

LOCAL BOUNDARY COMMISSION

STATE OF ALASKA

In the Matter of the Petition to )  
Incorporate Nikiski as a Home Rule )  
City, )  
\_\_\_\_\_ )

RESPONSIVE BRIEF OF THE KENAI PENINSULA BOROUGH TO THE PETITION TO  
INCORPORATE NIKISKI AS A HOME RULE CITY

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## RESPONSIVE BRIEF OF THE KENAI PENINSULA BOROUGH TO THE PETITION TO INCORPORATE NIKISKI AS A HOME RULE CITY

COMES NOW the Kenai Peninsula Borough (“borough”), and hereby submits the following brief in response to the Petition for Incorporation filed by residents of the proposed City of Nikiski. This response brief is submitted pursuant to 3 AAC 110.480.

The Petition for Incorporation (“Petition”) of the City of Nikiski (“CON”) as a home rule city shall be analyzed under the applicable provisions of the Alaska Constitution, statutes, and regulations.

### I. INTRODUCTION

Article X, Section 1 of the Alaska Constitution provides the purpose of the local government article is “to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions.” AS 29.05.021(b) places the following limitation on the incorporation of a city:

A community within a borough may not incorporate as a city if the services to be provided by the proposed city can be provided on an areawide or nonareawide basis by the borough in which the proposed city is located, or by annexation to an existing city.

3 AAC 110.981(8) provides city incorporation is not appropriate where local government needs can be met by areawide or nonareawide borough powers, annexation to a city, or through an existing service area. The Petition does not meet the constitutional and statutory standards. By incorporating

CON an additional local government will be formed without demonstrated need as no additional services to those already provided by the borough are being proposed.

## II. DISCUSSION

### A. Community Standards

Exhibit G to the Petition is Petitioner's Brief ("Brief"). At Section 1, (pgs. 4-7) of the Brief, the "community" standards required for incorporation are discussed. 3 AAC 110.005 requires that the territory proposed for incorporation as a city must encompass a community. 3 AAC 110.920 sets forth how the existence of a community is determined for purposes of approving an incorporation petition. 3 AAC 920(a)(2) sets forth that a "community" is where permanent residents live in geographical proximity that allows frequent personal contacts and interaction. Inclusion of the west side of Cook Inlet ("West Side") does not meet this standard based on the evidence presented thus far by the petitioners. Cook Inlet separates the West Side from the core area of Nikiski. The West Side, and in particular the village of Tyonek and nearby area of Beluga, are geographically isolated which does not allow for frequent personal contact and interaction with the residents of the road-accessible community of Nikiski. The personal contacts and interactions of the community of Nikiski are described at length at pages 4-6 of the Brief. The interactions and places those interactions occur between residents are all in Nikiski, none are on the West Side, nor do they show any connectivity between

people of Tyonek and the people of Nikiski. The discussion of community events, commercial establishments, and community services largely excludes discussion of the West Side. The commercial establishments referenced in the Petition –Carla’s North Road Café, Treehouse Restaurant, Studio Coffee Shop, Delars, M&M Market, the Hunger Hut Bar, The Place, Forelands Bar, Charlie’s Pizza<sup>1</sup>, and La Casa Restaurant are all located within the boundaries defined by the Nikiski Community Council. The Nikiski Community Council restricts membership to “any one in the Salamatof and Nikiski voting districts.”<sup>2</sup> “The boundaries encompassing the community to be represented by the Nikiski Community Council are those boundaries which describe Nikiski One Voting District, Nikiski Two Voting District and the Salamatof Voting District”.<sup>3</sup> None of these voting districts extend to the West Side. [Ex.A]<sup>4</sup> Additionally, of the 14 churches the petitioners’ reference in their petition, only one is located on the West Side and there is no evidence that it has parishioners in attendance from the East Side.

3 AAC 110.920(a)(3) further examines whether a “community” exists by reviewing whether “the permanent residents at a location are a discreet and identifiable social unit,” as indicated by such factors as resident public school enrollment, number of sources of employment, voter registration, precinct boundaries, permanency of dwelling units, and the community services and service centers. The permanent residents of Tyonek and Beluga are not the

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<sup>1</sup> Charlie’s Pizza has recently closed.

<sup>2</sup> <http://www.nikiskicc.com>

<sup>3</sup> “Bylaws North Peninsula Community Council, Inc. d.b.a. Nikiski Community Council” at <http://www.nikiskicc.com/wp-content/uploads/2008/08/Bylaws-09-03-09.pdf>.

<sup>4</sup> Ex.A - Nikiski Voter Precinct Map

same “discrete and identifiable social unit” as the permanent residents of Nikiski and Salamatof. The communities on the West Side of Cook Inlet (Senate District P, House District 32, Anchorage Recording District) do not share voter precincts and house and senate districts with the community of Nikiski and Salamatof (Senate District O, House District 29, Kenai Recording District). [Ex.B]<sup>5</sup> Nikiski, Salamatof, Tyonek and Beluga are also all separate census-designated places (“CDP”). [Ex.C]<sup>6</sup> The schools in the proposed petition area are also part of separate, distinct systems; Nikiski North Star Elementary feeds Nikiski Junior and Senior High School on the East Side while Tyonek on the West Side maintains the K-12 Tebughna School for 29-30 students.<sup>7</sup>

Pursuant to 3 AAC 110.920(b)(1) there is a presumption that a community for incorporation purposes cannot be comprised of a closed community, i.e., one where “public access or the right to reside at the location of the population is restricted”<sup>8</sup>. As the petitioners acknowledge, Tyonek is such a closed community. [Petition, p.11] Further, it appears that Tyonek does not necessarily share Nikiski’s industry philosophy. [Ex.D]<sup>9</sup> The petitioners indicate that the CON will better serve Tyonek than the borough. There is no evidence to support this claim. The Charter proposes that a Nikiski City council member will be appointed as a liaison to

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<sup>5</sup> Ex.B - House & Senate District Map & Kenai Recording District Map

<sup>6</sup> Ex.C - CDP Map of Beluga, Nikiski, Salamatof & Tyonek

<sup>7</sup> <http://tebughnaschool.blogs.kpbsd.k12.ak.us>

<sup>8</sup> With regards to the Village of Tyonek in 1997, the Ninth Circuit Court of Appeals found: “There is no reasonable expectation that outsiders living in the village is likely to recur.” *Native Village of Tyonek v. Puckett*, 133 F.3d 928 (1997)

<sup>9</sup> Ex.D – BBC article “The Alaska fishing village taking on ‘Godzilla’”

Tyonek. However, since the council is to be elected at large, there is no requirement or rule that a council member be from Tyonek let alone the West Side. None of the Petition study group members are from Tyonek. [Petition, p.42] Additionally, of the 103 pages of signatures on the Petition none appear to be from the West Side, they all appear to have Nikiski or Kenai physical addresses. [Ex.E]<sup>10</sup>

The Petition provides for an exclusion from taxation for Tyonek. [Petition, p.12] The Tyonek area already enjoys tax exempt status for the vast majority of properties in the Tyonek CDP; 216 of 254 parcels are tax exempt. [Ex.F]<sup>11</sup> Of the 38 taxable parcels in Tyonek, one-half or 19, will return to tax exempt status in 2028. [Ex.G]<sup>12</sup> The Petition also asserts the inclusion of Tyonek is necessary so that the fire, senior and recreational services provided by borough contract can continue to be provided. [Ex.H]<sup>13</sup> The borough already provides these services and can continue to do so for Tyonek. Senior services are provided through borough contract with the Native Village of Tyonek. [Ex.H] While there is a Boys and Girls Club of the Central Peninsula with two club houses in Nikiski<sup>14</sup>, the contract services for the Tyonek Boys and Girls Club is with Southcentral Boys and Girls Club located in Anchorage, which further underscores the disconnect between Nikiski and Tyonek.

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<sup>10</sup> Ex.E – Petition signatures

<sup>11</sup> Ex.F – Tyonek Tax Summary

<sup>12</sup> Ex.G – Lease Agreement – Native Village of Tyonek and Cook Inlet Housing Authority (11/1/78)

<sup>13</sup> Ex.H - Boys & Girls Club and senior services contracts

<sup>14</sup> [www.bgckp.com/nikiski-middle-high](http://www.bgckp.com/nikiski-middle-high); and, [www.bgckp.com/nikiski-club](http://www.bgckp.com/nikiski-club)

The borough's Nikiski Fire Service Area currently maintains stations in Beluga and Tyonek, which are staffed by volunteers. See, KPB FY 2017 Annual Budget at p.153.<sup>15</sup> Eleven calls were made to Tyonek in 2016 and three to Beluga. [Ex.I]<sup>16</sup> The borough is equipped and prepared to continue providing these services. There is no demonstrated need to include Tyonek in the petition area, as no services will be provided that aren't already being provided by the borough.

#### **B. Need for City Government**

The Brief at Section 2 (p.5-13) discusses the need for incorporation because of Nikiski's growing population, inadequate and unsafe road maintenance provided by the borough, need for law enforcement, and need for a groundwater quality program.

The population data provided by the Brief does not support the claim of a rapidly growing population in the proposed CON. The Brief claims an increase of 6% in the population over five years and 8.5% since the 2000 US census. (Brief, p.19) However, this calculation inaccurately portrays the trend by using two different data sources. The population statistics for the non-census years are from Alaska Department of Labor annual estimates that use a different methodology than the census counts. Comparing population

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<sup>15</sup> [http://www.kpb.us/images/KPB/FIN/Finance\\_Documents/Budgets/FY2016-17/FY2017\\_KPB\\_Assembly\\_adopted\\_budget.pdf](http://www.kpb.us/images/KPB/FIN/Finance_Documents/Budgets/FY2016-17/FY2017_KPB_Assembly_adopted_budget.pdf)

<sup>16</sup> Ex.I – NFSA Dispatch Log



statistics from different sources to calculate population growth can show trends that are not there, or fail to show trends that are. Using the most recent US Census data, it appears there was a 3.8% population increase between the 2000 and 2010 census. Further, the estimates from the Alaska Department of Labor for 2011, 2015, and 2016, respectively are as follows:

Nikiski - 4,642, 4,558, 4,616  
Beluga - 19, 19, 16  
Tyonek - 183, 175, 182  
Salamatof: 1,052, 1,155, 1,097  
  
Total: 5,896, 5,907, 5,911.

These numbers reflect a five year growth from 2011 to 2016 of .25% with all the growth attributable to Salamatof.<sup>17</sup> Also, when describing education rates, individuals below poverty level, and median household income for the community, Salamatof, Tyonek, and Beluga statistics are not included, rather only the statistics for the Nikiski CDP are used. (Brief, p. 17) However, when taxable value is discussed the entire region proposed for incorporation is included. The statistics for these various attributes should use a consistent methodology, population base, and geographic area in order to present accurate information. Only providing the information for the Nikiski CDP further emphasizes the disconnect between Nikiski proper and the remaining area that is subject to the incorporation petition.

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<sup>17</sup> <http://live.laborstats.alaska.gov/pop/aboutest.cfm>; and, <http://live.laborstats.alaska.gov/pop>

The main crux of petitioners' Brief is that the city of Nikiski should be formed because the borough's road service area ("RSA") is providing inadequate service to the Nikiski area and that the tax base in Nikiski is supporting road services in areas of the RSA outside Nikiski.<sup>18,19</sup> This position requires both factual and legal clarity. The RSA is divided into five regions—north, south, west, east, and central. The north region of the RSA is entirely within the petition area for the city of Nikiski. [Ex.J]<sup>20</sup> For FY14-FY17 to date, the north region has led the RSA in cumulative road repair<sup>21</sup> work with a total of \$181,522.69 in expenditures. The west region follows with \$170,685.64. The central, east, and south regions have received \$39,097.32, \$61,869.43 and \$53,914.85, respectively. [Ex.K]<sup>22</sup> With regards to capital improvement projects ("CIP") the north region is neither at the bottom nor at the top of the project list. From 2008 to present CIP projects on 16 miles of road, totaling \$5,765,866, were completed in the north area. By comparison, for the same time period the east region had 2.5 miles of road projects at a cost of \$1,850,340, the south region had 14.2 miles improved at a cost of \$5,148,957, the central region had 28.5 miles improved at \$9,933,791, and the

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<sup>18</sup> See, Brief @ p.5-7

<sup>19</sup> The pictures of roads in the petitioners' brief are not identified and it is not known if they are borough maintained roads or where they are located.

<sup>20</sup> Ex.J – RSA Map

<sup>21</sup> "Road repair" in this context includes addressing sinkholes or more extensive muddy areas on a travel way to ensure they remain passable; minor road embankment, shoulder or ditch damage repair (with placement of additional sub-base and capping material as required) caused by localized flooding conditions or other unique events; repair and placement of geotextile fabric material and additional embankment/capping as needed to ensure road integrity.

<sup>22</sup> Ex.K – Affidavit of P. Malone

west region had 29.8 miles of CIPs at a cost of \$10,350,042. [Ex.L]<sup>23</sup> Further, the RSA's five year plan calls for an additional \$2,180,000, to be spent in the North Region of the borough's RSA. [Ex.M]<sup>24</sup>

While petitioners argue that major capital projects are constructed for the remainder of the borough, but not for Nikiski, the evidence does not support this statement. The Spur Highway extension project is a federal grant project located in Nikiski and is the largest road project ever undertaken by the RSA. It has absorbed significant borough staff time and resources. Since 1996 the assembly has adopted nine resolutions and five ordinances regarding this ongoing project. This approximate \$6,000,000 project which is in the engineering phase is located entirely within the petition area. [Ex.N]<sup>25</sup>

Another inaccuracy in the Petition is the statement that Nikiski residents are footing the bill for the road improvements in the remainder of the RSA. A large portion of the tax revenue in the Nikiski area is not from the residents, rather it is from the oil and gas industry (oil and gas exploration, production and transportation as identified in AS 43.56). Based on the FY17 Nikiski Fire Service Area budget, AS 43.56 oil and gas property provides about \$1,108,088,210 of the taxable value. [Ex.O]<sup>26</sup> The Tesoro refinery, Agrium fertilizer plant and Conoco Phillips LNG production facility, assessed outside of AS 43.56, provide an additional \$282,866,900 in taxable value in the Nikiski Fire Service Area. [Ex.O] In comparison, Nikiski residents provide \$495,258,937

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<sup>23</sup> Ex.L – H. Knackstedt 1/30/17 Summary

<sup>24</sup> Ex.M – RSA Capital Project Fund 5-Year Projected Revenues & Appropriations

<sup>25</sup> Ex.N – Extended Kenai Spur Highway-North Road Memorandum of Agreement & Match Agreement

<sup>26</sup> Ex.O – Nikiski Fire Service Area – 2016 Taxable Totals

in real and personal property taxable value. The residents of Nikiski pay the same 1.4 mill for road services as do the other property owners throughout the RSA.

While the petitioners assert that a minimal amount of money and attention is given roads in the Nikiski area the borough intervened in a lawsuit and spent significant staff and attorney time to establish road access rights to the Nikiski area beach.<sup>27</sup> Petitioners' claims of disparate treatment in road services is not supported by any objective analysis of available information. Further, tax benefit and burden are not legally required to be equal. The validity of a tax does not depend on whether a taxpayer receives a special benefit.<sup>28</sup>

As the US Supreme Court has stated:

A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve the abandonment of the most fundamental principle of government—that it exists primarily to provide for the common good.<sup>29</sup>

The RSA encompasses a much greater area than the north Kenai Peninsula. AS 29.05.130 “Integration of special districts and service areas” provides:

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<sup>27</sup> *OSK v. AK DOTPF*, 292 P.3d 48 (AK 2012)

<sup>28</sup> *Devilbiss v. Matanuska Susitna Borough*, 456 P.3d 290 (AK 2015)

<sup>29</sup> *Carmichael v. Southern Coal & Colke Co.*, 57 S.Ct. 868 (1937)

A service area in a newly incorporated municipality shall be integrated into the municipality within two years after the date of incorporation. On integration the municipality succeeds to all the rights, powers, duties, assets, and liabilities of the service area.

This statute assumes that the city being formed will have the same boundaries as a service area or that the service area will be smaller than the city that is being formed. Pursuant to AS 29.35.450(a) to be included in a service area the city needs to agree either by ordinance or a popular vote held both inside and outside the city. However, under the present statutory scheme it is not an option to allow an incorporating city to secede from a much larger service area and simply start providing the service itself. In addition to this serious legal impediment there are practical difficulties of what assets and liabilities the new city would assume. While it may be evident that the roads within the north region of the RSA would be the assets that would be assumed by the CON, the RSA is a large service area encompassing almost the entire borough outside the various city limits. Its tax revenues are to be used throughout this entire area otherwise it undermines the rule of law that the taxes in the service area are for the common good throughout that service area and not for the specific benefit of particular persons.<sup>30</sup>

The Charter proposes one new service in an odd way “Disaster Planning and Cooperative Response (a) Law Enforcement. The City of Nikiski will address its need or desire for local Law Enforcement as appropriate by public vote through the City Council. Currently, the City Area Law Enforcement relies on Alaska State Troopers.” (underlining in original). [Charter, p.6] There is no

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<sup>30</sup> Ex.P – Omitted

guarantee in the Charter that CON will provide law enforcement. While law enforcement could have been established by Charter which would be voted upon by the residents the decision is being left to the city council. (Elsewhere in the Petition it states the voters will decide the law enforcement issue after incorporation.) [Brief, p.28] Law enforcement is not a service currently provided and would require additional tax revenue to support. Further, it is likely that as a home rule city, Nikiski would receive less Alaska State Trooper (“AST”) support than it currently receives. Trooper stations have been closed throughout the state including posts in Girdwood, Talkeetna, McGrath, Ninilchik and Yakutat. [Ex.Q]<sup>31</sup> The AST have seen a budget reduction during the past two fiscal years of over 10 million dollars. Throughout the peninsula AST has two to three troopers on duty between 11 pm and 7 am. Further, the AST has taken the position that a city should be responsible for all the policing within its boundaries. [Ex.Q] There is an understandable concern that the CON voters will reject a charter containing such powers as the same voters in 2015 rejected a law enforcement service area. [Ex.R]<sup>32</sup> Speculation in the Petition that the service area vote failed because Nikiski residents were concerned that the money for law enforcement would be spent elsewhere in the borough is baseless. Just as the borough cannot legally spend the money for Nikiski senior and recreation service areas elsewhere in the borough it would not be legally able to do so with a law enforcement service area encompassing only Nikiski. It is more likely the vote failed because Nikiski

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<sup>31</sup> Ex.Q – AST Colonel James Cockrell’s 2/13/17 Letter to APD Chief of Police Tolley

<sup>32</sup> Ex.R - Resolution 2015-043 certifying 2015 election results

residents were unwilling to pay for the service through increased taxes and this could be true regardless of whether road service is a city function.

An additional function of water quality regulation is suggested in the Brief, but not specifically in the Charter. The contradiction with the inclusion of water quality regulation as a justification for incorporation is that the Petition also asserts that the city of Nikiski will welcome industry better than the borough. One element that encourages industry in Nikiski is the lack of such local regulation by the borough, as industry generally is more comfortable operating under consistent statewide regulations. The proposal in the Petition will require a local permitting process and Nikiski will need to provide the personnel, budget and mill levy to support that process.

Central Kenai Peninsula Hospital Service Area (“CKPHSA”) presents a similar concern as the RSA. CKPHSA which encompasses the proposed petition area is also much larger than the proposed petition area. The CKPHSA is incorrectly excluded from the service areas listed on page 17 of the petition. CKPHSA includes the Central Peninsula, Nikiski and the West Side areas of the borough. As with the RSA, it appears that to remain in the CKPHSA either the city council must by ordinance agree that the proposed city be included in the service area or the proposed city would have to approve this. AS 29.35.450(a). This vote is problematic for at least two reasons: First, essentially it would be a vote to approve a service continuing in the exact geographical region it already encompasses rendering the vote purposeless and underscoring the point that the city of Nikiski proposal as written is inconsistent with incorporation

standards that prohibit incorporation where the services are already being provided by a borough service area. Second, if the city council or voters do not approve remaining in CKPHSA, the residents of the CON would no longer be paying taxes for the hospital that will continue to be the source of their primary hospital care. Therefore, if the Petition is approved by the Local Boundary Commission, it should include a condition that incorporation is contingent on the approval that the CON remain in the service area. It would not be equitable to remaining residents of the CKPHSA to allow the CON to secede from the service area when the CON residents will continue to use the services that the remaining service area residents will continue to pay for.

At pages 10-11 of the Brief the social and economic development discussed by the petitioners appears to be limited to their belief that the proposed Alaska LNG project in Nikiski will require attention to road maintenance and construction. They assert this scenario indicates “a significant need... for the formation of local government.” Also, at pages 37-39 of the Petition outdated information is provided regarding the LNG project. The most recent information reflects that the project is in a significant slowdown. The industry partners, BP, ConocoPhillips, and ExxonMobil, last year declined to approve additional expenditures toward project development because the \$45 billion development, in their opinion, is not financially viable at this time. [Ex.S]<sup>33</sup> The state is in the process of taking over the project in an effort to keep it moving ahead, but the timeline

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<sup>33</sup> Ex.S – AKLNG 1/4/17 letter to FERC



for the transition and project development is uncertain. For example, the project sponsor must prepare answers to 420 pages of comments and questions from federal and state agencies in order to submit a complete project application to the Federal Energy Regulatory Commission (“FERC”). Until this work is completed and an application submitted, FERC cannot provide a timeline for its environmental review. Further, a project developer must show it has a legal right to a project site before FERC will accept an application as complete. The complication is that the state was not a party to the almost 650 acres of land purchased for the LNG plant and marine terminal in Nikiski by ExxonMobile, BP and ConocoPhillips. The state, through the Alaska Gasline Development Corporation is negotiating with the companies for a lease or option on the property to meet the FERC requirement - but no agreement had been reported as of March 7, 2017. Any transition to state ownership would make the property tax exempt, diluting the tax base in Nikiski. A negotiated payment in lieu of taxes by the state could replace property tax revenues, but that is unknown at this time. Additionally, the Alaska Gasline Port Authority, a municipal endeavor of the City of Valdez and the Fairbanks North Star Borough, recently filed a 210 page report with FERC urging that the LNG facility and marine terminal be located in Valdez instead of Nikiski. [Ex.S]<sup>34</sup> While borough does not believe or agree the project should be moved, this filing represents another potential delay and more uncertainty.<sup>35</sup>

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<sup>34</sup> <https://www.adn.com/business-economy/energy/2017/03/01/group-wants-gas-line-to-go-to-valdez-sparking-intramural-spat-over-alaska-project/>

<sup>35</sup> Ex.T – KSRM 3/2/17] – “Persily: LNG Project Unlikely to Move to Valdez”

In general, the economic health of Nikiski is exaggerated in the examples given in the Petition. Page 8 discusses the history of the Chevron refinery but does not acknowledge that it has been shut down and dismantled though its storage tanks remain.<sup>36</sup> The petition discusses the fertilizer plant owned by Agrium, but doesn't mention it has been closed since 2007, though the company is evaluating whether to reopen the plant in the future.<sup>37</sup> Page 8 of the Petition reports the long history of the existing LNG plant in Nikiski (now owned by ConocoPhillips) but neglects to mention that the plant did not export any LNG in 2016, was sporadic in its exports in the previous few years, is now for sale, and will lose its federal export authority 12 months from now.<sup>38</sup> The BP gas-to-liquids pilot project closed down in 2009.<sup>39</sup>

At pages 20-21 (Section 6) of the Brief, petitioners claim they meet the criteria of 3AAC 110.040(a) and AS 29.05.011(a)(2) for determining a proposed city's boundaries. The Brief does not set forth the standard in 3 AAC 110.040(a) which reads as follows:

- (a) In accordance with AS 29.05.011(a)(2), the boundaries of a proposed city must include all land and water necessary to provide the development of essential municipal services on an efficient, cost-effective level. In this regard, the commission may consider relevant factors, including
- (1) land use, subdivision platting, and ownership patterns;
  - (2) population density;

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<sup>36</sup> <http://www.upi.com/Archives/1991/04/03/Chevron-closes-Alaska-refinery/5770670654800/>

<sup>37</sup> <https://www.agrium.com/en/investors/news-releases/2007/agrium-announces-closure-kenai-nitrogen-facility>

<sup>38</sup> <https://www.adn.com/business-economy/energy/2016/11/17/conocophillips-looking-to-sell-kenai-lng-plant/>

<sup>39</sup> <http://www.petroleumnews.com/newsbulletin/660457850.html>

- (3) existing and reasonably anticipated transportation patterns and facilities;
- (4) natural geographical features and environmental factors;
- (5) extraterritorial powers of cities;
- (6) salability of land for residential, commercial, or industrial purposes; and
- (7) suitability of the territory for reasonably anticipated community purposes.

The Brief at p.20 makes some general statements about the status of land ownership in Nikiski without any supporting documentation. The Brief further states CON will welcome industry and as a result property values will rise providing a solid financial support for city government without an increase to taxpayers' mill rate. This is conjecture with no supporting documentation. When the applicable standard is reviewed the Brief by and large does not address that standard. Most notably there is no justification for why the West Side is needed to provide essential services (the standard presented in 3 AAC 110.040(a)). Factors such as population density, the geographical separation of the West Side, and existing and reasonable anticipated transportation patterns and facilities do not support inclusion of the West Side.

In Section 7 at pages 21-23 of the Brief the petitioners allege that the CON must encompass the entire area of the current Nikiski Fire Service Area because the service area has been effectively managed for 46 years and therefore a city encompassing the same area would be also. This largely ignores that the success of the service area is an entity of the borough, supported by the general government of the borough which will no longer

provide human resources, purchasing, municipal clerk functions such as elections, official training, finance and payroll, legal, land management and capital project support that the service area currently enjoys from the borough's general government.

At page 17, the Petition also projects a two million dollar subsidy or as a start-up fund from the borough's Nikiski service area taxes. To the extent it involves fund balances from service areas that are not entirely embraced by the city those funds were generated to support services throughout the service area not to provide start-up for a new city. The petitioners also inaccurately point to the service areas having fund balances as evidence that tax revenue generated by Nikiski is not being spent in Nikiski. [Petition, pg.17] First, the borough will not and legally cannot spend these funds elsewhere. Second, the fund balance is a savings account for those Nikiski services which demonstrates the borough has planned well financially and is a good steward of these service area funds.

The certain services listed in the Charter (parks and recreation, senior services, and road and emergency services) are already provided by the borough, therefore the CON does not overcome the statutory standard disallowing incorporation where the services to be provided can be provided by the borough, because they are already provided by the borough.

### C. Boundaries

The Brief in Section 8 (p.23-24) briefly addresses the standard which requires the boundaries of the proposed city may not include entire geographical regions or large unpopulated areas, except if those boundaries are justified by application of the standards and otherwise suitable for city government. 3AAC 110.040(b)(2). The Brief does not address the obvious inclusion of an entire geographical region or large unpopulated area that is the West Side in violation of the standard found at 3 AAC 110.040. As discussed above, the West Side has little in common with Nikiski proper.

Again the Brief in Section 8 proclaims that the Nikiski area's welcoming attitude toward industry, its abundance of energy, water resources and "access to the land area" will ensure industrial growth.<sup>40</sup> The Brief does not say exactly how it will welcome industry; however, the borough without zoning regulations or building permits, little land use regulation, an economic development tax exemption<sup>41</sup> and a low mill levy on real property couldn't be much more welcoming<sup>42</sup>. Further, there is no evidence demonstrating how forming a city will entice more industry to set down roots in Nikiski. The "abundance of energy and water resources" touted as forming a basis for industry already exist, incorporation of a city will not change

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<sup>40</sup> It is not clear what is meant by "access to the land area".

<sup>41</sup> KPB 5.12.116

<sup>42</sup> A review of mill levies statewide reveals that KPB has the lowest mill levy of the boroughs and unified municipalities that assess real property at 4.50 mills.

<https://www.commerce.alaska.gov/dcra/DCRARepoExt/RepoPubs/Taxable/2016-Supplement-NEW!.pdf>

that. Formation of a city alone will not encourage industry. Economics, oil and gas prices, federal and state laws and regulations, supply and demand among other factors more strongly influence industrial growth. Incorporation of a city would be a much lower factor in corporate decision making.

Pages 24 and 25 of the Brief (Section 9) is meant to address the standard set forth in 3 AAC 110.040(d). This standard provides:

If a petition for incorporation of a proposed city describes boundaries overlapping the boundaries of an existing organized borough or city, the petition for incorporation must also address and comply with all standards and procedures to alter the boundaries of the existing organized borough or city to remove the overlapping territory. The commission will consider that petition for incorporation as also being a petition to alter the boundaries of the existing borough or city.

The Brief repeats the claims made in the Petition that the CON will respect Tyonek's status as a sovereign tribe. [Brief, p.24] This standard actually requires the overlapping territory to be removed and requires the LBC to consider the petition for incorporation as a petition to alter the boundaries of the existing city. If anything, this requirement would be offensive to Tyonek's sovereignty. However, since neither Tyonek nor Beluga are organized cities under Alaska law, it appears this standard is not applicable to this petition.

The Petition also states that, with only one-ninth of the voting power on the assembly, the Nikiski assembly representative is historically outvoted on Nikiski issues. There are no resolutions or ordinances provided as exhibits to the brief that support this contention of regular 8-1 votes on issues impacting

Nikiski. The assembly has nine members apportioned according to law. [Ex.U]<sup>43</sup>  
The 2011 apportionment map reflects that the large area encompassed by Assembly District 3 which in part includes Nikiski has a similar population to the other eight assembly districts. The fact that it is a large area geographically underscores that the proposed CON contains large unpopulated areas in violation of the incorporation standard at 3 AAC 110.040(b)(2).

#### **D. Best Interest of the State**

At pages 25-27 (Section 10) of the Brief, petitioners contend that the Petition meets the “best interests of the state” standard. This standard has its origin in Article X, Section 1 of the Alaska Constitution which provides: “The purpose of this article is to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions.” AS 29.05.100(a) provides that the petition must be in the best interest of the state; otherwise it shall be rejected. 3 AAC 110.981(8) more specifically provides:

...for city incorporation or annexation in an organized borough, whether the proposal would extend local government to territory or population of the organized borough where local government needs cannot be met by the borough on an areawide or nonareawide basis, by annexation to an existing city, or through an existing borough service area.

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<sup>43</sup> Ex.U - 2011 apportionment map

All of the services the CON will provide in accordance with the Petition are already provided by “existing borough service areas” which provide road, senior services, recreational services, and fire and emergency services. The borough also provides economic development services on a nonareawide basis which includes Nikiski. KPB 19.30. Therefore, the standard set forth in 3 AAC 110.981(8) is not met. There is no commitment in the Charter to provide law enforcement services; rather this decision will be left to the city council or voters after incorporation. Therefore, there is no relief for the state from its current provision of trooper services to the Nikiski area. There is also an indication in the Petition that a permitting system will protect groundwater because “new industry” will abide by “standards written into contracts, operating agreements, and permits to engage industry”. [Petition, p.13] It is unlikely these water quality protections will be adopted unless new industry is established in Nikiski as this function is not mentioned in the charter. The Petition assumes new industry will locate in CON, merely because a city has been incorporated. As discussed above there is no evidence to support this theory. If CON wishes to develop a law enforcement and groundwater protection program it will have to pay for it. It is unlikely CON can do this without an increased mill levy to support the general government services the borough will no longer provide, despite petitioners’ projection otherwise at page 20 of the Brief. Every city in the borough has its own mill levy to support its services. [Ex. V]<sup>44</sup> Many of these cities are also served by borough

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<sup>44</sup> Ex. V - 2016 mill rate chart



service areas with additional mill levies for those services. Adding a new taxing jurisdiction to provide essentially the same services that are already being provided by an existing borough service area with the assistance of the borough's general fund and general government services does not meet the standards for incorporation as it creates a duplicative tax jurisdiction to support general government.

Whether or not the formation of CON is in the best interest of the state, it is not in the best interest of the borough. It appears under AS 29.06.470, 3 AAC 110.280 and 23 AAC 110.300, that if it becomes necessary in the future to dissolve a city within a borough, that borough may end up assuming the city's duties and liabilities.

#### **E. Charter Residency Requirement for Elective Office**

Section 11 of the Brief at page 27 states the proposed CON will not deny any person the enjoyment of any civil or political right, including voting rights because of race, color, creed, sex, or national origin consistent with 3 AAC 110.910 requirements. The Charter requires a three year residency requirement to hold public office which has been specifically held to violate the equal rights clause of the Alaska constitution.<sup>45</sup>

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<sup>45</sup> *Pelozo v. Freas*, 871 P2d 687 (AK 1994).

## **F. Essential Municipal Services**

Section 12 at page 27-28 of the Brief contends that essential services are 1) are reasonably necessary to the community; 2) promote maximum, local self-government; and, 3) cannot be provided more efficiently and effectively by another political subdivision of state as stated in 3 AAC 110.970. Here again the Brief states it is “reasonably necessary” and “unquestionably logical” for CON to provide fire and emergency services, parks and recreation services, senior service, and road services—all of which are already provided through borough service areas. The Brief states “the proposed city would also be empowered to provide local city administration, capable of capital improvement projects, economic development, community development projects, voter approved law enforcement improvements and accessibility to the residents of the territory—all functional components to maximize local self-government.” The Brief is absent any evidence of how it will be more efficient and less costly for CON to provide these services. Without the borough’s centralized payroll, human resources, insurance policies, legal, land management and capital project services it can only be more costly for the new city to provide these services. The reference to “voter approved law enforcement” indicates that another vote of the people rather than the council will be the basis for providing these services. This ignores that Nikiski has recently rejected law enforcement at the polls. The proposal of having either the council or voters consider law enforcement after incorporation indicates law enforcement is not an essential service for CON.

The Petition alleges that a public-private partnership (“PPP”) approach similar to Sandy Springs, Georgia will be a cost-effective way of delivering municipal services. Sandy Springs uses major contract companies to provide a number of city services. [Ex.W]<sup>46</sup> The CON will need to explore whether these types of companies work in Alaska. If the approach to PPP is to hire people directly, rather than contracting with companies to provide the services, those individuals will likely still be considered employees of the CON<sup>47</sup> rather than independent contractors and the associated costs such as salaries, PERS, workers compensation, medical and other employee benefits would need to be provided by CON. A comparison between Sandy Springs and the proposed CON reveals they are not very analogous communities. Sandy Springs has more than 100,000 residents, general fund revenues of more than \$100,000,000 and a total budget of more than \$400,000,000 for FY17.<sup>48</sup> In addition to almost 5 mills in property taxes, Sandy Springs also had a bed tax, a 911 fee, a car rental tax, a sales tax, an alcohol tax, a real estate transfer tax, a motor vehicle registration fee, building permit fees, business tax and insurance premium tax, and electricity and natural gas, cable TV and telephone franchise fees—that all in total provide about half of the city’s general fund revenues.<sup>49</sup> This is a very diversified revenue stream.

The Petition at page 9 also states formation of a city is necessary because other communities in the borough “have consistently voted down the

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<sup>46</sup> Ex. W - *New York Times* article “A Georgia Town Takes the People’s Business Private”

<sup>47</sup> *Benner v. Wichman*, 874 P.2d 949 (AK 1994)

<sup>48</sup> <http://www.sandyspringsga.gov/government/budget-and-finance>

<sup>49</sup> <http://www.sandyspringsga.gov/home/showdocument?id=11305>

opportunity to host big industry presence in their areas knowing the borough authorities will provide for them with Nikiski taxes.” Little evidence is provided to support this statement and the borough is unaware of what big industry the voters have rejected.

Another “essential service” CON fails to consider is a 911 emergency service communications system. Currently the borough provides call-receiving and dispatch services in the petition area. If a city is formed it will need to finance its own call and dispatch system or contract with the borough for those services. [Ex.X]<sup>50</sup>

Section 13 of petitioners’ Brief contends that incorporation is the only means by which residents of the territory can receive essential municipal services as described in 3 AAC 110.982(6). Again, this section of the brief argues without evidence that Nikiski is neglected and ignored by the borough and states that incorporation is the only viable solution. At page 10, the petitioners compare Nikiski to other municipalities within the borough that have incorporated to ensure maximum local self-government. However, of the six incorporated cities in the borough only one, Soldotna, incorporated after the borough was established<sup>51</sup>. The cities did not incorporate to separate from the borough in pursuit of self-determination; rather their existence predated the borough. According to the Final Report on Borough Government at page 17, as quoted on the Local Boundary Commission’s website, “local government

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<sup>50</sup> Ex.X – –KPB and various city ordinances; Boedecker memo

<sup>51</sup> <http://dcra.commerce.alaska.gov/ComBoroMap/CRMap.pdf>

principles in Alaska's Constitution view a borough with no city governments as the ideal structure for the delivery of local services. The drafters of the Local Government Article of Alaska's Constitution 'viewed the long-term relationships between the borough and the city as a gradual evolution to unified government'."

### III. CONCLUSION

Realistically, the CON is not proposing to provide any services not already provided by borough on a nonareawide basis or through service areas. Therefore, its incorporation would violate 3 AAC 110.981(18). The incorporation would add another taxing jurisdiction without enhancing or adding services in violation of Article X, Section 1 of the Alaska Constitution providing for a minimum of local government units and the prevention of duplication of tax-levying jurisdictions. The inclusion of the West Side violates the prohibition on the inclusion of a closed community (Tyonek) in incorporation and also does not meet the community connectivity standards.


IV. RESPONDENT'S REPRESENTATIVE

As required by 3 AAC 110.480 Respondent Kenai Peninsula Borough designates the following individual as its representative:

Mike Navarre, Borough Mayor  
144 N. Binkley Street  
Soldotna, AK 99669  
Tele: (907)714-2150  
Fax: (907)714-2377  
Email: [mnavarre@kpb.us](mailto:mnavarre@kpb.us)

RESPECTFULLY SUBMITTED this 8 day of March, 2017, at Soldotna, AK.

KENAI PENINSULA BOROUGH

  
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Mike Navarre  
Borough Mayor

## EXHIBIT INDEX & EXHIBITS A -X

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<u>EXHIBIT</u>	<u>DESCRIPTION</u>
A	Nikiski Voter Precinct Map
B	House & Senate District Map & Kenai Recording District Map
C	Census Designated Places Maps (Beluga, Nikiski, Salamatof & Tyonek)
D	BBC Article "Alaska Fishing Village Taking on Godzilla"
E	Petition Signatures
F	Tyonek Tax Data Summary
G	Tyonek Lease w/Cook Inlet Housing
H	Contracts for Boys & Girls Club & Senior Services Re Tyonek
I	Alarm Analysis by District (1/1/16-12/31/16 NFSA Dispatch Log)
J	RSA Map
K	Pat Malone Affidavit
L	H. Knackstedt Summary 1/30/17
M	RSA - 5 Year Plan
N	N. Road Extension Grant & Project MOA
O	NFSA Taxable Totals Summary
P	OMITTED
Q	AST Director Cockrell's letter to APD Police Chief Tolley
R	Resolution 2015-043 Certifying Election Results
S	January 4, 2017 letter to FERC from AK LNG
T	KSRM website summary of "Persily: LNG Unlikely to Move to Valdez"3/12/17
U	2011 Apportionment Map
V	2016 Mill Rate Chart
W	<i>New York Times</i> article "A Georgia Town Takes People's Business Private"
X	911 Ordinances & Boedecker Memo