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August 10, 2017

Chair Lynn Chrystal  
State of Alaska Local Boundary Commission  
c/o Department of Commerce, Community and Economic Development  
Division of Community and Regional Affairs  
550 West Seventh Avenue, Suite 1640  
Anchorage, AK 99501

**Subject: Request for LBC Suspension/Relaxation of Current process**

Dear Chair Chrystal,

As the primary Petitioner for the Nikiski Petition to Incorporate as a Home Rule City, I request that the Local Boundary Commission (LBC) suspend the City of Nikiski incorporation process and return the Petition back to the pre-technical review phase, under the authority granted in 3 AAC 110.660: "The purpose of the procedural requirements set out in 3 AAC 110.400 - 3 AAC 110.700 is to facilitate the business of the commission, and will be construed to secure the reasonable, speedy, and inexpensive determination of every action and proceeding. Unless a requirement is strictly provided for in the Constitution of the State of Alaska, AS 29, or AS 44.33.810 - 44.33.849, the commission, by a vote of at least three members, may relax or suspend a procedural regulation if the commission determines that a strict adherence to the regulation would work injustice, would result in a substantially uninformed decision, or would not serve relevant constitutional principles and the broad public interest." It appears that AS 29.05.070-.080 and AS 44.33.810-.849 anticipate and allow my request. A team of volunteers and I have spent many hours reviewing the Department's Preliminary Report to the Local Boundary Commission Regarding the Petition to Incorporate Nikiski as a Home Rule City dated May 10, 2017 (Preliminary Report), and trying to address the statements made in the Preliminary Report that the constitution, statutes, and/or regulations appear to disagree with. But in doing this, we discovered a virtually insurmountable problem: Department staff did not follow AS 29.05.070 and 3 AAC 110.440(c), and their failure to follow those statutes render nigh impossible our effort to comply with the

code and meet our burden of proving that we are a community that is appropriate in constitution and prepared to become a home rule city.

The author of the Preliminary Report apparently believed that our Petition did not meet certain portions of the regulatory standards for incorporation of a city in 3AAC Chapter 110 - and after making that partial determination, recommended against allowing incorporation.<sup>1</sup> That recommendation could not have been more surprising, because we crafted most of our proposal to conform to the specific responses of LBC staff to our requests for clarification about what standards we should apply. Most notably, when we sought guidance on *the size* of our city, we were advised to follow the service area boundaries, when we sought clarification on the way in which we should present our perspective *on new services such as Public Safety*, we received guidance to follow other petition examples like Big Lake, and when we sought to understand and represent our *community* it was suggested to let historical relationships be our guide. We followed those suggestions to the letter, and yet in the Preliminary Report were not even offered alternatives (as many petitions before us) as to how to comply with the statutes. This begs the most fundamental and relevant question which prompts this request: If our Petition was that deficient, ought not the Department Staff have sent the Petition back to the Petitioners for correction and completion under AS 29.05.070 and 3AAC 110.440(c)? The answer by the code is clearly yes, yet this did not happen. Instead, we were led to believe that our petition was in "substantial compliance with applicable provisions of AS 29.04, AS 29.05, AS 29.06 and [Chapter 110]" when it was accepted for filing on December 30, 2016. As a result, we were stunned and dismayed to read the Preliminary Report, which stated that our Petition fails the standards for incorporation; and recommends that the LBC deny it.

We *appropriately depended* on Department staff to assist us and give us guidance in the incorporation process. This reliance, if used against our community's petition now, will make a mockery of the intended process. Consider our situation, where as an applicant community that filed for LBC action, relied on their direction and judgement, crafted the petition in adherence to that judgment, only to be told in the preliminary report that the petition does not comply with the statutes and that the only options available are to fight against the LBC or withdraw the petition. Should we choose to

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<sup>1</sup> The Preliminary Report contradicts itself on this point, stating that the Petition does not meet: "most" standards (page 2), "enough of the standards" (page 3), "the requisite standards" (page 99), two specific standards: "no new services are planned" and "not in the best interests of the state" (page 100).

proceed and our petition be denied, the consequence is to wait three years before re-applying or the costly option of challenging the decision in court. This is not how the process is supposed to work, according to the LBC website, and LBC reports to the Alaska Legislature. For example, the 2015 LBC report to the Alaska Legislature states that --

When a petition is prepared by the community, it is then submitted to staff for technical review. The staff will review the petition to identify *any deficiencies in form or content*. This can *allow petitioners to correct or clarify the draft before it is either circulated for voter signatures* or adopted by a municipal government. If the staff finds that the petition contains all the required information, Commerce then accepts it for filing. [Emphasis added]

Department staff did not assist us in identifying, prior to acceptance of petition, these noted deficiencies in form or content, and as a result, petitioners were not afforded the opportunity to correct or clarify the draft petition; a necessary and fundamental right which deprives this Petitioner and all those who volunteered and even those who signed the original petition, due process rights to remedy the petition. What follows are a few examples:

As a first example, Department staff instructed us to use past petitions such as Big Lake's 2014 Petition for Incorporation as a template, and pointed to Big Lake as an example of how our petition process would work. Instead, our experience is entirely different than Big Lake's petition procedure. Big Lake's Preliminary Report liberally construed the Big Lake petition as compliant without much analysis, giving the Petition the benefit of the doubt; while the Preliminary Report for our petition strictly construes the regulations applied to our petition, nitpicking, undermining and arguing against just about every point in our Petition. And recall, the earlier cited example of how Big Lake's petition as a Second-Class City suggested that in the future they might add Public Safety, which the Department & LBC deemed acceptable, whereas in our petition for a Home Rule city, with substantively similar language, was deemed insufficient.

Another example: the proposed City of Nikiski boundaries were specifically discussed on a few occasions prior to and during submission of the Petition. Department staff told us that while the proposed boundaries were large, they may not necessarily cause issue as "Alaska is a large state." Contrast that staff guidance to the statement in the Preliminary Report: "The proposed boundaries are not on a scale suitable for city government." Department staff knew our proposed boundaries followed the existing Nikiski service area boundaries well in advance of our submission -- they even stated this in the 2016 LBC Report to the Alaska Legislature (February 2016).

At no time were we advised of any of the substantial inadequacies the Department staff found in the Petition, according to the Preliminary Report. Prior to the technical review, we submitted the draft Petition for pre-technical review per Department staff guidance. The reply (see enclosure) only contained two issues: (1) the grant was not listed in the budget and (2) borough sales tax was not listed. This is an example of one point in time where Department staff should have returned the Petition to us for correction. The most salient point in time was when the regulations required the Department to identify any issues with the petition, *before* accepting the Petition for filing in December 2016, under AS 29.05.070 and 3 AAC 110.440(c).

In addition to the missed opportunities to help us correct our petition, we also received numerous erroneous or just incorrect instructions from Department staff. For example, at first, Department staff advised us that the Nikiski Charter would be developed after the incorporation vote -- that our proposed Charter was considered a draft. Department staff confirmed in writing that our proposed Charter was not the final version (see enclosure). Then, we were told by the Department at the February 2017 public hearing that our proposed Charter would be the final version voted on, citing the statute, AS 29.05.110(d). Yet in the Preliminary Report, Department staff reversed itself again, referring to our proposed Charter as a “draft” (page 58). If the Charter is indeed a “draft” the Department should treat it as such and indicate the areas needing improvement rather than using it to substantiate proof of deficiency. Additionally, the statutes and regulations do not clarify when in this process, the Charter is solidified, and, up to that point what changes are allowed?

Since our Petition was accepted for filing on December 30, 2016, under 3 AAC 110.440, it must have been in “substantial compliance with applicable provisions of AS 29.04, AS 29.05, AS 29.06 and [Chapter 110]” - meeting all the standards for city incorporation. After acceptance for filing, the subsequent public comment period on our Petition ran from Jan 4 – Mar 8, 2017. On the last day of the public comment period, the Kenai Peninsula Borough and the Native Village of Tyonek/Tyonek Native Corporation filed almost identical responsive briefs opposing the petition. After reviewing these unexpected and extremely negative briefs, we replied as provided for in 3 AAC 110.490 on Mar 29, 2017.

On May 10, 2017, Department staff issued a Preliminary Report, which notes at page 99: “The department has carefully reviewed the incorporation proposal and has concluded that the requisite standards found in law for incorporation have not been met.” This Report is not in compliance with 3 AAC 110.440, which requires that Petitioners be given an opportunity to correct a deficient Petition (as the Department concluded in the Preliminary Report) *before* a petition is accepted. Instead, our hard

work, at great expense, has been ripped to shreds in a 100+-page written diatribe, and we have experienced, and continue to experience “needless public discord and strife” in the local media and other public venues, where we are frequently taunted by the Borough administration, based on the findings in the Report<sup>2</sup>.

In 2002, both the Alaska House and Senate passed House Concurrent Resolution No.27am (HCR 27am) urging the LBC --

[T]o adopt standards and procedures to enable the commission to return a petition for a local boundary change to the petitioner when the commission determines the petition is substantively deficient, in need of substantial amendment or supplementation, or the procedure used in preparing the petition was deficient.

HCR 27am stated the Legislature's reasons for the resolution:

[L]engthy consideration of deficient petitions by the Local Boundary Commission may result in unnecessary expenditures of money, time and other resources on the part of the state, local governments, and citizens of the state, and may also result in needless public discord and strife.

Although HCR 27am resulted in some changes to 3 AAC 110 in the amendment contained in register 162 on 5/19/2002; these new procedures were not followed in our case. As a result, the very “needless public discord and strife” the Legislature wanted to prevent is happening to us, and in our community.

Instead of returning the Petition to us for correction *before* acceptance, when we could have made changes to our Petition, we had to wait 5 months after our Petition was accepted to find out it was deficient, through the 100+-page Preliminary Report, posted publicly on the State's website, where the majority of our Petition was found deficient.

Because neither the intent of HCR27am nor 3 AAC 110.440 were followed, we have been put in an untenable position. Upon reviewing the unexpected and extremely negative position taken in the Preliminary Report, we have reviewed our options as outlined in 3 AAC 110.540-.545. It appears that there are three options: proceed, amend, or withdraw the petition. However, the amendment and withdrawal regulations, 3 AAC 110.540 and 3 AAC 110.545 respectively, are vague -- it is unclear exactly what the process is to amend or withdraw a petition; and what requirements there are seem arbitrary, overly burdensome and punitive. For example, why would we have to obtain 30% signatures for withdrawal, but only 15% signatures for filing?

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<sup>2</sup>[http://kpb.granicus.com/MediaPlayer.php?view\\_id=1&clip\\_id=539](http://kpb.granicus.com/MediaPlayer.php?view_id=1&clip_id=539)

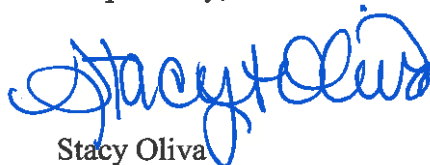
We have struggled with how to proceed in this situation that should not have happened, and would not have happened had Department staff correctly processed our petition during the Technical Review process. Please note that we Petitioners and our volunteers are all laypeople -- not paid, full time, staff with unlimited resources. We spent a lot of time and money trying to put together a Petition that could go to Nikiski voters, and we have just about lost faith in the current process.

During this current public comment period in which we are working to reply to the Preliminary Report, we have also struggled to obtain public information that is solely within the control of the Department. The Department staff has interpreted the Public Records Act to limit our requests for documents to 5 hours a month -- or be billed for thousands of dollars, which we don't have. These Department materials are not accessible to the public, such as being posted in a manner that is easily accessible such as the Internet. Our lack of access to this information has severely hampered our efforts to comment on the Preliminary Report.

To summarize: For the reasons stated above and in accordance with 3 AAC 110.660, we request the LBC suspend our current Petition process and relax the standards allowing this Petition to go back to pre-technical review phase. By moving back into the pre-technical review phase, we will have many options not now available and the ability to modify our Petition without additional requirements being placed upon it; thus, improving the chance of success.

If this request should not be approved, or expeditiously responded to, then we request another month extension to the public comment period, to September 22, 2017, to submit our comments to the Preliminary Report, for the reasons stated in this letter and the same reasons as stated in our last request for additional time to comment.

Respectfully,



Stacy Oliva  
Petitioner's Representative

Enclosure: Email dated Apr 29, 2016

CC Senator Peter Micciche  
Representative Mike Chenault  
Peninsula Clarion  
Radio Station KDLL  
TV Station KTUU

From: Michele Hartline <[hartlines@hotmail.com](mailto:hartlines@hotmail.com)>

Date: Fri, Apr 29, 2016 at 3:41 PM

To: Oliva Stacy <[stacy.oliva@gmail.com](mailto:stacy.oliva@gmail.com)>

See below. We can talk later when I get home.

Sent from my iPhone

Begin forwarded message:

From: "Collins, Eileen M (CED)" <[eileen.collins@alaska.gov](mailto:eileen.collins@alaska.gov)>

Date: April 29, 2016 at 3:12:32 PM AKDT

To: 'Michele Hartline' <[hartlines@hotmail.com](mailto:hartlines@hotmail.com)>

Cc: "Commission, Boundary (CED sponsored)" <[lbc@alaska.gov](mailto:lbc@alaska.gov)>

Subject: Nikiski Petition Informal Technical Review

Hi Michele,

It was good to talk to you this afternoon. First, under 3 AAC 110.420(21) only the *proposed* municipal charter is required in the incorporation petition of a proposed home rule city. Nothing I'm seeing says it cannot change or must be final at this stage.

The other requirements missing from your petition are 3 AAC 110.420(13)(A). While the grant is mentioned on page 17 of the petition, your proposed budget attachment doesn't have any indication of this grant.

Also, 3 AAC 110.420 (12)(C) states that you need to provide each municipal government tax levy current in effect in the territory proposed for change and only property tax is mentioned and not the borough sales tax. This also helps to explain what services they are providing, etc.

In 3 AAC 110.440, the regulations discuss the formal technical review. In Section c, it says that the department (staff) shall determine whether the deficiencies in the petition are significant enough to require new authorization for the filing of the completed or corrected petition.

That means that if the deficiencies noted in the technical review are significant, then we can require you to go and get new signatures. However, for small changes that isn't always necessary. From what you said today, it sounded like you thought even a comma change would require new signatures which isn't the case.

Please let me know if you have any questions. Again, I'll be out all next week (May 2-6) but I'll be happy to answer your questions when I get back and if you have pressing questions, please don't hesitate to reach out to my colleague Brent at 269-4559.

Eileen

**Eileen M. Collins**

**Local Government Specialist**

**Local Boundary Commission**

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Enclosure

