



THE STATE
of **ALASKA**
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Preliminary Report to the Local Boundary Commission

Concerning the Petition to Incorporate Whale Pass as a
Second Class City within the Unorganized Borough

April 22, 2016

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This is the “Preliminary Report to the Local Boundary Commission Concerning the Petition to Incorporate Whale Pass as a Second Class City within the Unorganized Borough.” The report was written by staff to the Local Boundary Commission. The staff is part of the Division of Community and Regional Affairs of the Alaska Department of Commerce, Community, and Economic Development (Commerce). The report can also be found at the following address:

<https://www.commerce.alaska.gov/web/dcra/LocalBoundaryCommission/CurrentPetitions/2016IncorporationPetitionforaSecondClassCityofWhalePass/Reports.aspx>

The report is preliminary and should be used for public review and comment in accordance with 3 AAC 110.530, which also requires LBC staff to issue a final report after considering written comments regarding the preliminary report.

Commerce complies with Title II of the Americans with Disabilities Act of 1990. Upon request, this report will be made available in large print or other accessible formats. Such requests should be directed to the Local Boundary Commission staff at 907-269-4559, 907-269-4587, or LBC@alaska.gov.

Chapter I. Background

Local Boundary Commission

Local Boundary Commission's Constitutional Foundation

Article X of the Constitution of the State of Alaska created the Local Boundary Commission (also referred to as "LBC" or "commission").¹ The commission is responsible for establishing and modifying proposed municipal government boundaries. Placing decision-making authority with a state body allows debate about boundary changes to be analyzed objectively, taking areawide or statewide needs into consideration.

Local Boundary Commission's Statutory Authority

Pursuant to AS 29.06.040(a), the Local Boundary Commission may consider any proposed municipal boundary change. The commission may amend the proposed change and may impose conditions on the proposed change. If the commission determines that the proposed change, as amended or conditioned if appropriate, meets applicable standards under the state constitution and commission regulations, and is in the best interests of the state, it may accept the proposed change. Otherwise, it shall reject the proposed change. A Local Boundary Commission decision under this subsection may be appealed under AS 44.62.

LBC Duties and Functions

The LBC acts on proposals for several municipal (cities and boroughs) boundary changes. These are:

- incorporation
- annexation
- detachment
- merger
- consolidation
- reclassification
- dissolution

In addition to acting on the above proposals for municipal boundary changes, the LBC under AS 44.33.812 shall:

- make studies of local government boundary problems; and
- adopt regulations providing standards and procedures for municipal incorporation, annexation, detachment, merger, consolidation, reclassification, and dissolution.

¹ Article X, section 12 states, "A local boundary commission or board shall be established by law in the executive branch of the state government. The commission or board may consider any proposed local government boundary change. It may present proposed changes to the Legislature during the first ten days of any regular session. The change shall become effective forty-five days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house. The commission or board, subject to law, may establish procedures whereby boundaries may be adjusted by local action."

Local Boundary Commission Staff

Constitutional Origin

The Constitution of the State of Alaska called for establishing an executive branch agency to advise and assist local governments (article X, section 14). The duty to serve as that local government agency is presently delegated to the Alaska Department of Commerce, Community, and Economic Development (Commerce, DCCED, or department). Commerce serves as staff to the LBC per AS 44.33.020(a)(4). Within Commerce, the Division of Community and Regional Affairs (DCRA) performs the local government agency's functions. This includes providing staff, research, and assistance to the LBC.

LBC Staff Role

LBC staff is required by law to investigate and analyze each boundary change proposal and to make recommendations regarding the proposal to the LBC. For each petition, staff will write at least one report for the commission. All materials are available to the public.

Petition Procedures

Procedures to establish and alter municipal boundaries and to reclassify cities are designed to ensure every proposal's reasonable and timely determination. The procedures are also intended to ensure that commission decisions are based on application of the standards to the facts.

Preparing and Filing a Petition

The LBC staff offers technical assistance, information, and forms to prospective petitioners. When a petition is prepared, it is then submitted to staff for filing. The staff will then review the petition to identify any deficiencies in form and content. If the staff finds that the petition contains all the required information, Commerce accepts it for filing.

Public Notice and Public Review

Once a petition is accepted for filing, the staff arranges for extensive public notice. This provides ample opportunity for public comment concerning the petition.

Analysis

Following the public comment period on the petition, the LBC staff analyzes the petition, written comments, briefs, and other materials. Both the petitioner and the staff can conduct public informational meetings. If the petition is for incorporation, the staff must hold at least one public meeting within the boundaries proposed for incorporation. When the staff finishes its analysis, it issues a preliminary report including a recommendation to the commission. It will also issue a final report following a second public comment period after the publication of the preliminary report.

Commission Review of Materials, Public Hearings, and Decision

LBC members review the petition, responsive briefs, written comments, reply briefs, and the staff report which includes recommendations to the commission. The commission is not obligated to follow staff recommendations; however, it has historically considered the staff analyses and recommendations to be critical components of the record in municipal boundary proceedings. The LBC considers the entire record when it renders its decision.

LBC Decisions Must Have a Reasonable Basis

LBC decisions regarding petitions must have a reasonable basis. Both the LBC's interpretation of the applicable legal standards and its evaluation of the evidence in the proceeding must be rational.² The LBC must proceed within its jurisdiction, and conduct a fair hearing.

The LBC must adopt a written decision stating the basis for its decision. Copies of the decision are issued to the petitioner, respondents, and others who request them. At that point, the decision becomes final, but is subject to reconsideration. Any person may ask the LBC to reconsider its decision under 3 AAC 110.580. The LBC may order reconsideration on its own motion. If the LBC does not approve any reconsideration requests within 30 days of the decision's mailing date, all reconsideration requests are automatically denied.

Implementation

3 AAC 110.630(a) specifies conditions that must be met before a LBC final decision is effective. If the LBC approves a petition, the proposal is typically subject to approval by voters, or disapproval by the legislature, depending on whether it was filed as a local action petition, or a legislative review petition, respectively. If an election was held, certification of voter approval of the LBC's final decision is needed from the division of elections or the appropriate municipal official. If all of the requirements of 3 AAC 110.630(a) have been met, the department shall issue a certificate describing the effective change.

Legal Standards for Incorporation of Cities

The criteria used by the commission to evaluate the incorporate the Whale Pass incorporation proposal are set out in AS 29.05.011, AS 29.05.021, 3 AAC 110.005 - 3 AAC 110.042, and 3 AAC 110.900 - 3 AAC 110.990.

Conclusion

This chapter has described the Local Boundary Commission's background, the role of the LBC staff, and petition procedures. Chapter 2 will discuss this petition's proceedings to date, analysis of the standards and the staff recommendation to the commission.

² See *Keane v. Local Boundary Commission*, 893 P.2d 1239, 1241 (Alaska 1995). When an administrative decision involves expertise regarding either complex subject matter or fundamental policy formulation, the court defers to the decision if the decision has a reasonable basis.

Chapter II. Analysis and Recommendations

Introduction

The petition, briefs, and all of the comments submitted were read and reviewed for this report. The entire record is available online at:

<https://www.commerce.alaska.gov/web/dcra/LocalBoundaryCommission/CurrentPetitions/2016IncorporationPetitionforaSecondClassCityofWhalePass.aspx>.

The single comment received can be found in Appendix B.

The report uses the term “Commerce” interchangeably with “LBC staff” and “we.” LBC staff works in the Division of Community and Regional Affairs (DCRA) within the Department of Commerce, Community, and Economic Development (DCCED).

Petition proceedings thus far

Residents of Whale Pass submitted a petition to incorporate with the requisite number of signatures in late 2015. After a technical review, staff accepted it for filing on January 7, 2016. The first public comment period began when notice of the filing was published on January 8, 2016 and lasted until March 11. Only one comment was received. LBC staff held an information session on April 14, 2016 at the Whale Pass Community Library, which was attended by 17 people.

This is a preliminary report. There will be a public comment period on this report beginning with its April 22, 2016 mailing until May 31, 2016 (see notice in Appendix A). After reviewing comments received on this preliminary report, Commerce will issue a final report in June. A public hearing is scheduled tentatively for August 2016. A tentative schedule is in Appendix C.

Standards

The standards for consideration are found in statutes and regulations. Where these overlap or are redundant, they will only be addressed once. Only standards relevant to the incorporation of a second class city will be addressed in this report.

Some standards contain factors that commission “may consider” in determining whether the standard is met. As the standards use the word “may,” it is not required that the commission (or this report) consider all those factors, only that the commission consider whether the standard is met.

AS 29.05.011. 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.

The requirements of AS 29.05.011 are addressed by and included in the regulatory standards and so this report will not address the standards found in AS 29.05.011 separately.

AS 29.05.021. Limitations on incorporation of a city

(a) A community in the unorganized borough may not incorporate as a city if the services to be provided by the proposed city can be provided by annexation to an existing city.

(b) A community within a borough may not incorporate as a city if the services to be provided by the proposed city can be provided on an areawide or nonareawide basis by the borough in which the proposed city is located, or by annexation to an existing city. (§ 4 ch 74 SLA 1985)

The analysis of AS 20.05.021 is included within the analysis of 3 AAC 110.010.

3 AAC 110.005 Community

Territory proposed for incorporation as a city must encompass a community.

Per 3 AAC 110.005, the territory proposed for incorporation must encompass a community (as determined in 3 AAC 110.920(a), and defined by 3 AAC 110.990(5)). See below.

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 permanent residents;

(2) the permanent residents live in a geographical proximity that allows frequent personal contacts and interaction; and

(3) the permanent residents at a location are a discrete and identifiable social unit, as indicated by such factors as resident public school enrollment, number of sources of employment, voter registration, precinct boundaries, permanency of dwelling units, and the number of commercial or industrial establishments, community services, and 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; or

(2) repealed 1/9/2008;

(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.

- (c) A city that absorbs one or more municipalities through merger comprises a single community. A city that is formed through the consolidation of one or more municipalities comprises a single community.

3 AAC 110.990. Definitions

Unless the context indicates otherwise, in this chapter

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

Analysis

The community of Whale Pass is recognized by the United States Census Bureau as a Census Designated Place (CDP), and has had a community association for many years. The community also hosts a library, a school, a church, a health clinic, as well as businesses and other community organizations. The community is accessed by a road and residents live in close geographic proximity. Commerce finds that Whale Pass meets the definition of a community as defined by 3 AAC 110.990(5).

The Department of Labor and Workforce Development of Alaska lists a population of 46 in 2015, well over the required 25 permanent residents. This number is determined in part by permanent fund dividend applications and therefore, only counts those with their permanent addresses in Whale Pass.

In addition, under 3 AAC 110.920(b), public access to or the right to reside at the location of the population is not restricted, nor is the location of the population provided by an employer and occupied as a condition of employment primarily by persons who do not consider the place to be their permanent residence.

Many of these statutes are repeated in regulations that are addressed below. After considering these factors, Commerce concludes all the standards above are met and that Whale Pass meets the definition of a community.

3 AAC 110.010 Need

- (a) In accordance with AS 29.05.011(a)(5), a community must demonstrate a reasonable need for city government. In this regard, the commission may consider relevant factors, including
 - (1) existing or reasonably anticipated social or economic conditions;
 - (2) existing or reasonably anticipated health, safety, and general welfare conditions;
 - (3) existing or reasonably anticipated economic development; and
 - (4) adequacy of existing services.
- (b) In accordance with AS 29.05.021(a), and to promote a minimum number of local government units in accordance with art. X, sec. 1, Constitution of the State of Alaska, a community in the unorganized borough may not incorporate as a city if essential municipal services can be provided more efficiently or more effectively by annexation to an existing city.
- (c) In accordance with AS 29.05.021(b), and to promote a minimum number of local government units in accordance with art. X, sec. 1, Constitution of the State of Alaska, a community within an organized borough may not incorporate as a city if essential municipal services can be provided more efficiently or more effectively
 - (1) by annexation to an existing city;

- (2) by an existing organized borough on an areawide or nonareawide basis; or
- (3) through an existing borough service area.

Analysis

Currently, residents of Whale Pass are represented only by the state of Alaska and have no closer local government. While citizens may participate in the Whale Pass Community Association, only incorporation as a municipality may allow the autonomy and local control the petition seeks. The community association is merely a nonprofit without the power of law to raise revenue, issue bonds, or represent residents adequately.

A community in the unorganized borough that actively seeks local control demonstrates a reasonable need for city government and Whale Pass meets this standard. AS 29.05.011(a)(5) and 3 AAC 110.010(a) are met.

AS 29.05.021(a) and 3 AAC 110.010(b) do not allow a city in the unorganized borough to incorporate if municipal services can be provided by annexation to another city. Although Whale Pass is in the unorganized borough, there is no nearby city that could annex Whale Pass. Hence, AS 29.05.021(a) and 3 AAC 110.010(b) do not prevent the incorporation of Whale Pass.

AS 29.05.021(b) and 3 AAC 110.010(c) do not allow a city in an organized borough to incorporate if municipal services can be provided by annexation to another city, by an existing borough, or through a borough service area. As the proposed city is not in an organized borough, AS 29.05.021(b) and 3 AAC 110.010(c) do not prevent the incorporation of Whale Pass.

For those reasons, Commerce finds that AS 29.05.011(a)(5), AS 29.05.021(a), AS 29.05.021(b), and 3 AAC 110.010 are met.

3 AAC 110.020 Resources

In accordance with AS 29.05.011(a)(3), the economy of a proposed city must include the human and financial resources necessary to provide essential municipal services on an efficient, cost-effective level. In this regard, the commission

- (1) will consider
 - (A) the reasonably anticipated functions of the proposed city;
 - (B) the reasonably anticipated expenses of the proposed city;
 - (C) the ability of the proposed city to generate and collect revenue at the local level;
 - (D) the reasonably anticipated income of the proposed city
 - (E) the feasibility and plausibility of the anticipated operating and capital budgets of the proposed city through the period extending one full fiscal year beyond the reasonably anticipated date
 - (i) for receipt of the final organization grant under AS 29.05.180;
 - (ii) for completion of the transition set out in AS 29.05.130-29.05.140 and 3 AAC 110.900; and
 - (iii) on which the proposed city will make its first full local contribution required under AS 14.17.410(b)(2) if the proposal seeks to incorporate a home rule or first class city in the unorganized borough;
 - (F) the economic base of the area within the proposed city;
 - (G) valuations of taxable property within the proposed city;
 - (H) existing and reasonably anticipated industrial, commercial, and resource development within the proposed city; and

- (1) personal income of residents of the proposed city; and
- (2) may consider other relevant factors, including
 - (B) land use within the proposed city;
 - (C) the need for and availability of employable skilled and unskilled persons to serve the proposed city government; and
 - (D) the reasonably predictable level of commitment and interest of the residents in sustaining a city government

Analysis

The proposed city of Whale Pass seeks to assume control over the community harbor, road maintenance, the fire department, emergency medical services (EMS), and the land and buildings now held by the Whale Pass Community Association. These services are similar to those being provided by the community association now. The petition states that the community seeks incorporation in order to provide these services more efficiently and effectively, enter into legal agreements, contracts, and apply for grants as a municipal incorporation rather than a community nonprofit.

To this end, the petition provides a budget of anticipated expenses including deferred maintenance, as well as anticipated costs associated with city government. In the event of city incorporation, a City of Whale Pass would receive the assets of the community association which lists a surplus of more than \$50,000, as well as its physical assets. The budget lists expenses and potential revenue sources for three years after incorporation and includes the anticipated state organizational grant. Whale Pass residents have anticipated the potential loss of community revenue sharing and have indicated foresight in planning for the possible reduction in state aid. In each scenario calculated, the potential City of Whale Pass comes out with a net surplus.

Whale Pass has about eight lodges and several tourism-related businesses in the community, and a proposed second class city would allow for revenue generation. There are at least two general stores, and several hunting and/or fishing guide or charter businesses. Whale Pass indicates that it could use sales and bed taxes to supplement any reductions in community revenue sharing and serve as the primary source of income.

Future services including refuse collection are anticipated and could be served by the municipal land entitlement that comes with incorporation as a second class city. The petition budget forecast does not include payment in lieu of taxes, shared fisheries taxes, rural roads, or national forestry receipts all of which a potential second class city might be entitled to. The petition indicates the potential city's unwillingness to rely on uncertain state allocations due to forecast budget reductions and uncertainty of federal appropriations year to year. Commerce believes this reluctance to rely on moneys that are no longer guaranteed as a primary source of income is wise.

Whale Pass does not intend to assess property taxes due to the cost of appraisal and implementation. A rough estimate of property values indicates revenue generated annually would likely be under \$100,000. The petition also indicates that assessing as of yet unvalued property is cost-prohibitive. As such, property taxes would only be considered if a future, organized borough government provided the appraisal information and infrastructure necessary to make assessment cost-effective. Again, property tax is not intended to be a source of income for a potential Whale Pass second class city.

In addition to financial resources, the petition also acknowledges the human resources necessary for a well-functioning city. The Whale Pass Community Association is run currently by a volunteer board; the fire department and emergency medical services are also volunteer forces. The petition indicates the potential city intends to hire a city clerk rather than rely solely on volunteer participation and in order to increase stability.

Population numbers indicate some growth in the Whale Pass vicinity, and anecdotal evidence indicates increased tourism in the region is a reason for residents to seek greater local control over development and the resources in their locale. Logging, fishing, hunting, and mining are all present in Whale Pass and are employers as well as sources of potential revenue though in varying capacities. The primary income will likely be generated by taxing tourism-related activities in the form of bed and/or sales taxes.

The only numbers for Whale Pass residents' personal incomes indicate that 46 percent of residents are employed as of 2014. This information is not considered reliable (because of extremely small sample size) or relevant because the residents will not be levying a tax on income.

In sum, Commerce finds that the proposed city has the human and financial resources necessary to provide the development of essential municipal services on an efficient, cost-effective level, and that 3 AAC 110.020 and AS 29.05.011(a)(3) are met.

3 AAC 110.030 Population

- (a) In accordance with AS 29.05.011(a)(4), the population of a proposed city must be sufficiently large and stable to support the proposed city government. In this regard, the commission may consider relevant factors, including
 - (1) census enumerations;
 - (2) durations of residency;
 - (3) historical population patterns;
 - (4) seasonal population changes;
 - (5) age distributions;
 - (6) contemporary and historical public school enrollment data; and
 - (7) nonconfidential data from the Department of Revenue regarding applications under AS 43.23 for permanent fund dividends.

Analysis

The boundaries for the proposed City of Whale pass are slightly different from the Census-designated place (CDP) of Whale Pass. CDPs are used for statistical purposes. There should not be major differences however in terms. In 2010, the most recent Census count, the population numbered 31. The most recent Department of Labor and Workforce Development lists the CDP with a population of 46. These numbers are for permanent, year-round residents; there are many indications that the population swells in the summer season. The state demographer, whose numbers come from permanent fund dividend (PFD) applications in part, also determined the population to be 46 in 2015. Because an application for the PFD requires a declaration of a permanent, primary address in Alaska which may be verified, use of these data is considered the most reliable source of population data between decennial U.S. Census counts.

Therefore, the requirement for 25 permanent residents in a second class city is met.

Historical data indicate a declining population due in part to a closed logging camp. No population data is available before the 1980 Census, which listed 90 residents. This number has declined since, but has risen in the last 5 years. While the school closed for the 1998-1999 school year, the Whale Pass School now has 11 students and is a part of the Southeast Island School District. A closer look at the residents reveals a stable core of year-round permanent residents who own and run the tourism-related businesses that a potential city government would rely on for tax generation. These same residents are those who have run the volunteer community association, fire service, and EMS over the years.

After consideration of these factors, Commerce concludes that Whale Pass has a sufficiently stable population to support city governance. AS 29.05.11(a)(4) is also met.

3 AAC 110.040. Boundaries

- (a) In accordance with AS 29.05.011(a)(2), the boundaries of a proposed city must include all land and water necessary to provide the development of essential municipal services on an efficient, cost-effective level. In this regard, the commission may consider relevant factors, including
 - (1) land use, subdivision platting, and ownership patterns;
 - (2) population density;
 - (3) existing and reasonably anticipated transportation patterns and facilities;
 - (4) natural geographical features and environmental factors;
 - (5) extraterritorial powers of cities;
 - (6) salability of land for residential, commercial, or industrial purposes; and
 - (7) suitability of the territory for reasonably anticipated community purposes.
- (b) To promote the limitation of community, the boundaries of the proposed city
 - (1) must be on a scale suitable for city government and may include only that territory comprising a present local community, plus reasonably predictable growth, development, and public safety needs during the 10 years following the anticipated date of incorporation; and
 - (2) 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 and are otherwise suitable for city government.
- (c) Absent a specific and persuasive showing to the contrary, the commission will presume that territory proposed for incorporation that is noncontiguous or that contains enclaves does not include all land and water necessary to allow for the development of essential municipal services on an efficient, cost-effective level.
- (d) If a petition for incorporation of a proposed city describes boundaries overlapping the boundaries of an existing organized borough or city, the petition for incorporation must also address and comply with all standards and procedures to alter the boundaries of the existing organized borough or city to remove the overlapping territory. The commission will consider that petition for incorporation as also being a petition to alter the boundaries of the existing borough or city.

3 AAC 110.990(28) states that “region”

- (A) means a relatively large area of geographical lands and submerged lands that may include multiple communities, all or most of which share similar attributes with respect to population, natural geography, social, cultural, and economic activities, communications, transportation, and other factors
- (B) includes a regional educational attendance area, a state house election district, an organized borough, and a model borough described in a publication adopted by reference in (9) of this section.”

3 AAC 110.990(15)

defines “area” as “the geographical lands and submerged lands forming the boundaries described in a petition regarding a borough government or forming the boundaries of an incorporated borough.”

Analysis

The residents of Whale Pass have selected boundaries that conform to section township lines. These have been carefully chosen to incorporate only land and water constituting a present local community plus reasonably expected growth and development during the 10 years following the anticipated date of incorporation. The community is recognized by the U.S. Census Bureau and the boundaries are appropriate for the recognized community, which was discussed earlier in this report. Commerce believes the proposed boundaries are more appropriate for the community than those of the CDP, where the boundaries chosen are solely for statistical purposes in Census data collection. In addition, Commerce finds the boundaries are on a scale suitable for city government.

The land proposed for the municipality is close to the average size for an Alaska city at 26 square miles. The land and water chosen conform to section boundaries. In addition, land is available for growth within the existing community of Whale Pass. It does not include entire geographical or unpopulated areas. The territory proposed for incorporation encompasses the subdivided neighborhoods where residents live and work, and land and water available for development and recreation.

The boundaries for the proposed City of Whale Pass do not contain enclaves and are contiguous. Commerce finds that the boundaries of the proposed city do not fit the definition of “region” because those boundaries do not constitute an area, or contain multiple communities that share common attributes. The boundaries do not include an entire regional educational attendance area, state house election district, organized borough, or model borough.

Commerce finds that the expanded boundaries of the proposed city do not meet the definition of “area” because they do not describe a borough. As stated above, the boundaries are of a size suitable for a city and specifically for the proposed city of Whale Pass.

3 AAC 110.040(d) does not apply because the petition does not describe boundaries overlapping the boundaries of an existing organized borough or city.

Commerce finds that the boundaries meet the standards in 3 AAC 110.040, 3 AAC 990(15), 3 AAC 990(28) and thereby also satisfy AS 29.05.011(a)(2).

3 AAC 110.042. Best interests of state

In determining whether incorporation of a city 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, as determined under 3 AAC 110.981;
- (2) promotes a minimum number of local government units, as determined under 3 AAC 110.982 and in accordance with art. X, sec. 1, Constitution of the State of Alaska;
- (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 city in the event of the city's dissolution.

3 AAC 110.981 Determination of Maximum Local Self-Government

In determining whether a proposed boundary change promotes maximum local self-government under art. X, sec. 1, Constitution of the State of Alaska, the commission will consider

- (7) for city incorporation or annexation in the unorganized borough, whether the proposal would extend local government to territory and population of the unorganized borough where no local government currently exists;

3 AAC 110.982 Minimum Number of Local Government Units

Among the factors to be considered in determining whether a proposed boundary change promotes a minimum number of local government units in accordance with art. X, sec. 1, Constitution of the State of Alaska, the commission will consider

- (6) for city incorporation, whether incorporation of a new city is the only means by which residents of the territory can receive essential municipal services;

Analysis

If formed, the city would extend local government to territory and population of the unorganized borough where no local government currently exists. Citizens of a potential City of Whale Pass would be empowered and would be exercising local control and thereby maximizing local self-government if a new city is formed. Commerce finds that 3 AAC 110.981 is met and promotes maximum local self-government.

Because Whale Pass is in the unorganized borough, incorporation of a municipality is the only means by which residents may receive services. Whale Pass cannot reasonably receive services by annexation to another city or service area. Because the territory proposed for incorporation is not near or overlapping any existing local governments, no duplicative or redundant service providers or municipalities will be created and so Commerce finds that 3 AAC 110.982 is met.

If a portion of the unorganized borough forms a municipality as Whale Pass is proposing, this relieves the state of the provision of some local services including planning and zoning.

A potential City of Whale Pass is unlikely to serve any additional risk to the state in the event of dissolution. The proposed expenses and revenues for Whale Pass are similar to other cities and pose no undue risks to the state.

In conclusion, Commerce finds that that the proposed incorporation is in the best interests of the state under Alaska's constitution, meets 3 AAC 110.981 and 982 and therefore satisfies AS 29.05.100(a) and 3 AAC 110.042.

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 municipal services into the boundaries proposed for change in the shortest practicable time after the effective date of the proposed change. A petition for municipal detachment or dissolution under AS 29.06, or a city reclassification under AS 29.04, must include a practical plan demonstrating the transition or termination of municipal services in the shortest practicable time after detachment, dissolution, or city reclassification.
- (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 city, city, unorganized city service area, or other appropriate entity located within the boundaries proposed for change. The plan must be prepared in consultation with the officials of each existing borough, city, and unorganized city 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 city, city, unorganized city service area, and other entity located within the boundaries proposed for change. The plan must be prepared in consultation with the officials of each existing city, city, and unorganized city service area wholly or partially included within the boundaries proposed for 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 city, cities, unorganized city service areas, or other entities wholly or partially included within the boundaries 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.
- (e) The transition plan must state the names and titles of all officials of each existing city, city, and unorganized city service area that were consulted by the petitioner. The dates on which that consultation occurred and the subject addressed during that consultation must also be listed.
- (f) If a prospective petitioner has been unable to consult with officials of an existing city, city, or unorganized city service area because those officials have chosen not to consult or were unavailable during reasonable times to consult with a prospective petitioner, the prospective petitioner may request that the commission waive the requirement for consultation with those officials. The request for a waiver must document all attempts by the prospective petitioner to consult with officials of each existing city, city, and unorganized city service area. If the commission determines that the prospective petitioner acted in good faith and that further efforts to consult with the officials would not be productive in a reasonable period of time, the commission may waive the requirement for consultation.

Analysis

The petition to incorporate Whale Pass as a second class city does include a transition plan. This plan includes a timeline and description of powers to be assumed by a potential City of Whale Pass. The plan also includes the process of electing a city council, as well as plans to hire a city clerk, and the process of development of a comprehensive plan by a planning commission to be appointed by the city council. The transition plan also lists the objectives for this planning commission in its first year in operation. Commerce believes the community of Whale Pass has the capacity, as demonstrated in its transition plan, to transfer assets, and assume responsibility for municipal government if the petition is approved and voters approve the incorporation in an election.

The petition lists all monetary and physical assets of the Whale Pass Community Association and a plan to transfer all assets and liabilities in a timely manner. The Whale Pass Community Association bylaws also include a provision for dissolution of the community organization in the event of a city being formed in Whale Pass and its transition completed. This task is listed as one that will be carried out in conjunction by the city clerk and city council.

The members of the Whale Pass Community Association overlap with the petitioners and signers of this petition. The need to consult with the community association as an interested entity in the territory is relevant but redundant in this case. Commerce finds the provisions of 3 AAC 110.900 are met.

3 AAC 110.910 Statement of Nondiscrimination

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.

Analysis

Nothing in these proceedings suggest that the proposed incorporation will deny any person the enjoyment of any civil or political right, including voting rights, because of race, color, creed, sex, or national origin. Commerce finds that the standard of 3 AAC 110.910 is met.

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 permanent residents;
 - (2) the permanent residents live in a geographical proximity that allows frequent personal contacts and interaction; and
 - (3) the permanent residents at a location are a discrete and identifiable social unit, as indicated by such factors as resident public school enrollment, number of sources of employment, voter registration, precinct boundaries, permanency of dwelling units, and the number of commercial or industrial establishments, community services, and 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; or
 - (2) repealed 1/9/2008;

(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.

(c) A city that absorbs one or more municipalities through merger comprises a single community. A city that is formed through the consolidation of one or more municipalities comprises a single community.

Analysis

Commerce found that 3 AAC 110.920(a) and (b) was met in its analysis of 3 AAC 110.005. 3 AAC 110.920(c) is not pertinent. Commerce finds that the standard of 3 AAC 110.920 is met.

3 AAC 110.970. Determination of essential municipal services

(c) If a provision of this chapter calls for the identification of essential municipal services for a city, the commission will determine those services to consist of those mandatory and discretionary powers and facilities that

- (1) are reasonably necessary to the community;
- (2) promote maximum, local self-government; and
- (3) cannot be provided more efficiently and more effectively by the creation or modification of some other political subdivision of the state.

(d) The commission may determine essential municipal services for a city to include

- (1) levying taxes;
- (2) for a city in the unorganized borough, assessing the value of taxable property;
- (3) levying and collecting taxes;
- (4) for a first class or home rule city in the unorganized borough, establishing, maintaining, and operating a system of public schools within the city as provided in AS 14.14.065;
- (5) public safety protection;
- (6) planning, platting, and land use regulation; and
- (7) other services that the commission considers reasonably necessary to meet the local governmental needs of the residents of the community.

Analysis

Whale Pass intends to undertake several municipal services including harbor maintenance, EMS, fire service, taxing authority, with the possibility of future additional services such as refuse collection. As there is no municipality in this area proposed for incorporation, Commerce finds these services essential to Whale Pass. There is no other body to efficiently or effectively provide them reasonably. This standard is met.

Conclusion

Commerce finds that the city incorporation standards are met for the proposed incorporation of a second class city of Whale Pass. The staff recommends that the petition be approved as presented. Approval of this petition will allow residents of Whale Pass the opportunity to vote on whether the proposed territory becomes a second class city. The mailing of this preliminary report begins another public comment period through May 31, 2016. After that date, staff will publish another analysis in a final report, and the petition will be heard and evaluated by the Local Boundary Commission at a public hearing in the fall.

APPENDIX: A

Notice of Preliminary Report and Public Comment Period Concerning the Whale Pass Incorporation Petition

The Local Boundary Commission (LBC) staff has published a preliminary report concerning the petition to incorporate Whale Pass as a second class city. This report recommends that the LBC approve the petition without amendment or condition. The preliminary report, petition, and related documents, including a map of the territory proposed for incorporation, are available for public review at the following locations:

- Whale Pass Community Library
- Whale Pass Community Library Facebook page
- Whale Pass community website
- The LBC website:
<https://www.commerce.alaska.gov/web/dcra/LocalBoundaryCommission/CurrentPetitions/2016IncorporationPetitionforaSecondClassCityofWhalePass.aspx>

Any interested person, party, or entity may file with the LBC written comments regarding the preliminary report. Comments should also be sent to the petitioner's representative at the address listed below. All comments sent to the LBC staff should be accompanied by a statement that the comment was also sent to the petitioner, or the commenter should notify staff of an inability to serve comments on the petitioner, in accordance with 3 AAC 110.480. The LBC has waived the requirement to send a hard copy of any electronically submitted comments.

Written comments must be received in the LBC office by 4:30 pm on Tuesday, May 31, 2016. Questions concerning the proposed incorporation may be directed to LBC staff at the below mailing address, email address, fax number, or phone numbers:

Petitioner's Representative

Dick Erickson, Box WWP Whale Pass, Ketchikan, AK 99950; richarderi@gmail.com

LBC staff

550 West Seventh Avenue, Suite 1640, Anchorage, AK 99501
Phone: 907-269-4587/4559 Fax: 907-269-4563 Email: LBC@alaska.gov

Following receipt and consideration of comments on the preliminary report, LBC staff will issue its final report. Procedures governing departmental reports are set out in 3 AAC 110.530. It is recommended that persons interested in receiving future LBC notices, updates, and materials by email subscribe to the LBC notice list server by visiting <http://list.state.ak.us/soalists/DCED-LocalBoundaryCommission/jl.htm>, and following the instructions.

Appendix B

From: [Rick Watson](#)
To: [Commission, Boundary \(CED sponsored\)](#)
Subject: Re: NOTICE OF FILING A PETITION RE: WHALE PASS
Date: Thursday, February 04, 2016 12:37:47 AM

To: State of Alaska - Local Boundary Commission

RE: Petition to Incorporate Whale Pass as a second class city

I have taken the time to review this petition and would like to add my comments and concerns.

Although I am a resident and registered voter of Ketchikan, my property in Whale Pass is my second home. I understand that under Alaska Statutes local registered voters have the right to file this petition but the law to me is unfair. This type of petition affects all property owners not just the registered voters in the area. To suggest or present that a significant amount or percentage of registered voters are in support of this petition does not represent the true facts. Also if just the registered voters can accept this by majority vote once approved by the LBC, as a property owner, I am left out. How can I be left out of the decision process if something like this can affect me just as much as a registered voter in the area? I do see this type of approval acceptable in a larger population base. One that has a majority of local voting residents vs. non-voting property owners. In the case of Whale Pass if you look at the facts there are more property owners than voting residents. Therefore this does not represent a majority rule when only the voting residents can make the decision. However if the conditions were that a significant amount or percentage of property owners were able to decide, that would signify a proper display of justification.

That being said, amongst several others reasons as stated in the justification, a primary reason for the petition to become a second class city is to avoid the area being adopted by a future "Prince of Whales Borough" . Although I do agree this possibility does exist, I do not see this as proper justification.

The projected value to the residents and property owners is not justifiable. This is clearly present when considering the budget they have presented clearly shows over 60% of all future 1 year revenue will be allocated to administrative costs. The remaining 40% shows very little increase in spending for things that benefit the community such as road maintenance, EMS, Fire, Etc over current expenditures as a non second class city.

There are no facts supporting such statements as increased residency, tourism, etc. The projected income has no factual support and there is no support for this petition presented from the local industries such as lodging, bed and breakfasts, tourism whom are projected to fund a major portion of this form of government.

I find it very hard to justify all this in a community of less than 50 year round residents that based on the staffing levels projected for the City Council, Planning Commission, Administration and others which would require a very large percentage of these residents could not be considered biased in such a small population base.

I fear that due to the lack of sustainable funding. Future funding issues will progress to a state of affairs that dictates some form of property tax being assessed even though the stated initial intent is to not incorporate a property tax.

In conclusion I do not see any real significant benefits to the residents and property owners , other than a select few who will now become financially compensated rather than volunteers, that are not already available and ask the LBC to deny this petition on lack of merit.

Sincerely,

Richard R. Watson

Nami M. Watson

Property / Home Owners

Lot 11 block 5 Whale Pass

From: Williams, Brent R (CED) <brent.williams@alaska.gov> on behalf of Commission, Boundary (CED sponsored) <lbc@alaska.gov>
Sent: Wednesday, February 3, 2016 2:40 PM
To: Rick Watson
Cc: McGee, Marty (CED); Collins, Eileen M (CED); Commission, Boundary (CED sponsored)
Subject: RE: NOTICE OF FILING A PETITION RE: WHALE PASS

Hello Mr. Watson,

Thank you for your note. We appreciate your concerns. I'll try to address them for you. Any petition must go through a long public process, which has only just started for Whale Pass. The petition process requires providing certain public notice. The petition followed that required process, including printing in the *Ketchikan Daily News* the notice of the petition's acceptance for filing. Now the petition is in a public comment period that lasts until March 11. You are very welcome to send us any comments that you have concerning the petition at the below address, or at this email address. The staff and the Local Boundary Commission (LBC) will consider them seriously. The role of the LBC is to consider any proposed local boundary changes.

I respectfully urge you to look at the Whale Pass petition and related documents (including the notice and a schedule), which are available at <https://www.commerce.alaska.gov/web/dcra/LocalBoundaryCommission/CurrentPetitions/2016IncorporationPetitionforaSecondClassCityofWhalePass/petition.aspx>. Looking at the petition might answer your questions about the proposed incorporation. Additionally, the LBC staff will hold an informational meeting in Whale Pass, probably in April. Notice of that meeting will be

[Petition, 2016 Incorporation Petition for a Second Class City of Whale Pass, Current Petitions, Local](#)

Appendix B

Boundary Commission, Division of Community and Regional Affairs

www.commerce.alaska.gov

Division of Community and Regional Affairs, other key words

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provided. Persons interested in receiving future notices from the LBC are encouraged to sign up for the email list serve at <http://list.state.ak.us/soalists/DCED-LocalBoundaryCommission/jl.htm>. We hope that you will be able to attend.

No incorporation can occur without the LBC's approval. After the second public comment period, the LBC will hold a hearing and vote on whether or not to approve the petition. *If* the LBC approves the petition, then there will be an election by the voters of Whale Pass as to whether to incorporate or not. This petition cannot be approved without the residents voting on it.

I hope that I have answered your questions. Please feel free to contact us if we can be of further service.

Thank you,

Brent Williams

Local Boundary Commission
Alaska Department of Commerce, Community, and Economic Development
550 W. 7th Avenue, Suite 1640
Anchorage, AK 99501
(907) 269-4559

Please be sure to send all email correspondence regarding Local Boundary Commission matters through the following email address: lbc@alaska.gov. This ensures that all LBC staff receive your correspondence in a timely manner. Thank you.

From: Rick Watson [mailto:n55w131@live.com]
Sent: Wednesday, February 03, 2016 12:54 PM
To: Commission, Boundary (CED sponsored)
Subject: NOTICE OF FILING A PETITION RE: WHALE PASS

Hello,

As a concerned property owner in Whale Pass I just happened to run across this proposal on the internet and I am concerned as to how something like this can take place without due diligence. For example, I have never been contacted, nor have I seen any public notices referring to this proposal.

How am I supposed to voice my concerns if I don't know about it and proper reasonable methods have not been addressed to contact affected property owners. In this case it seems two people came up with an idea to change the status of Whale Pass. I have many questions. Why? Who will benefit? What are the pro's & con's? and many more.

I see now, after the fact they held a meeting at the library in Whale Pass. Well I live in Ketchikan, Whale Pass is my second home. Even if I had known, to travel to Whale Pass is expensive and I should be give an opportunity to attend remotely or to be able to respond.

How can this be approved with the residents voting on this?

Richard R. Watson
Property Owner
Block 5 Lot 11
Whale Pass

Whale Pass Incorporation Petition Schedule (Subject to change by LBC chair) January 7, 2016

January 7, 2016

LBC accepts petition for filing.

January 8, 2016

Petition public comment period starts on this first date of publication of notice.

March-April, 2016

Staff conducts information session in Whale Pass. This session which will be conducted in person by LBC staff will be scheduled before the preliminary report is issued—as early as February and as late as April, but residents will be given adequate notice.

March 11, 2016

Deadline to file comments or responsive briefs concerning the petition.
Petitioner has 21 days after receiving a responsive brief to file a reply brief.

April 22, 2016

Staff issues a preliminary report.
Public comment period on the preliminary report begins.

May 31, 2016

Public comment period ends. Staff then considers the comments and writes a final report.

June 24, 2016

Staff mails the final report.
Staff issues a notice of public hearing.

August 3, 2016

LBC holds a public hearing.
LBC holds a decisional meeting immediately following the hearing.

August 17, 2016

Staff drafts a written decision and sends it to the commissioners.

August 24, 2016

LBC meets to approve or amend a written decision.

August 26, 2016

Staff issues the written decision.
An 18-day period for the public to request reconsideration of decision begins. LBC has 30 days, on its own motion, to reconsider. If reconsideration is granted, then petitioner or respondent has 10 days to file a brief.