State of Alaska
Ombudsman

INVESTIGATIVE REPORT

Ombudsman Complaints A2007-0391, J2007-0091 and J2007-0198
Findings of Record and Closure – Public Version

March 31, 2009

This report has been redacted in accord with AS 24.55.160 to remove any information that would identify the complainants. The complainants are public interest complainants whose personal circumstances did not figure in the investigation. Complainants will be identified only as Complainant A, Complainant B, and Complainant C to protect their confidentiality.

NOTE: This report concerns complaints filed with the Office of the Ombudsman in March, April, and June 2007. This final investigative report was substantially completed by August 9, 2007. The ombudsman refrained from issuing a final report at that time because balloting on the proposed Deltana Borough was scheduled to take place on August 21, 2007. The Office of the Ombudsman is a non-partisan, impartial, fact finding agency, and did not want criticism of the process followed by the Local Boundary Commission (LBC) and its state agency support staff to influence voters on the substantive issue of whether the public good would be served by incorporating a new borough.

The ombudsman took no position on the desirability of establishing a Deltana Borough in 2007, and does not take a position on it now. The ombudsman's concern is with aspects of the administrative process followed by the LBC and the Department of Commerce, Community and Economic Development (DCCED). As explained in greater detail in this report, the LBC and state agency staff received and responded to a preliminary investigative report dated June 27, 2007, covering the same topics as this final report, which also addresses concerns and disagreements raised in the LBC's formal response.

The Division of Elections confirmed officially on September 5, 2007, that the ballot measure to establish the Deltana Borough failed by a count of 1242 "No" votes to 129 "Yes" votes.

SUMMARY OF THE COMPLAINTS

On March 28, 2007, Complainant A made a complaint to the Office of the Alaska Ombudsman about the Local Boundary Commission (LBC) investigation, public process, and final report regarding the Petition to Incorporate a Deltana Borough. Complainant B made a similar complaint April 2, 2007. Complainant C also made a similar complaint June 19, 2007. All three complainants are residents of the Delta area.

The ombudsman opened an investigation April 3, 2007, into the following allegations, stated in terms that conform to AS 24.55.150, which authorizes the ombudsman to investigate complaints about administrative acts of state agencies:

> ***Allegation 1: The Local Boundary Commission arbitrarily found that Whitestone and the Native Village of Healy Lake are communities satisfying the requirements of AS 29.05.031(a)(1) and 3 AAC 110.045.***
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> ***Allegation 2: The Local Boundary Commission unfairly failed to provide accessible public notice as required by the formal policies of the State of Alaska and accepted standards of public notice to the populations affected by the proposed borough incorporation, resulting in the populations' inability to participate in the public comment and hearing process.***
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> ***Allegation 3: The Local Boundary Commission unreasonably failed to engage in government-to-government consultation with the tribal government of the Native Village of Healy Lake, as required by the State of Alaska policy adopted in the 2001 Millennium Agreement.***

The ombudsman issued a Preliminary Investigative Report to the agency on June 27, 2007, proposing to find the allegations ***justified***. The LBC was given 30 days in which to respond, as provided in AS 24.55.180[1] and 21 AAC 20.230(a).[2] On July 6, 2007, LBC Chairman Kermit Ketchum requested a four-week extension of time in which to respond, until August 24, 2007. After careful deliberation and consultation with the LBC and the Attorney General's Office, the ombudsman declined to grant the extension. The primary reason for not granting the extension was the time-sensitive nature of the complaints, as an election on the issues presented in the complaints was scheduled for August 21, 2007. The ombudsman requested that the LBC respond

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[1] **AS 24.55.180. Consultation.** Before giving an opinion or recommendation that is critical of an agency or person, the ombudsman shall consult with that agency or person. The ombudsman may make a preliminary opinion or recommendation available to the agency or person for review, but the preliminary opinion or recommendation is confidential and may not be disclosed to the public by the agency or person.

[2] **21 AAC 20.220 Modification of Finding or Opinion.** (a) If, in the preliminary report transmitted to the agency under 21 AAC 20.210, the ombudsman proposes a finding that is critical of the agency, the agency may seek modification of the finding or opinion presented to it within 15 days after the date the preliminary report is presented. The ombudsman will, in his or her discretion, extend the period in which modification of the finding or opinion may be requested by the agency, but each extension will not exceed 30 days.

to the ombudsman's preliminary findings and recommendations before the election rendered a number of the recommendations moot.

The LBC submitted its response (LBC Response) to the Preliminary Investigative Report on July 27, 2007. The LBC Response is summarized in this report; the complete document is attached as Appendix B

BACKGROUND

The Local Boundary Commission (LBC) was established by the Alaska Constitution, Article 10 §12:

> A local boundary commission or board shall be established by law in the executive branch of the state government. The commission or board may consider any proposed local government boundary change. It may present proposed changes to the legislature during the first ten days of any regular session. The change shall become effective forty-five days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house. The commission or board, subject to law, may establish procedures whereby boundaries may be adjusted by local action.

Under this constitutional mandate, the LBC is responsible for review of proposals to incorporate, dissolve, reclassify, annex to, detach from, or merge cities, boroughs, and unified municipalities.

The LBC is composed of five members appointed by the Governor. The LBC functions with administrative support from the Department of Commerce, Community and Economic Development (DCCED), as required by AS 44.33.020(a)(4). In compliance with this statutory duty, the DCCED's Division of Community Advocacy (DCA) provides technical support and other administrative services to the LBC.

The Deltana region is defined as that area bounded by the Fairbanks North Star Borough to the north, the Denali Borough to the west, the Gateway Regional Educational Attendance Area (REAA) to the east, the Copper River REAA to the south, and the Mat-Su Borough to the southwest (see map, Appendix A). The only incorporated municipality in the region is the City of Delta Junction, which was incorporated as a second class city in 1960. The region surrounding the City of Delta Junction is part of Alaska's single unorganized borough. The junction of the Alaska Highway and the Richardson Highway, Ft. Greely Army base, the Trans-Alaska Pipeline, and the Pogo Mine (operated by Teck-Pogo, Inc.) are all within the region. The Deltana region is rural, and the majority of the nearly 6,000 square mile area is off the road system.

In 2005 Delta Junction assembled a Charter Commission to review the issue of incorporating the Deltana region as a unified home rule[3] borough. The Commission was appointed by the City Council. There was one City delegate, one Delta Junction Regional Development Council delegate, and one Deltana Community Corporation delegate. The remaining eight members were "at-large," chosen by the City Council from a pool of applicants.

Over the course of a year, the Charter Commission developed a Petition for Incorporation of the Deltana Borough, a Unified Home Rule Borough (Petition). The Petition was filed with the LBC on November 16, 2005. The first official public notice of the Petition filing (Notice of Petition) was issued on January 20, 2006. Subsequently, in late January and February 2006, the notice was published in the *Fairbanks Daily News-Miner* and *Delta Wind* newspapers, was mailed to interested parties, and appeared online.

DCA staff members Kathy Atkinson and Darlene Watchman prepared the "Preliminary Report to the Local Boundary Commission on the Deltana Borough Proposal," which DCA issued on November 13, 2006. Only written public comment was accepted prior to issuance of a preliminary staff report by DCA.

Ms. Atkinson is listed as a Local Government Specialist at DCCED but was listed as an "LBC staffer" and author of the "Final Report to the Local Boundary Commission Regarding the Deltana Borough Proposal" on an unnumbered acknowledgements page at the beginning of the report. Ms. Watchman also was listed on the acknowledgements page as an "LBC staffer." She has since left the agency as has Dan Bockhorst who was listed as LBC Staff Supervisor.

Complainant A initially filed a complaint with the Office of the Ombudsman on November 25, 2006. Upon preliminary review of his complaint, the ombudsman investigator determined that the LBC was still in the process of making a decision regarding the Petition. Therefore, the ombudsman determined that Complainant A's complaint was premature. The investigator explained this to Complainant A and closed his complaint.

The LBC held an informational meeting December 4, 2006, at which the public was permitted to ask questions and make limited public comment. Ms. Atkinson of DCA prepared the "Final Report to the Local Boundary Commission Regarding the Deltana Borough Proposal." It was issued in February 2007. The LBC convened a public hearing March 16, 2007, at which the LBC heard public comment. The following day, the LBC entered into an open "decisional session," during which the commissioners indicated that they supported the Petition.

On March 28, 2007, Complainant A made a second complaint to the ombudsman about the manner in which the LBC conducted its review of the Petition. Complainant B complained to the ombudsman on April 4, 2007. Complainant C also filed a complaint with the ombudsman, but did not do so until June 19, 2007. Although Complainant C's complaint was filed well after the ombudsman investigation started, he was added to the list of complainants.

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[3] The Alaska Constitution, Article 10, Section 11 provides, "A home rule borough or city may exercise all legislative powers not prohibited by law or by charter." AS 29.04.010 defines a home rule borough municipality as follows: "It is a city or a borough that has adopted a home rule charter, or it is a unified municipality."

The LBC issued its Statement of Decision on April 12, 2007. The LBC accepted the Petition as meeting all regulatory and statutory requirements, recommended incorporation of the Deltana Borough, and proposed to forward it to the electorate for a vote. Members of the public submitted seven requests for reconsideration to the commission. The LBC held a hearing on these requests for reconsideration on May 10, 2007. All were denied.

INVESTIGATION

On April 23, 2007, the LBC produced information requested by the investigator.

On May 8, 2007, the investigator interviewed JoAnn Polston, the tribal chief of the traditional council of the Native Village of Healy Lake, also known as the Mendas Cha-Ag Tribe. Ms. Polston stated that she had provided written comment, as well as verbal comments at the public proceedings before the LBC.

Complainants A and B identified Don Bailey as someone who had personal experience working with the community of Russian/Slavic people in the Deltana region. The investigator interviewed Mr. Bailey on May 9, 2007. Mr. Bailey talked exclusively about the notice provided to the "Russian community," as he referred to the substantial number of people in the region of Russian and/or Slavic descent. Mr. Bailey also provided information *via* e-mail.

On May 9, 2007, the investigator contacted Steve Fields, who served as the Delta Regional Economic Development Council representative on the Charter Commission (the body which drafted the Petition). Mr. Fields said that no specific representative of the Russian-speaking population was appointed to the Charter Commission. According to Mr. Fields, the City Council appointed Rev. Paul Kulakevich, a pastor of one of the larger Russian/Slavic congregations in the area, to the Charter Commission. Rev. Kulakevich was not chosen by the Russian/Slavic community to represent them. Also, he was not available at the time of the appointment and did not attend any of the meetings. Mr. Fields stated that, because Rev. Kulakevich did not attend the meetings, the Charter Commission appointed a replacement. Mr. Fields also reported that the Charter Commission did not discuss appointing a "Slavic representative" when replacing Charter Commission members who left or were replaced for non-attendance.

In the course of reviewing information previously provided by the LBC, the investigator posed additional questions to and asked for additional information from LBC staff member Kathy Atkinson. The investigator also listened to audio recordings of the LBC proceedings of December 4, 2006; March 16, 2007; and March 17, 2007.

On June 19, 2007, Complainant C complained to the ombudsman about the complexity of the LBC's public notices.

On June 1, 2007, the ombudsman provided formal written notice of this investigation under AS 24.55.140 to DCA Director Michael Black. The ombudsman issued revised notice on June 7, 2007. Assistant Ombudsman J. Kate Burkhart investigated this complaint and drafted the preliminary finding with the assistance of Assistant Ombudsmen David Newman. Ms. Burkhart

left the Ombudsman's office in November 2007 and the finding of record was completed by Assistant Ombudsman Beth Leibowitz and Assistant Ombudsman Tom Webster.

Litigation Regarding LBC Decision

During the course of this investigation, two appeals of the LBC's final decision were filed in Superior Court in Fairbanks.[4]

On June 7, 2007, Assistant Attorney General Marjorie Vandor, the state's attorney assigned to DCCED, informed the ombudsman investigator that Michael Murphy had appealed to the court the LBC's denial of his request for reconsideration of its final decision. Mr. Murphy raised eight issues in his appeal, all of which involved the LBC's findings about the economy of the region, the proposed budget for the borough, and the proposed payment-in-lieu-of-taxes (PILT) agreement with Teck-Pogo, Inc. Mr. Murphy did not contact or file a complaint with the ombudsman.

On June 20, 2007, AAG Vandor informed the ombudsman investigator of a second appeal to the superior court, filed by Margret Mullins on June 11, 2007. The ombudsman reviewed the issues raised in the second appeal, as well as the legal standards at issue. Ms. Mullins's Statement of Points on Appeal alleged that the LBC had violated the law in multiple respects:

- LBC violated AS 29.05.070 and AS 29.05.100 by accepting the budget and financial plan proposed for the borough (points 1, 2);
- LBC violated 3 AAC 110.045, 3 AAC 110.910, and the Voting Rights Act of 1965 by accepting a borough proposal that "denied the existence of two minority bodies of residents . . . not fluent in spoken and written English" (point 3);
- LBC violated 3 AAC 110.045, 3 AAC 110.910, and the Voting Rights Act of 1965 (as well as state and federal constitutional protections) by not providing "informational materials concerning the proposed borough, in a timely manner" and by not mailing the Petition and LBC reports to every voter in the region (points 4, 5, 12);
- LBC violated 3 AAC 110.045, 3 AAC 110.910, and the Voting Rights Act of 1965 by not providing "informational materials . . . in a form understandable by the substantial minority of Russian speakers" (point 6);
- LBC violated AS 44.62.310 and AS 44.62.312 by conducting a "private tour of a portion of the proposed borough area" and then relying upon that tour in its decision making (7);
- LBC violated Alaska law by revising "procedural regulations without public notice and review" in order to approve the Petition (point 8);
- LBC violated 3 AAC 110.145 "in that it failed to adequately consider the concerns of the residents of Healy Lake" (point 13);
- LBC violated the Voting Rights Act of 1965 by providing for election of borough assembly members "at-large" rather than by district (point 15);

[4] *Murphy v. LBC* 4FA-07-1738 CI; *Mullins v. LBC*, 4FA-07-1818 CI, consolidated by Superior Court Judge Randy M. Olsen on July 20, 2007, as 4FA-07-1738 CI.

- LBC violated the Alaska Constitution by approving the PILT agreement and directing the Division of Elections to include on the ballot a measure calling for voters to approve or disapprove this agreement in conjunction with proposed energy taxes (points 20-22).

In addition to these alleged violations of the law, Ms. Mullins also alleged in her Statement of Points that the LBC violated Executive Order 186 "when it failed to conduct government to government consultation with the Mendas Cha-Ag Tribe" (point 14); that the LBC showed bias against Alaska's unorganized borough and the Delta area in particular by criticizing the area "for not carrying its share of educational costs," and that this alleged staff bias prejudiced the LBC's final decision (point 9-11). Finally, Ms. Mullins's appeal raised issues about actions taken by the Division of Elections relating to the Petition (points 16-19). Ms. Mullins did not file a complaint with the ombudsman.

On July 19, 2007, after the ombudsman sent the preliminary report to the LBC, Ms. Mullins filed an Amended Points of Appeal that revised the wording of several of the numbered points of appeal, altered their order, and added three more points alleging that the Director of Elections "erred in following the LBC's directions to join the PILT agreement together with the energy taxes vote into one ballot proposition," and that both the Director of Elections and the LBC "failed to appropriately respond to the public's notice of these errors" (Amended Points of Appeal, points 22-24).

The Amended Points of Appeal document also contained five points under the heading, "Remedy Sought" asking the court to order:

- that "there be two elections, one for borough approval or rejection, together with the tax issues involved, and a later second election for the election of borough officers";
- that "diverse income sources needing approval . . . be separate [ballot] propositions";
- that "the Deltana Borough election . . . be stayed until all the points of appeal . . . are addressed by this Court";
- that "the Deltana Borough elections . . . be stayed until this Court has addressed . . . [allegations of fraud relating to] the charter's budget";
- that "the process be begun again" in accordance with state law.

On July 20, 2007, Superior Court Judge Randy M. Olsen presided over oral argument in Mr. Murphy's and Ms. Mullins's consolidated appeals. The hearing focused on the appellants' efforts to obtain a preliminary injunction staying the election, and the need for expedited consideration before ballots were mailed. On July 27, 2007, Judge Olsen denied an injunction to stay the election without evaluating the issues on their merits.

The full text of Judge Olsen's July 27, 2007 Order on Motion for Preliminary Injunction to Stay of Election is as follows:

> Appellants move for a preliminary injunction compelling the Division of Elections to stay the scheduled vote on the incorporation election for the proposed Deltana Borough. To obtain injunctive relief the applicant must be faced with irreparable harm, the object of the injunction must be protected if the injunction is granted, and, when the effects of the

> injunction are not inconsiderable and not subject to adequate indemnification by bond, a showing of probable success on the merits is required.[1] [Note 1: "*North Kenai Peninsula Maintenance Service Area v. Kenai Peninsula Borough*, 850 P.2d 636, 639 (Alaska 1993)."] After reviewing the pleadings filed in the consolidated case, neither appellant appears to be subjected to irreparable harm. The real interested parties in the election are all those who wish to vote in the election. While an injunction can interrupt an election, the courts should be extremely cautious about interfering with the election process. Although a vote could still be had, any delay may be a recognized effect, not subject to indemnification by bond. Further, with the current state of the pleadings, although appellants may ultimately yet prevail, the court at this time cannot conclude that appellants have carried their burden to demonstrate probable success on the merits."

The election proceeded, with ballots mailed on July 30 as scheduled by the Division of Elections.

The voters defeated the ballot measure to create a Deltana Borough by a vote of 1,242 to 129. Voters also defeated by an equal margain a second question on the ballot authorizing the Borough – if created by the vote – to establish an agreement with the Teck-Pogo mine for payment in lieu of taxes, and to levy a 3 percent home heating fuel and vehicle gas sales tax and a 10 percent tax on electrical power. On September 19, 2007, the court approved a stipulation by Mr. Murphy and the LBC to dismiss Mr. Murphy from the consolidated case, "including dismissing Murphy's points on appeal with prejudice." Subsequently, Judge Olsen dismissed the remainder of the case, i.e. Ms. Mullins's appeal, as moot. The superior court never decided the merits of the issues raised by Mr. Murphy and Ms. Mullins. Judge Olsen's October 5, 2007 order stated in part:

> It is ordered that the Local Boundary Commission's motion to dismiss is granted. This appeal is dismissed in its entirety, with prejudice, with each party to bear its own costs and fees.

On November 7, 2007, Ms. Mullins appealed this dismissal to the Alaska Supreme Court. Her Statement of Points of Appeal set forth 47 points on appeal in eight sections headed A through G (section label E is repeated once):

A. "Lower court errors of procedure appealed"
B. "Appeal re PILT agreement"
C. "Appeal re unresolved contract law violations of the PILT"
D. "Appeal re unresolved legality of lack of grass roots participation and formation of the borough petition & PILT"
E. "Appeal re Mr. Murphy's stipulation to dismiss did not affect Mullins' appeal"
E. "Appeal re unredressed grievances against LBC's law, guideline, and civil rights violations"
F. "Appeal re unresolved questions of Deltana Borough election held according to unlawful statutes, unclear statutes, as well as re the faulty election procedures by the Fairbanks Elections office"
G. "Appeal re violation of Russian language minority's civil rights, including due process of law, equal access to the law, equal treatment under the law, to name a few"

As of March 20, 2009, Ms. Mullins had filed her opening brief, the Office of the Attorney General had responded on behalf of the LBC and the Division of Elections, and Ms. Mullins's reply brief was due in April 2009.

July 2007 LBC response asks ombudsman to discontinue investigation

The ombudsman provided a preliminary investigative report (per AS 24.55.180) to the LBC on June 27, 2007, and the LBC responded on July 27, 2007. In its response the LBC requested that the ombudsman discontinue investigation of these complaints—and thus not issue a final report—because of the then-pending Murphy/Mullins litigation. The LBC cited the following regulation of the Office of the Ombudsman:

> 21 AAC 20.200. Discontinuing an investigation
> . . .
> (b) The ombudsman will discontinue an investigation, with written notice to the complainant and to the agency, if, during the course of the investigation . . .
> (3) the complaint relates to a matter that becomes the subject of a judicial proceeding; . . .

Ombudsman's response to LBC's request

The fact that litigation exists is not sufficient in itself to bar investigation of related matters by the ombudsman. For example, the ombudsman regularly investigates administrative actions of the Office of Children's Services (OCS) regarding families who are involved with OCS and engaged in Child in Need of Aid (CINA) litigation. This is because a considerable number of OCS administrative acts, decisions, and omissions are not ruled upon by the court during a CINA case. Further, the Ombudsman Act specifically provides that the ombudsman will investigate and make findings when the ombudsman has reason to believe that an administrative act may be "unreasonable, unfair, oppressive, arbitrary, capricious, an abuse of discretion, or unnecessarily discriminatory, *even though in accordance with law*." See AS 24.55.150(a) (Italics added). In other words, the ombudsman's review of an issue is not limited to the standard of review available to a court reviewing an administrative decision.

The regulation must be read in light of the statutes authorizing it. AS 24.55.110 provides that the ombudsman "shall" investigate, and offers limited grounds for declining or discontinuing an investigation:

> Sec. 24.55.110. Investigation of complaints.
> The ombudsman shall investigate any complaint that is an appropriate subject for investigation under AS 24.55.150, unless the ombudsman reasonably believes that
> (1) there is presently available an adequate remedy for the grievance stated in the complaint;
> (2) the complaint relates to a matter that is outside the jurisdiction of the ombudsman;

> (3) the complaint relates to an administrative act of which the complainant has had knowledge for an unreasonable length of time before the complaint was submitted;
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> (4) the complainant does not have a sufficient personal interest in the subject matter of the complaint;
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> (5) the complaint is trivial or made in bad faith;
>
> (6) the resources of the ombudsman's office are insufficient for adequate investigation.

The terms of the ombudsman's jurisdiction over "administrative acts" of agencies are defined in AS 24.55.330. AS 24.55.330(1) defines "administrative act as follows:

> (1) "administrative act" means an action, omission, decision, recommendation, practice, policy, or procedure of an agency, but does not include the preparation or presentation of legislation *or the substantive content of a judicial order, decision, or opinion*; [*Italics* added.]

When an ombudsman investigation may be related to pending litigation, the decision to discontinue the investigation can be supported statutorily by AS 24.55.110(1) (adequate remedy elsewhere for the grievance stated in the complaint) or AS 24.55.110(2) (matter outside the ombudsman's jurisdiction, such as the substantive content of a judicial decision, which is excluded from the ombudsman's jurisdiction pursuant to AS 24.55.330(1)). Also, the ombudsman may discontinue an investigation if it becomes apparent that the Office of the Ombudsman does not have the necessary resources for the investigation, as stated in AS 24.55.110(6).

In this case, ombudsman Complainants A, B, and C, were not parties to the Murphy/Mullins lawsuit. As they had not chosen that forum and were not participating in it, the Murphy/Mullins lawsuit did not necessarily offer an "adequate remedy" for Complainant A, Complainant B, and Complainant C. Instead there is some injustice in depriving them of the forum they chose – ombudsman's review and investigation – because of others' choice of litigation. The ombudsman does not believe that AS 24.55.110(1) applied in this instance.

AS 24.55.110(2) (matter outside the ombudsman's jurisdiction) does not support discontinuation, either. The substantive content of a judicial decision is not to be questioned by the ombudsman; however, this case is so far devoid of any substantive decision. The superior court refused to issue a preliminary injunction, and then dismissed the case as moot after the election – there was no decision on the merits and the case has been dismissed, which would usually preclude the possibility of a decision on the merits. Currently, Ms. Mullins is appealing the dismissal to the Alaska Supreme Court, and the case is being briefed. Unless or until the Supreme Court reverses the lower court's dismissal of the case, there is no possibility of a judicial ruling addressing the quality of the LBC's procedure in the Deltana Borough incorporation effort.

The ombudsman does have statutory authority to discontinue an investigation that requires expenditures of labor or expertise that are beyond the office's resources, pursuant to AS 24.55.110(6). In June 2007, the ombudsman discontinued a portion of the complaint

regarding the economic viability of the proposed borough; this decision was based in large part on the lack of in-house expertise to evaluate the economic arguments.

However, the ombudsman's resources were sufficient for the remaining complaint issues, and the ombudsman duly issued the preliminary report to the LBC on June 27, 2007.

In short, the LBC's reading of 21 AAC 20.200 puts the regulation in conflict with its authorizing statutes in AS 24.55, because this case does not fit well into any of the statute's limited provisions for discontinuing an investigation. To avoid thwarting the intent of the statute, the ombudsman's interpretation of 21 AAC 20.200 limits it to cases where the ombudsman complainant becomes party to litigation, or where judicial decision makes ombudsman investigation redundant. The ombudsman's interpretation of its own regulations is entitled to great weight. See *United States v. RCA Alaska Communications, Inc*., 597 P.2d 489, 498 (Alaska 1979).

In addition to the statutory issues discussed above, the ombudsman's investigation was not a replication of the matters the court could have decided – had it reached a decision on the merits – in the Murphy/Mullins lawsuit. The ombudsman's preliminary report provided findings to the LBC on three allegations. The first of the allegations read:

> ***Allegation 1: The Local Boundary Commission arbitrarily found that Whitestone and the Native Village of Healy Lake are communities satisfying the requirements of AS 29.05.031(a)(1) and 3 AAC 110.045.***

In the two appeals filed in court, only one paragraph approaches this issue tangentially. Paragraph 13 of Ms. Mullins's June 11, 2007 "Statement of Points" of appeal alleges:

> 13. The Local Boundary Commission erred and violated 3 AAC 110.145 in that it failed to adequately consider the concerns of the residents of Healy Lake, when neither area is closely tied to the primary area of the proposed borough.

The above paragraph mentions "concerns" of residents of Healy Lake, but does not mention Whitestone.[5] It alleges violation of 3 AAC 110.145, but does not indicate what part of the regulation the plaintiff believed was violated. In contrast, the ombudsman investigator focused on the requirements of 3 AAC 110.045(b), [6] which created a presumption that a borough must contain at least two communities in order to have a sufficient level of interrelationship required by 3 AAC 110.045(a) and AS 29.05.0319(a)(1). The ombudsman inquired whether the DCA – as

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[5] In her July 19, 2007 "Amended Points of Appeal" Ms. Mullins repeated this allegation, renumbered and reworded as follows:

> 12. The Local Boundary Commission erred and violated 3 AAC 110.145 in that it failed to adequately consider the concerns of the residents of Healy Lake, who are not closely tied to the primary area of the proposed borough, and transportation and expense logistics would prevent those residents from actively participating in borough activities and assembly meetings, as well as receiving borough services.

[6] 3 AAC 110.045(b) was repealed in January 2008, after the ombudsman issued the preliminary investigative report. The regulation no longer includes any requirement of multiple communities.

LBC staff – reached an arbitrary conclusion when they informed the LBC that Whitestone and Healy Lake were "communities" for purposes of the pre-2008 regulation. The ombudsman then discusses the extent of the LBC's support for overcoming the presumption, as provided in 3 AAC 110.045(b), if Whitestone and Healy Lake did not qualify as distinct communities to satisfy the presumption.

Judicial review of the LBC requires a deferential standard of review, which means that the court must stop when the record has a minimum amount of evidence to support the administrative agency. That is not the function of the ombudsman. The ombudsman is not required to accept an agency's decision because there was some basis to support it. The ombudsman is obliged to ask if the decision reflected good use—beyond merely acceptable use—of the available information. In this case, the ombudsman concluded that the LBC's conclusions were not adequately based on the available information. The ombudsman's findings and recommendations are intended to be candid advice, without built-in deference to the agency's own judgment; unlike a court, however, the ombudsman's findings are not binding. This trade-off—discretion to review without deference, combined with non-binding findings and recommendations—is implicit in the mandate of the Ombudsman Act. Indeed, the ombudsman standards set out at AS 24.55.150 include "unreasonable, unfair, oppressive, arbitrary… even though in accordance with law," an option obviously not available to a court.

In its response to the ombudsman's preliminary investigative report, the LBC complained that "the Ombudsman attempts to substitute its judgment for that of the constitutionally created LBC, a body to which the courts have granted great discretion" (p. 8). This argument underscores the LBC's misunderstanding of the ombudsman's role and of the statutory standards for ombudsman evaluation of agency acts and decisions. The ombudsman regularly substitutes its judgment for that of agencies and, unlike the courts, does not "grant great discretion" to an agency in evaluating its administrative acts and decisions.

The LBC response also places great emphasis on the ombudsman's use of the phrase "no reasonable basis" in the preliminary report and argues that the ombudsman used the same standard of review as a court applying the most deferential standard of legal review to the LBC's conclusions.[7] The passage in the ombudsman's preliminary investigative report read as follows:

> It is the Ombudsman's belief that the LBC offered no factual basis for its initial findings that there were multiple communities in the proposed Deltana Borough satisfying AS 29.05.031 and 3 AAC 110.045. No reasonable basis was offered in the LBC's Statement of Decision for the finding of a "specific and persuasive showing" that "the

[7] The Alaska courts use "reasonable basis" to connote a deferential standard of review of administrative decisions, but that is not the exclusive usage. It is also used as an ordinary English phrase, denoting exactly what it says. For example, the Alaska Supreme Court, while using its independent judgment to review a question of law, wrote: "But the activities covered by these two regulations--construction and discharge in coastal waters--require federal permitting; the requirement of a federal permit, in turn, ensures that the minimum level of compliance required under Alaska's coastal development standard will be achieved upon approval of a federal permit. We thus find no *reasonable basis* for construing Alaska's regulatory standard to require a separate layer of cumulative impacts analysis as part of DGC's consistency review process." [*Italics* added]. *See* Greenpeace, Inc. v. State Office of Management and Budget, Div. of Governmental Coordination and Alaska Coastal Policy Council, 79 P.3d 591, 595 (Alaska 2003).

> social, cultural, and economic characteristics and activities of the people" in the proposed borough are "interrelated and integrated" as required by 3 AAC 110.045(a). There was no discussion in the Statement of Decision as to what facts and premises supported the LBC's decision, and there was no discussion of the important factors involved in the determination. Therefore, the allegation that the LBC arbitrarily found Whitestone and the Native Village of Healy Lake to be communities satisfying the requirements 3 AAC 110.045 is ***justified***.

With all due respect, a fair reading of the ombudsman's preliminary investigative report (and this final version) would find a marked lack of deference toward both DCA's analysis and the LBC's decision based on that analysis. The ombudsman investigator looked carefully at the data received by the LBC, as documented in the public record, and discussed it in detail in the report. In evaluating whether the LBC had drawn logical conclusions from the available information, the ombudsman concluded that the LBC decision failed to support its conclusions regarding Whitestone and Healy Lake with evidence that a reasonable and impartial person would find persuasive to justify its finding that the proposed borough had either multiple communities (as presumed necessary in former 3 AAC 110.045(b)) or was sufficiently integrated and interrelated despite not meeting that requirement.

The ombudsman strives to avoid legal jargon and regrets that the plain English phrase "no reasonable basis" may have contributed to the LBC's misunderstanding of the ombudsman's function and standards. The passage quoted above has been reworded in this final report to avoid misleading lawyers and to remove any potential ambiguity on that point.

The ombudsman also investigated an allegation regarding the LBC's management of public notice and comment in the proposed borough:

> ***Allegation 2: The Local Boundary Commission unfairly failed to provide accessible public notice as required by the formal policies of the State of Alaska and accepted standards of public notice to the populations affected by the proposed borough incorporation, resulting in the population's inability to participate in the public comment and hearing process.***

Ms. Mullins asked the court to conclude that the LBC "violated 3 AAC 110.045, 3 AAC 110.910, and the Federal Voting Rights Act of 1965, as amended," by not providing informational materials "in a form understandable by the substantial minority of Russian speakers in the area of the proposed borough."[8] Again, the ombudsman did not seek to determine whether the LBC violated state or federal law; the ombudsman questioned whether the LBC's public notice in this case was fair in the sense of being good governmental policy.

Furthermore, although the Mullins appeal apparently attempted to raise the issue of adequate notice for Russian speakers in the Delta area, the lawsuit does not actually reach the issue investigated by the ombudsman, i.e. whether the LBC provided comprehensible notice to both

[8] June 11, 2007 "Statement of Points" of appeal, number 6. Ms. Mullins repeated this allegation in her July 19, 2007 "Amended Points of Appeal" at number 6, and in her November 6, 2007 "Statement of Points of Appeal" in support of her appeal to the Alaska Supreme Court of Judge Olsen's October 5, 2007 dismissal of her case, at number 31.

English and Russian speakers. Of the three laws that Mullins cited, 3 AAC 110.045 does not address procedures for adequate notice. 3 AAC 110.910 states simply: "A petition will not be approved by the commission if the effect of the proposed change denies any person the enjoyment of any civil or political right, including voting rights, because of race, color, creed, sex, or national origin." This regulation may obliquely approach notice requirements, but appears to actually address the effects of the LBC decision itself rather than the quality of the hearing process. As for the Voting Rights Act of 1965, the LBC response states that it does not apply to the Russian-speaking minority. See LBC Response, page 15, n. 17. Finally, the ombudsman looked at this issue from a broad perspective that included the readability of LBC notices in English and state agency policy on the use of "Plain English" in state publications.

Allegation 3: The Local Boundary Commission unreasonably failed to engage in government-to-government consultation with the tribal government of the Native Village of Healy Lake, as required by the State of Alaska policy adopted in the 2001 Millennium Agreement.

The Mullins complaint contained a related allegation in Paragraph 14, which read as follows:

> 14. The Local Boundary Commission erred and violated the requirements of Executive Order 186, when it failed to conduct government to government consultation with the MENDAS CHA-AG TRIBE.[9]

Administrative Order 186, signed by Governor Knowles on September 9, 2000, is the precursor to the 2001 Millennium Agreement. The administrative order does not contain many specifics, other than a commitment to work further with the tribes.[10] The result of Administrative Order 186 was the 2001 Millennium Agreement, as signed by the State and the federally recognized Alaska Native tribes on April 11, 2001. Unlike the Mullins point of appeal, the ombudsman investigation focused on implementation of the 2001 Millennium Agreement, which provided more specific commitments than the general statement in the administrative order.

However, as specifically noted in the LBC response, the Millennium Agreement does not create a legally enforceable right:

> 31. In executing this AGREEMENT, no party waives any rights, including treaty rights, immunities, sovereign immunities, or jurisdiction it may possess. This AGREEMENT in no way diminishes any rights or protections afforded any persons or entities, whether parties or not, under applicable tribal, state, federal, or

[9] June 11, 2007 "Statement of Points" of appeal, number 14. Ms. Mullins repeated this allegation in her July 19, 2007 "Amended Points of Appeal" at number 13, adding a short clause at the end: "and ignored Healy Lake's native sovereignty."

[10] The consultation provision in Administrative Order 186 referenced by Ms. Mullins states:

> I declare that it is the commitment and policy of the State of Alaska, consistent with the Constitutions of the United States and the State of Alaska, to work on a government-to-government basis with Alaska's sovereign Tribes, which deserve the recognition and respect accorded to other governments. The State of Alaska has a long-standing commitment to local self-government that is rooted in the belief that the best and most effective solutions to local problems are those that are conceived locally.

> international law. Through the provisions of this AGREEMENT the parties strengthen their collective ability to successfully address and resolve issues of mutual concern. This agreement is a policy directive and does not create legally binding or enforceable rights. By signing this AGREEMENT no party is making an admission, nor may this document be used in any court of law.

An allegation regarding whether an agency has followed the Millennium Agreement is thus effectively excluded from judicial review. The ombudsman's mandate, however, encompasses exactly this type of situation. AS 24.55.150 provides, "An appropriate subject for investigation by the ombudsman is an administrative act of an agency that the ombudsman has reason to believe might be . . . unreasonable, unfair, oppressive, arbitrary, capricious, an abuse of discretion, or unnecessarily discriminatory, even though in accordance with law."

The ombudsman declines to withdraw the findings and recommendations provided to the LBC

Upon receipt of preliminary findings and recommendations on June 27, 2007, the LBC contended that it need not respond to the substance of the ombudsman's report, and requested that the ombudsman not issue a final report. The LBC argued that the Murphy/Mullins lawsuit, filed two months after the ombudsman opened this case, destroyed the ombudsman's jurisdiction to offer its report to the agency. The LBC cited 21 AAC 20.200(b)(3), which states that the ombudsman will discontinue an investigation that becomes the subject of judicial proceedings.[11]

The ombudsman has long interpreted these regulations to permit investigation of complaints when the complainant is not a litigant or when the administrative action is being reviewed under standards different from judicial review. The ombudsman adopted these regulations to ensure that complainants do not expect the ombudsman either to act as a sort of appellate court by reviewing judicial decisions or to provide a forum in parallel with a complainant's lawsuit. The former puts the ombudsman in the position of investigating a judge's decision, which is outside the ombudsman's statutory mandate. The latter is unfair to complainants who lack the forum provided by litigation, as it diverts the ombudsman's resources away from those individuals for whom the ombudsman is the only avenue, because their problem is not one readily solvable by judicial review or because they lack the resources to engage in litigation. The ombudsman notes that neither Ms. Mullins nor Mr. Murphy contacted the ombudsman or was a complainant or source of information in the ombudsman's investigation of the complaints filed by Complainant A, Complainant B, and Complainant C. The ombudsman believes it is not appropriate to allow a third party's choice of litigation to bar the complainants' recourse to the ombudsman, and that it would be particularly inappropriate when the third-parties' litigation has not offered any ruling to address the complainants' issues.

For the foregoing reasons, the ombudsman has issued this final report pursuant to AS 24.55.190.

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[11] In a heading in its July 27, 2007 response, the LBC also cited 21 AAC 20.010(a)(1), which states that the ombudsman "may not investigate (1) a complaint that, at the time the complaint is filed, is the subject of a judicial proceeding," but this regulation is inapplicable.

Investigation methodology

The investigator interviewed or solicited information from the following people:

- Complainant A
- Complainant B
- Complainant C
- JoAnn Polston, First Chief of the Mendas Cha-Ag Tribe
- Dan Bailey, resident of Delta Junction
- Stephen Fields, President of Delta Regional Economic Development Council and former member of Charter Commission
- Kathy Atkinson, Local Government Specialist, LBC
- Marjorie Vandor, Assistant Attorney General
- Sarah Felix, Assistant Attorney General

The investigator obtained documentary evidence from LBC, the Department of Law, the complainants, Dan Bailey, Stephen Fields, the City of Delta Junction, and others in the course of the investigation. This documentation includes the following:

- The complaints made by Complainants A, B and C
- The Petition for Incorporation of the Deltana Borough
- The notices issued by the Petitioner and LBC
- Distribution lists and affidavits of service prepared by the Petitioner and LBC staff
- Petitioner's Response to Comment and Briefs Filed Regarding the Deltana Borough Petition, April 17, 2006
- Written public comments made to the LBC
- The Preliminary Report prepared by LBC staff and issued November 13, 2006
- The Final Report prepared by LBC staff and issued February 2007 by the LBC
- The LBC's Statement of Decision issued April 12, 2007
- Requests for Reconsideration made to the LBC
- The appeal filed by Michael Murphy on May 29, 2007 (4FA-07-1738 CI)
- The appeal filed by Margret Mullins on June 11, 2007 (4FA-07-1818 CI)
- The February 2003 Unorganized Areas of Alaska that Meet Borough Incorporation Standards Report issued by the LBC
- The November 2004 Delta Junction Region Comprehensive Economic Development Strategy (prepared on behalf of the City of Delta Junction with the support of a US Department of Commerce grant)
- Audio recordings of LBC public proceedings held December 4, 2006; March 16, 2007; March 17, 2007; and May 10, 2007
- July 27, 2007 Letter from Mark Davis, Director of Banking and Securities Division, in response to a letter from Ombudsman Linda Lord-Jenkins
- July 27, 2007 Memorandum from Michael Black, Director of DCA, Re: Publication Guidelines for Monthly DCA Newsletter
- The LBC's July 27, 2007 Response to the ombudsman's Preliminary Investigative Report

- Materials available on the LBC website regarding the following LBC actions:
  - 1978 Petersburg Annexation
  - 2000 Haines Consolidation
  - 2000 Fairbanks-North Star Borough Consolidation
  - 2000 Ketchikan-Gateway Borough Consolidation
  - 2001 Skagway Municipal Incorporation
  - 2004 Petersburg Annexation

The investigator also reviewed relevant legal authority:

- Alaska Administrative Code Title 3, Part 15, Chapter 110 (3 AAC 110 *et seq.*)
- AS 29.05.031
- The Voting Rights Act (42 USC §§ 1973 *et seq.*)
- *Federal Register,* vol. 67, no. 134, p. 46332
- *Keane v. LBC*, 89 P.2d 1239 (Alaska 1995)
- *Lake & Peninsula Borough v. LBC*, 885 P.2d 1059 (Alaska 1994)
- *SEACC v. State*, 665 P.2d 544 (Alaska 1983)
- *Trustees for Alaska v. State*, 795 P.2d 805 (Alaska 1990) (referred to as *Camden I*)
- *Millennium Agreement between the Federally recognized Sovereign Tribes of Alaska and the State of Alaska*, April 11, 2001
- Administrative Order No. 186, September 29, 2000
- Administrative Order No. 157, June 5, 1995
- Administrative Order No. 44, October 26, 1977
- AS 24.55 21; AAC 20.010(a)(1); 21 AAC 20.200-20.250

Additional research included:

- US Census Borough data available at www.census.gov and http://factfinder.census.gov
- The Division of Community Advocacy Community Database Online
- The Division of Corporations, Business and Professional Licensing online licensing database
- The Regulatory Commission of Alaska online database of active certificates for public utilities
- City of Delta Junction website at www.ci.delta-junction.ak.us
- Whitestone Community Web at http://community.wsfnet.org
- *Fairbanks Daily News-Miner, Delta Wind,* and *Delta News* articles and archives
- Policy of Government-to-Government Relations with Federally Recognized Tribes of Alaska, Alaska Department of Fish and Game, issued May 1, 2002
- National Water Quality Inventory: Report 2000, U.S. Environmental Protection Agency (August 2002)
- *How to Write Plain English*, Dr. Rudolf Flesch (Harper & Row, 1979)
- *The Art of Readable Writing*, Dr. Rudolf Flesch (Harper, 1949)
- *The Art of Plain Talk*, Dr. Rudolf Flesch (Harper, 1946))
- Resources on “plain English” use by government at www.plainlanguage.gov

- *Who's Reading Your Writing?*, Debby Weitzel (Colorado State University, June, 2003)
- Agency Attorney Review Checklists created by the Department of Law
- Alaska Department of Education Assessment, Accountability and Student Information for the Delta-Greely REAA and Alaska
- *Federal Government Eases School Rules in Alaska*, AP, June 12, 2007
- Voting rolls for Delta Junction residents
- Division of Elections Order and Notice of Election of [sic] the Proposal to Incorporate the Deltana Borough
- Public Notice of Petition to Consolidate the City of Fairbanks and the Fairbanks North Star Borough
- December 14, 1991 Memorandum, ombudsman counsel Michael Hostina to Ombudsman Duncan Fowler

OMBUDSMAN'S NOTE

The ombudsman did not review whether the proposed Deltana Borough is good or bad policy. Instead, the ombudsman reviewed whether or not LBC's actions during the petition process complied with the standards of good government according to standards specified in The Ombudsman Act. To that end, the ombudsman based this investigation almost entirely on the administrative record—the reports prepared by LBC staff, the written and oral public comment, the statements of commissioners at the public proceedings, the requests for reconsideration, and the written decisions of the LBC. This is because what was at issue in the ombudsman's investigation was the administrative actions of the LBC—based on the record—in a public process.

The ombudsman specifically takes no position on the proposal to form a Deltana Borough. The ombudsman is only interested in ensuring that Alaska's state administrative agencies meet standards of good government.

ANALYSIS AND FINDINGS

The ombudsman uses a two-part review in investigations. The standard used to evaluate allegations made in all ombudsman complaints is a **preponderance of the evidence**. This means that, when reviewing the information and evidence collected during an investigation, the ombudsman evaluates whether **the allegation is more likely to be true than not.** If a preponderance of the evidence indicates that the administrative act took place as alleged, then the ombudsman reviews the administrative agency's action according to one of the standards established by AS 24.55.150 and AS 24.55.190(a) and defined by the Ombudsman Policies and Procedures Manual.

Alaska Statute 24.55.150 authorizes the ombudsman to investigate administrative acts of Alaska state agencies that "the ombudsman has reason to believe might be contrary to law; unreasonable, unfair, oppressive, arbitrary, capricious, an abuse of discretion, or unnecessarily discriminatory, even though in accordance with law; based on a mistake of fact; based on improper or irrelevant grounds; unsupported by an adequate statement of reasons; performed in an inefficient or discourteous manner; or otherwise erroneous." The ombudsman reformulates citizen complaints against state agencies as allegations using these statutory terms. AS 24.55.150 also provides that "the ombudsman may investigate to find an appropriate remedy."

Under 21 AAC 20.210 the ombudsman evaluates evidence relating to a complaint against a state agency to determine whether criticism of the agency's actions is valid, and then makes a finding that the complaint is *justified*, *partially justified*, *not supported*, or *indeterminate*. A complaint is *justified* "if, on the basis of the evidence obtained during investigation, the ombudsman

determines that the complainant's criticism of the administrative act is valid." Conversely, an allegation is *not supported* if the evidence shows that the administrative act was appropriate. If the ombudsman finds both that an allegation is *justified* and that the complainant's action or inaction materially affected the agency's action, the allegation may be found *partially justified*. An allegation is *indeterminate* if the evidence is insufficient "to determine conclusively" whether criticism of the administrative act is valid.

Allegation 1

> ***The Local Boundary Commission arbitrarily found that Whitestone and the Native Village of Healy Lake are communities satisfying the requirements of AS 29.05.031(a)(1) and 3 AAC 110.045.***

The ombudsman investigated whether it was **arbitrary** for the LBC to find that Whitestone and the Native Village of Healy Lake are communities for the purposes of the Petition. The Ombudsman Policies and Procedures Manual at 4040(5) defines "arbitrary" to include the following circumstances:

> (A) the agency's action or decision was not based upon an intelligible or understandable public policy decision; . . . or
>
> (D) the agency's action or decision was not based on a conscientious consideration of all relevant factors.

To incorporate as a home rule borough, an area must meet the requirements of AS 29.05.031, which states, in part:

> (a) An area that meets the following standards may incorporate as a home rule, first class, or second class borough, or as a unified municipality:
>
> (1) the population of the area is interrelated and integrated as to its social, cultural, and economic activities, and is large and stable enough to support borough government . . .

The threshold requirement of integration and interrelationship is also found in 3 AAC 110.045(a), which requires a finding that "the social, cultural, and economic characteristics and activities of the people in a proposed borough must be interrelated and integrated." 3 AAC 110.045(b) establishes a presumption that such "interrelationship cannot exist unless there are at least two communities in the proposed borough." To overcome the presumption, the regulation required "a specific and persuasive showing to the contrary." Therefore, the LBC was required to find that at least two qualifying communities exist in the Deltana region—or that a specific and persuasive showing of community interrelationship existed—before it could approve the Petition.[12]

[12] As noted above, 3 AAC 110.045(b) was repealed in January 2008, after the ombudsman issued the preliminary investigative report. The regulation no longer includes any requirement of multiple communities, but the

3 AAC 110.920 controls how to determine what constitutes a "community." The regulation establishes that a "community" is a settlement of at least 25 inhabitants residing permanently in close geographical proximity as a "discrete and identifiable social unit" that allows frequent personal contact and has population density characteristic of neighborhood living. (3 AAC 110.920(a)(1)-(3)). A "discrete and identifiable social unit" is indicated by factors such as "school enrollment, number of sources of employment, . . . permanency of dwelling units, and the number of commercial establishments and other service centers." (3 AAC 110.920(a)(3)). There is a presumption that a settlement "does not constitute a community" if "public access to or the right to reside at" the settlement is "restricted." *See* 3 AAC 110.920(b)(1).

There is no question that the City of Delta Junction satisfies the regulatory standards. However, the reports prepared by LBC's staff – personnel in the Division of Community Advocacy (DCA) – also concluded that Healy Lake and Whitestone are "communities" as defined by 3 AAC 110.920(a). In support of the conclusion that they are "communities," LBC staff indicated in their Preliminary Report that Whitestone and Healy Lake are "open and accessible" communities that are socially, culturally and economically related to Delta Junction and the Deltana region. LBC staff affirmed this finding in their Final Report, but provided no basis in either report for finding that Whitestone or Healy Lake satisfied those standards.

As noted above, 3 AAC 110.045(b) was repealed in January 2008, after the ombudsman issued the preliminary investigative report. The regulation no longer includes any requirement of multiple communities. The ombudsman evaluated the complaints based on standards – statutes and regulations – in effect at the time of the administrative decision.

Whitestone

The Preliminary Report prepared by LBC staff describes Whitestone as "a religious commune" founded in 1982 on five square miles of privately held land eight miles outside of Delta Junction. (Preliminary Report, pp. 48-49). It is not on the road system, nor does it have an air strip, regular ferry service, or public river dock. Its "members live in multifamily dwellings built by church volunteers" and "collectively pool their individual assets" (p. 50). DCCED's on-line Community Database confirms that the residents of the Whitestone settlement live communally, operate their farming enterprises communally, and hold real and personal property communally.[13]

The Church of the Living Word, Inc. operates the commune and holds the licenses for all Whitestone businesses (according to the Division of Occupational Licensing Business License Database[14]). In addition, there is a community school for the settlement's children, as well as a religious post-secondary school, all operated by the Whitestone Training Center. The settlement generates its own power.

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investigation focused on events and standards as they were at the time of the actions that are the focus of these complaints.

[13] http://www.commerce.state.ak.us/dca/commdb/CF_BLOCK.cfm?comm_boro_name=Big+Delta&DATA_TYPE=Overview,Economy (last visited June 12, 2007).
[14] http://www.commerce.state.ak.us/occ/bussearch/BusMain.cfm (last visited June 12, 2007).

The Whitestone Community Association (WCA) was founded in 2003. In his December 13, 2006 written comment to the LBC, WCA President Steve Selvaggio described the settlement as an "open community." However, at the March 16, 2007 public hearing, Mr. Selvaggio reported that, while non-church members do live along the Delta and Tanana rivers near the Whitestone commune, the WCA represents the members of the Church of the Living Word. He reported that at least half of the directors of the Whitestone Community Association board must be members of the Church of the Living Word, and to his knowledge all the directors are and have been church members.

Mr. Selvaggio's written comment explained that the "K-12 school and college" are operated by the WCA (which represents only members of the church) as "a private entity." The WCA also operates Whitestone Power & Communication (a private enterprise, not a public utility,[15] providing electricity and communication services to commune members) and the fuel station at the commune (Comments by Steve Selvaggio, December 13, 2006, p. 2).

In his December 13, 2006 written comment, Mr. Selvaggio asserted that "access to the community is not restricted." However, at the March 16, 2007 public hearing, Margret Mullins, Mitchell Gay, and others all commented that outsiders without invitation had regularly been turned away with assertions that the Whitestone lands were "private." Tim Robbins commented that just a week before the March 16, 2007 public hearing, Whitestone residents had denied him use of the driveway to the commune. Mr. Selvaggio, in response to these comments, admitted at that hearing that outsiders attempting to snowmachine over land held by the church had been turned away, though not by him personally.

In her written comment to the LBC on December 11, 2006, Emma Irene Mead also provided information as to Whitestone's closed nature. Ms. Mead prefaced her comments by stating that she has lived in the Delta area "since 1940" and has worked "closely with the religious organization, Whitestone" as part of her volunteer work with the Big Delta Historical Park over the past 27 years. Ms. Mead stated that she is "a local historian with the Delta Historical Society." According to her comment, Whitestone does not allow members of the public to "go to their holdings" or to "enter their buildings . . . unless invited."

Ms. Mead also commented on the "unwarranted fear in the community" that church members "were taking over Delta businesses" (Comments by Emma Mead, December 11, 2006, p. 1). At the March 16, 2007 public hearing, audience members interrupted and on one occasion heckled Mr. Selvaggio while he was commenting about the nature of the commune. No evidence of a sense of community or social interrelationship (such as joint community projects with the City, use of public facilities at Whitestone, etc.) among Delta Junction residents and the members of the commune was offered by the Charter Commission as the petitioner, by Mr. Selvaggio, or by members of the public.

[15] A search of the active certificates for utility companies, as provided by the Regulatory Commission of Alaska (RCA) at http://rca.alaska.gov/data/certificateActive.html (last visited June 20, 2007), shows that Whitestone Power & Communication does not operate under an active certificate issued by the RCA and therefore cannot be considered a "public utility."

It is also relevant that, in previous efforts to identify "communities" within this region, neither the LBC nor the Delta Junction Region Comprehensive Economic Development Strategy (CEDS) listed Whitestone as a "community." In 2003 the LBC, at the direction of the Alaska Legislature, issued a report entitled *Unorganized Areas of Alaska that Meet Borough Incorporation Standards* (Model Borough Report). In that report, the LBC identified a model Upper Tanana Basin Borough (Model Borough Report, pp. 78-79). The model borough included an area larger than, but inclusive of, the entire area identified in the proposed Deltana Borough (pp. 78-79). In identifying the communities "within the boundaries" of the model borough, the LBC listed 19 settlements (p. 79). The LBC did not include Whitestone. There is no mention of Whitestone in the CEDS except as an area employer (CEDS, Appendix 3).

Healy Lake

There also appears to be a lack of evidence in the administrative record to support the conclusion that Healy Lake is an open community as defined by 3 AAC 110.045. According to JoAnn Polston, the First Chief (equivalent of the tribal council president) of the Mendas Cha-Ag Tribe of Healy Lake, the village is not an open community. She provided uncontested oral comment on December 4, 2006, and on March 16, 2007. She also provided uncontested written comment on March 20, 2006. In all her comment, Ms. Polston stated that there is no substantial social, economic, or cultural interrelationship with Delta Junction. Specifically, Ms. Polston stated that:

- All land at Healy Lake is either restricted trust property, owned by the village corporation, or owned by the tribal council. Such land is only alienable with the permission of the tribal council.
- All land access is restricted by locked gates.
- Uninvited visitors are permitted to stay only if they have legitimate business in the village, and will be asked to leave as soon as the business is completed.
- All but one resident of the village is of Native Alaskan descent.
- There are no employment opportunities currently available; existing jobs are Native preference as permitted by federal law.
- There is no housing currently available. Low-income housing is offered, but is Native preference as permitted by federal law.
- 40-Mile Air service out of Tok offers three regularly scheduled flights per week, from Healy Lake to Fairbanks, for $70 each way. Private air charter service from Delta Junction is cost prohibitive (over $300 each way). Therefore, Healy Lake residents use commercial and transportation services in Fairbanks.
- The air strip is owned by the tribal council.
- All mail arrives from Fairbanks, not Delta Junction. 40-Mile Air service out of Tok delivers the mail.
- There is no clinic in Healy Lake (the Charter Commission incorrectly referred to on-site health care in its Petition). There is no Indian Health Service provider in Delta Junction, so Healy Lake residents fly to Fairbanks for medical services.
- There is no school in Healy Lake. The school building in the village was built with federal funds, but closed approximately four years before the hearings (all utilities were disconnected and the building was boarded up). Two village

> children were enrolled in correspondence through the Delta-Greely REAA in 2006-2007, but may not continue.

The LBC staff reports upon which the LBC relied stated that the 2000 Census recorded that 27 percent of the village's population was non-Native. Ms. Polston stated to the investigator that she testified on March 16, 2007, about the current population. The LBC staff reports indicated that the Delta-Greely REAA serviced the school in Healy Lake, but Ms. Polston testified that the school had been built with federal funds and was closed.

Healy Lake is a traditional Athabascan village reliant upon subsistence activities. All identified connections to outside communities were with Tok (*via* the air service) and Fairbanks (*via* Tanana Chiefs Conference and the provision of medical care). No one from the Charter Commission or LBC made an on-site visit. The record contained no testimony or comment to contradict Ms. Polston's comments.

All public comment on Healy Lake offered in writing and at the December 4, 2006 and March 16, 2007 public proceedings supported Ms. Polston's characterization of the community as a closed Native village. Jim and Nadine Black's December 13, 2006 written comment referenced the "no trespassing" sign and locked gate at 9 Mile Cummings Road, preventing public access to Healy Lake. Mary Emma Girvan's undated written comment also addressed the closed nature of the village:

> In your preliminary report you state Healy Lake meets the "community" standards. Healy Lake is a closed community, a Sovereign Nation under the Native Settlement Act. It may be a community but not in the sense you want it to be.

Ms. Mead's December 11, 2006 written comment stated that "Healy Lake is <u>not an open community</u>" (emphasis in the original).

<u>The DCA analysis did not reasonably support the conclusion that either Whitestone or Healy Lake was a "community" for purposes of the regulatory presumption requiring multiple communities in the proposed borough.</u>

The ombudsman believes there is insufficient information and evidence in the administrative record to support a finding by DCA or LBC that either Whitestone or Healy Lake constitutes a "community" under the regulatory standards in effect at the time of LBC's decision. Whitestone has the requisite 25 or more residents living in a discrete social unit (3 AAC 110.920(a)(1)-(3)), but its status as open and accessible to visitors or prospective residents is questionable. The school and all economic endeavors are operated by the Church of the Living Word, which controls the community association and access to communal resources.

While the DCCED-certified population of Healy Lake is 46, the community profile compiled by the Department indicates that there are only 11 year-round households.[16] Consideration of factors in 3 AAC 110.920(a)(3) such as "school enrollment, number of sources of employment, . . . permanency of dwelling units, and the number of commercial establishments and other service centers" does not establish that Healy Lake meets the standard for a "community." There is no school, and two children are enrolled in a correspondence curriculum. There are few employment opportunities and no commercial establishments (no village store, no gas station), according to Ms. Polston's March 16, 2007 comments. The LBC did not dispute this information.

Under 3 AAC 110.920(b)(1) there is a presumption that a settlement "does not constitute a community" if "public access to or the right to reside at" the settlement is "restricted." Public comment offered during the December 4, 2006 and March 16, 2007 proceedings was that people attempting to travel over Whitestone lands were prevented from using these "private lands." The WCA president confirmed on March 16, 2007 that outsiders had been turned away. He did not make any statement as to whether the residents of Whitestone intended to stop restricting access to the commune. This clearly indicates that public access to the settlement is restricted. The fact that resources and community governance are limited to church members is also clear evidence that the "right to reside" there in any meaningful fashion is restricted.

Regarding Healy Lake, the comments of Ms. Polston and members of the greater public both assert that there is no public access and no right to reside in Healy Lake. There is no unrestricted rental property or freely alienable land, the road into the village is gated, the air strip is on private land, and there is no public dock for river access.

These facts were in the public record prior to the issuance of the Preliminary Report prepared by LBC staff and had been reiterated for the record in written and oral comment by the time LBC staff prepared the Final Report. However, both reports made findings that Whitestone and Healy Lake were communities satisfying the statutory and regulatory standards. These findings were not based on a conscientious consideration of the facts.

LBC decision: The LBC did not reach a conclusion that Whitestone and Healy Lake satisfied the presumed requirement for multiple communities, nor did the LBC reasonably support an alternative conclusion that the presumption did not apply to the proposed borough.

After the March 16, 2007 Public Hearing, Commissioner Hicks specifically argued that neither settlement constituted an acceptable community for the purposes of accepting the Petition.[17] At the Decisional Meeting on March 17, 2007, he characterized Whitestone as a "closed community" with "no access to the public." He pointed to the fact a person "cannot reside there unless you join the church." He also noted that "we [LBC] have not seen any evidence" of "social or political intercourse" with private landowners around the Whitestone commune. Commissioner Hicks also stated that the Whitestone Community Association is a "contrivance" that was "created for purposes of permitting." Turning to Healy Lake, he found that the village

[16] http://www.commerce.state.ak.us/dca/commdb/CF_BLOCK.cfm?comm_boro_name=Healy+Lake&DATA_TYPE=Overview,Economy (last visited June 13, 2007).
[17] His statements are memorialized in footnote 13 of the LBC's April 12, 2007 Statement of Decision.

was "separate and different" and "closed," noting that the public comment offered was that "I cannot reside there freely."

The LBC offered no argument to rebut Commissioner Hicks's conclusion, instead turning to the language of 3 AAC 110.045(b) for overcoming the presumption that the proposed borough must have multiple communities:

> We can overcome the presumption in 3 AAC 110.045(b) . . . through a higher level of proof ("a specific and persuasive showing") that the proposed Deltana Borough meets the Community of Interests Standard. In that regard, we find the residents of the proposed Deltana Borough have strong ties with respect to social, cultural, and economic characteristics and activities, enough to overcome the presumption in 3 AAC 110.045(b). There exists among residents of the proposed Deltana Borough a compatibility of urban and rural areas, including compatibility of economic lifestyles, and industrial, or commercial activities. There also exists throughout the proposed borough, transportation and communication patterns that reflect, on a scale suitable for borough government, a population that is interrelated and integrated with respect to social, cultural, and economic characteristics and activities. Slavic immigrants comprise a significant component of the population of the proposed Deltana Borough. Some Slavic immigrants might not speak English very well. To the extent that is the case, however, there clearly are accommodations of spoken language differences. For example, arrangements were made for translation of our hearing and decisional session. Accommodations for spoken language differences are also made by the Delta-Greely REAA and through social service organizations in the proposed Deltana Borough. Lastly, the geographic area of the proposed Deltana Borough, which comprises an estimated 5,892 square miles, is of a scale suitable for borough government. (LBC Statement of Decision, pp. 19-20)

Without providing specific facts or evidence to support its finding that a "specific and persuasive showing" had been made, the LBC nonetheless found that the urban and rural areas in the region were compatible and exhibited "compatibility of economic lifestyles." At the Decisional Meeting, Commissioner Hicks asserted that there were "many communities" in the proposed borough, but he did not describe or identify those communities for the record.

The LBC found that transportation and communication patterns reflected "a population that is interrelated and integrated with respect to social, cultural and economic characteristics and activities" (Statement of Decision, p. 20). However, the LBC included no discussion of what those transportation and communications patterns are. Public comment disputed the Charter commission's assertion that such patterns existed. Multiple public comments stated instead

stating that both the Native village and the religious commune were considered to be separate and removed—geographically, culturally, economically, and socially—by the residents of each settlement and by the region's population in and around Delta Junction. The public comment and recorded public reaction to the inclusion of Whitestone as a "community" at the March 16, 2007 Public Hearing was strongly opposed to the finding and indicated considerable public sentiment that the settlement was not a part of the Delta Junction community. The LBC did not respond specifically to these comments or to attempt to reconcile conflicts between the factual record and their unsupported assertions in making their finding.

The ombudsman investigator asked if LBC sought "a legal opinion from the Department of Law as to the findings that Healy Lake and Whitestone Community qualified as communities under 3 AAC 110.045(b)" Ms. Atkinson, LBC's Local Government Specialist, responded:

> There was no legal opinion, as you describe it, sought on this point. Keep in mind that the *Preliminary Report to the Local Boundary Commission on the Deltana Borough Proposal* and the *Final Report to the Local Boundary Commission Regarding the Deltana Borough Proposal* are written by the LBC Staff, and are in essence, the LBC Staff's recommendation to the LBC. The LBC is free to adopt, modify, or disregard the LBC Staff's recommendations. Sometimes the LBC may have a different interpretation of particular regulations, statutes, or constitutional standards than LBC Staff. For example, my conclusion after I studied the matter was that Whitestone and Healy Lake were not "closed" communities, and both were communities as defined by the regulations. Some of the Commissioners disagreed. Some thought Whitestone and Healy Lake were "closed" communities.
>
> Also, the Commission looked at 3 AAC 110.045(b) differently than I did, which is evident from their comments at the hearing on March 17 and from their Statement of Decision, p. 16 to 21. 3 AAC 110.045(b) states, "Absent a specific and persuasive showing to the contrary, the commission will presume that a sufficient level of interrelationship cannot exist unless there are at least two communities in the proposed borough." In the Preliminary Report, I found that there were more than two communities. In their Decision, the LBC didn't concern themselves with the number of communities, but instead, found the legal requirements were met because there was a sufficient level of interrelationship. (June 12, 2007 e-mail with attachments from Kathy Atkinson to the ombudsman investigator)

The ombudsman reviewed this allegation to determine whether the LBC arbitrarily—i.e. without basis in an intelligible or understandable public policy and without conscientious consideration of all relevant factors—made its decision regarding the sufficiency of communities in the proposed borough. Review of the evidence showed that the LBC staff offered no factual basis for

its initial findings that there were multiple communities in the proposed Deltana Borough satisfying AS 29.05.031 and 3 AAC 110.045. In its decision, the LBC did not refer to convincing evidence in the administrative record to support its Statement of Decision finding a "specific and persuasive showing" that "the social, cultural, and economic characteristics and activities of the people" in the proposed borough are "interrelated and integrated" as required by 3 AAC 110.045(a). The LBC simply stated that this was so.

For the reasons set out above, the ombudsman concluded that the LBC made an arbitrary finding that the requirements of 3 AAC 110.045 were met during its consideration of the Petition. Accordingly, the ombudsman proposed to find this allegation *justified*.

Agency Response

The LBC did not expressly dispute the ombudsman's finding, stating instead:

> . . . [T]he question of whether the LBC's conclusions regarding the satisfaction of the requirements of 3 AAC 110.045 is, the Commission respectfully believes, a matter best left to the court, not the Ombudsman. (LBC Response, p. 10)

The LBC provided information that one of the commissioners had personal experience with Healy Lake:

> Former Chair Darroll Hargraves lived and worked in the area of the proposed borough as the consulting Superintendent for the Delta-Greely REAA from the fall of 1990 to June 1991. During that time he visited Healy Lake and had consultations with community officials about a school at Healy Lake. The Ombudsman complains that the LBC did not tour Healy Lake. A tour is not required, and the Ombudsman should not presume that the Commissioners have no knowledge of a place or have never visited there, simply because they did not choose to officially tour Healy Lake on March 16, 2007. (LBC Response, p. 10, footnote)

Ombudsman response to this point:
Chairman Hargraves did not introduce evidence or information into the administrative record regarding a visit he apparently made to the village 16 or 17 years before this petition was filed. However, he commented that he had voted against the formation of the Delta-Greely REAA, implying past personal experience when he worked for less than a year nearly two decades ago.

Even accepting the chairman's limited and, frankly, outdated personal experience in the region does not change the fact that the LBC failed to provide an adequate basis in the public record for its finding. The concept of transparency and responsiveness in government rests on the public having fair notice and opportunity to comment on administrative actions. To argue that the LBC is permitted to make decisions based on 16-17 year old personal knowledge or information that

is not made part of the administrative record is to champion the position that the public process has little bearing on LBC actions.

LBC staff and the LBC's finding

The LBC's response to the ombudsman preliminary report also distinguished between the findings made by LBC staff in their Preliminary and Final Reports, and those made by the commissioners:

> The LBC is free to adopt, modify, or reject DCCED's recommendations. Sometimes the LBC may have a different interpretation of particular regulations, statutes, or constitutional standards than DCCED. For example, DCCED's conclusion after studying the matter was that Whitestone and Healy Lake were not "closed" communities and that both were communities as defined by the regulations. This DCCED conclusion and the explanation supporting that DCCED conclusion are in the Preliminary and Final Reports to the LBC. Some of the Commissioners disagreed. Some Commissioners thought Whitestone and Healy Lake were "closed" communities. The Commissioners rely on their own interpretation of the statutes, regulations, and Alaska Constitution; their own personal knowledge of the area; their own opinions; and their personal analyses of the written and oral comments that are supplied by parties and members of the public. (LBC Response, p. 9)

The LBC charged that the ombudsman "often confused actions taken by DCCED as those of the LBC" (LBC Response, p. 8). DCCED's Division of Community Advocacy provided the LBC with staff, who were frequently referred to as "Local Boundary Commission Staff" in the reports provided on the proposed borough.

Ombudsman Response to LBC

The Preliminary Report on the Deltana Borough Proposal (November 2006) states in Appendix C under the heading, "Staff to the Commission,"

> The Alaska Department of Commerce, Community, and Economic Development (Commerce) serves as staff to the LBC. Commerce staff to the Commission is required by law to evaluate petitions filed with the LBC and to issue reports and recommendations to the Commission concerning such. The Commerce staff serving the Local Boundary Commission may be contacted at:
>
> Local Boundary Commission Staff
> Department of Commerce, Community, and Economic Development
> Division of Community Advocacy
> 550 West Seventh Avenue, Suite 1770

> Anchorage, AK 99501-3510
> [Preliminary Report on the Deltana Borough Proposal, p. C-6]

The Final Report to the Local Boundary Commission Regarding the Deltana Borough Proposal (February 2007) begins with an "Acknowledgements" page that states,

> Report written by:
> - Kathy Atkinson, Local Boundary Commission Staffer
> [unnumbered page following title page]

Ms. Atkinson is listed as a Local Government Specialist at DCCED but was listed as an "LBC staffer" and author of the "Final Report to the Local Boundary Commission Regarding the Deltana Borough Proposal" on an unnumbered acknowledgements page at the beginning of the report. Darlene Watchman of DCCED also was listed on the acknowledgements page as an "LBC staffer." She has since left the agency, as has Dan Bockhorst who was listed in the report as LBC Staff Supervisor.

These excerpts from the two reports describe DCA staff as "Local Boundary Commission staff." In passages from Ms. Atkinson's correspondence with the ombudsman quoted in this report, she referred to "LBC staff.

The LBC Response seeks to create a gap between the LBC and its supporting staff where there had previously been a fairly seamless working relationship. In raising the objection that the ombudsman confused these agencies, the LBC is making a distinction that DCA and the LBC did not bother to make in the course of the process under review. It is a distinction without any practical difference.

Another significant problem is that the LBC's written decision, if it does not actually rely on the DCA's material, does not offer much evidence to support its finding. Indeed, the LBC did not expressly find that Whitestone and Healy Lake were (or were not) "communities" as defined in 3 AAC 110.920 and required by 3 AAC 110.045(b). The LBC Decision attempts to sidestep the issue by stating, "We can overcome the presumption in 3 AAC 110.045(b) that a sufficient level of interrelationship cannot exist unless there are at least two communities in the proposed borough through a higher level of proof ("a specific and persuasive showing") that the proposed Deltana Borough meets the Community of Interests Standard." However, the LBC's statement that it can overcome the presumption is <u>not</u> followed by <u>specific evidence</u> to show that the presumption was in fact overcome

Indeed, the LBC's assertion that they applied a "higher standard of proof" to override the two-communities requirement of 3 AAC 110.045(b) is neither specific nor persuasive. It consists of general assertions that are not supported with specific details in the decision or in the public record:

> [W]e find the residents of the proposed Deltana Borough have strong ties with respect to social, cultural, and economic characteristics and activities, enough to overcome the presumption in 3 AAC 110.045(b). There exists among residents of the proposed Deltana

> Borough a compatibility of urban and rural areas, including compatibility of economic lifestyles, and industrial, or commercial activities. There also exists throughout the proposed borough, transportation and communication patterns that reflect, on a scale suitable for borough government, a population that is interrelated and integrated with respect to social, cultural, and economic characteristics and activities. Slavic immigrants comprise a significant component of the population of the proposed Deltana Borough. Some Slavic immigrants might not speak English very well. To the extent that is the case, however, there clearly are accommodations of spoken language differences. For example, arrangements were made for translation of our hearing and decisional session. Accommodations for spoken language differences are also made by the Delta-Greely REAA and through social service organizations in the proposed Deltana Borough. Lastly, the geographic area of the proposed Deltana Borough, which comprises an estimated 5,892 square miles, is of a scale suitable for borough government.
>
> Based on the findings above, we conclude that the proposed Deltana Borough embraces an area and population with common interests to the maximum degree possible and, on a scale suitable for borough government, has a population that is interrelated and integrated with respect to social, cultural, and economic characteristics and activities.

The LBC asserts but does not demonstrate that a variety of relationships exist that comprise a broad-based community suitable for organization as a borough. The LBC asserts that unspecified "services and facilities provided by the City of Delta Junction are already areawide in nature," that Healy Lake is "integrated into the area's educational structure" because "four Healy Lake students currently receive instruction by correspondence study provided by the Delta-Greely REAA," and that area residents participate in unspecified "transportation and communication patterns" and are "integrated with respect to [unspecified] social, cultural, and economic characteristics and activities." The LBC states that many Slavic immigrants speak some English but the LBC arranged for translation services to help them exercise the rights of citizenship. Finally, "the geographic area" is 5,892 square miles. Four children and 5,892 square miles are the only specific measures indicating community that the LBC offers in its Statement of Decision. Then the commissioners end with a sweeping conclusion that recycles the same generalities and that characterizes the proposed borough "an area and population with common interests to the maximum degree possible."

The LBC claims that it applied "a higher standard of proof" than that used in LBC staff reports to make "a specific and persuasive showing" that the evidence supported the finding in its Statement of Decision. This showing, however, is not supported by the public record accumulated over many months of reports and hearings and public comment. For that reason, the LBC's rationale is not "specific" or "persuasive." Indeed, it is even more arbitrary than the conclusions reached by LBC staff in their preliminary and final reports.

For the reasons set out above, the ombudsman finds this allegation *justified*.

The ombudsman believes the LBC has a duty to state for the public record what personal "interpretations," "personal knowledge," "opinions," and "personal analyses" other than publicly

available information the commissioners base their decisions on. The LBC does the public a disservice by cloaking its final decision-making process in silence.

For the reasons set out above, the ombudsman finds this allegation ***justified***.

Allegation 2

> ***The Local Boundary Commission unfairly failed to provide accessible public notice as required by the formal policies of the State of Alaska and accepted standards of public notice to the populations affected by the proposed borough incorporation, resulting in the populations' inability to participate in the public comment and hearing process.***

The Ombudsman Policies and Procedures Manual at 4040(3) defines "unfair" as an instance in which "an administrative act violated some principle of justice." The ombudsman examines the facts to determine whether the agency acted in one or more of several possible unfair ways, including the following:

> (A) adequate and reasonable notice of the matter was not provided to the complainant;
>
> (B) adequate opportunity was not given for a person having an interest in a decision to be heard or, if applicable, to conduct an examination or cross-examination to secure full disclosure of the facts; . . .

Plain English and public policy

It is the policy of the State of Alaska to employ "plain English" in drafting regulations, public notices, etc. Governor Jay Hammond issued the first order related to use of "plain English" in 1977. Administrative Order no. 44, addressing paperwork reduction, required use of "plain English" in the forms to be reissued under the order (Administrative Order no. 44, paragraph 5). In 1995, Governor Tony Knowles reiterated this policy by issuing Administrative Order no. 157 requiring "plain English" for all notices of promulgation of regulations. The express purpose was "to ensure maximum public awareness of the agency action" (Administrative Order no. 157, paragraph 6). The extent of this policy is seen in the checklist for drafting regulations[18] used by the Attorney General's Office: it includes a "plain English" component in the drafting requirements (Checklist, p. 2).

Use of "plain English" is the norm for state agencies:

- The Departments of Environmental Conservation and Community and Economic Development (now DCCED) released a plain English guide for rural water utilities in 2002;[19]

[18] Available at www.law.state.ak.us/doc/manuals/.
[19] Available at http://www.dec.state.ak.us/water/wwdp/onsite/pdf/plainguide.pdf (last visited June 19, 2007).

- The Division of Personnel adopted Writing Policy & Procedure 10120 on December 28, 2005, to ensure use of "plain English" in drafting personnel policies and procedures;

- The Department of Transportation used "plain English" in the Final 2006-2008 Statewide Transportation Improvement Program to "make them easier to use and understand;"[20]

- The Regulatory Commission of Alaska's (RCA) 1997 Letter Order L9700633 requires that all RCA public notices contain "a general description of the filing that is accurate, written in plain English, and sufficient to alert consumers" of the pending agency action.[21]

While none of these statements of the State's "plain English" policy defines what "plain English is," according to the widely-used Flesch Reading Ease Scale, defines a score ranging from 65 to 100 as "plain English."

Dr. Rudolf Flesch developed tools for assessing readability. See *The Art of Readable Writing* (Harper, 1949); *The Art of Plain Talk* (Harper, 1946). These tools analyze the number of words, syllables and sentences in a piece of writing to determine the level of accessibility or readability. See also Flesch, *How to Write Plain English* (Harper & Row, 1979). With the Reading Ease scale, writing is evaluated on a 0-100 scale (0 is most difficult, 100 is easiest). The Reading Ease score has a grade level equivalent, as well. A score of 65 indicates writing in "plain English;" the equivalent reading level of 8th-9th grade also is considered an indication of "plain English."

Reading Ease	Grade Level
90-100	5th grade
80-90	6th grade
70-80	7th grade
60-70	8th-9th grade
50-60	10th-12th grade
30-50	college
0-30	college graduate

Flesch Reading Ease score ranges and Flesch-Kinkaid Grade Level equivalents

A second assessment tool for readability is the Gunning Fog Index. It also looks at the number of sentences, words and syllables. A simpler calculation than the Flesch formula, the Gunning Fog Index defines "plain English" as a score of 7-8 which indicates a grade level of 7th to 8th grade.

[20] Available at http://www.dot.state.ak.us/stwdplng/cip_stip/assets/06_08stip/06_08final/final_intro_06_08.pdf (last visited June 19, 2007). See p.

[21] 1997 Letter Order L9700633 is cited as authority in the 1998 ORDER REOPENING DOCKET U-97-239; CORRECTING PREVIOUS TARIFF SHEET APPROVAL; OUTLINING NOTICE REQUIREMENTS; AND RECLOSING DOCKET U-97-239 (available at http://www.state.ak.us/rca/ orders/utils/1997/u97239_2.pdf (last visited June 19, 2007)).

The plain language (i.e., "plain English") resources offered by the federal government are also illustrative (available at www.plainlanguage.gov). Like the Flesch tools, the federal resources advise that writers should:

1. use short sentences (less than 20 words)
2. use simple sentence construction (subject-verb-object)
3. avoid compound sentences and dependent clauses
4. use concrete verbs instead of abstract nouns
5. use the active voice
6. connect modifiers to words being modified
7. use short, familiar words
8. avoid technical or legal jargon
9. explain technical terms which cannot be avoided
10. use the same term for the same idea throughout[22]

The notices provided by the LBC were not in "plain English." The investigator applied the readability assessment available through Microsoft Word, which calculates a Flesch reading ease score and a Flesch-Kincaid grade level rating as part of the program's grammar check. Use of this tool is recommended by "plain English" experts at www.plainlanguage.gov. The January 2006 Notice of Petition yielded a Flesch Reading Ease Score of 13.2 (a low score on a scale of 1-100 is considered less readable, and a score of 13.2 is deemed "very confusing"). The investigator calculated the Gunning Fog Index scores manually. Using the Gunning Fog Index, the Notice of Petition is written at a grade level of 15.6. A subsequent public notice announcing the December 4, 2006 informational meeting, has a Flesch Reading Ease Score of 16.8. Also, the paragraph in that notice describing the purpose of the December meeting (arguably the most important part of the meeting notice) was written at a grade level of 19.6 according to the Gunning Fog Index (the reading level equivalent of a college graduate). Finally, the March 16, 2007 public hearing notice has a Flesch Reading Ease Score of 1.7/100, which means it could not be much less readable. None of these LBC notices can be considered "plain English" by any standard.

It is worth noting that the LBC has issued more readable notices in the past. The Public Notice of Petition to Consolidate the City of Fairbanks and the Fairbanks North Star Borough issued in 2000 was written at grade level 14.5 (not "plain English," but more accessible than the notices issued regarding the proposed Deltana Borough).

The limited English proficiency of the population at issue is also relevant, given that the purpose of notice is to provide the public with practical notice and opportunity for hearing. U. S. Census Bureau data indicates that the majority of Deltana region residents are high school graduates. However, information about the English proficiency (the ability to read at grade level) of students in the Delta-Greely school district—and in Alaska in general—indicates that the standard of 8th-9th grade reading level is far more appropriate than 12th grade-to-postsecondary. According to the Spring 2006 Standards Based Assessment for the Delta-Greely Schools, 17-24 percent of eighth graders, 32-43 percent of ninth graders, and 26 percent of tenth graders were

[22] Available at www.plainlanguage.gov/howto/guidelines/index.cfm (last visited June 19, 2007).

not proficient in reading or writing. In 2006, 75 percent of eleventh graders and 73.3 percent of twelfth graders taking the High School Graduation Qualifying Exam were not proficient in reading. According to statewide results for the same period, 58 percent of twelfth graders were not proficient in reading.[23]

What bearing does "plain English" have on the LBC's proceedings in this case?

The readability issue with the most obvious effect on the complainants was the understanding of how to become a respondent to the Petition, instead of an informal public commenter. The LBC's regulations provide a way for a person to become a party to the proceedings, with the status of respondent. A respondent, is entitled to file a brief with the LBC supporting or opposing the proposed borough, and, as a party, has procedural rights greater than those of someone offering ordinary public comment. For example, a respondent's brief is considered sworn testimony, while ordinary public comment is not made under oath. Usually, public comment can be subject to certain limitations, such as time or length, set by the LBC, while the respondent's brief can be longer and is not as subject to such limitations.

Makers of public comment are not entitled to individual notice of proceedings from LBC or a petitioner. The general public notices issued are considered sufficient. However, respondents—those who have filed a brief according to 3 AAC 110.480—are entitled to specific and individual notice of public meetings (3 AAC 110.520(b)) and public hearings (3 AAC 110.550(b)(1)). They are also entitled to receive a copy of the LBC's reports from the LBC (3 AAC 110.530). Finally, respondents are entitled to greater opportunity for participation at the public hearing, to include the making of opening and closing statements and the offering of witness testimony, expert or otherwise (3 AAC 110.560(b)).

The procedure for becoming a respondent and filing a responsive brief is set out in 3 AAC 110.480:

> (a) If an interested person or entity seeks to participate as a respondent to a petition, that person or entity must have the capacity to sue and be sued, and must file with the department an original and five complete copies of a responsive brief containing facts and analyses favorable or adverse to the petition. If the respondent is a group, the group shall designate one person to represent the group. Copies of the responsive briefs, including maps and other exhibits, must conform to the original in color, size, and other distinguishing characteristics. The respondent shall provide the department with a copy of the responsive brief in an electronic format, unless the department waives this requirement because the respondent lacks a readily accessible means or the capability to provide items in an electronic format.

[23] All data cited is available at www.eed.state.ak.us (last visited May 9, 2007).

> (b) The responsive brief, and any companion exhibits, must be filed with an affidavit by the respondent that, to the best of the respondent's knowledge, information, and belief, formed after reasonable inquiry, the responsive brief and exhibits are founded in fact and are not submitted to harass or to cause unnecessary delay or needless expense in the cost of processing the petition.
>
> (c) A responsive brief must be received by the department in a timely manner in accordance with 3 AAC 110.640. A responsive brief must be accompanied by an affidavit of service of two copies of the brief on the petitioner by regular mail, postage prepaid, or by hand-delivery.

Once a responsive brief is filed that meets the requirements of 3 AAC 110.480, the petitioner has the opportunity to file a reply brief (3 AAC 110.490). This is a more formal response than that made by a petitioner to public comment.

It is clear from Complainant A's comments at the public hearing and the manner in which his "petition" was written that Complainant A intended to become a formal respondent. Complainant A, in his written complaint and in the course of multiple interviews by the investigator, explained that he had offered the LBC a "Petition for Denial of the Deltana Charter," and he disputed its characterization as informal public comment instead of a separate petition. He did not, however, meet the regulatory requirements to become a respondent, despite his apparent belief that his writing should be counted as a petition or brief. He said during his public comment to the LBC on March 16, 2007, that he did not understand the notice or the procedural requirements of becoming a respondent.

3 AAC 110.480(a) provides that "if an interested person or entity seeks to participate as a respondent to a petition, that person or entity must . . . file . . . a responsive brief containing facts and analyses favorable or adverse to the petition." (See full text page 35 of Ombudsman report)

Complainant C stated in his written complaint to the ombudsman that "we wanted to become respondents" in the matter of the acceptance of the Petition. When interviewed by the investigator, Complainant C explained that he did not understand from the Notice of Petition or subsequent notices the difference between informal public comment and formal testimony. While he could determine the time and place of the scheduled proceeding, Complainant C said he did not understand that to offer expert or other sworn testimony before the LBC, he should have filed a responsive brief in opposition to the Petition before March 31, 2006. Neither Complainant A nor Complainant C reported ever receiving a response from LBC about the procedures for becoming respondents, the procedures for offering formal comment or testimony, or the manner in which comments they had made were categorized by the LBC.

Complainant C explained in his written complaint that he was not permitted to offer "expert witnesses" at the public hearing, despite attempting to arrange with the LBC to present such evidence as early as November 2006. He told the investigator on June 20, 2007, that he spoke to Ms. Atkinson in November 2006. Complainant C said Ms. Atkinson told him that he would not

be permitted to call expert witnesses at the December 4, 2006 proceeding "because you [Complainant C] are not a respondent." Complainant C said Ms. Atkinson offered no explanation beyond this. The LBC did not dispute Complainant C's recollection of events.

No responsive briefs were filed in this matter. Given the vocal public opposition to the proposed incorporation of a borough and the complainants' assertion that they wished to participate in the process formally as respondents, the lack of any responsive briefing is telling. The Notice of Petition provided that

> An interested person or entity may file with the LBC written comments supporting or opposing the incorporation petition. Additionally, a person or legal entity may file with the LBC a responsive brief favorable or adverse to the petition. Responsive briefs must be filed in accordance with 3 AAC 110.480. A person who files a responsive brief (as distinguished from written comments) gains certain procedural rights and duties during the incorporation proceedings.

The text of 3 AAC 110.480 was not provided as part of the public notice.

The information provided by the complainants to the LBC and the investigator, and the lack of any qualifying respondents despite vehement commentary and efforts at participation, leaves considerable doubt that that the Notice of Petition comprehensibly informed area residents of their right and opportunity to make to participate as a respondent.

Notice to language minorities

Even had the notices been issued in "plain English," such notices would still have been inaccessible to a significant portion of the population in the proposed borough. This appears to be contrary to the LBC's policy of non-discrimination. 3 AAC 110.910 requires the LBC to reject any petition that results in a change that deprives a person of "enjoyment of any civil or political right" due to their "race, color, creed, sex, or national origin." While this regulation does not speak directly to the issuance of notice in a form accessible to language minorities, it does codify a policy of fairness and protection of the civil and political rights of all Alaskans.

The Petition states that there are 1,000 residents who speak Russian as a primary or secondary language (Petition, Ex. H). In its Statement of Decision, the LBC adopted the DCA estimate of a regional population of 4,148 as of 2005. (Statement of Decision, p. 15). Based upon the agency's own figures, about 24 percent of the total population of the region speaks English as a second language. The 2000 US Census reached similar results. According to the 2000 US Census Borough, more than 14 percent of Delta Junction residents are foreign born. In 2000, 21.9 percent of Delta Junction residents and 18.7 percent of Deltana region residents spoke a language other than English. The Census indicated that 11-15 percent of residents spoke English "less than 'very well.'"

According to LBC staffer Kathy Atkinson, "the first request to LBC Staff for translation services was received February 27, 2007," from Sharon Dalton. (June 12, 2007 e-mail). However, the LBC received seven separate public comments raising the issue of including the Russian-speaking citizens in the public process. Michael Nuckols e-mailed the LBC on March 1, 2006, and stated that the lack of information available in Russian resulted in "a significant portion of the community that has effectively been disenfranchised from this process." In her written comment (undated) to the LBC about the Preliminary Report, Mary Emma Girvan also raised this concern:

> Very few of the Slavic people residing in the Delta area have any knowledge of the proposed borough. English being their second language no effort at all was made to inform them or incorporate them in the proceedings. However, they will be expected to vote on something no one bothered to explain to them. (Girvan Comment, p. 1)

Leston McNeil's March 10, 2006 written comment also makes this point, asserting limited English proficiency among those of Slavic descent.

The Charter Commission's response to these concerns was, "It is understood that local U.S. citizens—Slavic and non-Slavic—[are] generally have fluent understanding of English." (Response to Comment and Briefs Filed Regarding the Deltana Borough Petition, p. 2; bracketed word in original). The Charter Commission provided no evidence to support this assertion. The LBC made no response to the concerns raised.

Ms. Atkinson did arrange translation of "the shorter version" of the Notice of Public Hearing, but that service was billed to the City of Delta Junction (June 12, 2007 e-mail). The City also paid for translation of the public hearing: audience members could gather around the translator in order to hear the proceedings simultaneously translated into Russian. The LBC made no record (audio or written) of the proceedings as translated.

Providing translation and Russian language notices in the Delta area is a fair and reasonable accommodation. Residents interviewed reported that many public signs are in Russian (in Cyrillic script) as well as English. In April 2000 Department of Fish and Game biologists conducted informational sessions on fishing regulations specifically for Russian speakers. The school district offers accommodation for the significant number of students that speak Russian (Statement of Decision, p. 20).

The Petitioner argued that the Russian/Slavic residents are proficient in English, that citizens speak English, and that non-citizens are not relevant. Marjorie Vandor, the Assistant Attorney General for DCCED, justified LBC's failure to afford accessible notice to the Russian-speaking members of the Deltana region by referring to the federal Voting Rights Act, stating that "Slavic is not in there" as a protected language minority.[24]

[24] Marjorie Vandor was interviewed by telephone on June 7, 2007.

Aside from federal requirements, the ombudsman views notice as a practical, common-sense problem for the state. The goal is to get plain information out to affected individuals, so that a state agency conducts its business with informed comment and in full view of the public.

As a practical matter, Viktor Linnik provided evidence with his Request for Reconsideration that a substantial portion of the citizens of Russian or Ukrainian descent (50 percent of those polled) did not speak, read or write English fluently (Request for Reconsideration of Viktor Linnik, pp. 14-17).

These individuals had just as much stake in the LBC proceedings as the English-speaking citizens in the proposed borough, and thus just as much need for information.

According to US Citizenship and Immigration Services (USCIS), a person seeking US citizenship by naturalization must be able to "read, write, and speak English."[25] The required level of fluency is not specified. However, sample questions from the USCIS citizenship exam[26] are written at a Flesch-Kincaid grade level of 3.1. Thus, advanced command of English does not appear to be required for USCIS purposes.[27]

While neither state nor federal law required the LBC to afford notice in Russian to the Russian-speaking citizens of the Deltana region, neither did the law prohibit it. The LBC was given fair warning —from the Petition, the written comment received before and after issuance of LBC staff's Preliminary Report, and the oral comment received at the December 4, 2006 meeting— that a substantial number of people affected by the proposed incorporation of a borough were not afforded fair notice and opportunity to be heard on the issue. However, the LBC did not accommodate that part of the population in any meaningful way.

When asked about the LBC's efforts to include the Russian-speaking citizens in the public process, Ms. Atkinson replied *via* e-mail on June 12, 2007:

> In the Preliminary Report at page 35, translation at the LBC Public Hearing is addressed: "If anyone attending the hearing lacks a fluent understanding of English, the LBC may allow time for translation. Unless other arrangements are made before the hearing, the individual requiring assistance must arrange for a translator."
>
> I contacted the City and asked them to find a translator for the public hearing, and the City Clerk started looking around for someone willing and able to do it. Oleg Kiselev was recommended by someone in the health services community who said he was competent and reliable. The City paid him $25 an hour to translate

[25] The requirements for citizenship by naturalization are found at http://www.uscis.gov/naturalization (last visited July 31, 2007).
[26] Available at http://www.usimmigrationsupport.org/citizenship_test.html (last visited July 31, 2007).
[27] "Proficient" is defined as, "Performing in a given art, skill, or branch of learning with expert correctness and facility." A "proficient" is "an expert." *The American Heritage Dictionary of the English Language.*

> at the public hearing and decisional session on March 16 and 17, 2007. I don't know whether he is "certified."

From the beginning, the LBC limited its responsibility for translation of notice or public proceedings. When translation was requested by the public, the LBC asked the City to arrange and pay for translation of the public hearing. The City of Delta Junction picked up this responsibility, but the LBC does not appear to have had any plan to address the problem beyond hoping that the City would do so.

Summary of Allegation 2

The ombudsman believes a preponderance of the evidence shows that the LBC failed to issue accessible public notice, due to the complex nature of the English notices and the fact that the LBC did not accommodate the substantial Russian language minority in the Deltana region. Failure to issue "plain English" notice and information may have resulted in significant obstacles to meaningful and effective public participation in the matter of the Petition. Failure to provide adequate notice and translation services to the Russian-speaking citizens of the Deltana region likely resulted in the exclusion of a substantial portion of the affected population from the opportunity to fully and knowledgeably participate in the public comment and hearing process of the LBC's deliberations.

The ombudsman proposed to find this allegation *justified.*

Agency Response

The LBC responded that it "has not had an opportunity to fully consider the Ombudsman's analysis, conclusions, and proposed recommendation regarding the proposed 'plain English' recommendation" (LBC Response, p. 12). However, the LBC defended its notice process:

> [T]he LBC stresses that it complied with all statutory and regulatory requirements for public notice in the Deltana proceeding. Notice was published of the filing of the petition and all public meetings in two newspapers; in the online public notice website for the State; on the LBC's website; via public service announcements; and in the Delta News Web, a popular local community website. Further, notices were posted in numerous places in the community, such as City Hall, the public library, the grocery store, and even in the bars. The public was obviously informed since 115 people attended the informational meeting on December 4, 2006; and 251 people attended the public hearing on March 16, 2007. (LBC Response, p. 12)

Regarding the issue of notice to the Russian-speaking citizens of the region, the LBC disputed the population information cited by the ombudsman:

> In contrast to the Ombudsman's claim that at least 24 percent of the residents of the proposed borough speak Russian, the LBC notes that within the five areas of the proposed Deltana Borough identified by the United States Census Bureau for statistical purposes, the 2000 federal Census counted 306 individuals who were at least five years old that, at home, spoke Indo-European languages other than Spanish and also spoke English "less than very well." That constituted nine percent of residents of those five areas who were at least five-years old. If one were to assume that all of those 306 individuals spoke Russian (as opposed to any of the other hundreds of Indo-European languages), the Ombudsman's projection that 24 percent of the residents of the proposed Deltana Borough speak Russian is 2.7 times greater than the figure supported by the U.S. Census Bureau data. (LBC Response, p. 13)

Ombudsman response to this point

The ombudsman relied in good faith on the information provided by the Charter Commission in the Petition accepted by the LBC, and on the LBC staff estimates adopted by the LBC in its Statement of Decision. Based on those numbers—specifically accepted by the LBC—the affected population who speak Russian is at least 24 percent of the total population of the region. It seems odd and disingenuous that the LBC challenges its own numbers as overestimating this portion of the Deltana region's population. Among that 24 percent, the exact number who are not fluent or able to readily understand English appears to be in dispute. The U.S. Census figures indicate that a significant number are not, as the Census indicated that at least nine percent of the area's population did not speak English well. It is undisputable that a significant part of the area's population was not going to receive effective notice through English announcements. The LBC also responded:

> Notwithstanding the circumstances above, DCCED and the LBC did make reasonable accommodations within the law for persons who speak and read Russian and not English. Specifically, on February 27, DCCED received a request that a Russian translator be present for the upcoming public hearing, and that the announcement be translated into Russian. These arrangements were made without cost to the LBC or DCCED. The City of Delta Junction paid Oleg Kiselev an hourly rate to translate at the public hearing and decisional session on March 16 and 17, 2007. The City of Delta Junction also paid Svetlana Potton (a native speaker and certified translator, owner of *Russian Translating*), to translate into Russian the shorter version of the Notice of Tour, Public Hearing, and Decisional Meeting Regarding Deltana Borough Incorporation Proposal drafted by DCCED. Note that at the bottom, it says "A Russian translator, Oleg Kiselev, will be at the Public Hearing on March 16 and 17." (The difference between the shorter version of

> the Notice that was to be translated into Russian and the longer version is negligible. For example, the shorter version left out instructions on how to subscribe to the LBC's notice list service that is in the longer version.)
>
> This notice, in Russian and English, was posted on the City's website, at the Delta Community Library and at City Hall, where the other public review petition materials were being kept, and on the Delta News Web, a popular community website for local news. The City Clerk also posted it in numerous other places around town. LBC Staff sent copies to two organizations in the Deltana area on March 9, 2007, and asked them to post the notice in their offices to spread the word about the upcoming hearing – Catholic Social Services, Refugee Assistance & Immigration Services; and Alpha Omega, a social service organization. On March 9, 2007, LBC Staff also called Sharon Dalton, who made the request that a translator be present at the hearing. DCCED informed Mrs. Dalton that a translator would be present at the hearing on March 16 and 17 and that a notice of the hearing had been translated into Russian; she was also asked how many copies she wanted for posting and distribution. (LBC Response, p. 14)

The record appears to show that LBC was proactive to the extent of asking others to provide Russian-language notice. This consideration, however, occurred relatively late. The LBC did not arrange for written notice in Russian until March 2007—one year after the March 31, 2006 deadline for the submission of written comment and responsive briefs. The LBC did not post the translated notice on its Website. The LBC did not offer translation of the December 4, 2006 informational meeting. On March 16, 2007, the LBC allowed Russian speakers to cluster in a corner around a translator at the public hearing, but the LBC did not make any record of the translated proceedings for these and other similarly situated residents to consult. Nor can interested parties determine if the translations accurately represented the hearing testimony.

The ombudsman believes the LBC could, with very little effort and at minimal expense, have done a much better job of issuing easily understandable notice to all significant sectors of the community. Accordingly, the ombudsman finds this allegation ***justified***.

Allegation 3

> ***The Local Boundary Commission unreasonably failed to engage in government-to-government consultation with the tribal government of the Native Village of Healy Lake, as required by the State of Alaska policy adopted in the 2001 Millennium Agreement.***

The Office of the Ombudsman Policies and Procedures Manual at 4040(2) defines the standard "unreasonable" to include the following type of administrative action or decision:

> (A) A procedure adopted and followed by an agency in the management of a program is inconsistent with, or fails to achieve, the purposes of the program.

It is the express public policy of the State of Alaska to "work together with Tribal governments to develop mutual respect for the rights, responsibilities, and interests of all parties" and "to work on a government-to-government basis with Alaska's sovereign Tribes" (Administrative Order no. 186). The 2001 Millennium Agreement entered into by the government of Alaska and the federally recognized tribes of Alaska reaffirmed this public policy. It is also apparent in the practices and policies of state agencies other than the LBC.

The Millennium Agreement is a statement of intent that the State will coordinate and cooperate with sovereign tribal governments. A "guiding principle" is that "as a matter of courtesy between governments, the State of Alaska and the Tribes agree to inform one another, at the earliest opportunity, of matters or proposed actions that may significantly affect the other" (Millennium Agreement, III. 8(c)). The Agreement speaks of "government-to-government relationships" (III. 8). Commitments include that "officials working to resolve issues of mutual concern will act in a manner consistent with the spirit, intent and purposes of this Agreement" (V. 16). This includes the commitment that "Each tribe and the state shall develop an effective process to permit representatives of the other to provide meaningful and timely input on matters that significantly or uniquely affect that government" (V. 16).

The established public policy of the State of Alaska is to engage in government-to-government consultation with tribal governments on issues that affect tribes and their members. Furthermore, it is the express policy of the DCCED (within which the LBC operates) to recognize and "work with" tribal governments. The DCCED Website's "Frequently Asked Questions" page explains the department's policy of cooperation with Alaska's tribes:

> **Does the State recognize tribes as the local government in Native communities?**
>
> Yes. In communities where residents are mostly Native and have not incorporated a municipal government, the State, for practical purposes, considers the tribal council to be the local government.
>
> In communities with both municipal and tribal governments, the State recognizes both as a local government and will work with both governments jointly or separately, depending on the issue at hand. Only municipalities, however, are accepted by the state as the local government representing all residents. Tribal councils are viewed as representing the interests of the tribal membership and a potential partner with the municipality in providing community services.[28]

[28] DCCED website, http://www.dced.state.ak.us/dca/LOGON/muni/muni-govtoverview.htm (last visited June 15, 2007).

Other state agencies have standard practices of government-to-government consultation with tribes. The **Department of Fish and Game** and the **Boards of Fisheries and Game** adopted a "Policy on Government-to-Government Relations with the Federally Recognized Tribes of Alaska" on May 1, 2002:

> The department and boards are committed to consulting with tribes in Alaska as early in the department's decision-making process as practicable, and as permitted by law, prior to taking action or undertaking activities that significantly or uniquely affect a tribe or tribes. . . . Department and board actions shall favor meaningful participation of the affected tribe, with the goal of achieving informed decision-making.[29]

Moreover, the **Department of Natural Resources** is required to consult with federally recognized tribes on issues of subsistence (*See* 11 AAC 112.270(d)). An example of how this policy is implemented is the inclusion of the affected tribe in the deliberative process regarding the Sitka Coastal Management Plan (2005-2006).

The **Department of Corrections** also has adopted an express policy of government-to-government consultation with tribes:

> The department will make a good faith effort to notify any federally-recognized tribe in Alaska, at the earliest practicable time, of any proposed departmental actions that will have a significant or unique affect [sic] on the tribes. When circumstances permit, the department will afford the tribe reasonable time to respond to any notification and to participate in consultation with the department. Consultation will be initiated as early in the decision-making process as practicable. Consultation will continue throughout the department's decision-making process, except where expressly prohibited by law. (DOC Policy & Procedure 107.01 B, "Tribal Government-to-Government Relations")

The **Department of Transportation and Public Facilities** has adopted a similar policy (*see* Policy & Procedure 01.03.010, "Government-to Government Relations with the Federally-Recognized Tribes of Alaska"), under which the department entered into a memorandum of agreement with the affected tribal government in Unalaska after two years (2002-2003) of consultation regarding the construction of the bridge at Amaknak and mitigation of its potential adverse impacts.

The City of Delta Junction as Petitioner mailed the same notice to the Mendas Cha-Ag Tribe at Healy Lake that it mailed to the commander at Ft. Greely and to Teck-Pogo, Inc. (*See* Deltana Borough Notice of Filing Distribution List). Notice mailed to the tribe did not include an invitation to participate as an affected governmental entity.

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[29] Available at http://www.adfg.state.ak.us/pubs/tribal_policy/tribepol.pdf (last visited June 15, 2007).

The tribe specifically stated in its March 20, 2006 letter to the City of Delta Junction (which was provided to the LBC by the Petitioner) that it had not up to that point been "included in notifications or discussions in the proposed borough." The LBC did not respond to this statement, and did not attempt to provide an opportunity for consultation. When Ms. Polston raised the issue of compliance with the Millennium Agreement at the December 4, 2006 meeting, LBC commissioners and staff made no response.

Past LBC Practice Consulting with Tribal Governments

Review of past LBC actions indicates that it has not been the standard practice of the LBC (or DCCED and DCA acting in conjunction with LBC actions) to afford government-to-government consultation with federally recognized tribes. Prior to adoption of the Millennium Agreement in 2001, the LBC did not consult with tribal governments.

- In the 1978 Petersburg Annexation action, the LBC offered no specific notice or opportunity for consultation to the local tribal government.
- There is also no record that in 2000, when addressing the petition to consolidate the city of Fairbanks and the North Star Borough, LBC provided notice of the petition to any of the area's tribal governments or to Tanana Chiefs Conference (the consortium representing the region's tribes).[30]
- In 2000 the City of Haines filed a petition to consolidate the city and the Haines Borough. According to the distribution list available on the LBC website,[31] the President of Chilkat Indian Village Council received the same notice as local Chamber of Commerce, but the LBC did not include the tribe as an affected governmental entity.
- When the City of Ketchikan filed its 2000 petition to consolidate the city with the Gateway Borough, the LBC provided notice of the filing of the petition to 64 people—but not to Ketchikan Indian Community.[32]
- The same is true for the Notice of Public Hearing on the 2000 petition for annexation of land at Bear Valley by the City of Ketchikan.[33]

LBC Practice Since the 2001 Millennium Agreement

Throughout the prolonged proceedings on the petition to incorporate a Municipality of Skagway (which began in 2001 and are ongoing), there is no record that the LBC ever afforded the Village of Skagway (the federally recognized tribal government) government-to-government consideration.

[30] The distribution list is available at http://www.commerce.state.ak.us/dca/lbc/pubs/Fairbanks_NOF_00.pdf.
[31] Available at ftp://ftp.dcbd.dced.state.ak.us/DCBD/Haines_Consolidation/Public_Notice/Haines percent20Notice percent20of percent20Filing.pdf (last visited July 30, 2007).
[32] The distribution list is available at http://www.commerce.state.ak.us/dca/lbc/pubs/Ketchikan_Consol_NOF_00.pdf (last visited July 30, 2007).
[33] The distribution list is available at http://www.commerce.state.ak.us/dca/lbc/pubs/Ketchikan_Hearing_00.pdf (last visited July 30, 2007).

When the issue of annexation arose again in Petersburg in 2004, three years after adoption of the state policy of government-to-government consultation with federally recognized tribes, the LBC did not include Petersburg Indian Association (PIA) as an affected governmental entity. In its directions to the petitioner regarding the required notices, DCA (which provides technical and administrative support to the LBC) did not list PIA as among the entities to which it had given notice and did not require the petitioner to give notice to the tribe (December 13, 2004 Letter from DCA's Michael Black to Bruce Jones, pp. 3-5). In fact, DCA specifically stated that notice to PIA was "left to your [the petitioner's] discretion" (p. 4).

The LBC's interactions with Mendas Cha-Ag Tribe at Healy Lake appear to follow the same pattern. The ombudsman believes the evidence shows plainly that the LBC did not engage in government-to-government consultation with the Mendas Cha-Ag Tribe at Healy Lake regarding the issues presented by the Petition for Incorporation of the Deltana Borough. While this appears consistent with LBC's practice, it appears to be inconsistent with the clear policies of DCCED and the State of Alaska regarding tribal governments. Therefore, the ombudsman proposed to find this allegation *justified*.

Agency Response

The LBC disagreed with the ombudsman's proposed finding:

> . . . during the course of the proceedings, DCCED communicated with JoAnn Polston, First Chief of the Mendas Cha-Ag tribe, several times by phone and e-mail in 2006 and 2007. DCCED asked her [for] information about Healy Lake – specifically about the roads, airstrips, landing on the lake and airstrip in the winter, the winter ice-road into Healy Lake and when it was sufficiently frozen enough for travel. By e-mail, DCCED sent Ms. Polston a written account of her December 4 oral comments at the informational meeting in Delta Junction, before those comments were published in the Final Report, asking her for her edits or comments, but received no response. At no time did Ms. Polston complain that that [sic] this government-to-government contact was insufficient.
>
> JoAnn Polston and the Tanana Chiefs Conference were also sent copies of the Preliminary and Final Reports. Ms. Polston attended both the DCCED informational meeting regarding the incorporation proposal and the LBC hearing on the matter. (LBC Response, p. 17)

The LBC's assertion that "at no time did Ms. Polston complain that that [sic] this government-to-government contact was insufficient" is not accurate. The Mendas Cha-Ag Tribe, through Ms. Polston, stated specifically to the LBC in its March 20, 2006 letter:

> The Mendas Cha-Ag Tribe and its governing body of the Healy Lake Traditional Council was not included in notifications or discussions in the proposed borough . . ."

Ms. Polston's public comment on December 4, 2006, specifically addressed this point: "Why wasn't Healy Lake contacted?" LBC staffer Kathy Atkinson answered that the public notices were sufficient to put the tribe on notice. Ms. Polston replied that the Millennium Agreement required "government-to-government consultation." Ms. Atkinson was silent, making no answer to this, and then moved on to a new topic. Ms. Polston raised this issue again later in the public comment period of the December 4, 2006 meeting, stating her "dismay" at the lack of government-to-government consultation. These statements were clearly a complaint that the public notice mailed to the tribe was insufficient to be considered government-to-government consultation.

DCCED decorated its Local Government Web pages with numerous photos of Alaska Natives, as well as the statement that it is DCCED policy to recognize and "work with" tribal governments. In practice, however, the LBC appear to interpret "government-to-government" consultation to mean that it is not required to actively solicit tribes' input or to respond to tribes' concerns. The ombudsman finds Allegation 3 ***justified*** by the evidence.

Findings of Record

Based on the evidence and analysis set out above, the ombudsman finds allegations 1, 2, and 3 ***justified***. Accordingly, the finding of record for these complaints, taken as a whole, is ***justified***.

RECOMMENDATIONS

A primary function of the Office of the Ombudsman is to provide recommendations to agencies on ways to minimize or prevent future problems similar to the ones investigated. To this end, the ombudsman proposed the following recommendations to the LBC:

Recommendation 1: The LBC should pend its acceptance of the Petition while further evidence and public comment is solicited and at least one additional public hearing is conducted on the limited issue of whether or not the proposed Deltana Borough meets the requirement of social, cultural, and economic interrelationship and integration as established by AS 29.05.031 and 3 AAC 110.045. After such information is gathered, the LBC should issue an amended Final Report with the findings and conclusions reached based upon the information received.

Agency Response

The LBC rejected this recommendation. Prior to making its written response, DCA Local Government Specialist Dan Bockhorst and Assistant Attorney General Marjorie Vandor both asserted the position that the LBC lacked authority to pend acceptance of the Petition, because once it had been referred to the Division of Elections, the LBC lost all jurisdiction over the issue. In a telephone conversation on July 9, 2007, Ms. Vandor explained to the investigator that the

LBC could not ever rescind acceptance of a petition or otherwise review its decision to accept a petition once that decision was "final." When asked what legal authority—statute, regulation, caselaw, etc.—supported that position, Ms. Vandor could not point to one that clearly applied.

The LBC's written response explained that the commission's rejection of the recommendation was based on the advice of counsel:

> The LBC's legal counsel from the State Attorney General's Office advised the LBC that the Commission does not presently have jurisdiction over the incorporation petition for the Deltana Borough. (LBC Response, p. 3)

Further, the LBC asserted that:

> . . . under AS 29.05100(a), once the LBC has approved a petition for incorporation of a borough (which means that all requests for reconsideration have been addressed or denied), then the LBC is mandated by law to immediately notify the director of elections of its acceptance of the petition. The director of elections is then mandated by law to "order an election" within 30 days after being notified by the LBC. The law further requires that the election "shall be held" not less than 30 or more than 90 days after the date of the election order. (LBC Response, p. 3)

The LBC also stated:

> The Director of Elections carried out her duties under AS 29.05.110(a) on May 24, 2007, by ordering an election on the Deltana Borough proposal on August 21, 2007. Thus, in accordance with the Alaska statutes and regulations, the election order was issued "within 30 days after notification" by the LBC of its acceptance of the petition, and the election was scheduled to occur "not less than 30 or more than 90 days after the date of the election order."
>
> Given that the LBC's decision to accept the Deltana Borough incorporation proposal was final 78 days ago, the LBC would be violating its own regulations if it now attempted to "pend" its acceptance of the petition as proposed by the Ombudsman. (LBC Response, p. 4)

In short, the LBC Response offered the argument that the LBC could not comply with this recommendation because it had no authority to delay the borough incorporation election once the LBC's regulatory deadlines for reconsideration had lapsed and the LBC had referred the incorporation petition to the Division of Elections.

The LBC is correct that its regulation setting the procedure for reconsideration (3 AAC 110.580) does not provide for reconsideration—even on the LBC's own motion—after the rather short deadlines provided. In this case, the ombudsman's preliminary report and recommendations reached the LBC more than a month after denial of the previous requests for reconsideration, and over two months after the written decision, well after those deadlines.

However, the LBC regulations include a provision for relaxing the LBC's procedural regulations, presumably including the deadlines for reconsideration set in 3 AAC 110.580(a) and (b). In 2007, 3 AAC 110.660 (Purpose of procedural regulations; relaxation or suspension of procedural regulation) stated:

> The purpose of the procedural requirements set out in 3 AAC 110.400 – 3 AAC 110.660 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 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.

Unless prohibited by constitution or statute, the LBC could relax its regulatory deadlines if it believed that its decision was based on flawed or inadequate information. The LBC decided otherwise.

The LBC also responded that it lacked the ability to follow this recommendation because the Division of Elections had assumed jurisdiction over the incorporation petition and upcoming ballot. The ombudsman recognizes that the LBC rejects this recommendation based on its interpretation of the law limiting its authority to reconsider its acceptance of the Petition. While the ombudsman respects the LBC's need to consult with the Department of Law, the ombudsman was unable to identify authority to either support or refute the LBC's stated helplessness in this situation.

While it is too late to rectify the problem in this situation, it would serve the public interest if the LBC amended its regulations to permit review of final decisions based on serious procedural and/or factual errors when these are identified more than 20 days after issuance of a final decision. Standards of good government should allow for an agency to rectify decisions based on "a substantial procedural error" or errors involving "a material issue of fact." This is particularly important when the circumstances allow for such a remedy without undue burden or prejudice to the agency or the public.

<u>In January 2008 the LBC changed its regulations</u>

In January 2008, the LBC amended its reconsideration regulation, 3 AAC 110.580, to extend the deadline for the LBC to reconsider a decision on its own motion. 3 AAC 110.580(b) now reads: "(b) Within 30 days after a written statement of decision is mailed under 3 AAC 110.570(f), the

commission may, on its own motion, order reconsideration of all or part of that decision." The LBC also amended 3 AAC 110.660 to clarify exactly how – by a vote of at least three members – the LBC can relax a procedural requirement (such as the deadline for reconsideration). The ombudsman therefore recognizes that the LBC and DCCED have partially implemented Recommendation 1.

Recommendation 2: The LBC should adopt a written policy and procedure for provision of "plain English" notices in compliance with State of Alaska policies and the LBC's own non-discrimination policy. Such policy and procedure should utilize accepted "plain English" standards to ensure that notices are accessible to the greatest number of people.

Agency Response

The LBC did not specifically reject this recommendation but expressed concern that accessible notices could not be issued that also complied with 3 AAC 110.450(b) (LBC Response, p. 11). That regulation requires that notices include:

> (1) the title of the notice of the filing of the petition;
> (2) the name of the petitioner;
> (3) a description of the proposed action;
> (4) a statement of the size and general location of the territory proposed for change;
> (5) a map of the territory proposed for change, or information where a map of the territory is available for public review;
> (6) a reference to the constitutional, statutory, and regulatory standards applicable to the commission's decision;
> (7) a reference to the statutes and regulations applicable to procedures for consideration of the petition;
> (8) designation of where and when the petition is available for public review;
> (9) a statement that responsive briefs and comments regarding the petition may be filed with the commission;
> (10) a reference to the regulations applicable to the filing of responsive briefs;
> (11) the deadline for receipt of responsive briefs and comments;
> (12) the mailing address, facsimile number, and electronic mail address for the submission of responsive briefs and comments to the department;
> (13) a telephone number for inquiries to the commission staff.

The LBC based its position that notices could not be drafted in an accessible manner on "a brief experimentation" with the Notice of Filing in the Deltana Borough incorporation proceeding:

> As written, it has a "Flesch Reading Ease" score of 15.5 and a "Flesch-Kincaid Grade Level" score of 16.3.12. Dramatic changes in the readability scores occur if information currently required by

> law is deleted from the notice. For example, if each "reference to the constitutional, statutory, and regulatory standards applicable to the commission's decision" currently required by 3 AAC 110.450(b)(6) is deleted, the "Flesch Reading Ease" score increases from 15.5 to 28.3 and the "Flesch-Kincaid Grade Level" score drops from 16.3 to 14.0. (LBC Response, p. 11-12)

The LBC argues that the notices must include the references to the legal standards and so the LBC cannot make them more readable. The purpose of referring to the legal authority in the notice is to ensure that the public understands the basis for agency decisions. However, as currently drafted, the notices fail to give the public a clear understanding of that basis, and so fail to achieve their purpose.

Given that reading accessibility is based on sentence structure and the use of words with more than three syllables, it is unclear why adopting a policy and procedure for fair and accessible notices is not possible. The LBC response does not satisfy the intent of the Ombudsman's recommendation.

Recommendation 3: The LBC should adopt a written policy and procedure for provision of notices in languages other than English whenever the population affected by the proposed agency action includes a language minority (not limited to the language minorities protected by the Voting Rights Act of 1965) constituting more than 5 percent of the citizens of voting age.[34] Such policy and procedure should include the provision of translation services at all public proceedings.

Agency Response

The LBC rejected this recommendation, citing cost considerations and an inability to determine when a language minority exists:

> The Commission's "adoption" of the policy recommended by the Ombudsman would, of course, need to be by regulation adopted under the Administrative Procedure Act. That process requires analysis of the fiscal impact of that policy on the agency (State) and the public and must be addressed in a fiscal note that accompanies the proposed regulation change. It is difficult to conceive that the cost of the "policy" suggested by the Ombudsman would be *de minimis* to the State.
>
> With regard to the second concern, the LBC is wary of the practicality of implementing such a recommendation and the cost of doing so. Neither the LBC nor DCCED is aware of any practical means of determining what percentage of citizens of voting age speaks particular minority languages. (LBC Response, p. 13)

[34] This standard is the same as that provided in the Voting Rights Act, 42 USC 1973aa-1a(b)(2)(A)(i)(I).

The ombudsman believes that to dismiss the recommendation as cost-prohibitive without further review does not reflect the LBC's stated commitment "to ensure that its notices convey the information required by law in a manner that is understood by those potentially affected" (LBC Response, p. 11).

The LBC also indicated that, because "any of its regulations affecting voting rights and procedures are subject to review and approval by the U.S. Department of Justice (DOJ) under the Federal Voting Rights Act of 1965," the recommendation was not necessary (LBC Response, p. 14). The federal law protects the rights of the substantial number of Alaskans who speak a Native Alaskan language, such as Yupik, as well as those citizens who speak Asian languages and Spanish. However, there is nothing in the federal law that prevents the LBC from expanding those protections to include citizens of other language minorities. Nor does state law prevent the LBC from ensuring that citizens from all language minorities are able to understand and participate in the public process.

The LBC also argued that Alaska's law making English the "official language" of Alaska restricted its ability to accommodate Russian speaking voters. The LBC response cited "significant legal constraints" on the LBC's ability to provide Russian language translations. See LBC Response, p.12, n. 13. The LBC cited AS 44.12.300 – AS 44.12.390 (the "Only English Initiative"). In particular, the LBC cited AS 44.12.320 and AS 44.12.350.

Since issuance of the preliminary report and the LBC's response, the Alaska Supreme Court has ruled on the constitutionality of these statutes. *See* Alaskans for a Common Language, Inc. v. Kritz, 170 P.3d 183 (Alaska 2007). The court ruled that the State could not exclude other languages from all government functions and struck down the first sentence of AS 44.12.320, which read: "The English language is the language to be used by all public agencies in all government functions and actions." Thus, LBC's argument that it might be prohibited from offering translators and Russian-language versions of documents has proved unsupported. The court, however, allowed a portion of the law to stand, and left AS 44.12.350 intact. This included the requirement that every state agency provide a separate line item in its budget for costs of translation services and the printing of non-English materials. The ombudsman notes that this requirement makes implementation of this recommendation more cumbersome, yet it does not lessen the need for translations.

Recommendation 4: The LBC should adopt a written policy and procedure for government-to-government consultation with federally-recognized Alaska Native tribes, in conformance with the express policies of the State of Alaska and the Alaska Department of Commerce. Such policy and procedure should include specific procedures for the affording of notice to tribal governments and consultation of tribal governments by LBC staff and commissioners on issues affecting the tribe related to the agency action being considered.

Agency Response

The LBC rejected this recommendation. The LBC Response states on p. 17:

> . . . while the LBC promotes every reasonable means to encourage public awareness of and participation in its proceedings, the Millennium Agreement expressly provided that it created "no legally binding or enforceable rights." (*See* Section 31 of the Millennium Agreement.)

The ombudsman recognizes that the Millennium Agreement is not law, but instead a public policy directive applicable to all state agencies since 2001—and therefore applicable to this matter. The record shows that the LBC conducted its business in a manner that conflicts with the official policies of the State of Alaska and DCCED. The LBC ignored the factual record in its eagerness to count the Native Village of Healy Lake in determining that the proposed borough met the requirements of Alaska law, and then the LBC and its DCA staff dismissed the tribal chief's comments without bothering to respond.

That the LBC now claims it is effectively exempt from the Millennium Agreement and DCCED policy seems arrogant and runs directly counter to the principle of fostering consultation between "Tribal Governments, and the State of Alaska, through its Governor, in order to better achieve mutual goals through an improved relationship between their governments It is also disturbing that this appears to be the considered position of the Alaska Department of Law as articulated by the assistant attorney general who represents DCA and the LBC. The ombudsman formally recommends that the LBC adopt a policy that reflects the position of the State of Alaska on government-to-government consultation set out in the Millennium Agreement.

Finding of Record

The LBC's defense of its actions does not persuade the ombudsman to change the proposed findings of justified. The ombudsman closed these three complaints as ***justified.***

For the most part, the LBC rejected the ombudsman's recommendations. However, in January 2008 the LBC changed its regulations to allow the commission to withdraw and reconsider a petition after the commission had forwarded it to the Division of Elections for a vote. That addresses the intent of Recommendation 1. When an agency accepts a portion of the ombudsman's recommendations but rejects others, the complaint will be closed as ***partially rectified*.**

This investigation will be closed as ***justified*** and ***partially rectified***.

Appendix A

Map showing boundaries of the proposed Deltana Borough, from the cover of "Preliminary Report to the Local Boundary Commission on the Deltana Borough Proposal." Available at:

ftp://ftp.dcbd.dced.state.ak.us/DCBD/Deltana_Borough/Prelim_Report/Cover-Table_of_Contents.pdf