MEETING NO. 2012-16: The Special Meeting of the City and Borough of Juneau Assembly, held in the Assembly Chambers of the Municipal Building, was called to order at 7:30 p.m. by Mayor Bruce Botelho.

I. ROLL CALL

Assembly Present: Mary Becker, Bruce Botelho Karen Crane, Ruth Danner, Johan Dybdahl (telephonic), Jesse Kiehl (telephonic), Carlton Smith, David Stone, and Randy Wanamaker.

Assembly Absent: None.

Staff Present: Kim Kiefer, City Manager; John Hartle, City Attorney; Rob Steedle, Deputy City Manager; Rorie Watt, Engineering Director; Greg Chaney, Planning Manager; Amy Mead, Assistant City Attorney, and Bruce Simonson, GIS Manager.

II. PUBLIC PARTICIPATION ON NON-AGENDA ITEMS – None.

III. CONSENT AGENDA

A. Bid Awards

1. Bid E12-167
Main Street, Second to Fifth Street Improvements.

Administrative Report: Attached. The manager recommended award of this project to Arete Construction Corporation for the Base Bid and Additive Alternates Numbers 1 and 2, in the total amount bid, for an award of $2,131,429.50.

Public Comment: None.

Assembly Action:

MOTION, by Wanamaker to award this project to Arete Construction Corporation for the Base Bid and Additive Alternates Numbers 1 and 2, in the total amount bid, for an award of $2,131,429.50. Hearing no objection, it was so ordered.

IV. NEW BUSINESS

A. Petersburg Annexation – Update

Mr. Wanamaker stated that as a member of the Goldbelt Board, he had a conflict of interest. Mayor Botelho agreed, and hearing no objection, Mr. Wanamaker stepped away from the meeting.
Mayor Botelho reported on the Local Boundary Commission (LBC) hearing in Petersburg during the prior week. On all issues related to Juneau, the LBC ruled in favor of Petersburg. The purpose of the discussion tonight was to receive an update and it could lead into an executive session to discuss the pros and cons of further action. He said Amy Mead was lead counsel for the CBJ on its petition request to annex land and she was present with Bruce Simonson to provide information on the current situation.

Ms. Mead said the procedure was fatally flawed because the LBC staff failed to critically analyze the CBJ’s competing claims with respect to a contested area, which she outlined on the map displayed on the projector. Petersburg sought an entire section that CBJ also claimed, and because the LBC failed to consider CBJ’s claims with respect to that area, the LBC could not make a decision on that area without abusing its discretion. CBJ’s position was based on the reading of a Supreme Court Case, Yakutat vs. LBC. The staff received all the pleadings from the various parties and issued a report, which the LBC then considers and most often adopts. In the Yakutat case, staff recommended to the LBC that it reserve from award to Yakutat an area that Yakutat sought. The LBC did that because staff argued that the area more properly belonged in a different borough that was not “on the radar.” There was not a competing petition and Yakutat did have an overriding interest in the area, but the staff recommended that the LBC reserve this portion from the Yakutat petition. The LBC adopted that position.

Yakutat, represented by the same attorney that was representing the Petersburg petition, argued that the LBC had mistaken its role for being one of considering what the ideal boundaries for the area were, and what the LBC should have done instead was to look only at the Yakutat petition standing alone and determine whether, in and of itself, it met the standards for incorporation. That position is almost identical to the position the LBC staff took in CBJ’s case. The LBC staff told LBC that its sole question was whether Petersburg’s petition met Borough incorporation standards, and that it was not to determine what the best or ideal boundaries were for this contested area. CBJ argued that staff’s recommendation failed to consider Article X, Section 3, of the Alaska Constitution, which says that Boroughs must embrace areas and population with common interests to the maximum degree possible, and therefore the failure to critically analyze our competing claims meant that there was no way that the LBC could make a determination as to which entity shared common interests with this area to the maximum degree possible. The position CBJ took, with respect to the LBC’s role, was identical to the position that the LBC itself took in the Yakutat case. In the Yakutat case, the LBC argued to the Supreme Court that it had to look outside the four corners of the petition in order to meet its constitutional obligation to make this determination about “shared common interests in the area to the maximum degree possible.” It argued that it had to consider alternative boundaries and that it had to make decisions about the best and most ideal boundaries. The Supreme Court agreed with the LBC’s position, which is what CBJ argued to the LBC. The Supreme Court said that when the LBC makes a decision, it “presupposes a thorough consideration of alternative boundaries and a decision as to what boundaries would be optimal.” CBJ argued the LBC could not make a finding that both Petersburg and CBJ met this constitutional standard, therefore, the LBC’s failure to consider and critically analyze CBJ’s competing claim meant it could not create a boundary that was maximally cohesive. CBJ told the LBC that its intention was to give the LBC an idea of the nature of CBJ’s competing claim, and Ms. Mead presented some slides that were shown to the LBC.

Mayor Botelho said there was an earlier procedural issue about consolidation and asked Ms. Mead to explain. Ms. Mead said the LBC regulations allowed for the consolidation or postponement of a petition when there was a competing petition filed. The regulation allowed the LBC to consolidate petitions if the subsequent petition was filed within 90 days of the
public notice of the first petition. CBJ met that standard and asked the LBC to consolidate the petitions and the LBC declined to do so based on a staff recommendation that Petersburg had filed its petition seven months earlier and therefore it would be unfair to the people of Petersburg to consolidate the proceedings. CBJ argued in a public hearing that that was an abuse of the LBC’s discretion because although Petersburg had submitted its petition seven months earlier, it had not completed technical review and there was no public notice of it until August. CBJ’s position was not well taken by the staff or by the LBC and they declined to consolidate. It was for this reason that we argued consolidation was appropriate, as there was no way that the LBC could meet its constitutional obligation to make its determination unless it considered both at the same time given the amount of overlap in the areas contested was 100%.

Ms. Mead reviewed the presentations before the LBC from CBJ and other Juneau area representatives at the recent hearing. She said a representative of the Alaska Department of Fish and Game (ADF&G) presented a map showing Petersburg residents’ subsistence use, which was almost all outside of the contested area. A cultural anthropologist said the Taku and Kake people had a claim to all of the contested area, none of which had any connection to the City of Petersburg. Mr. Simonson displayed slides showing the administrative, regional, and political boundaries and the extent of overlap, which was argued to the LBC that all areas were managed from Juneau, indicating best management practices and logistical challenges of having the areas managed from Juneau but in the Petersburg Borough boundaries. An Associate Hydrology professor explained the watersheds and drainages in the area and how the staff’s recommendation, in light of those, did not meet the standards of compliance with the natural geography. Petersburg’s main argument for its claim regarded fishing in the area, referring to the contested area as Petersburg’s “backyard” and “breadbasket.” A Juneau commercial fisherman showed that the Petersburg fleet fished only small portions of the contested area and that the Petersburg fishermen fish all of Southeast Alaska, so the economic gain from this area for Petersburg fishermen was 2.25% of the overall fishing effort and the number of days they fished in the area was 4.2 days out of 365. Malcolm Menzies discussed the logging efforts at Hobart Bay, which were provisioned almost exclusively out of Juneau. Assemblymember Stone spoke about the mining history of the area. The SE Project Director of Trout Unlimited testified about Juneau residents’ use of the area for sports fishing, Wayne Regelin testified about commercial guiding and sport hunting in the area. A representative of the USFS testified about the agency’s permitting of the area, which illustrated the use of the area with respect to tourism, and Mayor Botelho testified about CBJ’s prior annexation efforts. Ms. Mead said other than the fishing arguments and some fox farming examples, there was virtually no testimony from Petersburg about its connection to the contested area or the use of the land in the area, other than some hunting by fishermen and storage of crab pots. The LBC was not impressed and chose to not consider the CBJ’s competing claims and determined that because Petersburg put on a sufficient case on its face to meet the statutory and regulatory standards they adopted the LBC staff’s recommendation to award Petersburg its petition in full up to Tracy Arm, and left Tracy Arm in the Unorganized Borough for now. The state cartographer was preparing the meets and bounds description and when finished, a final report would be issued and the LBC decision would be final.

Ms. Becker asked if Goldbelt Corporation testified. Ms. Mead said yes, it gave compelling testimony about its historical use of the area and their interest in Hobart Bay being included in a Borough with Kake and possibly Angoon. Katherine Eldemar stated also possibly in Juneau. The LBC declined to consider that testimony, stating that Goldbelt had made other statements in the past, so it would not be given much weight.
Mayor Botelho said the City of Kake also testified in opposition of inclusion of that area into the Petersburg Borough, and it was acknowledged, but not addressed.

Mr. Kiehl asked if the regulation allowing consolidation of cases used the wording “allows” or “requires.” Ms. Mead said within 90 days of public notice, the LBC was allowed discretion regarding consolidation. She reviewed past history regarding competing petitions (Denali/Mat-Su Valley’s) that were filed months apart, but a former staff member stated that the petitions were consolidated. In this case, the LBC staff said it could handle the matter in the same way they handled Wrangell and Ketchikan. The difference there was that the overlap area was only 191 square miles and involved an area where there were residents (Meyer’s Chuck) who had a say, who knew about both proceedings, and who could participate in both. Here, there was possibly only one resident in the contested area (a caretaker in Hobart Bay with a Juneau mailing address), so there was no one to participate in the proceedings. The Wrangell and Ketchikan petitions were filed within a month of each other, and the decisional meeting and the final written recommendations by the LBC staff came out within weeks of each other, so the LBC had all the information before them on both petitions. Although it is a discretionary decision to consolidate, it is not discretionary whether the LBC follows the constitutional mandate that it create boroughs that are maximally cohesive. She said the LBC needed to consolidate to meet that requirement.

Mayor Botelho said the trigger point was 90 days from the date of public notice, not from the date first submitted for filing.

Mr. Smith asked who represented the Petersburg petition and Ms. Mead said it was Jim Brennan. He asked for more information about the standards presented in the Petersburg petition. Ms. Mead said there was a constitutional idea that borough boundaries were to embrace an area and population with common interests to the maximum degree possible. There was statutory language and regulations that guide the LBC on “maximum cohesiveness.” These included the history of the area, a population’s use of the area, the economics, the natural geography, administrative boundaries, and others. In this case, the decision was based entirely on the usage of the water. There was virtually no testimony by Petersburg of the use of the land mass, and so they had a difficult time understanding how LBC made its findings. Petersburg was very concerned about Juneau imposing a fish tax on the Petersburg fishermen.

Mayor Botelho said one of the specific provisions was to look at not only land use but also “land use and ownership.” CBJ provided testimony that demonstrated that in the contested area there was not a single property owner based in Petersburg. Virtually all private land ownership was connected to Juneau residents, with the exception of one in Sitka. Goldbelt was the largest single surface property owner. There was not a single property tax payer in the area that resided in Petersburg, but it was an issue that the LBC dealt with by not addressing it at all.

Mr. Smith said it seemed that the LBC staff had exercised a high degree of discretion in this case.

Ms. Mead said that each one of the CBJ witnesses’ testimony tied back to the regulations that the LBC was to consider.

Mr. Kiehl asked whether the fact that the LBC did not grant Petersburg’s entire application and left out a portion was an indication of the LBC applying its discretion. How could it be said that they did not consider Juneau’s comments when different conclusions were drawn. Ms.
Mead said the LBC staff’s recommendation regarding Tracy Arm was that the portion of Tracy Arm not currently in the CBJ Borough should be left out of the Petersburg petition so that CBJ could annex it later for the sole reason that it just seemed odd to split it in half. There was no discussion in staff’s report about Juneau using that area or a better connection to Juneau. There was not consideration or analysis at all by the LBC or staff to how the area met the constitutional standards. It was the failure to apply the constitutional standards, which dictated what the LBC could decide. The LBC had significant discretion to draw boundaries but it was not unfettered and they were bound to follow the constitutional mandates.

Mayor Botelho said the LBC staff made the recommendation on exclusion of Tracy Arm before the hearing and going in to the hearing Petersburg had acquiesced and supported the decision, so it was not contested at the time of the hearing.

Ms. Danner asked how strong Petersburg’s arguments against Juneau’s application were. Ms. Mead said Petersburg had approximately 50 witnesses and those were evenly divided between discussing the municipal services to be provided to people currently residing in the incorporation area but not in the city, and fishermen. Petersburg put on very little evidence regarding CBJ’s contested claims. This was not the first time the claims were before Petersburg. There were two separate, but related, processes in motion. There was the CBJ annexation petition process and then there was the Petersburg Petition and CBJ’s responsive brief to that petition, Petersburg’s reply brief, the LBC preliminary report, upon which both communities commented, the LBC staff final report, and the LBC hearing. CBJ made these same comments regarding the contested area and Juneau’s closer connection to that area since filing the respondent’s brief. There was very little from Petersburg contesting the land use. Petersburg contested CBJ’s claims about tourism and the use of the area by tourism companies based out of Juneau, but put forth virtually no evidence of its own.

Mayor Botelho said the testimony by Petersburg fishermen made up a significant portion of their argument as a dominant presence in the area. They stated that there were virtually no Juneau fishing activities in the contested area and that for the most part Juneau’s tourism related activities were limited to Tracy Arm, not Endicott Arm, to which Petersburg generally asserted a superior claim. On-land activities were historic fox farming, and the record indicated an equal number of fox farms were based from both Juneau and Petersburg. In addition, Petersburg fisherman claimed the land, based on storage of crab pots in Endicott Arm historically and currently.

V. EXECUTIVE SESSION

*MOTION*, by Stone, to enter into executive session to discuss legal strategy regarding annexation.

Public Comment: None.

Hearing no objection, the Assembly entered executive session at 8:04 p.m. and returned to regular session at 8:50 p.m.

Upon returning to regular session, Mayor Botelho stated that the Assembly discussed the matter of the Petersburg Annexation and would take up the matter again at the next Assembly meeting.
VI. ASSEMBLY COMMENTS AND QUESTIONS

Mr. Smith said he thoroughly enjoyed being in the Celebration parade with Mr. Wanamaker and was pleased to note that this event would be held every other year in Juneau.

Mr. Kiehl said he was enjoying some time in Anchorage with family.

VII. ADJOURNMENT - 8:52 p.m.

Signed:_________________________     Signed:_____________________________

Laurie Sica, Municipal Clerk     Bruce Botelho, Mayor