Paul C. Rusanowski, Director
Division of Governmental
Coordination

March 2, 1993

663-92-0618

465-3600

Alaska Coastal Policy Council Members' Eligibility to Hear Petitions Under AS 46.40.100

Elizabeth J. Kerttula
Assistant Attorney General

INTRODUCTION

You have requested an opinion from this department on a number of questions relating to the Alaska Coastal Policy Council ("CPC") and its members' eligibility to sit on petitions brought to it under AS 46.40.100. To make it easier to follow our response, the first part of this opinion provides brief answers to your questions. The second part of the opinion gives a brief historic background of petitions, and in the third section we more fully develop our response.

I. OPINION REQUEST QUESTIONS AND BRIEF RESPONSES

Your questions with our brief answers follow:

QUESTION 1: Can a Coastal Policy Council member (or their alternate) sit on a petition proceeding if that individual previously participated in the action now under appeal to the Council? Your specific questions were:

a). For a state consistency determination, can a state resource agency commissioner who acted on the determination also hear and decide a petition on the state agency action?

ANSWER: No. If a commissioner participated in a commissioner-level elevation under 6 AAC 50.070(k), the commissioner may not participate in a CPC petition proceeding under AS 46.40.100 on the same state agency action.

b). In a parallel case, can a Coastal Policy Council public member hear and decide on a petition regarding a coastal district action if the public member substantively participated as a local official in the coastal district action under petition?

ANSWER: The answer to this question depends on the definition of "substantively participated." For the purposes of this opinion, as it parallels

your first question, we assume that "substantively participated" means that a public member has participated in the decision on the coastal district action that is being brought by petition to the CPC. Considering these facts, our response is no, a CPC public member who participates in a decision on the coastal district action may not participate in a CPC petition proceeding under AS 46.40.100 on the same district action.

QUESTION 2: If the answer to the first question was "no," your next question was whether a state resource agency commissioner may delegate his or her authority to act on a state agency action (e.g., a state conclusive consistency determination) in order to participate as a Coastal Policy Council member in a subsequent petition on the same state agency action?

ANSWER: No. The regulations governing the procedures for a consistency determination do not allow for such delegation to be made. However, this is a complicated issue because AS 44.19.155 and AS 46.40.100 statutorily require commissioners to sit on petitions. Because of the inconsistency between the statutes and the regulations in 6 AAC 50, there should be some change made to resolve this conflict.

QUESTION 3: Is it acceptable for a Coastal Policy Council member (or alternate) to sit on a petition proceeding when the member's agency or municipality initiates the petition? Does a conflict of interest exist precluding that member's participation on the petition?

ANSWER: CPC members and alternates may not sit on petitions initiated by their agencies or municipalities.

QUESTION 4: Is it acceptable for a Coastal Policy Council member (or alternate) to sit on a petition proceeding when an action by the member's agency or municipality is the subject of the petition? Does a conflict of interest exist precluding that member's participation on the petition?

ANSWER: We assume that this question is the converse of your question number three, and that the question is whether a CPC member or alternate

> may sit on a petition brought by another party against a member's agency or municipality. Under these facts, if a CPC member participated in a decision concerning an action, that member or his or her alternate may not sit on a petition proceeding concerning that action. If the member did not participate in the decision, then that member or alternate would normally still be unable to participate in the petition decision. There has been one exception to this. Because of the extraordinary circumstances in that situation, this was acceptable; but as we have said, normally it is not.

You also noted in your request that it "would be helpful if your response discussed some of the different scenarios Council members might experience." Opinion Request from Paul C. Rusanowski, Director Division of Governmental Coordination, Office of Management and Budget to Attorney General Charles E. Cole, May 26, 1992, at 1. We will outline some of the situations that have arisen concerning petitions in this opinion and we will also describe a few scenarios likely to occur.

II. HISTORICAL BACKGROUND

To give some perspective on the issues you raise we provide the following background information.

The main reason the Alaska Coastal Management Program ("ACMP") and the Alaska Coastal Policy Council ("CPC") are facing the issues you raise is because, when the consistency determination process in 6 AAC 50 was adopted in 1984, there was no commensurate statute change to AS 46.40.100. In 1977, when the legislature enacted AS 46.40.100, it created an ability for certain people to appeal issues to the CPC through "petitions." In 1984, when the CPC promulgated its regulations creating the consistency review process for consistency determinations in 6 AAC 50, it deleted a section of the regulations that specifically allowed consistency determinations to be reviewed by the CPC. 6 AAC 80.030(a)(3), am. 10/28/84, Register 92. The intent was to have consistency determinations appealed to court rather than to the CPC. See 1988 Inf. Op. Att'y Gen. (Jul. 1; 366-136-85). However, there was no commensurate statutory change to AS 46.40.100. Notwithstanding the new regulations, the statute continued to provide for a petition to the CPC from a final consistency determination. Thus, a dual avenue of appeal was created. This creates due process concerns and complex

delegation-of-authority issues. Because AS 44.19.155 and AS 46.40.100 statutorily mandate that commissioners (or high-ranking permanent alternates) sit as members of the CPC (including when the CPC hears petitions), it is in conflict with the consistency determination regulations at 6 AAC 50 et seq. which require commissioners to sit on final consistency determinations. There would be a violation of the Administrative Procedure Act and its due-process implications if commissioners followed the mandates of both 6 AAC 50 and the statutes. Because of this, there should be changes made to either the statutes, the regulations, or both to resolve this conflict.

AS 46.40.100(b)

In 1977, when the legislation creating the ACMP passed, it contained AS 46.40.100, the statute providing the right for certain people to "petition" the CPC for relief from violations of a coastal district management program. AS 46.40.100(b), which has not changed since 1977, except for renumbering, states:

> On petition of a coastal resource district, a citizen of the district, or a state agency, showing that a district coastal management program is not being implemented, enforced or complied with, the council shall convene a public hearing to consider the matter. A hearing called under this subsection shall be held in accordance with the Administrative Procedure Act (AS 44.62). After hearing, the council may order that the coastal resource district or state agency take any action which the council considers necessary to implement, enforce or comply with the district coastal management program.

AS 46.40.100 was codified from section 4, chapter 84, SLA 1977, the source of which was HB 342 (1977). Subsection (b) of AS 46.40.100 (the most pertinent to this opinion) was only changed slightly during the legislative process. CSHB 342 was offered April 21, 1977, by the Community and Regional Affairs Committee.

The legislative history indicates that the legislature intended the Alaska Coastal Policy Council to be an adjudicatory body composed of high-ranking state and local officials who, as part of their duties, would be involved with hearing petitions concerning the implementation and enforcement of coastal district

programs.[1] See AS 44.19.155 for a list of individuals composing the CPC (mayors, assembly members, and state commissioners). The foremost indication of the intention that the CPC is an adjudicatory body is the plain language of AS 46.40.100(b).

The language of the statute clearly envisions certain parties bringing petitions to the CPC on district coastal management program implementation, enforcement, or compliance issues for resolution. The statute does not exempt ACMP consistency determinations from its ambit.[2] The legislature's policy statement about the ACMP legislation noted:

> It is the policy of the state to:
>
> . . . .
>
> (6) authorize and require state agencies to carry out their planning duties, powers and responsibilities and take actions authorized by law with respect to programs affecting the use of the resources of the coastal are in accordance with the policies set out in this section and the guidelines

[1] There have been some interviews of people who participated in the creation of the ACMP. One of them was with Murray Walsh, who was with the state Office of Coastal Management and who worked on draft coastal zone legislation in the 1970s. As Mr. Walsh recalls, the committee charged with looking at creating the ACMP did not spend a great deal of time on the CPC petition process (embodied in AS 46.40.100). It was incorporated into the draft legislation as a standard appeals mechanism to accompany the CPC's proposed rule-making authority. Mr. Walsh also noted that AS 46.40.100 addressed the concerns raised about the various parties' compliance with coastal programs. See Enclosure "C" from the CPC Petition Subcommittee Meeting Packet from Robert L. Grogan, Director, Division of Governmental Coordination, Office of Management and Budget, Nov. 15, 1989, at 5.

[2] The initial ACMP consistency determinations were adopted after passage of the ACMP and did not include an elevation process. Prior 6 AAC 80.030 (eff. 7/18/78, Register 67). The ACMP elevation consistency determination regulations were not adopted until 1984, seven years after the legislature enacted the statute, so it is unsurprising that the initial statute makes no mention of consistency determinations.

> and standards adopted by the Alaska Coastal Policy Council under AS 46.35.

Sec. 2, CCS SCS CSHB 342 (emphasis added). Thus, the legislature recognized that state agencies were required to carry out their duties in accordance with the guidelines and standards set by the CPC. AS 46.40.200; see 1978 Op. Att'y Gen. No. 27 (Oct. 26). To enable the CPC to enforce its standards, the legislature also gave the CPC the authority to hear petitions on district coastal management program standards (which, once adopted by the CPC, become enforceable as state regulation as outlined in AS 46.40.100). See 6 AAC 85.180(a); and see statutory authority cited as authority for that regulation.

In the Attorney General's bill review of HB 342 after it passed, this office noted:

> The central feature of the proposed Act is the creation of the Alaska Coastal Policy Council in the Office of the Governor. AS 44.19.891. The council is comprised of nine public members (who must be elected municipal officials) appointed by the governor from the nine coastal regions set out in sec. 891(1), and seven state cabinet officials motioned in sec. 891(2). The main function of the council is to adopt guidelines and standards, for use by municipalities in organized boroughs and "coastal resource service areas" in the unorganized borough, stating how to develop a coastal management program and what to include in that program to gain council approval.
>
> . . . .
>
> Following legislative approval of the district programs, the municipalities which exercise zoning or land use controls implement the programs for their areas, and in areas of the coast where zoning of land use controls are not exercised state agencies implement the program. If the programs are not implemented or if they are not being properly enforced, a coastal resource district, a citizen of the district, or a state agency can commence an administrative action before the council under the Administrative Procedure Act ("APA"), to require implementation or enforcement. The council decision is

> reviewable in superior court under the APA and orders of the council are enforceable in superior court under AS 46.35.100.

Att'y Gen. Bill Review for CCS SCS CSHB 342, June 6, 1977, Att'y Gen. File No. J-88-066-77, at 2, 3 (emphasis added).

III. FEDERAL STATEMENTS

Besides the contemporaneous bill review, there are subsequent statements about the petition process as an enforcement mechanism, and the CPC as an adjudicative body, contained in the Final Environmental Impact Statement ("FEIS") and its "Findings" on the ACMP when it was accepted into the federal coastal zone management system. In particular, in the FEIS "Summary of the Alaska Coastal Management Program" ("Summary"), the FEIS mentions that

> [t]he Act establishes a Coastal Policy Council to direct the coastal management program and resolve conflicts during its implementation. The Council is responsible for reviewing and approving district coastal programs and developing specific standards and guidelines for managing coastal land and water areas and uses.

State of Alaska Coastal Management Program and Final Environmental Impact Statement, State of Alaska Office of Coastal Management, and
U.S. Department of Commerce, Office of Coastal Zone Management, May 30, 1979, at 17. The FEIS further states in the Summary that

> [t]he Division of Policy Development and Planning, as lead agency for the program, is responsible for reviewing the consistency of state and Federal actions with the ACMP. On petition, the Council may order any action considered necessary to implement, enforce or comply with the district coastal management program. Council orders are enforced in the state Superior Court. State agency actions inconsistent with the standards are subject to judicial review.

Id. at 19. The FEIS also notes:

> The main device for conflict resolution in areas for which district programs have been approved is

provided for in AS 46.40.100(b)-(e).

Id. at 153.

Besides the FEIS, there were "Findings" made by Robert Knecht, the Assistant Administrator for the federal Coastal Management Program when he approved Alaska's program. In the "Findings" Mr. Knecht stated:

> The agency having greatest responsibility for implementation of the ACMP is the Alaska Coastal Policy Council. . . . It may issue orders to ensure compliance with approved district programs and adopt resolutions to express its views on matters that concern the ACMP. Under the Administrative Directive, the Council is authorized to resolve interagency disputes concerning implementation of the ACMP, unless deadlines make it necessary to carry the dispute directly to the Governor.

"Findings" of Robert W. Knecht, Assistant Administrator, for Coastal Zone Management, National Oceanic and Atmospheric Administration, Approval of the Alaska Coastal Zone Management Program, July 1979, at 44.

Furthermore, while it may not have been necessary to create the CPC or the petition process to satisfy federal requirements for acceptance into the federal coastal zone program (16 U.S.C.A. • 1451 et seq.), there are federal requirements for some sort of implementation and enforcement mechanism to obtain federal approval of a state coastal management program.

The National Oceanic and Atmospheric Administration (NOAA) coastal zone management regulations (15 C.F.R. • 923.1 et seq.), largely unchanged since early 1979, provide the national framework and the options available to states developing coastal programs. As a general statement about coastal program requirements, the federal requirements require a state to develop a management program that "includes sufficient legal authorities and organizational arrangements to implement the program and ensure conformance to it." 15 C.F.R. • 923.1(c)(6)(1992).

The NOAA regulations at 15 C.F.R. • 923 Subpart E describe the detailed requirements regarding a state's coastal program authorities and organization. 15 C.F.R. • 923.40(b) indicates that a state may choose which state entity or entities

will exercise its coastal program authorities, but

> [t]he major approval criterion is a determination that such entity or entities are required to exercise their authorities in conformance with the policies for the management program. Accordingly, the essential requirement is that the state demonstrate that there is a means of ensuring such compliance.

Id. Also, 15 C.F.R. • 923.41(b)(2)(iii) requires that the state have the ability to "[r]esolve conflicts among competing uses." Thus, if a state wishes to have a federally certified coastal management program, as Alaska did when it created the ACMP, see FEIS, infra, it must have some enforcement mechanism. Prior to the creation of the elevation process for consistency determinations in 6 AAC 50.010 et seq., the CPC was the main enforcement component of the ACMP.

Before 1984 and the creation of the "elevation" process outlined in 6 AAC 50, there was a state regulation specifically stating that any consistency reviews were subject to CPC review. See previous 6 AAC 80.030 (eff. 7/18/78, Register 67). From 1978 until 1984 state agencies and the Division of Policy Development and Planning ("DPDP") performed "consistency reviews" to determine whether a project was consistent with the ACMP. The reviews were guided by the standards of the ACMP at 6 AAC 80.010 et seq., which were adopted in 1978, and by several governors' Administrative Orders, but did not include the elevation process.

IV. CONSISTENCY DETERMINATIONS

In 1984, the Governor's Office developed a new method to review consistency determinations and adopted regulations. This was the "elevation process" outlined in 6 AAC 50 et seq. Subsequent to the Governor's adoption of regulations, the CPC incorporated them into the ACMP. June 8, 1984, Adoption Order of the CPC; see Apr. 19, 1984, memorandum from Assistant Attorney General Laura Davis to Bob Grogan, Assoc. Director, Division of Governmental Coordination, Att'y Gen. File No. 399-122-84, Re: Proposed amendment to Coastal Policy Council regulations incorporating project consistency regulations. When the CPC incorporated the changes to 6 AAC 80.030(a)(3), it did so by deleting language providing for CPC review of state consistency actions and, instead, inserting a reference to the new process specified at 6 AAC 50. The regulation, showing the amendments, was as follows:

6 AAC 80.030 is amended to read:

> 6 AAC 80.030. PROGRAM MANAGEMENT AND COORDINATION. (a) The [OFFICE OF COASTAL MANAGEMENT] Division of Governmental Coordination of the Office of Management and Budget is the designated lead agency for the Alaska Coastal Management Program. The [OFFICE OF COASTAL MANAGEMENT] Division of Governmental Coordination of the Office of Management and Budget shall
>
> . . . .
>
> (3) review State and federal actions for consistency with the Alaska Coastal Management Program, [SUBJECT TO COUNCIL REVIEW.] as provided in 6 AAC 50.

6 AAC 80.030, amended 10/28/84, Register 92; Amendment to 6 AAC 80.030 as submitted to the Department of Commerce, Office of Ocean and Coastal Resource Management for Review, by Robert L. Grogan, Associate Director, Division of Governmental Coordination, June 26, 1984.

While the CPC thus adopted the elevation procedures outlined in 6 AAC 50, and tried to remove itself from the process of reviewing petitions on consistency determinations, AS 46.40.100 and its right of petition remained unchanged. This analysis is supported by a 1984 Attorney General's Informal Opinion. See 1988 Inf. Op. Att'y Gen. (Jul. 1; 366-136-85).[3] To

[3] This opinion was written in 1984, but was redated 1988 for publishing. The Attorney General's informal opinion makes it clear that, when the state created the consistency determination process in 6 AAC 50.010 et seq., it intended to avoid having conclusive consistency determinations appealed to the CPC. In fact, the opinion states that there is no administrative appeal of consistency determinations--rather, an appeal goes straight to court. Because of the importance of the opinion, which definitely outlines the belief that after the implementation of the consistency determination process in 6 AAC 50 there was no right of administrative appeal of a consistency determination, we have cited it at length below. As the opinion states:

> [The attorney general's office was requested to provide advice] regarding the creation of a

(..continued)

> uniform appeals procedure for the review of project consistency determinations made under 6 AAC 50, and agency permits which implement a project consistency determination. Any appeals procedure should be consistent with the goals of the Governor's Administrative Order No. 78 (December 20, 1983), i.e., simplifying and expediting well-reasoned decision making in the issuance of state agency permits and in the issuance of project consistency determinations under the Alaska Coastal Management Program ("ACMP").
>
> . . . .
>
> Alaska superior courts have jurisdiction to hear appeals from a state administrative agency "when appeal is provided by law." AS 22.10.020. There is no statute specifically providing for the appeal from a project consistency determination. However, there are numerous statutes and regulations providing for review of resource agency actions which may implement a consistency determination.
>
> Despite the absence of any statutory provision for appeal of a project consistency determination, it is a final state agency action and is, we believe, reviewable by appeal to the superior court. However, appellate review of the project consistency determination alone may not provide meaningful relief if the applicant obtains permits and proceeds with the project in the meantime. The issuance of permits may be stayed only if the state withholds its consistency determination (i.e., by allowing reconsideration before it is issued) or if a court enjoins the issuance of permits.
>
> . . . .
>
> An adjudicatory hearing would be time consuming and is not, in our view, necessary to provide an adequate record for judicial review. A project consistency determination which reflects the reasoning of the agencies and the alternatives

the extent that opinion suggests that there is no right to "appeal" consistency determinations through petitioning the CPC under AS 46.40.100, we hereby clarify that opinion.

V. PETITIONS

Although the CPC changed its regulations, apparently to avoid appeals of consistency determinations to the CPC, this is not what happened. Since the inception of the ACMP, seven petitions have been submitted to the Council: Anchorage citizen (1981), Anchorage citizen (1984), City of Kaktovik (1988), Juneau citizen (1990), Cenaliulriit Coastal District (1990), North Slope Borough Coastal District (1991), and Bering Straits Coastal District in conjunction with the Native Village of Koyuk IRA. Five of the seven petitions were resolved before reaching a full hearing and/or were subsequently withdrawn by the petitioner. See Memo from Paul Rusanowski, Director, Division of Governmental Coordination, to Paul Fuhs, Legislative Liaison, Feb. 2, 1992, Briefing Paper on SB 47, at 1, note 1. The two that were not withdrawn were the petitions brought by Cenaliulriit and Bering

(..continued)

> considered should constitute an adequate "decisional document" permitting judicial review of the agency decision on the record.
>
> In summary, the project consistency review process has simplified and streamlined the issuance of agency permits for development projects in Alaska's coastal zone, and it provides a reasonable opportunity for all interested parties to participate in agency decision making.
>
> In order to enhance this effort we recommend the following: (1) We would discourage the adoption of any uniform appeals procedure which unduly extends the time required for final agency decision making. (2) We would also encourage all resource agencies to propose changes to their own statutes and regulations to eliminate time-consuming administrative appeals or adjudicatory hearing processes which apply to their permit decisions.

1988 Inf. Op. Att'y Gen. at 2-4 (Jul. 1; 366-136-85) (citations omitted).

Straits. Both of these petitions concerned consistency determinations. The Cenaliulriit petition went to a full hearing before the CPC and the Bering Straits petition is still pending.

After hearing the Cenaliulriit petition, the CPC issued a decision. The Council's October 1991 decision on the Cenaliulriit petition, affirming DNR's consistency determination for Goodnews Bay offshore prospecting permits, was affirmed by superior court Judge Fabe on February 10, 1992. Kuitsarak Corp. v. Swope, Comm'n, No. 3AN-90-7663 Ci. However, the decision was subsequently appealed to the Alaska Supreme Court. Kuitsarak Corp. v. Swope, Comm'r, No. S-5176. (Briefing should be complete in that case by the end of March 1993.)

In Kuitsarak Corp. (also referred to as "Goodnews Bay"), the superior court rendered the first of two court decisions to date concerning a petition to the CPC. In doing so the court discussed the language of AS 46.40.100, stating:

> The statute clearly contemplates two distinct stages: (1) a petition that makes a "showing" that the district program "is not being implemented, enforced or complied with"; and (2) a hearing to determine whether substantial evidence supports the showing. AS 46.40.100(b). The statutory language, itself, limits the initial review of the evidence to the petitioner's facts, only. This is consistent with the definition of a prima facie case where the focus is on whether the moving party can put forth enough evidence "such as will 'suffice, until contradicted and overcome by other evidence.'" Pacific Telephone v. Wallace, 75 P.2d 942, 947 (Ore. 1938) (emphasis added). At the first stage, then, the reviewing body examines only the petition and any supporting or explanatory exhibits or documentation submitted with the petition. If it is determined from a review of the petitioner's written presentation that a prima facie showing has been made, then a full hearing is required where both parties present all of their evidence and the council determines the validity of the petitioner's claim using the substantial evidence test.

Kuitsarak Corp. at 16 (Alaska Super., Feb. 19, 1991) (emphasis in original). After the court reheard its initial appeal, the court further noted, "The CPC has considerable institutional competence

in these issues and has a key statutory role to play prior to judicial review." Opinion on Rehearing at 3 (June 10, 1991). The procedure used in the Goodnews Bay case was contrary to the way major ACMP appeals concerning consistency determinations had been brought since 1984. As an Attorney General's informal opinion noted in 1990:

> The common understanding [of how consistency determination appeals would be brought] was that any adjudication of the consistency of a particular state or local government action with the ACMP would be by the courts. See, e.g., Hammond v. North Slope Borough, 645 P.2d 750 (Alaska 1982). Judicial relief normally is not available until whatever administrative remedies provided are exhausted. See, e.g., Hyning v. University of Alaska, 621 P.2d 1354 (Alaska 1981). Significantly, it has never been argued, or even suggested, that someone must file a petition with the Coastal Policy Council under AS 46.40.100(b) before one may seek relief from the courts.

1990 Inf. Op. Att'y Gen. at 8 (Feb. 9; 663-90-0178).

At this point, as noted above, the Goodnews Bay case is on appeal to the Alaska Supreme Court, and the CPC has another petition pending before it in Bering Straits Coastal Management Program and Native Village of Koyuk IRA Council v. State of Alaska, Dep't of Natural Resources, and Keith Koontz, concerning the issuance of an Alaska Department of Natural Resources trapping cabin permit near Timber Creek in northwest Alaska. While there have been few petitions overall, they present difficult issues such as the ones you have raised.

As there has only been one complete hearing before the CPC (in the Goodnews Bay case), there is little experience with the questions you pose. However, the issue about who can sit on a petition is an important one, and one that will arise as soon as the pending petition is heard by the CPC. We now turn to a more in-depth analysis of your questions.

VI. ANALYSIS OF RESPONSES TO OPINION REQUEST QUESTIONS

A. Participation In Decisions Under The APA And Due Process

Your first question was, "Can a Coastal Policy Council

member (or their alternate) sit on a petition proceeding if that individual previously participated in the action now under appeal to the Council?" Your first specific question under this topic was

> a) For a state consistency determination, can a state resource agency commissioner, who acted on the determination, also hear and decide on a petition on the state agency action?

As we said earlier, the brief answer to this question is "No." If a commissioner participated in a commissioner-level elevation under 6 AAC 50.070(k), the commissioner may not participate in a CPC petition proceeding under AS 46.40.100 on the same state agency action.

The main reasons for this are the duty of impartiality required under the state Administrative Procedure Act and the due process implications raised by that duty. AS 46.40.100(b) states that "[a] hearing called under this subsection shall be held in accordance with the Administrative Procedure Act (AS 44.62)."[4] The Administrative Procedure Act ("APA") includes a duty of impartiality. AS 44.62.630 states:

> IMPARTIALITY. The functions of hearing officers and those officers participating in decisions shall be conducted in an impartial manner with due regard for the rights of all parties and the facts and the law, and consistent with the orderly and prompt dispatch of proceedings. These officers, except to the extent required for the disposition of ex parte matters authorized by law may not engage in interviews with, or receive evidence from, a party, directly or indirectly, except upon opportunity for all other parties to be present. Copies of all communications with these officers shall be served upon all parties.

---

[4] Although there has been some question whether all the procedures of the Administrative Procedure Act apply to CPC petitions, see 1990 Inf. Op. Att'y Gen. at 10 (Feb. 9; 663-90-0178), because of the direct statement in AS 46.40.100(b), the APA is applicable for purposes of adjudicating a petition. See 1989 Op. Att'y Gen. No. 01 (July 25).

The APA requirement of impartiality reflects fundamental fairness considerations that attend agency tribunals. An "impartial tribunal" is one of the cornerstones of fundamental fairness required under both the APA and constitutional due process rights.[5] See K & L Distributors, Inc. v. Murkowski, 486 P.2d 351, 357 (Alaska 1971). As we have previously described:

> Paramount to all administrative proceedings is that the Respondent be accorded "due process." What lawyers usually refer to when they speak of "due process" is the right to a fair and impartial hearing. Each board member who sits in a hearing has an obligation to protect these rights. . . . [A hearing] must be before an impartial adjudicator.

1977 Inf. Op. Att'y Gen. at 5 (Nov. 12; 663-239-78) (emphasis in the original).

Impartiality is not affected by simply knowing information about a case, or even by participating in early investigative phases of a case. See 1984 Inf. Op. Att'y Gen. (Feb. 6; 366-220-84). As the U.S. Supreme court has noted, "The mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing." Withrow v. Larkin, 421 U.S. 35, 55 (1975). Thus, if it were not for the fact that commissioners cannot participate in both a final consistency determination and a CPC petition on the same determination, it would be acceptable for commissioners to participate in the consistency determination elevation process outlined in 6 AAC 50 without running afoul of due process

---

[5] The Alaska Constitution incorporates the due process clause of the U.S. Constitution's Fourteenth Amendment in Alaska Const. art. I, • 7. That section states: "No person shall be deprived of life, liberty, or property, without due process of law . . . ." Id. This memorandum discusses general due process considerations. Because petitions are governed by the APA we have not separately analyzed what specific due process might be required completely independent from the APA. However, there are cases that recognize that the right to bring a cause of action may constitute a property interest mandating due process. See Logan v. Zimmerman, 455 U.S. 422 (1982); Save our Dunes v. Ala. Dep't of Env't Management, 834 F.2d 984 (11th cir. 1987).

concerns, even though they might have some information about the project undergoing review before sitting at the final elevation level. Similarly, CPC members, including commissioners (if they are not barred from having previously sat on a commissioner-level elevation on the same matter), who participated in an initial "showing" hearing under AS 46.40.100(b), may still participate in the final decision on the matter. What is not acceptable is for a commissioner to participate in a commissioner-level elevation decision under 6 AAC 50, and then also participate in the separate review of that same decision by the CPC under AS 46.40.100. Under these circumstances, requiring a commissioner to review and evaluate his or her own decision violates due process considerations. As the U.S. Supreme Court has stated, "[W]hen review of an initial decision is mandated, the decision maker must be other than the one who made the decision under review. Allowing a decision maker to review and evaluate his own prior decisions raises problems." Withrow at 58 n.25 (citations omitted).

In Matter of Robson, 575 P.2d 771 (Alaska 1978), the Alaska Supreme Court commented on the difference between a board making preliminary factual inquiries and sitting on a final decision versus a board participating in an advocacy capacity against a party and then sitting on a final decision concerning the same party. While not exactly on point (although in some consistency determination elevation proceedings this could be the situation as state agencies can themselves elevate and advocate a position, see 6 AAC 50.070(j)), the case clearly warns against a board member serving in two conflicting capacities on the same matter. As the court noted, "It is desirable that administrative hearings be clothed with not only every element of fairness but with the very appearance of complete fairness as well." Id. 575 P.2d at 774 (citations and quotes omitted). Finally, in an Alaska Supreme Court decision that is instructive on this issue as well as another issue you have raised, the court (citing to a United States Court of Claims case) has said, "[N]o man can review his own decision with the requisite degree of quasi-judicial detachment and impartiality." State v. Lundgren Pacific Const. Co., 603 P.2d 889, 895 (Alaska 1979). As the legislative history outlined previously portrays, the CPC was intended to be an independent adjudicative review body to hear petitions and make orders. The independence of the CPC's review authority would be jeopardized by a commissioner prejudging an issue in a consistency determination and then also sitting on the CPC to again judge the same issue.

To conclude on this issue, our analysis is that when a

board makes an initial determination under standards different from the final determination, such as during the "showing" phase outlined in AS 46.40.100(b) (and discussed in the Goodnews Bay case, infra), board members may sit on a final decision on the same issue (if there is no other reason barring them from doing so). However, when a commissioner participates in the decision at a commissioner-level elevation on a final consistency determination, that commissioner may not then also sit in judgment on the same matter with the CPC. To do so would violate the APA requirement of impartiality and due process notions of fairness as outlined above.

Your second question in this section was:

> b) In a parallel case, can a Coastal Policy Council public member hear and decide on a petition regarding a coastal district action if the public member substantively participated as a local official in the coastal district action under petition?

As our brief answer stated, assuming that "substantively participated" means that the public member participated in a decision, the public member cannot then transfer to the CPC and sit in judgement on the same matter. This presents the same difficulty presented with the commissioners, and our analysis is the same. Therefore, for the reasons that we have given to question 1(a), we find that this too would be a violation of the APA and due process notions of fairness.

B. Delegation

Your second question was, if the answer to the first question was "no," (as it is), whether a state resource agency commissioner may delegate his or her authority to act on a state agency action (e.g., a state conclusive consistency determination) in order to participate as a Coastal Policy Council member in a subsequent petition on the same state agency action.[6] Our brief answer to this question was "no" concerning consistency determinations, because the ACMP consistency

[6] AS 44.19.155(d) allows a CPC member to select one person (who must have fairly high-ranking official qualifications) as a permanent alternate.

determination procedures do not allow for such a delegation.[7] We also noted that this is a complicated issue because AS 44.19.155(d) in combination with AS 46.40.100 statutorily require commissioners to sit on petitions. If a commissioner participates in an elevation he or she cannot sit on the same issue with the CPC. Because of this inconsistency there should be a change in the statutes, the regulations, or both. Our more complete response follows.

1. Delegations Under 6 AAC 50

The elevation regulations in 6 AAC 50 ignore AS 44.19.155, AS 46.40.100, and the statutory petition process in general. Again, because the statutes did not change, neither did the right to bring a petition to the CPC (rather than appeal from an elevation straight to court as the elevation regulations allow). The regulations cannot overrule the statute in this regard. AS 44.62.030; see also Chevron U.S.A. v. LeResche, 663 P.2d 923, 927 n.6 (Alaska 1985) (citing AS 44.62.030). The elevation regulations are also clearly structured to provide for the second to last level of elevation to be held by high-ranking state officials (commissioners) and for the final level to be held by the highest-ranking state official - the governor. 6 AAC 50.070(k). It is clear that the regulations intend only these officials to make the kinds of decisions that rise to this level of importance, especially as the decisions are appealable directly to court.

The elevation process described in ACMP regulations provides for a series of internal appeals from staff through the commissioners and possibly the governor. When a project undergoes a consistency review (for consistency with the ACMP and coastal district standards), information on the project is disseminated to all the resource agencies and the affected coastal districts. A coordinating agency organizes consideration of comments from the agencies, the applicant, and the district, and determines whether there is a consensus on the project at staff level.[8] The coordinating agency then notifies the affected

[7] We have answered this question only about consistency determinations. Other state actions would have to be reviewed on a case-by-case basis to determine whether a delegation was acceptable.

[8] The Division of Governmental Coordination coordinates the review when more than one agency's permits are required for a project; the agency whose permits are sought coordinates the

coastal district and the applicant about a proposed consistency determination, or issues to be resolved. If an agency, the coastal district, or the applicant does not concur with the proposed determination, it may "request elevation of the review." 6 AAC 50.070(j). If elevation is requested, the coordinating agency "shall elevate the review as necessary to the division directors, and then commissioners of the resource agencies." 6 AAC 50.070(k). The coordinating agency shall also arrange meetings and mediate among the agencies, the affected coastal resource districts, and the applicant to resolve outstanding issues and reach a mutually acceptable consistency determination. "If no consensus is reached, the coordinating agency shall render a determination consistent with any policy direction given by the commissioners or the governor." Id.[9]

As described above, the elevation of consistency determinations depends upon the "appeal," informal though it may be, of issues up through a chain of command to the commissioners, and even the governor.[10] In determining whether a delegation of authority is allowed, the Alaska Supreme Court has said that

> the general rule governing subdelegations is whether it is reasonable to believe that the legislature intended a particular function to be performed by designated persons because of their special qualifications. If the legislature intended a function to be performed only by limited persons, a subdelegation is invalid.

Kaiser v. Sundberg, 734 P.2d 64, 69-70 (Alaska 1987) (citing 1 Norman J. Singer, Sutherland Statutory Construction • 4.14 at 155-56 (4th ed. 1985)) (other citations omitted); see 1992 Inf. Op. Att'y Gen. at 4 (May 29; 663-92-0494).

Although 6 AAC 50.070 is a regulation rather than a statute, the rules of statutory construction are the same, and the question becomes what the intent of the CPC was when it

(..continued)
review if only that agency's permits are required. AS 44.19.145(11); 6 AAC 50.010; 6 AAC 50.070(c), and (d).

[9] As defined in AS 44.19.152(3), "render" means to coordinate and issue.

[10] We are aware of only one consistency determination that has gone to the governor for a decision.

adopted the consistency determination regulations. In the historical background section of this opinion we noted that a consistency determination is a "final state agency action and is . . . reviewable by appeal." 1988 Inf. Op. Att'y Gen. at 2 (Jul. 1; 366-136-85).[11] Because of the way the consistency determination process is structured, with the final level being the commissioners (or, as noted, the governor), with the result then appealable to court, clearly the intent behind that structure was to have the commissioners, not delegees, sit on the commissioner-level elevation. While elevations are, in practice, processed on a fairly informal basis, the final levels do take on an adjudicative function. The decisions are essentially appealed to the highest level of state administration for a final consistency determination which may then be appealed to court. Thus, under the ACMP's consistency determination elevation regulations, commissioners may not delegate their authority to sit on commissioner-level elevations. However, this inability to delegate creates a conflict with AS 44.19.155(d) and AS 46.40.100, which require commissioners to sit on CPC petitions (as explained below). Because of this, the regulations, or the statutes, or both, should be changed.

2. Delegations Under ACMP Statutes

When the legislature created the ACMP it used a holistic, broad-based approach, mandating that all the state resource agencies comply with the ACMP. AS 46.40.200; see 1978 Op. Att'y Gen. No. 27 (Oct. 26). Moreover, just as the federal coastal zone management program delegates authority over federal decisions in state coastal areas (when a state has a federally-approved program such as Alaska's), 16 U.S.C. • 1451 et. seq. (1990); see Timothy Eichenberg, Federalism and Federal Consistency: The State Perspective, 1 Coastal Zone '87, at 542-55 (1987), the ACMP similarly requires the state to comply with approved coastal district programs' standards. See AS 46.40.010(c)(1) (incorporating district programs into the ACMP); AS 46.40.070; 6 AAC 80.010; 6 AAC 85.090; 1980 Op. Att'y Gen. No. 11 (May 12). This makes it extremely important for high-ranking state officials to be integrally involved in the adoption and enforcement of district programs' standards.

Your question asked whether commissioners may delegate

[11] We also discussed the anomaly created by the fact that AS 46.40.100 was not amended when 6 AAC 50 was adopted, thus leading to two appeal routes.

their duties under the elevation regulations in 6 AAC 50. Our response is "no," but this means the regulation creates a due-process problem because of what ACMP statutes require. This section explains these statutory requirements. If a commissioner were not statutorily required to sit on CPC petitions, or if due process would allow a commissioner to appoint a subordinate to sit in his or her stead on a petition there would be no problem with the commissioner being bound to participate in an elevation under the process in 6 AAC 50. However, due process considerations and the statutory construction and intent of AS 44.19.155 do not allow a commissioner to delegate his or her duties to sit on a CPC petition to his or her subordinate alternate even if the commissioner has participated in an elevation (as the elevation regulations require). Under present law, the commissioner would be bound to serve in both forums - which is unacceptable under due process considerations. Therefore, either the regulations or statutes must be changed.

3. Delegations Under ACMP Statutes And Due Process

State v. Lundgren Pacific Const. Co., 603 P.2d 889 (Alaska 1979), dealt with a situation where a decision maker had delegated a decision on appeal of his original decision to his subordinates. The court specifically noted that "[i]ndividuals given the right to decide in their own favor or the favor of the person who employs them cannot be said to be exercising a judicial function at all." Id. at 895 (citation omitted). As the court noted, "[a]n impartial tribunal is basic to a guarantee of due process," and "administrative hearings must not only be fairly conducted, but must also give the appearance of complete fairness." Id. at 895-96. As the court finally noted, "Not only is a biased decisionmaker constitutionally unacceptable, but our system of law has always endeavored to prevent even the probability of unfairness." Id. at 896 (citations and quotations omitted). Thus, under due process requirements, a commissioner may not delegate to a subordinate his or her authority to sit on a CPC petition on a matter in which the commissioner participated during the elevation process. See also Utica Packing Co. v. Block, 781 F.2d 71, 78 (6th Cir. 1986) ("There is no guarantee of fairness when the one who appoints a judge has the power to remove the judge. . . .")[12]

[12] Because of the holding in Lundgren we also note that if the governor were to ever again make a final consistency determination, no state official could sit on a CPC petition because they are all subordinate to her or him. This also

4. Delegations Under ACMP Statutes And Statutory Construction And Intent

Besides the due process concern explained above, the CPC's statutory structure and the intent behind it would also preclude delegations from commissioners on petitions in most cases. Under AS 44.19.155, the structure of the CPC reflects the fact that the legislature intended only high-ranking state and local officials to be members. The structure also creates a balance between state and local officials. There are nine public members and seven state members. The public members must be mayors or assembly members, the state members are the director of OMB and six commissioners. Id. Even members' permanent alternates must be mayors, assembly members, deputy commissioners, or division directors. AS 44.19.155(d). It is clear that the legislature intended the CPC be composed of only top-level officials who were capable of making the important decisions necessary to create and manage the ACMP. Alternates may only sit if a member is "unable to attend." Id. Because of the clarity of the statute and the legislative intent, CPC members may not delegate their positions on petitions to their permanent alternates unless they are "unable to attend" for some reason other than the fact that they have previously sat on the issue the petition concerns. As we have noted previously, in determining whether a delegation of authority is allowed, the Alaska Supreme Court has said that

> the general rule governing subdelegations is whether it is reasonable to believe that the legislature intended a particular function to be performed by designated persons because of their special qualifications. If the legislature intended a function to be performed only by limited persons, a subdelegation is invalid.

Kaiser v. Sundberg, 734 P.2d 64, 69-70 (Alaska 1987) (citing 1 Norman J. Singer, Sutherland Statutory Construction • 4.14 at 155-56 (4th ed. 1985)) (other citations omitted); see 1992 Inf. Op. Att'y Gen. at 4 (May 29; 663-92-0494). As Professor Singer notes in his treatise on statutory construction, subdelegations may defeat the desire for "multiple judgment in rule making . . . [and to] a lesser degree this is also true in the case of final

(..continued)
creates a break between the ACMP's statutory and regulatory requirements.

adjudicative determinations." Singer, supra at 155. Therefore, AS 44.19.155(d) will not allow commissioners to designate their alternates to sit instead of them on the CPC to decide petitions brought to the CPC from elevations the commissioners decided.

5. Delegations Under ACMP Statutes Versus The General Authority To Delegate

There is one general statute that allows a commissioner to delegate responsibilities to his or her subordinates (AS 44.17.010). However, this statute does not independently allow a commissioner to delegate his or her responsibility to participate in a CPC petition to a subordinate. As previously explained, this would violate both due process and the specific language and intent of the ACMP statutes. But, even if due process were not violated, AS 44.17.010 would not allow commissioners to override the ACMP's requirements. AS 44.17.010 states, "[T]he principal executive officer of each state department may assign the functions vested in the department to subordinate officers and employees." Id. AS 44.17.010 only applies to "functions vested in the department." While the ACMP is a holistic program, used to coordinate the state's coastal management program and the decisions made under it, and while departments must abide by ACMP standards, the ACMP and its regulations are not "functions vested" in the separate departments. See 1978 Op. Att'y Gen. No. 27 (Oct. 26). Rather, they are functions independently vested in the ACMP that departments must abide by. See AS 44.17.010; AS 46.40.100; see also 1982 Inf. Op. Att'y Gen. at 5 (July 16; J66-502-81). To "vest" is defined by the dictionary as "to grant, endow, or clothe with a particular authority, right, or property." Webster's New International Dictionary 2547 (3d ed. 1976). Thus we read the terms "functions vested" as requiring that function to be within that particular agency's authority, not one in another agency or statutory scheme. Under AS 46.40.200, state agencies were required within six months of the ACMP's effective date (in 1977) to "take whatever action [was] necessary to facilitate full compliance with and implementation of the [ACMP]." Id. This requirement further denotes the ACMP's statutory independence from the departments, again leading us to the conclusion that ACMP functions are not internally "vested" within agencies for delegation purposes. Moreover, although departments are bound to comply with the ACMP and its regulations, the ACMP statute is independent of departments' statutes, and ACMP regulations are separately adopted by the CPC, not the departments themselves. AS 44.19.160; 44.19.161; 46.40.100.

In the only state case to deal with AS 44.17.010, City of Cordova v. Medicaid Rate Comm'n, 789 P.2d 346 (Alaska 1990), the Alaska Supreme Court rejected an argument that AS 44.17.010's general statutory authority for a commissioner to delegate overcame a more specific statutory requirement for the governor to appoint a member of a commission. In that case, the court noted that specific statutes take precedence over general ones. Id. at 352. Given the ACMP's separate statutory and regulatory identity, under the holding in City of Cordova we do not think that the general authority in AS 44.17.010 can overcome the ACMP's more specific and independent requirements in AS 44.19.155.[13]

Thus, because the ACMP is an independent statutory and regulatory scheme that departments are required to abide by, AS 44.17.010 does not allow commissioners to delegate their responsibilities to participate in petitions. Hearing petitions brought to the CPC under AS 46.40.100 is an important part of CPC members' duties. The fact that there haven't been many petitions does not reduce the importance of the decision making. For the same reasons noted above, it is important to have high-ranking officials, both state and local, participating in any petition brought to the CPC to maintain the balance strived for throughout the ACMP. As Judge Fabe recognized in her Goodnews Bay decision, "The CPC has considerable institutional competence in these issues." Kuitsarak Corp. Opinion on Rehearing, at 3 (June 10, 1991).

6. Conclusion On Delegations

The practical result is an inconsistency among the statutory requirements of AS 44.19.155 and AS 46.40.100, due process, and the regulatory procedures in 6 AAC 50. Although the issue rarely arises (there have been only seven petitions), when it does it creates an untenable situation. The regulatory scheme creates a due process concern, forcing commissioners to relinquish their positions on the CPC which statutorily they

[13] For similar reasons AS 44.17.010 does not allow commissioners to delegate their authority to sit during elevations under 6 AAC 50.070(k). The ACMP is a separate statutory and regulatory scheme, not "vested" in commissioners' departments. Therefore, under the same analysis as used to show that the general authority to delegate does not apply to the CPC's statutory requirements, we find that AS 44.17.010 does not apply to 6 AAC 50.070(k).

cannot do. Regulations may not be inconsistent with their authorizing statute, nor may they be unreasonable or unnecessary. Chevron U.S.A., Inc. v. LeResche, 663 P.2d 923 (Alaska 1983). Because of the contradiction between ACMP regulations and statutes, changes must be made to 6 AAC 50, or to AS 44.19.155 and AS 46.40.100, or to all of them. As there are numerous possibilities, not within the scope of this opinion request, we will not outline options here but will remain available to provide assistance as requested.

VII. OTHER DUE PROCESS CONCERNS

Your third question was whether it was acceptable for a CPC member or his or her alternate to sit on a petition when the member's agency or municipality initiates the petition. The second part of the question was whether this would amount to a conflict of interest. Our short response was no, it was not acceptable for CPC members or alternates to sit on petitions when the member's agency or municipality initiates the petition. Our analysis follows.

We have previously said:

> The rules relating to the disqualification of commissioners or hearing officers to participate in a proceeding are substantially similar to the rules developed for the disqualification of judges. A judge is disqualified from hearing a case when he or she: 1) is a party to the suit or will be a witness in the proceedings; 2) is related to any party by consanguinity or affinity within the third degree; 3) represented any party within two years preceding the filing of the action; 4) has a direct interest in the case, such as a pecuniary or proprietary interest, or an interest in a position or term that could be affected by the case; or 5) is impermissibly biased or prejudiced against any party. See AS 22.20.020.

1984 Inf. Op. Att'y Gen. at 1 (Feb. 6; 366-220-84) (emphasis added). See also Canon 3(c), Alaska Code of Judicial Conduct. In essence, if the agency or municipality the CPC member represents on the CPC brings a petition to the CPC, the member may either be a party themselves to the petition, or would at the least have the appearance of not being impartial. This would violate due process as it would raise the question of whether the

member could remain fair under the circumstances. See Utica Packing Co. v. Block, 781 F.2d 71, 77 (6th Cir. 1986), and this memo's discussion on impartiality and the requirements of due process, infra. CPC members or alternates whose agencies or municipalities bring petitions to the CPC should recuse themselves from sitting in judgment on these petitions. Because of our response we have not reached your question about whether this is a conflict of interest.

Your fourth question was whether it was acceptable for a CPC member or alternate to sit on a petition proceeding when an action by their agency or municipality is the subject of the petition. The second part of this question was whether a conflict of interest exists in this situation.

As we noted in our brief response, this is the converse of your question number three. The main concern here is whether the member participated in a previous decision on the same subject as the petition. If he or she did, then both the member and the alternate are barred from participating on the petition. Even when the member did not participate in a previous decision in all but exceptional cases we think that participation in the petition decision would present a due process violation for the same reasons outlined in our analysis to your question number 3 and the section on due process, infra.[14] Again, because of the

[14] There has been one exception to this general rule. In the Goodnews Bay case the Commissioner of the Alaska Department of Natural Resources ("DNR") sat on a CPC petition decision even though a DNR decision was the subject of the petition. This was legally acceptable because the commissioner had no conflict and due process was not violated because of the unique circumstances. The DNR decision in that case had been made by a previous commissioner under a different administration, and the new commissioner had no knowledge of the transactions or the decision except for what he heard at the CPC. The new commissioner instructed his agency not to present information to him concerning the petition and created a barrier (sometimes referred to as a "Chinese Wall") between himself and his agency so that he could remain independent and unbiased on the issue. Finally, the commissioner was not challenged by any party concerning his impartiality and his ability to sit on the petition, and the issue was not raised in any appeal. See Sept. 23-24, 1991, transcript from CPC Hearing on Kuitsarak Petition at 8. Under circumstances such as the one described, a CPC member or his or her alternate may be able to sit on a petition even though the member's agency or municipality is a party to the matter.

due process concern we have not reached the conflict question.

CONCLUSION

In conclusion, we would note that the CPC has striven to make certain that petition proceedings brought before it are handled with the utmost fairness. In 1984, with the adoption of the elevation procedures in 6 AAC 50, it is apparent that the CPC intended to take itself out of the adjudicative role of hearing petitions as appeals of consistency determinations. Unfortunately, the statute governing the "appeals," AS 46.40.100, remained unchanged and the avenue for petitions on final consistency determinations to the CPC remained. This vestigial procedure has created procedural difficulties that the CPC is very carefully trying to overcome. Because of the inconsistency between the ACMP's statutes and regulations, there must be changes made to rectify the untenable position created between elevations and petitions. We hope that the above advice is helpful in this endeavor, and again, we are ready to help with future issues that this situation may present.

EJK:smm

(..continued)
However, this may be a unique situation. We do not hypothesize on what other circumstances might allow commissioners to participate.