

MEMORANDUM

State of Alaska Department of Law

TO: The Honorable Deborah Sedwick
Commissioner
Department of Community &
Economic Development

DATE: December 12, 2001

FILE NO.: 663-02-0090

TELEPHONE NO.: 465-3600

FROM: Marjorie Vandor
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Governmental Affairs Section –
Juneau

SUBJECT: Authority of Local Boundary
Commission to require
truncation of terms of
governing body in annexation
proceeding

You have asked for an opinion from this office as to whether the Local Boundary Commission (LBC) has the authority to require truncation of terms of elected officials of an annexing municipality. And, if so, can the LBC exercise such authority in the short term absent regulations establishing standards and procedures for truncation of terms? In brief, it is our opinion that the LBC does not have the authority to require truncation of terms as a condition of approving a petition for annexation absent regulations establishing standards and procedures for truncation. However, it is our opinion that LBC has adequate constitutional and statutory authority to adopt such standards. The LBC also can recommend to the annexing city that it consider truncation of terms of the city council through passage of an ordinance if the LBC determines it to be appropriate.

1. Powers of the LBC -- Annexation Petitions

Under AS 29.06.040, the LBC may consider any proposed municipal boundary change. The LBC may also amend the proposed change and may impose conditions on the proposed change. If the LBC determines that the proposed change, as amended or conditioned if approved, meets applicable standards under the state constitution and commission regulations and is in the best interests of the state, it may accept the proposed change. Under AS 44.33.812(a)(2), the LBC is required to adopt regulations adopting standards and procedures for annexation.¹ The current standards for annexation to cities are set out in 3 AAC 110.090 -- 3 AAC 110.150.

¹ Alaska Statute 44.33.812 (a)(2) reads: “The Local Boundary Commission *shall* . . . (2) adopt regulations providing standards and procedures for municipal incorporation, annexation, detachment, merger, consolidation, reclassification, and dissolution.” (emphasis added).

While population of the existing city and the territory proposed for annexation are listed as relevant factors the LBC may consider in annexation proceedings, there are no criteria in the regulations to guide the LBC as to when it may condition approval of a city annexation petition on truncation of terms of the city council to address an increase in population to the city. Such standards would conceivably address percentage of increase in population, date of the next general election, number of council seats up for election based on staggered terms, and whether council members are elected at-large or by another method (*i.e.*, by district). These are variables which we believe a court would find should be established in regulation in order to provide the commission with standards as well as to promote informed, public participation in the annexation process.

The Alaska Supreme Court, while determining that the Local Boundary Commission enjoys broad discretion with respect to whether it approves of a proposed boundary change, has also held that development of standards is a precondition to the commission's exercise of its discretion. *United States Smelting, R & M, Co. v. Local Boundary Com'n*, 489 P.2d 140, 143 (Alaska 1971) (before the commission held hearings and prior to submitting annexation proposal to legislature, it was obligated to comply with the requirement of (former) AS 44.19.260(a)(2)² that it develop standards for changing local boundary lines). Conditioning an annexation petition on a requirement that terms of existing city council members be truncated is a condition that we believe goes beyond the normal scope of the annexation standards currently considered by the LBC as set out in its own regulations.

On the issue of the LBC's broad discretionary powers, you cite several state reapportionment cases as a potential basis for finding authority of the LBC to require truncation in the instant proceeding. We have reviewed those cases, but do not believe that the LBC enjoys the same degree of discretion afforded the governor in reappropriation of legislative seats. *See Groh v. Egan*, 526 P.2d 863 (Alaska 1974); *Egan v. Hammond*, 502 P.2d 856 (Alaska 1972). In those cases, wherein the governor's reapportionment plan resulted in the truncation of several senate seats, the court equated the governor's constitutional authority to reapportion the legislature³ and truncate terms to a regulation adopted under a delegation of authority from the legislature to an administrative agency to formulate policy and promulgate regulations. *Groh*, 526 P.2d at

² Now AS 44.33.812(a)(2).

³ Former Art. VI, secs. 3 -- 10 of the Alaska Const. (amended 1999; governor no longer adopts plan; current law provides for a plan adopted by a redistricting board consisting of members appointed by the three branches of government).

880-1; *Egan v. Hammond*, 502 P.2d at 873-4. The governor was not required to adopt regulations before exercising his authority under the constitutional provisions providing the power to adopt a reapportionment plan. In contrast, the LBC is an administrative agency that has been delegated authority to adopt regulations by the legislature and is actually mandated to do so in certain instances. See *U.S. Smelting*, 489 P.2d at 141-2. Notwithstanding the LBC's constitutional origin, it has been determined by the Alaska Supreme Court that the LBC's exercise of discretion in boundary changes must be based on developed standards as a precondition to exercising its discretion. *Id.* We believe a court would so hold here -- that development of standards for determining when truncation of terms of a city council is a condition for approving an annexation petition is prerequisite to exercising such discretion by the LBC.

2. **At-Large Representation; Power of City to Pass Ordinance to Truncate Terms**

The City of Homer, like most first class cities, elects its six council members on an at-large basis. AS 29.20.130.⁴ Assuming the annexation petition is approved, persons residing in the annexed territory will be represented by all members of the existing Homer city council. Then, in October 2002, based on the current staggered terms, the mayor and two council member seats will be up for election.⁴ At that election, the people in the annexed territory will have the opportunity to run for office as well as vote for at least three city officials within the first seven months after annexation is effective.⁵ While voters in the annexed territory may be considered to be temporarily disenfranchised since they did not have the opportunity to vote for any of the current members of the council, the disenfranchisement is temporary (*i.e.*, 7 months). Further, considering that all current council members are elected at-large, they will assume the constituency living in the annexed territory on the effective date of the annexation.

In the event truncation remains an issue beyond the LBC proceedings, the City of Homer has the authority to provide, by ordinance, for election of members other than on an at-large basis for all members. AS 29.20.130. And, the city council may pass an

⁴ Alaska Statute 29.20.130 reads: "Each first class city has a council of six members elected by the voters at large. Each second class city has a council of seven members elected by the voters at large. The council of a first or second class city may by ordinance provide for election of members other than on at at-large basis for all members."

⁵ If the annexation petition is approved by the LBC and not disapproved by the Alaska Legislature, it will become effective in March 2002. AS 29.06.040(b).

ordinance to truncate terms of its current council members.⁶ With the ability of the city to address truncation of terms at the local level, the LBC may want to recommend that the city consider adopting such an ordinance, particularly if the approved annexation results in a substantial increase in population.

Lastly, we are mindful that the Homer city annexation petition has the potential of increasing the population of the city by an estimated 56 percent (if approved with the amount of territory sought in the original petition) or by an estimated 22 percent (if approved with the amount of territory recommended by DCED staff in its preliminary and final reports). And, while truncation may well be an appropriate tool to apply in conjunction with substantial population increases resulting from a boundary change, there are simply no provisions of law or regulation to guide the LBC in making such a determination. This differs greatly from the municipal charters and state statutes setting out when reapportionment of assemblies is to occur (AS 29.20.080 -- 29.20.120). Yet, even under an established reapportionment process, the Alaska Supreme Court has determined that when a governing body is composed of members elected in staggered terms, the temporary disenfranchisement of transferred voters is an inevitable consequence of the reapportionment and this does not constitute invidious discrimination in violation of the constitutional guarantee to equal representation. *See Kentopp v. Anchorage*, 652 P.2d 453, 461 (Alaska 1982) (although a substantial number of Anchorage voters were transferred into new districts, the resultant temporary disenfranchisement is, at worst, no greater than that generally imposed on residents who move into an Assembly district or who become of voting age shortly after an election has taken place). Further, it has been held that continuity and stability associated with a staggered schedule of elections, which would be lost if the terms of all members were truncated, supports a decision to reject truncation. *Id.* at 462.

3. Conclusion

In conclusion, it is our opinion that the LBC does not, absent regulations, have discretionary authority to require truncation of terms of the city council of Homer as a condition to approving the petition for annexation presently being considered. In the event the LBC determines that truncation of terms is appropriate, it may recommend to the city council that it pass an ordinance addressing the matter. Finally, it is our opinion that the LBC has the authority to promulgate regulations to establish standards and

⁶ See AS 29.20.150 (term of office); AS 29.35.250 (powers of cities within boroughs); AS 29.35.100 (a liberal construction shall be given to all powers and functions of a municipality conferred in this title).

The Honorable Deborah Sedwick, Commissioner
Department of Community & Economic Development
A.G. file no: 663-02-0090

December 12, 2001
Page 5

procedures dealing with truncation of terms to be applied in future boundary change petition reviews.

If you have questions regarding this advice, please do not hesitate to call.

cc: Hon. Drew Scalzi
Alaska House of Representatives

Dan Bockhorst, Staff Supervisor, Local Boundary Commission