in your letter and/or supports your request for an official investigation
19 and cancellation of the Ketchikan annexation proposal public hearings scheduled
20 for November 6, 2007.

21 Your letter asserts that (1) after KGB announced the vacancy . . . Mr. Bockhorst
22 submitted his report to the LBC completely reversing his recommendation of
23 1998. You also claim that (2) although nothing had changed, Mr. Bockhorst now
24 stated to the LBC that the Constitution had sufficient flexibility to allow KGB to
25 annex the uninhabited land and exclude Hyder. You further claim that (3) shortly
26 after submitting that report, he applied for the KGB Borough Manager position.
27 These statements are not based on facts. DCRA records clearly show the
28 following:

29 Regarding assertions (1) and (2) which discuss a recommendation in the 1998
30 proposal that is different in the current proposal, and your assertion that Mr.

31 ³⁸³ R. 1412. The newspaper article was not in the LBC's record.

32 ³⁸⁴ R. 1262-64. The letter was not in the LBC's record.

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1 Bockhorst completely reversed his 1998 recommendation to the LBC. These
2 assertions are not true. It is important to note that the 1998 recommendation
3 reflected the policy direction of a prior administration. Staff, including Mr.
4 Bockhorst, does not set policy. The prior administration's policy is noted clearly
5 in the DCCED *Preliminary Report to the Local Boundary Commission Regarding
6 the Petition for Annexation of Approximately 4,701 Square Miles to the Ketchikan
7 Gateway Borough*, June 30, 2007, p. 96, n. 67.

8 'DCRA policy makers in the Knowles Administration (i.e. the
9 Officer of Commissioner and the Directors, as contrasted to the
10 LBC Staff Component), opposed the prior KGB annexation
11 proposal. Reflecting the views of the DCRA policy maker's,
12 DCRA's preliminary report stated the following with respect to the
13 standard at issue here:

14 In the view of DCRA policy makers, significant adverse financial
15 impacts on communities in the unorganized borough are a more
16 important consideration than the constitutional principles in this
17 particular instance.'

18 Furthermore, contrary to your insinuation that the pending KGB annexation
19 proposal differences are attributable to the personal motives of Mr. Bockhorst, the
20 pending proposal is significantly different from the 1998 annexation proposal for
21 substantial reasons including the following:

22 Among the important differences is the inclusion of Meyers Chuck and
23 extensively different boundaries for the proposed Hyder Enclave. Those different
24 boundaries address particular concerns expressed by the Local Boundary
25 Commission in its 1999 decision. Further, Exhibit K of the current Petition
provides a through discussion by the Petitioner of justification for postponing
annexation of Hyder and the future circumstances which may lead to its inclusion
in the Ketchikan Borough.

Regarding assertion (3) that shortly after completing the preliminary 2007 report,
Mr. Bockhorst applied for the KGB Borough Manager position, our records
clearly shows this timeline of events:

March 26, 2007: Mr. Bockhorst began his analysis of the Ketchikan annexation
proposal at which point he discussed policy aspects of the proposal with the
former DCRA Director.

June 28, 2007: Mr. Bockhorst's work on the 2007 preliminary report was
complete and forwarded to the DCRA publications technician for formatting and
publication.

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1 **July 29, 2007:** just over one month after Mr. Bockhorst completed his work on
2 the annexation proposal for the Department's 2007 preliminary report, the
3 Ketchikan Gateway Borough first announced that it was recruiting for a Borough
4 Manager.

4 **August 1, 2007:** In accordance with the Executive Branch Ethics Act, Mr.
5 Bockhorst wrote a memorandum to the Department's Ethics Supervisor disclosing
6 that he had an interest in applying for the Ketchikan Borough Manager position.
7 Mr. Bockhorst stated in this memorandum that he first became aware of the
8 recruitment for the position on July 31. In that memorandum, he recused himself
9 with respect to any and all future dealings regarding the Ketchikan annexation
10 proposal. Mr. Bockhorst's work regarding the Ketchikan annexation proceeding
11 was immediately reassigned to Ms. Jeanne McPherran.

9 **October 15, 2007:** Ms. McPherran, not Mr. Bockhorst, independently prepared
10 the 2007 final report regarding the Ketchikan annexation proposal.

10 To conclude, given the discrepancies between the assertions in your letter and the
11 facts on record, I find no basis to support or recommend that the Local Boundary
12 Commission cancel or postpone its upcoming hearing. Furthermore, I find no
13 reason to support your request for an official investigation into a conflict of
14 interest claim against Mr. Dan Bockhorst.

14 Ms. Jolie's letter was copied to: Governor Palin; Lynne Smith, Special Assistant
15 to Governor Palin; the LBC; Emil Notti, Commissioner, DCCED; Mark Davis, Ethics
16 Supervisor, DCCED; and, AAG Vandor.

17 Mr. Bolling, in a letter to Director Jollie dated November 3, 2007,³⁸⁵ responded to
18 her October 31, 2007 letter. He stated:

- 19 1. Her letter raised more questions than it answered.
- 20 2. He is not claiming that Mr. Bockhorst had a conflict of interest. He is
21 claiming that there is the appearance of a serious conflict, and that the
22 same merits a full independent investigation.
- 23 3. Such an investigation has not yet occurred.
- 24 4. They have not seen anything in the record that reflects that the DCRA's
25 position in 1998-99 did not reflect Mr. Bockhorst's personal views.

³⁸⁵ R. 1430-38. The letter was not in the LBC's record.

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5. They disagree with her statement that Mr. Bockhorst does not make policy. He noted that Mr. Bockhorst (DCCED) opposed approval of the Skagway Borough formation petition even though Governor Murkowski was on record supporting the petition. "Fortunately, for the people of Skagway, and for the State as a whole, the LBC ultimately approved the formation of the Skagway Borough."³⁸⁶
 6. DCCED (DCRA) staff has historically opposed the creation of enclaves, including in the context of the KGB's 1998 annexation petition. He questions what opportunity the public is given to comment on such a dramatic change in policy.
 7. Her attempts to distance Mr. Bockhorst from the 1998 reports "is remarkable". "There is no way to mince words about it" [the new Preliminary Report] . . . can only be called a complete reversal of the [prior] recommendation."³⁸⁷
 8. He requested copies of all documents that show that Governor Palin directed DCCED to change the constitutional policy that is reflected in the 1998 Preliminary Report. Specifically, with respect to the change in interpretation of Article I, § 3 of the Alaska Constitution.
 9. They have reviewed the 1998 Preliminary Report and can find no language indicating that it was the "DCRA policy makers in the Knowles Administration," as contrasted to the LBC staff, who opposed the KGB's annexation petition. So he questions why Mr. Bockhorst felt compelled to make this claim at footnote 96 of the current Preliminary Report.
 10. The LBC, as a quasi-judicial body, is bound by its 1999 decision.
 11. The differences in the KGB petitions she identified are not material. They believe the LBC would have denied the 1998 petition even if it had included Meyers Chuck. The change in the boundaries of the Hyder enclave does not change the fundamental constitutional principles underlying the 1999 LBC decision. They discussed the same in their comments and the LBC did not address the matters in its decision.
 12. He questions why the LBC and DCCED did not postpone the LBC hearing and have a new, independent, preliminary report prepared.

³⁸⁶ R. 1431.

³⁸⁷ R. 1432.

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- 1 13. He questions whether the new DCCED staff who prepared the Final
2 Report really conducted an independent analysis. He noted that they were
3 Mr. Bockhorst's subordinates.
- 4 14. He questions why DCCED staff and the LBC did not address the City of
5 Craig's demand that the LBC either reject the DCEED's recommendations
6 and deny the petition based on applicable law or strike the Preliminary
7 Report and require that a new one be prepared by an independent
8 consultant.
- 9 15. He wants to know which former DCRA Director Mr. Bockhorst spoke
10 with about policy on March 26, 2007.
- 11 16. Her time line begins on June 28, 2007. But the KGB Borough Manager
12 position was "open" before June 30, 2007. What is missing is information
13 about Mr. Bockhorst's communications with the KGB during that "open"
14 time period.
- 15 17. He requested a copy of Mr. Bockhorst's ethics disclosure.
- 16 18. He questioned whether Mr. Bockhorst recused himself before or after he
17 spoke on the telephone with the person from Meyers Chuck.
- 18 19. He acknowledged receiving a letter from Ms. Bockmon advising that Mr.
19 Bockhorst had not violated the Ethics Act but he has not claimed that Mr.
20 Bockhorst violated that Act. He wonders why Ms. Bockmon was directed
21 to treat his letter as an Ethics Act complaint. But since Director Jollie
22 brought it up - the high standards set forth in AS 39.52.010 have not been
23 adhered to.
- 24 20. The City of Craig and like entities will be denied due process if there is no
25 independent report prepared and the LBC adopts Mr. Bockhorst's
recommendations due to the appearance of a conflict of interest.
- 26 21. He requested, per AS 40.25.100, that she provide him with certain
information and records, and he asked that the same be made a part of the
LBC record.³⁸⁸

³⁸⁸ His requests included: all drafts of her 10/31/07 letter; the identity of all who helped draft it and all who reviewed the draft(s); all communications between herself and all state employees between 10/29/07 and 10/31/07; all DCCED records she reviewed; all records from DCRA "policymakers to LBC staff concerning preparation of DCCED's Final Report; all communications between Ms. McPherran and all current and former LBC staff concerning the Final Report; all documents related to the March 26, 2007 discussion; Mr. Bockhorst's 8/1/07 memorandum to his ethic supervisor, and all other such communications; all records concerning Mr. Bockhorst's July 31, 2007 conversation with the representative of the Meyers Chuck

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2 Mr. Bolling copied several persons with his letter, including: the LBC, Governor Palin,
3 Commissioner Emil Notti, Mr. Davis, Ms. Bockmon, Ms. Vandor, State Senator Albert Kookesh,
4 and State Representative Bill Thomas.

5 The LBC Public Hearing occurred on November 6, 2007.³⁸⁹ The LBC Chair,
6 Kermit Ketchum introduced the LBC members. He noted that Commissioner Zimmerle had
7 been recused. He introduced the DCCED staff person present, Ms. McPherren. He then gave
8 the LBC members an opportunity to make opening comments. The comments included the
9 following:

- 10 1. Chair Ketchum stated: "I do thank you very much for inviting us down
11 here for this hearing. And I'm looking forward to a successful petition,
12 but I'm only one member of the committee, and I want to hear the whole
13 testimony. I have read the reports – both the original petition, the
preliminary, and the final - - and I am looking forward to your
participation in this endeavor."³⁹⁰
- 14 2. Commissioner Harcharek stated: "I'm also pleased to be here and I have
15 read the massive set of documents. . . . But I appreciate the offer to be here,
16 and I give my best objective analysis on the situation. Thank you."³⁹¹
- 17 3. Commissioners Wilson and Chrystal advised that they had nothing to add
18 and were looking forward to a productive session.

19 Ms. McPherren provided the DCCED Staff's Petition Summary. The KGB and
20 the respondents made opening statements. Twelve persons testified. Thirty-six persons provided
21 public comment. Closing statements were made. Five written public comments were submitted.

22 Community Association; all communications between any KGB employee, Assembly member,
23 and representative and DCCED between 3/26/07 and 11/7/07; and, the DCCED files, including
24 all notes and e-mails, for the 1998 and 2007 KGB petitions. R. 1437. The letter was not in the
LBC's record.

25 ³⁸⁹ Present were Commissioners Ketchum (Chair), Robert Harcharek (Vice Chair), Lynn
Chrystal, and Lavell Wilson. Tr. 1.

³⁹⁰ Tr. 10.

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1 The statements-comments-testimony included³⁹² the following:

- 2 1. Ms. McPherren presented a staff summary.³⁹³ She addressed: the staff's
3 recommendation; the loss of NFR's; the exclusion of Hyder, the Meyers
4 Chuck/Union Bay situation; and MIC's objection. She stated: DCCED
5 investigated the petition, applied the relevant standards, considered "all
6 briefs and comments filed in response to the Notice of the Petition and
7 staff's reports";³⁹⁴ staff concluded the petition met all relevant standards,
8 including being in the best interests of the State, and recommends
9 approval; "Staff believes that the [KGB] annexation is a major step
10 forward in meeting the constitutional goal of furthering regional
11 government in Alaska";³⁹⁵ the loss of NFR funding in the unorganized
12 borough "should not be a deterrent to the formation or extension of
13 borough government";³⁹⁶ in the LBC's "two latest annual reports to the
14 legislature, the commission has consistently and properly characterized
15 payment of National Forest Receipts to REAA's and cities in the
16 unorganized borough as a disincentive to the constitutional goal of
17 borough formation and annexation";³⁹⁷ staff concurs; DEED does not
18 oppose the petition: the differences between Hyder and Meyers Chuck are
19 explained in the Reports – "not the least of which is that [Hyder] relies on
20 Canada for services";³⁹⁸ Meyers Chuck would most logically be a part of
21 the KGB; and, Duke Island has historically been a part of the Ketchikan
22 area and are not included within the Annette Island Reserve and the
23 Interior Board of Land Appeals specifically excluded it from the Reserve
24 in 1993, Metlakatla has requested a boundary change and it is still pending
25 on the federal level, if the Secretary of the Interior does not grant their
request then Duke Island would be an enclave.
2. John Hill made the opening statement for the KGB.³⁹⁹ He agreed with
Ms. McPherren that not all of the comments made on the KGB Petition
merited a response.⁴⁰⁰ He provided an overview of the Petition.

20 ³⁹¹ Tr. 10.

21 ³⁹² The court is not recounting all of the testimony and comments. The court is attempting to
22 focus on testimony and comments that may be pertinent to the matters at issue.

23 ³⁹³ Tr. 11-17.

24 ³⁹⁴ Tr. 12.

25 ³⁹⁵ Tr. 12-13.

³⁹⁶ Tr. 13.

³⁹⁷ Tr. 13.

³⁹⁸ Tr. 14.

³⁹⁹ Tr. 17-26.

⁴⁰⁰ Tr. 19.

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- 1 3. Jim Brennan spoke on behalf of the Respondent City of Wrangell.⁴⁰¹ He
2 stated that: Wrangell has greater connection than Ketchikan to the Meyers
3 Chuck and Union Bay area; Wrangell seeks to include the same in its
4 borough area; the residents of those areas prefer to be in the proposed new
5 Wrangell borough if they have to be in a borough; the area was originally
6 in Wrangell's election district (before the 1991 model boundaries were
7 set); and, the area is not in the Ketchikan "non-subsistence area".
- 8 4. Leroy Wilder spoke on behalf of Respondent Metlakatla Indian
9 Community.⁴⁰² He stated that: Annette Island is a unique situation but the
10 impacts of the proposal on Metlakatla must still be considered; Metlakatla
11 is asking the Secretary of the Interior to expand the Reserves' southern
12 boundaries to include, in part, the water around Duke Island; this will
13 increase the exclusive fishing area for Metlaktatla residents; they want the
14 petition to be amended to exclude those waters; Metlakatla also supports
15 the arguments and efforts of the City of Craig and others regarding the
16 loss of NFR funding; this area has no value to the KGB; and, if it is not
17 excluded it will make it more difficult for the Secretary to grant their
18 request.
- 19 5. Peter Caffall-Davis made a statement on behalf of Hyder.⁴⁰³ He
20 questioned whether the residents of Hyder would be better served if the
21 KGB rather than the State had responsibility for it. He thinks the KGB is
22 fiscally irresponsible. He stated that: the unorganized borough is the last
23 frontier in Alaska; residents of the unorganized borough are self-sufficient
24 and self-reliant, they receive almost nothing from the State other than
25 schools; and, forcing people into organized boroughs kills that last frontier
26 spirit.
- 27 6. KGB Vice Mayor Davis Landis testified⁴⁰⁴ that: the KGB carefully
28 planned the annexation effort; they were mindful of the failed past effort
29 and the reasons for the failure; they were mindful of the impact of their
30 request on Meyers Chuck and Hyder and other residents of the
31 unorganized borough; he attended meetings in Hyder and Meyers Chuck;
32 the KGB has "grown up" and is ready to accept its responsibilities – it is
33 not the same borough it was in 1963; they are already providing many
34 services to the area proposed for annexation because Ketchikan is a
35 regional hub; he disagrees with Mr. Caffall-Davis concerning the KGB's
36 fiscal responsibility; the petition meets the constitutional standards; and, if
37 this petition is not approved it may be the last such effort in a long time.

38 ⁴⁰¹ Tr. 26-36.

39 ⁴⁰² Tr. 36-48.

40 ⁴⁰³ Tr. 49-56.

41 ⁴⁰⁴ Tr. 58-64.

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2 7. Former KGB and Ketchikan City Mayor and KGB Assembly member
3 Jack Shay testified⁴⁰⁵ that: the establishment of local government is an
4 important constitutional goal; "one of the goals of this effort of ours is to
5 have a seat at the table. Not only are events occurring around us which
6 seem to be beyond our control, but we need to have some kind of say in
7 regard to the future of our citizens";⁴⁰⁶ case in point is the Quartz Hill
8 Borax enterprise, it is one of the largest molybdenum deposits in the
9 world, the KGB will face a huge challenge coping with the impacts of its
10 development when that occurs as the price of molybdenum goes up;
11 education is mandated and residents in the unorganized borough do not
12 pay for it; and, Prince of Wales Island school districts have been receiving
13 ten to twelve times more per child in NFR funds than Ketchikan has, it
14 will still be twice as much if the annexation is approved.

15 8. Former Borough Manager Roy Eckert was a witness.⁴⁰⁷ He testified that:
16 the KGB had been working on this for several years; it had bent over
17 backwards to try to appease the entities that did not want to be part of the
18 KGB, he thinks they arrived at a good compromise; they are not asking for
19 any areas outside the KGB model boundary; these areas will be the
20 bridges to the KGB's future; the KGB imposes property taxes which are
21 used to pay for schools, and, other areas do not do this, they instead rely
22 on the NFR's from areas that are not even within their own model borough
23 boundaries.

24 He also testified that: "I know there's been some controversy with a
25 former employee of yours, Mr. Dan Bockhorst . . . And I know that he
26 recused himself from anything to do with our boundary once he applied
27 for the position, and I think rightly so. He was taken to task for that by the
28 City of Craig, and I will be filing an ethics violation letter with the
29 International City Manager Association because of that, because, to me,
30 that's just a delay tactic, it's a stalling tactic to try and just - - to push this
31 off to another year, to where this cannot make it before the state
32 legislature. And I'm very disgusted and very disturbed at that type of
33 tactic, because everyone knows that he recused himself. He was accused
34 of an ethics violation - conflict of interest before he even had a chance to
35 sit in my seat and take over the job. So there are a lot of politics going on,
36 a lot of things that do not come into play with what we want to do with
37 this annexation."⁴⁰⁸

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⁴⁰⁵ Tr. 65-72.

⁴⁰⁶ Tr. 68.

⁴⁰⁷ Tr. 72-78. He noted at the outset that he had been KGB Manager until the previous week.

⁴⁰⁸ Tr. 76-77.

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1 Chair Ketchum responded: "Thank you. And I have concern with your
2 comments on the problem with the former employee, the local – actually
3 not the Local Boundary Commission but of the Department of Commerce
4 and one of our staff members. We have investigated this one here quite
5 extensively. We do have some very precise dates on when things
6 happened, and they are way out of bounds in relationship to the petition.
7 We also recognize that the petition was reviewed by – the final petition
8 was completed by Jeanne McPherrin, and she also reviewed the
9 preliminary petition that Mr. Bockhorst had written way back in early
10 June, and most of it back even before that. And she reviewed that quite
11 extensively, and concurred with everything that he had in there, and I will
12 assure you we are quite prepared to defend anything that Mr. Bockhorst
13 has done. And I will also assure you that there would be absolutely no
14 difference had even written the petition and that was (indiscernible) for.
15 There would be zero difference because he actually performed exactly
16 what the law and what was required of him by myself, by the Department,
17 et cetera, and so – everybody that's associated. He did not put any of his
18 own personal opinions on there, or anything of that nature. And I know
19 that he had no intention of – when I started in this job – no intention of
20 moving into the Borough management job here, because he made me
21 promise way back in early July to not quit the Commission, because he
22 didn't want to train another person come January. So I do know that his
23 intention at that time was not to leave and to start – to come into this job.
24 But thank you, anyway. We appreciate your comments."⁴⁰⁹

15 9. Andrew Richter commented that: he is from Naukati; the loss of NFR will
16 be greatly felt by the small communities and school districts on Prince of
17 Wales Island; schools there have high energy costs so it costs a lot to
18 educate their children; and, he asks the LBC to deny the petition.⁴¹⁰

17 10. Elaine Price commented that: she is representing the community of
18 Coffman Cove and the Southeast Island School District; she has read the
19 Ketchikan Daily News for 25 years; the public comments by Borough
20 Assembly members when this first started show that it was about the
21 money; Coffman Cove is a 2nd Class city with no tax authority; they have
22 declining revenues; it seems the LBC is going to approve this annexation;
23 if it is not about the money then delay the effect of the annexation for 5
24 years to affected entities can adjust; Southeast Island's enrollment is
25 declining; they provide a good education for the students in Hyder; it costs
more to operate the school than the funds provided under the education

24 ⁴⁰⁹ Tr. 78-79.

25 ⁴¹⁰ Tr. 81-82. The LBC agreed to hear comments from Mr. Richter, Elaine Price, Carolyn
Duncan, Roseanne Demmert, Jocelyn Edenshaw, Rich Carlson, and Teresa Brown out of order
so that they could catch a ferry to Prince of Wales Island. Tr. 79-80.

1 formula; the District will lose \$80,000 if the annexation is approved; she
2 requests that if the annexation is approved, the LBC require the KGB to
3 cover the costs of operating the Hyder school above the amount of the
4 education foundation formula; they have 14 Hyder students and used a
5 rented classroom (\$3,600 per month), they have a teacher and an aide and
6 also have 2 Canadian students; and, the District's budget is \$3.2 million
7 and they get around \$350,000 in NFR's.⁴¹¹

8 Commissioner Chrystal noted that NFR's "are kind of hanging out in the
9 air right now, they could go away at any time."⁴¹² He asked if the District
10 had a contingency plan. Ms. Price stated that: they have been making
11 cuts; their energy costs are high; the District used to have 19 schools and
12 its own plane; and, they moved the District offices to Thorne Bay to save
13 money.⁴¹³

14 11. Carolyn Duncan commented: she has had an interest in the mineral
15 industry for some 30 years; the KGB annexation is about reaching out and
16 taking money; she wants to see Meyers Chuck and Hyder have the
17 autonomy to develop their own resources when they are ready; the
18 economy is bad and communities are clinging to hold on; loss of NFR's
19 will be devastating; and, it is ironic that the School District providing
20 education in Hyder would lose money if the annexation is approved.⁴¹⁴

21 12. Chair Ketchum stated:

22 "We hear a lot about the National Forest Receipts, and I would like to
23 make one comment, probably putting my foot in my mouth. And I'm
24 doing it in reference to the oil patch and what's on the North Slope. The
25 National Forest Receipts probably would not be too un-different than if
26 the people in the North Slope Borough were to say that all of the oil
27 money goes to our borough, and we'll divide it amongst our people up
28 there, and not share it with the rest of the state.

29 There are people around the state – and I don't mean where I live
30 necessarily – but there are people around in other areas of the state that
31 have some concerns on the National Forest Receipts, that they don't
32 receive any of the monies from it. They didn't have any stumpage – I
33 understand – and that was not what the intention was of it.

34 ⁴¹¹ Tr. 82-85.

35 ⁴¹² Tr. 86.

⁴¹³ Tr. 86-87.

⁴¹⁴ Tr. 87-89.

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1 I just want to make that mention to you, because we hear a lot about the
2 National Forest Receipts. It has nothing to do with borough formation.
3 It's basically out of the picture on the borough formation on the National
4 Forest Receipts. Unfortunately, this was a decision that was made some
5 time ago, before we come around.⁴¹⁵

6 13. Roseanne Demmert commented: she lives in Klawock; she knows they are
7 not about timber receipts, she read the reports, but unfortunately it does
8 affect them; she strongly disagrees with Mr. Shay's comment about their
9 receiving 10-12% more funding per student; Prince Of Wales residents
10 financially support Ketchikan; her school cannot afford to lose \$44,000;
11 they have already combined classes; there is a real strong possibility the
12 federal government is going to take away the money; the report says that
13 the State has the responsibility to fund education but they wait until the
14 last day of the session to do so; this affects all of them; she was insulted by
15 the Vice-Mayor's comments, she comes to Ketchikan and spends money
16 and pays sales tax; and, yet she understands why the KGB wants to
17 expand but the KGB needs to consider the affect on the children in the
18 unorganized borough.⁴¹⁶

19 14. Jocelyn Edenshaw commented: she lives in Hydaburg; Hydaburg is a
20 First Class city; she is appalled that she has to come over here to fight for
21 their kids; if the annexation is approved they will have to shut down their
22 school and the students will have to bus to school in Craig, 45 miles away;
23 they have already done everything they can to cope with the revenues they
24 have; she was appalled by Mr. Landis' comments, she does not think that
25 Prince of Wales Island residents use any KGB services; 99% of Island
residents come to Ketchikan to shop; they pay sales tax even when
ordering over the phone; and, the KGB provides no services for them or
their children.⁴¹⁷

18 15. Rich Carlson commented: he is the Superintendent of the Klawock School
19 District; the District strongly opposes the KGB petition; the annexation
20 would cost the District about \$46,000; they have declining enrollments
21 and already have been cutting costs; this will be a major impact; and, he
22 does not understand how it is not relevant, this is not in the best interest of
23 the State, the KGB would receive an additional \$1.2 to \$1.3 million and
24 not have to educate any additional children or provide any additional
25 services, and the surrounding communities would be devastated.⁴¹⁸

24 ⁴¹⁵ Tr. 89-90.

25 ⁴¹⁶ Tr. 90-93.

⁴¹⁷ Tr. 93-97.

⁴¹⁸ Tr. 97-99.

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1 16. Teresa Brown commented: she is the Vice-President of the Klawock
2 School Board; she wants the LBC to really consider their decision; the
3 KGB is attempting to increase its National Forest Receipts at the expense
4 of the 16 cities, 12 school districts, and 2,700 students in Southeast
5 Alaska; Klawock will lose \$63,000 annually, they cannot afford it, they
6 have already cut to the bare minimum; the KGB is getting a sweet deal, all
the money and no additional students, this is not fair; and, the LBC denied
the KGB's petition in 1999 because it did not include Hyder, the area with
the maximum common interests, the Alaska Constitution has not changed,
the LBC should be consistent.⁴¹⁹

7 17. Robert Blasco, counsel for the City of Craig, the POWCAC, and the
8 Meyers Chuck Association spoke.⁴²⁰ He noted that in 1999 the LBC made
the decision not to consider the NFR's. He noted that it also made the
9 decision then that a KGB annexation petition that did not include Hyder
violates Articles X, §§ 1 and 3 of the Alaska Constitution. He argued that
10 it would be a due process violation for the LBC to now change its
11 interpretation of the Alaska Constitution. He disputed that borough
annexation and formation are treated the same in the Alaska Constitution.
12 He argued that there was no basis for treating Meyers Chuck differently
13 and that doing so raised due process and equal protection concerns. He
noted that the author of the final report had stated that she did not have
time to address this.

14 He then stated: "There was a comment here about the conflict of interest,
15 and I want to point out that **nobody made any ethical violations. There
was an apparent conflict of interest, which still exists – it still exists.** It
16 still exists because you are a judicial body. And the apparent conflict of
17 interest is something that you have to satisfy the people and give them
18 confidence – the confidence – that this government is open and fair, and
that's a big – a heavy responsibility on your part, and we ask you to keep
19 that in mind. It may be that you've not read the whole record related to
that apparent conflict of interest, but many of the communities here . . .
20 have asked to put a lot of things into the record that may not be there yet,
you may not have looked at yet. But as a matter of due process, we're
21 certainly asking you to take the time to reflect and consider it. . . And also,
one other thing about picking and choosing from these past decisions. The
22 staff recommendation in 1999 was that you consider the receipts, that you
do consider the impact. The staff has changed their position now on that.
23 The staff has also, of course, changed their position on the constitutional

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25 ⁴¹⁹ Tr. 99-100.

⁴²⁰ Tr. 101-106.

1 interpretation that you espoused clearly in 1999. Everybody, I think, here
2 is asking: Why? And it's a fair question."⁴²¹

- 3 18. Mr. Hill testified.⁴²² He provided some background on the KGB
4 boundaries and the 1998 Petition. He stated that the LBC rejected that
5 petition because the LBC believed that: it excluded Meyers Chuck and
6 Hyder, areas that needed local government; it ignored the regional and
7 socioeconomic ties between Ketchikan and Meyers Chuck and Ketchikan
8 and Hyder; it was not in the State's best interest; it did not establish local
9 government to the maximum extent possible as mandated by the
10 Constitution; the exclusion of Hyder was seen as permanent; and, the
11 proposal did not conform to natural geography due to the exclusion of
12 Hyder and Meyers Chuck.⁴²³

13 He next addressed the reasons why the KGB wanted to expand.⁴²⁴ He
14 testified that: one of the KGB's goals was to "support orderly growth and
15 development as well as the provision of services in the territory";⁴²⁵
16 Ketchikan wants a seat at the decision-making table concerning the
17 management of regional activities impacting the community –i.e. through
18 a borough's statutory planning powers and the NEPA process and Forest
19 Service procedures; the activities in the proposed area include tourism and
20 natural resource development; another goal is the protection of the KGB's
21 tax base – Ketchikan is the regional service provider for transportation,
22 communications, freight, and emergency response, and the expansion of
23 the boundaries is consistent with its trade area; greater fiscal responsibility
24 is another goal – Ketchikan should collect the benefits from the territory it
25 presently serves, specifically timber receipts; the KGB is giving a lot of
weight to the model boundaries – the boundaries were the result of a lot of
work and discussion (he noted Wrangell did not object in 1991 when
Meyers Chuck was included with the KGB) and they are consistent with
other boundaries (Ranger Districts, Fish and Game, Census, Recording
District, Hospital Service area); it is not required that there be a need for
local government, rather the standards require an evaluation of regional
connections and Alaska's Constitution encourages the creation of
boroughs as regional governments (citing *Mobil Oil*); expanding the
boundaries will allow the KGB to influence resource development in the
region (tourism, mining, timber), tens of thousands of tourists visit Misty
Fjords annually with Ketchikan being their point of departure, there is the
Quartz Hill mining area, Mink Bay has had a commercial tourist resort,

23 ⁴²¹ Tr. 105-106.

24 ⁴²² Tr. 111-142.

25 ⁴²³ Tr. 113-14.

⁴²⁴ Tr. 117-25.

⁴²⁵ Tr. 117.

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1 Duke Island has rich mineral deposits which will be developed in the
2 future (about a million dollars has already been spent in Ketchikan related
3 to Duke Island development), there are mining claims in the Union Bay
4 area, Southeast Alaska in general is mineral rich and it is just a question of
5 time before development occurs, there is a commercial tourist operation at
6 Yes Bay, there was a timber sale at Emerald Bay, there are residential sites
7 on the Unuk River; Hyder does get some 40,000 visitors a year but they do
8 not come through Ketchikan – they come via road from Canada; Ketchikan
9 provides search and rescue services in the proposed area (including the
10 recovery of airplane crash victims in the Misty Fjords National Monument
11 in 2007); and, the KGB can manage rural areas as it has demonstrated with
12 the rural areas in the present borough (Loring, Moser Bay, Gravina Island,
13 Pennock Island) – the KGB has a long history of rural planning in
14 conjunction with federal and state activities.

15 He next addressed the reasons why Hyder was not included.⁴²⁶ With
16 respect to Hyder he noted that: it has some 92 year-round residents; it has
17 15 school age children (2 of which are Canadian); it has 72 housing units
18 of which 25 are vacant; its per capita household income is low (around
19 \$11,000); workforce participation is 31%; there is a floatplane dock and a
20 harbor that is owned by the State; there is a school facility that is leased
21 by the State; there is a federal post office; its utilities and telephone service
22 is provided from Canada; Hyder is 85 miles away from Ketchikan by air on
23 a good flying day, you have to travel about twice that far on a bad day; it
24 is 175 miles away from Ketchikan by boat; the KGB changed the
25 boundaries around Hyder (now 205 square miles) so that the Misty Fjords
26 National Monument border is one border and the Tongass National Forest
27 border is another border; Hyder is “truly unique in Alaska . . . Hyder , in
28 many respects, is a remote suburb of Stewart, British Columbia”;⁴²⁷ “It’s
29 the only Alaska community – that I know of . . . that constitutes an
30 international phone call”;⁴²⁸ it is the only Alaska border community that
31 does not have a U.S. Customs presence; Hyder residents use Pacific time,
32 not Alaska time; State ferry service to Hyder was eliminated in the late
33 1990’s – which cut Hyder further off from Ketchikan; Hyder does not
34 have a strong communication or media ties to Ketchikan (as does Meyers
35 Chuck); “They do not also have the developed transportation -
36 communication systems we feel are critical pieces for the successful
37 implementation of local government”;⁴²⁹ the KGB’s proposal is to phase
38 Hyder in at a later time;⁴³⁰ the inclusion of Hyder now is not necessary in

39 ⁴²⁶ Tr. 125-131. Mr. Hill’s testimony included a slide presentation concerning Hyder.

40 ⁴²⁷ Tr. 127.

41 ⁴²⁸ Tr. 128.

42 ⁴²⁹ Tr. 129.

43 ⁴³⁰ Tr. 129. He further testified that:

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1 order to meet constitutional and statutory requirements; nothing says they
2 have to annex all the land within the KGB's model boundary; there is
3 precedence for the phased in approach (examples provided); the
4 Department of Education concurs with the temporary exclusion of Hyder;
5 and the three keys to having Hyder become part of the KGB are – better
6 transportation between the communities (Hyder uses the Canadian road
7 system and there is no ferry service) and the existence of development
8 activities that would benefit from borough assistance.

9 He next addressed the differences between Meyers Chuck and Hyder.⁴³¹
10 Meyers Chuck has 11 residents. It does not have a school. It is 30 miles
11 from Ketchikan by plane and 41 miles by boat. It has a post office, a state
12 floatplane dock and boat dock. Meyers Chuck is 70 miles from Wrangell.
13 The issue is what borough it belongs in. It has closer ties to Ketchikan
14 than with any other borough. But the KGB does not object if it is placed
15 in the proposed Wrangell borough.

16 He next addressed NFR's.⁴³² He noted that: this is a temporary funding
17 source, the payments could (and have) gone up and down, and the
18 program could cease; if there were no NFR's there would not be this
19 vigorous opposition to the KGB's annexation proposal; there was no such
20 opposition to Wrangell's proposal; the organized boroughs subsidize
21 education in the unorganized borough at the rate of 189 million dollars a
22 year; on a per capita basis, the unorganized borough receives twelve times
23 what Ketchikan receives for territory that Ketchikan services; and, if the
24 annexation is approved this disparity will still exist, though it will drop to
25 two times.

26 He testified that the desire of the residents on the Annette Island Reserve
27 to expand its boundaries is a federal matter.⁴³³

28 He testified that the KGB annexation proposal is in the State's best interest
29 because: it fulfills the constitutional mandate to maximize local self-

30
31 The borough does not dispute that Hyder is best and inevitably suited for
32 inclusion in a future expanded Borough, but we're also suggesting that it's just
33 not ready for annexation at this time. The exclusion of Hyder is not terminal, but
34 it's incremental. And in reality, a future annexation could be initiated by any
35 number of people. It could be initiated by the borough . . . Hyder residents . . . a
36 state agency, once one of those groups of folks felt that it was appropriate to do
37 so."

38 ⁴³¹ Tr. 131-33.

39 ⁴³² Tr. 133-38.

40 ⁴³³ Tr. 138.

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1 government; it will increase the KGB's education contribution and
2 decrease that of the State; it will relieve the State from planning
3 responsibilities in the annexed area and shift it to where it belongs – the
4 local level; and, the proposal is consistent with Ketchikan's present role as
5 the regional service provider and the only organized borough in Southern
6 Southeast Alaska.⁴³⁴

7 19. Commissioner Ketchum stated his view that the model boundaries are a
8 consideration but are no longer important. He noted that the legislature
9 did not follow the constitution when it set up the unorganized borough as
10 the areas therein do not have common interests. He stated that the model
11 boundaries were set up on the basis of things such as fish & game
12 boundaries and federal boundaries that may not really apply.⁴³⁵

13 20. Mike Houts, the KGB Director of Administrative Services, testified that:
14 the KGB has the administrative services and accounting functions to
15 handle the annexation; the last budget cycle the KGB initially did not
16 include NFR funds because they thought there would be none and then
17 they got the word from Washington D.C. at the last minute that there
18 would be NFR funds for another year; so, it is nice to have NFR funds but
19 the KGB is not totally relying on them.⁴³⁶

20 21. Robert Boyle, Superintendent of the Ketchikan Gateway Borough School
21 District (KGBSD), testified that: the KGBSD could "readily
22 accommodate" the annexation of Hyder from a fiscal and staffing
23 standpoint; but, it would be challenging in the near term from a cultural
24 perspective; and, he thinks it would take a "long time for that process to
25 heal itself."⁴³⁷

26 22. Brett Hiatt, KGB Assessment Department, testified. He described the
27 steps his Department had taken to prepare for the proposed annexation.
28 He also testified that: they have counted some 180 private properties in the
29 proposed area; the properties are mostly remote cabins and single family
30 dwellings; there are also lodges, mining claims, vacant land, and federal
31 land leases; the current KGB boundaries have some 1,300 such properties;
32 and, the Department has a plan in place as to how to proceed if the
33 annexation is approved.⁴³⁸

34 ⁴³⁴ Tr. 138-39.

35 ⁴³⁵ Tr. 140-41.

36 ⁴³⁶ Tr. 141-43.

37 ⁴³⁷ Tr. 144-45.

38 ⁴³⁸ Tr. 145-48.

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1 23. KGB attorney Scott Brandt-Erichsen testified.⁴³⁹ He testified that the
2 current situation is different than that in 1998 because: the LBC has
3 different regulations;⁴⁴⁰ the KGB has provided more pertinent information;
4 the position of the DEED has changed; more is known about the history of
5 incremental growth towards model borough boundaries; and, the LBC
6 staff is not being ordered to follow a political agenda.⁴⁴¹ He discussed
7 each of these points.

8 With respect to the regulation changes, he testified:⁴⁴²

9 A. 3 AAC 110.180 was amended in 2002.

10 B. 3 AAC 110.190(b) was amended in 2002. The “focus is [now] on
11 whether that are enough resources to provide services to the new
12 borough within the proposed boundaries if either it includes
13 noncontiguous area, or excludes an enclave.”⁴⁴³ So it is now clear
14 that the focus is not on whether the excluded area is left with
15 adequate resources, but rather whether the area being included has
16 the land and water necessary to provide the services. 3 AAC
17 11.190(a) describes what is adequate land and water. You are
18 looking at whether excluding an area will hurt the included area.
19 Hyder (and Annette Island) are not needed to provide sufficient
20 land and water to allow for the full development of essential
21 borough services on an efficient and cost effective level within the
22 KGB.

23 “The Hyder annexation is not terminal.”⁴⁴⁴ A petition could be
24 submitted by Hyder residents, the KGB, the legislature, DCCED,
25 or citizens. It is unlikely that a petition would be filed to create a
city of Hyder as one of the standards would be whether the needed
services could be met by an existing borough, the services could be
so met, and the borough would be the KGB.

26 C. 3 AAC 110.200 has changed. The important change is that in 1998
27 the LBC had to evaluate a list of seven factors. Since 2000 there
28 are ten listed factors, and annexation by legislative review is
29 appropriate if any one of the ten applies. When the impacts on

30 ⁴³⁹ Tr. 149-171.

31 ⁴⁴⁰ Chair Ketchum pointed out that the LBC had to follow the regulations in effect when the
32 petition was filed, not as subsequently amended. R. 152-53.

33 ⁴⁴¹ Tr. 151.

34 ⁴⁴² Tr. 153-61.

35 ⁴⁴³ Tr. 155.

⁴⁴⁴ Tr. 157.

1 affected local governments is considered, the focus is on whether
2 the annexation will impinge on services that the other government
3 is providing within the affected area. There no longer is balancing
4 against the State's interests.

4 With respect to the KGB being more informed about the process, he
5 testified: the KGB made an error in setting the Hyder boundary in 1998
6 (used a waterway boundary then); the KGB has presented more evidence
7 and taken a closer look at Hyder, interacted more with people in Hyder;
8 the DEED now supports the KGB's petition; and, the KGB has learned
9 more about the history of annexations, in particular the history of
10 incremental expansions (he provided several examples).⁴⁴⁵

8 With respect to the "political agenda" point he testified:

9 "In 1998, the LBC staff was directed by the department supervisors to
10 justify rejection of the Ketchikan Petition. Lamar Cotton, then Deputy
11 Commissioner, told the Ketchikan Daily News that he was the one that
12 directed staff to reject the petition. He said he made the 1998 decision to
13 not recommend approval of Ketchikan's petition, even though he knew
14 that staff supported the petition.

13 Interestingly, a big part of the basis was the issue that the Commission in
14 1999 found was not relevant, the timber receipts. Mr. Cotton and the
15 administration . . . wanted to elevate revenues from timber receipts above
16 constitutional considerations, in whether a petition should be granted. It
17 was in conflict with prior petitions, such as the 1997 Yakutat expansion,
18 where the State's best interest, in the fulfillment of constitutional
19 objectives of maximum local self-government outweighed the concerns
20 over impacts of changes in timber receipts. Yakutat ended up getting a
21 significant gain in timber receipts. The quote, blown up from the
22 Ketchikan Daily News article where it appeared on October 30, 2007."⁴⁴⁶

19 NFR receipts are speculative. They have been significantly higher and
20 significantly lower than they are now. Also, Craig has a 7.5 million
21 school budget of which less than 2% is from NFR funds. The most
22 significant reduction that would be experienced by any of the affected
23 entities is 5%. Right now, Congress is approving NFR funding on the
24 basis of year-to-year stop-gap measures. Perhaps a bigger question is
25 what the Alaska legislature will do in response to the Institute for Social
and Economic Research (ISER) report. It has implemented ¼ of the ISER
formula, which resulted in a \$264,000 increase for Craig. Craig will

445 Tr. 161-63.

446 Tr. 163-64.

1 receive about \$600,000 if the entire formula is adopted. But this is not a
2 basis for making long-term decisions about where a boundary should be.
You cannot predict legislative appropriations from year to year.⁴⁴⁷

3 With respect to the constitutional standards, there are three: maximizing
4 local self-government; minimizing the number of local government units;
5 and having government units that embrace an area and population with
6 common interests to the maximum degree possible. The first two are from
Article X, § 1 and the third from Article X, § 3. The DCCED reports
concluded that all three are met.

7 Maximizing local self-government does not require that a petition be
8 rejected if it does not include all of the territory it could. If so, the Denali
9 Borough would have had to include Nenana. The standard encourages the
10 creation of boroughs and it is met if more of the State is included in an
organized borough. The standard is discussed in *Mobil Oil Corp.* It is a
directive for maximum local self-government, not maximum local
government.

11 The first directive is balanced against the second. The exclusion of Hyder
12 is neutral with regards to local governmental units. One of the new
13 regulations that does not apply, but can be looked to as persuasive
14 authority, is 3 AAC 110.9801(2), which provides that this standard is met
if the proposal would expand local government to portions of the
unorganized borough.

15 The third standard does not require the inclusion of all areas in a borough.
16 It does not prohibit enclaves. Hyder and Annette Island should be
excluded as enclaves because each has its primary economic relationship
17 with separate sovereign jurisdictions (Canada and the U.S. government).
Annette probably has closer ties to Ketchikan than Hyder. In the big
18 picture, the question is whether the area to be added has a need for
government services. The KGB believes it does.⁴⁴⁸

- 19 24. Metlakatla Council member Bill Wilson testified that: Metlakatla has 80%
20 unemployment; its cannery and mill have shut down; the cold storage
21 remains open and expanding the southern boundary will allow its
fisherman to catch more fish, which would increase the volume of fish
22 handled by the cold storage and fresh packing facility; and, their
expansion efforts would be hampered by the KGB annexation proposal.⁴⁴⁹

24 ⁴⁴⁷ Tr. 164-66.

25 ⁴⁴⁸ Tr. 166-70.

⁴⁴⁹ Tr. 173-74.

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- 1 25. Metlakatla Council member Jeff Moran testified that: he is a Fish &
2 Wildlife biologist who has lived there for nearly 17 years; few Metlaktala
3 fisherman have limited entry permits because most fished in the exclusive
4 Metlakatla fisheries (within 3,000 feet of Annette Island) and those efforts
5 did not qualify for permit points; their fisherman cannot afford to buy
6 permits; and, the requested southern expansion will increase their fishing
7 grounds and decrease the chances of their fisherman inadvertently fishing
8 over the line into State waters and being cited.⁴⁵⁰
- 9 26. The City of Wrangell called Carol Rushmore, who testified that: Meyers
10 Chuck came to Wrangell when it felt threatened by the KGB petition;
11 Wrangell looked at the ties between the communities and concluded they
12 were a good fit; so, they seek to include Meyers Chuck, but only if Meyers
13 Chuck has no other option.⁴⁵¹
- 14 27. Brett Agenbroad, the Superintendent of the Annette Island School District
15 commented. He asked that the LBC take the full 90 days possible to
16 decide this matter. He stated: "In America, we have what is called a
17 reasonable man or a common man litmus test on a lot of legal issues, and I
18 think there's a very real perception, whether its true or not, of a conflict of
19 interest with one of the former LBC staff, which is now the new City
20 Manager, and I would respectfully request that the Commission form an
21 independent investigation into these, I believe, real perceptions of the
22 common man of a conflict of interest in the reversal of a position from the
23 1999 LBC statements on the constitutionality of this petition excluding
24 Hyder." He also questioned how the pertinent standards could be met if
25 Hyder were excluded. And he stated that Annette Island is within the
26 KGB's model boundaries, and it is also a federal sovereign.⁴⁵²
- 27 28. Joannie Leisholm commented that it appeared to her that not much had
28 changed since 1999, and she asked the LBC to take the time to consider
29 the 1999 Decision.⁴⁵³
- 30 29. Chair Ketchum stated that he would like to hear from somebody who
31 might address why such a big issue was being made of the impact of the
32 Ketchikan Petition on NFR's but not with respect to the Wrangell Petition.
33 Mr. Agenbroad responded that in his view it was a question of
34 proportionality and the Wrangell borough would be much smaller. The

35 ⁴⁵⁰ Tr. 175-82.

⁴⁵¹ Tr. 182-84.

⁴⁵² Tr. 186-88.

⁴⁵³ Tr. 188-89.

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1 KGB is taking land that represents 22% of the NFR funding in order to
2 service 24 people.⁴⁵⁴

3 30. Sherrie Hayward of Metlakatla commented that the right constitutional
4 decision was made before, the LBC has a certain amount of time to make
5 the decision, and she asked that they take everything into consideration.⁴⁵⁵

6 31. Commissioner Chrystal then stated: "I think some people are thinking
7 that we just got all this information this morning. A lot of this
8 information that we've dealt with, we've had for months. I know I
9 have personally read through thousands and thousands of pages of
10 documents over the last couple of months. So it's not as if we're
11 making a rush decision, and we just got all this this morning, and
12 tomorrow we're going to make a decision. We've been dealing with
13 this stuff for a long time. And going back to 1999, just because a
14 decision was made in 1999 doesn't mean it is right today. It doesn't
15 mean it is wrong, but it doesn't mean it's right, because every
16 decision, no matter what we do in life, changes as we go along. It can
17 be bad or it could be - - it may be that it is the right decision. But, I'm
18 just saying that we've been dealing with this for quite some time now.
19 ⁴⁵⁶

20 32. Jeff Perez commented that the LBC could not change the borders to Indian
21 lands under the Alaska Constitution and that this is what the LBC was
22 being asked to do.⁴⁵⁷

23 33. Debbie Johnson commented that she did not understand how the LBC
24 could approve a petition now that was rejected in 1999. She disputed
25 some of the DCCED information about Meyers Chuck in both the
Wrangell and Ketchikan reports. She stated that they did not want to be
annexed. She noted that Wrangell had done a better job of communicating
with Meyers Chuck than Ketchikan did. She asked that the LBC not rush
its decision.⁴⁵⁸

34. Jim Van Altvorst commented that: the LBC is facing a dilemma because it
made the right decision in 1998/99 on the same issues and now its staff
reports are 180 degrees different from what they were then; he wondered
what would support this change; he asked the LBC to carefully review the
1999 Decision and then ask "what, if anything, could reasonably support
the change proposed in the staff's 2007 final report . . ."; and, the LBC

23 ⁴⁵⁴ Tr. 189-91.

24 ⁴⁵⁵ Tr. 191-92.

25 ⁴⁵⁶ Tr. 192-93.

⁴⁵⁷ Tr. 194-95.

⁴⁵⁸ Tr. 195-202.

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1 should not decide the Petition the next day, but should take the time to
2 fully consider what they heard during the hearing.⁴⁵⁹

3 35. Chair Ketchum noted that one reason the Decisional Meeting had been
4 scheduled for the next day was the impending legislative session and
5 another reason was his travel schedule.⁴⁶⁰

6 36. John Bolling commented that: he is appearing on behalf of the City of
7 Craig and the POWCAC; this is essentially the same petition as the 1998
8 petition; the same constitutional standards apply; the LBC's 1999
9 Decision was based on "a good report by staff. It's a report that had no
10 cloud of apparent conflict of interest ever brought up to it, unlike the
11 situation facing today – that the LBC is facing;" the LBC should take the
12 full 90 days to consider the matter; they should ask the KGB if it would
13 hold the other communities harmless with respect to the NFR's if it truly
14 is not a reason for its Petition; the Wrangell Petition is for incorporation
15 and has merit; he acknowledged that in 1999 the LBC said NFR's were
16 not relevant but stressed that the 1999 Decision needed to be taken as a
17 whole.⁴⁶¹

18 37. James Stanley commented that it appeared that neither the KGB nor the
19 DCCED had consulted with native people about the KGB's proposed
20 annexation.⁴⁶²

21 38. Terral Wanzer commented that: he owns property in Meyers Chuck; his
22 family is a long-time Alaska family; annexation should be a matter of
23 choice; and, he signed the petition to have Meyers Chuck join the
24 Wrangell borough but if being an enclave was a possibility he prefers that
25 option.⁴⁶³

26 39. Carol Brown from Meyers Chuck commented that: neither the KGB nor
27 Wrangell really want Meyers Chuck; Meyers Chuck wants to remain in
28 the unorganized borough; if the LBC deletes Meyers Chuck nobody is
29 going to complain; and, the LBC staff seems to be the only one pushing
30 this. She also commented:

31 "On July 31st I called Dan Bockhorst on behalf of the Meyers Chuck
32 Community Association. I asked him what it would take to get him to
33 reconsider his recommendation that Meyers Chuck be annexed and there

34 ⁴⁵⁹ Tr. 202-05.

35 ⁴⁶⁰ Tr. 206.

36 ⁴⁶¹ Tr. 206-10.

37 ⁴⁶² Tr. 210-11.

38 ⁴⁶³ Tr. 212-14.

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1 would be an isolating enclave for Hyder. He told me, make an equal or
2 stronger case, and if we did that, he would have to reconsider his
3 recommendation. I went on, and I asked for technical assistance. It's
4 something that his department is obligated to provide to communities,
5 such as Meyers Chuck. He said he'd just given me 24 minutes of
6 technical assistance, and he was the only who could provide it. He didn't
7 tell me he was seeking the managerial position in Ketchikan at that time.
8 He led me to believe that he would be the one writing the final report.

9 We did make the case. It's appended to this final report . . . It shows that
10 for every single criteria, his recommendation isn't justified. And in doing
11 this, I learned that Hyder was the fatal flaw in the earlier petition you
12 denied. The LBC made the constitutionally correct decision in denying
13 the petition in 1999. There weren't any objections.

14 If you accept Mr. Bockhorst's recommendation now, there would have to
15 be a complete change in the Constitution. Was there? When did this
16 happen?

17 Also, the LBC – you – would have to completely reverse policy decisions
18 about enclaves. Did this really happen?

19 You should know that that there's nothing short-term about a Hyder
20 enclave. It's terminal. . .

21 I agree with everyone today that says don't rush your decision.⁴⁶⁴

22 She added that she spoke with Mr. Bockhorst on July 31st at 9:32 a.m.⁴⁶⁵

23 40. Dan Higgins commented that: he had come to the meeting thinking that
24 the LBC was already pre-disposed to approve the annexation but he can
25 see that this is not the case; he is from Meyers Chuck; Meyers Chuck and
26 Ketchikan have different philosophies, Ketchikan is a tourist town and
27 Meyers Chuck is not; and, he realizes that the LBC has a difficult decision
28 to make and that someone is going to be unhappy no matter what the
29 decision is.⁴⁶⁶

30 41. Glen Rice commented that: he is from Meyers Chuck and has owned
31 property there for 36 years; Meyers Chuck has a community association
32 and has managed to meet the community's needs on their own; only 25%
33 of the homeowners in Meyers Chuck live in Ketchikan, not over 50% as

34 ⁴⁶⁴ Tr. 216-18.

35 ⁴⁶⁵ Tr. 219.

⁴⁶⁶ Tr. 219-21.

1 reported; and, the residents of Meyers Chuck prefer to remain in the
2 unorganized borough but if they have to be in a borough they prefer to be
in the new Wrangell borough.⁴⁶⁷

3 42. Katherine Peavey commented: she is the postmistress in Meyers Chuck;
4 she has lived there for 47 years; and, they prefer to remain in the
unorganized borough but if they have to be in a borough they prefer to be
5 in the new Wrangell borough.⁴⁶⁸

6 43. Joni Kuntz commented that: she is a member of the Craig City Council;
7 she has lived on Prince of Wales Island for 32 years; she previously served
on the Craig School Board; the proposed annexation would adversely
8 affect the schools and roads on the Island; the KGB is doing this to
increase its share of the NFR's at the expense of the other recipients; the
9 KGB and the City of Ketchikan should consolidate first before attempting
to add new territory to the KGB; and, she wonders why Hyder is not
10 included while Meyers Chuck is, when Ketchikan has nothing to offer
Meyers Chuck.⁴⁶⁹

11 44. Craig Mayor Dennis Watson commented that: the process in the past has
12 been extremely flawed; he "watched in horror while this Commission
dealt with the Skagway issue;" "this proceeding has an aura of conflict all
13 over it, because of people that were involved in that issue too;" "I get the
distinct feeling tonight from listening to comments from Commission
14 members that maybe the decision's already been made;" and, Wrangell is
trying to form a borough, not increase a borough, while Ketchikan is just
15 trying to get money at the expense of all of the other communities.⁴⁷⁰

16 45. Ronald Erickson commented that: the KGB proposal does not satisfy the
17 applicable standards; it is detrimental to the State due to the NFR
situation; and, it creates the Hyder enclave.⁴⁷¹

18 46. Valerie Steward commented that: she is from Klawock; the proposed
19 annexation would be devastating to her community, Prince of Wales, and
the surrounding areas; the proposed annexation would only benefit
20 Ketchikan; and, she thinks one issue is whether Prince of Wales should be
part of the KGB, it should not.⁴⁷²

23 ⁴⁶⁷ Tr. 222-24.

⁴⁶⁸ Tr. 225-26.

24 ⁴⁶⁹ Tr. 228-30.

⁴⁷⁰ Tr. 231-33.

25 ⁴⁷¹ Tr. 233-34.

⁴⁷² Tr. 235-37.

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- 1 47. Janice Bush commented that: she is a Klawock resident; she is President
2 of the Prince of Wales Chamber of Commerce; all of the communities in
3 southern Southeast have suffered from the decline in the timber industry
4 and decrease in timber receipts; the NFR loss that would result from the
5 proposed annexation would be substantial; Island residents spend a lot of
6 money in the KGB and it is hurtful that the KGB is trying to do this; and,
7 she supports Meyers Chuck's efforts to remain in the unorganized
8 borough.⁴⁷³
- 9 48. Neva Robertson commented that: she lives in the Klawock area; she has a
10 child in school in Klawock; Ketchikan should not be permitted to steal this
11 land and provide no services; and, the KGB does not have the right to
12 annex any land on Prince of Wales Island or anywhere else.⁴⁷⁴
- 13 49. Sonnie Anderson commented that: she lives in Craig and works in
14 Klawock; she has lived on Prince of Wales Island for 39 years; the KGB
15 proposal would have a devastating impact on Island communities; the
16 proposal is motivated by greed; Island residents provide significant
17 financial contributions to the Ketchikan economy; they should remain
18 good neighbors; and, she urges the LBC to follow the Constitution and be
19 consistent with its prior decisions.⁴⁷⁵
- 20 50. Ellen Clark commented that: she is the President of the Klawock School
21 Student Council; Klawock students universally oppose the KGB proposal;
22 and, they believe the annexation will have resounding negative impacts on
23 their school and community, and other Prince of Wales Island
24 communities.⁴⁷⁶
- 25 51. Kelly Larson commented that: she lives on Prince of Wales Island; she has
children who attend school in Klawock; and, she opposes the proposed
annexation due to the NFR financial impact.⁴⁷⁷
52. Homer Mills commented that: he works for the Klawock School District;
his son attends school there; and, he opposes the proposed annexation
because of the NFR financial impact.⁴⁷⁸

⁴⁷³ Tr. 238-40.

⁴⁷⁴ Tr. 240-41.

⁴⁷⁵ Tr. 241-44.

⁴⁷⁶ Tr. 245-46.

⁴⁷⁷ Tr. 247.

⁴⁷⁸ Tr. 247-48.

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- 1 53. Don Marvin commented that: he is the Mayor of Klawock; the loss of
2 NFR's will affect them drastically as they have a small tax base; so, the
3 City of Klawock opposes the KGB annexation proposal.⁴⁷⁹
- 4 54. Webster Demmert commented that: he is President of the Klawock
5 Cooperative Association; he is speaking on behalf of his Tribe; this is
6 about the money; and, it is also about the people who would be adversely
7 affected by the loss of the NFR funds.⁴⁸⁰
- 8 55. Sabrina Demmert commented that the loss of NFR funds will severely
9 impair education in Klawock.⁴⁸¹
- 10 56. Debbie Reed commented that: she is a member of the Thorne Bay City
11 Council; the City has passed a resolution asking the LBC to deny the KGB
12 annexation petition: and, the proposed annexation will hurt the schools
13 and small communities on Prince of Wales Island.⁴⁸²
- 14 57. William Unkel commented that: he represents the Gustavus City Council;
15 boroughs are supposed to help improve people's lives and this proposal
16 would not do so because of the impact on NFR and PILT funding;
17 Gustavus would lose 43% of its annual budget; and, the proposal would
18 still leave the State providing education in Hyder.⁴⁸³
- 19 58. Mr. Brandt-Erichsen commented during his closing, in part, that: the NFR
20 impacts are overstated – the loss to Craig would be 1.7% of its budget, to
21 Klawock 1.6% of its budget, and to the Southeast Island School District
22 2.56% of its budget; the 1998 KGB petition was denied because the KGB
23 declined the LBC's offer to include Hyder and Meyers Chuck in exchange
24 for approval; the KGB has now included Meyers Chuck and there are
25 stronger reasons now for excluding Hyder – its connections with Canada
are stronger and its connections with the KGB weaker, the State ferry no
longer goes to Hyder – the other proposed ferry service never happened;
the areas included within the petition need government services; if Annette
Island's expansion efforts are not successful then there would be an odd
enclave, and the area in question is used by commercial charterers from
Ketchikan; all three Constitutional standards have been met; the Southeast
Island School District would be hurt more if Hyder was included as it cost
the State \$150,000 to educate the students in Hyder but it would cost the
State \$300,000 under the state funding formula if it were in a borough;

23 ⁴⁷⁹ Tr. 249-50.

24 ⁴⁸⁰ Tr. 250-51.

25 ⁴⁸¹ Tr. 252-53.

⁴⁸² Tr. 253-54.

⁴⁸³ Tr. 254-57.

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1 and, the other criteria have all been satisfied; and, the LBC told the KGB
2 in 1999 that Meyers Chuck should be in the KGB, they agree and included
3 it, if the LBC believes it should be in the Wrangell borough the KGB does
4 not object.⁴⁸⁴

5 59. Mr. Brennan commented in his closing that: he is there only to address
6 Meyers Chuck; and, if Meyers Chuck should be in a borough it should be
7 in the new Wrangell borough rather than the KGB for several reasons.⁴⁸⁵

8 60. Mr. Wilder commented in his closing that: Metlakatla is only asking that
9 the annexation not include the water areas that it is trying on the federal
10 level to add to the Annette Island Reserve in order to increase the fishing
11 opportunities for its residents, though the new area would be non-
12 exclusive so it would not affect the Ketchikan charter fleet; and, inclusion
13 of this water area will make it more difficult for the Metlakatla request to
14 be approved.⁴⁸⁶

15 61. Mr. Caffall-Davis, making the closing statement on behalf of Hyder,
16 stated that: Hyder opposes being annexed now, or in the future; "we don't
17 fit with the Ketchikan Gateway Borough. We're a very small, very rural
18 remote village. I need to point out that we're not growing like Meyers
19 Chuck says. Actually, we're in a severe downturn, and it's looking very
20 bad. And the future – two years from now, we may not have enough
21 children for a school. Most of the children in that family of 14 that I
22 mentioned who moved here from Tennessee prefer home school . . . The
23 Bradfield Connector Road is a road that the Canadians and Americans
24 have been talking about building to Wrangell from the Mainland. And
25 because of our falling dollar again and the high gold prices, the talk is
26 evermore grown, and it's a very likely possibility. And I would ask you to
27 imagine if you can for just a minute, what would happen to Southeast
28 Alaska if you had two communities in close proximity with roads
29 connecting them? It's huge. We would have more in common as a town
30 with Wrangell at that point than we ever would have with . . . Ketchikan";
31 and, that he agrees the State should be divided into boroughs – organized
32 and unorganized, and Hyder should remain in the latter until it decides it
33 wants to join a borough, which would likely be the Wrangell or a Prince of
34 Wales Island borough.⁴⁸⁷

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⁴⁸⁴ Tr. 258-67.

⁴⁸⁵ Tr. 267-73. He discussed the reasons.

⁴⁸⁶ Tr. 273-77.

⁴⁸⁷ Tr. 277-85.

MEMORANDUM AND ORDER

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1 62. Mr. Brandt-Erichsen's rebuttal focused on Metlakatla. He argued that the
2 KGB was pursuing the annexation precisely so it could have a seat at the
table concerning areas, such as the Duke Island area, that affect it.⁴⁸⁸

3 63. Chair Ketchum noted that: "this is a very difficult decision"; they will
4 address Wrangell first the next day and then Ketchikan; and, they will go
into the evening if necessary to conclude the matter if possible.⁴⁸⁹

5 Commissioner Chrystal commented that: he is a 44 year Alaska resident;
6 he has lived in Barrow, Yakutat, and Valdez; he understands small towns;
7 he has decades of service as a school board member, a city council
8 member, and a city mayor; they are not "up here trying to screw over
9 anybody"; they are just citizens appointed to do a job and they will do the
best job they possibly can; they know they cannot please everyone; and,
they have laws and regulations they must follow – it is not a popularity
contest.⁴⁹⁰

10 Commissioner Wilson commented that: he echoed Commissioner
11 Crystal's comments; he is of two minds at the moment and does not know
12 which way to go; he has always lived in the unorganized borough and is
reluctant to force anybody into any form of government; but he realizes
13 that there are times it is necessary; he hopes that whatever they decide is
consistent with the wishes of a majority of the people, though he knows
14 that is not always what happens; and, he didn't realize until then how
tough the job was.⁴⁹¹

15 The LBC convened its Decisional meeting on the KGB Petition on November 7,
16 2007. Commissioner Harcharek noted that he had left the proceeding the prior day early for
17 medical reasons but had listened to the recording of the portion he had missed.⁴⁹²

18 Chair Ketchum noted that in his view there were three issues: Meyers Chuck, the
19 water area south of Annette Island, and Hyder. He noted that the LBC had decided in the context
20 of the Wrangell petition that Meyers Chuck would be in the Wrangell borough. The Annette
21

22 ⁴⁸⁸ Tr. 285-87.

23 ⁴⁸⁹ Tr. 289.

24 ⁴⁹⁰ Tr. 289-90.

25 ⁴⁹¹ Tr. 290-91. The hearing record also included written comments from Mr. Unkel, Ms.
Anderson, Ms. Clark, Ann James, Adrian LeCornu (Hydaburg Administrator) stating opposition
due to NFR situation.

⁴⁹² Tr. 3-4.

1 Island Reserve water matter was discussed. The Commissioners voiced the view that the water
2 south of the Reserve should not be deleted from the KGB annexation petition.⁴⁹³ The discussion
3 turned to Hyder.

4 Chair Ketchum noted that many of the speakers who opposed the KGB
5 annexation focused on Hyder because they realized that Hyder was the way to retain the NFR's
6 as the LBC had "determined some time ago" that the NFR issue was "irrelevant."⁴⁹⁴ He stated
7 his opposition to Hyder remaining an enclave forever. He asked for a motion to include Hyder in
8 the KGB boundaries. Commissioner Chrystal so moved. Commissioner Harcharek seconded for
9 purposes of the LBC being able to discuss the matter.⁴⁹⁵

10 Commissioner Chrystal stated that he was "still waiting to be convinced" that
11 Hyder should remain an enclave.⁴⁹⁶

12 Commissioner Wilson expressed concerns about leaving Hyder as an enclave. He
13 noted it eventually would be part of something and Ketchikan was the closest area. He also
14 noted that he was concerned that the people of Hyder were opposed to being annexed and had no
15 say in it. He also expressed concern that if the annexation were approved the KGB would be
16 receiving a lot of money and would not be providing services in the rural areas. He concluded
17 that he would like to hear more discussion.⁴⁹⁷

18
19 Chair Ketchum stated the belief that the KGB could use the additional money to
20 begin to formulate a plan for services that could be provided to Hyder. He noted that "it's really
21 a hard one because they are disconnected from everybody from the most part other than Stewart
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23
24 ⁴⁹³ Tr. 4-7.

⁴⁹⁴ Tr. 8.

25 ⁴⁹⁵ Tr. 8-9.

⁴⁹⁶ Tr. 10.

MEMORANDUM AND ORDER

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1 and at the same time I see a need for some organization there of some kind, and some planning
2 or, or some services. Although they may not want it – We’ve had a lot of boroughs that have
3 been pushed into it that didn’t want it and then after we got it we were happy that we were in
4 it.”⁴⁹⁸

5 Commissioner Chrystal noted that there had been changes in State law since 1999
6 and that a lot of people were confused by the Hyder situation.⁴⁹⁹ Ms. McPherran commented
7 that there had been significant changes made to the LBC regulations in 2002, which Mr. Brandt-
8 Erichsen had addressed during the November 6th hearing.⁵⁰⁰

9
10 Chair Ketchum stated concern with Hyder remaining as an enclave, particularly
11 with the State paying to educate its students. He also stated the belief that it was in the State’s
12 interest to get more of the unorganized borough into organized boroughs so education and other
13 funding could be done at the local level.⁵⁰¹

14 Commissioner Harcharek said he also did not want to see Hyder left as an enclave
15 and said he would include Hyder in the KGB.⁵⁰²

18 ⁴⁹⁷ Tr. 10-11.

19 ⁴⁹⁸ Tr. 11-12.

20 ⁴⁹⁹ Tr.

21 ⁵⁰⁰ Tr. 13-14. Ms. McPherran advised that there had not been much in the way of change with
22 respect to the pertinent Alaska statutes, but that:

23 “There were significant changes to your regulations though. I think in 2002, the
24 process started in 2000 following the previous Ketchikan annexation. I believe
25 Scott Brandt-Erichsen addressed that yesterday. [Commissioner Chrystal:
“Right”] But there were significant changes to your annexation regulations
following that 1999. . . . But there were substantial changes . . . to your annexation
regulations in 2002 following the 1999 Ketchikan decision.”

⁵⁰¹ Tr. 15-16.

⁵⁰² Tr. 16-17.

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1 Commissioner Wilson noted that: the DCCED staff recommended approval; they
2 do not seem to have a problem reconciling it with their 1998 decision; and, he favors leaving it
3 as an enclave “being they are so far and so disconnected from this community . . . the idea of
4 portioning people into a borough when they’re so far away and so disconnected with hardly any
5 transportation links or anything else this doesn’t sit too well with me. I don’t like the idea of an
6 enclave either but that’s my feeling on it”.⁵⁰³

7
8 Chair Ketchum stated that he understood the remoteness concern and that the
9 KGB “certainly gave a compelling reason for not to include it but in actuality I felt like it was
10 more of a reason to include it with the British Columbia and give it back to British Columbia if
11 that was what they were initially or not.”⁵⁰⁴

12 Ms. McPherrren stated that she wanted to clarify DCCED’s position. DCCED’s
13 position is that Hyder only be excluded in the short-term. You can direct DCCED to forward an
14 annexation petition if the KGB does not file one. The KGB suggested it was a short-term
15 exclusion. The LBC “could put a finite time period on such exclusion.”⁵⁰⁵

16 Commissioner Wilson moved that, if the motion on the floor failed, that the KGB
17 Petition be approved with a five year period for Hyder to become part of the KGB.⁵⁰⁶

18 Chair Ketchum stated that: he would have another similar motion if the motion on
19 the floor fails; he did not want to see a third hearing on Hyder; he wanted some finality on the
20 Hyder issue; and, he sees that Hyder had tourism potential as the premier brown bear viewing
21

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24 ⁵⁰³ Tr. 18.

25 ⁵⁰⁴ Tr. 18-19.

⁵⁰⁵ Tr. 19.

⁵⁰⁶ Tr. 19-20.

1 spot in the world and the KGB could provide Hyder with extensive related assistance. He also
2 noted that: the KGB was bringing in new talent

3 “a person with such expertise in municipal government and economic
4 development that you’ll be absolutely amazed. He has changed people’s heads
5 time and time again. People that have disliked him previous times and have
6 turned to really find that his knowledge and honesty is impeccable. Georgianna
7 being one of those people as a matter of fact. And I just, I cannot really express
8 how good of an expertise they have and how much he is going to help this
9 borough and I think he would be able to help Hyder extensively if they were
10 included within this borough.”⁵⁰⁷

11 Commissioner Wilson stated that: he was “starting to lean a little bit here; it is
12 obvious that down the road Hyder could only go one place, the KGB; future Commissions will
13 not leave it out there as an enclave forever; he does not know whether they should do it [include
14 Hyder] today; and, “I am starting to lean a little bit but – at least I can see the logic of it.”⁵⁰⁸

15 The question was called on the motion to include Hyder. The motion failed on a
16 2 to 2 vote – Commissioners Wilson and Chrystal voting no and Chair Ketchum and
17 Commissioner Harcharek voting yes.”⁵⁰⁹

18 Chair Ketchum stated he would like to take a break so he could work on the
19 language of the next motion. There was a “pause”. Chair Ketchum stated, as a possible motion
20 by one of the Commissioners, that:

21 “I move that the KGB annexation of Hyder within the next five years if it does
22 not, the Commission should request the Department of Commerce and
23 Community and Economic Development in consultation with the Department of
24 Education Early Development to develop a petition to propose such an annexation
25 with the Commission – in accordance with the Commission petition required and
standards a borough annexation.

⁵⁰⁷ Tr. 21.

⁵⁰⁸ Tr. 22.

⁵⁰⁹ Tr. 22-23.

MEMORANDUM AND ORDER

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1 So let me read this again . . . I move that the KGB annexation of Harder – Hyder
2 within the next five years. If it does not, meaning if they do not, KGB, the
3 Commission should request the Department of Commerce Community
4 Economical Development in consultation with the Department of Education and
5 Early Development to develop a petition to propose such annexation in
6 accordance with the Commission’s petition requirements and standards for
7 borough annexation. So that basically means that we would be going forth to the
8 Department of Ed and the – DCCED would be going with the Department of Ed
9 and having Ketchikan – they would form the petition to annex it. And that would
10 be within the five year period and to give I guess, Hyder a little time to adapt or
11 whatever the case may be.”⁵¹⁰

12 Commissioner Chyrstal asked Ms. McPherren if that exact wording was
13 appropriate. She responded that they may want to take a brief break to work on the language.
14 She also noted that it would not be the DCCED that would be working on such a petition. The
15 LBC took a break.⁵¹¹

16 When the hearing resumed, Ms. McPherren read the proposed motion:

17 “While I conclude that the KGB proposal before us justifies the short term
18 exclusion of Hyder from the - - Borough’s boundaries I’m also concerned that the
19 length of such short term exclusion might become indefinite. I strongly
20 recommend that the Ketchikan Gateway Borough propose annexation of Hyder
21 within the next five years. This is particularly important in view of its National
22 Forest Receipt’s revenues during that time period. If the KGB does not file such
23 an annexation proposal, the Commission should direct DCCED in consultation
24 with the [DEED] to develop a petition to propose such annexation in accordance
25 with the Commission’s petition requirements and standards of the borough
26 annexation.”⁵¹²

27 Commissioner Harcharek made the motion and Commissioner Wilson seconded
28 it. Commissioner Chyrstal stated that this was a good compromise, he noted he had voted
29 against the previous motion to include Hyder but it is obvious that “somewhere down the road
30 Hyder is going to be included in the KGB” as there is nowhere else it could go and it cannot stay
31

32 ⁵¹⁰ Tr. 24-25.

33 ⁵¹¹ Tr. 25-26.

34 ⁵¹² Tr. 26-27.

1 an enclave forever. Commissioner Wilson said it was a compromise he could support though he
2 still did not want to force Hyder into the KGB. He noted it would give Hyder some time to
3 adjust. He also noted that people, particularly those on Prince of Wales Island, are not happy
4 about the NFR situation but he hopes they understand "that's not one of the requirements that we
5 have to even look at by regulation." Chair Ketchum said that he also was concerned about the
6 NFR situation. But he noted that it is a disincentive to borough formation and it is irrelevant to
7 their determinations. He recommended those school districts bring their funding concerns to the
8 Legislature.⁵¹³

9
10 Ms. McPherran stated that the motion was:

11 "... that the KGB propose annexation of Hyder within the next five years and if
12 they do not, that the Commission should direct DCCED to consult with the
Department of Education to develop a petition to propose such annexation."⁵¹⁴

13 The motion to amend the KGB petition passed unanimously.⁵¹⁵

14 Commissioner Chyrstal noted that there were eleven standards, which they could
15 read and vote on individually but he thinks all are answered in the affirmative. He moved that
16 the amended KGB Petition be approved. Commissioner Wilson seconded the motion.⁵¹⁶

17 Chair Ketchum observed that the only complaint about the KGB Petition was that
18 it did not include Hyder, which means the KGB would receive additional NFR's without paying
19 for the Hyder school. He agrees that all of eleven of the standards have been met.⁵¹⁷

20
21 Commissioner Chyrstal commented that he knows that "the folks on Prince of
22 Wales Island are very unhappy" about the NFR situation, but it is not relevant to borough

23
24 ⁵¹³ Tr. 27-30.

⁵¹⁴ Tr. 30.

⁵¹⁵ Tr. 30-31.

⁵¹⁶ Tr. 31-32.

MEMORANDUM AND ORDER

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1 formation and he hopes they work with the Legislature to address their funding issues.⁵¹⁸ Chair
2 Ketchum noted that Craig and Klawock could reduce expenses by combining schools since they
3 are so close to each other.⁵¹⁹

4 Commissioner Wilson noted that he voted against the initial motion because of
5 the eleven standards. He stated the view that he did not think that standard number four
6 (communications, media, transportation facilities allow for level of communication necessary to
7 develop integrated borough) could be met if Hyder was included. And that he hopes this
8 improves over time.⁵²⁰ Chair Ketchum agreed and noted that the KGB had a person coming on
9 staff who will be:

10
11 “a very big help in trying to move this forward and in a logical fashion to include
12 Hyder into the borough, an absolute expert in dealing with that and will you in
13 solving some these standards to include Hyder and make them a very positive
14 annexation for the next incremental annexation to the [KGB].”⁵²¹

15 The motion to approve the amended KGB petition passed unanimously.⁵²²

16 Ms. McPherrren noted that the LBC had an annual report upcoming in the near
17 future – the NFR issue will come before them again as she understood Petersburg would be filing
18 a petition – and they may want to point out this issue again to the Legislature. Chair Ketchum
19 stated that education was very important and they would do so.⁵²³

22 ⁵¹⁷ Tr. 32-33.

23 ⁵¹⁸ Tr. 33.

24 ⁵¹⁹ Tr. 33-34.

25 ⁵²⁰ Tr. 34-35.

⁵²¹ Tr. 35.

⁵²² Tr. 36.

⁵²³ Tr. 36-37.

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1 Commissioner Wilson expressed appreciation to all involved, noted that they
2 could not please everyone, and expressed hope that things would work out.⁵²⁴ Commissioner
3 Harcharek expressed similar appreciation.⁵²⁵ Chair Ketchum noted that:

4 “we have spent extensive amount of time reading, studying, trying to figure out
5 where to go, what to do with things I have in the Ketchikan petition, my eyeballs
6 –I’ve read so much that I start to look and I’ve lost my distant vision. . . I
7 probably, in this petition alone, have probably put in about 180 hours of time
8 reading, trying to make decisions. I’ve spent up – I went to bed reading last night
9 until about 11:30 – went to bed – I woke up at 3:00 o’clock in the morning and
10 continued reading until we came down here, just about or until I went down to
11 breakfast . . . I’ve been pondering this thing for some time.”⁵²⁶

12 Ms. Bockmon sent an e-mail on November 7, 2007 to the various designated
13 Ethics Supervisors, including Mr. Davis, regarding “Guide Addressing Ethics Considerations Re
14 Seeking Other Employment/Post State Employment”, and to which she attached the “2007
15 Seeking Employ[ment] Post State Employ[ment] Guide”. She wrote that they are often asked
16 about such issues and noted that there had been 2007 legislative changes to the Ethics Act so she
17 is providing the attachment as an update to her September 2006 advisory opinion.⁵²⁷

18 Director Jollie, in a letter⁵²⁸ to Mr. Bolling dated November 17, 2007, stated that:
19 she is responding to his November 3rd letter; she is invoking the 10 day extension provision for
20 responding to his records request under 2 AAC 96.325(d) and explained the reasons why this
21 was necessary; a significant amount of research and copying will be involved, the costs will be
22 substantial, and she will provide him with a cost estimate as quickly as possible; certain of his

23 ⁵²⁴ Tr. 37.

24 ⁵²⁵ Tr. 38.

25 ⁵²⁶ Tr. 38-39.

⁵²⁷ R. 1423. Neither the e-mail nor the advisory opinion were in the LBC’s record.

⁵²⁸ R. 1462-63. The letter was not in the LBC’s record.

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1 requests are vague and potentially overbroad; she discussed three such requests; and, she advised
2 that certain of the requested information is available on-line.

3 Mr. Davis's ethics file regarding Mr. Bockhorst includes a November 19, 2007
4 memo to file in which he stated: that day he had received an e-mail from AAG Michael Mitchell
5 regarding the City of Craig's November 3, 2007 records request; he understood one of the
6 requests was for Mr. Bockhorst's August 1, 2007 memorandum to his Ethics Supervisor, the
7 Ethics Supervisor's response, and any related communications between Mr. Bockhorst and the
8 Ethics Supervisor; Mr. Mitchell asked him to check with Mr. Bockhorst to see if he objected to
9 the disclosure of the same; he did so; Mr. Bockhorst asked him what he thought; he declined to
10 provide advice; and, Mr. Bockhorst said he would think about it and get back to him.⁵²⁹

12 Mr. Davis sent a Memorandum⁵³⁰ to Ms. Bockmon, dated November 21, 2007,
13 regarding a "Request for Ethics Determination from Dan Bockhorst." He wrote:

14 "The following is my written report of my oral advice to Dan Bockhorst.

15 On August 1, 2007, Dan Bockhorst . . . submitted a Request for Ethics
16 Determination. He stated that he was interested in applying for the position of
17 Borough Manager for the . . . KGB. Mr. Bockhorst is employed in the Division
18 as staff to the Local Boundary Commission. One aspect of his work is to work on
19 petitions regarding borough . . . boundary changes.

20 The previous day, I had requested that Mr. Bockhorst discuss the situation with
21 the State Ethics Attorney. I was informed by both parties that this interview took
22 place and that Mr. Bockhorst had received advice . . . regarding his appropriate
23 course of action while employed by the [DCCED]. As part of that process, the
24 Ethics Attorney provided Mr. Bockhorst with a copy of a September 6, 2006
25 memorandum from the Ethics Attorney to Linda Perez regarding seeking non-
state employment, which memorandum has been updated with respect to certain
changes in the Act made in 2007.

⁵²⁹ R. 1424. The memo to the file was not in the LBC's record.

⁵³⁰ R. 1417-18. What appears to be a draft of the Memorandum is in the record at R. 1419-20.
Neither was in the LBC's record.

1 In his request, Mr. Bockhorst noted that the Borough has a petition before the
2 Local Boundary Commission for annexation . . . He also stated that a petition
3 'overlapping a small part . . . had been filed by voters in the Wrangell area.' Mr.
4 Bockhorst checked boxes on the Ethics Disclosure form indicated that the
5 provision of the Ethics Act addressing Misuse of Official Position (AS 39.52.120)
6 and Restrictions on Employment after Leaving State Service (AS 39.52. 190) may
7 apply. The form was accompanied by a four page . . . 'Attachment'. . . Mr.
8 Bockhorst advised that he was recusing himself from any further action regarding
9 the KGB annexation proposal as well as the Wrangell petition.

10 I reviewed the submitted material and initially determined that this matter raised
11 potential post-employment issues and, under AS 39.52.240(a), requested a
12 confidential advisory opinion from the . . . Department of Law. In due course, I
13 received that opinion. That opinion provides well reasoned and thorough
14 guidance on the considerations applicable to Mr. Bockhorst's request.

15 I also reviewed the updated version of the September 6, 2006 memorandum. I
16 rely on that opinion and on advice from the Department of Law with respect to
17 Mr. Bockhorst's disclosure in making my determination. I concluded that the
18 employee's understanding and agreement to recuse himself from all matters
19 regarding or which concern KGB during his employment by the [DCCED] is the
20 appropriate action to address the circumstances in which a potential violation of
21 the Executive Branch Ethics Act could occur during the period while his
22 application . . . was pending . . . and during his remaining state service if he was
23 offered and took the position. I discussed my review and determination with him
24 during the week of September 4, 2007.

25 This determination addressed only the issue of potential Ethics Act violation
during Mr. Bockhorst's employment by the [DCCED]. It did not respond to
whether issues under the Ethics Act could be raised or occur post-employment.
Mr. Bockhorst is aware that he may seek written advice from the State Ethics
Attorney regarding specific post-state employment matters."

Mr. Bolling, in a letter to Director Jollie dated November 29, 2007, briefly
discussed the requests that she had mentioned in her November 16, 2007 letter as being vague or
overbroad, advised that he concurred with her approach to the information production, and stated
his understanding that DCCED would not incur any expenses without first providing him with
the estimate.⁵³¹

⁵³¹ R. 1464. This letter was not in the LBC's record.

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1 Director Jollie, in a letter⁵³² to Mr. Bolling dated December 4, 2007, provided a
2 response to each of the twelve Public Records Act requests set forth in his November 3, 2007
3 letter and she provided research and copying cost estimates.

4 The LBC held a Public Meeting on December 4, 2007. The LBC addressed the
5 KGB annexation petition. Chair Ketchum stated at the outset:

6
7 “So anyway, I did request that Jeanne add to the petition a statement in
8 relationship to Dan Bockhorst. It does amaze me that a person who’s a salaried
9 person that they come on board and they try to do their job and they get so much
10 criticism and flack from it just because he’s trying to do his job. The job is
11 forming government. That’s what his job is. That’s what our job is, to form
12 governments. And as I - - my short relationship with Dan has been nothing but
13 positive and ethical to the highest degree. Never have I ever heard him express
14 his own personal opinions or anything, only his opinions on the law as he
15 understood them. And every one of them when he addressed them to me he
16 backed them up and also the Department of Law backed ‘em up with what he was
17 saying. And have never heard any of his personal feelings or anything in
18 relationship to any of the petitions or anything else. And it just really bothers me
19 immensely to have people trying to come after him on ethical violations and
20 especially when the record is clear. So I wanted to make sure we put that record
21 in here with all of the dates of when things transpired with Dan’s involvement on
22 the petition, so and so forth, and to make that a clear statement on there. And I
23 also asked - - I want to - - I would like to have a stronger statement placed on the -
24 - let’s see - - [Ms. McPherrren mentioned page 25] 25 was it? Okay, there. On
25 our -yeah. Part G is what it was in. I think it was. Yeah, on Part G in the last
paragraph.”⁵³³

18 Chair Ketchum continued:

19
20 ⁵³² R. 1465-68. This letter was not in the LBC’s record.

21 ⁵³³ Tr. 55-56. Commissioner Zimmerle was present as the Wrangell petition and other matters
22 were also on the agenda. It appears that the LBC had addressed other matters by this time as the
23 transcript jumps from page 3 to page 54 and on page 54 Chair Ketchum called the meeting back
24 to order, noted that the Wrangell petition was being moved down in the agenda, and said “so I
25 guess that moves us to the Ketchikan petition.” This is consistent with the Agenda for the
meeting, which is included in this part of the record (though it bears no page number – it appears
to be p. 2 as the transcript numbers jump from 1 to 3 and it is the page between those pages) and
which reflects that the LBC was addressing administrative matters and hearing from members of
the public on matters not on the agenda. When the Chair turned to the KGB Petition,
Commissioner Zimmerle said that she would not be participating. The ensuing discussion
reflects that she remained in the room as an observing member of the public. Tr. 55-56.

1
2 “Anyway I want . . . our statement on the borough annexing of Hyder I wanted to
3 add a little bit stronger statement in there that. I would like to add – amend the
4 words on – some wording of such to the fact that to have KGB work with the
5 Community of Hyder to develop their communications, transportation and
6 economic ties between Hyder and the Borough. And add some additional
7 language in there to work with the State in developing these ties.

8
9 And also there is a little bit stronger statement . . . directing DCCED and KGB
10 and DEED . . . after five years if they haven’t submitted an annexation petition
11 that we would direct them to, in fact, do that . . . And I would like to have some
12 kind of that wording put into that Paragraph G. . . but I guess I would like to
13 entertain a motion of such that nature to have that wording put in there. . .

14
15 The Commission noted that this was particularly appropriate in view of the
16 federal revenues that the Borough will be receiving from the newly annexed area.
17 If such a petition is not filed, and this is where I want a couple of wording put in
18 there and I guess that wording needs to be really addressed between the two of
19 them.

20
21 . . . And then if such a petition is not filed by the Borough itself that we will direct
22 DCCED and DEED in conjunction with KGB to file – to file a petition to annex
23 Hyder.”⁵³⁴

24 Two Commissioners stated their agreement. Ms. McPharren said she could work on the new
25 language while the LBC considered the Wrangell petition.⁵³⁵

26
27 Chair Ketchum expressed the view that, other than those changes, “I think this is
28 excellently put together.”⁵³⁶ Commissioner Wilson asked Ms. McPharren if there were any
29 substantive changes “in her writing here that it may be different than what we discussed in the
30 hearings and – I don’t think so, but . . . ?”⁵³⁷ She responded: “no . . . absolutely not . . . I’ve tried
31 to, you know, clarify everything, questions that you raised at hearing otherwise, you know, made
32 assumptions that your conclusions are based on the record before you and that [unidentified
33

34
35 ⁵³⁴ Tr. 57-59.

⁵³⁵ Tr. 59-60.

⁵³⁶ Tr. 62.

⁵³⁷ Tr. 63.

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1 voice 'Right'] . . . that's how I wrote it so . . ."⁵³⁸ Commissioner Wilson said he liked the
2 wording concerning Meyers Chuck.⁵³⁹

3 Commissioner Wilson asked about the language concerning directing DCCED to
4 file a petition to annex Hyder and having other staff persons work on it. Ms. McPherren
5 explained that they cannot develop a petition because it comes to them for review and
6 recommendation, so it would have to be done by other people in the Department. She also noted
7 that the DEED would likely agree to the annexation since "they only bought off on this Hyder
8 enclave for the short term like we did."⁵⁴⁰ Chair Ketchum noted that this was why he wanted the
9 language to let the KGB know "that we'll be looking at you" and that "Dan, I know, knows that
10 we'll be looking at 'em."⁵⁴¹

12 Commisioner Harcharek moved that the LBC accept the statement of decision as
13 written with the understanding that it would be amended per their discussion. The motion passed
14 unanimously. Chair Ketchum noted that they had moved the Petition forward with the notations
15 that they would come back and revisit the changes previously discussed.⁵⁴²

16 The LBC reconvened on the KGB Petition. Chair Ketchum noted that Ms.
17 McPherren had made the requested written changes. He stated:

18 "In approving a KGB annexation as amended, the Commission directed the KGB
19 to file a petition within five years to annex the Hyder area. In that regard, they
20 encourage - - the Commission encouraged the KGB to work toward developing
21 community - communications, transportation and economic ties between Hyder
22 and the Borough, including working with the State to help develop these ties. The
- that last sentence was the sentence that was added to it. If such a petition is not
filed the Commission may committed - - the Commission is committed, it should

23 ⁵³⁸ Tr. 63.

24 ⁵³⁹ Tr. 63.

25 ⁵⁴⁰ Tr. 68.

⁵⁴¹ Tr. 68.

⁵⁴² Tr. 69-70.

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1 be [Ms. McPherrren – “committed to directing”] . . . Okay. The Commission
2 committed to directing DCCED to file such petition. And – and what the new
3 part is, in that event DCCED should develop a petition in coordination with
DEED and KGB staff . . .”⁵⁴³

4 Commissioner Chyrstal asked if this was a complete change, if it replaced what
5 had been on page 25. Ms. McPherrren and Chair Ketchum responded that it did. Commissioner
6 Chyrstal moved that the changes to page 25 be accepted. The LBC unanimously agreed to
7 accept these changes.⁵⁴⁴

8 The LBC issued its Statement of Decision on December 5, 2007. The LBC
9 therein approved the KGB Petition. The Statement of Decision included the following.

10 The LBC discussed what had transpired with respect to the KGB annexation
11 petition.⁵⁴⁵ The LBC noted, in part, that:

12
13 “DCCED’s *Preliminary Report* was written by Dan Bockhorst. In the weeks
14 following completion of his review and analysis, the KGB began its recruitment
15 for a borough manager. Upon seeing a recruitment notice for that position on July
16 31, 2007, Mr. Bockhorst wrote a memorandum on August 1, 2007 to DCCED’s
17 Ethics Supervisor disclosing an interest in applying for the KGB manager
18 position. In his disclosure, Mr. Bockhorst recused himself with respect to any and
19 all future dealings regarding this annexation proposal. DCCED’s continuing
responsibilities for the annexation proposal was immediately assigned to Jeanne
McPherrren, Local Government Specialist IV, to complete. Commission Chair
Ketchum was also immediately notified by Mr. Bockhorst of his recusal and the
reasons therefore. A timeline regarding Mr. Bockhorst’s work in this proceeding
is attached to this decision as Appendix B.”⁵⁴⁶

20 And:

21 “As noted above, DCCED’s *Final Report* was written by Jeanne McPherrren. She
independently reviewed all materials in this proceeding, applicable laws, prior

22
23
24 ⁵⁴³ Tr. 181-82. The agenda reflects that the LBC had been addressing the Wrangell petition
between its addressing the KGB Petition.

25 ⁵⁴⁴ Tr. 182-83.

⁵⁴⁵ Tr. 975-82.

⁵⁴⁶ R. 979 n. 4.

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1 decisions of the Commission, and other relevant material before making her
2 recommendation and writing the *Final Report*.⁵⁴⁷

3 And: "DCCED provided each member of the Commission with a copy of the entire record in the
4 proceeding" prior to the November 6, 2007 LBC Public Hearing.⁵⁴⁸ And that at the November 7,
5 2007 decisional session:

6 ". . . the Commission determined [during the Wrangell decisional session] that the
7 Meyers Chuck/Union Bay area more appropriately belonged in the Wrangell
8 borough, and, thus, amended the KGB annexation proposal to delete that area.
9 The Commission deliberated on the amended KGB annexation proposal for
approximately an hour. At the conclusion of the deliberations, the Commission
voted unanimously to approve the Petition, as amended to delete the Myers
Chuck/Union Bay area. . .

10 To explain the basis for the Commission's decision . . . the following are the
11 Commission's findings and conclusions with respect to the Petition. In rendering
12 its determination . . . the Commission agreed with the majority of DCCED's
findings, conclusions, and recommendations regarding the annexation, except
with regard to the Meyers Chuck/Union Bay area."⁵⁴⁹

13
14 The LBC noted that, under AS 29.06.040(a):

15 "The commission may amend the proposed [municipal boundary] change and
16 may impose conditions on the proposed change. If the commission determines
17 that the proposed change, as amended or conditioned if appropriate, meets
applicable standards under the state constitution and commission regulations and
is in the best interests of the state, it may accept the proposed change. Otherwise,
it shall reject the proposed change."⁵⁵⁰

18
19 The LBC cited *Mobil Oil Corp.* for the proposition that the statutory standards are
20 intended to be flexibly applied to a wide range of regional conditions.⁵⁵¹ The LBC quoted from
21 the *Mobil Oil Corp.* decision, which quote included the following:

22
23 _____
24 ⁵⁴⁷ R. 979 n. 5.

25 ⁵⁴⁸ R. 980.

⁵⁴⁹ R. 981-82.

⁵⁵⁰ R. 982.

⁵⁵¹ R. 982-83.

1 “The borough concept was incorporated into our constitution in the belief that one
2 unit of local government could be successfully adapted to both urban and sparsely
3 populated areas of Alaska, and the Local Boundary Commission has been given a
4 broad power to decide in the unique circumstances presented by each petition
5 whether borough government is appropriate. Necessarily, this is an exercise of
6 delegated legislative authority to reach basic policy decisions. Accordingly,
7 acceptance of the incorporation petition should be affirmed if we perceive in the
8 record a reasonable basis of support for the Commission’s reading of the
9 standards and its evaluation of the evidence.”⁵⁵²

10 The LBC stated that it:

11 “finds no basis to distinguish between borough incorporation and annexation in
12 terms of whether the applicable standards should be flexibly applied and whether
13 the law should be read to uphold Commission decisions approving borough
14 annexation as well as borough incorporation whenever the applicable
15 requirements have been met. Moreover, the Commission concludes that borough
16 incorporation and borough annexation of areas that meet applicable standards are
17 equally encouraged by the law.”⁵⁵³

18 The LBC found that the KGB’s proposed annexation promotes maximum local
19 self-government in accordance with Article X, § 1 of the Alaska Constitution. The LBC stated
20 its reliance in this regard on the related review and analysis by DCCED in its Preliminary Report
21 and Final Report. The LBC stated its agreement with DCCED’s conclusion that: “maximum
22 local self-government is achieved whenever organized borough government is extended to an
23 unorganized area in accordance with applicable standards, regardless of the need for municipal
24 services.”⁵⁵⁴ The LBC noted that it had recently incorporated this conclusion in its revisions of 3
25 AAC 119.981(2).⁵⁵⁵ The LBC also noted that DCCED had analyzed the LBC’s 1999 decision to
reject the KGB’s prior annexation petition because Meyers Chuck and Hyder were not included

⁵⁵² R. 983 (quoting *Mobil Oil Corp.*, 518 P.2d at 98 (internal citations omitted)).

⁵⁵³ R. 983-84 (italics in original).

⁵⁵⁴ R. 984.

⁵⁵⁵ R. 984. The revised 3 AAC 110.981(2) reads: “In determining whether a proposed boundary change promotes maximum local self-government under art. X, sec. 1, Constitution of the State

1 “in great detail and determined that the same was based on “an unduly narrow reading of article
2 X, section 1”, and that it agreed with this determination.⁵⁵⁶

3 The LBC stated the belief that: “elevating the importance of Model Borough
4 Boundaries over the intent of the Constitution not only misconstrues the intent behind their
5 adoption but is also clearly erroneous.”⁵⁵⁷ The LBC noted that: the purpose of the Model
6 Borough Boundaries is for use as a “reference tool”, they “are not intended to totally constrain
7 the formation of boroughs or annexation thereto”, and, it had recently clarified the same in the
8 proceedings concerning the recently formed Skagway Borough and in its recent revisions to its
9 regulations.⁵⁵⁸

10
11 The LBC concluded that:

12 “[It] concurs with DCCED’s analysis and findings regarding this standard and
13 adopts them by reference for purposes of this decisional statement. The
14 Commission finds that the KGB proposal, as amended, satisfies this standard.”⁵⁵⁹

15 The LBC found that the proposed KGB annexation would promote a minimum
16 number of local government units in accordance with Article X, § 1 of the Alaska Constitution.
17 The LBC stated its concurrence with the analysis and review in DCCED’s Preliminary Report
18 and Final Report and adopted the same by reference.⁵⁶⁰ The LBC cited DCCED’s reliance on

19
20 of Alaska, the commission will consider . . . for borough annexation, whether the proposal would
21 extend local government to portions of the unorganized borough.”

22 ⁵⁵⁶ R. 985. The LBC noted that the effect of the 1999 decision was to leave 5,524 square miles
23 in the unorganized borough for the sake of 21.4 square miles, and that: “Not only is that an
‘unduly narrow reading of article X, section 1,’ it strikes this Commission as groundless in view
of the Constitutional Framer’s intent to provide ‘local government for regions as well as
localities and encompass lands with no present municipal use.’” (R. 985)

24 ⁵⁵⁷ R. 985.

25 ⁵⁵⁸ R. 985-86. The LBC noted that it had included Meyers Chuck/Union Bay in the new
Wrangell borough even though the area was within the KGB’s model borough boundaries.

⁵⁵⁹ R. 986.

⁵⁶⁰ R. 987.

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1 the view of the Local Government Committee of the Constitutional Convention that boroughs
2 should be large enough to prevent too many political subdivisions and should cover large
3 geographic areas with common economic, social, and political interests. The LBC stated:

4 "The Alaska Constitution promotes boroughs that embrace large and natural
5 regions. The KGB annexation proposal, as amended and approved by the
6 Commission, is in keeping with that intent. The standard set out in article X,
7 section 1 of the Alaska Constitution is satisfied by the KGB annexation, as
8 amended and approved by the Commission."⁵⁶¹

9 The LBC found that the expanded boundaries of the KGB proposed in the
10 annexation petition, as amended, embrace an area and population with common interests to the
11 maximum degree possible and, on a scale suitable for borough government, have a population
12 that is interrelated and integrated with respect to social, cultural, and economic characteristics
13 and activities in accordance with Article X, § 3 of the Alaska Constitution and 3 AAC
14 110.160(a).⁵⁶²

15 The LBC stated its concurrence with DCCED's related review and analysis in its
16 Preliminary Report and Final Report, and adopted the same by reference with the exception of
17 that portion concerning Meyers Chuck/Union Bay.⁵⁶³ The LBC noted that DCCED had found

18 ⁵⁶¹ R. 987. The LBC also noted that the KGB was then the 3rd smallest of the 17th organized
19 boroughs.

20 ⁵⁶² R. 988.

21 ⁵⁶³ R. 988. The LBC discussed its decision to include the Meyers Chuck/Union Bay area in the
22 Wrangell borough. (R. 988-94). The LBC discussed the ties between said area and Wrangell.
23 The LBC noted that some recent comments from residents of that area had included the desire
24 that the area become an enclave, not in the KGB or Wrangell borough, pending the possible
25 future formation of a Prince of Wales Island borough. The LBC stated that:

26 "such an enclave would violate the minimum number of local government units
27 clause of article X, section 1 of the Alaska Constitution. If such an enclave were
28 authorized, it would have impacted the Wrangell petition because of the
29 constitutional mandate to embrace an area with common interests to the
30 maximum degree possible. The common interests and interrelationships of

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1 that: "in the context of boroughs embracing large and natural regions, the large area and small
2 population proposed for annexation have many interests in common with the area and population
3 within the existing boundaries of the KGB."⁵⁶⁴

4 The LBC found that the communications media and transportation facilities allow
5 for the level of communications and exchange necessary to develop an integrated borough
6 government in accordance with 3 AAC 110.160(b).⁵⁶⁵ The LBC stated its concurrence with
7

8 DCCED's review and analysis in its Preliminary Report and Final Report, wherein DCCED
9 found that:

10 "in the context of large and natural regions, the communications media and
11 transportation facilities in the proposed expanded boundaries of the KGB allow
12 for the level of communications and exchange necessary to develop an integrated
13 borough government."⁵⁶⁶

14 The LBC also noted that DCCED had found that Ketchikan is the regional center for
15 transportation, retail, business, medical, and other services in southern Southeast Alaska.⁵⁶⁷

16 The LBC found that the population within the proposed expanded KGB
17 boundaries, as amended, was sufficiently large and stable to support the resulting borough in
18 accordance with 3 AAC 110.170. The LBC concurred with DCCED's related analysis in its
19 Preliminary Report and Final Report. The LBC noted that the LBC's decision to delete the
20
21

22 Wrangell, Meyers Chuck and Union Bay is well documented in these proceedings
23 and especially emphasized in the initial written comments received from Meyers
24 Chuck and Union Bay residents." (R. 993).

25 ⁵⁶⁴ R. 988.

⁵⁶⁵ R. 994.

⁵⁶⁶ R. 994.

⁵⁶⁷ R. 994-95.

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1 Meyers Chuck/Union Bay area from the KGB proposal “has minimal or no effect on this
2 conclusion.”⁵⁶⁸

3 The LBC found that the economy within the proposed KGB boundaries, as
4 amended, includes the human and financial resources necessary to provide essential borough
5 services on an efficient, cost-effective level in accordance with 3 AAC 110.180. The LBC noted
6 that DCCED had found that the KGB annexation proposal is fiscally sound, the greater
7 Ketchikan area is capable of supporting such an expanded borough government, and there are
8 sufficient employable persons to serve the needs of such an expanded borough. The LBC stated
9 its concurrence with DCCED’s analysis and adopted the same by reference. The LBC noted that
10 its decision to delete the Meyers Chuck/Union Bay area “has minimal or no effect on this
11 conclusion.”⁵⁶⁹

12 The LBC found that the proposed KGB boundaries, as amended, conform
13 generally to natural geography; include all land and water necessary to provide the full
14 development of essential borough services on an efficient, cost-effective level; and are otherwise
15 proper in accordance with 3 AAC 110.190.⁵⁷⁰

16 The LBC noted that DCCED had analyzed this standard. The LBC noted that
17 DCCED recognized that:

18 “the KGB annexation proposal creates a 205-square mile enclave in and around
19 Hyder, albeit for the short term. However, DCCED found that such an enclave
20 would not result in inefficient, cost-ineffective service delivery in the near term.
21 DCCED noted that if a Prince of Wales Island Borough were formed, the enclave
22 would become a small remnant of the former Southeast Island Regional
23 Education Attendance Area, which currently provides education to students in
24 Hyder. DCCED recommend that the Hyder enclave should be annexed to the

24
25 ⁵⁶⁸ R. 995.
⁵⁶⁹ R. 996.
⁵⁷⁰ R. 997.

1 KGB at that time. In its *Final Report*, DCCED also observed that concerns by the
2 . . . (DEED) regarding the proposed exclusion of Hyder had been resolved after
3 DEED's review of the Petition in this regard and that . . . DEED did not oppose
4 the KGB's annexation proposal."⁵⁷¹

5 The LBC stated its concurrence with DCCED's conclusions and analysis, except
6 with regards to the Meyers Chuck/Union Bay area, and adopted the same by reference. The LBC
7 noted that the deletion of the Meyers Chuck/Union Bay area from the proposed KGB boundaries
8 "has minimal or no effect on the Commission's analysis regarding this standard."⁵⁷²

9 The LBC also noted that this standard was relevant to the concerns raised by
10 Metlakatla. The LBC found that Metlakatla's expansion request to the Secretary of the Interior
11 was a totally separate process that would not be impacted by the LBC's decision. The LBC
12 noted its concurrence with DCCED's (and KGB's) analysis of Metlakatla's "enclave"
13 argument.⁵⁷³

14 The LBC again discussed Hyder, stating:

15 "The Commission agrees with DCCED that this standard is satisfied. However, at
16 its decisional meeting on the KGB annexation, the Commission expressed
17 concern with Hyder's status as an enclave. In approving the KGB annexation, as
18 amended, the Commission directed the KGB to file a petition within five years to
19 annex the Hyder area. In that regard, the Commission encourages the KGB to
20 work toward developing communication, transportation, and economic ties
21 between Hyder and the Borough, including working with the State to help
22 develop these ties. The Commission noted that this was particularly appropriate
23 in view of the federal revenues the Borough will be receiving from the newly
24 annexed area. If such a petition is not filed, the Commission committed to
25 directing DCCED to file such a petition. In that event, DCCED should develop a
petition in coordination with the DEED and KGB staff."⁵⁷⁴

22 ⁵⁷¹ R. 997 (italics in original).

23 ⁵⁷² R. 998.

24 ⁵⁷³ R. 998-999.

25 ⁵⁷⁴ R. 999. This is the "page 25" discussed during the November 7, 2007 Decisional Meeting. The LBC noted at n. 13 that "If DCCED is directed to file such a petition, the staff persons working on such would, of course, not include employees assigned to serve as staff to the Commission."

1 The LBC found that the KGB petition, as amended, satisfied the “best interests of
2 the State” requirement of AS 29.06.040 and 3 AAC 110.195. The LBC concurred with
3 DCCED’s analysis in its Preliminary Report and Final Report, and adopted the same by
4 reference. The LBC noted:

5 “As set out above, the loss of NFR’s to other communities in southeast Alaska
6 was the focus of the majority of written and oral comment in this proceeding. As
7 observed at the decisional session, the Commission is very sympathetic to that
8 loss. However, it is not a bar to the development of boroughs or their extension.
9 It is a factor that is considered in consultation with the DEED and when
10 considering the best interests of the State, and DEED does not oppose this
11 annexation proposal.

12 Further, the Commission observes that commentators focused only on the loss of
13 NFRs by the KGB annexation. No comments were filed in the Wrangell
14 incorporation proceeding regarding the identical NFR loss resulting from such
15 incorporation. The Commission finds this inconsistent view troubling.

16 Most specifically, the Commission endorses the prior Commission decision
17 rejecting the relevance of ephemeral financial considerations such as NFRs when
18 considering the standards for borough formation or extension. As asserted by the
19 1999 Commission, these programs may, over time, operate in a significantly
20 different manner or even no longer exist. ‘In contrast,’ the Commission stated,
21 ‘the formation of a borough or the extension of a borough over a large area is a
22 much more permanent action.’”⁵⁷⁵

23 The LBC found that the KGB petition, as amended, satisfied the legislative-
24 review annexation standards of 3 AAC 110.200. The LBC noted that DCCED had found that
25 several of the conditions listed in 3 AAC 110.200 had been met. The LBC concurred with
DCCED’s analysis of this standard and adopted it by reference.⁵⁷⁶

⁵⁷⁵ R. 1001.

⁵⁷⁶ R. 1001-02.

1 The LBC found that the KGB had presented a proper plan for the orderly
2 transition of borough government in accordance with 3 AAC 110.900. The LBC concurred with
3 DCCED's analysis of this standard and adopted it by reference.⁵⁷⁷

4 The LBC found that the KGB's proposed annexation would not have the effect of
5 denying any person the enjoyment of any civil or political right, including voting rights, because
6 of race, color, creed, sex, or national origin, and thus complied with the requirements of 3 AAC
7 110.910. The LBC concurred with DCCED's analysis of this standard and adopted it by
8 reference.⁵⁷⁸

9 The LBC then noted:

10
11 "As a final matter, the Commission will address the allegations regarding DCCED
12 Staff in this proceeding, specifically Dan Bockhorst. The Commission finds no
13 basis to support the ethical violations levied against Staff by the City of Craig and
14 others. Mr. Brockhorst and Ms. McPherran have consistently performed their
15 duties as Commission Staff in the most ethical and professional manner possible,
16 including in this proceeding. The Commission holds them both in high
17 regard."⁵⁷⁹

18 The "Order of the Commission" section of the Statement of Decision, in pertinent
19 part, reads:

20 "On the basis set out in Section II of this decision statement, the Commission
21 determines that the Petition, as amended to delete the approximately 191-square
22 mile area of Meyers Chuck and Union Bay, meets all applicable Constitutional,
23 statutory, and regulatory standards for borough annexation and is in the best
24 interest of the State. Accordingly, the Petition as amended, is approved."⁵⁸⁰

25 The LBC attached Appendix B to the Statement of Decision, and it reads:

**"Timeline of Events for Participation of
DCCED Staff in KGB Annexation Proceeding**

26 ⁵⁷⁷ R. 1002-03.

27 ⁵⁷⁸ R. 1003-04.

28 ⁵⁷⁹ R. 1004.

29 ⁵⁸⁰ R. 1004.

1
2 **March 26, 2007:** Mr. Bockhorst begins his analysis of the Ketchikan
3 annexation proposal, at which point he discussed policy
4 aspects of the proposal with the former Director of
5 Community and Regional Affairs (DCRA), Mike Black.

6 **June 26, 2007:** Mr. Bockhorst's work on the 2007 preliminary report was
7 complete and forwarded to the DCRA publications
8 technician for formatting and publication.

9 **July 13, 2007:** The KGB preliminary report was published by DCCED.

10 **July 29, 2007:** Just over one month after Mr. Bockhorst completed his
11 work on the annexation proposal for DCCED's 2007
12 preliminary report, the KGB first announced that it was
13 recruiting for a Borough Manager.

14 **August 1, 2007:** In accordance with the Executive Branch Ethics Act, Mr.
15 Bockhorst wrote a memorandum to the DCCED Ethics
16 Supervisor disclosing an interest in applying for the KGB
17 manager position. Mr. Bockhorst stated in his
18 memorandum that he first became aware of the recruitment
19 for the position on July 31. In his memorandum, he
20 recused himself with respect to any and all future dealings
21 regarding the Ketchikan annexation proposal. Mr.
22 Bockhorst's work regarding the KGB annexation
23 proceeding was immediately reassigned to Jeanne
24 McPherran.

25 **October 15, 2007:** Ms. McPherran independently prepared the 2007 final
report regarding the KGB annexation proposal."⁵⁸¹

Ms. McPherran, in a letter dated February 4, 2008⁵⁸², advised Mr. Blasco that she
was enclosing the 426 pages of records he had requested during his January 23, 2008 records
review and that he should remit the State \$106.50 for the same. She noted that the LBC's 2007

⁵⁸¹ R. 1008. The LBC's decision has now been issued. This letter was not in the LBC's record. None of the documents or testimony hereafter referenced in the "Record" portion of this decision were in the LBC's record.

⁵⁸² R. 1450. The "2007" date appears to be a typo and that the correct year is 2008.

1 Annual Report to the Legislature and the LBC's Model Borough Boundaries Report were being
2 provided on discs at no charge.⁵⁸³

3 Mr. Blaso sent Ms. Vandor a letter dated February 5, 2008.⁵⁸⁴ He discusses the
4 City of Craig's Public Records Act requests. He opines that "by simply tracking the State's
5 response to each of the City's twelve requests . . . it seems that the State is obstructing the City's
6 legitimate right to access public records that relate to public agency decisions." He references
7 four letters which the City did ask be included in the record, the two noted above, a DCCED
8 letter dated November 16, 2007, and a DCCED letter dated December 4, 2007. He addresses
9 each of the 12 requests, the State's response(s) thereto, and states opinions as to the credibility of
10 the State's responses.

11 Director Jollie, in a letter⁵⁸⁵ to Mr. Bolling dated December 18, 2007: stated that
12 she is responding to his November 29, 2007 letter; stated that he therein provided some
13 clarification of his prior requests for information and presented new requests; provided responses
14 to his new requests; explained what would be required to respond; and, provided a total cost
15 estimate of \$18,265 plus some additional expense, and she requested payment up front.

16 James Van Altvorst, in a letter⁵⁸⁶ to Director Jollie dated January 23, 2008, stated:
17 the City of Craig had retained him to assist with its Public Records Act requests; he had accessed
18 the materials she had informed Mr. Bolling were available on-line and was not able to find all
19 that had been requested; and, he inquired when the City of Craig would receive the documents
20 sought in this request that are not available on-line.

21
22
23
24 ⁵⁸³ The record includes Mr. Blasco's handwritten January 23, 2008 note referencing the
documents he wanted copied. R. 1451-52.

25 ⁵⁸⁴ R. 1278-88.

⁵⁸⁵ R. 1484-87.

⁵⁸⁶ R. 1488-89.

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1 Director Jollie, in a letter to Mr. Van Altvorst dated February 4, 2008, stated: she
2 is responding to his letter of January 23; an incomplete internet address had inadvertently been
3 provided; she is providing the correct address; she had addressed some of the responsive
4 documents not available on line in her December 4, 2007 and December 18, 2007 letters to Mr.
5 Bolling; the City of Craig has already been provided some of the documents he referenced; and,
6 the City of Craig has not paid the \$18,265.

7 Mr. Davis' ethics file for Mr. Bockhorst contains an undated document entitled

8 "Talking Points- Dan Bockhorst."⁵⁸⁷ The "talking points" included the following:

- 9 "- As staff to the LBC, Dan Bockhorst prepared a report on the proposed
10 Ketchikan borough expansion.
- 11 - After the report was completed, Mr. Bockhorst reported to me, as his
12 designated ethics supervisor, that he has seen a public posting for the
13 position of [KGB] manager . . . and was considering applying.
- 14 - I recommended that he talk to the state ethics attorney regarding the Ethics
15 Act requirements.
- 16 - I understand Mr. Bockhorst spoke directly to the State's Ethics Attorney
17 and was advised by her on how to conduct himself because of his interest
18 in the [KGB] job.
- 19 - The next day, he submitted an ethics disclosure form to me indicating his
20 intent to apply for this job.
- 21 - In that disclosure, Mr. Bockhorst stated that he had recused himself from
22 any further action regarding the KGB annexation petition . . .
- 23 - I orally confirmed with Mr. Bockhorst that he should stop all work on
24 Ketchikan matters.
- 25 - We discussed the reassignment of any such matters to other LBC staff.
- Subsequently, I was told by Mr. Bockhorst that he was being interviewed
for the [KGB] position.

⁵⁸⁷ R. 1425.

- 1 - Then, he informed me that he had been selected for the position.
- 2 - I interviewed other LBC staff to confirm that a reassignment of duties had
3 occurred.
- 4 - I also reviewed this matter confidentially with the state ethics attorney.
- 5 - I prepared a written determination in response to Mr. Bockhorst's ethics
6 disclosure confirming my prior directions.
- 7 - The Department of Commerce did not address any ethics matters that
could arise once Mr. Bockhorst became an employee of the [KGB]."

8 "Draft Talking Points"⁵⁸⁸ regarding "HJR 30/SJR 15 Disapproving Ketchikan
9 Annexation", apparently prepared by DCCED and dated February 5, 2008, included "points"
10 concerning an "Alleged Conflict of Interest Regarding LBC Staff."⁵⁸⁹ Said points were:

- 11 "- The City of Craig City Administrator, Jon Bolling, has expressed concern
12 about a possible conflict of interest regarding . . . Dan Bockhorst.
- 13 - During the process of preparing this LBC petition, Bockhorst became
14 aware of, applied for, and received the position of Manager of [KGB].
- 15 - Mr. Bolling called for an investigation into the circumstances and/or
16 timeline of Bockhorst receiving the managerial position and his
recommendations to teh LBC regarding the annexation.
- 17 - One of Mr. Bolling's supporting arguments is what he believes to be a
18 reversal of position by Bockhorst and the LBC from a similar petition
submitted by KGB in 1998.
- 19 - The city of Craig is pressing its legislators to pass resolutions
20 disapproving of the LBC Board's decision.
- 21 - The Department, in cooperation with the State Ethics Attorney,
22 determined that there was no apparent conflict of interest in Mr.
Bockhorst's actions with respect to the final LBC report and his job as
23 Manager of KGB.

24
25 ⁵⁸⁸ R. 1426-29. This document was also in Mr. Davis' ethics file for Mr. Bockhorst.

⁵⁸⁹ R. 1426-27.

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- 1 - Mr. Bolling was informed that the State's ethics attorney didn't believe
2 there was a conflict of interest in Mr. Bockhorst's actions with respect to
3 the final LBC report and his job as Manager of KGB.
- 4 - Mr. Bolling was then advised to file an ethics complaint if he still felt
5 there was a conflict of interest.
- 6 - The department is not aware of any complaint having been filed by Mr.
7 Bolling."

8 The "Talking Points" also included "The LBC's Response to Alleged Conflict of
9 Interest Concerns."⁵⁹⁰ The "points" include: the current LBC members are different from the
10 members in 1998; the rationale and conclusions of the prior LBC decision are not binding on the
11 current LBC; the LBC's regulations and controlling statutes have changed since 1999; the
12 Alaska Supreme Court stated in 2002 that the LBC has broad power to base its decisions on the
13 unique circumstances of each petition; the LBC disagrees with the prior reliance on Model
14 Borough Boundaries; the new petition differs as it included Meyers Chuck/Union Bay; "the LBC
15 conditioned its approval of the 2007 petition by imposing a duty on the KGB to file a petition to
16 annex Hyder within five years;" and, the LBC agrees with the prior LBC's position on NFR's.

17 And the "Talking Points" included a "Background/timeline: Dan Bockhorst's
18 Manager Application and the KGB Petition,"⁵⁹¹ which read:

- 19 "- June 28, 2007 Mr. Bockhorst finished preparing the . . . preliminary report
20 . . .
- 21 - July 29, 2007 The KGB announced it was recruiting for a Borough
22 Manager.
- 23 - July 31, 2007 Mr. Bockhorst became aware of the recruitment . . .

24
25 ⁵⁹⁰ R. 1427-28.

⁵⁹¹ R. 1428.

1 - Mr. Bockhorst reported to the Departments' Ethics Supervisor, Mark
2 Davis, that he had seen a public posting for the position . . . and was
3 considering applying.

4 - Mr. Bockhorst was advised to talk to the state's ethics attorney . . .

5 - Mr. Bockhorst was advised how to conduct himself in regard to his
6 interest in the Ketchikan borough job by the State's Ethics Attorney, Judy
7 Bockmon.

8 - August 1, 2007, Mr. Bockhorst submitted an ethics disclosure to Mr.
9 Davis indicating his intent to apply for the job.

10 - In that disclosure, Mr. Bockhorst stated that he had recused himself from
11 any further action regarding the KGB annexation petition during the KGB
12 application process, as required by the Ethics Act.

13 - Work relating to Ketchikan matters was reassigned to other LBC staff;
14 specifically Jeanne McPherren.

15 - Mr. Bockhorst received the manager's position with the Ketchikan
16 Gateway Borough.

17 - The LBC held hearings and made a decision that agreed with some of the
18 staff recommendations and disapproved of others."

19 The Draft Talking Points was the subject of February 5, 2008 and February 6,
20 2008 e-mails⁵⁹² from Ms. McPherren, Sally Saddler (DCCED), Mr. Davis, and Julia Bockmon to
21 each other and Director Jollie, Ms. Vandor, Michael Black (DCCED), Bill Rolfzen (DCCED),
22 Randall Ruaro (Governor's Office), Lynne Smith (Governor's Office), and cc'd to Daniel
23 Distefano (DCCED), Deborah Behr (Department of Law), and Jennifer Abbott (DCCED).

24 Ms. Saddler, in her February 5, 2008 e-mail: expressed her thanks to all who
25 provided input for the draft talking points; Mr. Distefano helped distill all of the "considerable
information" she had received; she asked that they review the draft for "completeness and
accuracy" and that they verify the dates and provide anything that has been left out by the end of

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1 the next day so it could be finalized; she understands that the resolution will be heard on
2 February 12; they are preparing the talking points so that they can provide accurate information
3 during related legislative hearings; Representative Johansen had requested a meeting; it would be
4 prudent to also meet with Senator Kookesh, Senator Bert Stedman, and Representative Thomas
5 (she noted Senator Kookesh and Representative Thomas are the sponsors of the resolution); she
6 understands that the Department of Law thinks that meeting with legislators is a mistake and that
7 they should instead just provide them with the talking points; she recommends meeting with
8 them but is open to reconsidering her approach; and, she understands that DCCED has concerns
9 with some of the facts stated in the resolution and she has asked Director Jollie to pull together a
10 separate set of talking points to address the same.

12 Ms. McPherrren's February 6, 2008 e-mail reflects that she and Ms. Bockmon
13 suggested changes which had been incorporated into the talking points.⁵⁹³

14 Ms. Vandor sent Mr. Blasco a letter dated March 13, 2008.⁵⁹⁴ She stated that she
15 is responding to his March 11, 2008 letter. She discusses: the cost of preparing the record
16 herein;⁵⁹⁵ her review of the correspondence between the City of Craig and the State concerning
17 the City's Public Record Act requests; her belief that the State's responses were correct and
18 made in good faith; and, the steps that she has taken so that the State would "be poised to
19 perform the search of archived e-mails . . . in anticipation that the estimated cost will be
20 forthcoming from your client."
21

23 ⁵⁹² R. 1439-48,

24 ⁵⁹³ R. 1439.

25 ⁵⁹⁴ R. 1273-77.

⁵⁹⁵ She references DCCED's February 28, 2008 letter to Mr. Blasco on this subject. The City of
Craig did not ask that the February 28, 2008 be added to the record.

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1 Director Jollie, in a Memorandum⁵⁹⁶ to Rachael Petro, Deputy Commissioner of
2 Administration, dated March 17, 2008, stated that: she understands that Ms. Petro's office
3 handles e-mail searches; DCCED had received a Public Records Act request related to the
4 KGB's annexation petition; the request has two parts – first, for certain e-mails sent/received
5 March 26-November 2007 to/from Mr. Bockhorst and certain identified persons associated with
6 the KGB (Mr. Eckert, Mr. Hill, Mr. Brandt-Erichsen, the KGB Clerk, Assembly Members) and
7 any e-mails to/from Mr. Bockhorst regarding the KGB annexation petition to/from Ms.
8 McPherrren, other State employees, and/or members of the LBC, and second, all e-mails to/from
9 Ms. McPherrren concerning the KGB annexation petition from August 1 – October 15, 2007;
10 payment for the searches has not been received but is anticipated; and, they are concerned that
11 “litigation may be imminent” so they need to “be poised to have the search initiated as soon as
12 money is made available.” Director Jollie provided a list of the LBC Members in 2007.⁵⁹⁷

14 Director Jollie, in a Memorandum⁵⁹⁸ to Joe Spears (Data Processing Manager)
15 and Frank Forque (Systems Programmer) of the Department of Administration dated April 3,
16 2008, stated: she had requested authorization on March 17-18, 2008 (via e-mails) for ETS to
17 search for e-mails requested by Mr. Blasco so they would be “poised” to conduct the search once
18 payment for the same had been received; the City of Craig has made a payment commitment;
19 and, the search should now proceed. She provided some related specifics.

23 ⁵⁹⁶ R. 1289.

24 ⁵⁹⁷ The list included all 8 Commissioners who served that year. The list reflects that: Darroll
25 Hargraves was the LBC Chair through 6/30/07, Tony Nakazawa was a Commissioner through
4/07, and Bob Hicks was a Commissioner through 3/26/07.

⁵⁹⁸ R. 1492.

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1 Ms. Vandor sent Mr. Blasco a letter dated April 25, 2008.⁵⁹⁹ She advised that the
2 e-mails sought by the City of Craig in its PRA request were enclosed except for some for which
3 attorney-client privilege was being asserted. She identified those documents as being:

- 4 1. 8/30/07 and 8/31/07 e-mails between Mr. Bockhorst and AAG Vandor.
5 She claims that these e-mails are protected by the attorney-client privilege.
- 6 2. 10/11/07 e-mail from AAG Paul Lyle to Ms. McPherren regarding Duke
7 Island/Expansion of Annette Island Reserve. This e-mail was copied to
8 AAG Elizabeth Barry.
9 10/11/07 e-mail from AAG Barry to Ms. McPherren and AAG Lyle.
10 10/11/07 e-mail from Ms. McPherren to AAG Lyle and AAG Barry.
- 11 3. 9/11/07 e-mail from AAG Lyle to Ms. McPherren regarding
12 Metlakatla/KGB/LBC.
13 9/11/07 e-mail from Ms. McPherren to AAG Lyle.
- 14 4. Two 9/20/07 e-mails from AAG Vandor to Commissioner Zimmerle, Ms.
15 Atkinson, and LBC Chair Kermit Ketchum regarding Commissioner
16 Zimmerle's alleged conflict of interest regarding the Wrangell petition.
17 The e-mails were copied to Mr. Bockhorst and Ms. McPherren together
18 with a copy of Commissioner Zimmerle's e-mail inquiry.

16 c. Hearing

17 The court granted the Appellants' request for an evidentiary hearing. The hearing
18 occurred on October 8-9, 2008. The parties appeared and participated. Each was represented by
19 their counsel of record. The evidence presented included the following.

20 1. Kermit Ketchum

21 Appellants called Chair Ketchum to testify. His testimony included the
22 following:
23
24
25

⁵⁹⁹ R. 1329-30.

- 1 A. Mr. Bockhorst sent him an e-mail on August 1, 2007 advising that he was
2 recusing himself from the KGB annexation petition and the Wrangell
3 petition.⁶⁰⁰
- 4 B. He joined the LBC on July 1, 2007. He had contact thereafter with Mr.
5 Bockhorst. They did not discuss the KGB annexation petition.⁶⁰¹
- 6 C. Mr. Bockhorst filled him in on the rules and regulations when he joined
7 the LBC but it was not a formal training session. There was a formal
8 training session some time in August 2007, he thinks maybe August 24th.
9 The training included presentations by Vic Fischer and Arliss
10 Sturgulewski on constitutional matters – Robert Hicks addressed some
11 legal issues – Ms. Vandor and another presenter addressed ethics issues.
12 Mr. Bockhorst helped to organize the training but was not a presenter.
13 The KGB petition was not discussed.⁶⁰²
- 14 D. Mr. Bockhorst had told him on July 31, 2007 that he had just that day seen
15 the KGB Borough Manager job posting and that he was considering
16 applying for it⁶⁰³ and was recusing himself from the Ketchikan and
17 Wrangell petitions.⁶⁰⁴ Chair Ketchum did not see that this presented a
18 potential conflict of interest.⁶⁰⁵ Mr. Bockhorst did not mention submitting
19 anything to his Ethics Supervisor.⁶⁰⁶ They did not discuss who had
20 prepared the preliminary report but Mr. Bockhorst did advise that the two
21 petitions would be referred to Jeanne McPherren and Kathy (he can't
22 remember her last name) he was new to the LBC and was not yet familiar
23 with the reports. He did not consider who would be supervising Ms.
24 McPherren and Kathy.⁶⁰⁷
- 25 E. He spoke with Mr. Bockhorst after July 31, 2007. They did not discuss
26 the KGB petition. They did not discuss his application for the KGB
27 Borough Manager position. If the KGB petition came up Mr. Bockhorst
28 would either leave the room or immediately stop the disucssion.⁶⁰⁸ He did
29 not hear anything more about Mr. Bockhorst applying for the KGB
30 position until Mr. Bockhorst sent the Commissioners an e-mail advising
31 that he had been offered the position. He had no further communication

600 Tr. 23.

601 Tr. 25.

602 Tr. 28-31.

603 Tr. 27.

604 Tr. 32-33.

605 Tr. 32.

606 Tr. 33.

607 Tr. 34-36.

608 Tr. 37-38.

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1 with Mr. Bockhorst prior to the November 6, 2007 LBC hearing on the
2 KGB petition other than to wish him good luck during a going away party
3 at the DCCED.⁶⁰⁹ He has not any contact with Mr. Bockhorst since Mr.
4 Bockhorst left DCCED.⁶¹⁰

5 F. He read "each and every" comment submitted on the KGB Preliminary
6 Report. Ms. McPherran or Kathy Atkinson provided the comments and he
7 recalls reading them sometime between September 4 and October 15,
8 2007. He does not recall exact dates.⁶¹¹

9 G. With regards to the POWCAC comments, he does not recall if the
10 comments raised a red flag for him concerning a possible conflict for Mr.
11 Bockhorst or not. He recalls that at some point after reviewing comments
12 he went into Mr. Bockhorst's office because he wanted to see when he had
13 last accessed the preliminary report files on his computer. The last time
14 was sometime in June, he thinks June 15th or earlier. So he did not think
15 that there was a conflict. He did not show Mr. Bockhorst the
16 comments.⁶¹²

17 He does not recall what he thought at the time concerning the request that
18 the LBC remove the Preliminary Report on the KGB annexation petition
19 and retain an independent consultant to prepare a new one. He guesses
20 that he thought then what he thinks now, that it was not warranted. He did
21 not discuss the request with anybody. If the Commissioners were to
22 discuss it the discussion would occur during an LBC meeting, during the
23 hearing on the KGB petition. He does not recall discussion outside of the
24 hearing.⁶¹³

25 H. With respect to Mr. Bolling and Ms. Stevens' October 19, 2007 letter to
26 Governor Palin, he cannot recall when he saw it, he thinks maybe a week
27 or two later, but certainly before the LBC hearing on the KGB petition.
28 He was shown the letter at Director Jollie's office. He does not recall
29 anybody else being present. It was not a formal meeting. He was aware
30 they were formulating a response. He remembers being offended by the
31 letter. He felt that they were doing their job making sure there was no
32 conflict of interest. He felt that Mr. Bockhorst "had done everything
33 possible to remove himself from any conflict of interest or ethic
34 violation."⁶¹⁴ He thinks he suggested they look at Mr. Bockhorst's

35 ⁶⁰⁹ Tr. 39-41.

⁶¹⁰ Tr. 45.

⁶¹¹ Tr. 47-50.

⁶¹² Tr. 53-57.

⁶¹³ Tr. 59-63.

⁶¹⁴ Tr. 66.

1 computer to see when he last accessed KGB related files and she
2 indicated that had been done. The letter was not copied on the LBC and
3 he did not get a copy of it. Concerning Mr. Bolling and Ms. Stevens'
4 request that the Governor cancel the LBC hearing pending an investigation
5 by the Attorney General's Office, he recalls thinking that the Governor did
6 not have the authority to direct the LBC to do anything. He would be
reluctant to cancel the public hearing as this would be part of the hearing.
He did not give any consideration, after reading the letter to the Governor,
to canceling the public hearing so that a conflict of interest investigation
could take place.⁶¹⁵

7 I. He saw Director Jollie's October 31, 2007 letter. He cannot recall if he
8 saw it in draft or not. He thinks the LBC had some input into the letter.
9 He saw it before the November 6, 2007 public hearing. With respect to
10 LBC input, he told Director Jollie that DCCED staff does not make policy
11 decisions, they follow the LBC's directions. Overall, he concurred with
12 her letter. He did not discuss the letter with Mr. Bockhorst. Copies of the
13 letter went to all the Commissioners. It was not for him to determine
14 whether the other Commissioners should also see the letter to the
15 Governor.⁶¹⁶

16 J. He probably gave some thought to how the Appellants would feel about
17 Mr. Bockhorst being the author of the Preliminary Report and then being
18 hired by the KGB at its Borough Manager. But he thought the public
19 hearing should proceed.⁶¹⁷

20 K. His comment that "we have investigated this one here extensively" was
21 "probably a poor choice of words at the time."⁶¹⁸ He was referring to
22 Director Jollie's investigation which ended up with the October 31, 2007
23 letter. His personal investigation consisted of looking at Mr. Bockhorst's
24 computer. The dates he referenced were from Mr. Bockhorst's computer
25 and when documents had been finalized, and he believes they are reflected
26 in Director Jollie's letter.

27 His comment that Ms. McPherrren had "reviewed that quite extensively"
28 and "concurred with everything that he had in there" referred to Mr.
29 Bockhorst as the "he."

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⁶¹⁵ Tr. 64-73.

⁶¹⁶ Tr. 74-77, 79-81.

⁶¹⁷ Tr. 78.

⁶¹⁸ Tr. 83.

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1 He made the comment that they were "quite prepared to defend anything
2 Mr. Bockhorst has done because of the accusations against Mr. Bockhorst
3 in the letters.

4 There is nothing in the Preliminary Report that he would refer to as Mr.
5 Bockhorst's personal opinion. Mr. Bockhorst was following the
6 requirements of the law as he (Chair Ketchum) understands it. The LBC
7 makes the ultimate decision on how to apply the law. He thinks that the
8 LBC has a "pretty well standard set of interpretations of those regulations
9 that we have been following"⁶¹⁹

10 He has not read the 1998 Preliminary or Final Report. He did not want to
11 be influenced by them. He was not aware when the LBC decided the
12 KGB's new petition that Mr. Bockhorst had authored the 1998 Reports. It
13 would not have made any difference if he had known. The LBC
14 determines how the rules and regulations are to be interpreted and asks
15 staff to follow those interpretations.

16 He did not personally give Ms. McPherren direction on how to prepare the
17 Final Report. They did have discussions. He cannot recall particulars.
18 They did discuss the boundary situation between the KGB and Wrangell
19 petitions. He does not recall that they discussed the Preliminary Report.
20 In his view it is the Final Report that takes precedence. He does not recall
21 if the Final Report adopted all of the recommendations and conclusions of
22 the Preliminary Report.⁶²⁰

23 L. At the time of the November 7, 2007 LBC decisional meeting he had not
24 read the 1998 Preliminary or Final Reports or the LBC's 1999 decision.⁶²¹

25 M. Ms. McPherren prepared the draft Statement of Decision based on input
26 from the Commissioners and the decisional meeting. He is sure he
27 discussed the draft decision with her between November 7 and December
28 4, 2007. He wanted to make sure that it included a strong statement about
29 the KGB revisiting Hyder within 5 years. He had glanced through the
30 Preliminary Report prior to the December 4 meeting but he focused on the
31 Final Report.⁶²²

32 N. With respect to his comment that he asked Ms. McPherren to include a
33 statement concerning Mr. Bockhorst, he was concerned that staff was
34 being brought to task for doing their job and following the law. He

35 ⁶¹⁹ Tr. 89.

⁶²⁰ Tr. 83-96.

⁶²¹ Tr. 96-97.

⁶²² Tr. 98-102.

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1 thought it was unfair, he thought some unfair allegations had been made
2 concerning Mr. Bockhorst's ethics and character. His knowledge of Mr.
3 Bockhorst began July 1, 2007. Mr. Bockhorst had worked very ethically
4 with him and his character had been very sound. They had had a very
5 good professional relationship. His reference to Mr. Bockhorst having
6 expressed his opinions on the law did not refer to the KGB petition but
7 rather to the Deltana petition. In that context he would ask the Attorney
General's Office and they would back him up. He does not recall seeing
an Attorney General's opinion on the KGB petition. He does not know
whether Mr. Bockhorst consulted the Attorney General's Office on the
KGB petition or not.⁶²³

- 8 O. The reference in the Final Decision to the LBC finding no basis to support
9 the ethical violations levied against the staff by the City of Craig and
10 others, in his view, means they found no basis for any of the allegations.
11 He thinks this statement was actually written by one of the
12 Commissioners, but he is not sure. Usually staff prepares something and
the Commissioners review it and make changes. He cannot recall if
Appendix B came from Ms. Jollie's October 31, 2007 letter or not. He
thinks Ms. McPherrin may have "chased down" some of the dates. He
did have input directly that Appendix B be prepared.⁶²⁴
- 13 P. He was in the military. He is retired. He had worked as a computer
14 science professor at the University of Alaska. When he checked Mr.
15 Bockhorst's computer he literally got on it himself and looked at the dates
the KGB records were accessed.⁶²⁵
- 16 Q. When he spoke to Mr. Bockhorst on July 31, 2007, he had stopped by Mr.
17 Bockhorst's office to ask a question or chit chat and Mr. Bockhorst had
volunteered that he had noticed the advertisement for the KGB position,
was considering applying, and was recusing himself.⁶²⁶
- 18 R. He read the Final Report "numerous times in detail."⁶²⁷ He glanced
19 through the Preliminary Report to make sure that the basic data was the
20 same as in the Final Report – to see if there had been any changes made in
21 the Final Report due to the comments. He thinks his focus at the time was
on the Meyers Chuck conflict between the KGB and Wrangell petitions –
so he was looking back and forth between the reports on those petitions.⁶²⁸

22
23 ⁶²³ Tr. 103-07.

24 ⁶²⁴ Tr. 108-114.

25 ⁶²⁵ Tr. 114-16. The LBC is now asking questions on cross-examination.

⁶²⁶ Tr. 116.

⁶²⁷ Tr. 121.

⁶²⁸ Tr. 121.

1 S. When he spoke to Mr. Bockhorst on July 31, 2007 it was in the
2 afternoon.⁶²⁹

3 T. His comment about looking forward to a successful petition meant being
4 able to get through the matter in the allotted time.⁶³⁰

5 **2. Director Jollie**

6 Appellants' next witness was Director Jollie. Her testimony included the
7 following:

8 A. She is the Director for the Division of Community and Regional Affairs
9 (DCRA). She has had that position since August 1, 2007. She previously
10 worked for DCRA and the Department of Labor. Part of DCRA's duties
11 is to provide staff for the LBC. DCRA has some 60 employees, 2 or 3 of
12 which are staff for the LBC. The LBC is "very autonomous" – sort of a
13 self-contained program that differs from DCRA's programs. At the
14 moment there are two full-time and one temporary staff members for the
15 LBC. The permanent staff are Kathy Atkinson and Melissa Taylor. The
16 temporary staff member is Jeanne McPherren. When she took over as
17 Director there were three permanent staff for the LBC – Ms. Atkinson,
18 Mr. Bockhorst, and a woman whose name she could not remember. Mr.
19 Bockhorst was the supervisor.⁶³¹

20 B. Mr. Bockhorst did continue as a supervisor until he left DCRA. He told
21 her the day she started that he had recused himself from issues concerning
22 the KGB annexation. He told her that if she had questions or concerns
23 that she should work with Ms. McPherren because he no longer had
24 anything to do with it. She did not assign Ms. McPherren to the KGB
25 petition, she thinks that happened before she started. It is her
understanding that Mark Davis, the Ethics Supervisor, made the
assignment. She did not talk with Mr. Davis about Mr. Bockhorst's
situation but she did read something he wrote about the same.⁶³² That first
day she and Mr. Bockhorst did not discuss the Wrangell petition. She did
not understand that the KGB and Wrangell petitions overlapped.⁶³³ She

23 ⁶²⁹ Tr. 122. The KGB did not ask Mr. Ketchum any questions on cross. He is now being asked
24 questions by Appellants on re-direct.

24 ⁶³⁰ Tr. 123.

25 ⁶³¹ Tr. 125-31.

⁶³² Tr. 131-35.

⁶³³ Tr. 137.

1 understood that he was telling her not to come to him with anything on the
2 KGB petition, to go to Ms. McPherren.⁶³⁴

3 C. She worked with Ms. McPherren on a daily ongoing basis. She did not
4 have any involvement in Ms. McPherren's preparation of the Final Report
5 on the KGB petition or Ms. Atkinson's Preliminary or Final Reports on
6 the Wrangell petition.⁶³⁵

7 D. She received the October 19, 2007 letter from the Governor's Office. She
8 routinely received letters through the Governor's Office. She was
9 instructed to prepare a response. She asked Mr. Bockhorst for information
10 on when he worked on the KGB petition and when he applied for the job.
11 She asked Ms. McPherren for information. She was asked for her opinion.
12 An investigation would be performed by the Attorney General's Office or
13 the Ethics Supervisor. She did not talk with anyone with the Department
14 of Law about this. In her opinion she didn't see anything that supported
15 the allegations.⁶³⁶

16 E. Most of the information in her October 31, 2007 letter came from Ms.
17 McPherren. She also received information from Mr. Bockhorst. She
18 focused on the timeline. From that she prepared her response. She did
19 review some of the reports she had noted. She does not recall the details
20 at this point. She had many other things going on at this time. She was
21 responding to other letters to the Governor from concerned citizens. She
22 did not see anything in the record that would be grounds for an
23 investigation by the Attorney General's Office or an ethics investigation.
24 She drafted the October 31, 2007 letter. Ms. McPherren may have
25 reviewed a draft. Nobody else would have. Ms. McPherren helped her
26 with reference and source materials so she could understand the issues.
27 ⁶³⁷

28 F. She did not give Ms. McPherren policy direction for the Final Report on
29 the KGB annexation petition. Policy is set by the Commissioner's office.
30 To her knowledge the Commissioner did not give Mr. Bockhorst policy
31 direction with respect to the Preliminary Report on the petition, but you
32 would have to ask him.⁶³⁸ To her knowledge the Commissioner did not

33 ⁶³⁴ Tr. 158-61.

34 ⁶³⁵ Tr. 136.

35 ⁶³⁶ Tr. 139-47.

36 ⁶³⁷ Tr. 148-54.

37 ⁶³⁸ Tr. 154-58.

1 give Ms. McPherren any policy direction with respect to the Final
2 Report.⁶³⁹

3 **3. Jeanne McPherren**

4 Appellants' next witness was Jeanne McPherren. Her testimony included the
5 following:

- 6 A. She is a long-term "non-pro" employee of DCRA. She is not full-time.
7 She was originally hired to assist with revisions to the LBC bylaws and
8 regulations. She was then tasked with working on the Final Report on the
9 KGB annexation petition. She was hired in May 2003 as a Local
10 Government Specialist IV. She and Mr. Bockhorst were the only LBC
11 staff during 2003-05. He was the supervisor. She wrote preliminary
12 reports and final reports. Mr. Bockhorst reviewed them but she does not
13 recall him making any substantive changes. She worked on the Gustavus
14 and City of Homer petitions. She edited (spelling/grammer) a preliminary
15 report in 2006 on Ketchikan consolidation. She retired in 2005. She came
16 back to work on the regulations project in 2006. At that time there were 3-
17 full time LBC staff plus her. LBC staff can ask other DCRA employees
18 for assistance. Mr. Bockhorst, during the 2003-05 time period, asked Bill
19 Rolfzen to help write some components of the Gustavus Preliminary
20 Report. In 2007, the LBC staff consisted of Kathy Atkinson and Mr.
21 Bockhorst. There was also a third employee, but she resigned in March
22 2007.⁶⁴⁰
- 23 B. With regards to her work on the regulations, the LBC had built up a list of
24 matters to be addressed over time. She took the list and reviewed the
25 regulations and the law and worked on amendments to the regulations
based on the issues on the list and her understanding of the law. She
worked independently. Mr. Bockhorst did provide some help. She had
been involved with regulation drafting for 25 years. There were numerous
workshops with the LBC and, to her recollection, four hearings on the
regulations. Mr. Bockhorst attended the workshops and would answer
questions but the work was all hers.⁶⁴¹
- C. She and Mr. Bockhorst never discussed his intent to apply for the KGB
Borough Manager's position. She was assigned the KBG annexation
petition on August 1, 2007. On August 1, 2007 he came to her office and

24 ⁶³⁹ Tr. 161. All of Director Jollie's testimony was provided on direct. Neither the LBC nor the
25 KGB asked her questions on cross.

⁶⁴⁰ Tr. 164-71, 173.

⁶⁴¹ Tr. 172-73.

1 told her for the first time that he had just seen the announcement of the
2 position vacancy, he was interested in applying, he has spoken to Mark
3 Davis, his Ethics Supervisor, and he was recusing himself from the KGB
4 petition and she would be taking over. They did not discuss the KGB
5 position. They did not discuss the KGB petition except that he told her
6 that she needed to follow up with Mr. Jeans of DEED. It is her
understanding that her assignment was made by Mr. Davis, or maybe by
Deputy Commissioner Black. She does not think Mr. Bockhorst told her
who made the assignment. She was working 100 hour weeks back then
and can't recall the details.⁶⁴²

7 D. She immediately started to work on the KGB matter. "It was an intensive
8 amount of work."⁶⁴³ She did not seek or receive direction on the project
9 from anybody. Mr. Notti was the Commissioner. She did not receive any
10 policy direction from him. The only person she talked to about the Final
11 Report was Kathy Atkinson, because she was working on the Wrangell
12 petition and both sought to include the Meyers Chuck/Union Bay area.
She thinks she completed work on the Final Report on or about October
10, 2007. She was not working on any other petitions during this time,
though she continued to work on the LBC regulations.⁶⁴⁴

13 E. She did have discussions with Mr. Bockhorst about the staff workload and
14 the LBC bylaws and regulations while she was working on the Final
15 Report. But they did not discuss the KGB petition. She noted that
16 comments were received that Mr. Bockhorst had not addressed all of the
17 comments in the Preliminary Report. She would like to have discussed
18 that with him but could not. There is no requirement that comments be
19 summarized or responded to, it is just required that they be considered and
20 the petitioner have an opportunity to respond. All of the comments were
21 on the LBC's website. One of the things she did do was to ask Mr.
22 Bockhorst to tell her what the staff workload had been from the time the
23 KGB petition was filed to the point that the Preliminary Report was
issued. She figured his workload was the reason he had not summarized
each and every comment. He sent her an e-mail with the information. She
attached this information to the Final Report. She thought people may
want to know what their workload was and they did not routinely
summarize comments. And she did not do so in the Final Report. She
read the entire record, researched NFR's, and researched other issues. It
was a very intensive time for her work-wise. She did not have time to do
a summary. She definitely considered the comments.⁶⁴⁵

24 ⁶⁴² Tr. 174-79.

25 ⁶⁴³ Tr. 179.

⁶⁴⁴ Tr. 179-84.

⁶⁴⁵ Tr. 184-92.

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- 2 F. Her August 3, 2007 e-mail to Mr. Bockhorst was related to the weekly
summary they do each week. She drafted it.⁶⁴⁶
- 3
- 4 G. She would have read POWCAC's September 4, 2007 comments soon after
they were received. She did not talk with anybody about POWCAC's
5 request that an independent consultant prepare a report.⁶⁴⁷ She did not
6 think the Final Report was the "venue in which to address it."⁶⁴⁸ She
thought the LBC should address such things and she knew the
Commissioners received copies of the comment.⁶⁴⁹
- 7
- 8 H. She received Mr. Hill's September 24, 2007 e-mail. He was working as a
consultant for the KGB. She provided him with the hearing transcripts he
9 requested. The transcripts were in electronic format and available on-line
– she just sent him the link, she did not mail him anything. This is
10 "absolutely"⁶⁵⁰ a regular activity for LBC staff, it is the type of procedural
guidance they would offer to any petitioner or member of the public.⁶⁵¹
- 11
- 12 I. The October 5, 2007 e-mails involve the list of LBC staff activities she
had asked Mr. Bockhorst to provide. Ms. Starkey helped her open his e-
13 mail. The attachment was included in the Final Report on the KGB
annexation petition as Appendix D.⁶⁵²
- 14
- 15 J. She drafted the Final Report on the KGB's annexation petition. She
16 included Appendix D and the related portions of the Final Report to let
those persons who submitted comments know why they were not all
17 individually summarized and commented on, and that they all were
considered. She responded to the comments generally as she responded to
18 the issues raised – i.e. NFR's. This what has historically been done. She
did not approach Chair Ketchum about this and ask for more time. She
19 considered every comment. She did not have time to summarize and
respond to each comment. She fully addressed the comments in the Final
Report. She addressed the comments that presented the major issues. She
did not consider asking Chair Ketchum for additional time.⁶⁵³
- 20
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22 ⁶⁴⁶ Tr. 192-94.

23 ⁶⁴⁷ Tr. 194-98.

24 ⁶⁴⁸ Tr. 212.

25 ⁶⁴⁹ Tr. 214-15.

⁶⁵⁰ Tr. 200.

⁶⁵¹ Tr. 198-200.

⁶⁵² Tr. 200-04.

⁶⁵³ Tr. 204-09.

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1 K. She saw the October 19, 2007 letter to Governor Palin some time in
2 October. Her Division Director (Jollie) asked her to provide some related
3 documentation. She thinks she gave the Director a box of materials from
4 the 1998 LBC proceeding, and she looked at a draft of the Director's
5 response and provided some technical assistance and a timeline. She does
6 not remember whether or not she pointed out footnote 67 in the
7 Preliminary Report to Director Jollie or not. She was shocked when she
8 first saw the letter to the Governor. She has worked for administrative
9 agencies for 36 years. She worked with Mr. Bockhorst for 5 years. She
10 considers him to be one of the most ethical and hard-working people she
11 has ever worked with. And, based on the evidence before her, there was
12 no conflict of interest. She does not know if any of the Appellants or
13 public at large had been made aware by the LBC that Mr. Bockhorst had
14 recused himself. But there was significant discussion of this at the public
15 hearing so people were aware he was recused and she had worked on the
16 Final Report. In her view, the intent of the letter to the Governor was to
17 accuse Mr. Bockhorst of an ethical violation. She did not consider giving
18 the LBC copies of the October 19 letter. She did not give the LBC copies
19 of that letter or the October 31 response.⁶⁵⁴

20 L. She was assigned to draft the LBC's Statement of Decision on the KGB's
21 annexation petition. She was directed by Chair Ketchum to add a
22 paragraph on Mr. Bockhorst and LBC staff in general, and to also add a
23 paragraph concerning the Hyder exclusion. She added the paragraph on
24 Mr. Bockhorst a couple of days before the December 5th hearing. She
25 does not recall the specifics of what she wrote in this paragraph. She
26 thinks the reference to ethical violations charges came from Chair
27 Ketchum. The LBC directed that the paragraph on the Hyder enclave be
28 added – they took a break in the public hearing so that it could be drafted.
29 She prepared Appendix B at the direction of Chair Ketchum. She looked
30 at Director Jollie's October 31 letter and the weekly reports.⁶⁵⁵

31 M. She has not had any discussions with Mr. Bockhorst about anything
32 related to this appeal. She did not discuss this hearing with Chair
33 Ketchum.⁶⁵⁶

34 N. The KGB reply brief she referenced in the Final Report as adequately
35 responding to certain comments was the KGB's reply after public notice of
36 their petition and not a reply to the comments.⁶⁵⁷

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⁶⁵⁴ Tr. 209-220.

⁶⁵⁵ Tr. 220-27.

⁶⁵⁶ Tr. 227-28.

⁶⁵⁷ Tr. 228-30.

MEMORANDUM AND ORDER

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- 1 O. Time constraints were such that she could not summarize and respond to
2 every comment, but she did respond to the comments generally and all of
3 the comments were provided to the LBC Commissioners. The
4 Commissioners get the entire record.⁶⁵⁸
- 5 P. She prepared a draft of the Statement of Decision and the LBC then meets
6 to discuss the draft and vote on the final draft.⁶⁵⁹
- 7 Q. The KGB responsive brief she referenced in the Final Report is at pp. 392-
8 425. A summary of a comment is just that. An example is found at p.
9 1044. Summarizing comments used to be much more prevalent before the
10 comments were posted on-line for the public and parties to see. She did
11 list in the Final Report (p. 739) the persons who submitted comments. She
12 made general statements later on what the comments were.⁶⁶⁰
- 13 R. She does not know whether comments were summarized in the Final
14 Report on the Wrangell incorporation petition.⁶⁶¹

11 4. Carol Brown

12 Appellants' next witness was Carol Brown. Her testimony included the
13 following:

- 14 A. She resides in Meyers Chuck. She is familiar with the Meyers Chuck
15 Community Association. All residents are members. The Association met
16 once to develop a consensus on how to respond to the Wrangell and KGB
17 petitions. She volunteered to spearhead the Association's responses to the
18 petitions.⁶⁶²
- 19 B. The overwhelming consensus of the Meyers Chuck Community
20 Association members was that they did not want to be in the new
21 Wrangell borough or the KGB. They tried to convince the LBC that the
22 information in the petitions was not accurate. And their view was that if
23 they had to be in a borough they preferred Wrangell. She got the idea for
24 Meyers Chuck continuing as an enclave from the KGB Preliminary Report
25 – she thought that all of the reasons for Hyder being an enclave also
applied to Meyers Chuck.⁶⁶³

23 ⁶⁵⁸ Tr. 231-32. Ms. McPherrren is now being cross-examined by the LBC.

24 ⁶⁵⁹ Tr. 233.

25 ⁶⁶⁰ Tr. 234-37. Ms. McPherrren is now being cross-examined by the KGB.

⁶⁶¹ Tr. 238. Ms. McPherrren is now being asked questions by the Appellants on re-direct.

⁶⁶² Tr. 241-42.

⁶⁶³ Tr. 245-47.

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C. She was in periodic contact with Mr. Bockhorst over the three years prior to the actual LBC hearings. She made a statement during the LBC's November 6, 2007 hearing. At that time she had her notes and records in front of her. What she said then was true and accurate. She called Mr. Bockhorst on July 31, 2007 because she had only received DCCED's recommendation on the KGB petition, and not on the Wrangell petition. She brought up Meyers Chuck being an enclave. He said he did not think that the Commissioners would accept it. But he did say that if she was able to present an equal or stronger case for Meyers Chuck being an enclave he would have to consider it and he assumed the Commissioners would as well. She was not focusing then on the Final Report. She understood from talking to others that most of the work went into the Preliminary Report and that it was more important than the Final Report. She did not focus on whether or not Mr. Bockhorst would be preparing the Final Report or not. She does not recall whether he indicated that someone else may be preparing the Final Report. She had no reason to think that he would not be doing so. She was not familiar with how the LBC had historically handled enclaves. He did not discourage her from attempting to make the case that Meyers Chuck should be an enclave. She understood that LBC staff provided technical assistance to the public. She asked him who she could contact for such assistance. He told her that he had just given her 24 minutes of technical assistance. He did not direct her to anybody else. She knew the LBC staff was small. He did not discourage her.⁶⁶⁴

D. She prepared comments on behalf of the Meyers Chuck Community Association after speaking with Mr. Bockhorst, and submitted them to the LBC. The comments were signed by Glen Rice. She tried to do what Mr. Bockhorst had mentioned, making a stronger case for Meyers Chuck to be an enclave than the case for Hyder.⁶⁶⁵

E. Mr. Bockhorst did not tell her during their July 31, 2007 telephone conversation that he was considering or intended to apply for the KGB Borough Manager position. She had no conversations with Mr. Bockhorst after the July 31 phone call.⁶⁶⁶

F. She wrote letters in 2006 in response to the KGB petition stating her personal view that Meyers Chuck should be part of a Wrangell borough. Mr. Blasco represented the Meyers Chuck Community Association in putting together its responses to the KGB and Wrangell petitions. The

⁶⁶⁴ Tr. 242-53.

⁶⁶⁵ Tr. 255-57.

⁶⁶⁶ Tr. 253-55.

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1 Association did not appeal the LBC decisions on the KGB or Wrangell
2 petitions. Mr. Bockhorst did not say anything to her that led her to believe
3 that the Preliminary Report would be the primary basis for the LBC
4 decision. That was just her general impression based on the amount of
work that went into its preparation and the time frame for preparing the
Final Report.⁶⁶⁷

5 G. She has not reviewed any other preliminary or final reports. She has never
worked for DCCED or DCRA.⁶⁶⁸

6 H. She has a Masters degree in civil engineering. She was a civil engineer
7 and a consultant to large institutional clients. She is now retired.⁶⁶⁹

8 **5. Mark Davis**

9 Appellants' next witness was Mark Davis. His testimony included the following:

10 A. He is the Director of the Division of Banking and Securities. He is the
11 designated Ethics Supervisor for the DCCED. He does not recall any
12 substantive discussions with Mr. Bockhorst about the KGB petition. He
13 does recall that in late July 2007, Mr. Bockhorst came to see him and said
14 that he was interested in applying for the KBG Borough Manager position.
15 Mr. Bockhorst mentioned that he learned of the position vacancy on-line.
16 He understood that Mr. Bockhorst had just learned of it that day. He did
17 not ask him when the Borough Manager had resigned. The conversation
was very short. Mr. Bockhorst sent him a subsequent e-mail. He
understood that Mr. Bockhorst had been involved in drafting a staff report
on the KGB matter. He does not know what Mr. Bockhorst had
recommended in the report. Mr. Bockhorst's follow-up e-mail that day
references their having talked that afternoon and that is consistent with his
recollection.⁶⁷⁰

18 B. Ms. Bockmon is the State Ethics Attorney. Mr. Davis is also an attorney.
19 He had suggested to Mr. Bockhorst during their July 31, 2007
20 conversation that Mr. Bockhorst also speak with her. Mr. Bockhorst had
21 told him that he had completed work on the KGB issue and was now
22 interested in working for the KGB which raised a potential issue under the
State Ethics Act. It is his understanding that the Act does not address
impressions of impropriety. He did not have an impression, independent
of the Act, that Mr. Bockhorst applying for the KGB position after he had

23
24 ⁶⁶⁷ Tr. 257-62. Ms. Brown is now being asked questions on cross-examination by the KGB.

25 ⁶⁶⁸ Tr. 263. Ms. Brown is now being asked questions on cross-examination by the LBC.

⁶⁶⁹ Tr. 264. Ms. Brown is now being asked questions on re-direct.

⁶⁷⁰ Tr. 271-77.

1 completed the KGB-related report could raise an appearance of a conflict.
2 He did not think that it created an appearance of a conflict. He understood
3 Mr. Bockhorst, a layperson, stating in his July 31 e-mail that he was
4 removing himself from the situation. He also communicated with Ms.
5 Bockmon. His purpose in doing so was not because Mr. Bockhorst's
6 situation created the appearance of a conflict. The purpose related to
compliance with the Act. The Act permits a State employee to negotiate
for employment with an entity. The issue under the Act is whether that
employee remains in a position where they could benefit the potential new
employer.⁶⁷¹

7 C. He received a memorandum from Mr. Bockhorst on August 1, 2007. It
8 was an ethics disclosure with an attachment. Mr. Bockhorst had told him
9 during their July 31st conversation that there was an overlap between the
10 KGB and Wrangell petitions. During that conversation he also told Mr.
11 Bockhorst he should not work on the KGB petition. He did not tell Mr.
12 Bockhorst to do the same with respect to the Wrangell petition. There was
13 no discussion of his supervisory role.⁶⁷²

14 D. He next spoke to Mr. Bockhorst during the week of September 4, 2007.
15 He wanted to make sure Mr. Bockhorst had taken himself off of the KGB
16 matter. He had by that time discussed the situation with Ms. Bockmon.
17 He did not see any of the comments submitted in response to the
18 Preliminary Report on the KGB annexation petition. And nobody talked
19 to him about the comments. They discussed that Mr. Bockhorst had stated
20 that he would not take action on the Wrangell petition and that that is what
21 he should do. He understood Ms. Atkinson was working on the Wrangell
22 petition. He also told Mr. Bockhorst that Mr. Bockhorst should not take
23 any action on the KGB petition. He understood somebody else would be
24 assigned to work on it.⁶⁷³

25 E. When he spoke with Mr. Bockhorst on July 31, 2007 they did not discuss
assignment of LBC staff to work on the KGB petition. He was not
involved in selecting who would work on the KGB petition.⁶⁷⁴

F. He has seen the October 19, 2007 letter to Governor Palin. He does not
read it as raising an issue under the State Ethics Act.⁶⁷⁵

671 Tr. 277-86.

672 Tr. 286-93.

673 Tr. 293-301.

674 Tr. 300-02.

675 Tr. 303.

1 G. He understood Mr. Bockhorst to be saying, as a layperson, at the end of
2 his July 31, 2007 e-mail that he was going to refrain from any action that
might be perceived as benefitting the KGB.⁶⁷⁶

3 H. His role as Ethics Supervisor ended the week of September 4, 2007 when
4 he gave Mr. Bockhorst his ethics determination. Except he does recall
5 stopping by and talking with Ms. Atkinson to make sure that Mr.
6 Bockhorst had not involved himself in what she was doing and she
7 confirmed that for him. He prepared the November 27, 2007
8 memorandum at Ms. Bockmon's request. And he is supposed to make a
9 written determination. He has prepared written determinations for other
10 matters. Sometimes it is not contemporaneous with the determination.
11 He verbally gave Mr. Bockhorst his ethics determination the week of
12 September 4th.⁶⁷⁷

13 I. It was his understanding that Mr. Bockhorst had also recused himself from
14 the Wrangell petition. He did not hear anything to the contrary and he
15 confirmed it with Ms. Atkinson. If someone recuses themselves from a
16 matter pending an ethics determination, and the determination is that
17 recusal is warranted, the State Ethics Act does not require an investigation.
18 He understood from Mr. Bockhorst that he had already prepared the final
19 staff report, it would not change, and he would have nothing further to do
20 with it.⁶⁷⁸

21 J. He also deals with complaints from the public. There is a form for public
22 complaints. The types of complaints he gets are that somebody is
23 misusing a State vehicle etc. If a member of the public had filed a
24 complaint claiming that Mr. Bockhorst had done something wrong, he
25 would review it.⁶⁷⁹

6. Dan Bockhorst

Appellants' next witness was Dan Bockhorst. His testimony included the
following:

⁶⁷⁶ Tr. 304-05.

⁶⁷⁷ Tr. 306-08.

⁶⁷⁸ Tr. 309-12. Mr. Davis is now being cross-examined by the LBC. The court later stated its understanding that Mr. Davis was saying that Mr. Bockhorst had told him that he had completed the Preliminary Report, it was done and had been published. The court gave the parties the opportunity to respond. The KGB, LBC, and Appellants agreed with the court's interpretation. Tr. 316-18.

- 1 A. In 1997-98 he was a Local Government Specialist V. His principal duties
2 were to serve as staff for the LBC. The same thing he did for a couple of
3 decades. He was hired in 1980. He had two or three subordinates in
4 1997-98.⁶⁸⁰
- 5 B. He drafted parts of the 1997 Preliminary Report on the KGB petition. He
6 was responsible for it being produced and published. This report was
7 different than others he had done in terms of the level of interest and
8 involvement in the analysis and conclusions by a number of persons,
9 including persons from the Director's Office and the Commissioner's
10 Office. Others wrote part of the report. He cannot now identify who
11 wrote what section by section. Others expressed particular philosophies
12 and positions that were included in the Preliminary Report. It is possible
13 that he did not get his instructions in this regard in writing. He does not
14 recall now whether he received written directions or not. The Preliminary
15 Report itself clearly indicates that policymakers in DCRA took certain
16 positions on the KGB petition.⁶⁸¹
- 17 C. The 1998 Preliminary Report did not reflect his professional judgment
18 with respect to application of the pertinent constitutional principles,
19 statutes, and regulations. The Final Report did not either. He did not state
20 any personal caveats in the reports and it would not have been appropriate
21 for him to do so as it is the DCRA entity that serves as LBC staff. He
22 does not think he would have been permitted to include such a caveat. He
23 does not recall if he received policy direction in writing. Input into the
24 conclusions and recommendations was provided by Bill Rolfzen, Pat
25 Poland, Lamar Cotton, and perhaps others. There are a number of
opportunities for a Director to influence the preparation of a report. There
are staff meetings. There are special meetings. He believes he gave drafts
of the Preliminary Report to Director Poland who returned it with changes.
There were a number of meetings on this petition. There was a very
intensive level of activity and involvement by the Director in particular as
well as on the part of the Southeast Regional Office, Mr. Rolfzen, and
Deputy Commissioner Cotton. He thinks drafts were distributed and
reviewed many times – reviewed by Director Poland and others. Perhaps
not complete drafts but the analysis of particular standards or issues.
Building the document was an evolutionary process.⁶⁸²

679 Tr. 313-15. Mr. Davis is now being cross-examined by the KGB. Appellants did not ask any questions on re-direct.

680 Tr. 324-32.

681 Tr. 332-40.

682 Tr. 340-52.

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- 1 D. He does not recall if drafts of the Final Report were given to Director
2 Poland or Deputy Commissioner Cotton, who then made changes and
3 returned the draft to him.⁶⁸³
- 4 E. He does not recall having any specific contact with the KGB before it filed
5 its petition in 1997. It would have been unusual if he did not have some
6 contact with a prospective petitioner prior to a petition being filed.⁶⁸⁴
- 7 F. It is his view, based on Alaska Supreme Court determinations, that Article
8 X, § 1 promotes the extension of borough government in Alaska,
9 including the extension of existing borough governments.⁶⁸⁵
- 10 G. He did not identify anybody as having provided policy direction in the
11 2007 Preliminary Report. He did not state in the Preliminary Report that
12 any of the conclusions, opinions, or analysis were related to DCCED
13 policymakers. It was his practice to reference policymakers if he was
14 given direction that he felt was particularly egregious and that he did not
15 want to be affiliated with. There were instances other than the 1997-98
16 KGB annexation proceeding.⁶⁸⁶
- 17 H. He wrote the Preliminary Report, Final Report, and a supplemental report
18 for the Skagway petition at some point between 1997 and 2007. The
19 positions in the Reports was consistent with those of the Commissioner of
20 the DCCED at the time. He is aware of the statement Governor
21 Murkowski made in Skagway as reported in the Skagway newspaper. The
22 statements attributed to the Governor did not reflect the position of the
23 Commissioner of the agency he works for. He does not know whether
24 what the Governor said was his official position. He recalls reading it in a
25 newspaper article. He assumed that the Commissioner was in contact with
the Governor's Office. He did not disagree with anything written in the
supplemental report. And the Commissioner and division Director were in
accord with the report. It was done under their policy direction. The
Department has a statutory responsibility to provide technical assistance
to, and staff for, the LBC, which is a quasi-judicial body created by the
Alaska Constitution. The Governor's Office does not have this
responsibility. So the direction appropriately comes from the
Commissioner. The Preliminary Report was done in 2005 and the
Governor's statements were made in February 2006.⁶⁸⁷

683 Tr. 352.

684 Tr. 352-54.

685 Tr. 355.

686 Tr. 357-60.

687 Tr. 360-69.

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1 I. With respect to the comment in the 1997 Final Report concerning the
2 KGB's claim that DCRA staff had led it to believe it would be more
3 appropriate to leave Meyers Chuck and Hyder out, rather than have them
4 included as an alternative, because the LBC could add them – he thinks
5 that the response that DCRA vigorously disputes this and told the KGB
6 the opposite was based on a team evaluation of the matter – nobody
7 involved thought that the KGB's assertion was correct. He wrote this part
8 of the Final Report. He was stating DCRA's official position.⁶⁸⁸

9 J. It was the DCRA's official position that Mr. Fischer's statements, set forth
10 in the Final Report, concerning the exclusion of Hyder and Meyers Chuck
11 were "well-founded."⁶⁸⁹

12 K. In the summary and recommendations portion of the Final Report there
13 are references to DCRA policymakers for some and not for others. He
14 wrote the report with the assistance of many others. The lack of such
15 reference does not mean that he agreed with a particular
16 recommendation.⁶⁹⁰

17 L. He had minimal contact with Mr. Eckert, the KGB Borough Manager after
18 the KGB filed its annexation petition in 2006 – he does not recall any
19 specific discussions. It was John Hill, the KGB's consultant, who
20 prepared the petition. He recalls that there were media reports that Mr.
21 Eckert had resigned. His recollection is that the first appeared on June 26,
22 2007. He is not saying that he was aware of this at the time – he reviewed
23 it in preparation for this evidentiary hearing. He had not heard in 2007
24 that Mr. Eckert might resign. He does not recall when he found out that
25 Mr. Ecker had resigned. It was not significant to him at the time. He does
not agree that the resignation necessarily meant that the position was then
open. The KGB could promote from within – it had an Assistant Borough
Manager. He did not speculate on the matter at the time. He learned on
July 31, 2007 that the KGB was trying to hire a new Borough Manager.
He read it on-line at home – a vacancy announcement - he thinks on the
Alaska Municipal League website. He was not aware of any prior
advertisements for the position. There had been a proceeding earlier in
2007 that he found particularly distasteful and he began to look for work
elsewhere. He had applied for a job in Kenmore, Washington. Once he
read the KGB on-line announcement, he considered applying for the
position. He did not make the decision to apply. He does not even know
if he was initially particularly interested in the position.

688 Tr. 369-77.

689 Tr. 377-78.

690 Tr. 381-88.

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1 Once he was at work that day he received a call from Ms. Brown. The
2 Preliminary Report on the KGB petition had already been published. So
3 there was something of a staff hiatus on the petition, waiting to receive
4 public comment. He thinks she called mid-morning. She asked about the
5 Preliminary Report and how she could convince the LBC to exclude
6 Meyers Chuck from the KGB petition. He talked generally with her about
7 the process and procedures and the standards. He thereafter reflected on
8 their conversation and decided that he did not want to be in the position of
9 contemplating applying for the KGB position and getting such phone
10 calls. So he spoke with his wife by telephone – he told her he needed to
11 either declare his interest in the position as required by the Executive
12 Branch Ethics Act or decide then and there that he would not apply. To
13 preserve his options, he spoke with the Deputy Commissioner and
14 Director of the Division and with the Department’s Ethics Supervisor,
15 who encouraged him to talk with the State Ethics Attorney. He decided
16 the next day to recuse himself from further involvement with the matter.
17 At that point he still had not decided to apply. He wrote a memorandum
18 to the Ethics Supervisor. He understood he was asking if he could apply
19 for the position under the circumstances.

12 He saw the reference to Ms. Brown’s LBC hearing testimony in the
13 court’s decision that addressed expanding the record. He did not discuss
14 her testimony with anybody.⁶⁹¹

14 M. He had no involvement with the KGB petition after he recused himself.
15 The Preliminary Report had been completed at the end of June and had
16 thereafter been published – in mid-July he thinks. The next step is to wait
17 for the end of the comment period. Then the comments are examined to
18 see if they have any merit, if they state anything that would change the
19 Department’s analysis and conclusions. He had no involvement in that.
20 The next step would be scheduling hearings and providing technical
21 assistance to the LBC. He had no involvement with that. He had no
22 communications with Ms. McPherran regarding the KGB petition after
23 August 1, 2007. He does not recall having any such communications with
24 Chair Ketchum. He did mention to Chair Ketchum that he was thinking of
25 applying for the position. He did not read any of the comments submitted
on the Preliminary Report. He was offered the KGB position on October
13, 2007. He did not consider Ms. McPherran’s October 5, 2007 e-mail
asking for a list of staff activities to be something having anything to do
with the KGB petition. He did not talk with her about why she wanted the
information. LBC staff had a number of other responsibilities – there
were other petitions pending, there was a annual report. He was not aware
of Ms. McPherran working on any other petitions at that time but there

⁶⁹¹ Tr. 388-400.

1 were other projects she may have been working on. He did not read the
2 Final Report.⁶⁹²

3 N. He does not recall receiving any legal opinions from the Department of
4 Law with respect to the 1998 or 2007 Preliminary Reports. He does not
5 recall in either instance asking for or receiving guidance from the
6 Department of Law.⁶⁹³

7 O. He has seen the October 19, 2007 letter to Governor Palin. He does not
8 recall when. He thinks it was prior to leaving his DCCED employment.
9 He left on October 31, 2007. He thinks Director Jollie gave it to him
10 because she asked him questions related to it. He does not recall if he
11 talked with anyone else about it. He does not recall that he submitted
12 anything in writing about it to Director Jollie. He does not recall ever
13 having previously seen Director Jollie's October 31, 2007 letter.⁶⁹⁴

14 P. He does not recall being interviewed by the Ketchikan Daily News after
15 he accepted the KGB Borough Manager position but before the LBC
16 hearing. The statement attributed to him in an October 30, 2007 article
17 that he learned about the vacancy the weekend of July 28th is not accurate,
18 he read it on-line on July 31st. He may very well have said, as reported in
19 the article, that he encouraged the KGB in a letter to apply for annexation
20 in 1998 because borough expansion is a constitutional goal of the State.
21 He does not recall having written such a letter.⁶⁹⁵

22 Q. There is nothing in the October 5, 2007 e-mail that is related to the KGB
23 petition. There was no indication to him that anything he provided would
24 be used for the KGB petition. This is the type of information he would
25 normally provide for other reports, for example, staff reports, reports to
the Alaska Legislature, reports to the LBC.⁶⁹⁶

R. It was his standard practice to seek out a policymaker position on a
petition when it came in. He did that for the Preliminary Report on the
KGB annexation petition. He spoke with the Director of the Division,
Michael Black. Mr. Black was the Director at that time. He sought policy
direction from Director Black. They discussed the merits of the KGB's
proposal. This was after the filing of the petition, responsive briefs, reply
briefs, and public comments on the petition, but prior to his drafting the
Preliminary Report. It occurred in March 2007. He outlined his position

23 ⁶⁹² Tr. 400-06.

24 ⁶⁹³ Tr. 406-07.

25 ⁶⁹⁴ Tr. 407-10.

⁶⁹⁵ Tr. 411-14.

⁶⁹⁶ Tr. 414-15. Mr. Bockhorst is now being cross-examined by the LBC.

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1 on the petition for Director Black, that he thought it was a strong petition.
2 Director Black did not take exception to his position. It was not his
3 practice over the 27 years he worked as staff for the LBC to note in a
4 report the instances where policymakers agreed with him. There were two
5 times during those 27 years where he strongly disagreed with the policy
6 direction given and in those instances it was noted in the reports – the
7 KGB 1997-98 reports were one of the two instances.⁶⁹⁷

8 S. He was never told by his Director or Commissioner to change the
9 Department's position on the Skagway petition due to Governor
10 Murkowski's comments. To the contrary, he was encouraged to continue
11 with the Department's position. The Commissioner personally
12 participated to a great extent. They carefully examined and debated the
13 constitutional principles and felt very secure with respect to the
14 Department's position.⁶⁹⁸

15 T. Since becoming KGB Borough Manager he has been isolated from this
16 case. He has not discussed this evidentiary hearing or this appeal with the
17 KGB Borough Attorney.⁶⁹⁹

18 U. His personal belief in 1997-98 was that the KGB petition should have
19 been approved, even though it did not include Hyder or Meyers Chuck.
20 The Preliminary and Final Report did not represent his personal beliefs.⁷⁰⁰

21 V. Newspaper articles are cited in reports if the Department chooses to
22 include them. It is his professional judgment that Article X, § 1 of the
23 Alaska Constitution encourages borough formation and encourages the
24 extension of borough government, and the 1997 and 1998 Reports
25 represent his personal professional judgment to the extent that they
 conclude that the KGB proposal met the applicable standards. He did not
 agree with those conclusions in the Reports that the KGB proposal did not
 meet an applicable standard. He did not reference DCRA policymakers on
 all such occasions. He did in instances that he found particularly
 egregious. He went out of his way then to point out that it was the policy
 makers who made that decision. He may have made the conscious
 decision that he did not want to go over the top and make such references
 in every other paragraph. He did not write a memorandum for the file
 stating his disagreements.⁷⁰¹

23 ⁶⁹⁷ Tr. 415-20.

24 ⁶⁹⁸ Tr. 425-27.

25 ⁶⁹⁹ Tr. 430. Mr. Bockhorst is now being cross-examined by the KGB.

⁷⁰⁰ Tr. 430-31.

⁷⁰¹ Tr. 431-37, 439-41. Mr. Bockhorst is now being asked questions on re-direct.

MEMORANDUM AND ORDER

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1 W. Deputy Commissioner Black made the decision on July 31, 2007 that Ms.
2 McPherren would complete the Final Report on the KGB annexation
3 petition. He thinks he told Ms. McPherren.⁷⁰²

4 X. When a petition arrives it is first reviewed for technical form and content.
5 Legal standards are applied during this process. It has long been the
6 Department's practice to encourage petitioners to submit the petition in
7 draft form. He worked for the Department for 27 years. During that time
8 he worked on developing the LBC's regulations. He is knowledgeable
9 with respect to the applicable legal standards for all of the types of
10 petitions.⁷⁰³

7. Lamar Cotton

11 The KGB called Lamar Cotton to testify. His testimony included the following:

12 A. During 1997-98 he was the Deputy Commissioner of DCRA. He had
13 previously served as a member of the LBC. As Deputy Commissioner he
14 oversaw the policy decisions for the Department and interacted directly
15 with the Division Director and staff. He was the one who ultimately made
16 department policy and that policy became the recommendation given to
17 the LBC.⁷⁰⁴

18 B. He is the person who ultimately made the policy decisions in 1998 with
19 respect to the KGB annexation petition. His policy position was to oppose
20 the KGB petition. He discussed the petition with Mr. Bockhorst. Such
21 discussions typically occurred on petitions. Mr. Bockhorst did not agree
22 with the policy decision. Mr. Bockhorst was in favor of the KGB petition.
23 He and Mr. Bockhorst had frequently had active and robust debates and
24 discussions on matters. The bottom line is that it was his call to oppose
25 the KGB petition. Mr. Bockhorst knew his place. He followed the policy
26 direction.⁷⁰⁵

27 C. He did not discuss his testimony with Mr. Brandt-Erichsen. He had
28 received telephone messages from Mr. Van Altvorst and Mr. Blasco. He
29 did not return their calls. He had received some exhibits from Mr.
30 Blasco's office.⁷⁰⁶

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⁷⁰² Tr. 437.

⁷⁰³ Tr. 441-43. Mr. Bockhorst is now again being cross-examined by the LBC.

⁷⁰⁴ Tr. 446-47.

⁷⁰⁵ Tr. 447-49.

⁷⁰⁶ Tr. 450-51. Mr. Cotton is now being cross-examined by the Appellants.

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1 D. He made the policy decisions on the KGB annexation petition in 1998.
2 The Commissioner could override him but he instead delegated the matter
3 to him due to his background in local government. He had served on the
4 LBC for four years in the late 1980's and early 1990's. He imagines that
5 back then he had a pretty good grasp on the pertinent constitutional
6 principles. He does not remember the particulars as to why he provided
7 Mr. Bockhorst with the policy direction in 1998 that he did. He imagines
8 that he determined that denying the KGB petition was in the best interest
9 of the State. He did not read the documents that Mr. Blasco had sent him
10 to review this matter. He does not recall having a hand in the actual
11 drafting of the 1998 Preliminary Report. He is sure he reviewed drafts and
12 was briefed on it as it was being written. His responsibility was to give
13 direction. He would not normally grab a red pen. The writer of the report
14 is separate from the policymakers. Mr. Bockhorst followed his direction
15 and that of the others who were directing him. He and Mr. Poland did not
16 simply hand the matter off to Mr. Bockhorst and move on. They certainly
17 had to review the matter. He cannot recall if he made any changes in the
18 drafts of this Preliminary Report. Sometimes he did and sometimes he did
19 not. He does know that Mr. Bockhorst was in favor of the petition and he
20 was not, and he was the one who made the call on the State's position. He
21 recalls being interviewed back then by a Ketchikan radio station and
22 within the last year or so by the Ketchikan paper. He thinks Mr.
23 Bockhorst may have called and given him the heads up that someone may
24 be calling.⁷⁰⁷

15 8. Jennie Starkey

16 The LBC called Jennie Starkey to testify. Her testimony included the following:

- 17 A. She is employed by the DDCED. She is a Publications Technician II. She
18 has had that position for close to ten years. She has worked for the
19 Division for 26 years. Her duties include arranging publication of LBC's
20 preliminary and final reports. She worked with Mr. Bockhorst for over 20
21 years. He was her supervisor from 1991 until 2003 or early 2004. Her
22 work on the LBC reports involved taking the work done by the LBC staff
23 and placing it into a layout document and adding the pictures, graphs, and
24 charts. The staff work came to her in multiple parts. It was a 1 to 2 month
25 process.⁷⁰⁸
- 22 B. She worked on the Wrangell and KGB publications in 2007. The KGB
23 Preliminary Report was mailed out on July 13, 2007. It usually takes
24 anywhere from a couple of weeks to up to a month and a half for her to get

25 ⁷⁰⁷ Tr. 451-63. The LBC had no cross and the KGB had no re-direct.

⁷⁰⁸ Tr. 465-68.

1 a report prepared for publication after she receives it from the person who
2 wrote it.⁷⁰⁹

3 C. In the August 31, 2007 e-mail she was checking with the LBC staff – she
4 was forwarding a comment to the person who had last been involved with
5 the KGB petition to her knowledge, Mr. Bockhorst. At some point
6 Lynette (Admin. Clerk III) came into her office and she told Lynette she
7 had forwarded something to Mr. Bockhorst. Lynette told her that he was
8 no longer involved, that things were to be forwarded to Jeanne. That is the
9 first she was aware of this.⁷¹⁰

10 D. With regards to the October 5, 2007 e-mail from Jeanne (Ms. McPherren),
11 Ms. McPherren had received a document prepared on Office 2007 and Ms.
12 McPherren's work computer had Office 2003. So she ran it through the
13 translator on her computer and forwarded it back to Ms. McPherren.⁷¹¹

14 E. Documents forwarded to her for publication become final once the policy
15 makers have approved the final document and she gets the approval from
16 the person responsible for the document. The it is delivered via Internet to
17 the contractor and they print it. The Preliminary Report was in final form
18 on July 13, 2007.⁷¹²

19 9. Harriet Edwards

20 The KGB called Harriet Edwards to testify. Her testimony included the
21 following:

22 A. She is the KGB Borough Clerk. She has had that position since 2002.
23 She was responsible for advertising for a new Borough Manager in 2007.
24 The Borough Assembly formed a committee – the Ad Hoc Manager
25 Search Committee. She gave the Committee a proposed packet to send
out to applicants. The Committee met on July 27, 2007 and approved the
packet. The packet included the employment application. She made one
revision on it that date and that is the application that was sent to the
applicants. So anybody who applied would have had to fill out an
application after July 27th.⁷¹³

709 Tr. 468-70.

710 Tr. 470-71.

711 Tr. 471-72.

712 Tr. 472-73. Neither the Appellants nor the KGB cross-examined Ms. Starkey.

713 Tr. 474-76. Neither the Appellants nor the LBC cross-examined Ms. Edwards.

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VI. DISCUSSION

a. Points Common To All Appellants

1. Alaska Constitution

Appellants claim that the LBC erred by interpreting Article X, § 1 and Article X, § 3 of the Alaska Constitution as encouraging the expansion of existing organized boroughs in the same manner as the Alaska Constitution encourages the formation of organized boroughs, regardless of the adverse consequences to persons in the unorganized borough, who have equal constitutional status with persons within unorganized boroughs.

Appellants argue that:

- A. The LBC (and DCCED), in addressing the KGB's 2006 annexation petition, interpreted Article X, § 1 and Article X, § 3 of the Alaska Constitution as encouraging the expansion of existing organized boroughs in the same manner as the Constitution encourages the formation of organized boroughs.
- B. This interpretation is a reversal of the LBC's (and DCRA's) interpretation of Article X, § 1 and Article X, § 3 with respect to the KGB's 1998 annexation petition.
- C. The LBC (and DCCED) did not explain why its interpretation changed.
- D. The LBC's (and DCCED's) interpretation is wrong. The Alaska Constitution does not equally encourage borough formation and borough expansion. The Alaska Constitution does not treat borough expansion the same as borough formation. The Alaska Constitution created the unorganized borough. Residents of organized boroughs do not have greater rights than residents of the unorganized borough. They have the same rights. So the LBC erred in its application of the "best interests of the state" standard.
- E. The LBC improperly applied Article X, § 1 and Article X, § 3 to the facts and circumstances of the KGB's 2007 annexation petition and erred in finding that the petition satisfied the standards set forth therein.

1 **A. Equating Incorporation and Annexation**

2 The LBC⁷¹⁴ did view Article X, § 1 as encouraging the extension of borough
3 government through both borough incorporation and borough annexation. The LBC based this
4 view on the wording of Article X, § 1⁷¹⁵; the “legislative” history of Article X, and the Alaska
5 Supreme Court’s *Mobil Oil Corp.* decision.⁷¹⁶ The LBC concluded that there is no reasonable
6 basis for distinguishing borough annexation from borough formation in this regard.⁷¹⁷
7

8 The LBC’s interpretation of Article X, § 1 did not originate with the KGB’s 2006
9 annexation petition. The interpretation is not a complete reversal of the approach used by DCRA
10 and the LBC in analyzing the KGB’s 1998 annexation petition. To the contrary, DCRA and the
11 LBC expressed similar views in 1998 and 1999.⁷¹⁸ But DCRA decided to give this constitutional
12 principle “diminished weight” because Hyder and Meyers Chuck were not included within the
13 territory the KGB proposed to annex.⁷¹⁹ And the LBC, though recognizing the principle, found
14 that the KGB petition still did not satisfy the requirements of Article X, § 1 because Meyers
15 Chuck and Hyder were excluded.⁷²⁰ And, the LBC had otherwise previously stated this view.⁷²¹
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18 ⁷¹⁴ The LBC, in its Statement of Decision, expressly adopted DCCED’s analyses of the
standards at issue in this appeal. So such references to the LBC necessarily also include DCCED.

19 ⁷¹⁵ “The purpose of this Article is to provide for maximum local self-government with a
minimum of local government units, and to prevent duplication of tax-levying jurisdictions. A
liberal construction shall be given to the powers of local government units.”

20 ⁷¹⁶ The Court in *Mobil Oil Corp.* stated: “We read this [Article X, § 1] to favor upholding
21 organization of boroughs by the Local Boundary Commission whenever the requirements for
22 incorporation have been minimally met.” 518 P.2d at 99. And: “Aside from the standards for
incorporation in AS 07.10.030, there are no limitations in Alaska law on the organization of
23 borough governments. Our constitution encourages their creation. Alaska const. art. X, § 1.”
518 P.2d at 101.

24 ⁷¹⁷ R. 450. The LBC adopted the DCCED’s analysis by reference in its Statement of Decision.
R. 983-85. Citations to the record in the Discussion section are not intended to be exhaustive.

25 ⁷¹⁸ R. 1050-52, 1055, 1098-1101, 1103-04, 1117-1122, 1028-30.

⁷¹⁹ R. 1054-55, 1099-1101, 1103-04, 1117-1122.

⁷²⁰ R. 1030-31.

1 The court, applying its independent judgment, finds that the LBC's interpretation
2 of Article X, § 1 as encouraging the extension of borough government by incorporation and
3 annexation is a correct interpretation as it is consistent with: the text of Article X, § 1; the
4 constitutional framers' intent concerning boroughs; the Alaska Supreme Court's *Mobil Oil Corp*
5 decision; and, reason and common sense.

6 With regards to the text, Article X, § 1 states that a purpose of Article X is to
7 provide for maximum local self-government. There is no local self-government for those areas
8 in the unorganized borough outside incorporated cities. There is no borough government at all in
9 the unorganized borough. So the purpose of providing for maximum local self-government is
10 advanced when territory in the unorganized borough becomes part of an organized borough.
11 Territory becomes part of an organized borough through both borough incorporation and
12 borough annexation.⁷²²

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15 ⁷²¹ DCCED stated that LBC Annual Reports to the Alaska Legislature set forth this
16 constitutional interpretation. R. 527. The court also notes that the LBC, in its brief, references a
17 2004 LBC and DEED study which stated the same constitutional interpretation. The study is not
18 in the record. Appellants have not objected to this reference or moved to strike. To the extent
19 the court can consider the study, it provides additional support for the conclusion that DCCED
20 and the LBC did not develop a new interpretation of Article I, § 1 in the 2007 KGB annexation
21 proceeding, but the court would have made this finding without considering this study.

22 ⁷²² Appellants criticize DCCED and the LBC for not obtaining an opinion from the Alaska
23 Attorney General's Office concerning the LBC's constitutional interpretation. The court address
24 this matter hereinbelow. The court here notes that the Attorney General's Office is defending the
25 LBC, and its interpretation, in this proceeding. And the Alaska Supreme Court has recognized
that it is not inappropriate for "non-lawyers in administrative agencies" to interpret the law that
applies to the agency. *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 42 (Alaska
2007). Moreover, the court also notes that Appellants submitted a portion of the Alaska's
Constitution, A Citizen's Guide (4th ed.), published by the Alaska Legislative Affairs Agency,
with its opening brief, apparently to show that the Department of Law has stated a different
interpretation. Appellants did not move to enlarge the record. The LBC did not object. The
KGB did object but did not file a motion to strike. To the extent that the court can consider this
exhibit, it provides additional support for DCCED and the LBC's interpretation as the author
states that Article I, § 1 "expresses the constitutional policy of encouraging the spread of local

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1 With regards to the framers' intent, the LBC has shown that the framers intended
2 that boroughs encompass large natural regions.⁷²³ The LBC has also shown that the unorganized
3 borough encompasses a large but not a natural region.⁷²⁴ So extending borough government
4 through borough incorporation where the applicable standards have been met advances the
5 framers' goal of having territory in Alaska in boroughs encompassing large natural regions. This
6 intent is also advanced when the extension of borough government occurs through annexation.

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8 The framers also intended, per Article X, § 3 of the Alaska Constitution, that all
9 boroughs, including unorganized boroughs, "embrace an area and population with common
10 interests to the maximum degree possible." The LBC has shown that the unorganized borough
11 does not satisfy the "common interests" standard. Borough incorporation advances the
12 "common interests" standard as it results in an area leaving the non-complying unorganized
13 borough and becoming part of an organized borough that must comply with the requirement if it
14 is approved by the LBC. So the extension of borough government also achieves this result.

15 *Mobil Oil Corp.* involved the question of whether the proposed North Slope
16 Borough met applicable borough incorporation standards. It was not necessary for the Court to
17 specifically discuss borough annexation and it did not do so. But the decision is pertinent to
18 borough annexations. The Court considered the purpose of Article X as set forth in Article X, §
19 1. The Court stated that it: "read this [purpose] to favor upholding organization of boroughs
20 whenever the requirements for incorporation have been minimally met."⁷²⁵ And the Court stated
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24 government in Alaska within the institutional framework of cities and boroughs . . . It establishes
a strong presumption in favor of local government." (p. 163)

25 ⁷²³ See also, *Mobil Oil Corp.*, 518 P.2d at 98-99 n. 14.

⁷²⁴ R. 1067-69, 1156-57, 1165-66 (1998 KGB Petition). R. 472 (2006 KGB Petition).

⁷²⁵ 518 P.2d at 99.

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1 that: "Our constitution encourages their (boroughs) creation."⁷²⁶ The Court reviewed the record
2 in light of this purpose. As discussed above, the purpose of Article X, § 1 is advanced by both
3 borough incorporation and borough annexation.⁷²⁷ So it follows that the Alaska Constitution
4 also encourages extending borough government by means of annexation when the applicable
5 standards have been met.⁷²⁸

6 The LBC's interpretation is consistent with reason and common sense for the
7 reasons stated above. Borough annexation involves the incorporation of additional territory into
8 an organized borough.

9 Appellants argue that the Alaska Constitution only favors borough incorporation.
10 They note that Article X specifically references borough "incorporation" but not "annexation."
11 This is correct. Borough incorporation is specifically mentioned in Article X, § 3. Borough
12 annexation is not specifically mentioned in Article X. But Article X does address borough
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14
15 ⁷²⁶ 518 P.2d at 101.

16 ⁷²⁷ Appellants apparently also assert that the LBC improperly read the *Mobil Oil Corp.* decision
17 as requiring that the LBC approve an annexation petition if the applicable standards are
18 minimally met. DCCED did not state this view (R. 450). The LBC did not state this view (R.
19 983-84). The LBC and DCCED did note that LBC decisions approving annexations should be
20 upheld by a court when the standards have been minimally satisfied. This view is consistent
21 with the Alaska Supreme Court's *Mobil Oil Corp.* decision. DCCED and the LBC also noted
22 that the LBC is not required to approve every minimally acceptable petition. This is consistent
23 with the Court's decision in *Yakutat v. Local Boundary Commission*, 900 P.2d 721, 727 (Alaska
24 1995). DCCED cited the *Yakutat* decision for this point (R. 447-48). So the LBC and DCCED
25 noted that a court should uphold the LBC's decision to approve a petition that met the applicable
criteria, albeit minimally. They did not state that the LBC had to approve such a petition.
Appellants submitted exhibits with their briefing, including with their Reply, related to the 2002
Skagway LBC proceeding. They did not move to supplement the record. Neither the KGB nor
the LBC moved to strike. Appellants argue that these documents show that DCCED (Mr.
Bockhorst) took a different position then – arguing that the LBC did not have to approve the
Skagway petition even if it minimally met the applicable criteria. To the extent the court can
consider these exhibits, they simply show that the DCCED understood the law, and do not show
that DCCED took different positions on this subject with respect to the Skagway petition and the
2006 KGB petition.

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1 annexations. Article X, § 12 states that: "The commission . . . may consider any proposed local
2 government boundary change." The Legislature has "prescribed" that the LBC must set
3 annexation standards and methods, the Alaska Supreme Court has enforced this statutory
4 mandate,⁷²⁹ and the LBC has set annexation standards and methods. The annexation standards
5 are substantially similar to the incorporation standards.⁷³⁰ The court also notes that Article X, §
6 1 refers to "local self-government" and "local government units", and does not specifically
7 mention Borough "incorporation", "formation", or "annexation".⁷³¹

8
9 Appellants also point out that Article X, § 3 mandates that Alaska be divided into
10 boroughs, organized or unorganized. They argue that this means that the unorganized borough
11 was created by the Alaska Constitution and, as a result, its residents have the same rights as
12 residents of organized boroughs and their interests must be given equal weight with those of the
13 residents of organized boroughs pursuing annexation.

14 The Alaska Constitution did not create "the" unorganized borough. Article X, § 3
15 does require that the State be divided into boroughs and allowed that the boroughs may be
16 organized or unorganized. The unorganized borough was created by statute. Article X, § 3 does
17 not exempt unorganized boroughs from its requirement that boroughs be established according to
18

19
20 ⁷²⁸ Said standards include compliance with Article X, § 3.

21 ⁷²⁹ *United States Smelting Refining and Mining Company v. Local Boundary Commission*
22 489 P.2d 140, 141-42 (Alaska 1971).

23 ⁷³⁰ Compare 3 AAC 110.045 - .65 (Standards for Incorporation) with 3 AAC 110.160 - .210
24 (Standards for Annexation to Boroughs). Both sets of standards address "community of
25 interests", "population", "resources", "boundaries", and the "best interests of state." And the
regulations addressing those subjects are substantially similar.

⁷³¹ The court also notes that Article X, § 3 must also apply to borough annexations inasmuch as
it would make no sense that boroughs being formed must comply with the "standards"
referenced therein and with the "common interests" requirements but once formed an organized
boroughs can annex territory without satisfying said standards and with which it has no such
"common interests."

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1 standards provided by law, including standards on population, geography, economy, and
2 transportation. It appears that the unorganized borough was not established according to said
3 standards. Article X, § 3 does not exempt unorganized boroughs from its requirement that each
4 borough “embrace an area and population with common interests to the maximum extent
5 possible.” The LBC has shown that the unorganized borough does not meet this “common
6 interests” requirement.

7
8 Appellants have cited no authority which supports the proposition that the LBC
9 must consider the interests of the residents of the unorganized borough as such. They have cited
10 no authority which supports the proposition that the LBC must somehow weigh equally the
11 interests of persons within and outside the proposed borough boundaries. They have cited no
12 authority which supports the proposition that the LBC must engage in such weighing at all.

13 The LBC was established to make objective decisions on the state level.⁷³² In so
14 doing it must consider the best interests of the State. The LBC may⁷³³ consider the Appellants’
15 interests in that context.

16
17
18 ⁷³² To the contrary, the Alaska Supreme Court has stated that:

19 “We have . . . recognized that the intention of the constitutional provision . . . was
20 to provide an objective administrative body [LBC] to make state-level decisions
21 regarding local boundary changes, thus avoiding the chance that a small, self-
22 interested group could stand in the way of boundary changes which were in the
23 public interest.”

24 *Port Valdez Company, Inc. v. City of Valdez*, 522 P.2d 1147, 1150 n. 7 (Alaska 1974) (citing
25 *Fairview Public Utility District No. 1 v. City of Anchorage*, 368 P.2d 540, 543 (Alaska 1962)
and *Oesau v. City of Dillingham*, 439 P.2d 180, 183-84 (Alaska 1968), *see also, Mobil Oil Corp.*,
518 P.2d at 759-60. And the Court has also held that “residents of a community have no
constitutionally protected interest in the existence of a separate government unit, so the
legislature may provide for its annexation without their consent.” *City of Douglas v. City and
Borough of Juneau*, 484 P.2d 1040, 1043 (Alaska 1971) (citing *Oseau v. City of Dillingham*).

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1 **B. LBC's Article X, § 1 Findings/Conclusions**

2 **1. Maximum Local Self-Government**

3 The LBC did not err in interpreting the "maximum local self-government"
4 standard set forth in Article X, § 1. The LBC noted, just as it had in 1999⁷³⁴, that Article 1, § 1
5 encourages the extension of borough government. The LBC stated that this standard is met when
6 borough government is extended to an unorganized area in accordance with applicable standards,
7 regardless of a need in the annexed area for any particular services.⁷³⁵ This is a correct
8 interpretation of the "maximum local self-government" standard as it is consistent with: the
9 wording of the standard;⁷³⁶ it serves to extend borough government; and, it is consistent with the
10 *Mobil Oil Corp.* decision.⁷³⁷

11
12 The LBC noted that in 1999 it had found that the KGB's 1998 annexation petition
13 did not satisfy this standard because it did not include Hyder and Meyers Chuck. The LBC
14

15
16 ⁷³³ The "best interests of the state" requirements are set forth at AS 29.06.040, 3 AAC 110.195,
17 and 3 AAC 110.980. These regulations and statute do not impose such requirements on the
18 LBC. But the LBC can consider the impact of the proposed annexation on residents in the
19 unorganized borough.

20 ⁷³⁴ R. 1028-30.

21 ⁷³⁵ Appellants argue that the area to be annexed had no need for borough services. But the LBC
22 found in 1999 that it did in the sense that it was likely that development would occur and
23 substantial weight should be given to the need to plan for it and to have local government in
24 place before it does. R. 1028-30, 532-34. The LBC took this same view with respect to the
25 KGB's 2006 petition. R. 532-37. There was substantial evidence in the record to support the
LBC's related factual finding. R. 8-9, 43-46, 62-65, 75-76. The court also notes that the LBC
found in 1999 that it is not necessary that there be a need for municipal services in the areas to be
annexed in order for the LBC to approve an annexation petition. R. 1218. That appears to be a
correct statement of the law in view of the facts in *Mobil Oil Corp.*

⁷³⁶ Self-government is maximized when areas within the unorganized borough, which do not
have self government, are incorporated into an organized borough, which does, either by
borough formation or annexation to an existing borough.

⁷³⁷ 518 P.2d at 101. The Court approved the incorporation of the North Slope Borough, which
encompassed 97,121 square miles and had 3,384 inhabitants.

1 explained that it based that finding on an unduly narrow reading of Article X, § 1.⁷³⁸ The LBC
2 noted that the result was that some 5,500 square miles of Alaska territory remained without local
3 government in the unorganized borough because the petition did not include the 21.4 square mile
4 Hyder and Meyers Chuck areas. The LBC concluded that this result did not serve the
5 constitutional goals of local government being provided on a regional basis.

6
7 There was a reasonable basis for the LBC's finding that the 2006 KGB
8 annexation petition satisfied this standard, and there was substantial evidence to support the
9 same, as the KGB proposed to bring 4,701 square miles of land in the unorganized borough with
10 no local self-government into the KGB.⁷³⁹

11 The LBC could reasonably find that this standard was met without Hyder being
12 included, and there was substantial evidence in the LBC record to support the same, for at least
13 five reasons. First, as noted above, the KGB proposal would result in borough government being
14 extended to a substantial area with no local self-government. Second, the standard does not
15 mandate the inclusion of all adjacent land in a borough, either by incorporation or annexation. If
16 it did all boroughs would include all of the land within their model boundaries. They do not.
17 The LBC recognized this in recounting the history of incremental borough expansion in Alaska.
18 Third, Article X, § 3 allows for some land being in unorganized boroughs. Unorganized
19 boroughs do not have local self-government outside incorporated cities. Fourth, the "maximum"
20 requirement does not mean that a borough must include adjacent areas that do not meet all of the
21 standards for annexation. Fifth, as discussed below, the LBC found that there was a sufficient
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25 ⁷³⁸ R. 985.

⁷³⁹ R. 434.

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1 basis for Hyder to remain an enclave and found, at least implicitly, that Hyder did not have
2 sufficient ties with the KGB to meet the “common interests” requirement of Article X, § 3.

3 **2. Minimum of Local Government Units**

4 The LBC did not err in interpreting the “ a minimum of local government units”
5 standard set forth in Article X, § 1. The LBC correctly concluded that this standard does not
6 require that an annexation result in the actual reduction of local government units. This is
7 consistent with the language of the standard. And it is consistent with the fact that annexations
8 do not themselves cause a reduction in the number of local government units as there is no legal
9 requirement that an existing local government unit in an area being annexed must merge with the
10 annexing borough or otherwise cease to exist.

11 There was a reasonable basis for the LBC’s finding that the KGB’s annexation
12 petition satisfied this standard, and there was substantial evidence in the LBC record to support
13 the same. The LBC found that the KGB’s proposed annexation was neutral in this respect. It
14 neither created nor reduced the number of local government units. And the LBC also found that
15 the annexation proposal would result in a substantial area outside any local government unit
16 being incorporated into the KGB, thereby significantly increasing the extent to which the
17 existing local government unit (KGB) encompasses a large natural region, which was one of the
18 constitutional framers’ intents.

19 The LBC could approve the KGB petition though it excluded Hyder because:
20 Hyder is not a local government unit; including or excluding Hyder would not increase or
21 decrease the number of local government units; the LBC record does not reflect that Hyder is
22 likely to incorporate in the foreseeable future if excluded from the KGB; Hyder could still
23 incorporate if included within the KGB; and, the LBC found that there was a sufficient basis for
24
25

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1 Hyder to remain an enclave and found, at least implicitly, that Hyder did not have sufficient ties
2 with the KGB to meet the “common interests” requirement of Article X, § 3.

3 **C. LBC’s Article X, § 3 Findings/Conclusions**

4 The LBC did not err in interpreting the standards set forth in Article X, § 3.
5 Article X, § 3 addresses “boroughs”. It provides, in part, that: “Each borough shall embrace an
6 area and population with common interests to the maximum degree possible.” This requirement
7 is not limited to borough formation. It also applies to borough annexations.

8
9 The LBC interpreted Article X, § 3 as requiring that the area and population
10 within the proposed new boundaries of the KGB embrace an area and population with common
11 interests to the maximum degree possible. This is a permissible interpretation of Article X, § 3
12 because it is consistent with: the text of Article X, § 3; and, the history of borough formation and
13 extension in Alaska.

14 With respect to the text of Article X, § 3, the provision does not require that a
15 borough embrace “all” areas and populations with “common interests.” The section instead
16 requires that the area and population within a borough have common interests to the maximum
17 degree possible. In the context of borough formation or borough extension this permits a focus
18 on the area and population proposed for inclusion within the borough.

19 With respect to the history of borough formation and extension, the LBC has
20 shown that many boroughs, when formed or after annexation, did not include the area and
21 population within their ideal boundaries, and that the LBC has construed the standards as
22

1 permitting the incremental expansion of borough government. This is evidenced by the LBC's
2 position recounted in *Valleys Borough Support Committee v. Local Boundary Commission*.⁷⁴⁰

3 There was a reasonable basis for the LBC to conclude that the territory the KGB
4 proposed to annex satisfied the requirements of Article X, § 3. There was substantial evidence in
5 the LBC record which supports this conclusion.⁷⁴¹

6 To the extent that the LBC was required to determine whether the KGB's ties to
7 Hyder were such that the KGB could not "embrace an area or population with common interests
8 to the maximum degree possible" without Hyder, the LBC impliedly found that such common
9 interests did not exist at that time.⁷⁴² This is evident from the LBC's enclave findings.⁷⁴³ And
10 from the LBC's decision to direct the KGB to file a petition to annex Hyder within five years and
11 to encourage "the KGB to work toward developing communication, transportation, and
12 economic ties between Hyder and the Borough".⁷⁴⁴

13 There was substantial evidence in the LBC record which supported the conclusion
14 that Hyder and the KGB did not have sufficient "common interests" for the KGB's petition to
15 not meet this standard if Hyder were excluded. This included evidence⁷⁴⁵ that:

- 16 1. The ferry run between Ketchikan and Hyder that the LBC speculated in
17 1999 may materialize did not;
- 18 2. The State stopped its ferry run between Hyder and Ketchikan in 2001;
- 19 3. Ketchikan and Hyder are no longer in the same House District;

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21
22 ⁷⁴⁰ 863 P.2d 232, 233 (Alaska 1993).

23 ⁷⁴¹ R. 457-87. The court notes, as did the LBC, that the LBC made similar findings in 1999 with
24 respect to basically the same area.

25 ⁷⁴² *See, Valleys Borough Support Committee*, 863 P.2d at 234-35; *Yakutat*, 900 P.2d at 726.

⁷⁴³ R. 519-23, 997.

⁷⁴⁴ R. 999. The LBC did not encourage the KGB to improve existing ties.

⁷⁴⁵ R. 6-8, 72, 89.

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- 1 4. Hyder is a considerable distance from Ketchikan, and the only means of
2 transportation between the two are by water or air (floatplane);
- 3 5. There are not significant economic, transportation, communication, or
4 social ties between Hyder and Ketchikan;
- 5 6. Hyder's economic, transportation, communication, and social ties are with
6 Stewart, B.C.⁷⁴⁶ Hyder obtains its utilities and phone service from Stewart.
7 Hyder's primary transportation link is the road that goes through Stewart.
8 Hyder stores accept Canadian money. Hyder residents shop in Stewart.
9 Hyder receives almost exclusively Canadian broadcast signals;
- 10 7. Hyder and Ketchikan are in different time zones;
- 11 8. Hyder and Ketchikan have different zip codes; and
- 12 9. Mr. Caffall-Davis's written and verbal comments on behalf of Hyder. He
13 vigorously asserted that Hyder has virtually no ties with the KGB. He
14 stated the view that if Hyder were to be part of an organized borough it
15 would fit better with the Wrangell Borough or a new Prince of Wales
16 borough.⁷⁴⁷

17 The LBC could reasonably conclude that the above is entitled to more weight than
18 the more abstract ties the LBC focused on in 1999.⁷⁴⁸ In this regard the court notes that the areas

19 ⁷⁴⁶ The LBC stated in 1999 that such ties are not relevant as Stewart is in Canada. This is true
20 insofar as Hyder could not become a part of Canada and in the sense that if Hyder were to join an
21 organized borough it would likely be the KGB. But it is clearly relevant to the issue of whether
22 Hyder has sufficient ties with the KGB for the "common interests" requirement of Article X, § 3,
23 and the related requirements of 3 AAC 110.160, to be satisfied.

24 ⁷⁴⁷ R. 246-65, Tr. 277-85 (11/06/07 LBC Public Hearing).

25 ⁷⁴⁸ *See*, Tr. 140-41 (11/06/07 LBC Public Hearing). For example, in 1999 the LBC placed
substantial reliance on the facts that Ketchikan and Hyder are in the same census subarea and
recording district, and Hyder is within the KGB's model borough boundaries. With respect to
model borough boundaries, it appears from the record that inclusion in a model borough
boundary simply means that if that area were ever annexed or included in a newly incorporated
borough it would be part of that particular organized borough. It does not necessarily mean that
the area presently has actual sufficient ties to require inclusion. The LBC has shown in this
regard that there is a historical pattern in Alaska of boroughs increasing in size incrementally and
not encompassing all of the area within the borough's model borough boundary. And the
Skagway materials the Appellants submitted further demonstrate this in view of the modest size
of the Skagway Borough. The court also notes that there was very little specific evidence of
significant actual ties between Ketchikan and Hyder cited by DCRA or the LBC in rejecting the

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1 where the evidence in the LBC record reflects that the KGB and Hyder lack ties generally
2 correspond to the “standards” specifically mentioned in Article X, § 3 – “population, geography,
3 economy, transportation.”

4 Appellants rely on the Alaska Supreme Court’s *Yakutat* decision in support of
5 their argument that Hyder must be included in order for the KGB annexation petition to satisfy
6 this standard. The Court in *Yakutat* did discuss the “maximum degree possible” standard. But
7 there is nothing in the discussion which would require that the LBC find that the standard could
8 not be met if Hyder was not included in the area the KGB proposed to annex.⁷⁴⁹ The Court held
9 that Article X, § 3 “vests the LBC with power to find non-compliance when the boundaries
10 originally described in a petition for incorporation do no maximize common interests. . . . the
11 LBC has broad authority to decide what the most appropriate boundaries of proposed borough
12 would be.”⁷⁵⁰ The Court did not hold that all inhabited areas adjacent to an area proposed for
13 inclusion in a borough must also be included in order for the Article X, § 3 standard to be met.
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19 KGB’s 1998 petition. DCRA and the LBC relied on the above abstract commonalities, the fact
20 that Hyder is within the service areas of Ketchikan Search and Rescue and the KGH, six Hyder
21 residents were KGH patients one year, and there was the possibility that there may be ferry
22 service between Hyder and Ketchikan. DCRA provided statistics on the significant float plane
23 connections between Meyers Chuck and Ketchikan. It provided none with respect to Hyder and
24 Ketchikan. The LBC also concluded that Hyder and Meyers Chuck were important points of
25 access to the areas the KGB sought to annex. No actual evidence was cited. Assuming there
was some basis for this conclusion in 1999, it is reasonable to now conclude that such is not now
the case given the increased size of the Hyder exclusion area. There is no evidence in the LBC
record that Hyder is a transportation or communications link to the area the KGB sought to
annex or that Hyder is an economic hub for any part of said area.

⁷⁴⁹ See, 900 P.2d at 725-27.

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1 **2. Stare Decisis/Res Judicata**

2 Appellants claim that the LBC acted arbitrarily and capriciously, and contrary to
3 principles of stare decisis and res judicata, when it reversed its 1999 decision in which it denied
4 on constitutional grounds a nearly identical KGB annexation petition.

5 Appellants argue that:

- 6 A. The stare decisis doctrine applies to LBC decisions.
- 7
- 8 B. The LBC erred by failing to follow the precedent it set in deciding the
9 KGB's virtually identical 1998 annexation petition.
 - 10 1. The LBC must decide matters in a manner consistent with
11 fundamental fairness and due process;
 - 12 2. The LBC did not explain why it was not acting consistently with
13 what it had decided in 1999 on the KGB's 1998 petition;
 - 14 3. There was no basis in fact or law for the LBC to approve the
15 KGB's 2006 petition when it had denied a nearly identical petition
16 in 1999; and,
 - 17 4. The LBC developed policies which intentionally favor residents of
18 organized boroughs over residents of the unorganized borough.
- 19 C. The doctrine of res judicata applies, the KGB's 2006 annexation petition
20 re-litigates issues decided by the LBC in 1999 on the KGB's 1998
21 annexation petition, and, the doctrine of res judicata prevents the KGB
22 from doing so.

23 **A. Stare Decisis**

24 Stare decisis is the doctrine of precedent.

25 "The doctrine of precedent is a common law doctrine under which courts are bound by prior decisions in their considerations of new cases. Precedent is a judge-made rule designed to constrain judicial decisionmaking by requiring that prior decisions with similar relevant facts be followed or, if they are not followed, that the reasons for departing from the prior rule be explained. . .

⁷⁵⁰ *Id.* at 726.

1 Precedent serves several purposes. One goal of precedent is to narrow issues that
2 need to be litigated, thus making litigation less costly and time consuming. . .
3 Adherence to precedent also ensures that litigants have an understanding of the
4 rules that may be applied to their actions. Finally, and most importantly,
precedent 'maintain[s] public faith in the judiciary as a source of impersonal and
reasoned judgments'.⁷⁵¹

5 The Alaska Supreme Court has stated:

6 "When confronted with stare decisis, we have held that 'we will overrule a prior
7 decision only when clearly convinced that that the rule was originally erroneous
8 or is no longer sound because of changed conditions, and that more good than
harm would result from a departure from precedent'.⁷⁵²

9 The Alaska Supreme Court has held that administrative:

10 "agencies may overrule a prior decision if convinced that it was wrongly decided.
11 When overruling a prior decision, the agency must provide a reasoned analysis
12 that explains why the change is being made. Moreover, it may not act in an
arbitrary, unreasonable, or discriminatory fashion."⁷⁵³

13 The LBC and the KGB argue that stare decisis does not apply to LBC decisions.

14 They rely on 3 AAC 110.650. 3 AAC 110.650 provides:

15 Except upon a special showing to the commission of significantly changed
16 conditions, a petition will not be accepted for filing that (1) is substantially similar
17 to a petition denied by the commission . . . during the immediately preceding 24
months; or (2) requests a substantial reversal of a decision of the commission that
first became effective during the immediately preceding 24 months.⁷⁵⁴

18 3 AAC 110.650 does expressly provide that a petitioner can submit, and the LBC
19 consider, a petition which is substantially similar to one which the LBC had denied more than 2
20

21 ⁷⁵¹ *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 43-44 (Alaska 2007) (quoting
22 *Pratt & Whitney Canada, Inc. v. Sheehan*, 852 P.2d 1173, 1175-76 n. 4 (Alaska 1993), quoting
Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970)) (citations omitted).

23 ⁷⁵² *May v. State, Commercial Fisheries Entry Commission*, 168 P.3d 873, 884 (Alaska 2007)
24 (quoting *State, Commercial Fisheries Entry Commission v. Carlson*, 65 P.3d 851, 859 (Alaska
2003)).

25 ⁷⁵³ *May*, 168 P.3d at 884.

⁷⁵⁴ 3 AAC 110.650 was amended in 2008. The time period during which a petitioner cannot
submit a petition that is substantially similar to one which the LBC had denied is now 3 years.

1 (now 3) years earlier without having to show that in the interim there has been a significant
2 change in circumstances. The court is not convinced, however, that this means that the LBC is
3 not required to explain why a change is being made or that it does not matter whether the LBC
4 acts in an arbitrary, unreasonable, or discriminatory fashion.

5 The LBC did not violate the stare decisis doctrine as applied to administrative
6 agencies in *May* for the following reasons.

7
8 DCCED discussed the LBC's 1999 decision at some length.⁷⁵⁵ The LBC also
9 addressed the 1999 decision and incorporated the DCCED's related analysis by reference. The
10 LBC found in 1999 that the KGB's annexation petition met most of the annexation standards.
11 Put another way, the LBC found in 1999 that the KGB's petition failed to satisfy only a few
12 standards – primarily because the KGB petition did not include Meyers Chuck and Hyder. The
13 LBC provided a reasoned analysis for reaching a different conclusion on those few standards in
14 its 2007 decision.⁷⁵⁶

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17 ⁷⁵⁵ R. 449-50, 454, 471-73, 484-85, 487-88, 493-94, 517, 529, 533-35, 746, 985. These citations
18 to the record focus on instances where the 1999 LBC decision is specifically discussed. The
19 citations do not necessarily reference all of the discussion of the reasons why the LBC found that
20 the KGB's 2006 annexation petition satisfied the standards that the LBC had found in 1999 had
21 not been satisfied by the KGB's 1998 petition.

22 ⁷⁵⁶ Part of the LBC's reasoning involved its discussion of model borough boundaries. The LBC
23 stated that model borough boundaries are not mandatory borough boundaries. The LBC
24 discussed the history of incremental borough boundary growth in Alaska. R. 517, 519-20. The
25 LBC noted that it clarified this point in its recent Skagway decision. R. 985. Appellants take
issue with this statement. They have submitted the Skagway decision, the LBC's related
briefing, and the Superior Court's decision on appeal. They did not request to have the record
enlarged to include the same. These are clearly documents that Appellants had access to and
could have submitted when they did request that the record be enlarged. The LBC did not object
to these exhibits. The KGB did, but did not file a motion to strike. To the extent that the court
can consider the documents, they support the LBC's position and do not support Appellants'
position. The documents show the following. The City of Skagway petitioned to form a borough
that basically encompassed only the City of Skagway. (Appellee's brief p. 1). DCCED
recommended the LBC not approve the petition. (Appellee's brief p. 2). The LBC agreed. An

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1 There was an adequate factual and legal basis to support the LBC's findings. The
2 LBC did not act in an arbitrary, unreasonable, or discriminatory fashion. And the LBC did not
3 violate Appellants' due process rights (or other rights) or favor residents of organized boroughs
4 over residents of the unorganized borough. These conclusions are based on the discussion above
5 concerning Article X, § 1 and X, § 3, and on the discussion hereinbelow.
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10 appeal was filed. The Appellant argued that the LBC had in effect imposed a new size related
11 regulation. The LBC argued on appeal that the petition did not satisfy all of the applicable
12 standards, and even if it did, the LBC has the discretion to still deny the petition. (Appellee's
13 brief pp. 7-8). The LBC found, in part, that borough government is intended to bring local self-
14 government to areas where there is no municipal government – which this petition did not do.
15 (Appellee's brief pp. 11-12). The LBC noted that the proposed borough encompassed only 1/7
16 of the model borough boundaries (Appellee's brief p. 12). The LBC argued that it had not in
17 effect promulgated a new regulation. The LBC argued that it could, and did, consider the size of
18 the proposed borough but did not set a specific requirement. The LBC pointed out that if this
19 borough were approved it could result in a number of such small boroughs which is not what the
20 constitutional framers intended. (Appellee's brief pp. 14-16). The Superior Court decided for
21 the Appellees, finding that the LBC had in effect promulgated a new size related regulation after
22 the Public Hearing. The case was remanded to the LBC. The LBC, in its Statement of Decision
23 on remand, noted that: a new Commission was now deciding the petition (p. 9); it did not
24 consider its decision to be precedent setting as it was based on unique facts and circumstances
25 (pp. 9, 51); it is charged with making fundamental policy decisions (p. 10-11); it was frustrated
by the lack of borough formation in Alaska (p. 12); the LBC noted the framers' intent that
boroughs be large and that small boroughs would be the exception to this rule (p. 12); it has
been a strong advocate for reform in this regard (p. 16); it has been criticized for placing too
much weight on model borough boundaries (pp. 18-19); it views its regulations as being
subordinate to the Constitution and statutes and that the Constitution and statutes can be flexibly
applied (p. 20); it is not requiring that the proposed borough be expanded to include adjacent
areas, such as Haines, due to the antagonism between the cities – the result would be a waste of
time, money, and other resources (p. 29) – this discussion was part of the LBC's analysis of
Article X, § 3; the proposed borough did not exceed model borough boundaries or create
enclaves so 3 AAC 110.060 does not require a higher degree of proof (p. 44); there are
arguments for larger boroughs in general but also for a smaller Skagway Borough in particular
(pp. 47-48); and, its bottom line was "why not" approve the borough – at least another borough
would be created (p. 48). It appears that the LBC may have taken a similar approach to the
KGB's 2006 annexation petition.

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1 **B. Res Judicata**

2 Res judicata is a common law doctrine which “binds the parties and their privies
3 to factual findings, as well as legal conclusions, that have been the subject of prior litigation.
4 The goal of res judicata . . . is finality.”⁷⁵⁷ The “aim is to prevent parties from again and again
5 attempting to reopen a matter that has been resolved by a court of competent jurisdiction.”⁷⁵⁸

6 The Alaska Supreme Court has recognized that the res judicata doctrine “may be
7 applied to adjudicative determinations made by administrative agencies.”⁷⁵⁹ The elements of the
8 doctrine are:

- 9
- 10 “1. The plea . . . must be asserted against a party or one in privity with a party to
the first action.
 - 11 2. The issue to be precluded from re-litigation by operation of the doctrine must
12 be identical to that decided in the first action;
 - 13 3. The issue in the first action must have been resolved by a final judgment on the
14 merits.”⁷⁶⁰

15 The res judicata doctrine does not apply to LBC decisions. 3 AAC 110.650
16 specifically provides that a petitioner may resubmit a “substantially similar” petition after 2 (3)
17 years without having to show that there are “significantly changed conditions.” The court also
18 notes that the Alaska Legislature has provided that the LBC “may consider any proposed
19 municipal boundary change.”⁷⁶¹

20

21

22 ⁷⁵⁷ *Alaska Public Interest Research Group*, 167 P.3d at 44.

23 ⁷⁵⁸ *Alaska Public Interest Research Group*, 167 P.3d at 44 (quoting *State, Child Support*
Enforcement Division v. Bromley, 987 P.2d 713, 726 (Alaska 1999)).

24 ⁷⁵⁹ *McKean v. Municipality of Anchorage*, 783 P.2d 1169, 1171 (Alaska 1989) (quoting
Jeffries v. Glacier State Telephone Company, 604 P.2d 4, 8 n. 11 (Alaska 1979)).

25 ⁷⁶⁰ *McKean*, 783 P.2d at 1171 (citing *Murray v. Feight*, 741 P.2d 1148, 1153 (Alaska 1987)).

⁷⁶¹ AS 29.06.040(a). The state decisis principles discussed above still apply.

1 To the extent that res judicata does apply, the second element has not been
2 established. The issues presented necessarily are the same in the sense that the LBC must again
3 apply the annexation standards. But the issues are not identical. There had been material
4 changes in circumstances.

5 The LBC noted that the KGB's 2006 petition included Meyers Chuck and that the
6 Hyder exclusion area had been modified to avoid the boundary problem identified by the LBC in
7 1999.⁷⁶² Appellants argue that the LBC would still have rejected the KGB's petition in 1999 if
8 Meyers Chuck had been included and the Hyder exclusion had not divided a watershed. But that
9 is speculation. And the fact remains that these circumstances were not before the LBC in
10 1999.⁷⁶³ Also, the LBC, as discussed above, employed a broader approach to the standards set
11 forth in Article X, § 1 and Article X, § 3 of the Alaska Constitution in 2007 than it did in 1999.
12 And, there were material changes in the annexation regulations.⁷⁶⁴ Finally, there were material
13 factual changes concerning Hyder. For example, the proposed ferry system on which the LBC
14 had placed substantial reliance in 1999 in finding significant ties between Ketchikan and Hyder
15

16
17 ⁷⁶² R. 449.

18 ⁷⁶³ It perhaps noteworthy in this regard that most of the DCRA and LBC discussion in 1998-99
19 concerning the ties between the KGB and the areas not included within its petition focused on
20 the ties between Meyers Chuck and the KGB and it was recognized even then that the ties
21 between the KGB and Hyder were "more attenuated."

22 ⁷⁶⁴ The KGB discussed the 2002 changes. Tr. 152-61 (11/06/07 LBC Public Hearing). The LBC
23 discussed the changes. R. 532-33 (changes described as "significant"), Tr. 152-53 (11/06/07
24 LBC Public Hearing). Ms. McPherrin did not tell the LBC, as Appellants assert, that the
25 changes were not important. Tr. 13-14 (11/07/07 LBC Decisional Meeting – she described the
2002 changes as being "significant" twice and also "substantial"). The KGB and the LBC also
noted that there had been changes to the LBC's annexation regulations in 2007. R. 435-36, 450,
518-19, Tr. 152-53 (11/06/07 LBC Public Hearing). The KGB and LBC recognized that the
2007 amendments did not govern the KGB's 2006 petition. R. 435-36, Tr. 152-53 (11/06/07
LBC Public Hearing), Tr. 166-70 (11/06/07 Public Hearing). The LBC did note in some
instances that the policy underlying the 2007 changes provided further support for a particular
finding. R. 435-36, 450, 518-19 The LBC did not base a finding on a 2007 revision.

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1 never materialized and state ferry service then in effect between those communities was
2 thereafter terminated.⁷⁶⁵

3 The 2006 KGB petition may have been similar in many respects to its 1998
4 petition but it differed in material respects with regards to the few factors that caused the LBC to
5 reject the 1998 petition. The LBC was created by the Alaska Constitution.⁷⁶⁶ The LBC “has
6 been given broad power to decide in the unique circumstances presented by each petition
7 whether borough governance is appropriate.”⁷⁶⁷ That is what it did with regards to the KGB’s
8 2006 annexation petition.

10 3. Best Interests of the State

11 Appellants claim that the LBC failed to properly apply the “best interests of the
12 state” standard set forth in AS 29.06.040(a) and 3 AAC 110.980, thereby violating Article X, § 3
13 of the Alaska Constitution, by declaring that the adverse financial impact of the proposed
14 annexation on the persons in the unorganized borough was not “relevant under the applicable
15 standards.”

16 Appellants argue that:

- 17 A. The LBC did not consider the impact of the loss of NFR funding to the
18 entities in the unorganized borough that would result if the KGB’s 2007
19 annexation petition was approved. The LBC did not do so because it had
20 decided as a matter of law that it could not do so.
- 21 B. The LBC’s 2007 decision dramatically tilted the balance decidedly in
22 favor of the KGB and to the detriment of the rest of the state as it shifted
23 NFR funds to the KGB though the KGB was not taking on new
24 commensurate financial obligations.

24 ⁷⁶⁵ R. 6-8, 89, Tr. 129 (11/06/07 LBC Public Hearing), Tr. 258-67 (11/06/07 LBC Public
25 Hearing).

⁷⁶⁶ Article X, § 12.

⁷⁶⁷ *Mobil Oil Corp.*, 518 P.2d at 99.

1 C. The LBC's only rationale was its philosophy that the entire state should be
2 divided into boroughs.

3 D. The SISD continues to provide education to students in Hyder.

4 E. The LBC ignored the comments of several persons to take more time to
5 decide the matter.

6 Alaska Statute 29.06.040(a) provides that the LBC may approve a municipal
7 boundary change if it determines that the proposed change "meets applicable standards under the
8 state constitution and commission regulations and is in the best interests of the state."

9 3 AAC 110.195 provided:

10 In determining whether annexation to a borough is in the best interests of the state
11 under AS 29.06.040(a), the commission may consider relevant factors, including
whether annexation

12 (1) promotes maximum local self-government;

13 (2) promotes a minimum number of local government units; and

14 (3) will relieve the state government of the responsibility of providing local
15 services.

16 3 AAC 110.980 provided that:

17 If a provision of AS 29 or this chapter requires the commission to determine
18 whether a proposed municipal boundary change or other commission action is in
19 the best interests of the state, the commission will make that determination on a
20 case-by-case basis, in accordance with applicable provisions of the Constitution
of the State of Alaska, AS 29.04, AS 29.05, AS 29.06, and this chapter, and based
on a review of:

21 (1) the broad policy benefit to the public statewide; and

22 (2) whether the municipal government boundaries that are developed serve

23 (A) the balanced interests of the citizens in the area proposed for change;

24
25
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1 (B) affected local governments⁷⁶⁸; and

2 (C) other public interests that the commission considers relevant.

3 So 3 AAC 110.195 provides that the LBC may consider the best interest factors
4 that it considers relevant, which may include the Article X, § 1 standards and whether the
5 annexation will relieve the state of the responsibility of providing local services. And 3 AAC
6 110.195 requires that the LBC review whether there is a broad policy benefit to the public
7 statewide and whether the proposed boundaries serve the balanced interests of the citizens in the
8 area proposed for annexation; affected local governments; and such other public interests as the
9 LBC considers relevant.

10
11 Given the above, the LBC was not necessarily required by its regulations to
12 consider the NFR impact on the public entities in the unorganized borough.

13 The LBC nonetheless did address Appellants' NFR argument. The LBC noted
14 that this circumstance could be considered as part of the best interests of the state
15 determination.⁷⁶⁹ The LBC considered the circumstance in that context.⁷⁷⁰

16
17
18 ⁷⁶⁸ The "affected local governments" provision focuses on whether a proposed boundary
19 "serves" an affected local government - for example, whether a boundary divides a school
20 district. The local governments involved in this litigation were not affected by the KGB's
21 proposed boundaries in this sense. They are affected by the manner in which the State has
22 decided to allocate federal NFR's if the State continues to receive such funds. That allocation is
23 based on the amount of land in the Tongass National Forest that is in organized boroughs and the
24 unorganized borough. The allocation is not based on where particular borough boundaries are
25 located

⁷⁶⁹ R. 525-27, 751, 1001. The LBC stated in its December 5, 2007 Statement of Decision that:

23 "As set out above, the loss of NFR's to other communities in southeast Alaska
24 was the focus of the majority of written and oral comment in this proceeding. As
25 observed at the decisional session, the Commission is very sympathetic to that
loss. However, it is not a bar to the development of boroughs or their extension.
It is a factor that is considered in consultation with the DEED and when

1 There were comments made by two Commissioners that it had been determined
2 that the NFR situation was not relevant.⁷⁷¹ They apparently were referring to the LBC's long-
3 stated position on this subject. The LBC had considered the NFR situation in 1999 and decided
4 that it did not prevent borough extension. The LBC had thereafter restated this position.⁷⁷² As
5 Appellants insist, and the court found above, stare decisis applies to LBC decisions. Moreover,
6 there is a difference between believing something is not relevant and totally ignoring it and
7 considering something and determining that it is not relevant. The LBC's written decision
8 quoted above, reviewed and concurred in by all 4 of the participating Commissioners, shows that
9 the LBC did consider the NFR situation.
10

11 The LBC considered relevant factors per 3 AAC 110.195 – the LBC considered
12 whether the KGB annexation petition would promote the goals stated in Article X, § 1 and
13

14 considering the best interests of the State, and DEED does not oppose this
15 annexation proposal.

16 Further, the Commission observes that commentators focused only on the loss of
17 NFRs by the KGB annexation. No comments were filed in the Wrangell
18 incorporation proceeding regarding the identical NFR loss resulting from such
19 incorporation. The Commission finds this inconsistent view troubling.

20 Most specifically, the Commission endorses the prior Commission decision
21 rejecting the relevance of ephemeral financial considerations such as NFRs when
22 considering the standards for borough formation or extension. As asserted by the
23 1999 Commission, these programs may, over time, operate in a significantly
24 different manner or even no longer exist. 'In contrast,' the Commission stated,
25 'the formation of a borough or the extension of a borough over a large area is a
much more permanent action.'”

R. 1001.

⁷⁷⁰ R. 525-31, 547-550, 751, 1001, Tr. 13 (11/06/07 LBC Public Hearing).

⁷⁷¹ Tr. 89 (Ketchum) (11/06/07 LBC Public Hearing), Tr. 8-9 (Ketchum), Tr. 33 (Chrystal)
(11/07/07 LBC Decisional Meeting)

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1 whether it would relieve the State of the responsibility of providing local services. And the LBC
2 conducted the review required by 3 AAC 110.980 – the LBC considered the broad policy benefit
3 to the public statewide, the balanced interests of the citizens in the area proposed to be
4 annexed,⁷⁷³ the affected local governments, and other considerations it deemed relevant.⁷⁷⁴

5 The LBC identified several reasons for its decision, and there was substantial
6 evidence in the LBC record to support each. The reasons included:

- 7
8 A. The LBC observed that NFR's are "ephemeral financial considerations."
9 There was substantial evidence in the LBC record to support this
10 conclusion.⁷⁷⁵ The LBC decided that the more permanent benefits of
11 borough expansion were entitled to greater weight.⁷⁷⁶

12 ⁷⁷² The court also notes that the LBC approved the Haines Borough annexation which resulted in
13 a revenue increase of \$4 million dollars to the Borough though the annexed land was
14 uninhabited. R. 1062-64.

15 ⁷⁷³ There were very few such citizens. The LBC implicitly considered this subject in addressing
16 many of the annexation standards. The LBC also did so in the context of the Wrangell petition,
17 wherein it decided that the Meyers Chuck/Union Bay area, in which most of such citizens
18 resided, should be included in the new Wrangell borough rather than the KGB. *See, Yakutat*,
19 900 P.2d at 726; *Valleys Borough Support Committee*, 863 P.2d at 234-35.

20 ⁷⁷⁴ R. 525-26.

21 ⁷⁷⁵ R. 527-31, Tr. 133-38 (11/06/07 LBC Public Hearing), Tr. 141-43 (11/06/07 LBC Public
22 Hearing), Tr. 164-66 (11/06/07 LBC Public Hearing). The court notes that none of the
23 commentators, in the written comments submitted to the LBC or the verbal comments made
24 during the November 6, 2007 LBC Public Hearing, disputed the LBC's 1999 findings
25 concerning the ephemeral nature of NFR funding or the KGB's testimony that Congress had
recently been funding the NFR program by means of annual stop-gap measures (Tr. 141-43, 164-
66). The court also notes that the LBC submitted an exhibit with its brief concerning NFR
funding received by the Appellants after the LBC's decision. This document is not in the LBC
record. It could not have been in the LBC record. The LBC did not move to supplement the
record. Appellants did not move to strike. The court is not considering this document because
the focus on this issue is on what was before the LBC at the time it made its decision. The court
also notes that Appellants did object to the court considering a reference to a letter in the LBC's
brief. The letter is not referred to herein and is not being relied on by the court.

⁷⁷⁶ R. 1001. There was evidence in the LBC record that the financial impact of the loss of NFR
funding had been overstated. Tr. 258-67 (11/06/07 LBC Public Hearing). There was also
evidence that entities in the unorganized borough would continue to receive more NFR funding
per capita than the KGB. Tr. 65-72 (11/06/07 LBC Public Hearing).

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- 1 B. A permanent benefit to the entire state was the fulfillment of the important
2 constitutional policy under Article X, § 1 of favoring the expansion of
3 borough government.⁷⁷⁷
- 4 C. NFR's are a deterrent to the extension of borough government.⁷⁷⁸
- 5 D. The KGB would be taking over platting, land use regulation, and
6 education services now being provided by the State in the annexed area.⁷⁷⁹
- 7 E. DEED did not oppose Hyder being an enclave in the near term.⁷⁸⁰
8 Organized boroughs in effect subsidize education in the unorganized
9 borough.⁷⁸¹ Though no students are presently within the area to be
10 annexed, the KGB is still responsible for providing education if the need
11 arises. The KGB would incur additional education costs as a result of the
12 local contribution statutory requirement, and the KGB already is required
13 to make substantial local contributions.⁷⁸²
- 14 F. The KGB's motivation in pursuing the annexation was not to maximize its
15 revenues and minimizes its related costs.⁷⁸³
- 16 G. The legislature is responsible for funding education. The legislature set
17 the allocation formula for NFR's. The legislature can make adjustments in
18 the allocation and/or school funding if it deems it appropriate.⁷⁸⁴

19 In addition, the LBC addressed the concern that Hyder would remain a permanent
20 enclave by directing the KGB to file an annexation petition within five years, encouraging the
21

22 ⁷⁷⁷ R. 287, 525-31, 547-550.

23 ⁷⁷⁸ R. 527-31, Tr. 13 (11/06/07 LBC Public Hearing).

24 ⁷⁷⁹ R. 525-27.

25 ⁷⁸⁰ R. 603, Tr. 14 (11/06/07 LBC Public Hearing). The LBC considered the fact that SISD
would continue to provide education services for Hyder students. R. 521-23. There was evidence
in the LBC record that the State would actually spend less on educating Hyder students if it
remained in the unorganized borough. Tr. 258-67 (11/06/07 LBC Public Hearing).

⁷⁸¹ R. 526, 535-36, 552-61.

⁷⁸² R. 526-27. There was also evidence in the record that Hyder was experiencing a severe
economic downturn and that it may not have enough children for a school within a couple of
years. Tr. 277-85 (11/06/07 LBC Public Hearing).

⁷⁸³ R. 527-31. The LBC record reflects that a borough obtaining substantial revenues while
incurring minimal costs as the result of its inclusion of large areas of the unorganized borough
had occurred with respect to the Yakutat borough. R. 1221-23, Tr. 163-64 (11/06/07 LBC Public
Hearing).

⁷⁸⁴ R. 527-31, 751.

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1 KGB to develop ties with Hyder, and committing to causing such a petition to be filed if the
2 KGB did not do as directed.

3 Appellants also claim that the LBC's decision to proceed with the November 7,
4 2007 Decisional Meeting as scheduled violated due process.

5 The LBC's decision to proceed with the November 7, 2007 Decisional Meeting as
6 scheduled instead of acceding to the requests made by some commentators during the November
7 6, 2007 Public Hearing that it be rescheduled for a later date⁷⁸⁵ did not violate due process.⁷⁸⁶

8 The record reflects that: the LBC heard from all who wanted to comment;⁷⁸⁷ the Commissioners
9 had spent considerable time reviewing the record;⁷⁸⁸ the NFR and other issues were addressed in
10 some detail therein;⁷⁸⁹ evidently none of the Commissioners believed that they needed additional
11 time to decide whether to accept or deny the KGB's annexation petition; and, delay, in particular
12 for 90 days, meant denial of the KGB annexation petition for at least a year given the date of the
13 public hearing and the start of the 2008 legislative session.⁷⁹⁰

14
15
16
17 ⁷⁸⁵ 3 AAC 110.570(a) provided that a decisional meeting must occur within 90 days of the last
18 public hearing on a proposed boundary change. No person requested during the 11/06/07 Public
19 Hearing that the Public Hearing be rescheduled.

20 ⁷⁸⁶ There is some overlap between Appellants' due process arguments on this point and those
21 presented in the second set of briefing by the subset of Appellants. To the extent the Appellants'
22 due process claims on this point are not fully addressed now, they are also addressed in the
23 court's resolution of the claims presented in the second set of briefing.

24 ⁷⁸⁷ DCCED addressed these issues, as noted above, in the Preliminary Report and Final Report.
25 Appendix B to DCCED's Final Report consisted of all of the written comments on the
26 Preliminary Report. The KGB had addressed the issue in its Reply Brief (R. 421-22). *See also*,
27 transcript of the LBC's Public Hearing.

28 ⁷⁸⁸ Tr. 192-93 (11/06/07 LBC Public Hearing), Tr. 38-39 (11/07/07 LBC Decisional Meeting).

29 ⁷⁸⁹ Related citations to the record are noted hereinabove.

30 ⁷⁹⁰ The Alaska Legislature convenes in January. Article X, § 12 requires that proposed local
31 government boundary changes must be submitted to the Legislature during the first 10 days of
32 the legislative session.

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1 mile area of Meyers Chuck and Union Bay, meets all applicable Constitutional,
2 statutory, and regulatory standards for borough annexation and is in the best
interest of the State. Accordingly, the Petition as amended, is approved.”⁷⁹²

3 The LBC’s “direction” is in effect, even though it is not specifically restated in
4 the “Order of the Commission,” for two reasons. First, the LBC voted to approve the “direction”
5 during both its November 7, 2007 Decisional Meeting and December 4, 2007 Public Meeting to
6 approve the Statement of Decision.⁷⁹³ Second, the “direction” is “set out in Section II” and so
7 was included in the “Order” as a basis for the LBC’s approval of the KGB’s annexation petition,
8 as amended.

9
10 **B. Enforceability**

11 Alaska Statute 29.06.040(a) provides that the LBC may “impose conditions on the
12 proposed [boundary] change” and may accept “accept the proposed [boundary] change” “as . . .
13 conditioned.”

14 3 AAC 110.410 provided in 2007, in pertinent part, that an annexation petition
15 could be initiated by: “the staff of the commission or a person designated by the commission”⁷⁹⁴
16 and that:

17 The staff of the commission or a person designated by the commission may
18 initiate a petition after the commission had determined that the action proposed
19 will promote the standards established under AS 29.05, AS 29.06, and this
20 chapter, and the commission has directed the staff or designated person to prepare
a petition by a motion approved by a majority of the appointed membership of the
commission.⁷⁹⁵

21 3 AAC 110.410 was amended in 2008 and now provides, in pertinent part, that:

22
23 ⁷⁹² R. 1004.

24 ⁷⁹³ Tr. 26-31, 36 (11/07/07 LBC Decisional Meeting), Tr. 57-59, 63, 68-70, 182-83, (12/04/07
LBC Public Meeting), R. 999.

25 ⁷⁹⁴ 3 AAC 110.410(a)(3).

⁷⁹⁵ 3 AAC 110.410(d).

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1 (a) A petition for a proposed action by the commission under this chapter may be
2 initiated by . . .

3 (3) a person designated by the commission, subject to (d) of this section . . .

4 (d) A person designated by the commission may initiate a petition if the
5 commission

6 (1) determines that the action proposed will likely promote the standards
7 established under the Constitution of the State of Alaska, AS 29.04, AS 29.05, AS
8 29.06, or this chapter, and is in the best interests of the state; and

9 (2) directs the designated person to prepare a petition by a motion approved by a
10 majority of the appointed membership of the commission.⁷⁹⁶

11 The LBC had the authority under AS 29.06.040(a) to condition its approval of the
12 KGB's annexation petition on the KGB actually filing a petition to annex Hyder within the 5
13 year period. It appears, for the following reasons, that the LBC did not impose such a condition.
14 First, the LBC did not expressly state that it was doing so. Put another way, the LBC did not
15 state or indicate that the annexation would be vacated if the KGB did not petition to annex Hyder
16 within the ensuing 5 years. Second, the LBC directed the KGB to submit such a petition but did
17 not expressly order that it do so. Third, the LBC contemplated that the KGB may not do as
18 directed as it also provided that it would cause such a petition to be filed if the KGB did not do
19 as it directed. Fourth, the apparent purpose of the direction was so to provide the LBC with the
20 opportunity within 5 years to take another look at the Hyder situation. The LBC found that the
21 KGB, as expanded, satisfied the annexation standards. The LBC did not find this would in fact
22 change within the next 5 years if the KGB did not annex Hyder. The LBC's direction was for
23 the petition to be filed. The LBC did not guarantee that it would be granted. The LBC will have
24 to view the circumstances that exist at the time a petition is filed and decide, based on the
25

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1 applicable standards and the evidence then in the record, whether or not to grant the petition.
2 Fifth, the LBC's purpose can be achieved if it follows through with its stated intent and exercises
3 its authority to direct that a person designated by the LBC prepare and submit such a petition.⁷⁹⁷

4 The court cannot now void or dissolve the KGB's annexation for 3 reasons. First,
5 the reasons stated in the preceding paragraph. Second, assuming that the LBC's approval of the
6 KGB's annexation petition was conditioned on the KGB submitting a petition to annex Hyder
7 within the 5 years, that deadline has not run. The court will not speculate now on what the KGB
8 will or will not do. Third, the LBC has total control over whether such a petition will be filed as
9 it can cause a petition to be filed independent of the KGB. It has stated its intent to exercise this
10 authority if the KGB does not file a petition. The court cannot presume that the LBC will not act
11 in accordance with its stated intention.
12

13 **a. Other Points on Appeal**

14 The second brief was filed by Naukati West, Inc., POWCAC, the Organized
15 Village of Kasaan, the Hollis Community Association, and, the Hydaburg Cooperative
16 Association. These Appellants therein state the following points:

- 17 A. The LBC acted arbitrarily and capriciously when it failed and refused to
18 require the DCCED to submit a Final Report that fully and fairly complied
19 with 3 AAC 110.530, thereby denying Appellants due process.
- 20 B. The LBC acted arbitrarily and capriciously by deviating from its historical
21 and regulatory policy by creating the Hyder enclave and retroactively
22 applying regulations adopted after the KGB filed its annexation petition to
23 support its decision, which denied the Appellants due process.

24
25 ⁷⁹⁶ The 2008 amendments also provide that a REAA may submit a boundary change petition (3 AAC 110.410(a)(5)).

⁷⁹⁷ Presumably the "person" would be someone outside DCCED.

1 C. The LBC denied Appellants and the people in the unorganized borough
2 their rights to a fair hearing and to an impartial decision-maker, thereby
3 denying them due process.

4 D. The LBC erred in holding that Article X, § 1 of the Alaska Constitution
5 requires the court to uphold LBC decisions approving annexations
6 whenever there is a reasonable basis for the decision.

7 E. Appellants have sought and are entitled to relief consistent with due
8 process.

9 “Administrative proceedings must comply with due process.”⁷⁹⁸ “Due process

10 does not have a precise definition, nor can it be reduced to a mathematical formula.”⁷⁹⁹ It
11 requires adequate notice and the opportunity to be heard⁸⁰⁰ and an impartial decision-maker.⁸⁰¹

12 “Administrative agency personnel are presumed to be honest and impartial until a
13 party shows actual bias or prejudice. To show hearing officer bias, a party must show that the
14 hearing officer had a predisposition to find against a party or that the hearing officer interfered
15 with the orderly presentation of evidence.”⁸⁰² Also, the presumption can be overcome if a staff
16 member becomes a “fox-in-the-chicken-coop” for a party and the staff member was able to
17 “psychologically or intellectually dominate” the decision-makers or overbear their wills.⁸⁰³

18 ⁷⁹⁸ *State, Department of Natural Resources v. Greenpeace, Inc.*, 96 P.3d 1056, 1064 (Alaska
19 2004) (citation omitted).

20 ⁷⁹⁹ *Id.* at 1063 (citation omitted).

21 ⁸⁰⁰ *Id.* at 1064.

22 ⁸⁰¹ *Lundgren Pacific*, 603 P.2d at 889; *see also, Matter of Dobson*, 575 P.2d 771, 774 (Alaska
23 1978).

24 ⁸⁰² *AT&T Alascom v. Orchitt*, 161 P.3d 1232, 1246 (Alaska 2007) (fact that a hearing officer
25 was also an elected officer with the Alaska Chapter of the AFL-CIO did not show bias); *see also, Bruner v. Petersen*, 944 P.2d 43, 49 (Alaska 1997) (actual bias is required, and is not shown merely because the decision-maker had ‘a close and supportive working relationship’ with the persons who made the initial decision that was the subject of the “hearing”).

⁸⁰³ *Amerada Hess Pipeline Corporation v. Regulatory Commission of Alaska*, 176 P.3d 667, 676-77 (Alaska 2008). There is language in *Matter of Dobson* which references the appearance of impropriety. The Court in *Amerada Hess* limited *Dobson* to the proposition that advocates, prosecution or defense, must be excluded from the jury room or its functional equivalent. 176

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1 recommendations that were filed with DCCED in a timely manner. 3 AAC 110.530 does not
2 require that a DCCED final report must necessarily specifically address each such comment. 3
3 ACC 110.530 does not necessarily require that a DCCED final report identify or synopsise each
4 such comment.

5 **B. 3 AAC 110.530 Compliance**

6 DCCED considered all of the comments it received on its Preliminary Report in
7 preparing its Final Report. Ms. McPherrren wrote the Final Report on the KGB's annexation
8 petition. She stated therein that she had considered all of the comments DCCED had received on
9 the Preliminary Report.⁸⁰⁷ She listed the comments and attached them as an Appendix.⁸⁰⁸ She
10 stated at the outset of the November 6, 2007 LBC Public Hearing that she had done so.⁸⁰⁹ She
11 testified during the October 2008 evidentiary hearing that she had considered all of said
12 comments.⁸¹⁰

14 Ms. McPherrren, in preparing DCCED's Final Report, gave "due" consideration
15 to all of the comments DCCED received concerning the substance of its Preliminary Report. She
16 considered all of the comments, as noted above. She read the entire record, researched NFR's,
17 researched other issues, and did "an intensive amount of work."⁸¹¹ She noted that, for the most
18 part, the comments reiterated points made in the comments submitted earlier in response to the
19 KGB's annexation proposal.⁸¹² She noted that DCCED had addressed those comments in the

22 ⁸⁰⁷ R. 740-41, 911-12.

23 ⁸⁰⁸ R. 739.

24 ⁸⁰⁹ Tr. 12.

25 ⁸¹⁰ Tr. 184-92, 204-09. The court found her testimony credible. She also testified credibly that she did not feel the need to ask Chair Ketchum for additional time to complete the Final Report.

⁸¹¹ Tr. 184-92. (Ms. McPherrren's October 2008 Evidentiary Hearing testimony). The court found her testimony credible.

⁸¹² R. 740.

1 Preliminary Report.⁸¹³ She incorporated the Preliminary Report by reference.⁸¹⁴ She noted that
2 the KGB's Reply Brief had "cogently responded" to the same.⁸¹⁵ She correctly stated that 3 AAC
3 110.530 did not require that DCCED summarize and comment on every comment.⁸¹⁶ She noted
4 that she did not do so due to her workload.⁸¹⁷ But she stated in the Final Report⁸¹⁸ and
5 testified⁸¹⁹ during the October 2008 Evidentiary Hearing that her workload did not prevent
6 DCCED from fulfilling its obligations with respect to the Final Report. She testified during the
7 October 2008 Evidentiary Hearing that she addressed the comments that presented the major
8 issues.⁸²⁰ She did address the Hyder situation,⁸²¹ Wrangell's claims concerning Meyers
9

12 ⁸¹³ R. 740. The court notes that a substantial portion of the City of Craig and POWCAC's
13 comments focus on the LBC's 1999 decision on the KGB's prior annexation petition and their
14 disagreement with DCCED's interpretation of the Alaska Constitution. Ms. McPherrren could
15 reasonably conclude that the discussion of these issues in DCCED's Preliminary Report
16 sufficiently addressed said comments. DCCED therein explained the basis for its Constitutional
17 interpretation and addressed the related portions of the 1999 LBC Statement of Decision.

18 ⁸¹⁴ R. 738.

19 ⁸¹⁵ R. 741. She testified during the October 2008 Evidentiary Hearing that she was here
20 referencing the brief the KGB filed in response to the comments on its annexation proposal. Tr.
21 228-30. These Appellants claim that she could not rely on this brief as it was filed before the
22 Preliminary Report was issued. The Reply Brief was filed before the Preliminary Report was
23 issued. But Ms. McPherrren could still reference and rely on the Reply Brief due to the similarity
24 between the comments DCCED had received on its Preliminary Report and the comments that
25 were submitted in response to the KGB's annexation proposal.

⁸¹⁶ R. 741.

⁸¹⁷ R. 741. Ms. McPherrren attached Appendix D which outlined DCCED's workload during the
pendency of the KGB annexation petition. Her October 2008 hearing testimony reflects that the
"Comprehensive Revisions to LBC Regulations and Bylaws" referenced Appendix D is what she
was working on in addition to the Final Report. Tr. 172-73, 179-84. The references to other
work are apparently included to show why she could not receive assistance in this regard from
other DCCED. At that point, the other staff consisted of Ms. Atkinson as Mr. Bockhorst had
recused himself.

⁸¹⁸ R. 741.

⁸¹⁹ Tr. 184-92, 204-09. The court found her testimony credible.

⁸²⁰ Tr. 204-09. The court found her testimony credible.

⁸²¹ R. 740.

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1 Chuck,⁸²² the Meyers Chuck situation as compared to Hyder's circumstances,⁸²³ NFR's,⁸²⁴ and
2 MIC's concerns.⁸²⁵

3 Ms. McPherren's treatment of the comments in the Final Report is consistent with
4 DCCED's practices. She so testified during the October 2008 evidentiary hearing.⁸²⁶ Her
5 testimony is consistent with the 1998 Preliminary Report on the KGB's prior annexation petition
6 wherein it was stated:

7
8 "This report is preliminary in the sense that it is issued as a draft for public review
9 and comment . . . The law requires . . . issue a final report after considering
10 written comments on this draft report. Often . . . preliminary reports to the
11 [LBC] become final without modification. If such occurs in this instance, it
12 will be announced by letter that will serve to meet the requirement for a final
13 report. If circumstances warrant otherwise, DCRA will publish a separate final
14 report."⁸²⁷

15 These Appellants have not shown that the manner in which she addressed the comments in the
16 Final Report violated some DCCED protocol.⁸²⁸

17 Ms. McPherren did not comment in the Final Report on the City of Craig and
18 POWCAC's allegations that: Mr. Bockhorst had a "substantial conflict of interest;" this conflict

19 ⁸²² R. 742-45.

20 ⁸²³ R. 746.

21 ⁸²⁴ R. 751. Here Ms. McPherren noted that she was specifically responding to the comments
22 submitted by the City of Craig and POWCAC. She noted that the grounds for their request that
23 the LBC reject the KGB's annexation petition were addressed in the Preliminary Report and the
24 KGB's Reply Brief. Said grounds include their claims concerning the 1999 LBC decision, their
25 constitutional arguments, and, most of their NFR arguments. R. 693-719.

⁸²⁵ R. 755.

⁸²⁶ Tr. 184-92, 204-09, 234-37. The court found her testimony credible.

⁸²⁷ R. 1034. The court notes that the primary author of this Preliminary Report was Mr.
Bockhorst and that the record reflects that at that point he had worked as staff for the LBC for
some 18 years. Tr. 324-32 (October 2008 Evidentiary Hearing). The court found Mr.
Bockhorst's testimony on this point credible.

⁸²⁸ The fact that DCCED has summarized and responded to individual comments in some other
preliminary and/or final reports does not prove the existence of such a protocol or that Ms.
McPherren's handling of the comments was somehow improper.

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1 of interest caused him to recommend that the LBC reverse its historical policy on enclaves,
2 thereby permitting the KGB to receive an additional \$1.2 million annually; an appearance of
3 impropriety exists because Mr. Bockhorst authored the 1998 Preliminary and Final Reports,
4 which recommended the LBC deny an identical KGB annexation petition, and the 2007
5 Preliminary Report recommending LBC approval, and he prepared the Preliminary Report while
6 he was seeking employment as the KGB Borough Manager;⁸²⁹ and, the LBC has two choices –
7 reject DCCED’s recommendations and deny the KGB’s petition because that would be the
8 factually and legally correct thing to do or remove the Preliminary Report and retain an
9 independent consultant to prepare a new preliminary report. She did not discuss these comments
10 with anyone.⁸³⁰

12 Ms. McPherrren did give said comments “due” consideration. She did consider
13 them, as noted above. She did not think the Final Report was the proper “venue” to respond to
14 these comments. Her view was reasonable for three reasons. First, she reasonably believed that
15 there was no actual conflict of interest or bias on the part of Mr. Bockhorst. It was her
16 understanding that he had recused himself from the KGB matter after the Preliminary Report had
17 been published and as soon as he was aware the KGB was seeking applicants for its Borough
18 Manager position.⁸³¹ Second, the commentators had requested that the LBC either reject the
19 KGB petition because that would be the correct thing to do factually and legally or remove the
20 Preliminary Report and retain an independent consultant to prepare a new report. She did give
21 due consideration to the first request inasmuch as it relates to the merits of the KGB’s petition
22 per the discussion above. She reasonably concluded that the second request, and the related bias,

25 ⁸²⁹ Hence the judge’s law clerk analogy in the comment.

⁸³⁰ Tr. 194-198 (October 2008 Evidentiary Hearing).

1 conflict of interest, and appearance of impropriety concerns were directed to the LBC and she
2 knew each Commissioner had been provided with a copy of the comment. Third, in any event,
3 as discussed above, she was not required by 3 AAC 110.530 to address these comments in the
4 Final Report.

5 **C. LBC**

6 These Appellants present four arguments concerning the LBC. First, the LBC
7 erred by not requiring that DCCED submit a Final Report that complied with 3 AAC 110.530.
8 Second, the LBC failed to realize that Mr. Bockhorst's situation created the appearance of
9 impropriety. Third, the LBC did not consider the request by the City of Craig and POWCAC
10 that it remove the Preliminary Report and retain an independent consultant to prepare a new
11 report. Fourth, the LBC did not solicit a legal opinion from the Attorney General's Office
12 concerning the LBC's interpretation of Alaska's Constitution.
13

14 **1. 3 AAC 110.530**

15 The LBC did not err by failing to realize that DCCED's Final Report on the
16 KGB's 2007 annexation petition did not comply with 3 AAC 110.530 because, as explained
17 above, DCCED's Final Report did comply with 3 AAC 110.530.

18 3 AAC 110.530 requires due consideration of the comments. It does not
19 necessarily require analysis of the same in the Final Report. "Due consideration" may require
20 that material issues raised in comments be addressed in a Final Report if not adequately
21 addressed in the Preliminary Report. Ms. McPherran, as noted above, satisfied the "due
22 consideration" requirement.
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⁶³¹ Tr. 174-79 (August 2008 Evidentiary Hearing). The court found her testimony credible.

1 **2. Appearance of Impropriety/Independent Consultant**

2 The City of Craig and POWPAC had some cause for concern at the time they
3 submitted their September 4, 2007 comment. They knew that: Mr. Bockhorst had written the
4 1998 reports recommending that the LBC reject the KGB's 1998 annexation petition; he had
5 written the 2007 Preliminary Report recommending the LBC approve the KGB's similar 2006
6 annexation petition; and, Mr. Bockhorst had recently applied for the KGB's vacant Borough
7 Manager position. And neither DCCED nor the LBC had publicly announced that Mr.
8 Bockhorst had recused himself from further involvement with the KGB petition.
9

10 To assess the LBC's understanding of Mr. Bockhorst's situation and its response
11 to the City of Craig and POWCAC's related comments it is necessary to review what had
12 actually happened with respect to Mr. Bockhorst and the KGB Borough Manager position; what
13 the LBC knew; and, what the LBC did.

14 Mr. Eckert submitted his resignation in a letter dated June 15, 2007.⁸³² The KGB
15 Borough Assembly accepted Mr. Eckert's resignation during a June 25, 2007 special meeting.⁸³³
16 Mr. Bockhorst had completed DCCED's Preliminary Report by June 30, 2007.⁸³⁴ DCCED
17 published the report on July 13, 2007.⁸³⁵ DCCED's work on the KGB petition was then on hold
18 pending the September 4, 2007 comment deadline.⁸³⁶
19
20

21 _____
⁸³² R. 1346-47.

22 ⁸³³ R. 1348.

23 ⁸³⁴ R. 426. The Preliminary Report is dated June 30, 2007. This is consistent with the Mr.
24 Bockhorst's testimony during the October 2008 Evidentiary Hearing (Tr. 400-06). And with
25 Chair Ketchum's testimony during that hearing that he had checked Mr. Bockhorst's computer
and saw no activity related to the KGB petition after mid-June 2007. Tr. 53-57. The court found
Mr. Bockhorst and Chair Ketchum's testimony credible.

⁸³⁵ Tr. 468-70 (Jennie Starkey's October 2008 Evidentiary Hearing testimony). Ms. Starkey also
testified that it usually takes between a couple of weeks and a month and a half for her to prepare

1 Mr. Bockhorst did have a conflict of interest with respect to the KGB annexation
2 petition once he became aware that the KGB was soliciting applications for its Borough Manager
3 position and that he had an interest in applying for the position. This occurred on July 31,
4 2007.⁸³⁷

5 The following then happened:

- 6
- 7 1. Mr. Bockhorst took a call the morning of July 31, 2007 from Carol Brown
8 of the Meyers Chuck Community Association. She sought technical
9 assistance. He did not mention the KGB Borough Manager's position.
10 She asked about Meyers Chuck also being an enclave. He told her that he
11 did not think the LBC would approve it but he would have to consider it if
12 she made an equal or stronger case than that for Hyder. He told her
13 generally about the process, procedures, and standards. She asked who
14 she could contact for technical assistance. He told her that he had just
15 provided her with technical assistance. He did not discourage her from

16 a finished report for publication once she has received it from the person who wrote it. The court
17 found her testimony credible.

18 ⁸³⁶ Tr. 388-400 (Mr. Bockhorst's October 2008 Evidentiary Hearing testimony). The court
19 found his testimony credible.

20 ⁸³⁷ R. 1416, 1266-71, Tr. 271-77 (Mr. Davis's October 2008 Evidentiary Hearing testimony), Tr.
21 388-400 (Mr. Bockhorst's October 2008 Evidentiary Hearing testimony). Mr. Bockhorst also
22 testified that he thinks he learned about the vacancy on the AML website. This is consistent with
23 the KGB's evidence in the record concerning when and where it advertised the position. The
24 court found Mr. Davis and Mr. Bockhorst's testimony to be credible. Mr. Bockhorst also
25 testified that he: dealt with Mr. Hill, not Mr. Eckert, on the KGB petition; he does not recall
when he found out that Mr. Eckert had resigned, it was not a significant matter to him at the
time; and, he knows now that there was an article in the Ketchikan Daily News on June 26, 2007
about the resignation. Tr. 388-400. The court found this testimony credible. The court notes
that the record simply does not support these Appellants' insinuation that Mr. Bockhorst learned
of the KGB position vacancy and then attempted to curry favor with a prospective employer by
favoring the KGB in the Preliminary Report. It is evident, as discussed below, that the
Preliminary Report is based on his actual professional opinion, that opinion pre-dates the KGB's
filing of its annexation petition, he had discussed this professional opinion of the KGB petition
with then Director Black in March 2007, and his work on the Preliminary Report was at least
substantially completed, if not totally completed, by the time that Mr. Eckert resigned and that
information became public.

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1 trying to make the case for Meyers Chuck being an enclave. They spoke
2 for some 24 minutes.⁸³⁸

3 2. Mr. Bockhorst reflected on his conversation with Ms. Brown and decided
4 he did not want to be in the position of taking such telephone calls while
5 contemplating applying for the KGB Borough Manager position.⁸³⁹

6 3. Later on July 31, 2007 he spoke with his Ethics Supervisor, Mr. Davis and
7 the State Ethics Attorney, Ms. Bockmon.⁸⁴⁰ Ms. Bockmon advised him to
8 make a formal disclosure to Mr. Davis and to refrain from taking any
9 action on the KGB petition until Mr. Davis made his ethics
10 determination.⁸⁴¹ Mr. Davis also told him to take no action on the KGB
11 petition pending his ethics determination.⁸⁴²

12 4. Mr. Bockhorst informed then Director Black of the situation on July 31,
13 2007.⁸⁴³ Director Black made the decision to reassign the KGB petition to
14 Ms. McPherran.⁸⁴⁴

15 5. Mr. Bockhorst informed Director Jollie of his recusal on August 1, 2007,
16 and that if she had questions or concerns about the KGB petition she
17 would have to speak with Ms. McPherran as he no longer had anything to
18 do with it.⁸⁴⁵

19 6. Mr. Bockhorst submitted a formal Request for Ethics Determination to
20 Mr. Davis on August 1, 2007.⁸⁴⁶

21 ⁸³⁸ Tr. 241-55 (Ms. Brown's October 2008 Evidentiary Hearing testimony). Tr. 388-400 (Mr.
22 Bockhorst's October 2008 Evidentiary Hearing testimony). The court found Ms. Brown and Mr.
23 Bockhorst's testimony to be credible.

24 ⁸³⁹ Tr. 388-400 (Mr. Bockhorst's October 2008 Evidentiary Hearing testimony). The court
25 found Mr. Bockhorst's testimony to be credible.

⁸⁴⁰ R. 1416, Tr. 271-77 (Mr. Davis's October 2008 Evidentiary Hearing testimony), Tr. 388-400
(Mr. Bockhorst's October 2008 Evidentiary Hearing testimony). The court found Mr. Davis and
Mr. Bockhorst's testimony to be credible.

⁸⁴¹ R. 1416, Tr. 271-86 (Mr. Davis's October 2008 Evidentiary Hearing testimony). The court
found his testimony credible.

⁸⁴² Tr. 286-93 (Mr. Davis's October 2008 Evidentiary Hearing testimony). The court found his
testimony credible.

⁸⁴³ Tr. 437 (Mr. Bockhorst's October 2008 Evidentiary Hearing testimony). Mr. Bockhorst also
informed the Deputy Commissioner. The court found his testimony credible.

⁸⁴⁴ Tr. 437 (Mr. Bockhorst's October 2008 Evidentiary Hearing testimony). The court found his
testimony credible.

⁸⁴⁵ Tr. 125-31 (Director Jollie's October 2008 Evidentiary Hearing testimony). She also
testified that this was her first day as Director. The court found her testimony credible.

⁸⁴⁶ R. 1266-71.

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- 1 7. Mr. Bockhorst informed Chair Ketchum of his situation and his recusal on
2 July 31 or August 1, 2007.⁸⁴⁷
- 3 8. Mr. Bockhorst told Ms. McPherren on August 1, 2007 that he had recused
4 himself and that the KGB petition had been reassigned to her.⁸⁴⁸ They did
5 not discuss the merits of the KGB petition.⁸⁴⁹ He did tell her she needed
6 to follow up with Mr. Jeans of DEED.⁸⁵⁰ She immediately began work on
7 the KGB petition.⁸⁵¹ She worked independently.⁸⁵² She only discussed
8 the petition with Ms. Atkinson.⁸⁵³
- 9 9. Mr. Davis requested and received a confidential advisory opinion on the
10 matter from the Department of Law.⁸⁵⁴ He informed Mr. Bockhorst
11 during the week of September 4, 2007 that his ethics determination was
12 that Mr. Bockhorst should continue to recuse himself from the KGB and
13 Wrangell petitions.⁸⁵⁵
- 14 10. Mr. Bockhorst took no action on the KGB petition after July 31, 2009.⁸⁵⁶

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12 ⁸⁴⁷ Tr. 400-06 (Mr. Bockhorst's October 2008 Evidentiary Hearing testimony), Tr. 23, 27 (Chair
13 Ketchum's October 2008 Evidentiary Hearing testimony). The court found Mr. Bockhorst and
14 Chair Ketchum's testimony credible.

15 ⁸⁴⁸ Tr. 172-73 (Ms. McPherren's October 2008 Evidentiary Hearing testimony). The court
16 found Ms. McPherren's testimony credible.

17 ⁸⁴⁹ Tr. 174-79 (Ms. McPherren's October 2008 Evidentiary Hearing testimony). The court
18 found Ms. McPherren's testimony credible.

19 ⁸⁵⁰ Tr. 174-79 (Ms. McPherren's October 2008 Evidentiary Hearing testimony). The court
20 found Ms. McPherren's testimony credible.

21 ⁸⁵¹ Tr. 179-84 (Ms. McPherren's October 2008 Evidentiary Hearing testimony). The court
22 found Ms. McPherren's testimony credible. R. 593-601 (8/2/07 letter to Mr. Jeans of DEED), R.
23 1295 (8/3/07 e-mail to Mr. Bockhorst -forwarding draft (apparently of a portion of the Final
24 Report) concerning Mr. Bockhorst's conversation the prior week with Mr. Jeans), R. 1294, R.
25 1493.

⁸⁵² Tr. 172-73, 179-84. (Ms. McPherren's October 2008 Evidentiary Hearing testimony). The
court found Ms. McPherren's testimony credible.

⁸⁵³ Tr. 179-84. (Ms. McPherren's October 2008 Evidentiary Hearing testimony). The court
found Ms. McPherren's testimony credible.

⁸⁵⁴ R. 1417-18.

⁸⁵⁵ R. 1417-18, Tr. 1293-1301 (Mr. Davis' October 2008 Evidentiary Hearing testimony). The
record reflects that Mr. Bockhorst had not been involved in the preparation of DCCED's
Preliminary Report on the Wrangell incorporation petition. R. 1267-71. And that Mr. Bockhorst
had also recused himself from the Wrangell petition. Tr. 306-08 (Mr. Davis's October 2008
Evidentiary Hearing testimony).

⁸⁵⁶ R. 1416, 1266-71, Tr. 400-06 (Mr. Bockhorst's October 2008 Evidentiary Hearing
testimony), Tr. 179-92. (Ms. McPherren's October 2008 Evidentiary Hearing testimony), Tr.
37-38, 53-57 (Chair Ketchum's October 2008 Evidentiary Hearing testimony). The court finds

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1 The City of Craig and the Craig Community Association requested in their
2 comment that the LBC “carefully scrutinize” the situation. They did not request a formal
3 investigation. They did not request that the LBC involve the Attorney General’s Office or any
4 other office, department, agency, or entity.

5 The LBC Commissioners received the City of Craig and POWCAC’s
6 comment.⁸⁵⁷ Chair Ketchum, as noted above, was already aware that Mr. Bockhorst had recused
7 himself the day he became aware that the KGB was soliciting applicants for its Borough
8 Manager position, and he was aware of when the Preliminary Report had been completed.⁸⁵⁸
9 Chair Ketchum checked Mr. Bockhorst’s computer to make sure that he had not done any KGB
10 related work since he was to have recused himself.⁸⁵⁹ He found that the last time that Mr.
11 Bockhorst had accessed anything on the KGB petition was mid-June.⁸⁶⁰ Chair Ketchum is a
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16 the testimony of Mr. Bockhorst, Ms. McPherren, and Chair Ketchum to be credible. There is
17 evidence in the record that Ms. McPherren e-mailed Mr. Bockhorst to ask if a draft section was
18 consistent with his prior contact with Mr. Jeans, Mr. Bockhorst was copied with a couple of e-
19 mails, and that Ms. McPherren asked him for the list of DCCED activities and he had complied.
20 In the court’s view none of these communications reflect that he had any actual continuing
21 involvement with the KGB petition. The court found credible the related testimony provided by
22 Ms. McPherren (Tr. 184-92, 200-04), Ms. Starkey (Tr. 470-72), and Mr. Bockhorst (Tr. 414-425)
23 during the October 2008 Evidentiary Hearing. The court also notes that it ordered that Appellants
24 have broad access to such communications and apparently what was added to the record (and
25 referenced herein) was all that was discovered.

⁸⁵⁷ Tr. 214-15 (Ms. McPherren’s October 2008 Evidentiary Hearing testimony). Tr. 47-50, 53-
57 (Chair Ketchum’s October 2008 Evidentiary Hearing testimony). The court found Ms.
McPherren and Chair Ketchum’s testimony credible.

⁸⁵⁸ The Preliminary Report was in the LBC record at that point. It is dated June 30, 2007. And
it is implicit in his testimony concerning his examination of Mr. Bockhorst’s computer.

⁸⁵⁹ Tr. 53-57. (Chair Ketchum’s October 2008 Evidentiary Hearing testimony). The court found
his testimony credible.

⁸⁶⁰ Tr. 53-57. (Chair Ketchum’s October 2008 Evidentiary Hearing testimony). The court found
his testimony credible.

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1 retired University of Alaska computer science professor.⁸⁶¹ He concluded that there was no
2 actual conflict of interest.⁸⁶²

3 The City of Craig and Craig Community Association, in their October 19, 2007
4 letter⁸⁶³ to Governor Palin, asserted that: the KGB had announced its Borough Manager vacancy
5 before Mr. Bockhorst had submitted the Preliminary Report on the KGB annexation petition; and
6 in the Preliminary Report he had completely reversed "his" 1998 recommendation on the KGB's
7 prior annexation petition. They expressed concern over the appearance of impropriety and
8 apparent conflict of interest. They requested that the Governor: direct the LBC to cancel the
9 November 6, 2007 Public Hearing on the KGB petition and the November 7, 2007 Decisional
10 Meeting; and, that she direct the Attorney General to conduct a full investigation of the conflict
11 of interest situation.
12

13 The Governor's Office forwarded the City of Craig and Craig Community
14 Association's letter to Director Jollie and instructed her to prepare a response. She routinely
15 received such letters through the Governor's Office. She asked Mr. Bockhorst when he had
16 worked on the Preliminary Report and when he had applied for the KGB position. She obtained
17 information from Ms. McPherrren. She did not find anything that supported the allegations. She
18 did not find anything that would be grounds for an ethics investigation or an investigation by the
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23 ⁸⁶¹ Tr. 32, 53-57, 66. (Chair Ketchum's October 2008 Evidentiary Hearing testimony). The
24 court found his testimony credible.

25 ⁸⁶² Tr. 53-57. (Chair Ketchum's October 2008 Evidentiary Hearing testimony). The court found
his testimony credible.

⁸⁶³ R. 1259-61.

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1 Attorney General's Office. She then prepared the October 31, 2007 letter to the City of Craig
2 and Craig Community Association.⁸⁶⁴

3 Director Jollie stated in her October 31, 2007 letter⁸⁶⁵ that: she was responding to
4 their October 19, 2007 letter to the Governor; she had carefully reviewed DCRA's records to see
5 if there was any support for their allegations; Mr. Bockhorst did not completely reverse his⁸⁶⁶
6 recommendation, the policy underlying the 1998 reports was set by the prior administration, Mr.
7 Bockhorst addressed this at fn. 67 of the Preliminary Report, and the new petition is materially
8 different from the old petition because it includes Meyers Chuck and the Hyder enclave has
9 different boundaries, and Exhibit K to the petition provides a thorough discussion of the
10 justification for the enclave; Mr. Bockhorst began his analysis of the KGB petition on March 26,
11 2007, he discussed policy aspects with the former Director that date; Mr. Bockhorst completed
12 his work on the Preliminary Report on June 28, 2007 and it was forwarded to the DCRA
13 publications technician; the KGB announced the position vacancy on July 29, 2007; Mr.
14 Bockhorst disclosed his interest in applying for the position in an August 1, 2007 memorandum
15 to his Ethics Supervisor in accordance with the Executive Branch Ethics Act; Mr. Bockhorst
16 advised in the memorandum that he had learned of the position vacancy on July 31, 2007; Mr.
17 Bockhorst recused himself in the memorandum and the KGB petition was reassigned to Ms.
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21 ⁸⁶⁴ Tr. 139-54 (Director Jollie's October 2008 Evidentiary Hearing testimony). The court found
Director Jollie's testimony credible.

22 ⁸⁶⁵ R. 1262-64.

23 ⁸⁶⁶ The record clearly reflects that the 1998 Preliminary Report and Final Report on the KGB's
24 1998 annexation petition did not reflect Mr. Bockhorst's professional views with respect to the
25 basis for DCRA's recommendations that the LBC deny the KGB's petition. This is evident from
the multiple references to "DCRA policymakers" in those reports. The court's conclusion is also
supported by Mr. Cotton's testimony during the October 2008 Evidentiary Hearing. Tr. 446-63.
and Mr. Bockhorst's October 2008 Evidentiary Hearing testimony. Tr. 430-441. The court
found Mr. Cotton and Mr. Bockhorst's testimony credible.

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1 McPherrren; Ms. McPherrren independently prepared the Final Report on the KGB petition; and,
2 she found no basis to support or recommend that the LBC cancel or postpone the upcoming
3 hearings and no reason to support their request for an official investigation into a conflict of
4 interest claim against Mr. Bockhorst.

5 Director Jollie showed Chair Ketchum the City of Craig and Craig Community
6 Association's October 19, 2007 letter to Governor Palin.⁸⁶⁷ He saw Director Jollie's October 31,
7 2007 letter before the November 6, 2007 LBC Public Hearing.⁸⁶⁸ He concurred with her
8 letter.⁸⁶⁹ He did not think that the Governor had the authority to cancel a LBC hearing and, after
9 reading the letter, he did not give any consideration to canceling the meeting so that a conflict of
10 interest investigation could take place.⁸⁷⁰ He thought that this issue would be addressed at the
11 hearing.⁸⁷¹

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13 Chair Ketchum did not discuss the City of Craig and POWCAC's September 4,
14 2007 comment with the other Commissioners.⁸⁷² He apparently did not discuss the October 19,
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20 ⁸⁶⁷ Tr. 64-73 (Chair Ketchum's October 2008 Evidentiary Hearing testimony). The court found
his testimony credible.

21 ⁸⁶⁸ Tr. 64-73 (Chair Ketchum's October 2008 Evidentiary Hearing testimony). The court found
his testimony credible.

22 ⁸⁶⁹ Tr. 64-73 (Chair Ketchum's October 2008 Evidentiary Hearing testimony). The court found
his testimony credible.

23 ⁸⁷⁰ Tr. 64-73 (Chair Ketchum's October 2008 Evidentiary Hearing testimony). The court found
his testimony credible.

24 ⁸⁷¹ Tr. 64-73 (Chair Ketchum's October 2008 Evidentiary Hearing testimony). The court found
his testimony credible.

25 ⁸⁷² Tr. 59-63 (Chair Ketchum's October 2008 Evidentiary Hearing testimony). The court found
his testimony credible.

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1 2007 or October 31, 2007 letters with the other Commissioners. The other Commissioners had
2 copies of the September 4, 2007 comment⁸⁷³ and Director Jollie's October 31, 2007 letter.⁸⁷⁴

3 Chair Ketchum presided over the November 6, 2007 LBC Public Hearing. Near
4 the outset Mr. Eckert mentioned the controversy concerning Mr. Bockhorst in his testimony.⁸⁷⁵

5 Chair Ketchum responded:

6
7 "Thank you. And I have concern with your comments on the problem with the
8 former employee, the local – actually not the Local Boundary Commission but of
9 the Department of Commerce and one of our staff members. We have
10 investigated this one here quite extensively. We do have some very precise dates
11 on when things happened, and they are way out of bounds in relationship to the
12 petition. We also recognize that the petition was reviewed by – the final petition
13 was completed by Jeanne McPherren, and she also reviewed the preliminary
14 petition that Mr. Bockhorst had written way back in early June, and most of it
15 back even before that. And she reviewed that quite extensively, and concurred
16 with everything that he had in there, and I will assure you we are quite prepared to
17 defend anything that Mr. Bockhorst has done. And I will also assure you that
18 there would be absolutely no difference had even written the petition and that was
19 (indiscernible) for. There would be zero difference because he actually performed
20 exactly what the law and what was required of him by myself, by the Department,
21 et cetera, and so – everybody that's associated. He did not put any of his own
22 personal opinions on there, or anything of that nature. And I know that he had no
23 intention of – when I started in this job – no intention of moving into the Borough
24 management job here, because he made me promise way back in early July to not
25 quit the Commission, because he didn't want to train another person come
January. So I do know that his intention at that time was not to leave and to start
– to come into this job. But thank you, anyway. We appreciate your
comments."⁸⁷⁶

21 ⁸⁷³ Tr. 214-15 (Ms. McPherren's October 2008 Evidentiary Hearing testimony). Tr. 47-50, 53-
22 57 (Chair Ketchum's October 2008 Evidentiary Hearing testimony). The court found Ms.
McPherren and Chair Ketchum's testimony credible.

23 ⁸⁷⁴ R. 1262-64, Tr. 74-79 (Chair Ketchum's October 2008 Evidentiary Hearing testimony). The
court found his testimony credible.

24 ⁸⁷⁵ Tr. 76-77

25 ⁸⁷⁶ Tr. 78-79. Chair Ketchum credibly testified during the October 2008 Evidentiary Hearing
that the "investigation" he was referencing was that done by Director Jollie which resulted in her
October 31, 2007 letter. Tr. 83-84.

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1 Four other persons mentioned this matter during the remainder of the LBC Public
2 Hearing. The first was Mr. Blasco, legal counsel for the City of Craig, Craig Community
3 Association, and Meyers Chuck Community Association. He stated that: nobody was claiming
4 that there was an ethical violation; they are claiming that there was an apparent conflict of
5 interest; and, it still exists because the LBC is a quasi-judicial body and many of the
6 communities in the unorganized borough have asked to include things in the record that may not
7 be in the record, DCCED staff has changed its position from 1998 on NFR's and on its
8 interpretation of the Alaska Constitution.⁸⁷⁷ He did not request an investigation or request that
9 the hearing be canceled or continued. The second was Mr. Brandt-Erichsen, KGB's counsel,
10 who testified that DCRA had a political agenda in 1998 and that the Deputy Commissioner, Mr.
11 Cotton, had made the policy decision that DCRA would recommend against LBC approval of the
12 KGB's annexation petition.⁸⁷⁸ The third was the Superintendent of the Annette Island School
13 District, Mr. Agenbroad, who opined that there was a very real perception, whether true or not,
14 of a conflict of interest and he asked that the LBC cause a related independent investigation.⁸⁷⁹
15 The fourth was Mr. Bolling, who opined that the 1999 LBC decision had been correct and had no
16 cloud of apparent conflict, unlike the current situation.⁸⁸⁰

17
18 None of the other Commissioners mentioned the conflict of interest or apparent
19 conflict of interest allegations during the LBC Public Hearing. The matter was not discussed
20 during the November 7, 2007 Decisional Meeting.
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24 ⁸⁷⁷ Tr. 105-06.

⁸⁷⁸ Tr. 163-64.

⁸⁷⁹ Tr. 186-88.

⁸⁸⁰ Tr. 206-10. Mr. Brown, in her comment, also noted that she had spoken with Mr. Bockhorst
on July 31, 2007 at 9:32 a.m. about the KGB petition. Tr. 219.

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1 The Commissioners did state their view on this matter in the LBC's Statement of
2 Decision, which included the statement that:

3 "As a final matter, the Commission will address the allegations regarding DCCED
4 Staff in this proceeding, specifically Dan Bockhorst. The Commission finds no
5 basis to support the ethical violations levied against Staff by the City of Craig and
6 others. Mr. Brockhorst and Ms. McPherran have consistently performed their
7 duties as Commission Staff in the most ethical and professional manner possible,
8 including in this proceeding. The Commission holds them both in high
9 regard."⁸⁸¹

10 And the LBC appended the following to the Statement of Decision as Appendix B:

11 **"Timeline of Events for Participation of**
12 **DCCED Staff in KGB Annexation Proceeding**

13 **March 26, 2007:** Mr. Bockhorst begins his analysis of the Ketchikan
14 annexation proposal, at which point he discussed policy
15 aspects of the proposal with the former Director of
16 Community and Regional Affairs (DCRA), Mike Black.

17 **June 26, 2007:** Mr. Bockhorst's work on the 2007 preliminary report was
18 complete and forwarded to the DCRA publications
19 technician for formatting and publication.

20 **July 13, 2007:** The KGB preliminary report was published by DCCED.

21 **July 29, 2007:** Just over one month after Mr. Bockhorst completed his
22 work on the annexation proposal for DCCED's 2007
23 preliminary report, the KGB first announced that it was
24 recruiting for a Borough Manager.

25 **August 1, 2007:** In accordance with the Executive Branch Ethics Act, Mr.
Bockhorst wrote a memorandum to the DCCED Ethics
Supervisor disclosing an interest in applying for the KGB
manager position. Mr. Bockhorst stated in his
memorandum that he first became aware of the recruitment
for the position on July 31. In his memorandum, he
recused himself with respect to any and all future dealings
regarding the Ketchikan annexation proposal. Mr.
Bockhorst's work regarding the KGB annexation

⁸⁸¹ R. 1004.

1 proceeding was immediately reassigned to Jeanne
2 McPherren.

3 **October 15, 2007:** Ms. McPherren independently prepared the 2007 final
4 report regarding the KGB annexation proposal.⁸⁸²

5 Given the above, the court finds that:

- 6 1. The public could reasonably have perceived that Mr. Bockhorst's applying
7 for the KGB Borough Manager position resulted in his having an actual or
8 apparent conflict of interest.
- 9 2. Mr. Bockhorst had completed his work on DCCED's Preliminary Report
10 on the KGB's 2007 annexation petition before Mr. Eckert's resignation as
11 the KGB Borough Manager was public knowledge.
- 12 3. Mr. Bockhorst became aware that the KGB was soliciting applicants for
13 its Borough Manager position after he had completed his work on
14 DCCED's Preliminary Report on the KGB's annexation petition. He
15 would have had a conflict of interest if he had continued to work on the
16 KGB petition when he knew he was interested in the position. He did not
17 do so after he became aware of the KGB solicitation.⁸⁸³
- 18 4. DCCED's Preliminary Report contains Mr. Bockhorst's actual long-
19 standing professional views on the issues addressed therein. DCRA's
20 1998 reports on the KGB's prior annexation petition did not set forth his
21 personal professional views on the points that DCRA relied upon in
22 recommending that the LBC deny that petition. He did not in any way
23 tailor the 2007 Preliminary Report to curry favor with the KGB.

18 ⁸⁸² R. 1008. The LBC's decision has now been issued. This letter was not in the LBC's record.
19 None of the documents or testimony hereafter referenced in the "Record" portion of this decision
20 were in the LBC's record.

21 ⁸⁸³ He did speak with Ms. Brown by telephone the morning of July 31, 2007. Assuming that Mr.
22 Bockhorst had a conflict of interest at that point, his conversation with Ms. Brown constituted a
23 de minimis act while the conflict existed. He had just learned of the KGB solicitation, he took
24 her call because he had been the DCCED staff person assigned to the KGB petition, he provided
25 her with technical assistance as required by the LBC's regulations; he did not attempt to
discourage her; the subject she presented involved Meyers Chuck; he realized after her call that
he needed to take action to avoid a conflict of interest, he took appropriate action, the Director
reassigned the KBG petition to Ms. McPherren that date, and he had no further involvement with
the KGB petition. He did respond to Ms. McPherren's request for DCCED work load
information but he was not knowingly assisting her in her preparation of the Final Report and the
information he provided had nothing to do with the merits of the KGB's petition.

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- 1 5. Mr. Bockhorst complied with the Executive Branch Ethics Act⁸⁸⁴, and
2 otherwise proceeded appropriately once he became aware of the KGB
3 solicitation for applicants and knew he had an interest in applying. Said
4 awareness and interest occurred roughly contemporaneously. He recused
5 himself from the KGB annexation petition. Then Director Black
6 reassigned the petition to Ms. McPherren. He thereafter did no work on
7 the KGB petition and did not attempt to influence Ms. McPherren with
8 respect to the same.
- 9 6. Ms. McPherren reviewed the record, conducted related research, and gave
10 due consideration to all of the comments DCCED received on the
11 Preliminary Report. She independently prepared DCCED's Final Report.
12 Her work and the Final Report complied with the requirements of the
13 applicable administrative regulations.
- 14 7. Ms. McPherren worked for DCCED on a contract basis. She worked
15 independently. Mr. Bockhorst may technically have been her supervisor.
16 The record reflects that his being her supervisor had no affect on her views
17 of the KGB petition or her work on the related Final Report.
- 18 8. The LBC (Chair Ketchum) did "carefully scrutinize" the conflict of
19 interest allegations per the request stated in the City of Craig and
20 POWCAC's September 4, 2007 comment. He had already spoken to Mr.
21 Bockhorst and understood that Mr. Bockhorst had completed the
22 Preliminary Report before he was aware of the KGB position solicitation
23 and that he had recused himself from the KGB petition. He used his
24 computer expertise to check Mr. Bockhorst's computer to confirm that Mr.
25 Bockhorst had not done any KGB related work since finishing the
Preliminary Report in mid-June 2007. He was aware of Director Jollie's
investigation and the content of her October 31, 2007 letter to the City of
Craig and the Craig Community Association.
9. Chair Ketchum reasonably concluded that: Mr. Bockhorst had completed
work on the DCCED's 2007 Preliminary Report on the KGB annexation
petition well before the KGB solicited applications for its Borough
Manager position; there was no conflict of interest; there was no need for
an investigation; there was no need to reject the Preliminary Report; and,
there was no need to cancel or postpone the LBC's November 6, 2007
Public Hearing or its November 7, 2007 Decisional Meeting. He also was
aware that the City of Craig and the Craig Community were now aware of
what he (reasonably) understood the facts to be.⁸⁸⁵

⁸⁸⁴ AS 39.52.010 et seq.

⁸⁸⁵ And that Mr. Bolling was acting as representative for both the City of Craig and POWCAC.

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- 1 10. The LBC's handling of the conflict of interest comment during its
2 November 6, 2007 Public Hearing was reasonable.

3 The LBC was aware that Ms. Jollie's October 31, 2007 letter had already
4 been sent to the City of Craig and the Craig Community Association, and
5 that the City of Craig was one of the entities that had raised the matter in
6 the September 4, 2007 comment.⁸⁸⁶

7 Chair Ketchum stated during the November 6, 2007 LBC Public Hearing
8 on the KGB's annexation petition that: Mr. Bockhorst had completed the
9 Preliminary Report in June 2007; Mr. Bockhorst had no intention of
10 applying for the KGB petition when he spoke with him in July 2007; Ms.
11 McPherren prepared the Final Report; she agreed with Mr. Bockhorst's
12 conclusions; and, they had investigated the matter extensively and were
13 prepared to defend what Mr. Bockhorst and Ms. McPherren had done.

14 The vast majority of the persons who addressed the LBC thereafter during
15 the Public Hearing did not mention this subject.

16 Mr. Bolling, speaking of behalf of the City of Craig, only briefly
17 mentioned the matter. He did not ask for a further investigation. He did
18 not ask that the hearing be continued to a later date. He did not ask the
19 LBC to require a new Report or require an independent investigation of
20 Mr. Bockhorst's situation. He did ask the LBC to take the full 90 days to
21 decide the KGB petition.

22 Mr. Blasco, counsel for the City of Craig (and POWCAC and the Meyers
23 Chuck Community Association) told the LBC that nobody was claiming
24 that Mr. Bockhorst had committed ethical violations, the concern was that
25 there was an apparent conflict of interest, and that it still existed because
DCCED's staff had changed its position on constitutional matters from
that espoused by the LBC in its 1999 decision on the prior KGB
annexation petition, and the staff had changed its position on NFR's. He
stated that people wanted to know why. He did not ask that the hearing be
continued. He did not request that the LBC order a new Report or require
an independent investigation of Mr. Bockhorst's situation.

DCCED explained the basis for its constitutional interpretations in the
2007 Preliminary Report and Final Report and why they differ from the
LBC's 1999 position. The LBC clearly disagreed in 1999 with DCRA
with respect to the latter's view of the importance of NFR's. This would
provide an apparent and logical explanation for DCCED's 2007 treatment
of NFR's. And DCCED's approach would be consistent with the "stare

⁸⁸⁶ And the City of Craig and POWCAC were both being represented by Mr. Bolling.

1 decisis” principles discussed in the *May* decision. And DCCED provided
2 additional explanation at fn. 67 of the Preliminary Report, which
3 explanation was entirely consistent with the text of the 1998 DCRA
4 Reports (and the multiple references to “DCRA policymakers”).

5 The LBC Commissioners, having reviewed the September 4, 2007
6 comment and Director Jollie’s October 31, 2007 letter and the DCCED
7 Reports, and having heard Chair Ketchum’s statement during the
8 November 6, 2007 Public Hearing and the related comments, evidently
9 individually decided that matter did not merit further comment or scrutiny.

10 11. There was no apparent conflict of interest by the time the LBC’s
11 November 6, 2007 Public Hearing had concluded. The apparent conflict
12 of interest allegations were based on the timeline concerning the KGB
13 Borough Manager position, the content of DCRA’s 1998 Report, the
14 LBC’s 1999 Statement of Decision, and DCCED’s 2007 Reports. The
15 City of Craig, POWCAC, and the Craig Community Association may
16 have subjectively believed that there was an apparent conflict of interest,
17 but an objective person who had reviewed the 1998 DCRA Reports, the
18 1999 LBC Statement of Decision, the 2007 DCCED Reports; and attended
19 the November 6, 2007 LBC Public Hearing would not have. And this
20 conclusion would find further support if the reasonable person had
21 reviewed Director Jollie’s October 31, 2007 letter.

22 12. The LBC addressed Mr. Bockhorst’s situation in the text of and Appendix
23 B to its Statement of Decision. A reasonable person, at this point and
24 having reviewed the above, could not conclude that there was an apparent
25 conflict of interest.⁸⁸⁷

26 13. The LBC acted reasonably in not requiring that a new Report be prepared
27 by an independent consultant, or anybody else.

28 14. The LBC acted reasonably in not requesting that the Attorney General’s
29 office conduct an investigation. The City of Craig and POWCAC had
30 asked the LBC to closely scrutinize Mr. Bockhorst’s situation. They did
31 not ask the LBC to make such a request of the Attorney General’s Office.

32 ⁸⁸⁷ The City of Craig evidently did not believe Director Jollie, as evidenced by Mr. Bolling’s
33 November 3, 2007 letter which, in part, addressed this subject. And these Appellants continue to
34 subjectively believe that there was an apparent, if not actual, conflict of interest. But the City of
35 Craig (and all of the other Appellants) have now had a full opportunity to obtain the information
36 they requested in the November 3, 2007 letter, and other pertinent information. They have had
37 the opportunity to present evidence during an evidentiary hearing and to otherwise supplement
38 the record on appeal. And they nonetheless have not been able to factually support their conflict
39 of interest related claims.

1 Such a request was made in the October 19, 2007 letter to Governor Palin,
2 but the City of Craig and the Craig Community Association did not send
3 the letter to the LBC or copy the LBC. Chair Ketchum was aware of the
4 letter. He and the other Commissioners were aware of Director Jollie's
5 October 31, 2007 response. They could reasonably conclude that a
6 request for such an investigation was not warranted.

7
8 15. Though the court has found that there was no actual conflict of interest,
9 and that there was no appearance of impropriety or apparent conflict after
10 the LBC's November 6, 2007 Public Hearing, it appears that the actual
11 decision point on this issue is now, with the determination being made by
12 the court and on the basis of the entire record. The court finds that Mr.
13 Bockhorst's situation does not create the appearance of impropriety or an
14 actual or apparent conflict of interest.

15
16 16. These Appellants have not shown that there was a due process violation as
17 a result of Mr. Bockhorst's involvement with the KGB's 2006 annexation
18 petition. They have not shown that said involvement is otherwise the
19 basis for the court to grant them the relief they seek.

20 **D. Attorney General Opinion**

21 DCCED did not request an opinion from the Attorney General's Office with
22 respect to its interpretation of the pertinent provisions of the Alaska Constitution in the 2007
23 Preliminary and Final Reports. The LBC did not request such an opinion. These facts do not
24 warrant the court granting these Appellant's the relief they seek for at least four reasons. First,
25 neither DCCED nor the LBC are required by statute or regulation to obtain such an opinion.
Second, these Appellants have not shown that DCCED or the LBC routinely request such
opinions. The record reflects that they do not. For example, there is nothing in the record
concerning the KGB's 1998 annexation petition that reflects that DCRA or the LBC sought such
an opinion with respect to the same. Third, the Alaska Supreme Court has recognized that non-
lawyers in administrative agencies interpret the law in the course of their official duties⁸⁸⁸ and
the Court has also recognized that the LBC "has been given a broad power to decide in the

1 unique circumstances presented by each petition whether borough government is appropriate.⁸⁸⁹

2 Fourth, these Appellants have not shown that the lack of Attorney General opinion violated their
3 rights to due process or is otherwise the basis for the court to grant them the relief they seek.

4 **2. Hyder Enclave**

5 These Appellants claim that the LBC acted arbitrarily and capriciously by
6 deviating from its historical and regulatory policy by creating the Hyder enclave and by
7 retroactively applying regulations adopted after the KGB filed its 2006 annexation petition in
8 order to support its decision, which denied the Appellants due process.
9

10 They argue that:

- 11 A. DCCED admitted in the Preliminary Report that the LBC has a policy
12 against approving borough boundaries that leave enclaves.
- 13 B. The only prior enclave the LBC has approved was the exclusion of
14 Klukwan from the Haines Borough.
- 15 C. The public policy rationale for the Klukwan enclave does not exist with
16 respect to Hyder.
- 17 D. The LBC had no justification for departing from its policy against
18 enclaves. The LBC improperly focused on the territory proposed for
19 annexation into the KGB and not the Hyder area being excluded. The 3
20 AAC 110.190 standards were not met.
- 21 E. The LBC favored the KGB by relying on a version of 3 AAC 110.190 that
22 was not in effect when the KGB filed its 2007 annexation petition. This is
23 analogous to the Skagway situation in which the Juneau Superior Court
24 determined that the LBC had erred by in effect developing and applying
25 new regulations after its Public Hearing, without the public having notice
or an opportunity to be heard.
- F. The foregoing demonstrates that the LBC acted arbitrarily and
capriciously.

⁸⁸⁸ See, *Alaska Public Interest Research Group*, 167 P.3d at 42.

⁸⁸⁹ *Mobil Oil Corp.*, 518 P.2d at 99. And the court again notes that the Attorney General's Office is defending the LBC's interpretations of the Alaska Constitution in this appeal.

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1 **a. Enclave Policy**

2 The LBC did have a policy against the creation of enclaves. The policy was
3 embodied in 3 AAC 110.190(b). 3 AAC 110.190(b) provided:

4 Absent a specific and persuasive showing to the contrary, the commission will
5 presume that territory . . . that would create enclaves in the annexing borough,
6 does not include all land and water necessary to allow for the full development of
essential borough services on an efficient, cost-effective level.

7 The DCCED properly acknowledged this in its Preliminary Report on the KGB's 2006
8 annexation petition.⁸⁹⁰

9 **b. Policy Implementation**

10 The LBC did not violate its enclave policy with respect to the KGB's 20076
11 annexation petition for five reasons.

12 First, the LBC⁸⁹¹ recognized that the presumption applied and that a "higher level
13 of proof" was required.⁸⁹²

14 Second, the LBC did compare the proposed Hyder enclave to the one existing
15 enclave, Klukwan. The LBC noted that the public policy issues present for the Klukwan enclave
16 did not apply to Hyder. But the LBC also noted facts that reasonably support the conclusion that
17 there was less justification for the Klukwan enclave than for a Hyder enclave.⁸⁹³

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21 ⁸⁹⁰ R. 517.
22 ⁸⁹¹ The LBC incorporated DCCED's analysis of the enclave situation in its Statement of
Decision. R. 998.
23 ⁸⁹² R. 518-19.
24 ⁸⁹³ R. 521-23. The LBC noted that: Klukwan is connected by road to Haines; Klukwan is only
25 21 miles by road from Haines; most of the students who attend school in Klukwan live in the
Haines Borough; some students who attend school in Haines live in Klukwan; residents of
Klukwan rely on Haines for commercial services, communication services, and for other needs;
and, in contrast, Hyder's commercial, social, cultural, and economic ties are presently with
Stewart, B.C., not with Ketchikan.

1 Third, to the extent that the LBC focused on the territory the KGB proposed to
2 annex, the LBC did not err. The presumption created in 3 AAC 110.190(b) is that an enclave⁸⁹⁴
3 would result in the borough, as it existed after annexation, not including “all land and water
4 necessary to allow for the full development of essential borough services on an efficient, cost-
5 effective level.” The “all land and water necessary” requirement in 3 AAC 110.190(b) is read in
6 conjunction with 3 AAC 110.190(a), which provided that:

7
8 The proposed boundaries of the borough must conform generally to natural
9 geography, and must include all land and water necessary to provide for the full
10 development of essential borough services on an efficient, cost-effective level. In
11 this regard, the commission may consider relevant factors, including

- 12 (1) land use and ownership patterns;
- 13 (2) ethnicity and cultures;
- 14 (3) population density patterns;
- 15 (4) existing and reasonably anticipated transportation patterns and
16 facilities;
- 17 (5) natural geographic features and environmental factors; and
- 18 (6) extraterritorial powers of boroughs.

19 Fourth, the LBC reasonably concluded that the exclusion of the 205 square mile
20 Hyder area did not result in the proposed boundaries failing to conform to natural geography or
21 failing to include all land and water necessary to provide for the full development of essential
22 borough services on an efficient, cost-effective level.⁸⁹⁵ The LBC’s conclusion was supported

23
24 ⁸⁹⁴ 3 AAC 110.190(b) uses the word “enclaves”. It appears that the presumption would also
25 apply to an enclave. The court notes that DCCED and the LBC apparently interpreted the
regulation in this manner and neither the LBC nor the KGB has argued that this provision does
not apply to a single enclave situation.

⁸⁹⁵ Tr. 518-23.

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1 by substantial evidence in the record.⁸⁹⁶ The LBC's related constitutional analysis⁸⁹⁷ was
2 reasonable for the reasons discussed above.

3 Fifth, the LBC recognized that the 2007 amendments to 3 AAC 110.190 were not
4 in effect when the KGB filed its petition and were not applicable to the petition.⁸⁹⁸ The LBC
5 applied 3 AAC 110.190(b) as written. The LBC did comment that it was notable that the 2007
6 revision to 3 AAC 110.190(a) had "refined" that regulation by placing "expanded" between "The
7 proposed" and "boundaries". The LBC's analysis did not rely on the amended version of 3 AAC
8 110.190(b). And, in any event, the amendment did refine, but did not materially change
9 subsection (a). The focus was, and continues to be, on whether the territory within the proposed
10 boundaries "conform generally to natural geography . . . and . . . include all land and water
11 necessary . . ."⁸⁹⁹

12
13 In addition, the LBC addressed the concern that Hyder would remain a permanent
14 enclave by directing the KGB to file an annexation petition within five years, encouraging the
15

16
17 ⁸⁹⁶ Including the evidence referenced above concerning the lack of ties between Hyder and the
18 KGB, and the very strong ties between Hyder and Stewart, B.C. And the evidence concerning
19 the modification of the Hyder enclave boundaries from the boundaries proposed in 1998.

20 ⁸⁹⁷ R. 518-19.

21 ⁸⁹⁸ The court has provided related citations to the record above. The citations include – R. 435-
22 36, 450, 518-19.

23 ⁸⁹⁹ So, to the extent the court can rely on the Skagway documents Appellants submitted without
24 seeking or obtaining leave of court, this situation differs materially from the Skagway situation.
25 The court also notes that these Appellants rely on Mr. Fischer's comments, with respect to the
KGB's 1998 annexation proposal, that Hyder would become a permanent enclave. Mr. Fischer
apparently is a recognized expert concerning at least the municipal government portions of the
Alaska Constitution. The record reflects that he provided his comments in 1998 after being
provided a copy of DCRA's Preliminary Report. He was not asked, by the LBC or Appellants,
to comment on DCCED's 2007 Preliminary Report. He was not asked to comment on the LBC's
Statement of Decision (wherein the LBC stated its intent to revisit the Hyder situation in 5 years
if the KGB did not file a petition to annex Hyder). The court also notes that the Appellants
ignore his comments that it would be entirely improper for the LBC consider NFR funding in
deciding whether or not to approve an annexation petition.

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1 KGB to develop ties with Hyder, and committing to causing such a petition to be filed if the
2 KGB did not do as directed.

3 **c. Arbitrary and Capricious**

4 Given the above, these Appellants have not shown that the LBC acted arbitrarily
5 or capriciously with respect to the Hyder enclave.

6 **3. Decision-Maker**

7
8 These Appellants claim that the LBC denied them, and the people in the
9 unorganized borough, their rights to a fair hearing and to an impartial decision-maker, thereby
10 denying them due process.

11 They argue that:

12 A. The LBC denied a nearly identical KGB annexation petition in 1999.
13 They expected the LBC to likewise deny the KGB's 2006 annexation
14 petition. The LBC instead adopted the analysis set forth in the
15 Preliminary Report on the KGB's 2007 annexation petition. The KGB
16 had accepted Mr. Eckert's resignation before the Preliminary Report was
17 prepared. And Mr. Bockhorst signed a contract to become the KGB
18 Manager just days before completion of the Final Report by his
19 subordinate.

20 B. The LBC was not impartial because:

- 21 1. It did not require the preparation of a new, independent Report.
- 22 2. It refused to request an Attorney General's opinion on its
23 constitutional analysis.
- 24 3. It allowed Ms. McPherren to consult with Mr. Bockhorst on issues
25 related to the KGB petition while it was still pending.
4. It accepted Ms. McPherren's overwork excuse.
5. The Final Report did not address the City of Craig and
POWCAC's constitutional arguments or their appearance of
impropriety claims contained in their September 4, 2007 comment.

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- 1 6. Chair Ketchum stated during the November 6, 2007 LBC Public
2 Hearing that the LBC was prepared to defend what Mr. Bockhorst
3 had done.
- 4 7. Chair Ketchum stated during the November 6, 2007 LBC Public
5 Hearing that the (apparent) conflict of interest claims had been
6 investigated extensively but all that he had done was check Mr.
7 Bockhorst's computer.
- 8 8. The LBC refused to consider the request made by some of the
9 persons making comments during the November 6, 2007 LBC
10 Public Hearing that the LBC take more time to decide whether to
11 accept or reject the KGB's annexation petition.
- 12 9. Chair Ketchum stated that Mr. Bockhorst did not put his personal
13 views in the 2007 Preliminary Report but he could not know of
14 Mr. Bockhorst's October 2008 Evidentiary Hearing testimony
15 during which he explained why the 1998 Reports did not set forth
16 his professional view.
- 17 10. One Commissioner stated during the Decisional Meeting that it
18 was a little hard to reconcile DCCED's recommendation with the
19 LBC's 1999 decision. Ms. McPherrren admitted during the
20 November 7, 2007 LBC Decisional Meeting that there had been no
21 changes in applicable statutes or regulations. The LBC deliberated
22 for only a little over an hour and did not discuss the constitutional
23 issues at all.
- 24 11. Chair Ketchum stated during the December 4, 2007 Public
25 Meeting that the Attorney General's Office had backed up Mr.
 Bockhorst in the past. This shows that he had exalted opinion of
 Mr. Bockhorst and was biased towards accepting his views.
12. Ms. McPherrren would not have done anything in the Final Report
 to contradict Mr. Bockhorst's views, even if shown that he was
 wrong.
13. They have shown that there was a probability of LBC bias based
 on the totality of the circumstances.
14. This situation is analogous to that in *Vaska v. State*.

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1 **a. Mr. Bockhorst**

2 These Appellants' arguments are not persuasive to the extent they are claiming
3 that their due process rights were violated because Mr. Bockhorst prepared DCCED's
4 Preliminary Report and he signed a contract with the KGB days before DCCED's Final Report
5 was completed. Mr. Bockhorst's work on the Preliminary Report had been completed before
6 KGB accepted Mr. Eckert's resignation.⁹⁰⁰ He recused himself from the KGB petition and did
7 not work on the Final Report or attempt to influence the contents thereof. He did not slant the
8 2007 Preliminary Report in an effort to curry favor with the KGB.
9

10 **b. LBC Impartiality**

11 The court has addressed many of these arguments in the context of other claims
12 made by these Appellants and/or all of the Appellants. Per the above discussions, it has not been
13 shown that the LBC was biased in favor of the KGB or otherwise not impartial because: the LBC
14 did not order the preparation of a new Report on the KGB annexation petition by an independent
15 consultant; the LBC refused⁹⁰¹ to request an Attorney General's opinion on its constitutional
16 analysis; the LBC allowed Mr. Bockhorst to consult with Ms. McPherren on issues related to the
17 KGB petition while it was pending, he did not so consult; the LBC accepted Ms. McPherren's
18 workload excuse in the Final Report; or, the LBC accepted the Final Report even though it did
19 not specifically address all of the City of Craig's constitutional arguments and conflict of
20 interest/appearance of impropriety allegations.
21
22
23

24 ⁹⁰⁰ The record reflects that Mr. Bockhorst was not aware of the KGB accepting Mr. Eckert's
resignation at the time it was publicly announced (June 26, 2007).

25 ⁹⁰¹ In addition to the LBC not being required to obtain such an opinion, none of the Appellants
asked the LBC to do so in their written or verbal comments.

1 Chair Ketchum's "defend" comment during the November 6, 2007 LBC Public
2 Hearing did not show that the LBC was biased in favor of the KGB or otherwise not impartial.
3 He made the statement in the course of advising that the allegations concerning Mr. Bockhorst
4 and the KGB Borough Manager position had been looked in to and been found to be without
5 merit. The allegations had been made in a comment on the Preliminary Report. It was
6 appropriate for the LBC to address the same during its Public Hearing.
7

8 Chair Ketchum's statement during the November 6, 2007 LBC Public Hearing
9 that "we have investigated this one here quite extensively" in reference to the allegations
10 concerning Mr. Bockhorst and the KGB Borough Manager position did not show that the LBC
11 was biased in favor of the KGB or otherwise not impartial. These Appellants' claim that the
12 "investigation" consisted of Chair Ketchum checking Mr. Bockhorst's computer is not accurate.
13 Chair Ketchum had spoken with Mr. Bockhorst about the recusal situation and he was aware of
14 the content of Director Jollie's October 31, 2007 letter. That letter contained the time line he
15 also referenced during his statement.⁹⁰²

16 The LBC's decision to proceed with the November 7, 2007 LBC Decisional
17 Meeting, despite the requests of some persons during the November 6, 2007 LBC Public Hearing
18 that it take up to the full 90 days permitted to make a decision on the KGB's annexation petition,
19 did not show that the LBC was biased in favor of the KGB or otherwise not impartial. The
20

21
22 ⁹⁰² These Appellants question the thoroughness of Director Jollie's investigation. But they have
23 not identified what else could or should have been done. The LBC staff consisted of two persons
24 (Mr. Bockhorst and Ms. Atkinson) and Ms. McPherran operating under contract. Ms.
25 McPherran spoke with Mr. Bockhorst and Ms. McPherran, the two persons who had been
involved with the KGB petition. She spoke with Chair Ketchum, who told her he had checked
Mr. Bockhorst's computer. She reviewed documents related to the 1998 KGB petition. She was
aware of what Mr. Bockhorst had done to comply with the Executive Branch Ethics Act. She
developed a time line which is accurate in all material respects.

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1 Decisional Meeting had been scheduled for November 7, 2007. The LBC had had the record for
2 some time. The testimony and comments presented during the November 6, 2007 Public
3 Hearing basically consisted of reiterations of points and positions already expressed and were
4 previously in the record. As Commissioner Chrystal⁹⁰³ noted during the Public Hearing and
5 Chair Ketchum⁹⁰⁴ during the Decisional Meeting, the LBC did not see the KGB petition and
6 learn about the various related issues for the first time at the Public Hearing.⁹⁰⁵

7
8 Chair Ketchum's statement during the November 6, 2007 LBC Public Hearing
9 that Mr. Bockhorst did not put his personal views in DCCED's Preliminary Report did not show
10 that the LBC was biased in favor of the KGB or otherwise not impartial. Chair Ketchum made
11 this statement in the context of responding to the allegation that Mr. Bockhorst had tailored
12 DCCED's Preliminary Report to benefit the KGB in order to improve his chances of being hired
13 as the KGB Borough Manager. This statement was immediately followed by a statement
14 concerning the pertinent time line.⁹⁰⁶

15
16 ⁹⁰³ Tr. 192-93 (November 6, 2007 LBC Public Hearing).

17 ⁹⁰⁴ Tr. 38-39 (November 7, 2007 LBC Decisional Meeting).

18 ⁹⁰⁵ The LBC proceeding differs from a jury or court trial in this very important respect. Most of
19 the record in an LBC proceeding has been developed before the Public Hearing. The petitioner
20 and respondent have already submitted briefs and supporting evidence. DCCED has issued two
21 reports. Related comments have been submitted. Another significant difference is that the
22 LBC's deliberations are public.

23 ⁹⁰⁶ Tr. 78-79 (November 6, 2007 LBC Public Hearing). The court also notes that Chair
24 Ketchum had seen Director Jollie's October 31, 2007 letter to the City of Craig and the Craig
25 Community Association. Director Jollie therein addresses the allegation that DCCED's 2007
Preliminary Report evidenced a complete reversal by Mr. Bockhorst of his interpretation of the
pertinent constitutional provisions. Likewise, Chair Ketchum's comment about Mr. Bockhorst's
abilities during the December 4, 2007 Public Meeting (Tr. 21) that he was bringing expertise and
talent to the KGB does not demonstrate that the LBC had some exalted view of Mr. Bockhorst
that tainted their decision-making. Chair Ketchum made the comment in the context of
discussing adding the direction that the KGB petition to annex Hyder within the next 5 years or
the LBC would address the matter itself. It is noteworthy that said provision is not something
Mr. Bockhorst had recommended and was contrary to his stated position on what should trigger

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1 The LBC's deliberations on the KGB's annexation petition during the November
2 7, 2007 Decisional Meeting did not show that the LBC was biased in favor of the KGB or
3 otherwise not impartial. The LBC record reflects that: the LBC had not made up its mind⁹⁰⁷ on
4 the KGB petition before the Meeting; the Commissioners addressed what they believed to be the
5 salient issues; they rejected DCCED's recommendation⁹⁰⁸ concerning Meyers Chuck; there was
6 a motion⁹⁰⁹ to amend the KGB's petition to include Hyder, the motion failed⁹¹⁰ on a 2-2 vote; the
7 Commissioners approved the KGB petition only after adding the five year⁹¹¹ provision; and, the
8 Commissioners addressed the applicable annexation standards.⁹¹² The fact that they did not
9

12 Hyder being annexed by the KGB. And, again, the LBC rejected DCCED's position, as stated
13 by Mr. Bockhorst in the Preliminary Report, that Meyers Chuck be in the KGB. And Chair
14 Ketchum, the person making these positive statements about Mr. Bockhorst, also voted to amend
15 the KGB petition to include Hyder – a position directly contrary to that stated by Mr. Bockhorst
16 in DCCED's Preliminary Report.

17 ⁹⁰⁷ Tr. 289 (November 6, 2007 LBC Public Hearing) (Chair Ketchum), Tr. 290-91 (November 6,
18 2007 LBC Public Hearing) (Commissioner Wilson), Tr. 10-11, 22 (November 7, 2007 LBC
19 Decisional Meeting) (Commissioners Wilson and Chrystal).

20 ⁹⁰⁸ Tr. 4-7 (November 6, 2007 LBC Public Hearing). The court notes that these Appellants'
21 statement that the LBC deliberations last a little over an hour is not accurate as the Meyers
22 Chuck issue was discussed during the LBC's deliberations on the Wrangell petition.

23 ⁹⁰⁹ Tr. 8-9 (November 7, 2007 LBC Decisional Meeting). Chair Ketchum requested a motion to
24 amend the KGB petition to include the Hyder enclave area. The motion was made and seconded.
25 Most of the LBC discussion focused on Hyder. These Appellants view the Hyder enclave as the
critical issue as they stated at p. 11 of their Reply to the LBC's brief that they would not have
appealed if Hyder had been included.

⁹¹⁰ Tr. 22-23 (November 7, 2007 LBC Decisional Meeting). Chair Ketchum and Commissioner
Harcharek voted in favor of the motion and Commissioners Wilson and Chrystal voted against
the motion.

⁹¹¹ Tr. 19-31 (November 7, 2007 LBC Decisional Meeting). The court notes that the idea for
such a provision originated with Ms. McPherran (Tr. 19) and it was not something that Mr.
Bockhorst had addressed or recommended in DCCED's Preliminary Report. To the contrary, he
had identified the formation of a Prince of Wales Borough as the triggering event that should
result in Hyder being annexed into the KGB. R. 521-23.

⁹¹² Tr. 31-36 (November 7, 2007 LBC Decisional Meeting).

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1 debate DCCED's constitutional interpretations reflects that they ultimately⁹¹³ agreed with
2 DCCED.⁹¹⁴

3 Chair Ketchum's comment during the December 4, 2007 LBC Public Meeting
4 that the Attorney General's Office had backed up Mr. Bockhorst's professional views in the past
5 did not show that the LBC was biased in favor of the KGB or otherwise not impartial. These
6 Appellants have not shown that the LBC had an "exalted" or elevated opinion of Mr. Bockhorst
7 or was otherwise biased in favor of accepting his views. Chair Ketchum made the statement in
8 the context of explaining that he had asked Ms. McPherrren to include a statement in the LBC's
9 Statement of Decision which addressed the allegations concerning Mr. Bockhorst.⁹¹⁵ He
10 expressed the view that Mr. Bockhorst had just been doing his job, Mr. Bockhorst had always
11 acted ethically during their short relationship, and Mr. Bockhorst had expressed his professional
12 opinions on the applicable law in the Preliminary Report. He stated that he wanted the record on
13

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17 ⁹¹³ As these Appellants noted, Commissioner Wilson did make the comment that it was "a little
18 hard" to reconcile DCCED's position in 2008 with its position in 2007. Tr. 17-18. He went on
19 to say that he thought Hyder should remain an enclave. Tr. 18. He later stated that the applicable
20 standards could not be met if Hyder were included in the area proposed for annexation due to the
21 lack of ties to the KGB. Tr. 34-35. The "little hard" to reconcile comment, in context, shows
22 that the LBC was deliberating. It does not show that the 2007 Reports could not in fact be
23 reconciled with the 1998 Reports on the basis of the distinctions drawn by DCCED in 2007.
24 Also, as noted above, Ms. McPherrren did not tell the LBC that there had been no important
25 changes to the applicable regulations.

⁹¹⁴ Again, the LBC did not learn about the KGB's annexation petition and the related issues the
day before at the Public Hearing. The LBC record before the Public Hearing already included
DCCED's Preliminary and Final Reports, the briefs, and the written comments. DCCED's
Preliminary Report discussed the constitutional issues in some detail and also discussed why
DCCED's analysis differed from DCRA's analysis, and that of the LBC, with respect to the
KGB's prior annexation petition. And, the City of Craig and POWCAC's comments had
discussed these matters in some detail.

⁹¹⁵ Tr. 55-56 (LBC's December 4, 2007 Public Meeting).

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1 the time line concerning Mr. Bockhorst's involvement to be clear.⁹¹⁶ The record, as discussed
2 above, factually supports Chair Ketchum's comment.

3 And what occurred during the November 7, 2007 LBC Decisional Meeting
4 demonstrates that the LBC did not have an improper elevated or exalted opinion of Mr.
5 Bockhorst. The LBC rejected Mr. Bockhorst's professional views on the KGB annexation
6 petition in two important respects by placing Meyers Chuck in the Wrangell Borough and by
7 including the 5 year revisit provision. Moreover, a motion to amend the KGB petition to include
8 Hyder, a step directly contrary to Mr. Bockhorst's recommendations, failed on a 2-2 vote.
9

10 These Appellants state that Ms. McPherran would have affirmed Mr. Bockhorst's
11 recommendations in DCCED's Final Report even if shown that he was wrong. This argument
12 fails for two reasons. First, it is speculation. Said Appellants rely factually on his being her
13 supervisor. They extrapolate from that that she would not have contradicted her boss and that
14 she did not want to spoil his chances of getting the KGB position. Second, the record does not
15 support this speculation. Ms. McPherran testified credibly that she worked independently, she
16 reviewed the entire record, she conducted independent research, she considered all of the
17 comments, and, she prepared DCCED's Final Report. She also testified that she has worked for
18 the State of Alaska for 25 years. She appeared during the October 2008 Evidentiary Hearing to
19 be a competent, experienced, independent person who would have made different
20 recommendations if she had disagreed with Mr. Bockhorst, and who would not have presented a
21 recommendation to the LBC that she believed was contrary to applicable law in an effort to boost
22

23
24 ⁹¹⁶ Chair Ketchum testified credibly during the October 2008 Evidentiary Hearing that when he
25 mentioned the Attorney General's Office backing up Mr. Bockhorst's legal views he was
referring to his conversations with the Attorney General's Office concerning the Deltana
petition. Tr. 103-07.

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1 Mr. Bockhorst's prospects for the KGB job. The record reflects that, after her independent
2 review, she agreed with Mr. Bockhorst's findings and recommendations.⁹¹⁷

3 These Appellants' argument that they have shown a probability of actual bias by
4 the LBC based on the totality of the circumstances fails for three reasons. First, they must prove
5 actual bias in order to overcome the applicable presumption. Second, they have not proven
6 actual bias or lack of impartiality. Third, assuming that the probability of bias standard is
7 applicable, they have not met this standard.

8
9 These Appellants rely on a law clerk analogy which the court noted in its August
10 12, 2008 Memorandum and Order does not apply.⁹¹⁸ The analogy is based on the Alaska Court
11 of Appeals' decision in *Vaska v. State*.

12 In *Vaska*, the Court addressed whether the defendant's conviction should be set
13 aside because the trial judge's law clerk was actually biased in favor of the prosecution or had a
14 substantial personal interest in the outcome of the litigation. The law clerk had been in a sexual
15 relationship with a prosecutor and had given another prosecutor in another case, at around the
16 time of Mr. Vaska's trial, a copy of a confidential bench memorandum with a note in which she
17 indicated that she had been fighting battles for the prosecutors.⁹¹⁹ The Court noted the close
18 working relationship between a judge and their law clerk and observed that at some point a law
19 clerk's bias for or against a party or potential interest in the outcome of particular litigation "rises
20

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22
23 ⁹¹⁷ The court notes that, as discussed above, Mr. Bockhorst has not been shown to have been
24 wrong with respect to the substantive legal questions that are the subject of this appeal. And, in
25 any event, DCCED Reports are not binding on the LBC and it is the LBC which makes the
decision whether to approve or deny a boundary change petition.

⁹¹⁸ Page 5, n. 17.

⁹¹⁹ 955 P.2d at 945.

1 to an intolerable level” where the “judicial decisionmaking process comes under reasonable
2 suspicion.”⁹²⁰

3 The Court stated that a law clerk with actual bias or a substantial personal interest
4 in the outcome of the case should not participate in any facet of the case. The Court then stated
5 that “[m]ore difficult problems are posed by” situations that do not involve actual bias or conflict
6 of interest but the law clerk’s relationship with to a party or attorney may give rise to an
7 appearance of impropriety.⁹²¹

8
9 The Court determined that the law clerk may have had an actual bias in favor of
10 the State. But the record did not reveal whether the law clerk had done significant work on Mr.
11 Vaska’s case. The Court remanded the case to a new trial judge. The Court stated that on
12 remand, Mr. Vaska had the burden of showing by a preponderance of the evidence that the law
13 clerk was personally biased in favor of the prosecutor who prosecuted him or that the law clerk

14 engaged in conduct that created a reasonable appearance of strong personal bias in
15 favor of the state – a bias above and beyond philosophical or political bias in
16 favor of the government in criminal cases.⁹²²

17 And that if Vaska did so, then his conviction would be set aside unless the State proved by a
18 preponderance of the evidence that the law clerk “did not significantly participate in one or more
19 of [the trial court’s] . . . rulings [in the case].”⁹²³

20 In this case, as discussed above, the record reflects that: Mr. Bockhorst’s only
21 involvement with the KGB’s 2006 annexation petition was to prepare DCCED’s Preliminary
22 Report; the Preliminary Report constituted “significant work” on the KGB petition; but he did

23
24 ⁹²⁰ *Id.* at 946.

25 ⁹²¹ *Id.* at 947.

⁹²² *Id.*

⁹²³ *Id.*

1 not have an actual bias in favor of the KGB when he did the work and he did not engage in
2 conduct that created a reasonable appearance of a strong personal bias in favor of the KGB;⁹²⁴
3 when the potential or actual conflict of interest situation later arose he recused himself; he had no
4 further involvement with the KGBH petition thereafter; another person with DCCED (i.e.
5 another law clerk) took over, prepared the Final Report, and attended the Public Hearing, the
6 LBC did not simply adopt all of his conclusions and recommendations in its decision; and, the
7 LBC was not biased or partial.

8
9 These Appellants nonetheless argue that, per *Vaska*, there was an appearance of
10 impropriety which violated their due process rights because Mr. Bockhorst did significant work
11 on the KGB annexation petition and after he had completed the work a potential conflict of
12 interest situation arose involving he and the KGB. *Vaska* does not support this proposition. And
13 they have cited no authorities which do support this theory.

14 **4. Reasonable Basis For Decision**

15 These Appellants claim that The LBC erred in holding that Article X, § 1 of the
16 Alaska Constitution requires the court to uphold LBC decisions approving annexations whenever
17 there is a reasonable basis for the decision.

18
19
20 ⁹²⁴ Mr. Bockhorst completed his work on the Preliminary Report by late June 2007. The KGB
21 did not solicit applicants for the position until late July 2007. Mr. Eckert's resignation letter is
22 dated June 15, 2007. The KGB Borough Assembly publicly accepted Mr. Eckert's resignation
23 during a special meeting the evening of June 25, 2007. There was a related Ketchikan Daily
24 News article the next day. The record does not reflect that Mr. Bockhorst was aware of the
25 resignation or the KGB Borough Assembly's action at the time. And, even if he were, he had
told the Director some 3 months earlier that the KGB had submitted a strong petition and of his
views on the applicable standards, and he would have had the 160 page Preliminary Report
substantially, if not virtually, completed. It is extremely unlikely that he could have suddenly
changed positions with respect to many of the most critical parts of the Preliminary Report,
completely rewritten substantial portions of the Preliminary Report, and then submitted it to the

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1 This claim does not focus on an LBC holding on the merits of the KGB's 2007
2 annexation petition. The claim instead focuses on the standard of review that this court should
3 use with respect to DCCED's and the LBC's constitutional interpretations and the due process
4 claims. These Appellants claim that the court should apply the independent judgment standard
5 to both.

6 The court applied its independent judgment in reviewing DCCED and the LBC's
7 interpretations of the pertinent provisions in the Alaska Constitution. The court was the fact
8 finder with respect to the due process claims. The court applied its independent judgment with
9 respect to the same.
10

11 **5. Relief Sought**

12 Given the above, these Appellants are not entitled to the relief they have requested
13 herein.

14 **VII. CONCLUSION**

15 The LBC's decision to approve the KGB's 2006 annexation petition, as amended,
16 is affirmed for the reasons stated above.

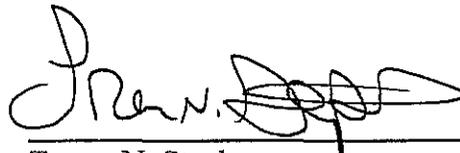
17 **IT IS SO ORDERED.**

18 Dated at Ketchikan, Alaska this 18th day of February 2010.

19 **CERTIFICATION**

20 Copies Distributed
21 Date 2/18/10

22 To Robert Bladed
Marion Vardas
Scott Brandt Erickson
23 By SN

24 

Trevor N. Stephens
Superior Court Judge



25 technician for publication by the end of June 2007. And, whether or not he could have done so,
the court has found that he did not do so.