



# Local Boundary Commission Statement of Decision

## IN THE MATTER OF THE PROPOSAL TO DISSOLVE THE CITY OF SKAGWAY AND INCORPORATE A SKAGWAY BOROUGH

### Members

*Kevin Waring*  
Chairperson  
At-Large

*Myrna Gardner*  
Member  
First Judicial District

*Robert Harcharek*  
Member  
Second Judicial District

*Allan Tesche*  
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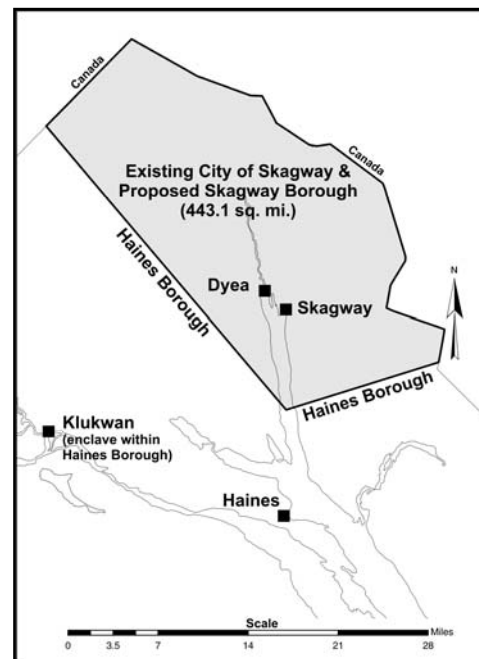
*Ardith Lynch*  
Vice-Chairperson  
Fourth Judicial District



## SECTION I OVERVIEW

Fifty-eight qualified voters in Skagway have petitioned the Local Boundary Commission to concurrently incorporate a Skagway borough and dissolve the City of Skagway. Section II of this decisional statement summarizes the specific proceedings in this matter.

The City of Skagway is a first class city in Alaska's unorganized borough. The Petitioner proposes to incorporate a first class borough in place of the City of Skagway. The boundaries of the proposed Skagway borough are identical to those of the existing City of Skagway. Moreover, the Petitioner intends that the proposed borough exercise the identical powers at the same levels currently exercised by the City of Skagway. Thus, approval of the Petition would result in no change in the capacity or practice of the Skagway local government with respect to local services.



Evidence suggests that the Petition is motivated largely, if not exclusively, by local concern that the Alaska Legislature or an existing borough will initiate proceedings to combine Skagway with other communities in an existing or proposed borough without the consent of Skagway voters. The Commission stresses, however, that approval of the Petition would not preclude such. Further, denial of the Petition would maintain the status quo (i.e., the first class City of Skagway in the unorganized borough) that has been in place since 1961.

AS 29.05.100 provides that the Commission may approve the Petition only if the Commission determines that it meets every applicable standard established in the Constitution of the State of Alaska, Alaska Statutes, and the Alaska Administrative Code. In all, the Skagway proposal must meet eighteen specific standards before the Commission may approve it. The Commission identifies and addresses each of those standards in Section III of this decisional statement.

All five members of the Commission were present at the public hearing and decisional session regarding the Skagway borough proposal held in Skagway. In its evaluation of the proposal, the Commission considered the Petition, written public comments on the Petition, the Preliminary Report of the Department of Community and Economic Development (DCED), written public comments on DCED's Preliminary Report, and DCED's Final Report.

Additionally, the Commission toured portions of the proposed Skagway borough. The Commission also held an extensive public hearing on the proposal in Skagway.

Based on the written record, observations during the tour of the territory, and testimony at the public hearing in Skagway, the Commission unanimously concludes that the Petition does not meet all requisite standards. Consequently, the Commission is compelled to deny the Petition. Details about the findings and conclusions of the Commission regarding each of the eighteen standards at issue are provided in Section III of this decisional statement.

## **SECTION II**

### **BACKGROUND AND PROCEEDINGS**

#### **A. LOCAL INTEREST IN BOROUGH GOVERNMENT PRECEDING THE FILING OF THE PETITION**

The record in this proceeding indicates that officials and other residents of Skagway have contemplated proposals for borough formation intermittently at least since the 1970s.

Local discussions leading to the pending Petition appear to have begun in earnest in July 1997. From the beginning, DCED<sup>1</sup> was candid and forthright with local officials regarding the agency's preliminary policy views concerning a prospective Skagway-only borough proposal. Those preliminary policy views reflected concern that the prospective proposal was not consistent with the concept of borough government. Therefore, DCED expressed the position that it would be difficult to satisfy the legal standards established for incorporation of a borough.

Notwithstanding, Skagway officials initiated efforts to draft the borough proposal in August 1998. Despite its policy views regarding the prospective proposal, DCED worked with local officials and their affiliates to provide both technical assistance and to continue to convey DCED's policy views relating to the prospective proposal.

In the fall of 1999, the City of Skagway submitted a complete draft of the borough proposal to DCED for technical and policy review. DCED completed its review of the proposal in December of that year. At that time, DCED reiterated its policy concerns regarding the prospective proposal.

#### **B. FORMAL PETITION SUBMITTED TO DCED AND ACCEPTED FOR FILING**

On January 22, 2001, voters in Skagway submitted to DCED the *Petition for Dissolution of the City of Skagway and Incorporation of a Skagway Borough* ("Petition").

Sixty-four individuals signed the Petition. It was subsequently determined that fifty-eight of the signatures were from qualified voters.<sup>2</sup> The fifty-eight signatures were sufficient to satisfy the requirements of AS 29.05.060(7) for filing the Petition. On October 23, 2001, DCED completed its technical review of the Petition and accepted it for filing.

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<sup>1</sup> Reference is made throughout this decisional statement to DCED as the agency that provides staff support to the Local Boundary Commission (AS 44.33.020(4)). However, DCED was not created until 1999 (Chapter 58 SLA 1999) through the consolidation of the Department of Community and Regional Affairs (DCRA) and the Department of Commerce. References to DCED for matters that occurred prior to the 1999 consolidation should be construed to mean DCRA.

<sup>2</sup> The group of fifty-eight qualified voters is referred to collectively as the Petitioner.

### **C. PUBLIC NOTICE OF THE FILING OF THE PETITION**

Under 3 AAC 110.640, the Chair of the Commission set December 28, 2001 as the deadline for receipt of responsive briefs and comments on the Petition.

Notice of Filing of the Petition was given in accordance with 3 AAC 110.450. Specifically, notice was published as display advertisements in the *Juneau Empire*, *Chilkat Valley News*, and *Skagway News*. Notice was also published through the *Alaska Online Public Notice System* and on the LBC Internet Web site maintained by DCED.

Notice was also mailed to 61 potentially interested individuals and organizations, including the mayors of the City of Skagway, City of Haines, and the Haines Borough. Requests for public service announcements of the filing of the Petition were submitted to radio stations KHNS-FM and KINY-FM which serve the territory proposed for incorporation. Further, notice of the filing of the Petition was posted at the Skagway City Hall, Skagway Post Office, and Skagway Public Library.

### **D. SERVICE OF THE PETITION**

The Petitioner served copies of the Petition upon the City of Skagway, City of Haines, and Haines Borough. The Petitioner also made copies of the Petition materials available for public review at the Skagway City Hall and Skagway Public Library. In doing so, the Petitioner satisfied the requirements of 3 AAC 110.460.

### **E. RESPONSIVE BRIEFS AND COMMENTS**

No responsive briefs were filed under 3 AAC 110.480 in opposition to or in support of the Petition. However, forty-three written comments concerning the proposal were received by the December 28, 2001 deadline.

With two exceptions, the comments consisted of pre-printed postcards stating, "I SUPPORT THE CITY OF SKAGWAY INCORPORATING AS THE MUNICIPALITY OF SKAGWAY IN A FIRST CLASS BOROUGH."

Beyond the pre-printed postcards, Barbara Kalen wrote a one-page letter endorsing the Skagway borough proposal. In addition, Tim Bourcy, Mayor of the City of Skagway, wrote a two-page letter elaborating on aspects of the Petition. Attached to Mayor Bourcy's letter was *Resolution No. 2001-22R* of the Skagway City Council, supporting the formation of the proposed Skagway borough.

In addition to the comments noted above, the Haines Borough Assembly adopted Resolution Number 537, "A Resolution of the Haines Borough Asking the Local Boundary Commission to Grant the City of Skagway's Request to Incorporate as a First Class Borough." The resolution was adopted on November 20, 2001, by a vote of 4 to 0.

### **F. REPLY BRIEF**

Since no formal responsive briefs were filed and all timely comments supported the Skagway borough proposal, a reply brief from the Petitioner was unnecessary and none was filed.

### **G. DCED PRELIMINARY REPORT**

In June 2002, DCED completed its *Preliminary Report on the Skagway Borough Incorporation Proposal* ("Preliminary Report") under 3 AAC 110.530(b). The Preliminary Report consisted of 128 pages of background information, analysis, and conclusions. Additionally, the Preliminary Report included seven appendices comprising 98 pages. The appendices provided additional background materials and analysis.

DCED concluded in its Preliminary Report that the Skagway borough proposal did not meet nine of the eighteen applicable standards established in the Constitution, Alaska Statutes, and the

Alaska Administrative Code. Consequently, DCED's Preliminary Report recommended that the Commission deny the Petition.

The Preliminary Report was released to the Petitioner and its consultants in an electronic format on June 28, 2002. DCED mailed printed copies of its Preliminary Report to ninety-two potentially interested individuals and organizations on July 1, 2002. Additionally, the report was transmitted in an electronic format to twenty-three others in early July. Under 3 AAC 110.640, the Commission Chair set July 31, 2002, as the deadline for receipt of comments on DCED's Preliminary Report.

## **H. SCHEDULING OF LBC HEARING**

The Petitioner and Skagway officials repeatedly urged the Commission to hold its public hearing on the Skagway borough proposal at the earliest opportunity. The Commission Chair acceded to the request and directed DCED to confer with the Petitioner's Representative to determine the most suitable date for the hearing.

On July 15, 2002, the Petitioner's Representative advised DCED that "it was the desire of the mayor to continue to move this process forward as quickly as possible." At that time, the Petitioner's Representative expressed a preference that the hearing be held August 31, 2002.

During its July 18, 2002 meeting, Commission members considered the Petitioner's express preference to hold the hearing on August 31. At the time, there were two vacancies on the Commission. The Petitioner had been aware of those vacancies for some time.

The prospect existed that the Governor would appoint individuals to fill the two vacancies before the hearing. However, the Commission had no assurance that such would be done. During its July 18 meeting, the three incumbent members of the Commission agreed to hold the Skagway hearing on August 31 beginning at 2:00 p.m. However, they directed DCED to confer with the Petitioner's Representative to insure that he had considered the potential disadvantage of holding a hearing in the event Commission vacancies remained on August 31.<sup>3</sup>

On July 18, DCED discussed the matter with the Petitioner's Representative. Four days later, the Petitioner's Representative advised DCED that he had conferred with others involved with the Petition on the issue and that, "we want to proceed as expeditiously as possible." Accordingly, DCED proceeded with notice of the August 31, 2002 hearing.

## **I. NOTICE OF LBC HEARING**

Formal notice of the August 31 hearing was given by DCED in accordance with 3 AAC 110.550. This included publication of the notice as a display ad in the *Skagway News*, *Juneau Empire*, and *Eagle Eye News*. Additionally, notice was posted on the Internet through the *Alaska Online Public Notice* system and on the Commission's Web site. Further, DCED provided notice of the hearing at the July 25 informational meeting.<sup>4</sup> Additionally, notice of the hearing was included in DCED's Final Report. Moreover, the notice was posted at the Skagway City Hall, Skagway Post Office, and Skagway Public Library. The notice was also placed with the Petition materials available for public review at the Skagway City Hall and the Skagway Public Library. Lastly, DCED submitted a request to KHNS for a public service announcement of the notice of the hearing.

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<sup>3</sup> The potential disadvantage related to the requirement for three affirmative votes to approve a petition (3 AAC 110.570(d)). If only three members considered the Petition, approval would require unanimous agreement by those three members.

<sup>4</sup> Seventy-five copies of the written notice were made available at the hearing. As noted earlier, there were 20 – 25 individuals present at the hearing. At the end of the informational meeting, DCED gave the Petitioner's Representative all remaining copies of the notice for his discretionary distribution.

## **J. APPOINTMENT OF TWO NEW MEMBERS TO THE LOCAL BOUNDARY COMMISSION**

Governor Tony Knowles appointed two individuals to fill the vacancies on the Local Boundary Commission on July 18. Myrna D. Gardner of Juneau was appointed to serve as the Commissioner from the First Judicial District. Bob Harcharek of Barrow was appointed to serve as the Commissioner from the Second Judicial District.

## **K. DCED INFORMATIONAL MEETING**

On July 25, 2002, DCED conducted a duly noticed public informational meeting concerning the Skagway borough proposal as required by AS 29.05.080(a) and 3 AAC 110.520.<sup>5</sup> The meeting was held in the Skagway City Council chambers.

## **L. WRITTEN COMMENTS ON DCED'S PRELIMINARY REPORT**

Two sets of written comments on DCED's Preliminary Report were submitted by the previously noted July 31, 2002 deadline. One was a thirty-page letter (with three pages of attachments) from the City of Skagway signed by Mayor Bourcy. The other was a two-page letter from Skagway City Council Member Mike Korsmo.

## **M. DCED FINAL REPORT**

In accordance with 3 AAC 110.530(d), DCED prepared its Final Report on the Skagway borough proposal in early August. The report addressed the written comments on DCED's Preliminary Report. The Final Report also addressed significant developments that had occurred regarding the Skagway borough proposal since the Preliminary Report was issued.

DCED's Final Report affirmed the analysis and conclusions set out in the Preliminary Report with respect to all standards except the city dissolution standard. In its Preliminary Report, DCED had concluded that the city dissolution standard was met. However, based on subsequent comments by the City of Skagway, DCED expressed the conclusion in its Final Report that the standard was not met. DCED stressed, however, that the deficiency with respect to that particular standard was a minor technicality that could be readily resolved through an amendment of the Petition by the Commission. However, satisfaction of nine other fundamental standards was, in DCED's view, problematic. Consequently, DCED affirmed its preliminary recommendation that the Commission deny the Petition. On August 9, 2002, ninety-three copies of DCED's Final Report on the Skagway Borough Proposal were distributed.

## **N. ORIENTATION FOR NEW MEMBERS OF THE COMMISSION**

On August 10, 2002, the Commission held an orientation session for the two newly-appointed members. All five members of the Commission participated in the orientation session. Additionally, DCED staff and local government experts Vic Fischer and Lee Sharp participated in the orientation session.

## **O. SUBMISSION OF WITNESS LIST**

In accordance with 3 AAC 110.550(e), on August 15, 2002, the Petitioner submitted to DCED a list of witnesses that it planned to call to provide sworn testimony at the hearing. The following eight individuals were named in that regard:

1. Tim Bourcy, Mayor, City of Skagway;
2. Robert W. Ward Jr., City Manager, City of Skagway;
3. Wayne Selmer, U.S. Postmaster, Haines;

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<sup>5</sup> The informational meeting is summarized in DCED's Final Report. According to DCED, approximately 20 – 25 persons attended the meeting at the Skagway City Hall. The meeting lasted just over two hours. Seven individuals offered remarks to DCED during the meeting.

4. Robert Blasco, City Attorney, City of Skagway;
5. Michael Brant, Former Director, Yukon Trade and Investments;
6. Kirby Day, Director of Operations, Princess Tours;
7. Kathie Wasserman, partner in the consulting firm of Solutions Inc., Mayor of Pelican, and former member of the Local Boundary Commission; and
8. John Mielke, former Mayor of Skagway, employee of White Pass and Yukon Route.

#### **P. REQUEST FOR POSTPONEMENT OF THE HEARING**

On August 21, 2002, ten days before the scheduled date of the hearing, the Petitioner's Representative asked the Commission Chair, through DCED, to postpone the hearing for approximately nine months (until late May or early June of 2003). The request was founded upon perceived inadequacies regarding the Petitioner's list of witnesses for the August 31, 2002 public hearing.

The Commission Chair denied the request to postpone the hearing. On August 23, 2002, attorney Robert Blasco wrote to the Commission Chair, through DCED, on behalf of the Petitioner and the City of Skagway seeking reconsideration of the decision not to postpone the hearing.<sup>6</sup>

The Chair denied the request for reconsideration, citing the following circumstances:

- The public hearing date was set in response to insistent requests from Petitioner's Representative with the reported endorsement of Mayor Bourcy and other Petition supporters;
- By the time the public hearing date was set, the Petitioner's Representative and local officials had opportunity to review DCED's Preliminary Report, and its analysis and recommendations on the Petition (issued June 28, 2002); DCED's position remained essentially unchanged in the Final Report (issued August 9, 2002);
- The Petitioner's Representative and City officials were aware that the Commission had two vacant seats (since filled), and were eager to proceed nonetheless;
- The City of Skagway had, for some time, urged DCED and the Commission to expedite their work on the Petition; and
- State law (3 AAC 110.640(a) and (b)) defines the timetable for Local Boundary Commission action on a petition. The scheduled August 31, 2002 public hearing date complied with that law.

In denying the request for reconsideration, the Chair stressed that by proceeding with the public hearing as scheduled, the Commission would be in a position to address the reasons given for the proposed postponement. Specifically, the Petitioner would have an opportunity to seek relaxation of the Commission's procedural regulations under 3 AAC 110.660, so that it may present additional sworn witness testimony. The Chair stressed that if, at the end of the August 31, 2002 public hearing, the Commission determined that more time was warranted for the Petitioner to present additional sworn witnesses, the Commission could vote to recess the hearing until a later date for that purpose. Additionally, proceeding as scheduled would enable the Commission to visit Skagway during the visitor season as desired by Petitioner.

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<sup>6</sup> Commission member Allan Tesche advised DCED on August 27 that Mr. Blasco had sent written materials directly to him. Without reading them, Commissioner Tesche forwarded the materials to DCED because 3 AAC 110.550(b) prohibits ex parte communication with Commission members. DCED later determined that the materials consisted of a copy of Mr. Blasco's August 23, 2002 request for reconsideration. Mr. Blasco and his clients were reminded of the prohibition on ex parte communication with the Commission in an August 27 letter from the Attorney General's office. No other member of the Commission reported any attempted improper ex parte communication in this proceeding.

The Chair stressed that in considering the August 21, 2002 request for postponement, his overriding purpose was to ensure the Commission's ability to make a reasonable, informed decision on the Petition, without needless delay or expense, consistent with constitutional, statutory and regulatory requirements, and broad statewide public interest.

### **Q. ONE HOUR POSTPONEMENT DUE TO WEATHER**

On the morning before the hearing (August 30), information obtained from the National Weather Service indicated a limited chance that the weather in the Lynn Canal area would offer favorable aviation conditions on the following day. Consequently, the Chair of the Commission directed staff to arrange travel from Juneau to Skagway via the Alaska Marine Highway. The *MV Malaspina* was scheduled to depart Juneau on August 31 at 7:00 a.m. and arrive in Skagway at 1:45 p.m.

The change in travel plans compelled the Chair to provide notice under 3 AAC 110.550(d) that the hearing would be postponed for one hour.<sup>7</sup> DCED prepared notice of the one-hour postponement and provided it to the Petitioner for posting in accordance with 3 AAC 110.550(d). Additionally, in the morning of August 30, DCED submitted a request to KHNS for notice of the one-hour postponement to be broadcast beginning immediately through 3 p.m. the following day.

### **R. HEARING AND TOUR**

Immediately before the hearing, the Petitioner submitted a revised witness list to the Commission Chair. The names of six of the eight individuals on the original August 15 witness list remained on the revised list (Tim Bourcy, Robert W. Ward Jr., Wayne Selmer, Michael Brant, Kathie Wasserman, and John Mielke). The names of two individuals on the original list did not appear on the revised list (Robert Blasco and Kirby Day). Lastly, four individuals whose names did not appear on the August 15 list appeared on the revised list. They were:

1. Jan Wrentmore, Skagway resident, Skagway business owner, and lobbyist for the City of Skagway;
2. Sioux Plummer-Douglas, Juneau resident and former mayor of the City of Skagway;
3. Carl Rose, Skagway resident and Executive Director of the Association of Alaska School Boards; and
4. Bill Thomas, resident of Haines, former commercial fisherman, lobbyist, former Chairman of Klukwan, Inc., Chairman of Chilkat Cruises and Tours.

The Commission convened the hearing on August 31 at 3:00 p.m. in the Skagway City Council chambers, as rescheduled. Approximately 60 individuals attended.<sup>8</sup>

The hearing began with introductory remarks by the Chair concerning the Commission and the nature of the proceeding. Next, DCED presented a summary of its analysis, conclusions, and recommendation to the Commission. Tim Bourcy made opening remarks on behalf of the Petitioner. The opening remarks were followed by sworn testimony by the ten witnesses named on the Petitioner's revised witness list. The witnesses appeared in the following order.

1. Bob Ward,
2. Michael Brandt,
3. Wayne Selmer,
4. Jan Wrentmore,
5. Sioux Plummer-Douglas,
6. Bill Thomas,

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<sup>7</sup> 3 AAC 110.550(d) states, "[t]he commission may postpone the time or relocate the place of the hearing by conspicuously posting notice of the postponement or relocation at the original time and location of the public hearing, if the hearing is relocated within the same community or territory and is rescheduled no more than 72 hours after the originally scheduled time."

<sup>8</sup> During the hearing, neither the Petitioner, City officials, or members of the public raised concerns or objections regarding the time, date, place, or notice of the hearing and decisional session.

7. John Mielke,
8. Kathie Wasserman,
9. Carl Rose, and
10. Tim Bourcy.

Following the testimony of Bill Thomas, the Chair recessed the hearing at 6:15 p.m. The Chair announced that the hearing would reconvene at 8:30 p.m. During the recess, the Commission toured Dyea and other parts of the territory by automobile for approximately ninety minutes.

At the conclusion of the testimony by witnesses called by the Petitioner, the Chair invited members of the public to offer comments on the proposal to the Commission. Seven individuals did so in the following order:

1. "Buckwheat" Donahue,
2. Stan Selmer,
3. Scott Mulvihill,
4. Barbara Kalen,
5. John Tronrud,
6. Mike Korsmo, and
7. Dennis Busson.

Following the period of public comment, the Petitioner made its closing statement. Comments in that regard were offered by Robert Blasco, attorney for the City of Skagway, and Tim Bourcy.

The hearing concluded at approximately 10:35 p.m. The Chair recessed the meeting briefly at that time.

## **S. DECISIONAL SESSION**

The Commission convened a decisional session at approximately 10:45 p.m. During the decisional session, the Commission reached findings and conclusions outlined in Section III of this decisional statement. The decisional session concluded at 12:35 a.m., September 1, 2002.

## **SECTION III REVIEW OF FUNDAMENTAL NATURE OF A BOROUGH IN GENERAL AND THE SKAGWAY BOROUGH PROPOSAL IN PARTICULAR**

Before it addresses the particular facts relating to the Skagway borough proposal, the Commission considers it fitting to outline here the fundamental nature of borough government in Alaska.<sup>9</sup>

### **A. FUNDAMENTAL NATURE OF BOROUGHES**

The Commission recognizes several fundamental principles about the formation of organized boroughs in Alaska in this decision. Addressed in subsection A of this decisional statement, these principles are grounded in the constitutional and decisional law of the State of Alaska as well as earlier decisions of the Commission.<sup>10</sup>

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<sup>9</sup> The Commission deals with the topic in a fairly comprehensive fashion, even addressing fundamental characteristics of a borough that are not relevant or especially significant in terms of the Skagway borough proposal. By dealing with the topic in that fashion, the Commission provides a more complete policy review of borough government that is intended to guide the Commission and others in future discussions concerning borough proposals.

<sup>10</sup> Many of these principles were first addressed by the dissenting commissioner in the Commission's 1992 decision in *City and Borough of Yakutat*.



**1. Each Borough and Each City is Both a Municipality and Political Subdivision.**

Boroughs and cities are municipal corporations and political subdivisions of the State of Alaska. AS 29.04.010 – 29.04.020. They are the only types of municipalities in Alaska.<sup>11</sup> *Id.*; Art. X, sec 2, Ak Const.

**2. The Function of Boroughs is Comparable to that of Home Rule and First Class Cities in the Unorganized Borough.**

Generally, the powers and duties of home rule and first class cities in the unorganized borough are comparable to those of boroughs. There are, of course, subtle distinctions between the powers and duties of particular classes of boroughs. The same is true for home rule and first class cities in the unorganized borough.<sup>12</sup>

**3. A Borough is a Regional Municipality whereas a City is a Community-Based Municipality.**

As noted in subparts A-1 and A-2, cities and boroughs are identical in certain fundamental respects. Both are municipal corporations and political subdivisions. Moreover, the powers and duties of boroughs are comparable to those of home rule and first class cities in the unorganized borough.

However, major distinctions exist between boroughs and cities with respect to form. Boroughs are governments that serve relatively large natural regions. In contrast, city governments are relatively small community-based governments. Thus, home rule and first class cities may exercise borough-like powers, but only within city-like jurisdictions. Additional specifics about the distinctions between boroughs and cities are noted in subparts A-3-a and A-3-b below.

**a. The “Limitations of Communities” Doctrine does not apply to Boroughs but does to Cities.**

Cities are subject to the “limitation of community” doctrine while boroughs are not. The Alaska Supreme Court held as follows concerning that distinction:<sup>13</sup>

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<sup>11</sup> In addition to “city” and “borough”, AS 29.04.010 refers to “a unified municipality.” A unified municipality is a borough as defined in 3 AAC 110.990(1). More specifically, a unified municipality is a home rule borough in which city governments are precluded. AS 29.71.800(24). *See* also Department of Community and Economic Development, *Local Government in Alaska* at 4 (2001).

<sup>12</sup> Consider, for example, the following comparison between a first class borough and a first class city in the unorganized borough. A first class borough has three mandatory areawide responsibilities. Those are education, assessment and collection of taxes, and land use regulation. AS 29.35.150 – AS 29.35.180. In comparison, a first class city in the unorganized borough has the duty to “establish, operate, and maintain a system of public schools as provided by AS 29.35.160 for boroughs.” AS 29.35.260(b). Further, the law stipulates that a “first class city outside a borough shall . . . provide for planning, platting, and land use regulation as provided by AS 29.35.180(a) for first and second class boroughs.” AS 29.35.260(c). Additionally, a first class city in the unorganized borough may assess, levy, and collect a property tax in the manner provided by law for boroughs. AS 29.45.550. Lastly, a first class city in the unorganized borough “may levy and collect sales and use taxes in the manner provided for boroughs.” AS 29.45.700(c).

Beyond its three mandatory functions, a first class borough has broad discretionary powers. The law provides that a “first class borough may exercise by ordinance on a nonareawide basis any power not otherwise prohibited by law.” AS 29.35.200(a). Similar language exists with respect to the powers of cities in the unorganized borough. Specifically, the law provides that “[a] city outside a borough may exercise a power not otherwise prohibited by law.” AS 29.35.260(a).

Prohibitions and limitations on the powers of second class cities in the unorganized borough are significantly greater than is the case for first class cities. For example, a second class city in the unorganized borough is prohibited from operating a school district, while a first class city outside a borough is required to operate a school district. AS 29.35.260(b). Further, a second class city in the unorganized borough is permitted, but not required, to exercise land use regulation. AS 29.35.260(c). Another example is the limited taxing property authority for a second class city. AS 29.45.590. In contrast, limitations on the powers of a first class city in the unorganized borough are similar to those of a first class borough.

<sup>13</sup> In the *Mobil Oil* case (involving incorporation of the North Slope Borough) the Court addressed the limitation of communities doctrine by making a distinction between boroughs and what it termed “municipalities” (e.g., “boroughs are not restricted to the form and function of municipalities”). Clearly, in the view of the

[Appellants] offer a series of cases striking down municipal annexations and incorporations where the lands taken have been found to receive no benefit. We find this authority unpersuasive when applied to borough incorporation. In most of these cases, the courts inferred from statutes or state constitutions what has been called a ‘limitation of community’ which requires that the area taken into a municipality be urban or semi-urban in character.

There must exist a village, a community of people, a settlement or a town occupying an area small enough that those living therein may be said to have such social contacts as to create a community of public interest and duty. . . .

The limitation has been found implicit in words like ‘city’ or ‘town’ in statutes and constitutions or inferred from a general public policy of encouraging mining or agriculture. In other cases, the limitation has been expressed as a finding that the land taken is not susceptible to urban municipal uses. The result in these cases was determined not by a test of due process but by restrictions in pertinent statutes and constitutions on the reach of municipal annexations and incorporations.

Aside from the standards for incorporation in AS 07.10.030, there are no limitations in Alaska law on the organization of borough governments. Our constitution encourages their creation. Alaska const. art. X, § 1. And boroughs are not restricted to the form and function of municipalities. They are meant to provide local government for regions as well as localities and encompass lands with no present municipal use.

*Mobil Oil Corp. v. Local Boundary Commission*, 518 P.2d 92, 100 (Alaska 1974) (footnotes omitted).

The Commission finds that the limitation of communities doctrine is, indeed, implicit in the Alaska statutes concerning incorporation of cities. In particular, AS 29.05.011 provides as follows (emphasis added):

**Incorporation of a city.**

(a) A community that meets the following standards may incorporate as a first class or home rule city:

- (1) the community has 400 or more permanent residents;
- (2) the boundaries of the proposed city include all areas necessary to provide municipal services on an efficient scale;
- (3) the economy of the community includes the human and financial resources necessary to provide municipal services; in considering the economy of the community, the Local Boundary Commission shall consider property values, economic base, personal income, resource and commercial development, anticipated functions, and the expenses and income of the proposed city, including the ability of the community to generate local revenue;
- (4) the population of the community is stable enough to support city government;
- (5) there is a demonstrated need for city government.

(b) A community that meets all the standards under (a) of this section except (a)(1) may incorporate as a second class city.

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Commission, the Court was referring in the *Mobil Oil* case to “cities” (or derivatives thereof such as “city”, or “city government”) when it used the term “municipalities”, (or derivatives thereof such as “municipality”, or “municipal”). It is significant in that regard that when the North Slope Borough incorporation petition was filed, statutory standards and procedures for borough incorporation as well as other laws concerning boroughs were codified in “Alaska Statutes – Title 7 – Boroughs.” In contrast, statutes relating to cities were codified in “Alaska Statutes – Title 29 – Municipal Corporations.” The Court made reference to borough standards and other provisions in AS 07 seventeen times in the *Mobil Oil* case. In 1972, Titles 7 and 29 of the Alaska Statutes were repealed and new laws concerning both cities and boroughs were enacted as “Alaska Statutes – Title 29 – Municipal Government”. Today, AS 29 refers to both cities and boroughs as municipalities. The distinction in the terms used by the Court in *Mobil Oil* to describe the two types of governments (i.e., “boroughs” and “municipalities”) was purely nominal. However, the distinction made by the Court as to the form of the two types of governments (boroughs and cities) was significant.

Moreover, the limitation of communities doctrine is explicit in terms of the Commission's regulations governing city incorporation and annexation.<sup>14</sup> For example, 3 AAC 110.040(b) provides:

The boundaries of the proposed city must include only that territory comprising a present local community, plus reasonably predictable growth, development, and public safety needs during the 10 years following the effective date of incorporation.

Further, 3 AAC 110.040(c) provides:

The boundaries of the proposed city may not include entire geographical regions or large unpopulated areas, except if those boundaries are justified by the application of the standards in 3 AAC 110.005 - 3 AAC 110.042.

*b. Geographically, Boroughs were Envisioned as Relatively Large Regional Units while Cities are Intended to be Relatively Small Units.*

The Local Government Committee at the Alaska Constitutional Convention envisioned boroughs as units of government that would cover large areas. According to Vic Fischer:<sup>15</sup>

As the committee was evolving [borough] principles, its members agreed that some type of unit larger than the city and smaller than the state was required to provide both for a measure of local self-government and for performance of state functions on a regionalized basis.

. . . the initial principles set forth by the committee for consideration in the formation of the new areawide government units included these guidelines: . . .

- Units should cover large geographic areas with common economic, social, and political interests. . . .

Victor Fischer, *Alaska's Constitutional Convention*, p. 118 – 119, (1975).

This fundamental characteristic of boroughs is reflected in Article X, Section 3 of the Constitution.

SECTION 3. BOROUGHS. The entire State shall be divided into boroughs, organized or unorganized. 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.

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<sup>14</sup> The Commission has a duty under AS 44.33.812(a)(2) to adopt regulations providing standards and procedures for incorporation of cities and boroughs. Further, AS 29.05.100(a) conditions approval of a city incorporation petition upon a determination by the Commission that the standards it has adopted in regulation are satisfied.

<sup>15</sup> Mr. Fischer is recognized by the Alaska Supreme Court as “an authority on Alaska government.” *Keane v. Local Boundary Commission*, 893 P.2d 1239, 1244 (Alaska 1995). The Court has relied on his work in the *Keane* case (1242, 1243) and in the *Mobil Oil* case (98). Mr. Fischer is well known to most members of the Commission. He has addressed the majority of the current Commission in the past on a number of occasions concerning matters relating to local government in Alaska. Most recently, he addressed all current members of the Commission on August 10, 2002. Mr. Fischer received a bachelor's degree from the University of Wisconsin in 1948 and a Master's Degree in Community Planning from the Massachusetts Institute of Technology in 1950. He also received the Littauer Fellowship in public administration from Harvard University (1961-1962). Mr. Fischer has held several planning related positions in Alaska. He was a delegate to the Alaska Constitution Convention in 1955-1956. During the convention he was a member of the Committee on Local Government and served as its Secretary. Mr. Fischer has written and co-authored a number of books and publications concerning state and local government in Alaska. These include *The State and Local Governmental System* (1970), *Borough Government in Alaska* (1971), and *Alaska's Constitutional Convention* (1975). Mr. Fischer served in Alaska's Territorial House of Representatives (1957-1959) and the Alaska State Senate (1981-1986). He was a member of the faculty of the University of Alaska Fairbanks and of the University of Alaska Anchorage. At the University, he was primarily associated with the Institute for Social and Economic Research, where he was director for ten years. His current work includes studying Alaska Native and regional governance issues.

Methods by which boroughs may be organized, incorporated, merged, consolidated, reclassified, or dissolved shall be prescribed by law.

The fourth sentence of Article X, Section 3, which provides that “[e]ach borough shall embrace an area and population with common interests to the maximum degree possible”, is particularly significant with regard to the fundamental characteristic at issue. This sentence, by itself, does not indicate the territorial or socioeconomic scale at which the commonality of interests ought to be evaluated. The minutes of the Alaska Constitutional Convention, however, provide compelling evidence as to the framers’ intent with respect to the character and scope of boroughs. In the following exchange, delegate John Rosswog, Chairman of the Committee on Local Government, responded to a query from delegate John Coghill on January 19, 1956 about the Committee’s intent with respect to the language that each borough shall embrace an area and population with common interests to the maximum degree possible.

COGHILL: Further on in Section 3, I would like to ask you, Mr. Rosswog, on line 6 of page 2, "Each borough shall embrace, to the maximum extent possible, an area and population with common interests." My question here is directed to you to find out what the Committee's thinking was as to boundary areas of local government. Could you give us any light on that as to the extent? I know that you have delegated the powers to a commission, but you have said that each borough shall embrace the maximum extent possible. I am thinking now of an area that has maybe five or six economic factors in it -- would they come under one borough?

ROSSWOG: We had thought that the boundaries should be flexible, of course, and should be set up so that we would not want too small a unit, because that is a problem that has been one of the great problems in the states, the very small units, and they get beyond, or they must be combined or extended.

*Proceedings of the Alaska Constitutional Convention*, Alaska State Legislature, Legislative Council p. 2620 – 2621 (1963).

A nearly identical question arose on the floor of the Convention later that same day. Delegate Barrie White inquired about the Local Government Committee’s intent with respect to the term “maximum extent possible.” Committee member James Doogan and Committee Chairman John Rosswog responded:

WHITE: Mr. President, on page 2, Section 3, I would like to ask the Committee, on line 4, if the words "to the maximum extent possible" could be construed to mean the largest possible area?

PRESIDENT EGAN: Mr. Doogan.

DOOGAN: I think that is the intent. It was pointed out here that these boroughs would embrace the economic and other factors as much as would be compatible with the borough, and it was the intent of the Committee that these boroughs would be as large as could possibly be made and embrace all of these things.

WHITE: Is it the thinking of the Committee that the largest possible area, combining area and population, with common interest, would be the most desirable type of borough?

PRESIDENT EGAN: Mr. Rosswog.

ROSSWOG: Could I answer on that? I think that was the idea or the thinking of the Committee that they would have to be fairly large but the wording here would mean that we should take into consideration the area and population and common interest to the maximum extent possible because you could not say definitely that you were taking it all in, but as much as you possibly could.

*Id.* p. 2638.

The following day, January 20, 1956, delegate Katherine Nordale raised the virtually identical question. Vic Fischer, Local Government Committee Secretary responded.

NORDALE: Mr. President, I think this was brought up yesterday, but I have sort of forgotten what was said. It is just a question. On line 4, page 2 of Section 3, there was some discussion of the wording, "Each borough shall embrace to the maximum extent possible an area and population with common interests." Does that mean to the greatest degree it shall be a group of people with common interests? Nothing to do with the area - I mean the square mile?

V. FISHER: What it means is that wherever possible, "Each borough shall embrace an area and population with common interests."

*Id.* p. 2711.

In summary, the constitutional, statutory, and regulatory standards for local governmental boundaries indicate that cities are meant to be local community governments, and boroughs are meant to be regional governments. Indeed, it is difficult to suppose that a city government's boundaries could be consistent with both 3 AAC 110.040(b) and the constitutional and statutory standards for borough boundaries.

***4. Both Cities and Boroughs Must Embrace Areas with Common Social, Cultural, and Economic Interests, but the Requisite Degree for Such is Significantly Greater for Cities than Boroughs.***

As noted with respect to subpart A-3-a of this section of the decisional statement, each city government must embrace a community. For purposes of the Local Boundary Commission, the term "community" is defined in law. A community is comprised of a discrete area and population with significant common interests concerning social, cultural, economic, and other characteristics.<sup>16</sup>

As noted in subpart A-3-b of this decisional statement, the fourth sentence of Article X, Section 3 of the constitution stipulates that each borough must maximize the area and population, but with the condition that the maximum area and population also have common interests. However, the requirement for maximum area and population necessarily presumes an acceptable level of common interests less than that found at the community level.

The following discussion on the floor of the Constitutional Convention on January 19, 1956 between delegate James Hurley, Local Government Committee Chairman John Rosswog, Local Government Committee member Eldor Lee and delegate John Hellenthal is important in several respects in terms of defining the nature of a borough. It demonstrates that the Local Government Committee had no precise upper or lower limits in mind regarding the geographic size of boroughs. It also stresses the importance of flexibility in setting borough boundaries. Further, the dialogue provides additional evidence that the delegates foresaw, in general terms, relatively large boroughs. Perhaps most importantly, however, the exchange provides insights with respect to the framers' vision concerning the requisite degree of common interests within boroughs.

HURLEY: Mr. President, going back to Section 4, the matter has been mentioned many times about the possible thinking as to the size of the boroughs. I took occasion to check back into the criteria which would be used for the establishment of election districts. I find that except for two different words they are the same as the criteria that you use for the establishment of boroughs: population, geographic features, and the election districts say integrated socio-economic areas, and you say economy and common interests which I think means the same thing.

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<sup>16</sup> A "community" is defined by 3 AAC 110.990(5) to mean a social unit of 25 or more permanent residents as determined by 3 AAC 110.920. A community exists where individuals reside permanently in a close geographical proximity that allows frequent personal contacts and comprise a population density that is characteristic of neighborhood living. Factors such as school enrollment, number of sources of employment, voter registration, precinct boundaries, permanency of dwelling units, and the number of commercial establishments and other service centers are evidence of a community. Further, the law presumes that a population does not constitute a community if public access to or the right to reside at the settlement is restricted, if the population is adjacent to a community and is dependent upon that community for its existence, or if the location of the population is provided by an employer and is occupied as a condition of employment primarily by persons who do not consider the place to be their permanent residence.

Consequently, I might be led to the conclusion that your thinking could well be carried out by making election districts and boroughs contiguous or congruous, the same area, is that true?

ROSSWOG: It was thought this should be left very flexible. Of course, you would not say they should be the same as election districts because of rather unwieldiness for governing. It would more possibly, and should, take more study of whether the size should bear on whether your governing body would be able to supervise an area of that size.

PRESIDENT EGAN: Mr. Lee.

LEE: Mr. Hurley, I think we are unanimous in the opinion that many of these boroughs will be substantially the same as election districts but that is just the idea that we had in mind. Some of them won't be feasible, but in our thinking I consider that form of boroughs we felt they would be much the same as an election district.

PRESIDENT EGAN: Mr. Hellenthal.

HELLENTHAL: Did any of you think that they might ever be greater than the election districts in size?

LEE: If that question is directed to me, we did not give it any consideration because actually we have not made any statement about the size. But in our thinking we didn't consider that thought, but it is certainly very possible.

HELLENTHAL: In other words, that the boundaries of the election districts could possibly be maximums governing the size of the boroughs?

LEE: It is possible. It is up to the legislature to decide.

HELLENTHAL: Would it be desirable to make them minimums?

LEE: That would take away the flexible portion which we wish to keep here.

HELLENTHAL: I gather then you would not desire to make them minimums but probably would have little objection to making them maximum.

LEE: I can't speak for the Committee. I would have no objection, personally.

The framers envisioned that the initial State election districts would be, in many cases, models for future boroughs. As originally adopted, Article VI, Section 6 of Alaska's constitution established the following standards for drawing State House election districts (emphasis added by underlining):<sup>17</sup>

Section 6. Redistricting. The governor may further redistrict by changing the size and area of election districts, subject to the limitations of this article. Each new district so created shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area. Each shall contain a population at least equal to the quotient obtained by dividing the total civilian population by forty. Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible.

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<sup>17</sup> Article VI was amended in 1999. The amendments dealt principally with the process for redistricting. However, two changes dealt somewhat with the standards. Both occurred in the third sentence which was revised as follows (added text in bold type and underlined, deleted text struck through): "Each shall contain a population **as near as practicable** ~~at least equal~~ to the quotient obtained by dividing the ~~total civilian~~ population **of the state** by forty."

The Alaska Supreme Court addressed the meaning of the term “relatively integrated socio-economic area” with respect to election districts in *Hickel v. Southeast Conference*, 846 P.2d 38, 47 (Alaska 1992) (emphasis added):

The Alaska Constitution requires districts comprising “relatively integrated” areas. . . . “Relatively” means that we compare proposed districts to other previously existing and proposed districts as well as principal alternative districts to determine if socio-economic links are sufficient. “Relatively” does not mean “minimally,” and it does not weaken the constitutional requirement of integration.

The framers’ vision that the initial State election districts were, in many cases, models for future boroughs is reinforced by the fact that election district boundaries were used to define prospective boroughs in the 1963 Mandatory Borough Act. As introduced by Representative John L. Rader, the mandatory borough legislation called for the compulsory incorporation of the nine State election districts in Alaska that encompassed independent school districts.<sup>18</sup>

The mandatory borough legislation was introduced just four years after Alaska’s constitution took effect. The short interval between those two seminal events, in the view of the Commission, is further evidence of the suitability of the early election districts for borough boundaries. Six of the twenty members (30%) of the 1963 Senate had been delegates to the Constitutional Convention.<sup>19</sup> Additionally, two members of the 1963 House of Representatives had been Constitutional Convention delegates.<sup>20</sup>

Moreover, the Commission considers it noteworthy that the use of election districts to define borough boundaries in the 1963 mandatory borough legislation occurred just two years after the Alaska Legislature first adopted statutory standards for incorporation of boroughs. That fact becomes even more significant when it is recognized that 11 of the 20 Senators (55%) and 23 of the 40 Representatives (57.5%) in the 1963 Legislature had held the same elected offices during the 1961 Legislature.<sup>21</sup>

While the early State election districts were viewed by the framers to be, in many cases, suitable borough models, the Commission does not take the position that the same is necessarily true today. Social and economic integration remains a fundamental characteristic of election districts for the State of Alaska, however, there have been numerous social, political, and legal developments which have had great influence over the size and configuration of election districts in Alaska. Social changes include a significantly greater concentration of Alaska’s population in southcentral Alaska. Political changes include the uniform use of single-member election

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<sup>18</sup> House Bill No. 90 provided that the areas would be incorporated as boroughs by legislative fiat if the voters in those regions failed to form boroughs before January 1, 1964. The nine regions were designated as follows in Section 3 of House Bill No. 90:

- (1) Anchorage Election District;
- (2) Lynn Canal – Icy Straits Election District;
- (3) Ketchikan – Prince of Wales Election District;
- (4) Kodiak Election District;
- (5) Palmer – Wasilla – Talkeetna Election District;
- (6) Sitka Election District;
- (7) Fairbanks – Fort Yukon Election District;
- (8) Juneau Election District; and
- (9) Kenai – Cook Inlet Election District.

<sup>19</sup> The former delegates in the 1963 Senate were Senators Coghill, Kilcher, McNealy, Nolan, Peratrovich, and Smith.

<sup>20</sup> The former delegates that were members of the 1963 House of Representatives were Representatives Sweeney and Taylor.

<sup>21</sup> The Senators were Bronson, Coghill, Hopson, McNealy, Nolan, Owen, Peratrovich, Brad Phillips, Vance Phillips, Smith, and Walsh. The Representatives were Baggen, Baker, Binkley, Blodgett, Boardman, Cashel, Christiansen, Ditman, Hammond, Harris, Jarvela, Kendall, Kubley, Leonard, Longworth, Parsons, Pearson, Reed, Sanders, Stalker, Strandberg, Sweeney, and Taylor.

districts throughout Alaska.<sup>22</sup> They also include the enactment of legislation such as the Federal Voting Rights Act which have significantly influenced the configuration of election districts in Alaska. Lastly, judicial rulings have shaped election districts. For example, in *Hickel v. Southeast Conference, id.* at 62, the Alaska Supreme Court directed that certain factors be given priority in the drawing of house election districts.<sup>23</sup>

Priority must be given first to the Federal Constitution, second to the federal voting rights act, and third to the requirements of article VI, section 6 of the Alaska Constitution. The requirements of article VI, section 6 shall receive priority inter se in the following order: (1) contiguosity and compactness, (2) relative socioeconomic integration, (3) consideration of local government boundaries, (4) use of drainage and other geographic features in describing boundaries.

While it can no longer be said that election districts make for ideal borough boundaries in most cases, the original vision does provide a measure of the geographic scale within which boroughs were expected to exhibit a distinguishing degree of social, cultural, and economic integration.

**5. Boroughs Should Generally Include Multiple Communities and Should be Able to Provide Services Efficiently and Effectively.**

As noted in subparts A-3 and A-4, city governments are intended to be small governmental units with intense common interests, while boroughs are envisioned as large governmental units with moderate common interests.

Other indications of the intended difference in scale between cities and boroughs also exist. For example, Article X, Section 5 of the constitution allows boroughs to establish service areas. There is no comparable constitutional provision for city governments.<sup>24</sup> In the Commission's view, such reflects the vision that, as relatively large units of government, boroughs require the flexibility to establish service areas to meet the varying needs of particular communities within boroughs.

Another indicator of the framers' vision regarding the relative scale of city and borough governments is found in Article X, Section 7 of Alaska's constitution. That provision reinforces the perspective that boroughs are large units and cities are small units by stating that cities, "shall be part of the borough in which they are located."

On January 20, 1956, delegate Vic Fischer expressed the view that it is 'unimaginable' that a city would be the same size as a borough as reflected in the following exchange.<sup>25</sup>

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<sup>22</sup> The initial election districts in the more populous areas of Alaska encompassed multiple House seats to retain their regional characteristics. Of the original 24 districts, five were two-member districts, one was a five-member district, and one was an eight-member district. The remaining seventeen districts were all single-member districts. The current plan utilizes forty single-member districts, which diminishes the regional character of those districts in the more populous areas.

<sup>23</sup> The Alaska Supreme Court adhered to the same priorities in *re 2001 Redistricting Cases*, 44 P.3d 141 (Alaska 2002).

<sup>24</sup> The Commission recognizes that AS 29.45.580 authorizes city governments to establish differential property tax zones. In some respects, those are the city equivalent to a borough service area. However, the Commission still considers Article X, Section 5 to be evidence of the intended large scale of boroughs.

<sup>25</sup> The dialog was also relevant in terms of original Article X, Section 4 of Alaska's constitution which provided in relevant part that:

Each city of the first class, and each city of any other class designated by law, shall be represented on the assembly by one or more members of its council. The other members of the assembly shall be elected from and by the qualified voters resident outside such cities.

The provision was repealed in 1972.



GRAY: Mr. Chairman, I would like to ask the Committee a question. Is it possible under Section 5 that the city council complete would also be complete in the assembly? Is it quite possible?

V. FISCHER: I think that would be possible only if the borough was the same size as the city, or if the legislature provided that the people outside of the city shall have no representation.

GRAY: It could be so?

V. FISCHER: I could not imagine it happening.

Finally, Article X, Section 13 authorizes cities to transfer, and revoke transfer of city power and functions to the borough in which it is located. There is no similar constitutional provision for transfer of borough powers and duties to cities. This asymmetry is consistent with the notion that boroughs would have broader jurisdiction than cities.

**6. *The Constitution Encourages a Minimum Number of Boroughs.***

Article X, Section 1 of the Constitution of the State of Alaska provides, in part, that “[t]he purpose of this article is to provide for maximum local self-government with a minimum of local government units. . . .”

Vic Fischer indicates that one of the fundamental principles concerning borough formation set forth by the Local Government Committee was that, “units should be large enough to prevent too many subdivisions in Alaska . . .” Victor Fischer, *supra*, p. 119.

The Commission concludes that the creation of boroughs should be limited, not to a specific total number, but by the principle that only the minimum number of governments necessary to provide effective and efficient local self-government should be created.

**7. *Borough Boundaries Should be Established at the State Level to Reflect State-Wide Considerations as well as Regional Criteria and Local Interests.***

Article X, Section 12 of Alaska’s constitution provides for the establishment of the Local Boundary Commission. Of the 116 active State boards and commissions, only the Local Boundary Commission and four others have origins in the constitution.<sup>26</sup>

The Alaska Supreme Court observed that the Commission was created to serve as an impartial body to review, from a statewide perspective, proposals relating to the establishment and alteration of municipal governments. Specifically, the Court stated:

An examination of the relevant minutes of [the Local Government Committee of the Constitutional Convention] shows clearly the concept that was in mind when the local boundary commission section was being considered: that local political decisions do not usually create proper boundaries and that boundaries should be established at the state level. The advantage of the method proposed, in the words of the committee:

. . . lies in placing the process at a level where area-wide or state-wide needs can be taken into account. By placing authority in this third party, arguments for and against boundary change can be analyzed objectively.

*Fairview Public Utility District No. 1 v. City of Anchorage*, 368 P.2d 540, 543 (Alaska 1962).

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<sup>26</sup> The other four are the (legislative) Redistricting Board, Judicial Council, Commission on Judicial Conduct, and the University Board of Regents.

***8. Alaska's Constitution Encourages the Extension of Borough Government; However, All Standards Must be Met and the Commission is not Obligated to Approve Proposals that Only Minimally Meet the Standards.***

Article X, Section 1 of Alaska's constitution promotes maximum local self-government which encourages the extension of borough government in areas that satisfy the standards for borough incorporation and annexation. In this regard, the Alaska Supreme Court held as follows:

Our review of the record has been undertaken in light of the statement of purpose accompanying article X, the local government article, of the Alaska constitution. Section 1 declares in part:

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. . . .

We read this to favor upholding organization of boroughs by the Local Boundary Commission whenever the requirements for incorporation have been minimally met.

*Mobil Oil, supra*, at 99.

However, the Commission stresses that it is prohibited from approving any borough proposal if the application does not meet each applicable standard established in the Constitution of the State of Alaska, Alaska Statutes, and the Alaska Administrative Code. Specifically, Alaska Statute 29.05.100(a) provides as follows:

The Local Boundary Commission may amend the petition and may impose conditions on the incorporation. If the commission determines that the incorporation, as amended or conditioned if appropriate, meets applicable standards under the state constitution and commission regulations, meets the standards for incorporation under ... 29.05.031, and is in the best interests of the state, it may accept the petition. Otherwise it shall reject the petition.

The use of the term "shall" in the third sentence of AS 29.05.100(a) clearly indicates that the Commission must reject any proposal if it does not meet each of the applicable standards, with or without amendments and/or conditions.

While the Supreme Court held in the *Mobil Oil* case that Article X, Section 1 of the constitution should be read to favor upholding of an LBC-approved incorporation whenever the requirements for incorporation have been minimally met, the Court also held in a subsequent case that the Commission is not obligated to approve any minimally acceptable petition. Specifically, the Court stated:

Petitioners' arguments, however, reflect the mistaken premise that the LBC must approve any minimally acceptable petition for incorporation and has only limited authority to consider or adopt "the most desirable" borough boundaries.

It is difficult to conjecture circumstances under which the Commission would reject a borough proposal if it met each of the applicable standards; however, the Commission clearly has that prerogative. The use of the term "may" in the second sentence of AS 29.05.100(a) leaves no doubt that the Commission has discretion to approve any borough incorporation petition, even if it meets all requisite standards.

***9. Boroughs Should not be Prematurely Formed when Local Government Needs Can be met by City Annexation or Incorporation.***

Occasionally, communities in the unorganized borough express interest in borough formation, particularly, single-community boroughs, when the expansion of boundaries of an existing city or the incorporation of a new city would be more fitting and would serve the needs of the territory in question.

### **10. Conclusion.**

In summary, the Commission has identified the following fundamental principles relating to borough government in Alaska.

- each borough and each city is both a municipality and political subdivision;
- the function of boroughs is comparable to that of home rule and first class cities in the unorganized borough;
- a borough is a regional municipality whereas a city is a community-based municipality;
- both cities and boroughs must embrace areas with common social, cultural, and economic interests, but the requisite degree for such is significantly greater for cities than boroughs;
- boroughs should generally include multiple communities and should be able to provide services efficiently and effectively;
- the constitution encourages minimum numbers of boroughs;
- borough boundaries should be established at the state level to reflect state-wide considerations as well as regional criteria and local interests;
- Alaska's constitution encourages the extension of borough government; however, all standards must be met and the Commission is not obliged to approve proposals that only minimally meet the standards;
- boroughs should not be prematurely formed when local government needs can be met by city annexation or incorporation.

## **B. STANDARD CONCERNING COMMON INTERESTS**

### **1. Standard Established in Law**

Provisions establishing the standard for social, cultural, and economic interrelation and integration of boroughs (common interests) are included in Alaska's constitution, statutes, and administrative code.

Article X, Section 3 of the Constitution of the State of Alaska provides as follows:

**Section 3. Boroughs.** The entire State shall be divided into boroughs, organized or unorganized. 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.

In addition, AS 29.05.031(a)(1) requires the population of the proposed borough to be socially, culturally, and economically interrelated and integrated. Specifically, State law provides, in relevant part, as follows:

**Sec. 29.05.031. Incorporation of a borough or unified municipality.** (a) An area that meets the following standards may incorporate as a home rule, first class, or second class borough, or as a unified municipality:

(1) the population of the area is interrelated and integrated as to its social, cultural, and economic activities . . .

Lastly, 3 AAC 110.045(a) provides as follows with respect to the standard at issue:

**3 AAC 110.045. COMMUNITY OF INTERESTS.** (a) The social, cultural, and economic characteristics and activities of the people in a proposed borough must be interrelated and integrated. In this regard, the commission may consider relevant factors, including the

- (1) compatibility of urban and rural areas within the proposed borough;
- (2) compatibility of economic lifestyles, and industrial or commercial activities;
- (3) existence throughout the proposed borough of customary and simple transportation and communication patterns; and
- (4) extent and accommodation of spoken language differences throughout the proposed borough.

**2. *Application of the Common Interests Standard to the Skagway Borough Petition***

During the August 31, 2002 decisional session, individual Commissioners expressed a range of views about many factors relating to the common interest standard.<sup>27</sup>

The Commission notes DCED's examination of a multitude of factors relevant to this standard on pages 55 – 74 and F-1 – F-39 of its Preliminary Report and pages 9 – 12 and 19 – 26 of its Final Report. Included in that analysis was an examination of interrelationships between Skagway and adjoining localities in Alaska. The analysis addressed factors such as marine transportation, air transportation, common major economic activity, shared fishing areas, common interest in management of State lands, racial composition of the populace, historical links, geographic proximity, dependence on a community for transportation, entertainment, news and professional services, geographical similarities, and historical economic links. Additionally, DCED addressed the compatibility of urban and rural areas within the proposed borough, compatibility of economic lifestyles, and industrial or commercial activities, existence throughout the proposed borough of customary and simple transportation and communication patterns and the extent and accommodation of spoken language differences throughout the proposed borough.

Based on the evidence in this proceeding, the Commission finds that the Skagway borough proposal does not embrace an area and population with the fundamental characteristics of a borough as outlined in Section III-A of this decisional statement. In other words, the 443.1-square mile territory in question lacks the geographic scope and social, cultural, and economic characteristics of an "area," as that term is used in the Constitution of the State of Alaska, Alaska Statutes, and Alaska Administrative Code with respect to borough incorporation proposals.<sup>28</sup>

Consequently, based on the extensive evidence in this proceeding, the Commission concludes that the Skagway borough proposal fails to meet the common interests standard set out in Article X, Section 3 of the Constitution of the State of Alaska, AS 29.05.031(a)(1) and 3 AAC 110.045.

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<sup>27</sup> The Commission separately addressed each of the eighteen standards that apply to the Skagway borough proposal during its August 31, 2002 decisional session. With respect to the common interests standard, three Commission members expressed findings and reached the uniform conclusion that the Skagway borough proposal did not meet the standard. However, the other two Commission members made favorable comments regarding the Skagway borough proposal in terms of the common interests standard. It is emphasized that the August 31 comments of the five Commissioners regarding application of the common interests standard and other standards to the Skagway borough proposal represented their respective individual preliminary opinions at that particular point in the deliberative process. The Commission's deliberative process begins with the expression of such preliminary opinions by individual Commission members; however, it certainly does not end there. Once Commission members have expressed their preliminary opinions concerning all of the standards at the decisional session, the Commission votes whether to approve or deny the petition pending before them. In this case, the Commission voted unanimously (5-0) at the August 31 decisional session to deny the Skagway borough Petition. Such clearly demonstrates that, notwithstanding favorable comments by Commission members about various standards, when viewed in totality, all Commission members reached the uniform conclusion that the Skagway borough Petition failed to meet the requirements set out in AS 29.05.100(a). The deliberative process does not end with the Commission vote on a petition. Following the vote, the Commission must adopt a written statement of decision. In doing so, the Commission has further opportunity to articulate its findings and conclusions. Only at that point does the Commission's decision become final, unless reconsideration is granted which extends the deliberative effort (3 AAC 110.570(g)).

<sup>28</sup> The Commission ascribes significance to the fact that the term "area" is used both in Article X, Section 3 of the constitution and AS 29.05.031 with respect to a borough. The word "area", in that context, is a term of art that describes a regional territory possessing all of the fundamental characteristics of a borough outlined in Section III-A of this decisional statement.

## **C. STANDARD CONCERNING DISSOLUTION OF A CITY UPON INCORPORATION OF A BOROUGH**

### ***1. Standard Established in Law***

The Petitioner proposes dissolution of the City of Skagway under AS 29.06.450(c), concurrent with the incorporation of a Skagway borough. AS 29.06.450(c) states in relevant part that, “[a] city is dissolved when all its powers become areawide borough powers.”<sup>29</sup>

### ***2. Application of the City Dissolution Standard to the Skagway Borough Petition***

The Commission finds that evidence in this proceeding clearly indicates that the Petitioner intends that the proposed Skagway borough would assume, on an areawide basis, all powers currently exercised by the City of Skagway. That evidence includes statements made on pages 6 and 41 of the Petition, analysis by DCED on pages 17 - 19 of its Preliminary Report and pages 20 – 21 and 41 of its Final Report, as well as testimony by the Petitioner’s Representative at the August 31, 2002 hearing. The Commission finds further that the list of proposed areawide powers of the Skagway borough on page 7 of the Petition includes all powers currently exercised by the City of Skagway with the exception of daycare assistance.

The Commission has authority under AS 29.05.100 to amend the Petition to add daycare assistance to the list of proposed areawide borough powers. The Petitioner’s Representative expressed support for such an amendment at the August 31, 2002 hearing. The amendment would be fitting if the Petition were approved.

Based on the findings above, the Commission concludes that the standard concerning dissolution of a city upon incorporation of a borough as set out in AS 29.06.450(c) is satisfied.

## **D. STANDARD CONCERNING BOROUGH CLASSIFICATION**

### ***1. Standard Established in Law***

AS 29.05.031 allows certain classes of boroughs to form, but prohibits the incorporation of others. Specifically, AS 29.05.031(b) provides as follows:

**Sec. 29.05.031. Incorporation of a borough or unified municipality. . . .**  
(b) An area may not incorporate as a third class borough.

### ***2. Application of the Borough Classification Standard to the Skagway Borough Petition***

The Commission notes that the Skagway borough proposal seeks to form a first class borough. As such, it does not propose to incorporate a borough with a classification prohibited by AS 29.05.031(b). In that respect, the standard is satisfied.

## **E. STANDARD CONCERNING TRANSITION PLAN**

### ***1. Standard Established in Law***

3 AAC 110.900 requires the Petitioner to provide a transition plan addressing the proposed change. The standards for the transition plan are written in a broad fashion to pertain to any proposal that comes before the Commission from an existing or prospective city or borough government. Specifically, the law provides as follows:

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<sup>29</sup> State statutes require a borough incorporation petition to designate areawide powers to be exercised by a proposed borough (AS 29.05.060(8)). Those powers are listed in Section 13 of the Skagway Petition which begins with the statement that, “[a]ll services and powers currently exercised by the City of Skagway are to be exercised by the Municipality of Skagway on an areawide basis.” The specific designation of areawide powers proposed to be exercised by the Skagway borough is provided on page 7 of the Petition. AS 29.05.110(c) provides that, “[a]reawide borough powers included in an incorporation election petition are considered to be part of the incorporation question.” Thus, if the Commission and voters had approved the Skagway proposal and if the list of areawide powers in Section 13 of the Petition were complete, the requirements of AS 29.06.450(c) would have been satisfied.

**3 AAC 110.900. TRANSITION.** (a) A petition for incorporation, annexation, merger, or consolidation must include a practical plan that demonstrates the capacity of the municipal government to extend essential city or essential borough services into the territory proposed for change in the shortest practicable time after the effective date of the proposed change. A petition for city reclassification under AS 29.04, or municipal detachment or dissolution under AS 29.06, must include a practical plan demonstrating the transition or termination of municipal services in the shortest practicable time after city reclassification, detachment, or dissolution.

(b) Each petition must include a practical plan for the assumption of all relevant and appropriate powers, duties, rights, and functions presently exercised by an existing borough, city, unorganized borough service area, and other appropriate entity located in the territory proposed for change. The plan must be prepared in consultation with the officials of each existing borough, city, and unorganized borough service area, and must be designed to effect an orderly, efficient, and economical transfer within the shortest practicable time, not to exceed two years after the effective date of the proposed change.

(c) Each petition must include a practical plan for the transfer and integration of all relevant and appropriate assets and liabilities of an existing borough, city, unorganized borough service area, and other entity located in the territory proposed for change. The plan must be prepared in consultation with the officials of each existing borough, city, and unorganized borough service area wholly or partially included in the area proposed for the change, and must be designed to effect an orderly, efficient, and economical transfer within the shortest practicable time, not to exceed two years after the date of the proposed change. The plan must specifically address procedures that ensure that the transfer and integration occur without loss of value in assets, loss of credit reputation, or a reduced bond rating for liabilities.

(d) Before approving a proposed change, the commission may require that all boroughs, cities, unorganized borough service areas, or other entities wholly or partially included in the area of the proposed change execute an agreement prescribed or approved by the commission for the assumption of powers, duties, rights, and functions, and for the transfer and integration of assets and liabilities.

## ***2. Application of the Transition Plan Standard to the Skagway Borough Petition***

Page 42 of the Petition provides that

Powers and services exercised by the City of Skagway continue to be exercised until the new borough assumes the powers and functions. Ordinances, rules, resolutions, procedures, and orders in effect before the transfer remain in effect until superseded by the action of the new municipality. The same is true for the new school district.

The intent of 3 AAC 110.900(a) is to require each petitioner to demonstrate that it has given forethought to the manner in which services will be provided to the territory proposed for change. The plan must also demonstrate the petitioner's good faith to extend services.

3 AAC 110.900(b) requires each petitioner to present a practical plan for the assumption of relevant powers, duties, rights, and functions presently being exercised by other service providers. 3 AAC 110.900(c) requires each petitioner to provide a practical plan for the transfer and integration of relevant assets and liabilities.

The brevity of the transition plan included with the Skagway Petition stems from the expressed nature of the proposal that "no changes in municipal boundaries, population, or services or powers are proposed" (at page 42). The only effects of the proposal would be a change in the name of the local government (from "City of Skagway" to "Municipality of Skagway"), a change of the type of local government (from a first class city in the unorganized borough to a first class borough), and a change in the name of the governing body (from a city council to a borough assembly).

The plan provides that

As one of [the assembly's] first orders of business it adopts and assumes all ordinances, codes, Laws, assets and liabilities of the City of Skagway." Additionally, the plan states, "As one of [the assembly's] first orders of business it adopts and assumes all policies, procedures, contracts, assets and liabilities of the City of Skagway School District.

The affidavit of the Petitioner's Representative (at page 49) includes a statement that the transition plan was prepared in consultation with the City of Skagway. Four City officials are

listed as having been consulted in that regard. Those are the City Manager, Treasurer, School Superintendent, and School Administrator.

The Commission concludes that, given that the existing and proposed municipal governments are indistinguishable in terms of powers, duties, obligations, jurisdictional territory, and number of residents served, the one-page transition plan is adequate. As such, the Commission finds that the standard relating to transition planning set forth in 3 AAC 110.900 is satisfied with respect to the pending Petition.

## **F. STANDARD CONCERNING CIVIL AND POLITICAL RIGHTS**

### ***1. Standard Established in Law***

3 AAC 110.910 states that a petition will not be approved by the Commission if the effect of the proposed change denies any person the enjoyment of any civil or political right, including voting rights, *because of race, color, creed, sex, or national origin*. Specifically, the State law provides as follows:

**3 AAC 110.910 STATEMENT OF NON-DISCRIMINATION.** A petition will not be approved by the commission if the effect of the proposed change denies any person the enjoyment of any civil or political right, including voting rights, because of race, color, creed, sex, or national origin.

In addition to the provisions in State law, the federal Voting Rights Act of 1965, codified as amended at 42 U.S.C. Section 1973, establishes standards relating to the effects that incorporation would have upon civil and political rights of minorities. The Voting Rights Act prohibits political subdivisions from imposing or applying voting qualifications, voting prerequisites, standards, practices, or procedures to deny or abridge the right to vote on account of race or color or because a person is a member of a language minority group. Specifically, the Federal law provides as follows:

**Sec. 1973. - Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation**

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

### ***2. Application of the Civil and Political Rights Standard to the Skagway Borough Petition***

The Petition (at pages 43 – 44) addresses the Skagway borough proposal in the context of the federal Voting Rights Act. The Petition stresses that “There will be no change to voting rights upon incorporation of the territory.”

All municipal annexations in Alaska are subject to review under the Voting Rights Act. The boundaries of the City of Skagway were expanded twice since the Voting Rights Act was applied to the State of Alaska and its political subdivisions. The first occurred on March 6, 1978 and the other occurred on March 4, 1980.

The existing and proposed Skagway municipal governments are indistinguishable in terms of powers, duties, obligations, jurisdictional territory, number of residents served, composition of the governing body, apportionment of the governing body, and form of representation. Therefore, changes to voting rights and practices are, in effect, in name only.

Given the foregoing, the Commission concludes that no voting qualifications, prerequisites, standards, practices, or procedures will result from dissolution of the City of Skagway and incorporation of the Municipality of Skagway that would deny or abridge the right to vote on account of race or color or because a person is a member of a language minority group. The Commission concludes further that the proposed city dissolution and borough incorporation would not deny any person the enjoyment of any civil or political right, including voting rights, because of race, color, creed, sex, or national origin. Thus, the Commission finds that the standards set forth in 42 U.S.C. Section 1973 and 3 AAC 110.910 are satisfied by the Skagway borough proposal.

## **G. STANDARD CONCERNING RESOURCES**

### ***1. Standard Established in Law***

AS 29.05.031(a)(3) provides that a proposed borough must have the human and financial resources to support borough government. Specifically, State law provides, in relevant part, as follows:

**Sec. 29.05.031. Incorporation of a borough or unified municipality.** (a) An area that meets the following standards may incorporate as a home rule, first class, or second class borough, or as a unified municipality: ...

(3) the economy of the area includes the human and financial resources capable of providing municipal services; evaluation of an area's economy includes land use, property values, total economic base, total personal income, resource and commercial development, anticipated functions, expenses, and income of the proposed borough or unified municipality;

Additionally, 3 AAC 110.055 provides as follows:

**3 AAC 110.055. RESOURCES.** The economy of a proposed borough must include the human and financial resources necessary to provide essential borough services on an efficient, cost-effective level. In this regard, the commission

(1) will consider

(A) the reasonably anticipated functions of the proposed borough;

(B) the reasonably anticipated expenses of the proposed borough;

(C) the ability of the proposed borough to generate and collect local revenue, and the reasonably anticipated income of the proposed borough;

(D) the feasibility and plausibility of the anticipated operating and capital budgets through the third full fiscal year of operation;

(E) the economic base of the proposed borough;

(F) property valuations for the proposed borough;

(G) land use for the proposed borough;

(H) existing and reasonably anticipated industrial, commercial, and resource development for the proposed borough; and

(I) personal income of residents of the proposed borough; and

(2) may consider other relevant factors, including

(A) the need for and availability of employable skilled and unskilled persons to serve the proposed borough; and

(B) a reasonably predictable level of commitment and interest of the population in sustaining a borough government.

### ***2. Application of the Resources Standard to the Skagway Borough Petition***

In addressing this standard, the Commission considered the reasonably anticipated functions, expenses, and income of the proposed borough. It also considered the other factors set out in the law such as the feasibility and plausibility of the anticipated operating and capital budgets through the third full fiscal year of operation.

The City of Skagway clearly provides a broad range of municipal services. The City of Skagway is a relatively sophisticated municipal government. The Commission finds from these circumstances that the residents of Skagway have a strong commitment and interest in local government.

Moreover, the evidence in this matter conclusively demonstrates that Skagway is a community with substantial financial resources. Among Alaska's 162 municipal governments, the City of Skagway ranks as third highest in terms of per capita value of taxable property. The 2001 per capita full and true value of taxable property in the City of Skagway was 2.3 times greater than



the comparable figure for Juneau. Moreover, the City of Skagway ranks far above all other municipal governments in Alaska in terms of its capacity to generate sales tax revenues. In 2001, the City of Skagway generated, on a per capita basis, \$883 in general sales tax revenues for each 1% of tax levied. That figure was 4.8 times the comparable measure for Juneau.

After reviewing the reasonably anticipated functions, expenses, and income of the proposed borough, the Commission concludes that the proposed Skagway borough clearly has the resources needed to provide the current level of municipal services. Notwithstanding, the Commission concluded earlier (Section III-B) that the 443.1 square miles proposed for incorporation and to which the proposed borough would provide services does not possess the characteristics of an “area” in the context of Article X, Section 3 of Alaska’s constitution and AS 29.05.031(a). For that reason, the Commission reaches the conclusion that the proposed Skagway borough does not satisfy the standard set out in AS 29.05.031(a)(3) and 3 AAC 110.055.<sup>30</sup>

## **H. STANDARD CONCERNING POPULATION SIZE AND STABILITY**

### ***1. Standard Established in Law***

AS 29.05.031(a)(1) requires the population of the proposed borough to be large and stable enough to support borough government. Specifically, State law provides, in relevant part, as follows:

**Sec. 29.05.031. Incorporation of a borough or unified municipality.** (a) An area that meets the following standards may incorporate as a home rule, first class, or second class borough, or as a unified municipality:

- (1) the population of the area is ... large and stable enough to support borough government;

Additionally, 3 AAC 110.050(a) states as follows regarding this standard:

**3 AAC 110.050. POPULATION.** (a) The population of a proposed borough must be sufficiently large and stable to support the proposed borough government. In this regard, the commission may consider relevant factors, including

- (1) total census enumerations;
- (2) durations of residency;
- (3) historical population patterns;
- (4) seasonal population changes; and
- (5) age distributions.

### ***2. Application of the Population Size and Stability Standard to the Skagway Borough Petition***

With 862 residents at the time of the 2000 Census, Skagway has a population that exceeds the threshold for a first class city within the unorganized borough.

Here again, the Commission takes the view that it is necessary to apply the population size and stability standard in the context of borough government.<sup>31</sup> Doing so necessarily entails consideration of the fundamental borough characteristics outlined in Section III-A of this decisional statement. Since the Commission found under Section III-B that the territory proposed for incorporation clearly lacks the required characteristics of a borough, the proposal necessarily fails to meet the population standard.

Given the foregoing, the Commission concludes that the population size and stability standard in 3 AAC 110.050(a) is not met.

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<sup>30</sup> One Commissioner made favorable comments concerning the application of the resources standard to the Skagway Petition. The observations made in footnote 27 concerning the nature of such comments apply here as well.

<sup>31</sup> One Commission member made favorable comments at the August 31 deliberations concerning satisfaction of the population size and stability standard. The discussion in footnote 27 also applies here concerning the nature of the August 31 comments.

## I. STANDARD CONCERNING RESIDENT 1,000 POPULATION

### 1. *Standard Established in Law*

3 AAC 110.050(b) provides as follows:

**3 AAC 110.050. POPULATION.** ...

(b) Absent a specific and persuasive showing to the contrary, the commission will presume that the population is not large enough and stable enough to support the proposed borough government unless at least 1,000 permanent residents live in the proposed borough.

### 2. *Application of the 1,000 Resident Standard to the Skagway Borough Petition*

The proposed Skagway borough is inhabited by an estimated 862 residents. The presumption set out in 3 AAC 110.050(b) for a minimum of 1,000 residents must clearly be judged in conjunction with the population size and stability standard set out in AS 29.05.031(a)(1) and 3 AAC 110.050(b). Since the Commission concluded that the latter standard was not met, the Commission concludes that the Skagway borough proposal does not overcome the minimum 1,000-population threshold set out in 3 AAC 110.050(b).<sup>32</sup>

## J. STANDARD PRESUMING MULTIPLE COMMUNITIES

### 1. *Standard Established in Law*

State law establishes a rebuttable presumption that a proposed new borough must include multiple communities. Specifically, 3 AAC 110.045(b) provides as follows:

**3 AAC 110.045. COMMUNITY OF INTERESTS.**

...  
(b) Absent a specific and persuasive showing to the contrary, the commission will presume that a sufficient level of interrelationship cannot exist unless there are at least two communities in the proposed borough.

**3 AAC 110.990. DEFINITIONS.** Unless the context indicates otherwise, in this chapter . . .

(5) “community” means a social unit comprised of 25 or more permanent residents as determined under 3 AAC 110.920;

3 AAC 110.920 provides as follows:

**3 AAC 110.920. DETERMINATION OF COMMUNITY.** (a) In determining whether a settlement comprises a community, the commission may consider relevant factors, including whether the

- (1) settlement is inhabited by at least 25 individuals;
- (2) inhabitants reside permanently in a close geographical proximity that allows frequent personal contacts and comprise a population density that is characteristic of neighborhood living; and
- (3) inhabitants residing permanently at a location are a discrete and identifiable social unit, as indicated by such factors as school enrollment, number of sources of employment, voter registration, precinct boundaries, permanency of dwelling units, and the number of commercial establishments and other service centers.

(b) Absent a specific and persuasive showing to the contrary, the commission will presume that a population does not constitute a community if

- (1) public access to or the right to reside at the location of the population is restricted;
- (2) the population is adjacent to a community and is dependent upon that community for its existence; or
- (3) the location of the population is provided by an employer and is occupied as a condition of employment primarily by persons who do not consider the place to be their permanent residence.

### 2. *Application of the Multiple Communities Standard to the Skagway Borough Petition*

DCED examined the nature of the settlement of Dyea at pages 75 – 86 of its Preliminary Report and pages 31 – 32 of its Final Report. Based on its analysis, DCED concluded that Dyea did not meet the definition of a community as set out in 3 AAC 110.990(5) and 3 AAC 110.920. However, testimony, public comments, and observations made during the tour persuade the

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<sup>32</sup> One Commission member made comments at the August 31 deliberations that the Skagway borough proposal overcame the presumption for a 1,000-minimum population. The discussion in footnote 27 also applies here concerning the nature of such comments.

Commission to regard Dyea as a separate and distinct community. Examples of such public comment and testimony include the following.

Haines Postmaster Wayne Selmer provided sworn testimony to the Commission that he believes Dyea is a separate community and has long been considered such by local residents. He testified further that approximately fifty people live in Dyea. Mr. Selmer also testified that Dyea businesses include a bed-and-breakfast establishment.

Former Skagway Mayor Sioux Plummer-Douglas testified that *USA Today* accounts of recent catastrophic flooding carried a Dyea by-line. She viewed such as evidence that Dyea is a separate community. Ms. Plummer-Douglas testified that Dyea is inhabited by 60 – 65 residents, 40 of whom live there year-round.

Stan Selmer, Skagway City Council member, provided public comment to the Commission concerning the nature of Dyea. He advised the Commission that the City of Skagway was compelled to develop a Dyea land use plan as a condition of its entitlement to a grant from the State of municipal lands in Dyea. He indicated further that Dyea has about 80 residents. He also noted that Dyea has an in-holders group. Lastly with regard to Dyea, Mr. Selmer expressed the view of Dyea residents are not dependent upon Skagway.

Dyea resident Dennis Busson also provided public comment to the Commission concerning the nature of Dyea. He indicated that he took exception to characterizations of Dyea as a ghost town. He advised the Commission that Dyea formerly had an honorary mayor, which points to a sense of community. Mr. Busson indicated that some boards established by the City of Skagway require Dyea residency. He also noted that Dyea has its “own land use planning committee.” Mr. Busson advised the Commission that residents of Dyea maintain Dyea roads through a cooperative effort. He also expressed the belief that Dyea would still exist if Skagway did not exist. He reiterated the view expressed in the testimony of Wayne Selmer that most local residents consider Dyea to be a community. In closing, Mr. Busson advised the Commission that Dyea residents fought the Dyea road expansion because “we wanted to be by ourselves.”

On the balance of the evidence in the record, the Commission accepts the assertion that Dyea is a *de facto* community. For these reasons, the Commission concludes that the Skagway borough proposal satisfies the multiple-community standard set out in 3 AAC 110.045(b).

## **K. STANDARD CONCERNING COMMUNICATIONS AND EXCHANGE**

### ***1. Standard Established in Law***

As a condition for borough incorporation, a region must have communication and transportation facilities that are sufficient to allow an integrated borough government. Specifically, AS 29.05.031(a)(4) states:

**Sec. 29.05.031. Incorporation of a borough or unified municipality.** (a) An area that meets the following standards may incorporate as a home rule, first class, or second class borough, or as a unified municipality:

.....  
(4) land, water, and air transportation facilities allow the communication and exchange necessary for the development of integrated borough government.

In addition, the Commission has adopted regulations concerning requirements for communication and exchange within a proposed borough. Specifically 3 AAC 110.045(c) provides as follows:

#### **3 AAC 110.045. COMMUNITY OF INTERESTS.**

.....  
(c) The communications media and the land, water, and air transportation facilities throughout the proposed borough must allow for the level of communications and exchange necessary to develop an integrated borough government. In this regard, the commission may consider relevant factors, including

- (1) transportation schedules and costs;
- (2) geographical and climatic impediments;
- (3) telephonic and teleconferencing facilities; and
- (4) electronic media for use by the public.

## ***2. Application of the Communications and Exchange Standard to the Skagway Borough Petition***

The Commission finds that transportation and communications facilities and services are well developed on a community level. They allow communication and exchange among the residents of the City of Skagway.

The record reflects concerns expressed about the Department of Transportation and Public Facilities' (DOT&PF) ability to maintain state highways, roadways, and airports in Skagway in the face of budget cuts. It demonstrates that in the 1980's, DOT&PF employed a substantially larger maintenance crew in Skagway than it does currently. However, the Commission acknowledges that the City of Skagway has made plans to make up for the loss of one full-time and one seasonal (winter) maintenance position when those cuts are made by DOT&PF by accepting additional road maintenance responsibility in specific areas.

The Commission takes the position that it is necessary to apply the communications and exchange standard in the context of borough government.<sup>33</sup> As is the case with other standards employing the term of art "area", this requires consideration of the fundamental borough characteristics outlined in Section III-A of this decisional statement. Since the Commission found under Section III-B that the territory proposed for incorporation clearly lacks the required characteristics of a borough, the proposal necessarily fails to meet the communications and exchange standard.

## **L. STANDARD CONCERNING ADEQUACY OF ELECTRONIC MEDIA AND LAND, AIR, AND MARINE TRANSPORTATION LINKS**

### ***1. Standard Established in Law***

Regulations adopted by the Commission establish a rebuttable presumption that specific characteristics regarding transportation and communication must exist in order for the Commission to conclude that a proposed borough has sufficient communications and exchange patterns. Specifically, the law provides as follows:

#### **3 AAC 110.045. COMMUNITY OF INTERESTS.**

....  
(d) Absent a specific and persuasive showing to the contrary, the commission will presume that communications and exchange patterns are insufficient unless all communities within a proposed borough are connected to the seat of the proposed borough by a public roadway, regular scheduled airline flights on at least a weekly basis, regular ferry service on at least a weekly basis, a charter flight service based in the proposed borough, or sufficient electronic media communications.

### ***2. Application of the Standard Regarding Adequacy of Electronic Media and Land, Air, and Marine Transportation Links to the Skagway Incorporation Petition***

The proposed Skagway borough has a well-developed public roadway system that allows communication and exchange within the community of Skagway. It also has extensive marine and aviation services and facilities and electronic media that permit communication and exchange with neighboring communities.

The specific standard at issue – 3 AAC 110.045(d) – is tied to the standard set out in AS 29.05.031(a)(4) which was addressed in the immediately-preceding discussion of standards. The Commission concluded that the statutory standard was not satisfied. Therefore, the Commission

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<sup>33</sup> One Commission member made favorable comments at the August 31 deliberations concerning satisfaction of the communications and exchange standard. The discussion in footnote 27 also applies here concerning the nature of the August 31 comments.

necessarily concludes that the Skagway borough proposal also fails to meet the related regulatory standard.<sup>34</sup>

## M. STANDARD REGARDING BOUNDARIES' CONFORMANCE WITH NATURAL GEOGRAPHY

### 1. *The Standard Established in Law*

As a condition for borough incorporation, the boundaries of a proposed borough must conform generally to natural geography. Specifically, AS 29.05.031(a)(2) provides as follows:

**Sec. 29.05.031. Incorporation of a borough or unified municipality.** (a) An area that meets the following standards may incorporate as a home rule, first class, or second class borough, or as a unified municipality:

....

(2) the boundaries of the proposed borough or unified municipality conform generally to natural geography . . . .

Additionally, 3 AAC 110.060(a) provides as follows (emphasis added by underlining):

**3 AAC 110.060. BOUNDARIES.** (a) The boundaries of a proposed borough must conform generally to natural geography, and must include all land and water necessary to provide the full development of essential borough services on an efficient, cost-effective level. In this regard, the commission may consider relevant factors, including

- (1) land use and ownership patterns;
- (2) ethnicity and cultures;
- (3) population density patterns;
- (4) existing and reasonably anticipated transportation patterns and facilities;
- (5) natural geographical features and environmental factors; and
- (6) extraterritorial powers of boroughs.

### 2. *Application of the Standard Regarding Conformance to Natural Geography*

The straight-line western boundary of the proposed Skagway borough generally follows the ridgeline dividing the Ferebee River drainage on the west and the Taiya River drainage on the east. Moreover, the straight-line southern boundary of the proposed Skagway borough generally follows the divide between the Kasidaya Creek watershed on the north and Katzehin River watershed on the south. The proposed eastern and northern boundaries are coterminous with the international boundary between Alaska and Canada.

However, the Commission stresses that the statutory standard concerning natural geography standard includes the term of art "area". As is the case with other standards employing that term, the Commission is compelled to judge the standard in the context of the fundamental characteristics of a borough. The Commission earlier concluded that the Skagway borough proposal does not embrace an area of borough scale. Consequently, the Commission concludes that the Skagway borough proposal fails to satisfy the standard in question.

## N. INCLUSION OF ALL LAND AND WATER NECESSARY TO PROVIDE ESSENTIAL SERVICES ON AN EFFICIENT, COST-EFFECTIVE LEVEL

### 1. *The Standard Established in Law*

State law requires that each proposed borough must include all land and water necessary to provide full development of essential municipal services. Specifically, State law provides as follows:

**Sec. 29.05.031. Incorporation of a borough or unified municipality.** (a) An area that meets the following standards may incorporate as a home rule, first class, or second class borough, or as a unified municipality:

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<sup>34</sup> Two members of the Commission made favorable comments at the August 31 deliberations concerning satisfaction of the standard set out in 3 AAC 110.045(d). The discussion in footnote 27 also applies here concerning the nature of the August 31 comments.

...  
(2) the boundaries of the proposed borough . . . include all areas necessary for full development of municipal services;

**3 AAC 110.060. BOUNDARIES.** (a) The boundaries of a proposed borough . . . must include all land and water necessary to provide the full development of essential borough services on an efficient, cost-effective level. In this regard, the commission may consider relevant factors, including

- (1) land use and ownership patterns;
- (2) ethnicity and cultures;
- (3) population density patterns;
- (4) existing and reasonably anticipated transportation patterns and facilities;
- (5) natural geographical features and environmental factors; and
- (6) extraterritorial powers of boroughs.

## ***2. Application of the Standard Concerning Inclusion of all Areas Needed for Efficient and Effective Delivery of Services on Regional Scale***

Here again, the statutory standard requiring inclusion of all territory necessary for full development of municipal services employs the term of art “area.” Because borough governments are intended encompass large natural regions, the Skagway borough proposal does not include all the land and water necessary to provide essential services on an efficient, cost-effective level at the scale of a borough. Consequently, the Commission concludes that the Skagway borough proposal fails to satisfy the standard in question.

## **O. RELATION OF PROPOSED BOROUGH BOUNDARIES TO THE MODEL BOROUGH BOUNDARIES**

### ***1. The Standard Established in Law***

The Local Boundary Commission must consider “model borough boundaries” in the course of any borough incorporation proposal. Specifically, State law provides as follows:

**3 AAC 110.060. BOUNDARIES.**

...  
(b) Absent a specific and persuasive showing to the contrary, the commission will not approve a proposed borough with boundaries extending beyond any model borough boundaries.

The term “model borough boundaries” is defined in 3 AAC 110.990(9) as follows:

**3 AAC 110.990. DEFINITIONS.** Unless the context indicates otherwise, in this chapter . . .

(9) “model borough boundaries” means those boundaries set out in the commission’s publication *Model Borough Boundaries*, revised as of June 1997 and adopted by reference.

### ***2. Application of the Model Borough Boundaries Standard to the Skagway Borough Petition***

The Skagway borough proposal is wholly within the Lynn Canal model borough boundaries. As such, it does not extend beyond any model borough boundaries. Consequently, the Commission concludes that this proposal satisfies the standard.

## **P. RELATION OF PROPOSED BOROUGH BOUNDARIES TO REAA BOUNDARIES**

### ***1. The Standard Established in Law***

State law requires the Local Boundary Commission to consider regional educational attendance area boundaries when determining the suitability of any borough incorporation proposal. Specifically, the law provides as follows:

**3 AAC 110.060. BOUNDARIES.**

(c) The proposed borough boundaries must conform to existing regional educational attendance area boundaries unless the commission determines, after consultation with the commissioner of education and early development, that a territory of different size is better suited to the public interest in a full balance of the standards for incorporation of a borough.

## ***2. Application of the REAA Boundaries Standard to the Skagway borough petition***

The requirement that boundaries of a proposed borough conform to REAA boundaries (unless alternative boundaries are more suitable) is yet another indicator of the regional nature of boroughs. The standards established in law governing the creation of REAAs reflect regional characteristics. Many of those standards are similar to the statutory standards for borough formation. Specifically, AS 14.08.031(a) and (b) provide as follows:

**Sec. 14.08.031. Regional educational attendance areas.** (a) The Department of Community and Economic Development in consultation with the Department of Education and Early Development and local communities shall divide the unorganized borough into educational service areas using the boundaries or sub-boundaries of the regional corporations established under the Alaska Native Claims Settlement Act, unless by referendum a community votes to merge with another community contiguous to it but within the boundaries or sub-boundaries of another regional corporation.

(b) An educational service area established in the unorganized borough under (a) of this section constitutes a regional educational attendance area. As far as practicable, each regional educational attendance area shall contain an integrated socio-economic, linguistically and culturally homogeneous area. In the formation of the regional educational attendance areas, consideration shall be given to the transportation and communication network to facilitate the administration of education and communication between communities that comprise the area. Whenever possible, municipalities, other governmental or regional corporate entities, drainage basins, and other identifiable geographic features shall be used in describing the boundaries of the regional school attendance areas.

The unorganized borough is divided into nineteen REAAs. Skagway is within the Chatham REAA. The Chatham REAA boundaries are peculiar in the sense that they encompass three non-contiguous parts. The first is Skagway. The second is Klukwan (an enclave within the Haines Borough). The third is the remainder, encompassing the largest part of the Chatham REAA. This third part includes the communities of Angoon, Cube Cove, Gustavus, and Tenakee Springs.

The Commission finds that the Chatham REAA boundaries would be unsuitable as a borough. There is a presumption in 3 AAC 110.060(d) that all territory within a borough will be contiguous. Based on conclusions reached earlier with respect to several of the standards, the Commission also finds that the Skagway borough proposal does not offer a suitable alternative boundary proposal. Consequently, the Commission concludes that the Skagway borough proposal does not meet the standard at issue.

## **Q. CONTIGUITY OF TERRITORY PROPOSED FOR INCORPORATION**

### ***1. The Standard Established in Law***

State law presumes that territory proposed for incorporation of a borough will be contiguous and that it will not contain enclaves. Specifically, the law provides as follows:

#### **3 AAC 110.060. BOUNDARIES.**

(d) Absent a specific and persuasive showing to the contrary, the commission will presume that territory proposed for incorporation that is non-contiguous or that contains enclaves does not include all land and water necessary to allow for the full development of essential borough services on an efficient, cost-effective level.

### ***2. Application of the Contiguity Standard to the Skagway Borough Proposal***

The 443.1 square miles proposed for incorporation are contiguous and do not contain enclaves. Therefore, the Commission concludes that the Skagway annexation proposal petition meets the standard set out in 3 AAC 110.060(d).

## **R. EXTENT OF ANY OVERLAPPING BOUNDARIES**

### ***1. The Standard Established in Law***

State law provides that if a proposal to incorporate a borough includes territory already within the boundaries of another existing organized borough, the proposal must address standards for detachment of the overlapping territory from the existing organized borough. Specifically, State law provides as follows:

**3 AAC 110.060. BOUNDARIES.**

(e) If a petition for incorporation of a proposed borough describes boundaries overlapping the boundaries of an existing organized borough, the petition for incorporation must also address and comply with all standards and procedures for detachment of the overlapping region from the existing organized borough. The commission will consider and treat that petition for incorporation as also being a detachment petition.

***2. Application of the Overlapping Boundaries Standard to the Skagway Borough Proposal***

The facts relating to the standard at issue are simple and straightforward. The territory comprising the proposed Skagway borough does not overlap any area currently within the boundaries of another existing organized borough. Consequently, the Commission finds that the standard set out in 3 AAC 110.060(e) is satisfied.

**S. BEST INTERESTS OF THE STATE**

***A. The Standard Established in Law***

State statutes permit the Local Boundary Commission to approve a borough incorporation proposal only if the Commission concludes that it will serve the best interests of the state. Specifically, the statutes provide as follows (emphasis added by underlining):

**Sec. 29.05.100. Decision.** (a) The Local Boundary Commission may amend the petition and may impose conditions on the incorporation. If the commission determines that the incorporation, as amended or conditioned if appropriate, meets applicable standards under the state constitution and commission regulations, meets the standards for incorporation under AS 29.05.011 or 29.05.031, and is in the best interests of the state, it may accept the petition. Otherwise it shall reject the petition.

The Commission has adopted regulations to define the “best interests of the state.” Those regulations provide as follows:

**3 AAC 110.065. BEST INTERESTS OF STATE.** In determining whether incorporation of a borough is in the best interests of the state under AS 29.05.100(a), the commission may consider relevant factors, including whether incorporation

- (1) promotes maximum local self-government;
- (2) promotes a minimum number of local government units;
- (3) will relieve the state government of the responsibility of providing local services; and
- (4) is reasonably likely to expose the state government to unusual and substantial risks as the prospective successor to the borough in the event of the borough’s dissolution.

***2. Application of best interests standard to Skagway borough proposal***

The principal elements of the standard as it applies to the Skagway borough proposal relate to the following:

- maximization of local self-government;
- promotion of a minimum number of local government units; and
- relief to the state government from the responsibility of providing local services.

The state encourages localities to assume and exercise local self-determination and provide municipal services that are funded and provided at the local level. Such is in the best interests of the public statewide and is consistent with the constitutional intent regarding municipal government.

Altering Skagway’s municipal status by changing its designation from a city to a borough may have effects on education and other funding. However, the financial consequences that extend from legislative policy should not be construed to be elements of state governmental interests. Rather, such is a statement of legislative policy. Incentives meant to promote localities to pursue incorporation or annexation are not particularity relevant to the standard.

On balance, the Commission finds that the Skagway borough proposal is inconsistent with the constitutional scheme for borough development and therefore is not in the best interests of the



state.<sup>35</sup> It does not advance maximum local self-government beyond the level that currently exists in Skagway. It does not promote minimum numbers of local government units. Furthermore, it does not relieve the State government of the responsibility of providing local services beyond that which exists under the current structure. Consequently, the Commission concludes that the best interests standard is not met.


## **SECTION IV**

### **ORDER OF THE COMMISSION**

Based on the findings and conclusions set out in Section III, the Commission hereby determines that the Skagway borough Petition fails to comply with all requisite borough incorporation standards established in the Constitution of the State of Alaska, Alaska Statutes, and Alaska Administrative Code. Further, there are no amendments or conditions that the Commission could make to the Petition that would bring the proposal into conformance with the applicable standards. Accordingly, the Petition is hereby denied.

Approved in writing this 27th day of September, 2002.

#### ***LOCAL BOUNDARY COMMISSION***

BY:   
Kevin Waring, Chair

Attest:   
Dan Bockhorst, Staff

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<sup>35</sup> During their August 31 deliberations, Commission members expressed divergent preliminary views regarding whether incorporation of a Skagway borough would promote maximum local self-government. Concern was expressed by some that the proposed borough incorporation would simply replace an existing city with an identical borough. Some felt that the Skagway borough would contravene the constitutional principle of minimum numbers of local governments, others differed regarding that point. Concern was also raised as to whether approval of a Skagway borough would set a precedent with far-reaching adverse consequences. Members stressed that denial of the petition should not be viewed as a “penalty” on the City of Skagway for the extensive services it now provides to its residents. The Commission acknowledged the validity of Mayor Bourcy’s observation that overall the State is shifting more responsibility to local government for services. Nevertheless, the view was expressed that the Skagway borough proposal does not relieve the state government of any responsibility for providing local services and that such is not consistent with the State’s best interests. Others expressed preliminary views that the best interests of the state were served by the Skagway borough proposal because Skagway currently relieves the State of some of the responsibility for local service delivery. It was also noted that the City of Skagway has assumed a higher proportional cost of delivery of education, in contrast to other communities such as Gustavus where the state of Alaska assumes all education costs. Some members noted that the Petitioner’s pledge that the community was prepared to waive the \$600,000 organizational grant and relieve the State of the responsibility of managing the Skagway harbor exemplifies maximum local government. Some members also expressed the view that promotion of a minimum number of local government units must be considered in the context of the number of local government units necessary to deliver services most effectively and relieve the state government of responsibility for local service delivery. Here again, the comments noted in footnote 27 apply to the August 31 preliminary comments concerning the best interests standard.

## RECONSIDERATION BY THE COMMISSION

Within eighteen days after the Commission's written statement of decision is mailed under 3 AAC 110.570(f), a person or entity may file an original and five copies of a request for reconsideration of all or part of that decision. Within twenty days after a written statement of decision is mailed under 3 AAC 110.570(f), the Commission may, on its own motion, order reconsideration of all or part of that decision. A request for reconsideration from a person or entity must describe in detail the facts and analyses that support the request for reconsideration.

A person or entity filing a request for reconsideration must provide DCED with a copy of the request for reconsideration and supporting materials in an electronic format. DCED may waive the requirement if the person or entity requesting reconsideration lacks a readily accessible means or the capability to provide items in an electronic format.

A request for reconsideration must be filed with an affidavit of service of the request for reconsideration on the Petitioner by regular mail, postage prepaid, or by hand-delivery. A request for reconsideration must also be filed with an affidavit that, to the best of the affiant's knowledge, information, and belief, formed after reasonable inquiry, the request for reconsideration is founded in fact, and is not submitted to harass or to cause unnecessary delay or needless expense in the cost of processing the petition.

If the person or entity filing the request for reconsideration is a group, the request must identify a representative of the group. The Commission will grant a request for reconsideration or, on its own motion, order reconsideration of a decision if the Commission determines that

- (1) a substantial procedural error occurred in the original proceeding;
- (2) the original vote was based on fraud or misrepresentation;
- (3) the commission failed to address a material issue of fact or a controlling principle of law; or
- (4) new evidence not available at the time of the hearing relating to a matter of significant public policy has become known. The law provides that if the Commission does not act on a request for reconsideration within twenty days after the decision was mailed under 3 AAC 110.570(f), the request is automatically denied. If it orders reconsideration or grants a request for reconsideration within twenty days after the decision was mailed under 3 AAC 110.570(f), the Commission will allow the Petitioner ten days after the date reconsideration is ordered or the request for reconsideration is granted to file an original and five copies of a responsive brief describing in detail the facts and analyses that support or oppose the decision being reconsidered. The Petitioner shall provide DCED with a copy of the responsive brief in an electronic format, unless DCED waives this requirement because the Petitioner lacks a readily accessible means or the capability to provide items in an electronic format. the day that the written statement of decision is mailed, postage prepaid, to the Petitioner.

Within ninety days after DCED receives timely filed responsive briefs, the Commission, by means of the decisional meeting procedure set out in 3 AAC 110.570(a)-(f), will issue a decision on reconsideration. A decision on reconsideration by the Commission is final on the day that the written statement of decision is mailed, postage prepaid, to the Petitioner.

## JUDICIAL APPEAL

A judicial appeal of this decision may also be made under the provisions of the Alaska Rules of Appellate Procedures, Rule 601 et seq. An appeal to the Superior Court must be made within thirty days after the last day on which reconsideration can be ordered.

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