The North Slope Borough, Oil, and the Future of Local Government in Alaska

David H. Getches
University of Colorado Law School

In the summer of 1972, Alaska's newest borough was incorporated. The North Slope Borough is the largest local government in the United States, having a land area larger than any but ten states of the Union. It is the home of less than 4,000 Eskimos whose ability to live in harmony with nature has enabled them to survive for centuries in the frigid desert which lies above the Arctic Circle. It also comprises an area which was recently discovered to be rich in petroleum resources. That richness has attracted the investments of major oil companies. The oil companies have taken legal action to declare unlawful the government of the North Slope Borough which was formed by the initiative of the Eskimo people and which now intends to tax and regulate oil company operations there.

This article begins with a sketch of the local government system in Alaska and the stimuli which shaped it, and then explores the creation of the North Slope Borough, with emphasis on the issues raised in the state supreme court by the oil companies which challenged its formation. The resolution of these issues, which are now before the Alaska Supreme Court and which may well be decided before publication of this article, as well as the related issues which the borough's creation is raising in Alaska, may have a great effect on local governments throughout the state. With the enactment of the Alaska Native Claims Settlement Act in 1971, twelve regional corporations were formed. Several of those corporations are in regions where there is no organized borough. The criteria for setting regional boundaries do not differ greatly from those for a borough. It is therefore likely that future attempts will be made to form large boroughs in predominately bush areas synonymous with the regions. Their fate will be determined by that of the North Slope Borough which now rests with the state supreme court and the legislature.

* A.B., Occidental College 1964; J.D., University of Southern California, 1967; Member of the Bars of California, District of Columbia and Colorado. Mr. Getches was founding Director of Native American Rights Fund, a national non-profit law firm representing Indians and Alaska Natives, based in Boulder, Colorado. He is presently a staff attorney with Native American Rights Fund and has represented the proponents of the North Slope Borough in litigation, described in this article, challenging its legality instituted by several oil companies.

Municipal governments in the United States follow a rather dull, unvarying pattern. The exception is found in the State of Alaska. The history of Alaska as a territory and the milieu in which its system of local government was conceived to provide a practical explanation of a local government system which might be expected to be a product more of academicians than latter-day pioneers. Constitutional drafting for Alaska was one way of demonstrating to the Congress and the nation that Alaska was ready to become a state, and there was a great desire to put together a "model constitution." The climate was ripe for innovation. There was a strong desire on the part of the territorial leaders to avoid the mistakes that had created problems in the "lower 48" and the Constitutional Convention was sharply aware of Alaska's historic struggle for self-determination. One of the prime objectives of the Alaska statehood movement was to wrest Alaska free from control by the remote federal government and absentee corporate interests.

The local government article included in the Alaska Constitution stated as its purpose:

To provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions. A liberal construction shall be given to the powers of local government units.

The provision mandating liberal construction as to the powers of local government units was based upon a review of the experience of local governments in other states. In order to prevent encumbrance of the imaginative new Alaskan local government system by traditional legislative and judicial doctrines, the language was considered necessary.

The article also provided for the entire state to be divided into boroughs, organized or unorganized, and left for the legislature to determine according to what procedures and by what entity or agency the mandate would be fulfilled:

---

2 An understanding of the history, powers, functions and organization of the Alaska borough as well as its failings and strengths can be found in MOREHOUSE & FISCHER, BOROUGH GOVERNMENT IN ALASKA (1971); CASE & SAROFY, THE METROPOLITAN EXPERIMENT IN ALASKA, A STUDY OF BOROUGH GOVERNMENT (1968); ALASKA LEGISLATIVE COUNCIL AND THE LOCAL AFFAIRS AGENCY, FINAL REPORT ON BOROUGH GOVERNMENT (1961).

3 MOREHOUSE & FISCHER, supra note 2, at 33.

4 Id. at 3-4.

5 ALASKA CONST. art. X.

6 Id. at § 1.

7 Alaska Constitutional Convention, Minutes of the Committee on Local Government, 23rd Meeting, 26th Meeting (1955-56).
They shall be established in a manner and according to standards provided by law. The standards shall include population, geography, economy, transportation, and other factors. Each borough shall embrace an area and population with common interests to the maximum degree possible. The legislature shall classify boroughs and prescribe their powers and functions. Methods by which boroughs may be organized, incorporated, merged, consolidated, reclassified or dissolved shall be prescribed by law.8

It was intended that the new "borough" would be adaptable to Alaska's special needs. Some boroughs might have relatively compact jurisdictions centering on an urban area while other boroughs might be regional in nature and cover extensive regions made up of small settlements, hinterlands, and urban centers. And to fit different conditions, the powers and functions of the boroughs could also vary.9 The delegates to the Constitutional Convention saw inadequacies in the traditional county, such as limited functional jurisdiction, frozen boundaries, an overabundance of constitutionally-established elected offices, and lack of specifically local governmental authority. A patchwork of special service districts generally overlaps counties and cities, filling service gaps left by counties and municipalities and creating a multiplicity of taxing jurisdictions.

8 Alaska Const. art. X, § 3. The principles which led to the adoption of the local government system were stated during the convention as follows:

Self-government—The proposed article bridges the gap now existing in many parts of Alaska. It opens the way to democratic self-government for people now ruled directly from the capital of the territory or even Washington, D.C. The proposed Article allows some degree of self-determination in local affairs whether in urban or sparsely population areas. The highest form of self-government is exercised under home rule charters which cities and first class boroughs could secure.

One basic local government system—The proposed article vests all local government authority in boroughs and cities. It prevents creation of numerous types of local units which can become not only complicated but unworkable.

Prevention of overlapping taxing authorities—The proposed article grants local taxing power exclusively to boroughs and cities. This will allow consideration of all local needs in levying of taxes and the allocation of funds. It will lead to balanced taxation. Single interest agencies with taxing authority often do not realize needs other than their own.

Flexibility—The proposed article provides a local government framework adaptable to different areas of the state as well as to changes that occur with the passage of time. It allows classification of units on the basis of ability to provide and finance local services. It allows optional administrative forms, adoption of home rule charters, boundary changes, etc.

State interest—The proposed article recognizes that the state has a very definite interest in and concern with local affairs. For example, the credit of the state is indirectly involved in local financial matters and local units are the agencies through which many state functions are performed. The proposal therefore give the state power to establish and classify boroughs, to alter boundaries of local units, to prescribe powers of non-charter government, to withhold authority from home rule boroughs and cities, and to exercise advisory and review function.

Alaska Constitutional Convention, Minutes of the Committee on Local Government 1-3 (1955-56).

9 Morehouse & Fischer, supra note 2, at 69.
The Committee on Local Government was searching for a unit which would be larger than the city and smaller than the state that could perform state functions on a regionalized basis and allow for local self-government. Thus, the area-wide unit of government was selected and dubbed a "borough." Because it was anticipated that boroughs would be the product of local initiative and for some time there would not be boroughs every place in the state, the concept of an unorganized borough was created to perform services for areas not yet in boroughs. The unorganized borough was, of course, conceived as an instrumentality of the state and not regarded as a self-governing unit. The legislature was given authority to exercise the same powers that borough assemblies would have in organized boroughs.

Following two years of hearings and studies, the Borough Act of 1961 was passed. The Act provided that all special service districts, including independent school districts, were to be integrated with organized boroughs (or cities in the case of certain public utility districts) no later than July 1, 1963. The Act carried out the constitutional requirement that standards for borough incorporation be prescribed, and it assigned to the Local Boundary Commission, created under Article X, § 12 of the Constitution for the purpose of considering local boundary changes, the duty of accepting local petitions for borough incorporation after a review by the Local Affairs Agency. The commission was empowered to hold hearings and approve, disapprove, or change locally recommended boundaries and borough governmental structures and powers.

Only the Bristol Bay Borough was incorporated by local initiative before the July, 1963 deadline. Even though petitions for incorporation were received from two other areas, the state agencies could not agree with local interests on the drawing of the boundaries. The state generally wanted boroughs larger than those which the local area proposed.

Because the 1963 deadline of the legislature was fast approaching with little action having been taken locally, the Mandatory Borough Act of 1963 was passed. The Act required incorporation

---

10 See Alaska Constitutional Convention, Minutes of the Committee on Local Government, 6th Meeting (1955-56).
12 See Session Laws of Alaska ch. 146 (1961). The act was codified in AS tit. 7. In 1972 most of that title was substantially revised and codified in AS tit. 29. Because the formation of the North Slope Borough took place when the act was codified in Title 7, all citations here refer both to the former, Title 7, codification, and to the new codification of same or similar provisions.
13 MOREHOUSE & FISCHER, supra note 2, at 73.
of boroughs in eight areas of the state containing public utility and independent school districts as of January 1, 1964. To expedite matters, the boundaries for the boroughs were made coterminous with election district boundaries, even though there was a feeling on the part of some that many of the areas were either too small or too large. The option remained open, however, for the local areas to undertake voluntary incorporation before the deadline which was set. Four boroughs were established in 1963 pursuant to local action, as the threat of mandatory incorporation drew near. Four others were mandatorily incorporated. No other new boroughs were formed until 1968 when the Haines Borough was incorporated.

II. THE NORTH SLOPE BOROUGH

The area which was to become the North Slope Borough comprises some 56.5 million acres. The population is spread about in five principal villages which are incorporated as cities. Because of continuous cold, agriculture and agricultural development is impractical. The commercial grazing of reindeer is the only successful agricultural activity which has occurred in the area. The people are mostly poor and have one of the worst levels of unemployment in the state. In no populated place other than military installations and the privately owned facilities at Prudhoe Bay are there any water or sewage systems. Most people depend upon melting ice or hauling water for their water supply. "Honeypots" are utilized in lieu of sewage facilities. There are no hospitals in the entire area. The median school year completed by Alaska Natives in this region, according to a 1960 survey, averages less than six years. There was testimony in the superior court administrative appeal of the Local Boundary Commission decision to establish a North Slope Borough that there were no schools in the entire North Slope area with classes above the tenth grade. Outside of Barrow, the highest grade for any school was the eighth grade. Of the five schools operating on the North Slope, three were run by the Bureau of Indian Affairs and two by the state. None was subject to local

---

16 Local options boroughs were incorporated in the Ketchikan, Sitka, Juneau and Kodiak Island areas. Mandatory boroughs were incorporated in the Anchorage, Fairbanks, Kenai Peninsula, and Matanuska-Susitna Valley areas.

17 Mean annual temperature in Barrow is 8°F while winter temperatures in coastal areas average —30°F. FEDERAL FIELD COMMITTEE FOR DEVELOPMENT PLANNING IN ALASKA, ALASKA NATIVES AND THE LAND 99-100 (1968).

18 The unemployment rate for the Barrow area (which includes some employment at the Prudhoe Bay oil fields) has been almost 15%. State of Alaska, Overall Economic Development Program—1971 for the City of Barrow and Adjacent Areas, 95, app. A, March, 1971.

FEDERAL FIELD COMMITTEE FOR DEVELOPMENT PLANNING IN ALASKA, ECONOMIC OUTLOOK FOR ALASKA 321 (1971).
control. The lack of a high school in the immense region was perhaps the single greatest impetus to borough development.

A report by the Federal Field Committee for Development Planning in Alaska found that:

While joblessness is high and income levels low among natives generally, these conditions are worse for those in villages. While educational achievement is low among natives generally, it is lower for those in villages. While the health status of natives is poor across the state, it is poorer for those in villages. While opportunity for progress is limited for most natives, it is virtually absent for those in villages. 19

In the North Slope Borough, its Eskimo proponents saw an opportunity for progress as well as a means to protect their culture from destruction. By controlling the use of lands within the North Slope Borough, the commercial development of Alaska's natural resources can be made compatible with preservation of those resources which are essential to their subsistence economy. By participating in the form of borough tax revenues, in the fruits of the exploitation of natural resources in the area which traditionally belonged to Eskimos and which is now public property, sorely lacking municipal services and facilities could be provided.

Early in 1971, the Arctic Slope Native Association 20 began circulating the necessary petitions to incorporate a borough 21 which they saw as a vehicle for finding local solutions to their problems. On April 6, 1971, the petition for incorporation was filed with the Local Affairs Agency. The Local Affairs Agency reviewed the petition to determine its formal adequacy and that the requisite number of signatures was present. 22 It investigated to determine whether the

20 The Arctic Slope Native Association is an association of individuals and villages in the Arctic Slope region of Alaska. It has been active for some time in organizing its members, who are Eskimos, from throughout the region generally north of Brooks Range, to meet various common needs, in particular for pursuing the Alaska Native Claims Settlement Act.
21 AS 07.10.010 & 07.10.020 (repealed). See AS 29.18.050, which changed the required number of signatures from 25% of the qualified voters to 15% of the permanent resident voters in each first class city and 15% of those first class cities.
22 AS 07.10.060 (repealed). See AS 29.18.060. The 1972 act assigns this and other functions which were performed by the Local Affairs Agency to the Department of Community and Regional Affairs. The statutory standards then in effect were found in AS 07.10.030:

No area may be incorporated as an organized borough unless it conforms to the following standards.

(1) The population of the area proposed for incorporation shall be interrelated and integrated as to its social, cultural, and economic activities. The population shall be qualified and willing to assume the duties arising out of incorporation, shall have a clear understanding of the nature of the undertaking for which they ask, and shall be large enough and stable enough to warrant and support the operation of organized borough government.
THE NORTH SLOPE BOROUGH

proposed incorporation, the composition and apportionment of the assembly, and the assignment of area-wide powers met the statutory standards which were then applicable. Upon completion of this investigation, the Local Affairs Agency submitted a report to the Local Boundary Commission and recommended that the petition be accepted.

The Local Boundary Commission then held the required public hearing in the city of Barrow on December 2, 1971, in order to elicit public comment on the proposed incorporation. At the hearing there was overwhelming testimony in favor of the borough. One representative of the oil companies made a statement in opposition. From the start of the state’s consideration of the petition for borough incorporation there had been extensive correspondence carried on with oil company representatives in order to get their views on the matter. Finally, in late February, 1972, the Local Boundary Commission held a public meeting in Anchorage at which time it considered the vast amount of evidence it had accumulated. On the last day of the meeting the commission accepted the petition for incorporation and, as the statute required, notified the lieutenant governor of its acceptance.

Seven oil companies and certain other persons having interests

(2) The boundaries of the proposed organized borough shall conform generally to the natural geography of the area proposed for incorporation, shall include all areas necessary and proper for the full development of integrated local government services, but shall exclude all areas such as military reservations, glaciers, icecaps, and uninhabited and unused lands unless such areas are necessary or desirable for integrated local government.

(3) The economy of the proposed organized borough shall encompass a trading area with the human and financial resources capable of providing an adequate level of governmental services. In determining the sufficiency and stability of an area’s economy, land use, property valuations, total economic base, total personal income, present and potential resource or commercial development, anticipated functions, expenses, and income of the proposed organized borough, shall be considered.

(4) The transportation facilities in the area proposed for incorporation shall be of such a unified nature as to facilitate the communication and exchange necessary for the development of integrated local government and a community of interests. Means of transportation may include surface (both water and land) and air. Areas which are accessible to other parts of a proposed organized borough by water or air only may not be included within the organized borough unless access to them is reasonably inexpensive, readily available, and reasonably safe. In considering the sufficiency of means of transportation within a proposed organized borough, existing and planned roads and highways, air transport and landing facilities, boats and ferry systems, and railroads, shall be included.

The 1972 revisions of the act considerably streamlined the standards. See AS 29.18.030.

23 AS 07.10.080 (repealed). See AS 29.18.070 which does not specify the subject matter of the investigation as did the former section.

24 AS 07.10.090 (repealed). See AS 29.18.080(a). The new statute is less specific on the subject matter of the recommendations to be made.

26 AS 07.10.120 (repealed). See AS 29.18.110(a).

as lessees or brokers of oil leases in the Prudhoe Bay area filed a petition for review with the Superior Court at Anchorage on the last day for doing so under the Administrative Procedure Act. The notice of appeal specified several grounds, both procedural and substantive in nature. The grounds included allegations of inadequate notice of the meeting at which the decision was made to accept the borough petition, that no adequate record was maintained of the proceedings of the commission, that there were no findings of fact in support of the decision to accept the petition, and that the formation of a new borough effects a boundary change which requires legislative approval under Article X, § 12 of the Alaska Constitution. The oil companies also alleged that they were denied due process of law because their property in the Prudhoe Bay area will be taxed even though they would receive little or no benefit from the borough, and that the decision to accept the petition was not based upon substantial evidence that the statutory standards for borough incorporation had been met.

In April of 1972, the Arctic Slope Native Association, which had sponsored the petition to incorporate, along with the five cities of the North Slope—Anaktuvuk Pass, Barrow, Kaktovik, Point Hope, and Wainwright—and two individuals residing in the area, moved to intervene in the case. The motion was granted by the court over oil company opposition as to the cities. The oil companies promptly moved for a stay of the election in the area proposed for incorporation. The state and the intervening borough proponents defended and an election was held of all the residents of the North Slope at which 95 per cent of the votes favored the borough. It was then the task of the lieutenant governor to certify the election results, at which time the borough would become officially incorporated.

29 AS 44.62.560(a). Review was sought under the portion of AS 07.10.110 (repealed) which provides that “any person aggrieved by any determination of the commission may appeal to the superior court in the manner and within the scope of review prescribed by the Administrative Procedure Act (AS 44.62).” The same provision for review is now found at AS 29.18.100(c). An objection was raised in the superior court to the standing of oil companies as “persons aggrieved” in that they could not demonstrate that they had been harmed in any way by the acceptance of the petition by the commission and their challenge was really to the legality of the borough’s formation. AS 07.10.120(f) (repealed) providing for challenges to the legality of the formation of an organized borough permitted such challenges only within the “six months of the date on which the lieutenant governor declares that an area is an organized borough,” which period had not yet begun to run. See new AS 29.18.150 relating to challenges to the legality of formation of a municipality, but which sets the beginning of the six month period as the “date of its incorporation.” It is unclear when this occurs under the act as revised. See note 30 infra. The superior court rejected the arguments.
30 AS 07.10.120(f) (repealed). The act no longer specifies when an area is “incorporated,” but presumably it occurs upon the lieutenant governor’s certification of incorporation election as was the case with the former act.
The oil companies, however, again moved the court for a stay. This time they sought to enjoin the lieutenant governor from making his certification, pending the outcome of the lawsuit. The superior court denied the request and a few days later the oil companies asked the Supreme Court of Alaska to rule on the question. Three of the justices being disqualified by reason of apparent oil interests on the North Slope, it was decided that a single justice would hear the matter. Justice Connor affirmed the decision of the superior court and allowed the election to be certified.31

The oil companies next moved for summary judgment in the Anchorage superior court in May of 1972, claiming that the incorporation of the North Slope Borough necessarily involved a change in the boundaries of the unorganized borough, which change required submission of a proposed boundary change to the legislature under Article X, § 12 of the state constitution. Secondly, as a ground for the motion, the companies alleged that at-large election of all five members of the borough assembly would constitute a violation of the equal protection clause of the fourteenth amendment of the United States Constitution as well as Article I, § 1 of the Alaska Constitution. The basis of the second ground was the fact that more than two-thirds of the registered voters in the proposed borough were within the city of Barrow while the rest were scattered among four other fourth-class cities. The oil companies objected that Barrow would have control of the borough assembly by virtue of its greater voting strength, urging that this would violate the one-man, one-vote principle.32

The issue relating to the alleged boundary change inherent in the formation of any new borough out of the unorganized borough

31 The North Slope Borough began operations and has been a full-fledged local government since the governor's certification in the summer of 1972. Under state law, the borough was entitled to a grant of $25,000 to assist it in getting organized. AS 07.10.170 (repealed). See AS 29.18.130. This small grant was, however, far from adequate for beginning the operations of a local government. The usual sources of revenue—real and personal property taxation—were not yet available because an assessment and taxation system had not yet been devised and implemented. In any event, there would be a lag between the time the system was implemented and the actual receipt of tax money. The borough found it impossible to issue revenue anticipation bonds because of the cloud of litigation. Without the litigation challenging the borough's legality resolved, the necessary opinion letters of bond counsel could not be obtained and as a result bonds could not be sold. At last, the borough's intensely determined assembly found a means of raising money. After obtaining some money in the form of grants and loans from churches, foundations, and the state itself, the borough issued special bonds to private individuals and financial institutions in Alaska, as well as to others outside Alaska who had the full knowledge that there was a risk that the bonds might not be redeemed if the borough were declared illegal by a court. In June of 1972 the first tax revenues were collected.

was again raised in the state supreme court. A discussion of the contentions of the parties on that issue is contained below.

The borough proponents argued that there was no denial of due process and that the one-man, one-vote principle was not violated by at-large elections of the North Slope Borough Assembly. In short, the at-large method of selecting the borough assembly which was sanctioned in the Alaska Statutes\(^{33}\) gave no greater voting strength to persons in one area than persons in another. Furthermore, the United States Supreme Court had specifically approved at-large voting where several districts within a municipality have widely disparate populations.\(^{34}\)

Judge Eben Lewis of the superior court denied the motion of the oil companies for summary judgment in a memorandum decision dated June 19, 1972. A motion of the borough proponents to dismiss was also denied at the same time. The decision, while expressing some concern over the difficulty of governing areas so large, pointed out that there is no established pattern of discrimination which would run afoul the Constitution. Judge Lewis did not cite \textit{Dusch v. Davis},\(^{35}\) however, in which the Court found as a matter of law that the type of at-large voting challenged in the North Slope Borough did not offend the one-man, one-vote principle.

After a full hearing on the merits of the administrative appeal, the superior court issued a memorandum decision on January 19, 1973. The court found in favor of the borough and its proponents on every point, specifically rejecting each of the contentions raised by the oil companies. In particular, the court found that the report of the Local Affairs Agency required by statute was adequate; that the agency's report need not be independently complete in that the Local Boundary Commission is itself required to conduct further inquiry; that the Local Affairs Agency adequately considered the statutory standards for incorporation; that substantial evidence was in the record to support each of the standards; and that the Local Affairs Agency is not required to make recommendations in its report concerning each of the subjects in the statute.\(^{36}\) Further,

\(^{33}\) AS 07.10.040(1) (repealed). See AS 29.23.020 permitting any composition and apportionment of the assembly which is consistent with the equal protection clause of the Constitution.

\(^{34}\) \textit{Dusch v. Davis}, 387 U.S. 112, 18 L. Ed. 2d 487 (1967).

\(^{35}\) \textit{Id}.\(^{36}\) AS 07.10.090 (repealed) provided that:

The Local Affairs Agency shall report the findings of its investigation to the Local Boundary Commission together with any recommendations it may have regarding incorporation of the proposed organized borough, the composition and apportionment of the assembly, and the assignment of area-wide powers.

AS 29.18.080(a) now requires merely that: "The Department of Community and
the court found that the numerous complaints raised by the oil companies regarding procedures of the Local Boundary Commission did not amount to a denial of procedural due process; that the composition and apportionment of the borough assembly, an issue again raised, did not create a problem under the one-man, one-vote principle; and that the Local Boundary Commission made a proper decision in granting to the North Slope Borough only those area-wide powers provided by law to a first-class incorporated borough and not all of the powers sought by it.37

Finally, the court found that the inclusion of Prudhoe Bay within the borough raised no constitutional problems as had been alleged by the oil companies. The companies had urged the court to rule that they were deprived of property without due process of law because they owned 98.5 per cent of the assessed valuation of the entire borough and would pay nearly all of the taxes while receiving little in the way of benefits. Judge Lewis' decision stated that "if Prudhoe Bay's inclusion were artificially contrived for no other purpose than to bring its property within the borough's taxing structure, the authority cited by appellants . . . would persuade me that the inclusion of Prudhoe Bay was improper." However, the court further pointed out that there were several potential benefits to the oil industry stemming from its inclusion in a borough.38

III. ISSUES PRESENTED TO THE ALASKA SUPREME COURT

The decision of the superior court was appealed to the Supreme Court of the State of Alaska. Each of the central issues and principal arguments of the parties on appeal will be discussed.

A. FINDINGS OF FACT

The oil companies said that the commission did not make formal findings of fact which, they argued, are necessary to any judicial review of administrative action. The borough proponents pointed out that the Administrative Procedure Act section which requires certain agency decisions to contain findings of fact39 is, by its terms, inapplicable to the Local Boundary Commission.40 The borough

Regional Affairs shall report its findings to the Local Boundary Commission with its recommendations regarding the incorporation.

37 The mandatory area-wide powers for a first-class borough are taxation, education, planning and zoning, AS 29.33.010; formerly AS 07.15.310 (repealed). The petition had sought the greater area-wide powers of a first-class city.
39 AS 44.62.330(a).
40 AS 44.62.330 contains a list of the agencies to which this section applies which does not include the Local Boundary Commission.
proponents also pointed out that there is no constitutional require-
ment that there be findings in order to furnish a basis for an admin-
istrative decision. In the case of *K & L Distributors, Inc. v.
Murkowski*, the Alaska Supreme Court held that due process is
satisfied so long as the reviewing court can discern the basis for the
agency's decision, and that compliance with specific statutory lan-
guage or standards can provide the court with such a basis.

The oil companies claimed that the court undertook "its own
review of the evidence and drew therefrom what it felt to be ade-
quate support for the decision." The borough proponents asserted
that the standard for review was whether or not there was substantial
evidence in the whole record to support the commission's conclu-
sions.

1. Adequacy of Evidence Concerning Geography

On appeal to the Supreme Court, the oil companies did not
challenge the finding of the superior court upholding the decision of
the Local Boundary Commission that the statutory standards for
borough incorporation relating to population and economy had been
met. They did, however, challenge the adequacy of the evidence as
to parts of the geography and transportation standards. The com-
panies conceded that the borough boundaries conformed to the
natural geography, but they claimed that the commission should have
excluded a federal "military reservation" and some purportedly
"uninhabited and unused lands" from the borough. Such areas

---

42 It was also argued that the Local Boundary Commission had complied with
any requirement that might exist for findings in that it filed a statement of findings
and conclusions which was made part of the record. The oil companies argued that it
was inadequate because they merely started legal conclusions without finding specific
factual bases for them.
43 It should be noted that in the superior court the oil companies urged that an
independent review of the evidence should be made.
44 The substantial evidence standard for administrative review is set forth in
AS 44.62.560(c). Substantial evidence has been defined by the Alaska Supreme Court
as "such relevant evidence as a reasonable mind might accept as adequate to support a
definition subsequently has been quoted with approval by the court. *E.g., In re
1972); *Swin Del v. Kelly*, 499 P.2d 291, 298 (Alaska 1972); *Anderson v. Employers
Liab. Assurance Corp.*, 498 P.2d 288, 290 (Alaska 1972); *Laborers & Hod Carriers
Union v. Employers Liab. Assurance Corp.*, 494 P.2d 808, 811 (Alaska 1971); *Brown
536, 670 (Alaska 1966); *Forth v. Northern Stevedoring & Handling Corp.*, 385 P.2d
944, 948 (Alaska 1963).
45 See note 22 supra for full text of all statutory standards for borough incorpora-
tion.
46 No such requirements are in the 1972 revisions of the act. The only inquiry,
could be included in boroughs if they were “necessary or desirable for integrated local government.”

The commission had found that there were no “unused” lands on the North Slope. As the superior court noted, there was a great deal of evidence in the record on this point indicating the historic importance of the entire Arctic Slope to its inhabitants for subsistence hunting, trapping, and fishing. The fact that the Arctic Slope region historically has depended upon a subsistence economy and that such dependence continues to the present day was very influential with the Local Boundary Commission and apparently with the superior court as well. In fact, the record showed that while most of Alaska is dependent primarily upon imported goods, the Arctic Slope region, relying so heavily upon a subsistence economy, is the most independent region in the state. This is especially remarkable in view of its adverse geographic and climatological features. As anyone who is familiar with Alaska knows, the area above the Arctic Circle has only slight precipitation and there is little in the way of vegetation north of the Brooks Range other than tiny and sparse plant life in the tundra, which the caribou and other grazing animals depend upon for food. The wanderings of Eskimo hunters in pursuit of caribou and other animals are as extensive as the migrations of the animals in search of food. It is difficult, but necessary, to understand this aspect of Eskimo culture (the preservation of which may be an accomplishment of the North Slope Borough) in order to appreciate the need for such great land areas.

The exclusion of military reservations, which was part of the geography standard, was explained in testimony to the commission as having its origin in the legislature’s intention to maximize federal support of schools, which apparently was understood to be jeopardized if military reservations were included within boroughs. Casually, if this were the intention of the legislature, the exclusion of the military reservation in question in the Arctic Slope region—Naval Petroleum Reserve No. 4—would make little sense. The petroleum reserve, popularly known as “Pet 4,” does not have a resident population in the same sense that an army base does, and it was created for the limited purpose of reserving the huge, 23 million acre area from alienation so that it could be utilized for possible future petroleum development.

---

47 The problem seems to have been solved in 1973 by amending AS 29.33.050 to exclude automatically military reservations within a borough from the borough school district until the reservation is terminated and the state Department of Education approves inclusion, AS 29.68.020 which was added at the same time permits annexation of military reservations by boroughs and cities.
The superior court reviewed the commission's deliberations as to whether Pet 4 was comprehended by the definition of "military reservation" in the statute, and determined that even if it were, it would be desirable for local government to include it for much the same reason as including the allegedly "unused lands." It was shown in the record that there was to be comprehensive land use planning which would be important to those dependent upon a subsistence way of life as well as to developers themselves. If the development of oil fields and coal mines was to be compatible with continued region-wide hunting and fishing, allowing economic development while not destroying an age-old way of life, the entire area must be subject to planning and regulation by the local government in the area. Thus to exclude Pet 4, just as to exclude the "unused lands," from the borough would be to exclude some of the territory most vital to the borough's inhabitants. The opportunity to regulate the development of those areas as a means of survival as well as to partake in its fruits is a significant reason for including it in any local or regional government in the area.48

2. Adequacy of Evidence Concerning Transportation

The oil companies also challenged the determination of the Local Boundary Commission upheld by the superior court that the statutory standard requiring sufficient transportation facilities had been met. The commission had deliberated at some length as to whether this criterion had been satisfied. They took note of the fact that their hearing in December of 1971 was well attended by representatives of people from all over the region, that there was well-established interchange among the communities of the Arctic Slope for church and social purposes, and that the Arctic Slope Native Association itself had organized a successful effort to organize and inform people throughout the area concerning settlement of the claims of Alaska Natives. The commission's record included evidence

48 The oil companies urged in the superior court that local governments possessed no regulatory jurisdiction over federally-owned lands and thus it would make no difference whether an area were included or not for purposes of regulation. The companies cited the case of Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 82 L. Ed. 1502 (1938) which was an action to enjoin enforcement of a state liquor law within a National Park. The decision that the state could not do so was based on California statutes expressly ceding the exclusive jurisdiction of the park to the United States. The Supreme Court in Collins also sustained the power of the state to impose taxes in the park because that power and others had been reserved in the state statute ceding jurisdiction to the United States. The borough proponents, therefore, argued that Collins stood only for the proposition that the statutes and agreements pertaining to each federal reservation must be examined to ascertain the precise extent of state and local regulatory jurisdiction. It was also pointed out that local regulation within federally-owned lands is common and is sometimes provided for by federal regulation. E.g., 50 C.F.R. § 25.3 (1972), which contemplates enforcement of local regulations in national wildlife refuges.
of scheduled commercial airline flights to most of the villages of the North Slope, the availability of charter aircraft in each populated area, local road systems and a planned highway system for the entire state, which would connect to all places with over 1,000 people by 1990, and a highway planned by the oil companies themselves. There was also evidence of a plan recommending a long-range airport system with major, medium and small hub airports, annual visits to coastal cities within the Slope by ship, and traditional means of travel such as dogsleds, which are still widely used, now powered by snow machines.

The statute shows that the express purpose of the transportation standard is to "facilitate the communication and exchange necessary for the development of integrated local government and a community of interest." It also provided that transportation shall be "reasonably inexpensive, readily available, and reasonably safe." The commission utilized a pragmatic interpretation of these requirements, relative to the then prevailing system, in which local government for the North Slope was administered in Juneau. One commissioner observed at the Anchorage decisional meeting, "it's expensive, but still if they want their representation in Juneau now, it would cost them a tremendous amount of money to go to Juneau or to go out there and to affirm or deny any legislation that's going through concerning it." The chairman of the commission, Mr. John Hedland, of Anchorage, responded, "I think that is a crucial point in looking at that standard." The present inadequacy of access for borough residents to their legislators in Juneau was then discussed:

**MR. ACKERMANN.** Besides the cost of going to Juneau, they have to appear before the legislature with which they have no representation. They do not have a representative in the legislature . . . .

**MR. HEDLAND.** At present, the schools are run by the state, there is no school board. The only means of being heard on that would be to go to Juneau. The proposed tax legislation would be levied by the state . . . and, the only body authorized to perform a function such as zoning, running schools, and other functions which they seek, they'd have to petition the State of Alaska through the legislature.

**MR. ACKERMANN.** Well, I think it would be desirable if they were able to go to some place where they could talk to people they knew about their problems. If they went to Juneau or anywhere in the state, there're no friends that are known to them. They would be much better served by a regional government. I believe this was the intent of the Constitution that the government be as close to the people as possible to resolve their problems and do something to better themselves.
The commissioners concluded that access to and from a seat of borough government would be easier than access to and from Juneau, and pointed out that consideration of transportation in Alaska cannot be done on a totally objective basis, but must be done relative to circumstances in a particular area. Support for flexible interpretation of the transportation standard was found in published works in the commission's record. Given the purpose of the transportation standard as expressed in the statute itself, and the statute's own requirement that facilities planned for the future be included in its consideration, "the commission reasonably determined the transportation standard to have been met."

3. Reasonable Basis Test

On appeal to the state supreme court, the oil companies objected that the superior court had given weight to the interpretations of the statutory criteria by the commission. The superior court deferred to the commission's interpretations of the standards as they related to adequacy of present and planned transportation and to inclusion of "military reservations" and "uninhabited and unused" areas and in defining the commission's own duties with respect to boundary changes. The court held that these interpretations were rational in light of their statutory purposes. But the companies argued that the commission was not endowed with any special technical expertise, and consequently should be entitled to no deference in its interpretation of statutes. The Alaska Supreme Court has determined, however, that where "cases concern administrative expertise as to either complex subject matter or fundamental policy formulation," then the "appropriate standard of review is whether the agency action had a reasonable basis." Prior to Swindel v. Kelly, the court had recognized that the reasonable basis test should be applied when reviewing agency interpretations of statutes if the agency has been delegated legislative authority and operates in a quasi-legislative

---

40 See, e.g., ALASKA LEGISLATIVE COUNCIL AND LOCAL AFFAIRS AGENCY, supra note 2, at 48, in which it was stated:
Transportation standards which relate to the means of transportation available within an area proposed for incorporation as an organized borough, must necessarily be flexible. The rivers, bays, islands, mountains, and glaciers of Alaska make any attempt at statewide uniformity of transportation standards futile. A body of water may be a barrier to transportation in some states—in Alaska it is often a means of transportation. The airplane, still a stranger to many Americans, is the only mechanical transport regularly used by some Alaskans. . . . Just how "adequate" transportation facilities need be, depends upon the needs of each individual local government.

50 Memorandum Decision, January 19, 1973, at 16. The standard in the revised statute requires only that transportation facilities "allow the communication and exchange necessary for the development of integrated local government." AS 29.18.030(4).

51 Swindel v. Kelly, supra note 44, at 298 (emphasis added).
To sustain the commission’s application of the statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.\(^\text{53}\)

The proponents of the borough argued that the Local Boundary Commission had been delegated legislative authority to reach political issues in applying the statutory criteria to evidence taken by the commission. The oil companies argued that the function of the Local Boundary Commission involved the kind of determination that a court could make with respect to the interpretation of statutes, and such determination should not be left to the agency. The borough proponents conceded that this would be proper in a quasi-judicial proceeding and argued that the kind of decision-making that the Local Boundary Commission was engaged in was quite different from the adjudicative decision-making of some administrative bodies. They pointed out that Davis distinguishes between two types of administrative proceedings, the “trial” type and the “argument” type. The trial type proceeding is to ascertain adjudicative facts; the argument type is to ascertain legislative facts. Adjudicative decision-making occurs when “a court or agency finds facts concerning the immediate parties who did what, when, and how and with what notice or intent . . . .”\(^\text{54}\) On the other hand

When a court or agency develops law or policy, it is acting legislatively; the courts have created the common law through judicial legislation and the facts which inform the tribunal’s legislative judgment are called legislative facts.\(^\text{65}\)

Determinations of whether a local government should be incorporated were made for the Territory of Alaska by the federal district court.\(^\text{66}\) Even though a court performed the function, it was held to be legislative in character.\(^\text{67}\) Courts in other jurisdictions have uniformly held proceedings of this type of agency to involve exercise of delegated legislative authority.\(^\text{68}\) Furthermore, all parties before

---


\(^{54}\) K. C. Davis, Administrative Law § 7.01 (1958). The distinction is made apparent by a reading of two United States Supreme Court decisions, Londoners v. Denver, 210 U.S. 373, 52 L. Ed. 1103 (1908), and Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441, 60 L. Ed. 372 (1915).


\(^{56}\) Session Laws of Alaska ch. 97 (1923); Alaska Compiled Laws Ann. § 16-1 (1949).

\(^{57}\) In re Annexation of the City of Anchorage, 146 F. Supp. 98 (Alaska 1957).

the superior court had conceded that the Local Boundary Commission was functioning in a legislative or executive capacity in the same manner as the agency in *Kelly v. Zamarello*.

The borough proponents argued that since the Local Boundary Commission is exercising delegated legislative authority, the commission has discretion to apply the various statutory criteria as they relate to the needs of local government on the North Slope. Because the commission had rationally interpreted the statute in light of its purposes, they argued that the court below had correctly sustained its determinations.

B. Boundary Change

The oil companies had sought summary judgment, urging as one ground that the petition for incorporation of the North Slope Borough involves a local government boundary change which is required to be submitted to the state legislature under Article X, § 12 of the Alaska Constitution. The companies argued that the superior court was wrong in denying summary judgment because there necessarily is a change in the boundaries of the unorganized borough when a new borough is formed out of it.

The borough proponents pointed out that the Local Boundary Commission derives its powers with respect to the formation of new boroughs from a different section of the Constitution, Article X, § 3, which mandates that the legislature shall prescribe "methods by which boroughs may be organized ...." The legislature implemented that constitutional provision in the act which was passed in 1961 providing the standards and procedures to be followed for incorporation of new boroughs, and it assigned to the Local Boundary Commission decision-making authority as to whether a particular area meets the standards set up by the statute. In the same act, the legislature provided that all areas which are not included within an organized borough shall constitute a single, unorganized borough. It was argued that if the legislature intended changes in the boundaries of the unorganized borough to be submitted to it, certainly they would have expressed it in enacting a statute which defined the unorganized borough and at the same time set up the procedures for establishing new boroughs. Those procedures, for all practical

---

60 486 P.2d 906 (Alaska 1971).
60 *ALASKA CONSTITUTION*, art. X, § 12 provides in pertinent part:
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 ....
61 See note 22 supra.
62 AS 07.05.010 (repealed). See AS 29.03.010.
purposes, place the final decision as to whether or not a borough
will be incorporated and where its boundaries will lie, within the
sole province of the Local Boundary Commission. All that remains
after that determination is made is an election within the proposed
borough at which the voters have an opportunity to approve or
disapprove the proposal. Express authority is given to the commission
to alter the boundaries of a proposed borough, but no legislative
review is required. The failure of the legislature to reserve to itself
any review power over decisions of the Local Boundary Commission
concerning establishment of new boroughs stands in contrast to
specific statutory provision for submission to the legislature of any
adjustments which the commission may make in the boundaries of
eexisting organized boroughs. No similar provisions exists for un-
organized boroughs.

It was also argued by the borough proponents that the Local
Boundary Commission, from its inception, has pursued a policy
of not seeking legislative approval for incorporation of an orga-
nized borough from an unorganized borough, as shown by the
commission’s record on the subject. They urged that the commission’s
longstanding interpretation of the constitution and statutes should
be given deference by reviewing courts, and in any event, the
legislature has had ample opportunity to impose the requirement as
to formation of new boroughs if it so intended.

It was influential with the superior court that the unorganized
borough has never functioned as a local government. The record in
the Local Boundary Commission indicated that the “unorganized
borough bears no relationship whatever to any other local govern-
ment” but was only a vehicle by which the state could perform local
government functions until such time as the area organized as a
borough. The court found that:

So far as disclosed by the record before me, the Alaska Legisla-
ture had done nothing since to implement these provisions, by
way of creation of special service districts to furnish these ser-
vice, or any other governmental action wherein the unorganized
borough is treated as a unit of local government.

In addition, the court said:

---

63 AS 07.10.110 (repealed). See 1972 reenacted version of the same provision,
AS 29.18.090(a).
64 AS 07.10.125(c) (repealed). See AS 29.68.010(a).
65 See, e.g., Whaley v. State, 438 P.2d 718 (Alaska 1968); Udall v. Tallman, 380
U.S. 1, 13 L. Ed. 2d 516 (1965), rehearing denied 380 U.S. 989, 14 L. Ed. 2d 283
(1965).
66 ALASKA LEGISLATIVE COUNCIL AND LOCAL AFFAIRS AGENCY, supra note 2, at 80.
67 Memorandum Decision, June 19, 1972, at 7.
Thus, if we consider the unorganized borough as a unit of local government authorized by the state constitution, the single Alaska unorganized borough exists only *de jure*, without functional substance.68

The policy behind the requirement that boundary changes of existing governmental units be submitted to the legislature has been articulated in a number of cases by the Alaska Supreme Court. In *Fairview Public Utility District No. 1 v. City of Anchorage*,69 the court found that the reason for the requirement was that “local political decisions do not usually create proper boundaries and boundaries should be established at the state level.”70 In its latest expression on the subject, the court said:

*Fairview’s* interpretation that the constitution sought to move the locus of decision-making on boundaries from the local to the state level and avoid needless multiplicity of local government was reaffirmed.71

The borough proponents argued that since the unorganized borough has never functioned as a government, it possesses none of the features and paraphernalia inherent in an operating local government, such as capital assets, employees, administration, debts, statutes, ordinances, and vested interests in the exercise of its power. Competing local interests simply are not present when there is no existing local government. The superior court recognized this in its decision below:

I am not persuaded, however, that creation of an organized borough within the area of the unorganized borough is a “boundary adjustment.” No allocation of assets or liabilities, and no apportionment of the tax burden to be borne by property owners in the two areas result [*sic*] from borough organization is involved. There is no problem respecting apportionment of continuing debt service to existing bond holders. The organized borough, if it comes into being, will merely fill a governmental vacuum now existing.72

C. *Denial of Due Process*

The ultimate reason for the oil companies’ strong opposition to the formation of the North Slope Borough is that the inclusion of

---

68 Id. at 8.
70 Id. at 543.
71 City of Douglas v. City & Borough of Juneau, 484 P.2d 1040, 1043 (Alaska 1971). *See also* Oseau v. City of Dillingham, 439 P.2d 180, 183-184 (Alaska 1968). In both *Fairview* and *Oseau* the Local Boundary Commission submitted a boundary change to the legislature but neither involved the formation of a borough out of an unorganized borough. *Fairview* involved the annexation of one governmental unit, a public utility district, by another, and *Oseau* involved the dissolution of an existing fourth class city.
72 Memorandum Decision, June 19, 1972, at 8.
Prudhoe Bay in the North Slope Borough will subject them to regulation and taxation. They assert that they will be paying over 98 per cent of the borough's tax revenue while receiving no services or benefits from the borough. The argument certainly has the greatest appeal in terms of the equities, as well as being the most straightforward in terms of stating the true position of the companies, as opposed to grounds alleging "errors" which they assert were made by the commission or the superior court in interpreting statutes and constitutional provisions and in the conduct of their proceedings.

The oil companies, in briefing the case to the state supreme court, cited several cases in which it was held that the annexation of an area which would receive no benefit at all and was included only for purposes of taxation through its addition to a municipality, constituted a deprivation of property without due process of law and could be stopped by a court.73 The proponents of the borough argued that nearly all of the oil companies' cases relating to benefits and burdens of inclusion involved no benefit at all to the area resisting inclusion, that nearly all of them involved annexations or formation of special service districts as opposed to forming a regional government, that none of them was concerned with counties or boroughs,74 that the borough is unquestionably an integral part of the North Slope region, and that the special intent and form of local government in Alaska dictates a different treatment than that which is found elsewhere in the United States.75

73 The oil companies cited: City of Sugar Creek v. Standard Oil Co., 163 F.2d 320 (8th Cir. 1947); Paducah-Illinois R.R. v. Graham, 46 F.2d 806 (W.D. Ky. 1931); Town of Satellite Beach v. State, 122 So.2d 39 (Fla. Ct. App. 1960); Chesapeake & O. Ry. v. City of Silver Grove, 249 S.W.2d 320 (Ky. 1952); Portland General Electric Co. v. City of Estacada, 194 Ore. 145, 241 P.2d 1129 (1952); State ex rel. Bibb v. City of Reno, 179 P.2d 366 (Nev. 1947); State v. Village of Leetonia, 210 Minn. 404, 298 N.W. 717 (1941); State v. Town of Boynton Beach, 129 Fla. 928, 177 So. 327 (1937); State ex rel. Attorney Gen. v. City of Avon Park, 108 Fla. 641, 149 So. 409 (1933); State v. City of Largo, 149 So. 420 (Fla. 1933); State ex rel. Davis v. City of Stuart, 97 Fla. 69, 120 So. 335 (1929); Waldrop v. Kansas City S. Ry., 199 S.W. 369 (Ark. 1917).

74 County and borough governments are of a different nature than other municipalities and different considerations obtain concerning them. See 3 & 4 C. J. AN'T=Aiu, MUNICIPAL CORPORATION LAW, chs. 30B & 31 (1965).

75 Some courts infer an "implied limitation of community" when reviewing legislative decisions regarding municipalities, based on the particular state constitution and legislative scheme for local government. This inference is often made where words such as "village" or "town" are used in the constitutional provision authorizing legislative incorporation and becomes a ground for finding the legislature or agency which made the decision acted contrary to the intent of the state law. 1 C. J. AN'T=Aiu, MUNICIPAL CORPORATION LAW § 1.04, at 13-14 (1965). See, e.g., State v. Village of Leetonia, supra note 73; Portland Gen. Elec. Co. v. City of Estacada, supra note 73; Town of Satellite Beach v. State, supra note 73; State v. Town of Boynton Beach, supra note 73; State v. City of Largo, supra note 73; State ex rel. Attorney General v. City of Avon Park, supra note 73; State v. City of Stuart, supra note 73. Other courts have relied merely upon a general public policy such as "to encourage agriculture" in order to protect an area from inclusion in a municipality. E.g., State ex rel. Bibb v. City of Reno, supra note 73.
The proponents of the borough claimed that there are no federal constitutional obstacles to inclusion of an area within a municipality, even when that area's tax burdens far exceed its benefits. They cited *Kelly v. Pittsburgh* for the leading case in the area. In *Kelly*, an owner of farmland objected to the inclusion of his property within Pittsburgh because all of the taxes he would pay would be for the benefit of persons enjoying city services to which he had no access. The Court, recognizing that probably "his tax bears a very unjust relation to the benefits received as compared with its amount," held that it is not constitutionally necessary to adjust the burdens of taxation or the fairness in their distribution among those who bear them. The Court added that there was some intangible benefit to the landowner simply by being included in the city, noting, as an example, that every citizen is interested in having educated children in the area. Acknowledging the substantial discretion of the lawmaking body which sets municipal boundaries, the Court concluded that "however great the hardship or unequal the burden of taxes for public purposes, it will not render the municipality unconstitutional."

The basis of the decision was explained:

What portions of a state shall be within the limits of a city and governed by its authorities and laws [and] how thickly or how sparsely the territory must be settled so organized into a city, must be one of the matters within the discretion of the legislative body. Whether its territory shall be governed for local purposes by a county, city, or township organized is one of the most usual and ordinary subjects or state legislation.  

The holding of *Kelly* seems to have been reaffirmed in *Gomillion v. Lightfoot*, in which the court stated at 343:

If one principle clearly emerges from the numerous decisions of this court dealing with taxation it is that the due process clause affords no immunity against mere inequalities in tax burdens, nor does it afford protection against their increase as an indirect consequence of a state's exercise of its political powers.

In many cases the courts have been very reluctant to set aside a legislative decision to include an area in a municipality, even where the facts are rather extraordinary. The rationale of such cases is

---

76 104 U.S. 78, 26 L. Ed. 658 (1881).  
77 Id. at 80, 26 L. Ed. at 659.  
78 364 U.S. 339, 8 L. Ed. 2d 110 (1960).  
79 Forsyth v. Hammond, 166 U.S. 506, 41 L. Ed. 1095 (1897); State ex rel. Pan Am. Prod. Co. v. Texas City, 303 S.W.2d 780 (Texas Sup. Ct. 1957) (annexation of submerged oil and gas lands); People ex rel. Averna v. City of Palm Springs, 51 Cal.2d 38, 331 P.2d 4 (1958) (10% of annexed area accessible only with mountain climbing gear); People v. City of Los Angeles, 154 Cal. 220, 97 P. 311 (1908) (annexation of narrow corridor of land to reach port area desired by city); People
that to look behind such a decision would be to usurp a legislative function. The borough proponents agreed that the cases cited by the oil companies evidenced only a narrow exception to the general policy against judicial scrutiny of essentially political decision-making concerning the establishment or enlargement of municipalities. These exceptions, they urged, exist in a few states where public policy as expressed in the state constitution and statutes is not as strongly oriented towards a system of comprehensive, area-wide governments as is Alaska's, or where the area to be included in the local government cannot benefit at all from inclusion but must bear a great tax burden.

The only Supreme Court case in which support for the oil companies' arguments could be found was *Myles Salt Co. v. Board of Commissioners.* That case was clearly distinguishable, said borough advocates, in that the Court there found that the property owner objecting to being included in a drainage district (but whose land was not the least bit in need of drainage) was "without a compensating advantage of any kind." The case involved a special improvement district where, without benefits from the specific type of improvement, there was no rationale whatsoever for including the property owner in the district.

1. Distinction: Unique Government Scheme

Perhaps the most strongly urged distinction between the oil companies' cases and the case of the North Slope Borough is the unique nature of the Alaska local government scheme. The proponents also argued strongly that Prudhoe Bay will, in fact, benefit from its inclusion in a borough government. They pointed out that the record supports the holding of the superior court that Prudhoe Bay, as a new community on the North Slope, will need the services of a local government. Although there was little in the record of the Local Boundary Commission contributed by the oil companies, they did state in testimony before the commission that municipal services might be needed in the future. The development of a viable community with significant population around the centers of oil development on the North Slope appears to be reasonable as there are industrial centers which are already operating in other countries above the Arctic Circle. For instance, Siberia has a number of industrial areas in the Arctic, many of them larger than Fairbanks and Anchorage. In Sweden and Norway, a variety of occupations, in-

---

*ex rel. Russell v. Town of Loyalton, 147 Cal. 774, 82 P. 620 (1905) (incorporation of 52 square mile area around nucleus of 40 homes).*

*80 239 U.S. 478, 60 L. Ed. 392 (1916).*

*81 Id. at 485, 60 L. Ed. at 396.*
including mining, have drawn people into permanent settlements above the Arctic Circle.82

A report by the Institute of Social, Economic, and Government Research at the University of Alaska, which was part of the record, concluded that “development and operation of the Prudhoe Bay Field and related transportation facilities will result in costs to state and local governments that would not otherwise have been incurred.”83 The same report points out that some of the families associated with oil development construction “will reside near construction camps or in roadside communities, and their children will attend state-operated schools.”84 The commission heard testimony that there are already 25 to 45 men from Barrow employed at Prudhoe Bay. Of course, most of the work to be done at Prudhoe Bay and the expansion of its operation lie in the future. The borough proponents insisted that all of the companies’ employees who choose to reside on the North Slope have a stake in being able to receive municipal services. Employees may want to take advantage of public library facilities, adult education, and police and fire protection. Their children should be able to attend school near their homes and not be subjected to the inadequate system of education that has plagued children and their families in existing communities of the North Slope.

If roads are built on the North Slope, including the road presently planned by the oil companies, residents already on the North Slope want some say in how it will be built and whom it will serve. Human needs as well as the potential impact of the road on the environment, they argued, should be considered. If a fire control system, which an industrial area will undoubtedly need, is established, it should be under borough control. Likewise, police protection can best be furnished by a municipal government for the benefit of both the industry and the rest of the borough. Water and sewage services which the industrial area needs can be furnished through a unified system more economically and more consistently with sound principles of local government.

2. Local Control

The proponents of the borough stressed the great importance of having local control over land use. They urged that the people whose cultural and economic roots are on the North Slope ought to have

82 State of Alaska, Overall Economic Development Program—1971 for the City of Barrow and Adjacent Areas, supra note 17, at 92.
83 INSTITUTE OF SOCIAL, ECONOMIC AND GOVERNMENT RESEARCH, ALASKA PIPELINE REPORT 92 (1971).
84 Id. at 96.
control over the activities of developers who, in the case of Prudhoe Bay, are absentee lessees. These arguments smack of the same sentiment which led to Alaska's statehood and to the development of its local government scheme. Moreover, the proponents urged that the beneficiaries of the exercise of this control will be the industry as well as the borough's present residents. The possibility of such functions benefiting the oil industry was considered by the Local Boundary Commission and recognized by the superior court. The superior court cited the statement of the Arctic Slope Native Association in support of the proposed North Slope Borough in which it was stated:

If necessary to use land for heavy industry, as the oil companies possibly are, then we must protect the heavy industry from uses that would be bad for that industry and bad for the people. This authority provides benefits for both the little people and the oil industry or the other industries, but they will pay for this authority and this help through sales and property taxes.\(^{85}\)

The need for planning and zoning throughout the North Slope, and especially around Prudhoe Bay, was confirmed by all the impartial sources which have considered the question, many of which were included in the record. For instance, the Federal Field Committee for Development Planning in Alaska stated in a 1971 report:

Special engineering problems exist for location, design, construction, and maintenance and roads, airfields, pipelines, water and sewer systems, waste disposal systems, buildings and other structures in permafrost regions. Needed are special engineering procedures designed to eliminate and minimize disruption of the natural environment while permitting the economic development of natural resources and human occupancy of the Arctic regions.\(^{80}\)

The superior court said on the question of whether Prudhoe Bay should be included in the borough:

The borough, possessing the planning and zoning authority, will be able to participate with the petroleum industry involving planning to protect the industry and the region (R.366), and other services, such as police protection, road planning and design, and environmental protection, of mutual benefit to industry and the area's permanent residents, may reasonably be anticipated. Thus, it cannot fairly be said that Prudhoe Bay will receive no services from the borough.\(^{87}\)

In spite of the record evidence to the contrary, the oil companies argued strongly that they would handle all of their own municipal

---

\(^{80}\) Federal Field Commission for Development and Planning in Alaska, Economic Outlook for Alaska, supra note 18 at 75.
\(^{87}\) Memorandum Decision, January 19, 1973, at 20.
needs, that there would not be permanent residents on the North Slope, and that there would be no need whatsoever for a municipal government which included Prudhoe Bay. In defending the commission’s decision, the proponents of the borough urged that an oil company should not be able to create a “company town” which manages not only the company’s affairs but the affairs of its employees, and that there is no right to opt out of a local government merely because a company, an industry, or anyone else chooses to provide municipal services for itself. Certainly, a citizen cannot merely elect not to participate in specific services provided by municipal government. At what point, if any, does an individual or corporation have a right to avoid local government altogether? Carrying the companies’ argument to its logical conclusion, a landowner (or in this case a lessee) could stop an area from being included in a municipal government because he says that he neither wants nor needs municipal services.

Not only would the ability of a few holders of property to frustrate attempts to form a local government which included them contradict the state’s public policy concerning local government which mandates that the entire state shall be included within boroughs, but it may raise constitutional problems. The California Supreme Court recently held that it would be a denial of equal protection of the law to apply a California statute allowing the owners of more than fifty per cent of the value of the property in an area to prevent its incorporation where a majority of the landowners have petitioned for its incorporation. The court called the situation before it

a spectacle where the desires of the 63 per cent of the resident landowners who signed the petition for incorporation would be overridden by a protest composed primarily of nonresident and absentee corporate owners. Thus under a literal application of section 34311 the right of residents of a region to self-government, to establish and to enjoy the amenities of civil life, would be subordinated to a few persons whose economic interests lie in maintaining low property taxes and lax land use regulations. The perpetuation of this condition cannot realistically nor constitutionally be described as a compelling interest of the State of California.

---

88 The Supreme Court has limited the degree to which a company may subjugate the interests or rights of the public and company employees to the interests of the company. See, e.g., Marsh v Alabama, 326 U.S. 501, 90 L. Ed. 265 (1946).

89 The oil companies own no land on the North Slope; they merely hold oil leases from the State of Alaska.

3. Benefits to Oil Companies

While there is a good deal of emotional appeal to the oil companies' argument that they will be overburdened and underbenefited taxpayers, there is evidence that they can and will receive some benefits. The cases are clear that there is no constitutional problem where some benefit can be realized and the Alaska constitutional and statutory intent favors the inclusion of the area. Furthermore, there is not and never has been a constitutional right to be excluded from a municipal government just because a landholder does not want such services as the local government will bring him.

The Alaska Supreme Court has indicated that the function of determining whether an area should be included in a municipality is a decision for the state government and the preference of an individual property owner cannot be determinative. In *Fairview Public Utility District No. 1 v. City of Anchorage*, the court held:

> Those who reside or own property in the area to be annexed have no vested right to insist that annexation take place only with their consent. The subject of expansion of municipal boundaries is legitimately the concern of the state as a whole, and not just that of the local community. 01

The borough proponents branded the oil companies' argument that Prudhoe Bay should not be included in the North Slope Borough as a plea for complete autonomy from local government. They noted that if that argument were accepted, no borough government possibly could be formed out of any surrounding area, which would include Prudhoe Bay. While some rural areas of the state may be unsuitable for incorporation into the city, it is unusual, to say the least, for it to be contended that an area is unfit for inclusion in any county or regional governmental unit, such as a borough. The fulfillment of the state's strong public policy of furthering local government, they maintained, requires inclusion of the entire North Slope area in the North Slope Borough. Indeed, given the standards for borough incorporation found in the statutes, the North Slope Borough is the only one in which the Prudhoe Bay area could be comprehended. A borough which included only the immediate area around Prudhoe Bay would, of course, be contrary to the intent of the framers of the constitution that there be a minimum of local government units, in that it would be confined to a single area in which most of the population and most of the economic activity is oriented to petroleum development. Lack of diversity and singleness of purpose

---

01 368 P.2d 540, 546 (1962).
which would attend a borough oriented to Prudhoe Bay certainly would not lead to the type of local government which the drafters of Alaska's Constitution and local government statutes intended. Furthermore, concentration of the tax base in such a small area could deprive other adjoining areas of the ability to organize regional governments, aggravating even more the underpinnings of Alaska's local government system.

IV. ADDITIONAL PROBLEMS CONFRONTING LOCAL GOVERNMENT

Even a favorable supreme court decision in Mobil Oil v. Local Boundary Commission will not end the borough's troubles. The oil companies, fearing excessive taxation, have resorted to other litigation aimed specifically at the borough's taxing powers. Further, the companies, in concert with Alaska's governor, have proposed legislation which would emasculate almost entirely the borough as to taxation of oil properties.

After the borough went into operation, it set about the task of creating an assessment and tax collection system. Before the assessments were completed, the borough was sued by more than 20 oil companies, alleging that much of the property that had been assessed was not assessable according to state law, and that illegal changes in property tax assessment had been made by the board of equalization of the borough. In a decision dated June 1, 1973, Judge Warren W. Taylor found that the borough's attempt to assess ad valorem taxes on oil and gas leases in the borough was unlawful because of a state statute making payment of the state gross production tax in lieu of all ad valorem taxes, and enjoined enforcement or collection of the taxes. The court also found that certain mandatory provisions of the statutes relating to assessment procedures were not complied with by the borough and voided the assessments on that ground as well. With the oil producing property—leases—the subject solely of state taxation, the borough was left primarily with personal property to tax. The oil companies balked at that tax as well.

The companies had sued the state concerning the alleged illegality of a legislative package providing for taxation and regulation of the oil industry. In September, 1973, it was announced by

---

92 See statutory standards for borough incorporation, supra note 22. The Prudhoe Bay area alone could not meet the standards. If the oil companies' predictions are correct, it never will be able to meet all of them.


94 AS 43.55.010.

Alaska's governor that the state had been holding a series of secret talks with the oil companies for some time in relation to that litigation and had come to an agreement concerning future taxation of the companies. The "agreement" provided for a 20 mill levy on the hardware of the oil industry and fifty to sixty cents on each barrel of oil produced. For the purpose of enacting the new oil tax package, an extraordinary, special session of the legislature was called, to begin October 17, 1973. It was no secret that the negotiations between the state and the oil companies were motivated also by the oil companies' concern that they would be overtaxed by the borough. The tax package as proposed would deny boroughs the ability to tax equipment at Prudhoe Bay, leaving little else to be the subject of their taxing power. The governor suggested including a rebate of seven mills as a revenue-sharing measure for the boroughs whose taxing power would be preempted, but the package as proposed contained no such provision. Many of the North Slope Borough's leaders feel that the proposal would be destructive of their local government powers, and that the state's removal of virtually all their effective taxing ability is unjust. Even if enacted, the seven mill rebate is a paternalistic measure which deprives them of their prerogative as a local governing body.

The other taxing power that the borough now has enables it to levy a sales tax. But the governor's tax package would provide some latitude for the oil companies to choose between state and local taxes by being able to designate capital expenditures as property subject to state tax or purchases subject to sales tax.

V. Conclusion: Whither Local Government in Alaska?

The North Slope Borough is a bellwether for the future of local government in Alaska. If it can stand the tests of litigation and of legislation, the intent of the draftsmen of Alaska's Constitution can be vindicated. The temptation to follow precedent concerning local government in other states, in light of the "equities" urged by the companies, is understandable. And the state legislature may act entirely reasonably if it yields to the tantalization of a tax package which would give them an unmitigated foothold on the most lucrative source of revenue in the state. The result will not totally destroy the determined people of Alaska, but if the oil companies have their way, history may repeat itself. Alaskans may again lose the battle to have the persons most intimately affected by development in their homeland in control of it and derive some benefit from it. Because the scale of petroleum development is so much greater than any in the past, it may mean that there is a mass exodus from the bush, that the natives in those areas, deprived of their subsistence
way of life, will be forced to move to cities or to company towns to seek employment, education, and the minimum comforts and benefits of organized community life. The value of the bush could become greater as a gigantic site for developing natural resources than as a home for many of Alaska's first citizens.

Local government in Alaska must now stand its hardest test. Can it withstand pressures of absentee corporate interests coveting natural resources and a desire for expedience by legislators far removed from the areas affected? Can there be large, regional boroughs—uncommon to the world of local governments, but suited to Alaska's peculiar local needs? As the wisdom of those who conceived Alaska's local government system becomes more apparent, the system paradoxically becomes more difficult to implement. For Alaska's unique local government system to work in the unusual circumstances which inspired it, a commitment to local self-determination and a hard-headed zeal for Alaska's future as their permanent home will be required of those making policy decisions today as it was of the architects of Alaska's government.