

Local Boundary Commission Decision

In the matter of the petition for incorporation as a second class city of Whale Pass

Members

Lynn Chrystal
Chair
At Large

John Harrington
Member
First Judicial District

Bob Harchbark
Vice Chair
Second Judicial District

Darroll Hargraves
Member
Third Judicial District

Lavell Wilson
Member
Fourth Judicial District

Section I Introduction

Voters (hereafter Petitioner) of the community of Whale Pass submitted a petition to the Local Boundary Commission (LBC) to incorporate as a second class city. The territory proposed for incorporation as the City of Whale Pass consists of approximately 26 square miles of land, tidelands, and water on the north end of Prince of Wales Island in southeast Alaska. It comprises state lands, federal lands, and privately-owned lands and is centered around Whale Passage and Neck Lake. It is wholly located in the First Judicial District.



Territory proposed for incorporation



Section II Summary of Activities

In late 2015, residents of Whale Pass submitted a petition to incorporate as a second class city with the requisite number of signatures. After technical review, LBC staff accepted it for filing on January 7, 2016. The first public comment period began when notice of the filing was published beginning on January 8, 2016, and ending on March 11. One comment was received. LBC staff held an information session on April 14, 2016, at the Whale Pass Community Library, which 17 people attended. The session covered the incorporation regulations and the process of filing a petition with the LBC.

There was a public comment period on the preliminary report beginning with its April 22, 2016 mailing and ending May 31, 2016. Nine comments were received. After reviewing comments received on this preliminary report, the LBC staff issued a final report. The commission convened a public hearing on August 2, 2016 at the Whale Pass Community Library. An estimated 30 people attended this hearing including one staff member and two LBC commissioners. Two other commissioners, another staff member, and others were present via teleconference. At the decisional meeting immediately following the public hearing, the four commissioners present voted to approve the petition for incorporation of Whale Pass as presented.

Section III Findings of Fact and Conclusions

The record in this proceeding includes the city incorporation petition with supporting materials, the staff preliminary and final reports, and public comments received. It also includes the petitioner's opening and closing statements, sworn testimony, and oral comments received at the public hearing on the petition. The hearing and decisional meeting were recorded; the recording and transcript are available from LBC staff upon request.

This decision outlines the major considerations that led to the commission's decision to approve the petition in the decisional meeting on August 2, 2016.

Standards

3 AAC 110.005. Community; 3 AAC 110.920. Determination of Community

The LBC determined that Whale Pass does represent a community as defined by regulation because it is a social unit with approximately 50 people who live in close proximity with frequent interaction. The commissioners indicated the turnout of about 30 at the midweek, midmorning hearing further indicated a healthy community interested in its future. The LBC noted that living in the community is neither required by an employer nor limited in access and that those living there do consider their residence to be their primary residence. The commission determined that Whale Pass met the standard of community.

AS 29.05.011(a)(5) Incorporation of a City; 3 AAC 110.010.(a) Need

Commissioner Harrington noted that the community of Whale Pass has demonstrated specific needs that are typically governmental responsibilities including road maintenance, harbor maintenance, and waste disposal. Commissioners noted the desire of residents to control future growth in the area, and to ensure adequate resources as well as representation as a city. Though residents are currently organized as a community association, the LBC determined that Whale Pass demonstrates a reasonable need for city government which will provide greater local control and better fit their needs.

AS 29.05.021.(a) Limitations of Incorporation of a City; 3 AAC 110.010.(b) Need

A community in the unorganized borough that actively seeks local control must demonstrate a reasonable need for city government. Currently, residents of Whale Pass are represented by the state of Alaska and have no local government. As the territory is in the unorganized borough, the commission noted that no alternate method exists to deliver municipal services to this community.¹ Services cannot be provided by annexation to an existing city or borough because there is no nearby city or borough. The commissioners found this standard met.

AS 29.05.011.(a)(3) Incorporation of a city; 3 AAC 110.020. Resources

The standard of resources requires the LBC to consider a number of factors regarding the ability to provide essential municipal services. The LBC considered if the resources of the community were adequate to support a second class city. The commissioners expressed concerns over the shorter-term financial resources of the community primarily due to looming concerns of lessened federal and state appropriations. However, the commissioners indicated that they were less concerned over the long-term viability of Whale Pass because they find the community has the capacity to raise revenue locally including instituting a bed and/or sales tax—a municipal power not currently available to an unincorporated community association. The commission found the presence of tourism-related businesses to be a reasonable basis for the economy and an important potential source for tax revenue. A consideration of property valuations was not necessary because the proposed city does not plan to assess property taxes; consideration of personal income was deemed irrelevant due to the inability to assess this information in small communities accurately as well as the fact that income tax is not planned. The commission found the provided budget sufficient because it covered one full fiscal year beyond the anticipated incorporation date, and it included reasonable expenses, revenues, and the organizational grant allocated by the state upon incorporation. Commissioners found that the budget is not overly reliant on state and federal aid including the organizational grant, which is administered only initially. The commission found that the community has adequate financial resources to sustain its proposed budget, and that this capacity would be enhanced and strengthened by incorporation.

In addition to financial resources, the LBC acknowledged that the human resources necessary for a well-functioning city were evidenced by the degree of participation in the petition process and in the public hearing. They also noted the history of the volunteer-run library and the community association as evidence of organization capacity in Whale Pass which they find important in governance of a second class city.

For those reasons, the commissioners determined that Whale Pass has the human and financial resources necessary to provide essential municipal services in a cost-effective, efficient level.

AS 29.05.011.(a)(4); 3 AAC 110.030. Population

The commission noted the discrepancies in current population estimates for the community from the Division of Elections, Census, and the petition, but found that the staff-provided 2015 estimate of 50 full-time residents based upon the Alaska Department of Labor and Workforce Development met the standard for a stable population. The population declined after closure of a logging camping in the 1980s, but they noted the recent increase in residents and families moving to the area indicated by the petition and by testimony, as well as the increase in the number of students (from 11 to 17) for the 2016-2017 school year as further anecdotal evidence of a stable population. Commissioners noted while the city would be small, that good governance depends on dedicated residents which was evident by the hearing turnout and public participation in the hearing. The commission considered all of these facts and found the population standard satisfied.

¹ Territory as defined by 3 AAC 110.990(32).

AS 29.05.011.(a)(2); 3 AAC 110.040. Boundaries

Commissioners thoroughly discussed the boundaries for the territory proposed for incorporation for Whale Pass. Commissioner Hargraves expressed concern about the proposed size in area with regard to square mileage compared to the number of residents living in Whale Pass. Commissioner Harrington noted that the land included is primarily centered around the waterways as is typical in Southeast Alaska communities and is appropriate in scale for the proposed city. The petitioners testified that the boundaries reflected their desire for additional land for municipal purposes as well as to accommodate additional population growth. The commission noted that the boundaries encompass the subdivided lots and roads where residents live and work, and land and water available for development and recreation as well as tourism-related businesses, as well as the bodies of water—around which most residents live.

Commissioners asked whether the petitioners were satisfied in only having partial control over their watershed. While petitioners indicated they are satisfied at this time, particularly because the land contains federal- and state-managed forestry lands, the commissioners noted that the record should reflect that, if in the future, an annexation petition seeking a larger territory to encompass the entire watershed is before the LBC, the LBC found that request reasonable and would approve it. The commission chose not to amend the petition's boundaries in order for the public hearing process to continue. An amendment would require additional public comment periods and notice. Whale Pass petitioners indicated they did not wish to pursue expanded boundaries at this time, and that these expanded boundaries were not necessary for incorporation of a second class city at this time—though they might be interested in annexing in the future.

The commission concurred that the current boundaries noted in the petition are reasonable and justified for the current community and its predicted growth, development, and public safety needs for the 10 years following potential incorporation.

The commission noted that the boundaries of the proposed city do not include entire geographical or unpopulated areas. The boundaries are contiguous and do not contain enclaves.

The commission also noted that the boundaries do not overlap any other existing municipality. They determined that the proposed city boundaries contain all land and water necessary for Whale Pass to provide essential municipal services.

In sum, the standard regarding boundaries is met.

3 AAC 110.042. Best interests of the State

Commissioner Harrington expressed his belief that incorporation was in the best interest of the state because if all cities formed with the smallest boundaries possible, the unorganized borough would be pockmarked with small jurisdictions without regional governance of any kind likely to materialize. Commissioner Harrington added that slightly larger cities such as Whale Pass are the best step for the state. If a portion of the unorganized borough forms a city as Whale Pass is proposing to do, this relieves the state of the duty to provide some local services including planning and zoning. The proposed expenses and revenues for Whale Pass are similar to other cities. The proposed incorporation poses no undue risks to the state in the event of dissolution.

Chair Lynn Chrystal stated that this incorporation represents citizens of Alaskan taking charge of their own business. Commissioner Harrington added that this kind of local government closest to the people is best. Commissioner Hargraves requested the record reflect his concurrence that this incorporation is in the best interest of the state though he retains reservations over the size of this proposed second class city.

The commissioners all concurred that incorporation of Whale Pass is in the best interests of the state.

3 AAC 110.900. Transition

The commission noted that the petition to incorporate Whale Pass as a second class city does include a transition plan. They indicated they were satisfied with the transition plan and felt the steps listed were adequate. The commission found that the plan included steps to assume powers, duties, rights and functions of a second class city. They also indicated that the transfer of assets and liabilities with regard to loss of credit reputation, loss of value to assets, or a reduced bond rating were addressed where applicable. The commission noted that staff indicated there were no cities or borough officials to consult with and this requirement did not apply, and that the transition plan was designed to be implemented within the two-year window as required. The commissioners found the transition plan to be adequate and appropriate for the community and that the community has the capacity to carry it out. This standard met.

3 AAC 110.910. Statement of Nondiscrimination

The commission found no evidence that anything in this petition for incorporation would infringe on any person's civil or political rights including voting rights, because of race, color, creed, sex, or national origin, and so the standard is met.

3 AAC 110.970(c) Determination of Essential Municipal Services

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. A paid city clerk will oversee these projects and their finances. The commission found these services are essential because they are reasonably necessary to the proposed second class city of Whale Pass. There is no local government currently as a community in the unorganized borough, these services also promote maximum local self-government, and cannot be provided more efficiently or more effectively by the creation or modification of some other political subdivision of the state. The commission found this standard satisfied.

3 AAC 110.981 Determination of Maximum Local Self-Government

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 new city of Whale Pass would be empowered and would maximize local self-government by exercising local control over growth and development of their community. The commission found that this standard is met because the proposed incorporation promotes maximum local self-government.

3 AAC 110.982 Minimum Number of Local Government Units

The commission noted that because Whale Pass is in the unorganized borough and relatively distant—more than 20 miles—from any existing city, city incorporation is the only means by which residents may receive the services they desire. Whale Pass cannot reasonably receive these services by annexation to another city or service area. The commission found that this standard is met.

Commissioner Harrington indicated that this standard in question was meant to minimize governmental units—not to eliminate them. LBC staff member Brent Williams added that the standard was meant to avoid multiple, overlapping jurisdictions.

Conclusion

Commissioner Harrington noted that indeed all standards were met and that he had no real concerns. He stated that incorporations of small communities in the unorganized borough like Whale Pass were the reason the LBC exists. Commissioner Harcharek added he concurred with Commissioner Harrington. He still had a few reservations regarding revenue generation, but felt that the audience present at the hearing was more than capable to take on the challenge. Chair Chrystal agreed and

complimented the community for their interest in its future, and dedication throughout the petition process.

Commissioner Harcharek moved to approve the petition to incorporate Whale Pass as a second class city by local action. Commissioner Harrington seconded the motion and added that the record should reflect the LBC's view that they support a future annexation of the entire watershed of the Twin Island area. Commissioner Hargraves voiced his appreciation of the community's civic activity. LBC staff member Eileen Collins called the roll and the four commissioners present voted to approve the Whale Pass petition.

Section IV Order of the Commission

The commission concludes that all of the relevant standards and requirements for incorporation of Whale Pass as a second class city are met. The commission reaches that conclusion after fully considering the written record, and the testimony and public comments given at the hearing.

The metes and bounds of the proposed city are:

City of Whale Pass Boundary Legal Description, located within Township 66 South, Range 79 East; Township 66 South, Range 80 East; Township 67 South, Range 79 East; Township 67 South, Range 80 East; all in the Copper River Meridian, First Judicial District, State of Alaska, more particularly described as follows:

Beginning at the southwest corner of Section 18, Township 67 South, Range 80 East, which is the true point of beginning of this description;

Thence north approximately 1 mile to the northwest corner of Section 18 Township 67 South Range 80 East,

Thence west approximately 1 mile to the southwest corner of Section 12, Township 67 South, Range 79 East,

Thence north approximately 1 mile to the northwest corner of Section 12, Township 67 South, Range 79 East,

Thence west approximately 2 miles to the southwest corner of Section 3, Township 67 South, Range 79 East,

Thence north approximately 4 miles to the northwest corner of Section 22, Township 66 South, Range 79 East,

Thence east approximately 2 miles to the southwest corner Section 13, Township 66 South, Range 79 East,

Thence north approximately 1 mile to the northwest corner of Section 13, Township 66 South, Range 79 East,

Thence east approximately 1 mile to the northeast corner of Section 13, Township 66 South, Range 79 East,

Thence south approximately 1 mile to the southeast corner of Section 13, Township 66 South, Range 79 East,

Thence east approximately 2 miles to the northeast corner of Section 20, Township 66 South, Range 80 East,

Thence south approximately 6 miles to the southeast corner of Section 17, Township 67 South, Range 80 East, located in Whale Passage,

Thence west approximately 2 miles to the southwest corner of Section 18, Township 67 South, Range 80 East, which is the true point of beginning of this description; said parcel containing approximately 26 square miles.

Based on USGS Petersburg A-4 (US Forest Service version) Quadrangle, 1994.

Approved in writing this 30th day of August 2016

Local Boundary Commission

By: _____
Lynn Chrystal, Chair

Attested by: _____
Eileen Collins, Staff

RECONSIDERATION BY THE COMMISSION

3 AAC 110.580 Reconsideration states that:

“(a) Within 18 days after a written statement of decision is mailed under 3 AAC 110.570(f), a person may file an original and five copies of a request for reconsideration of all or part of that decision, describing in detail the facts and analyses that support the request for reconsideration.

“(b) Within 30 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.

(c) A person filing a request for reconsideration shall provide the department with a copy of the request for reconsideration and supporting materials in an electronic format, unless the department waives this requirement because the person 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 and each respondent 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.

(d) If the person filing the request for reconsideration is a group, the request must identify a representative of the group. Each request for reconsideration must provide the physical residence address and mailing address of the person filing the request for reconsideration and the telephone number, facsimile number, and electronic mail address, if any, for the person or representative of the group.

(e) The commission will grant a request for reconsideration or, on its own motion, order reconsideration of a decision only 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.

(f) If the commission does not act on a request for reconsideration within 30 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 30 days after the decision was mailed under 3 AAC 110.570(f), the commission will allow a petitioner or respondent 10 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 or respondent shall provide the department with a copy of the responsive brief in an electronic format, unless the department waives this requirement because the petitioner or respondent lacks a readily accessible means or the capability to provide items in an electronic format.

(g) Within 90 days after the department 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 and the respondents.

JUDICIAL APPEAL

A decision of the LBC may be appealed to the Superior Court under AS 44.62.560(a) and Rules of Appellate Procedure 602(a)(2). Per 3 AAC 110.570(g), this is the final decision of the commission, unless reconsideration is timely requested or the commission orders reconsideration. A claimant has 30 days to appeal to the Superior Court.