Supplemental Report
Upon Remand of the Skagway Proposal to the Local Boundary Commission

August 2006

Prepared by Staff for the
Alaska Local Boundary Commission

Supplemental Report Upon Remand of the Skagway Borough Proposal to the Local Boundary Commission

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Supplemental Report Upon Remand of the Skagway Borough Proposal to the Local Boundary Commission

Section 1 - Background

In January 2001, a petition was submitted to the Local Boundary Commission (Commission or LBC) to dissolve the City of Skagway (City or Skagway city government) and concurrently incorporate a Skagway borough (R. 1-63).[1] The proposed borough boundaries – encompassing 443.1 square miles and 862 residents - were identical to the corporate boundaries of the City. Moreover, the powers and duties of the proposed borough were the same as those of the Skagway city government.

Opportunities for public comment and briefing, analysis by LBC Staff, and a public hearing in Skagway before the Commission followed the filing of the Petition (*see* R. 735 – 741 for summary of the full proceedings). At the end of those proceedings in September 2002, the Commission concluded that the Skagway borough proposal failed to meet several requisite standards established in law.[2] Those conclusions are set out in the Commission's 34-page 2002 decisional statement (R. 734-767). The decisional

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[1] The *Petition for Dissolution of the City of Skagway and Incorporation of a Skagway Borough* is referred to in this report as the "Petition." "R" refers to the 1,326-page Record on Appeal in the Superior Court for the State of Alaska in the matter of the *Petitioners for the Dissolution of the City of Skagway and Incorporation of the Skagway Borough v. Local Boundary Commission*, Case No. 1 JU-02-0124 CI. A copy of the Record was provided to each of the current members of the LBC in November 2005. The Record and other documents referenced in this report are available from the Alaska Department of Commerce, Community, and Economic Development (Commerce or the Department) at (907) 269-4501.

[2] The Commission found that the Skagway Petition failed to meet requirements that:

(1) the proposed Skagway borough embrace an area and population with common interests to the maximum degree possible (art. X, § 3 of the Alaska Constitution, AS 29.05.030(a)(1), and 3 AAC 110.045);

(2) creation of the proposed Skagway borough serve the best interests of the State (AS 29.05.100(a) and 3 AAC 110.065);

(3) the proposed Skagway borough encompass an area with ample human and financial resources to support borough operations (AS 29.05.031(a)(3) and 3 AAC 110.055);

(4) the proposed Skagway borough encompass an area with a population of sufficient size and stability to support a borough (AS 29.05.031(a)(1) and 3 AAC 110.050(a) - (b);

(5) the proposed Skagway borough encompass an area with communication and transportation facilities that allow an integrated borough government (AS 29.05.031(a)(4) and 3 AAC 110.045(c) - (d));

(6) the proposed Skagway borough encompass an area with boundaries that conform generally to natural geography (AS 29.05.031(a)(2) and 3 AAC 110.060(a));

(7) the proposed Skagway borough encompass an area that embraces all land and water necessary for efficient, cost effective service delivery (AS 29.05.031(a)(2) and 3 AAC 110.060(a)); and

(8) the proposed Skagway borough conform to the boundaries of a regional educational attendance area (3 AAC 110.060(c)).

statement also set out "several fundamental principles about the formation of organized boroughs in Alaska" that were recognized by the Commission (R. 741-752).[3]

LBC's 2002 Decisional Statement

Skagway appealed the Commission's decision to the Superior Court, asserting, in part, that the fundamental principles recognized by the Commission constituted *de facto* regulations that had not been adopted under the Administrative Procedure Act. The Commission countered, in part, that it had broad discretion to act on the Petition and that the fundamental principles recognized by the Commission were clearly rooted in existing law.

The Court found in Skagway's favor, decreeing that, "without prior notice, the Commission applied a newly-enunciated 'fundamental principle' to conclude that 443.[1] square miles is not 'relatively large' enough to be a borough." (*Petitioners for the Dissolution of the City of Skagway and Incorporation of the Skagway Borough v. Local Boundary Commission*, Case No. 1 JU-02-0124 CI, slip op. (Alaska, September 20, 2005).) Consequently, the court remanded the matter to the LBC.[4]

In directing the Commission to reconsider the matter, the court noted that the "Commission remains free to deny the petition. However, any decision must be based on standards adopted according to law." *Id.* Those standards are enumerated in AS 29.05.100(a), which states as follows:

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[3] The fundamental principles recognized by the Commission can be summarized as follows:

(1) each borough and each city is a municipality and political subdivision;

(2) State law imposes the same mandatory powers on home rule and first class cities in the unorganized borough as it does in the case of organized boroughs;

(3) a borough is a regional municipality whereas a city is a community-based municipality;

(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;

(5) boroughs should generally include multiple communities and should be able to provide services efficiently and effectively;

(6) Alaska's Constitution encourages minimum numbers of boroughs;

(7) borough boundaries should be established at the State level to reflect state-wide considerations as well as regional criteria and local interests;

(8) 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;

(9) boroughs should not be prematurely formed when local government needs can be met by city annexation or incorporation.

[4] Only one of the current five members of the Commission was a member of the Commission at the time of the 2002 decision.

> 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.

More specifically, the standards applicable to the Skagway borough incorporation proposal consist of article X, section 3 of the Alaska Constitution, AS 29.05.031, 3 AAC 110.045 – 3 AAC 110.065, and 3 AAC 110.900 – 3 AAC 110.990. Those provisions include specific measures of the best interests of the State. The provisions of the federal Voting Rights Act[5] also apply to borough incorporations in Alaska. A copy of the applicable standards is included in this report as Appendix A.

Staff for the Commission (LBC Staff)[6] is required by AS 29.05.080 and 3 AAC 110.530 to "investigate" each borough incorporation proposal and report its findings to the Local Boundary Commission with its recommendations regarding the incorporation. The LBC Staff fulfilled those duties in the original proceedings by preparing both a preliminary report (R. 166-397) and final report (R. 470-601), as required by 3 AAC 110.530. The Commission invited this supplemental report in these remand proceedings (*see* letter from Commission Chair Darroll Hargraves dated October 24, 2005).[7] LBC Staff prepared this report in accordance with that invitation. This supplemental report adopts by reference the LBC Staff 2002 preliminary and final reports. To the extent that any aspect of those reports conflicts with any analysis, findings, or conclusions presented here, this supplemental report prevails.

In the course of the remand proceedings, the Commission also invited the Petitioner to file a supplemental brief. On December 29, 2005, the Petitioner filed a 30-page supplemental brief in support of the Skagway borough proposal. Appended to the

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[5] 42 U.S.C. § 1973.

[6] AS 44.33.020(a)(4) provides that "the Department of Commerce, Community, and Economic Development shall serve as staff for the Local Boundary Commission." References to LBC Staff in this report include not only the Department of Commerce, Community, and Economic Development, but also its predecessors (i.e., Alaska Department of Commerce and Economic Development, Alaska Department of Community and Regional Affairs (DCRA), and the Local Affairs Agency).

[7] The schedule originally set out in the October 2005 letter was modified by the LBC Chair on February 21, 2006. The modification extended the deadline for the Petitioner's Supplemental Brief and also provided that "The new schedule will require LBC Staff to file its report at least three weeks prior to the hearing, as provided by 3 AAC 110.640." In August, the LBC Chair proposed to hold the Skagway hearing on September 15, 2006, which would have required publication of the LBC Staff supplemental report by August 25. Although the date for the hearing was extended past September 15 at the Petitioner's request, the Chair announced in a letter dated August 10 that he would reaffirm the deadline requiring the LBC Staff to submit a supplemental report by August 25.

Petitioner's supplemental brief was a three-page letter from Judge Thomas B. Stewart (Retired)[8] endorsing the Skagway borough proposal. Also appended to the Petitioner's supplemental brief was a copy of Resolution No. 05-28R of the Council of the Skagway city government. The resolution resolves on behalf of a future governing body of the proposed new borough to "waive any entitlement to any portion of an Organization Grant to which [the Skagway borough] may otherwise be entitled during the three year transition period of borough formation." Additionally, the resolution "resolves not to request a waiver of the local funding match for the Skagway School District, which it could otherwise request during the process of borough formation."

Public Comments Filed During the Remand Proceedings

During the remand proceedings, the Commission also invited responsive briefs and written comments from the public. Eleven sets of written comments were submitted. Those are listed below:

- Stuart Brown, President of the Skagway Development Corporation, wrote a three-page letter dated January 9, 2006, supporting the Skagway proposal;[9]

[8] Thomas Stewart served as Assistant Attorney General for the Territory of Alaska until 1954, when he was elected to the Territorial House of Representatives. While in the House, Mr. Stewart played a key role in researching, drafting, and gaining passage of the bill authorizing the Constitutional Convention, where he served as Secretary. In 1966, he was appointed to the Juneau Superior Court, where he served until 1981. Since his retirement, he has continued service to the Alaska Court System as a settlement judge and in other capacities. (http://www.alaska.edu/creatingalaska/)

[9] The Skagway Development Corporation is a nonprofit corporation "formed at the City of Skagway's request in 2001" on the belief that "a more professional and full-time approach to economic development needed to transpire for Skagway to develop into a vital year round community." *See* http://www.skagwaydevelopment.org/aboutus.html.

- State Senator Albert M. Kookesh and State Representative Bill Thomas wrote a two-page letter dated January 13, 2006, endorsing the Skagway borough proposal;[10]
- Stan Selmer, Chairman of the Board of Alaska Power & Telephone Company, wrote a one-page letter dated January 19, 2006, expressing support for the proposed Skagway borough;[11]
- Bernard H. Ruckardt, Cooper Landing resident, wrote a one-page note dated January 22, 2006, supporting the Skagway borough proposal;[12]
- Dr. Michael Dickens, Superintendent of the City of Skagway School District, expressed support for the Skagway proposal in a three-page letter dated January 24, 2006, with a one-page attachment;
- Gene Kane, Anchorage resident, wrote a one-page letter dated January 28, 2006, opposing the incorporation of a Skagway borough;[13]
- John R. Thronrud, owner and operator of At the White House, a Skagway inn, wrote a one-page letter dated January 29, 2006, favoring the Skagway borough proposal;[14]
- Kevin Waring, Anchorage resident, wrote an eight-page letter dated January 29, 2006, opposing incorporation of a Skagway borough;[15]
- State Senator Gary Wilken wrote a two-page letter dated January 30, 2006, opposing the proposed Skagway borough;[16]

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[10] Senator Kookesh represents Senate District C in the Alaska Legislature; Representative Thomas serves House District 5 in the Alaska Legislature. Skagway is within Senate District C and House District 5.

[11] Mr. Selmer is a former Mayor of the City of Skagway and former member of the Council of the City of Skagway.

[12] Mr. Ruckardt took an interest in the Skagway proposal in November and December 2005, when he advocated formation of a "Chugach Mountain Range Borough" by detaching the eastern portion of the Kenai Peninsula Borough and forming a new borough encompassing Cooper Landing, Moose Pass, Hope Crown Point, Sunrise, and Seward.

[13] Mr. Kane is a former member of the LBC Staff and former Director of Alaska's local government agency.

[14] Mr. Thronrud is a former member of the Council of the City of Skagway.

[15] Mr. Waring served on the LBC from 1996 – 2003 and was LBC Chair during the 2001-2002 Skagway borough incorporation proceedings; he is also a former Division Director in Commerce's predecessor agency, the DCRA.

[16] Senator Wilken represents Senate District E (Fairbanks) in the Alaska Legislature. He has been and continues to be a strong advocate for regional boroughs in unorganized areas of Alaska that have the fiscal and administrative capacity to operate borough governments.

- Kathie Wasserman, Juneau resident, wrote a one-page letter dated January 30, 2006, favoring the Skagway borough proposal;[17] and

- Chris Rideout, Homer resident, wrote a one-page letter dated January 31, 2006, expressing concern over the prospect of the proliferation of small, single-community boroughs in Alaska.[18]

The Petitioner's supplemental brief and the 11 sets of comments were included in the record in these remand proceedings. A copy of those materials was provided to each member of the Commission. The Petitioner's supplemental brief and the 11 sets of written comments may be viewed online at <http://www.dced.state.ak.us/dca/lbc/skagway.htm>.

Section II of this report presents a summary of the LBC Staff's supplemental findings in these remand proceedings. The summary is followed by Section III, which presents, in detail, the LBC Staff's supplemental findings regarding the Skagway borough proposal. This report closes with the LBC Staff's supplemental conclusions and recommendations, which are presented in Section IV.

[17] Ms. Wasserman is currently employed as the Deputy Director of the Alaska Municipal League. She is a former member of the LBC. During the 2001 – 2002 proceedings, she was paid by the City of Skagway to advocate for the Skagway borough proposal.

[18] Mr. Rideout has taken an interest in LBC matters following the filing of a petition for annexation by the City of Homer in March 2000.

Section II – Summary of Supplemental Findings

Part A. Strong local interests underlie the Skagway borough proposal; Commission decisions must reflect a broader scope - the best interests of the State.

In 2002, the Commission found that the Skagway borough proposal "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." (R. 734; *see* also R. 172-173.)

Substantial local interests underlie that motive. Among those is a desire expressed by City officials to shield Skagway's considerable tax base and preserve the significant degree of political autonomy afforded to Skagway as a first-class city in the unorganized borough. Given such interests, Skagway's motive is understandable; and no criticism is intended here by acknowledging that the interests and motive exist.

Skagway's Port During Tourist Season

It is fitting, however, to recognize Skagway's local interests and motive and to understand that local interests are not always in harmony with the State's interests when it comes to establishing boroughs. As noted in Section I of this report, AS 29.05.100(a) expressly prohibits the Commission from approving a borough incorporation proposal unless it determines that the proposal serves the *State's* best interest.

The framers of Alaska's Constitution foresaw the potential for local-State conflict in municipal boundary issues.[19] To advance the broad public interest in setting municipal boundaries, the framers provided for the Commission — one of only five boards named in Alaska's Constitution — to serve as an independent body to ensure that boundary determinations reflected the principles set out in the Local Government Article of Alaska's Constitution. Part A of Section III of this report examines in detail the specific local interests associated with the Skagway borough proposal.

[19] The contemporary arena in which borough incorporation proposals are initiated and decisions rendered often fosters conflict between local and State interests to a level that is perhaps even beyond that envisioned by the framers of Alaska's Constitution. To gain a better appreciation of the challenges of establishing boroughs in the post-1963 Mandatory Borough era, readers are encouraged to review Appendix B of this report.

Part B. Borough incorporation standards are most reasonably read in a regional context.

As discussed in Section III-B, the Alaska Supreme Court has repeatedly held that the Commission has broad latitude in determining whether to approve a borough incorporation petition, as long as its interpretation of the applicable legal standards has a "reasonable basis of support."

Only two types of local government are provided for in Alaska's Constitution — a city government and an organized borough. It is axiomatic that city governments and organized boroughs are distinctly different types of local government in Alaska. One fundamental difference between the two relates to size, with organized boroughs being the larger, regional form of government. This is evident in a plain reading of Alaska's Constitution, statutory standards for incorporation, and regulations governing incorporation. Thus, the LBC Staff finds that the standards for incorporation of organized boroughs are most reasonably read in a context that promotes boroughs that embrace a regional area with natural interests with respect to social, cultural, economic, transportation, geographic, and other characteristics.

Part C. The proposed Skagway borough does not comprise an *area* with a population that is interrelated and integrated as to its social, cultural, and economic activities.

In the 2001 - 2002 proceedings, the LBC Staff examined the social, cultural, and economic interrelationships and integration of the population of the proposed Skagway borough. Aspects of that earlier review are set out in Part C of Section III of this report. Based on that review, the LBC Staff concluded in 2002 "that the Skagway borough proposal does not satisfy the multiple community standard set out in 3 AAC 110.045(b)." (R. 257.)

The LBC Staff affirms its earlier conclusion for purposes of these remand proceedings. A critical aspect of whether the proposed borough comprises an "area" with a population that is socially, culturally, and economically interrelated and integrated is whether it encompasses multiple communities, as the term community is defined in law specifically applicable to these proceedings. The Petitioner takes the view that the proposed borough encompasses two such communities – Skagway and Dyea.

Based on its application of the legal definition of a community, LBC Staff differs with the Petitioner on this crucial point. Section III-C of this report, offers the LBC Staff's contemporary examination of Dyea in light of the applicable legal definition of "community."

Part D. The proposed Skagway borough does not comprise an *area* with a population that is large and stable enough to support borough government.

As is discussed in Section III-D, State law (3 AAC 110.050(b)) provides that, absent a "specific and persuasive showing to the contrary," the Commission will presume that a population is not large enough and stable enough to support a proposed borough government unless at least 1,000 permanent residents live in that proposed borough.

There are fewer than 1,000 residents in the proposed Skagway borough. Moreover, the relevant facts in this case militate heavily against finding that the presumptive requirement is overcome. Specifically, (1) the population of the proposed Skagway borough is far below the 1,000-resident threshold; (2) the number of Skagway residents is declining; (3) Skagway's young population is disproportionately smaller than the statewide average; (4) the disproportional nature of the age distributions among the population of Skagway is becoming increasingly disparate; and (5) Skagway's population is subject to significant seasonal population changes.

Part E. The boundaries of the proposed Skagway borough do not encompass an *area* that conforms generally to natural geography and that includes all areas necessary for full development of municipal services.

The boundary standard is addressed in 3 AAC 110.060. Subsection 3 AAC 110.060(c) requires a borough encompassing Skagway to conform to the boundaries of the Chatham regional educational attendance area (REAA), the REAA in which Skagway is located. The Chatham REAA encompasses 20,776 square miles. An exception to the requirement set out in 3 AAC 110.060(c) is permitted only if the Commission determines 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. The Petitioner's alternative boundary proposal does not satisfy the requirements that allow an exception to the mandate.

In fact, the Petitioner itself recognizes that its own proposal does not meet the boundary standards for borough incorporation. In 2002, the Petitioner acknowledged that the Constitution's framers called for boroughs that embrace large and natural regions, but implied that its proposal is permissible because the Skagway is "land-locked" due to a perceived error on the part of the Commission 38 years ago. However, the Petitioner's proposal conflicts with article X, section 3 of Alaska's Constitution and is at odds with other constitutional provisions that distinguish city governments from borough governments. Rather than remedy any perceived error, the Petitioner's proposal would compound it. The "land-locked" argument could then be used by others to promote boroughs whose boundaries do not conform to the visions set forth by the authors of the Local Government Article. For example, Klukwan residents could then advocate for formation of a 1.4-square-mile Klukwan borough, which is also an enclave surrounded by the Haines Borough. Moreover,

nearly thirty years ago in briefing to the Commission, Skagway city officials correctly characterized the exact 443.1 square miles at issue here as "a mere paucity by present borough standards prevailing in the state."

For these reasons and for a multitude of other reasons reflected throughout Section III of this report and the record of the 2001 – 2002 proceedings, the requirements for an exception to the mandate in 3 AAC 110.060(c) are clearly not evident in this proceeding.

Part F. Article X, section 3 of Alaska's Constitution promotes boroughs that embrace large, natural regions; it is a mandate under which all statutory borough standards are to be applied.

A thorough review of the efforts of the Local Government Committee and the debate among all delegates to Alaska's Constitutional Convention provides a clear view that the framers of the organic law of the State of Alaska intended each borough to embrace a large and natural region. The Petitioner and LBC Staff are in agreement on this point.

Part G. The best interests of the State are not served by the Skagway borough proposal.

The principle that the establishment of boroughs must reflect the broad public interest is manifest in the Alaska Constitution, Alaska Statutes, and standards adopted by the Commission. The Skagway borough proposal would advance parochial interests, but not the State's interest in promoting maximum local self-government. Neither would the Skagway proposal promote a minimum of local government units. Lastly, the proposal would not relieve the state government of the responsibility of providing local services.

Section III – Supplemental Findings and Conclusions Regarding the Skagway Borough Proposal

Part A. Strong local interests underlie the Skagway borough proposal; Commission decisions must reflect a broader scope – the best interests of the State.

As noted in Section II-A of this report, substantial local interests brought about the Skagway borough petition. In the original incorporation proceedings, the Commission found that the Skagway borough proposal "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" (R. 734, *see* also R. 172-173). That motive seems to be strongly rooted in a desire to insulate and isolate the local tax base and maintain the current level of political autonomy.

1. Skagway has significant economic and fiscal interests that would be advanced by a Skagway-only borough.

City officials and other Skagway residents have substantial economic and fiscal interests in creating a borough with boundaries identical to those of the existing City. Those interests are evident in an examination of the City's tax base. In per capita terms, the City's property tax base and sales tax base greatly exceed those of any other city or borough government in southeast Alaska. In fact, Skagway's tax base is superior to all but a tiny fraction of all local governments in Alaska.

Skagway Viewed From the Overlook Near Milepost 4 of Dyea Road

Statewide, Skagway's property tax base ranks behind only the North Slope Borough and City of Valdez, two municipalities with extensive taxable property relating to exploration, production, and pipeline transportation, and/or storage of oil from Alaska's North Slope. Similarly, Skagway's sales tax base ranks behind only the City of Adak, which generates vast per capita revenues from its sales tax levy on commercial fishing.

The State Assessor determined that the "full and true value of the taxable real and personal property" in the City of Skagway for 2005 (the most recent year on record) was $296,922 per resident. (Alaska Department of Commerce, Community, and Economic Development, *Alaska Taxable 2005* at 45 (January 2006).) That figure is more than 2.6 times the $113,743 per resident 2005 value of taxable property in Juneau.

Skagway

Skagway's property tax base is so substantial that it is the only school district in southeast Alaska, and one of only three in the entire state, whose local contribution to schools required by State law is capped under AS 14.17.410(b)(2) at 45 percent of the district's "basic need." Because Skagway's taxable property values are so great, it reaches the 45 percent limitation with a required contribution equivalent to only 2.8 mills. All other municipal school districts in southeast Alaska make a local contribution that is equivalent to 4 mills – a tax rate more than 40 percent higher than that of the City of Skagway. Statewide, only two other school districts, the City of Valdez and the North Slope Borough, reach the 45 percent limitation with a contribution equivalent to less than 4 mills.

As for Skagway's sales tax base, in 2005 Skagway's 4 percent sales tax generated $4,232,693. (*Alaska Taxable 2005* at 15.) That amounted to $1,058,173 for each 1 percent of tax levied.[20]

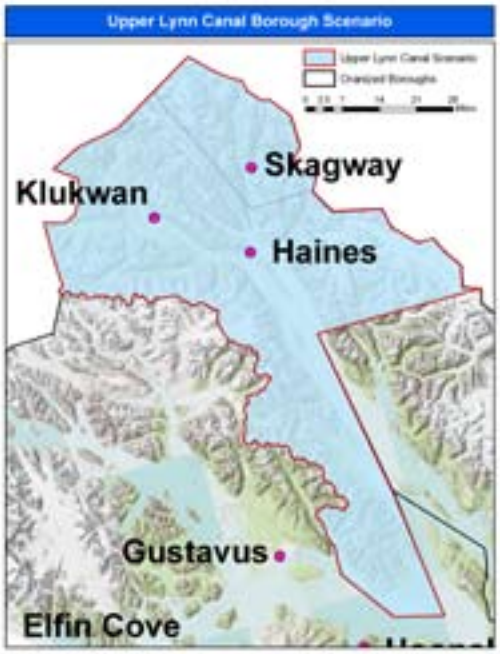
In per capita terms, Skagway's sales tax generated the equivalent of $1,216 per resident for each 1 percent of tax levied for the portion of the year in which the sales tax levy was in effect. By comparison, the City of Ketchikan ranked second among southeast Alaska municipalities, with the equivalent of $318 per resident for each 1 percent of sales tax levied. The City and Borough of Juneau ranked sixth among municipalities in southeast Alaska with a sales tax that generated the equivalent of

[20] It is noteworthy that the sales tax figure reported above does not include a full year of sales tax revenue. The City has suspended its sales tax levy from late November through late December in each of the past five years by declaring "sales tax holidays" as authorized by Ordinance 01-06.

$214 per resident for each 1 percent of sales tax levied. The figure for Skagway was 282 percent higher than the figure for Ketchikan and 468 percent higher than the figure for Juneau.

The fiscal and economic incentives to convert the Skagway city government into a borough are further evident in an examination of five different borough scenarios that have been contemplated in the course of the Skagway borough proceedings. Those are (1) a Skagway-only borough, with territory identical to that within the corporate boundaries of the City of Skagway (proposed by Petitioner); (2) an Upper Lynn Canal Model Borough, with an area encompassing the Haines Borough, City of Skagway, and Klukwan (R. 2); (3) a Skagway/Juneau Borough, with an area encompassing the City of Skagway and the City and Borough of Juneau (R. 38); (4) a Chatham REAA[21] Borough, with an area encompassing Skagway, Klukwan, Gustavus, Elfin Cove, Pelican, Hoonah, Tenakee Springs, and Angoon (R. 282); and (5) a Rural Southeast "Super Borough," encompassing the entire southeast Alaska portion of the unorganized borough (R. 38).

Figure 3-1. Map Showing Upper Lynn Canal Model Borough Boundaries



Any scenario other than a Skagway-only borough would have major adverse fiscal implications for Skagway, which demonstrates the fiscal and economic incentives in this matter.

A Skagway-only borough (i.e., with the same boundaries as the current City) would generate $6,223,308 or $7,462 per resident annually, assuming an 8.75 mill areawide property tax (approximately equal to the 8.78 mills in effect in Zone 1 of Skagway's differential property tax zones) and a 4 percent areawide sales tax (identical to the sales tax currently levied throughout the City of Skagway). Those revenues would be reserved for the benefit of residents of Skagway.

Figure 3-2. Map Showing Conjectural Juneau-Skagway Borough

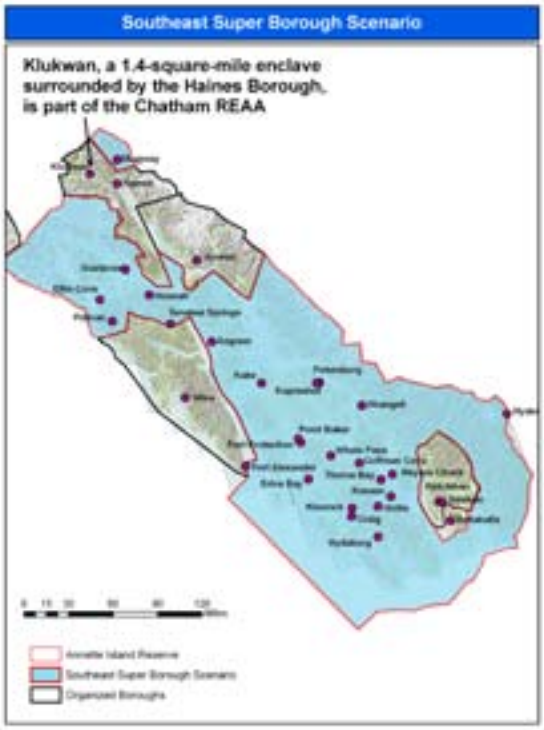
[21] REAA stands for regional educational attendance area.

However, if Skagway were included within a Skagway/Juneau borough, the economic effect would be quite different. While an 8.75 mill areawide property tax and a 4 percent areawide sales tax in a Skagway/Juneau Borough would generate the same amount of revenue within Skagway ($6,223,308), those funds would not be deposited into a Skagway treasury to fund services in Skagway alone but, instead, in the Skagway/Juneau Borough treasury to fund areawide borough services. The greater population of the Skagway/Juneau Borough and its comparatively lower tax base would dilute the per capita areawide tax revenues from the Skagway-only figure of $7,462 to $2,003, a reduction of 73 percent.

If Skagway were included with other communities in an organized borough, the projected per capita reduction in revenues based on existing Skagway tax rates would be substantial: 57 percent under an Upper Lynn Canal Borough; 61 percent in a Chatham REAA Borough, 73 percent in a Skagway/Juneau Borough, and 78 percent in a Rural Southeast Super Borough. A summary of the projected impacts is presented in the table on the following page.[22]

Figure 3-3. Map Showing Hypothetical Chatham REAA Borough

Figure 3-4. Map Showing Hypothetical Southeast Super Borough



22 Further details and discussion regarding the economic interests of the Skagway city government and the citizens of Skagway in promoting a Skagway-only borough are provided in the April 26, 2006, affidavit by LBC Staff filed in the Superior Court on April 27, 2006, in *Skagway v. LBC, supra*.

Table 3-1. Revenue Projections Under Five Borough Scenarios for Skagway

	Measure	Skagway Borough	Upper Lynn Canal Model Borough	Skagway/Juneau Borough	Chatham REAA Borough	Rural Southeast Super Borough
PER CAPITA FIGURES	Revenue from a 4-percent areawide sales tax	$4,864	$1,812	$964	$1,456	$832
	Revenue from a 8.75-mill areawide property tax levy	$2,598	$1,414	$1,039	$1,474	$804
	Sum of above	$7,462	$3,226	$2,003	$2,930	$1,636
	Difference between $7,462 for Skagway Borough and Figure for Other Boroughs	$0	Loss of $4,236 (57 percent)	Loss of $5,459 (73 percent)	Loss of $4,532 (61 percent)	Loss of $5,826 (78 percent)
PER CAPITA REVENUE TIMES SKAGWAY'S 2005 POPULATION (834)	Proportionate share of areawide revenues available for Skagway services	$6,223,308	$2,690,484	$1,670,502	$2,443,620	$1,364,424
	Loss of total sales and property tax revenues for the City of Skagway annually based on 2005 population of 834	$0	$3,532,824	$4,552,806	$3,779,688	$4,858,884

This analysis helps explain the City's economic incentive, and why the Skagway City Manager told the Juneau Empire: "The fear is that [in] a Haines-Skagway borough, the smaller Skagway would lose control of its . . . big tourism tax base." (*Juneau Empire — AP*, September 22, 2005.) It also explains why the City said in its Comprehensive Plan: "Borough formation is being considered to ensure smooth and continuous services for residents by protecting the community from a hostile annexation by the Haines Borough or incorporation into a larger Southeast Super-Borough."

The City's economic incentive in filing the Petition and bringing the appeal of the 2002 denial of the Petition is also reflected in the Skagway City Council's recent action to offer to sacrifice more than $1.2 million in one-time State fiscal incentives if the City is allowed to form a Skagway-only borough. In December 2005, the City Council resolved to waive the borough's entitlement to a $600,000 organization grant under

AS 29.05.190. The Council also resolved that the proposed borough would not take advantage of AS 14.17.410(e), which allows a newly formed borough to make lower required local contributions in support of schools during its first three years. Based on current figures, waiving the transition provisions of AS 14.17.410(e) would amount to an estimated $669,034. Thus, collectively, the City Council is offering to turn down $1,269,034 if granted borough status as a Skagway-only borough.

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2. A Skagway borough would enshrine a high degree of political autonomy unavailable to many other communities in Alaska.

In addition to the economic interests discussed above, there are strong local interests relating to political autonomy in transforming the Skagway city government into a borough.

As a first-class city in the unorganized borough, the Skagway city government operates its own city school district and is responsible for municipal planning, platting, land use regulation, tax assessment, and tax collection. (AS 29.35.260 and 29.45.550.) Identical responsibilities exist for home-rule cities in the unorganized borough. There are 18 first-class and home-rule cities in the unorganized borough. The State Demographer estimated that those 18 city governments were inhabited by a total of 27,854 residents in 2005. That represents 4.2 percent of the Alaska's 2005 population.

In contrast, within organized boroughs, it is the borough government that provides for education, planning, platting, land use regulation, tax assessment, and tax collection on an *areawide* basis. The State Demographer estimated that the 16 organized borough governments were inhabited by 582,277 residents in 2005. That represents 87.7 percent of the Alaska's total population in 2005.

Figure 3-5. Location of Home-Rule and First-Class Cities Outside of Organized Boroughs

Thus, nearly 90 percent of Alaskans operate under a constitutional system of local government in which fundamental political rights are a matter of areawide concern. If the Skagway city government were "converted" to a borough, the Skagway borough would be able to retain local control over municipal planning, platting, land use regulation, tax assessment, and tax collection. Again, the LBC Staff certainly understands the local interest in maintaining such control, particularly considering the fiscal resources available to the City. However, it is not only fitting to consider the local control afforded to a small percentage of Alaska's population in the context of the concept of borough government, it is also required when determining the best interests of the State.

Promoting a multiplicity of locally autonomous units does not serve the best interests of the State. This is particularly the case when the pursuit of those parochial interests works to the detriment of broader interests at the regional or statewide levels.

Part B. Borough incorporation standards are most reasonably read in a regional context.

The Alaska Supreme Court has, on multiple occasions, recognized that the Commission has broad latitude in determining whether to approve a borough incorporation petition, as long as the Commission's interpretation of the applicable legal standards has a "reasonable basis of support." Specifically, the Court has held that:

> [T]he Local Boundary Commission has been given a broad power to decide in the unique circumstances presented by each petition whether borough government is appropriate. Necessarily, this is an exercise of delegated legislative authority to reach basic policy decisions. Accordingly, acceptance of the incorporation petition should be affirmed if we perceive in the record a reasonable basis of support for the Commission's reading of the standards and its evaluation of the evidence.

(*Mobil Oil Corp. v. Local Boundary Commission,* P.2d, 518 P.2d 92 (Alaska 1974); *Valleys Borough Support Committee v. Local Boundary Com'n,* 863 P.2d 232 (Alaska 1993); *Petitioners for Incorporation of City and Borough of Yakutat v. Local Boundary Com'n*, 900 P.2d 721 (Alaska 1995).)

Alaska's Constitution provides for just two types of local government — cities and boroughs. It is axiomatic that city governments and organized boroughs are distinctly different types of local government in Alaska. One fundamental difference between the two relates to size, with organized boroughs being the larger, regional form of government.

In his written comments of January 29, 2006, former LBC Chair Kevin Waring addressed fundamental constitutional distinctions between the two types of local government. He noted that one-third of the 15 sections in the Local Government

Article of Alaska's Constitution make or imply a territorial distinction in the status of boroughs and cities. Those consist of sections 3, 5, 6, 7, and 15 of article X. Mr. Waring concluded with respect to that issue as follows:

> In sum, Article X, taken together with related statutory and regulatory standards, describes a consistent design for local government that distinguishes boroughs and cities by their territorial scale.[23]

(Letter from Kevin Waring to Darroll Hargraves, pp. 1 – 3, January 29, 2006.)

The LBC Staff concurs fully with Mr. Waring's comments on the fundamental constitutional distinctions between cities and boroughs. The LBC Staff stresses that the Alaska Supreme Court interprets the Alaska Constitution and legal issues "according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters."[24] Further, basic rules of statutory construction apply when the Supreme Court interprets the Alaska Constitution.[25] Under statutory construction, the Supreme Court presumes that "Every word, sentence, or provision has meaning and was intended for some useful purpose, has some force and effect, and that some effect is to be given to each, and also no superfluous words or provisions were used."[26] If the terms *city* and *borough* were synonymous, both words would not be used either in the Alaska Constitution (*see* Rules of the Style and Drafting Committee, Alaska Constitutional Convention)[27] or in State statutes and regulations.

In addition, under statutory construction, "Whenever possible, each part or section of a statute should be construed with every other part or section, so as to produce a harmonious whole."[28] Here again, if *city* is synonymous with *borough*, entire sections of Article X of the Alaska Constitution are rendered either meaningless or superfluous, and there would not be different sets of statutes regarding cities and boroughs.

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[23] Footnote 3 in original. The statutory and regulatory standards for borough and city incorporation (AS 29.05.011 through AS 29.05.031 and 3 AAC 110) consistently reflect this distinction in territorial scale, as do the standards for borough and city annexations.

[24] *Koyukuk River Basin Moose v. Board of Game*, 76 P.3d 383, 386 (Alaska 2003), quoting *Native Vill. of Elim v. State*, 990 P.2d 1, 5 (Alaska 1999) (emphasis added).

[25] *Brooks v. Wright*. 971 P.2d 1025, 1028 (Alaska 1999); quoting *Thomas v. Bailey*, 595 P.2d 1, 4 (Alaska 1979).

[26] *Alaska Transp. Com'n v. Airpac*, 685 P.2d 1248, 1253 (Alaska 1984).

[27] *See Alaska's Constitutional Convention*, p. 257. In his book at p. 60, Mr. Fischer specifically notes that among the basic drafting guidelines of the Style and Drafting Committee was the rule that "Same words should not be used for different meanings." I.e., if a city could be a borough, different words would not have been used in the Constitution.

[28] *Forest v. Safeway Stores, Inc.*, 830 P.2d 778, 781 (Alaska 1992); quoting *Anchorage v. Scavenius* 539 P.2d 1169, 1174 (Alaska 1975).

Many of the statutory standards for city incorporation and those for borough incorporation involve similar or even identical criteria. For example, AS 29.05.011(a)(3) requires, in the case of a city incorporation proposal, that the Commission determine whether the territory proposed for incorporation:

> [I]ncludes 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;

In comparison, AS 29.05.031(a)(3) requires that the Commission determine, in the case of borough incorporation, whether the area proposed for incorporation:

> [I]ncludes 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;

However, the key distinction between the statutory standards for city incorporation and those for borough incorporation involves the size of the territory or area in question. State statutes establishing standards for city incorporation consistently require the standards to be applied at the "community" level. Specifically, AS 29.05.011 provides as follows:

> **Sec. 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. (Emphasis added.)

In clear contrast, State statutes establishing standards for borough incorporation require the standards to be applied at the "area" level. Specifically, AS 29.05.031 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:
>
> (1) the population of *the area* is interrelated and integrated as to its social, cultural, and economic activities, and is large and stable enough to support borough government;
>
> (2) the boundaries of the proposed borough or unified municipality conform generally to natural geography and include *all areas* necessary for full development of municipal services;
>
> (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;
>
> (4) land, water, and air transportation facilities allow the communication and exchange necessary for the development of integrated borough government.
>
> (b) *An area* may not incorporate as a third class borough. (Emphasis added.)

It is noteworthy that the term "area" was used by the framers of Alaska's Constitution in reference to boroughs. Specifically, article X, section 3 of Alaska's constitution provides in relevant part that, "Each borough shall embrace an *area* and population with common interests to the maximum degree possible." (Emphasis added.)

The framers also used the term "area" in setting standards for State election districts. Specifically, in article VI, section 6 of the Constitution, the framers required that, "Each new district so created shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic *area*." (Emphasis added.) As noted in Section III-F of this report, which addresses the constitutional mandate that each borough embrace an area and population with common interests to the maximum degree, the framers drew parallels between boroughs and the State election districts set out in the Constitution. A number of the convention delegates considered those election districts to be appropriate borough boundaries.

It is also significant that the Alaska Supreme Court has held on several occasions that the statutory standards for borough incorporation "were intended to be flexibly applied to a wide range of *regional* conditions." (Emphasis added.) *Mobil Oil*; *Valleys Borough*; and *Yakutat, supra*.

In *Mobil Oil,* the Alaska Supreme Court also distinguished organized boroughs from city governments, noting that courts throughout the nation have generally inferred from applicable statutes and constitutions that city governments are subject to a "limitation of *community*" doctrine.[29] Specifically, the Court stated in *Mobil Oil:*

> [T]he property owners offer a series of cases striking down municipal annexations and incorporations where the lands taken have been found to receive no benefit.[30] 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'[31] 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. . . .[32]
>
> The limitation has been found implicit in words like 'city' or 'town' in statutes and constitutions[33] or inferred from a general public policy of encouraging mining or agriculture.[34] In other cases, the limitation has been expressed as

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29 The distinction stated by the court was between "boroughs" and "municipalities" (e.g., "boroughs are not restricted to the form and function of municipalities"). The court was referring city governments when it used the term "municipalities." 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, statutory standards and procedures for city incorporation were codified in "Alaska Statutes – Title 29 – Municipal Corporations." In 1972, after the LBC decision in the North Slope Borough case, 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.

30 Footnote 19 in original. FN19. The property owners rely principally upon United States v. City of Bellevue, Nebraska, 474 F.2d 473 (8th Cir. 1973); State ex rel. Attorney General v. City of Avon Park, 108 Fla. 641, 149 So. 409 (1933); State ex rel. Davis v. City of Stuart, 97 Fla. 69, 120 So. 335 (1929); City of Aurora v. Bryant, 240 Ind. 492, 165 N.E.2d 141 (1960); State v. Village of Leetonia, 210 Minn. 404, 298 N.W. 717 (1941); Portland General Electric Co. v. City of Estacada, 194 Or. 145, 241 P.2d 1129 (1952).

31 Footnote 20 in original. 1 C. Antieau, Municipal Corporation Law § 1.04 (1973).

32 Footnote 21 in original. State ex rel. Davis v. Town of Lake Placid, 109 Fla. 419, 147 So. 468, 471 (1933).

33 Footnote 22 in original. E. g., Town of Satellite Beach v. State, 122 So.2d 39 (Fla.App.1960); State v. Town of Boynton Beach, 129 Fla. 528, 177 So. 327 (1937); State ex rel. Davis v. City of Largo, 110 Fla. 21, 149 So. 420 (1933); State ex rel. Attorney General v. City of Avon Park, 108 Fla. 641, 149 So. 409 (1933); State ex rel. Davis v. City of Stuart, 97 Fla. 69, 120 So. 335 (1929); Chesapeake and O. Ry. v. City of Silver Grove, 249 S.W.2d 520 (Ky. 1952); Portland General Electric Co. v. City of Estacada, 194 Or. 145, 241 P.2d 1129 (1952).

34 Footnote 23 in original. E. g., State ex rel. Bibb v. City of Reno, 64 Nev. 127, 178 P.2d 366 (1947).

> a finding that the land taken is not susceptible to urban municipal uses.[35] 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,[36] 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.[37] For these reasons, the municipal cases relied upon by the property owners are poor guides to resolving whether organization of an Alaskan borough violates substantive due process.

As reflected in the above review of the statutory standards for city incorporation, AS 29.05.011 does indeed provide a "limitation of community" for city governments. Moreover, the limitation of community doctrine is explicit in terms of the Commission's regulations governing city incorporation.[38] 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.

In clear contrast to the provisions above, the regional context in which borough incorporation standards are to be applied is clearly evident in the regulations of the Commission. In particular, 3 AAC 110.045(b) establishes a formal presumption

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35 Footnote 24 in original. E. g., City of Sugar Creek v. Standard Oil Co., 163 F.2d 320 (8th Cir. 1947); Waldrop v. Kansas City Southern Ry. Co., 131 Ark. 453, 199 S.W. 369 (1917); City of Aurora v. Bryant, 240 Ind. 492, 165 N.E.2d 141 (1960); State v. Village of Leetonia, 210 Minn. 404, 298 N.W. 717 (1941).

36 Now AS 29.05.031 and 29.05.100.

37 Footnote 25 in original. See note 14, supra.

38 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.

in law that the Commission must reject a borough proposal unless the boundaries of the proposed borough encompass multiple *bona fide* communities. Moreover, 3 AAC 110.050(b) establishes a formal presumption in law that the Commission must deny a petition to incorporate a borough unless the proposed borough encompasses a minimum population that is two and one-half times greater than the minimum population required by 3 AAC 110.030(b) for a home-rule or first-class city. Further, 3 AAC 110.060(c) mandates that 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 an area of different size is better suited to the public interest in a full balance of the standards for incorporation of a borough.

There can be little doubt that the framers of Alaska's Constitution intended boroughs to be governmental units that are larger than city governments. This is evident from article x, section 7 alone, which provides in relevant part that "Cities shall be incorporated in a manner prescribed by law, and shall be *a part of the borough in which they are located*." (Emphasis added.)

A review of the minutes of the Constitutional Convention further demonstrates the intent of the framers that boroughs would be regional governments. The following remarks were made in plenary session at the Convention by John Rosswog, Chairman of the Committee on Local Government, on December 19, 1955 (day 42 of the Convention)

John Rosswog

ROSSWOG: Mr. Chairman, the commentary on this proposal is not quite completed, and as some of the members in the Committee worked with Mr. Cooper yesterday to finish it up, and it will be distributed before this session is over today, but at this time I would like to make some explanation of our work on this proposal. Now when this problem of local government structure, where the State of Alaska was placed before the Local Government Committee, we first considered whether local government units as we have them in the Territory were sufficient to take care of our needs as a state. **It was our conclusion that the three classes of cities and the service areas we have now were not sufficient**. For a growing state the framework of **some form of intermediate government was needed**. Without this framework, the orderly creation of local government units, there was a great possibility that we could have a hodgepodge of different local units that would be almost impossible to untangle at some later date. Now, in our considerations we can do two things, we can simply state that we should have cities and *then* **some other unit between the cities and the state**, or we could outline a plan on which such units could be built. The Committee felt that the first possibility we would be shirking our responsibility. We felt

that in drawing up a plan we should keep in mind that we should not disrupt the present local government units any more than it was just possible to do so. We approached the problem with three basic rules in mind, one, that the unit should have as much local home rule as possible. Second, that the overlapping of authority and taxing power should be held to a minimum, and third, that any form of local units should be adaptable to different sections of Alaska. If you will take the proposed article we will go to Section 1, and I believe that is self-explanatory. That states our purpose and also allows for liberal interpretation. **Section 2 provides for two primary units of local government. These are the cities and the boroughs. The name "borough" was selected because it had a meaning of local government and still was broad enough to cover a large area** and also that it would be immediately recognized as pertaining to government and would not be confused with anything else. The city and the borough would be independent but also would be integrated. If each were a completely independent unit we would have the same problems and abuses as in most of the states who are divided into counties, parishes or townships. The difference between this unit and the county, as usually created, is that the county is usually set up to work from the upper level down and to handle functions that are sometimes handled by the state, such as police, the lower courts, the roads, and recordings, etc. Our purpose in creating this local unit was to build from below and up and give local home rule where these units could take on these duties, and up to the amount that the local people were able to carry. **Section 3 provides that the borough or intermediate unit** should be set up in three classes. The first would have almost complete home rule, the second would have limited home rule and the third would have only basic government or be unorganized. Section 5 sets up the governing body of the borough. We have put it in as an assembly composed of members of city councils and members from the rest of the area. Section 6 provides for service areas within the boundaries of the other units. Section 7 provides for the authority of the city and its governing body. Both the city and the borough can be municipal corporations. Section 8 establishes the jurisdiction of the two units and the separation of their functions. Section 9 establishes the taxing power of the two units and prohibits delegating this to other units. Sections 10 and 11 establish a principle of home rule, and Section 12 provides for operational forms of government to be set up by the legislature. Section 13 makes provisions for establishment and change of boundaries and the way they shall be determined. On boundaries we felt that the units should have assistance and supervision from the state level. Now, under ordinary home rule charters, the unit sets up its own boundaries and authority, but under our proposal the boundaries would be under a commission or agency established by the legislature and also a department or agency in the state government would provide assistance to the local unit. Articles 15, 16, 17 and 18 cover and review the setting up of special districts and financial burdens, etc. I think we have not too much comment to make on those,

> but I would like to say that this plan, as proposed, is new in lots of ways as far as the Territory is concerned, but it is based actually on experience in local government in not only the states but in other countries and also on the studies that have been made for combining the smaller local units, particularly in the states. We feel that it has a base and experience behind it.[39] (Emphasis added.)

The concept of borough government envisioned by the framers is further reflected in the following commentary by Victor Fischer [40]:

> As the committee [on local government at Alaska's Constitutional Convention] was evolving [principles of local government], 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**. They also agreed "that any form of local government for Alaska that would be similar to counties would need a broader scope, should have authority to perform all services and should provide a maximum amount of local self-government." The result was the borough concept – **an areawide unit** that while different from the traditional form of the county, was in effect a modernized county adapted to Alaska's needs. As seen by delegates, the inadequacies of conventional counties were limited functional jurisdiction, frozen boundaries, an over abundance of constitutionally established elective offices, inadequacy of fiscal powers, and lack of specifically local (as against state) governmental

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[39] The referenced section numbers are from the original local government proposal, No. 6, considered by the Constitutional Convention. Only sections 1 – 3 retained their original numbering in the final version, No. 6a, of the local government article. Other sections were amended and either renumbered or removed.

[40] 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 Mobil Oil, supra (98). Mr. Fischer was a Delegate to the Alaska Constitutional Convention from 1955–1956. During the Convention, he was a member of the Committee on Local Government and the Style and Drafting Committee. He held the position of Secretary for the former. The Court has also relied on Mr. Fischer's work and expertise on constitutional matters in numerous other cases not related to local government issues.

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. 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); Alaska's Constitutional Convention (1975); testimony before U.S. Congress, Joint Economic Committee Regional Planning to Solve Social and Economic Problems, 1970; Victor Fischer in Partnership within the States: Local Self-Government in the Federal System, Home Rule In Alaska, University of Illinois, 1976; and Alaska State Government and Politics (1987).

Mr. Fischer also 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 (UAA). He was the first director of the Institute for Social and Economic Research (ISER), a part of the College of Business and Public Policy at UAA. Currently, he is Professor Emeritus of Public Affairs for ISER. In May 2005, Mr. Fischer was awarded an Honorary Doctor of Laws degree from UAA in recognition of his achievements and contributions to the state.

authority. They noted also that numerous special districts were being created to fill service gaps left by counties and municipalities, resulting in a multiplicity of overlapping tax jurisdictions.

To overcome such deficiencies, the initial principles set forth by the committee for consideration in the formation of the new areawide government units included these guidelines:

- Provisions should be made for subdividing all Alaska into local units (boroughs) based on economic, geographic, social, and political factors; initially, not all need be organized.
- **Units should be large enough to prevent too many subdivisions in Alaska**; they should be so designed as to allow the provision of all local services within the boundaries of a single unit, thus avoiding multiplicity of taxing jurisdiction and overlapping independent districts.
- The state should have power to create, consolidate, subdivide, abolish, and otherwise change local units.
- Creation of units should be compulsory, with provision for local initiative.
- Boundaries should be established at the state level to reflect statewide considerations as well as regional criteria and local interests, and must remain flexible in order to permit future adjustment to growth and changing requirements for the performance of regional functions.
- **Units should cover large geographic areas** with common economic, social, and political interests.
- Local units should have the maximum amount of self-government and have authority to draft and adopt charters; organized units should have the authority to perform any function, to adopt any administrative organization, and to generally undertake any action that is not specifically denied by the legislature.

When the local government article came before the convention, the delegates did not question the need for an areawide unit. Similarly, they accepted without argument most of the basic concepts evolved by the committee, even though many ideas were quire tentative and subject to further evolution upon statehood.

(Victor Fischer, *Alaska's Constitutional Convention,* pp. 118 – 120 (1975) (footnotes omitted and emphasis added).[41])

Other publications by Victor Fischer also reflect the regional nature of boroughs. For example, in a discussion of the constitutional framework of local government in Alaska, Mr. Fischer, in partnership with Thomas Morehouse, wrote:

Victor Fischer

> From the start of the convention's deliberations the committee members believed 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**. It was agreed early "that any form of local government for Alaska that may be similar to counties would need a broader scope, should have authority to perform all services and provide a maximum amount of local self-government."[42] The result was the borough concept, that of an areawide unit different from the traditional form of the county. (Emphasis added.)

(Thomas A. Morehouse and Victor Fischer, *Borough Government in Alaska*, p. 37 (1971).[43])

It is noteworthy that, beginning in 1900, local government at the community level in Alaska existed in the form of city governments.[44] However, the formation of **regional** governments prior to statehood was expressly prohibited without the consent of Congress.[45] It was the formation of regional governments that was the focus of the Local Government Committee.[46] An article published in 1958 by attorney and former Constitutional Convention Delegate John S. Hellenthal noted the following with regard to boroughs:

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41 LBC Staff is aware of thirteen cases in which the Alaska Supreme Court has cited Mr. Fischer's *Alaska's Constitutional Convention*. A list of those cases is available from LBC Staff upon request.

42 Footnote 8 in original. Minutes, 8th Meeting.

43 LBC Staff is aware of two cases in which the Alaska Supreme Court has cited *Borough Government in Alaska*. A list of those cases is available from LBC Staff upon request.

44 Skagway was the first incorporated city in Alaska.

45 See Territorial Organic Act (37 Stat. 512) August 24, 1912, ch. 387, § 9. It is understood that the limitation on the creation of regional governments in Alaska was a concession to outsiders, particularly the Guggenheim family and J.P. Morgan, and others with significant interests in Alaska's mining, fishing, timber, and transportation industries who feared taxation, regulation, and other impacts from regional governments.

46 *Borough Government in Alaska*, pp. 5-6.

New Approach to Local Government

> Evils of county governments with unchangeable boundaries, many elected officials, and overlapping tax authority are sought to be avoided by the creation of "borough" governments corresponding to counties, and to exist together with city governments as the only two classes of local government. Organized boroughs will be created as needed. Provision for home rule in cities and boroughs is made. . . .
>
> This approach is largely without precedent. The aim is desirable "to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions." Enlightened, inspired and unselfish legislation will be needed to accomplish this end within the constitutional framework.[47]

Moreover, if the drafters of Alaska's Constitution had intended that cities and boroughs were synonymous, there would not have been the repeated discussions among delegates over the need to form large regional governments (boroughs) as cities existed before statehood. Whereas, as noted above, regional governments not only did not exist, they could not exist under Territorial law absent congressional approval.

While one can be sympathetic to the desires of the local Skagway community, the conclusion they wish to reach is not reflective of the intent of the framers of the Local Government Article of the Alaska Constitution. This is reflected in comments by Victor Rivers, a Convention delegate and member of the Committee on Local Government, in his floor discussion regarding the article on local government, particularly creation of the new unit of local government – the borough:

Victor Rivers

> I don't believe there is any of us in this room that think that any one city or any one area exists by itself; independent and complete and sufficient unto itself, and all of us know that we live and must work with and do our business with our neighbors not only in the town but also in the surrounding area. We all know that the wealth and the prosperity of practically all of our cities in concentrated population groups springs from their association, their business, and their holdings with the surrounding areas which bring business to them and which in turn derive benefits and do business with them and from them. It cannot be held, I don't think . . ., that any one area stands by itself alone and for itself. We must give consideration to the interests of both groups

[47] http://www.alaska.edu/creatingalaska/StatehoodFiles/articles/hellenthalarticle.xml, reprinted from the December 1958 Edition of the American Bar Association Journal. (Emphasis added.)

> and their interrelated interests, one with the other, and in this arrival at the plan we present to you here, it has been with the intent in mind that that would be one of our underlying purposes, that in allowing this form of government to be established locally rather than allowing a series of conflicts and confusion and unhappiness to exist which took great difficulty and struggle to unravel, we would allow it in such a way that we would base our plan of thinking upon cooperation of those elements, and in such cooperation that rather than spending time, money, and energy in conflict, they could spend the same time, money, and energy in cooperative growth and progress. I feel I speak for all the Committee when I say that has been our underlying purpose and we present to you here today the efforts of our most sincere thinking in regard to that approach.[48]

Based on the foregoing, the LBC Staff finds that Alaska's borough incorporation standards ought to be applied in a regional context under the reasonable basis standard.[49]

Part C. The proposed Skagway borough does not comprise an *area* with a population that is interrelated and integrated as to its social, cultural, and economic activities.

In the 2001 – 2002 proceedings, the LBC Staff undertook an extensive examination of the social, cultural, and economic interrelationships and integration of the population of the proposed Skagway borough. The results of the LBC Staff's investigation on that issue were reported, in particular, on pp. 55 – 74 and Appendix F (F-1 – F-39) of the LBC Staff's Preliminary Report and pp. 19 – 32 of the LBC Staff's Final Report (R. 226 – 245, 348 – 386, and 492 - 505). The LBC Staff concluded in 2002 with respect to the broad standard that "the proposed Skagway borough does not encompass a population that is interrelated and integrated as to its social, cultural, and economic activities." (R. 245.) Moreover, in dealing with a fundamental component of the broader standard, the LBC Staff concluded that "the Skagway borough proposal does not satisfy the multiple community standard set out in 3 AAC 110.045(b)." (R. 257.) The LBC Staff incorporates the full analysis in those earlier materials by reference for consideration in these remand proceedings.

Beyond that earlier analysis, the LBC Staff offers a contemporary examination below in subparts 1 – 7 of this portion of the report regarding whether the proposed Skagway borough encompasses multiple communities. As noted above, the standards adopted according to law (3 AAC 110.045(b)) expressly provide that unless a

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48 *Proceedings of the Alaska Constitutional Convention* (PACC) 2715-16 (January 20, 1956)

49 LBC Staff recognizes that Judge Thomas A. Stewart (Retired) departs from the conclusion by authorities on the topic that boroughs are regional governments. Judge Stewart's views on the topic are addressed in Section III-F of the report regarding the borough standard set out in article X, section 3 of Alaska's Constitution.

proposed borough encompasses multiple communities, the Commission must presume – "absent a specific and persuasive showing to the contrary" – that a level of social, cultural, and economic interrelationship requisite for borough incorporation does not exist.[50] For purposes of that standard, the term *community* is formally defined in 3 AAC 110.990(5) as "a social unit comprised of 25 or more permanent residents as determined under 3 AAC 110.920."

The provisions of 3 AAC 110.920 allow the Commission to consider relevant factors, including whether (1) the 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.

Further, 3 AAC 110.920(b) requires the Commission – absent a specific and persuasive showing to the contrary – to 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.

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1. The existence of a Dyea Community Advisory Board is not an indication that Dyea is a separate community as defined by 3 AAC 110.990(5).

The Petitioner takes the position in its supplemental brief that the proposed borough encompasses two communities – Skagway and Dyea.[51] In support of its position that Dyea is a community, the Petitioner points out that "Dyea has its own Community Advisory Board." (*Supplemental Brief*, p. 8.) Testimony was also given to the Commission at the 2002 hearing that Dyea has its "own land use planning committee." (R. 760.)

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[50] A presumption is a rule of law which, in this case, provides that the Commission will assume a fact is true unless "specific and persuasive" evidence is provided which disproves or outweighs (rebuts) the presumption. Each presumption is based upon a particular set of apparent facts paired with established laws, logic, or reasoning. A presumption is rebuttable in that it can be disproven by factual evidence. One can present facts to persuade the Commission that the presumption is not true.

[51] It appears that the Superintendent of the Skagway City School District recognizes that Dyea does not meet the applicable legal definition of a community. On page 3 of his letter of January 24, 2006, Dr. Dickens states, "I ask Commission members to look favorably on a borough formation for Skagway and to consider eliminating some of the arbitrary impediments to our borough formation especially regarding minimum population and two site requirements."

The Dyea Community Advisory Board is not a body exclusive to the interests of Dyea. The Board was created by the Skagway City Council through the enactment of Ordinance 2002-25, passed and approved November 21, 2002.[52] The purpose of the Dyea Community Advisory Board is to advise the Skagway City Council on various matters of local interest and to periodically review the Dyea Flats Management Plan.[53] The Skagway City Council defined the role of the Board in SMC 3.15.010:

> There is established a Dyea Community Advisory Board to advise the city council on issues and policies relating to public lands in the Dyea and West Creek Valleys including, but not limited to, land use, planning, land disposal, land and water conservation, utilities, recreational and commercial development. Additionally, the Dyea Community Advisory Board shall be responsible for the periodic review of SMC 16.08 – Dyea Flats Management Plan. The Dyea Community Advisory Board shall consist of 5 property owners in Dyea, one of which being a representative from the National Park Service.

The Dyea Flats Management Plan (SMC 16.08) sheds some light on whether Dyea is a "discrete and identifiable social unit" – one element of the Commission's test of whether a locality is a community (3 AAC 110.920(a)(3)). It also provides evidence that bears on the question whether "the population is adjacent to a community and is dependent upon that community for its existence" – another element of the test (3 AAC 110.920(b)(2)).

It is noteworthy that the Dyea Flats Management Plan makes repeated references to the interests of *residents and citizens of Skagway*. Specifically, the Plan states:

- "An area of scenic beauty and uncommon open space, the Flats is also valued highly by <u>Skagway residents</u> and visitors to the National Park for its recreational and scenic values and for the opportunity it provides to escape the City environs during the busy summer months. . . ."
- "The <u>citizens of Skagway</u> are fond of the Flats as a familiar place for recreation and relaxation. . . ."
- <u>The City believes</u> that <u>Skagway residents'</u> use of the Flats for recreation is an extremely important local "public use" that should receive full consideration, along with the interests of the State and national "public," in decisions regarding ownership and management of the area.

(SMC 16.08.010. Emphasis added.)

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[52] Municipal planning by the City of Skagway specifically for the Dyea area was apparently initiated in an effort by the City to gain title to the Dyea Flats. *See*, for example, Skagway Comprehensive Plan, pp. 7-13, which states, "As part of its effort to gain title to the Dyea Flats, the City prepared a Land Management Plan for that area."

[53] City records indicate that as of June of this year, the Dyea Community Advisory Board was reviewing the Dyea Flats Management Plan. *See* Minutes of the Skagway City Council meeting of June 22, 2006.

It is also noteworthy that the Dyea Flats Management Plan makes no specific reference to Dyea residents or Dyea citizens. In other words, the Plan does not distinguish between residents and citizens of Skagway and those of Dyea. Moreover, as shown above, SMC 16.08.010 stresses the importance of Flats in terms of "the opportunity it provides to escape the City environs during the busy summer months."

The LBC Staff finds from the above facts that the existence of a Dyea Community Advisory Board does not indicate that Dyea is a discrete and identifiable social unit. Further, the formally recognized importance of Dyea Flats to residents and citizens of Skagway, particularly in terms of the "opportunity it provides to escape the City environs" provides evidence that Dyea is not a discrete social unit, but rather is part of the greater community of Skagway. The locality of Dyea, of course, is within the corporate boundaries of the Skagway city government.

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2. Dyea residents do not live in a close geographical proximity that allows frequent personal contacts characteristic of neighborhood living.

Given the absence of any formal demarcation for Dyea, official population data for that locality are unavailable.

The Petitioner takes the position in these remand proceedings that Dyea is delineated by a differential tax zone purportedly mandated by the Commission in the City annexation proceedings nearly 27 years ago.[54] The Petitioner asserts that the purported mandate "constitutes a clear admission by the Local Boundary Commission that Dyea is a distinct and separate community." (*Supplemental Brief*, p. 9.)

It is noteworthy, however, that the differential tax zone in which Dyea is located encompasses an estimated 432.1 square miles. In other words, the Petitioner, in effect, argues that the "distinct and separate community" of Dyea comprises 432.1 of the 443.1 square miles (97.5 percent) of the geographic territory within the proposed Skagway borough.[55]

Moreover, it is remarkable that the Skagway city government has determined that the 2005 value of taxable real and personal property in the differential tax zone encompassing Dyea (Zone 5) was only $477,100. (*See* 2005 Annual Report on

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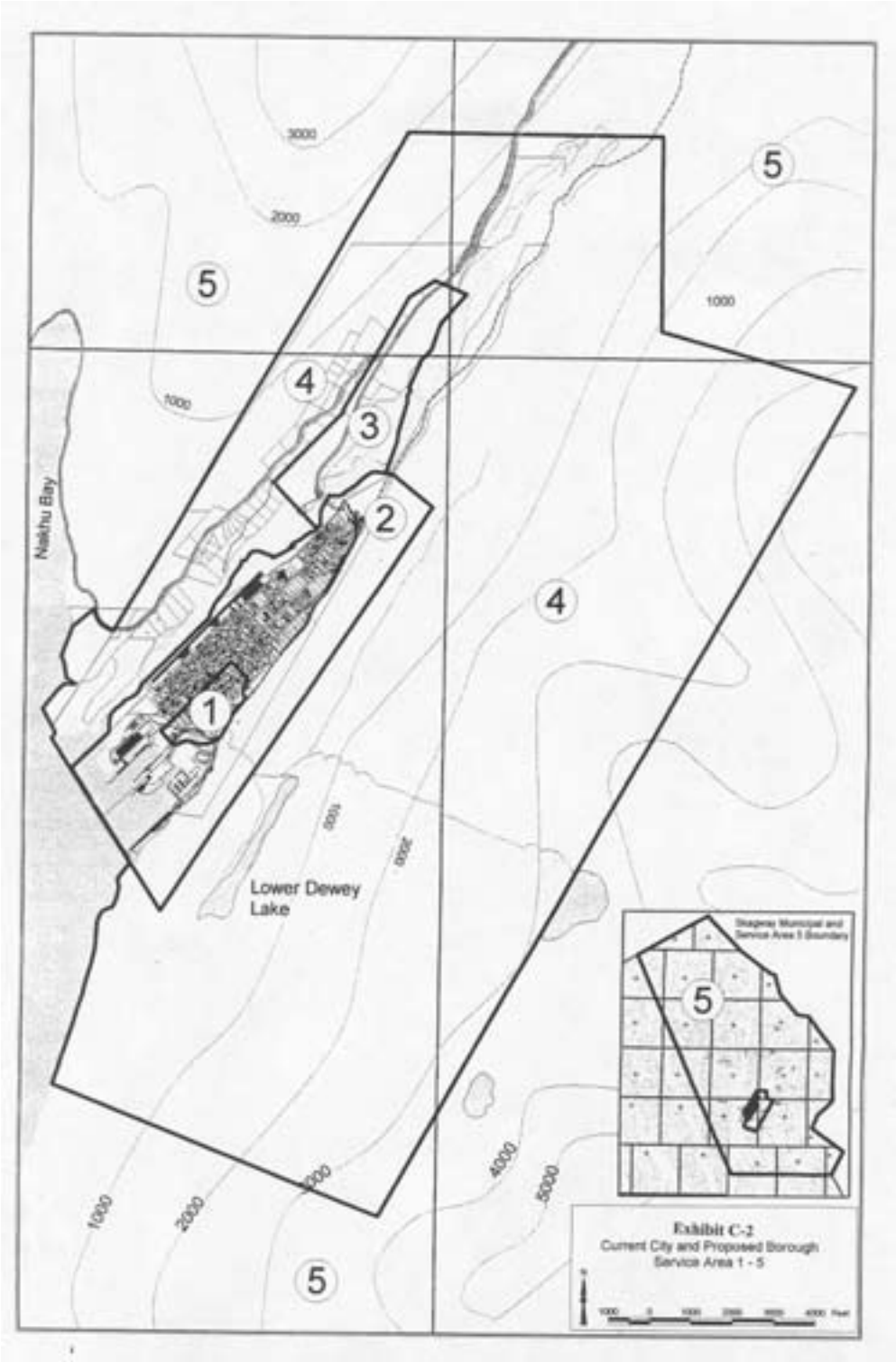
[54] AS 29.45.580 allows any city to "establish, alter, and abolish differential tax zones to provide and levy property taxes for services not provided generally in the city or a different level of service than that provided generally in the city." The Petitioner states that in the 1979 proceedings for annexation to the City of Skagway, the Commission mandated a differential tax zone through which Dyea residents would pay a lower rate of property tax compared to other parts of the City of Skagway. The Commission's 1979 decisional statement (Record on Appeal, pp. 396 – 397) does not reflect any such mandate.

[55] As reflected in the map on p. 40 of the 2002 Preliminary Report, there are four other differential tax zones in the remaining 11 square miles of the proposed borough. Based on the Petitioner's characterization of the significance of such tax zones, it would seem that the Petitioner is now arguing that the proposed Skagway borough actually encompasses five "distinct and separate" communities. LBC Staff does not agree that the creation of a differential tax zone within a city constitutes recognition of that differential tax zone as a distinct and separate community. Nothing in the laws governing the determination of a community (3 AAC 110.920) suggests otherwise.

Figure 3-6. City of Skagway Differential Property Tax Zones (Zone 5, Which Includes Dyea, Encompasses 432.1 Square Miles)



Assessment and Taxation, certified by the Skagway City Manager on August 12, 2005.) Such minimal levels of taxable property in such a relatively large portion of the territory proposed for incorporation (97.5 percent) hardly seem indicative of a bona fide community.

In support of its claim that Dyea is a separate community, the Petitioner emphasizes that "DCED conceded in 2002 that there are 102 residents along the Dyea road." (*Supplemental Brief*, p. 8.) The Petitioner is correct. In fact, for 2005, the number of residents along Dyea Road grew to 119.[56]

However, because Dyea Road begins at the Skagway ferry terminal (located at the southern end of Broadway in the Skagway townsite), the population count along Dyea Road is no more a reflection of the number of residents of Dyea than a tally of the number of residents along the Seward Highway (extending from Anchorage to Seward) is an indicator of the population of Seward.

The State Demographer provided a breakdown of the population along Dyea Road by milepost. Those data offer perhaps the best measure of the contemporary population of the locality of Dyea. Because Dyea Road includes much more than just the locality of Dyea, it is necessary to select points along Dyea Road where the "locality" reasonably appears to begin and end.

A map of Dyea Road is provided on the following page. As noted above, Dyea Road begins at the terminal of the Alaska Marine Highway in downtown Skagway. The first 2.5 miles are coterminous with the Klondike Highway. Mileposts are shown on the map provided in this report.[57] Dyea Road is generally described below.

> **Mile 0 – 1**. From the Skagway ferry terminal, Dyea Road runs northeasterly to its intersection with First Avenue in the Skagway townsite, where it turns northwesterly. At the intersection of First Avenue and State Street, Dyea Road turns back northeasterly and runs along State Street. Milepost 1 of Dyea Road is near the intersection of State Street and 12th Avenue in the Skagway townsite.
>
> **Mile 1 – 2**. Dyea Road continues northeasterly along State Street to the intersection with 23rd Avenue in the Skagway townsite, where it turns northwesterly. Dyea Road crosses the Skagway River (at approximately mile 1.8), then turns northeasterly just before milepost 2.0.

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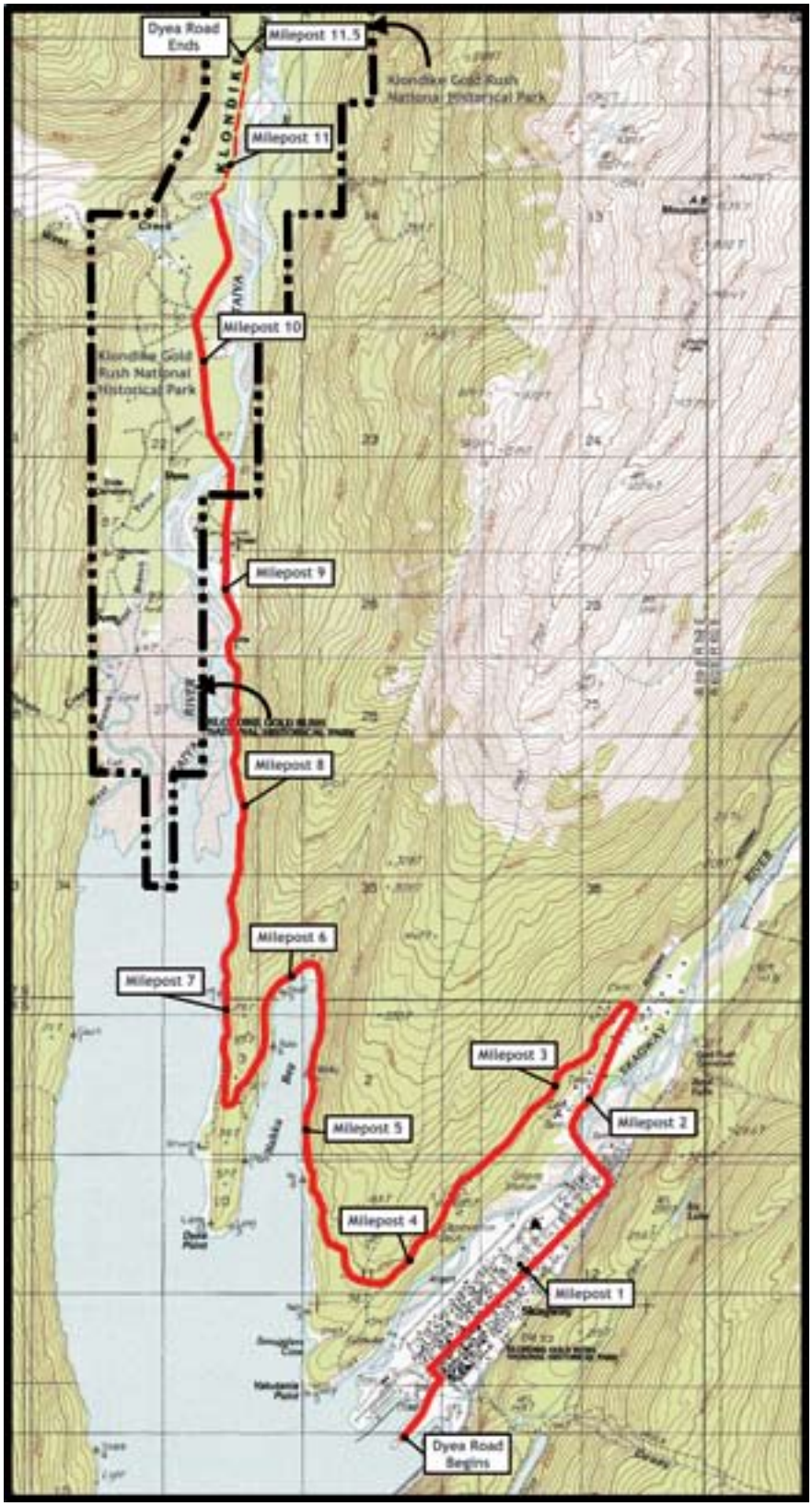
[56] Source: Greg Williams, State Demographer, Alaska Department of Labor and Workforce Development.

[57] For purposes of this analysis, mileposts for Dyea Road were determined by LBC Staff using *All Topo Maps V7* software based on U.S.G.S maps Skagway (B-1) NW Quadrangle and Skagway (C-1) SW Quadrangle, 1:25,000 scale.

Figure 3-7. Map Showing Dyea Road



Mile 2 – 3. Dyea Road continues northeasterly to mile 2.5, at which point it branches off from the Klondike Highway. Dyea Road then makes a sharp turn to the southwest. Milepost 3.0 is about one-half mile past the turnoff from the Klondike Highway.

Mile 3 – 4. Dyea Road continues southwesterly — milepost 4.0 is just past an observation platform overlooking the Skagway townsite.

Mile 4 – 5. Roughly three-tenths of a mile past the observation platform, Dyea Road rounds Yakutania Point. Here, it swings back to a northwesterly direction. Milepost 5.0 is approximately seven-tenths of a mile past Yakutania Point.

Mile 5 – 6. Dyea Road continues in a northwesterly direction to the head of Long Bay (also known as Nahku Bay). Milepost 6.0 is near the head of Long Bay.

Mile 6 – 7. Dyea Road turns back sharply in a southwesterly direction for approximately six-tenths of a mile near Dyea Point. Here, Dyea Road turns in a northerly direction. Milepost 7.0 is approximately four-tenths of a mile past Dyea Point.

Mile 7 – 8. Given its proximity to Dyea Point, milepost 7 is considered by LBC Staff to be a reasonable designation of the beginning of the Dyea locality for purposes of this review. From milepost 7, Dyea Road continues in a northerly direction. At approximately mile 7.5, Dyea Road begins to parallel the boundaries of the Chilkoot Trail Unit of the Klondike Gold Rush National Historical Park.

Mile 8 – 9. Milepost 8.0 is near the southern end of the tidal flats, where the Tayia River empties into Tayia Inlet. Dyea Road continues in a northerly direction. Milepost 9.0 is near the northern end of the tidal flats.

Mile 9 – 10. Dyea Road maintains its northerly direction; at mile 9.3, it borders a National Park Service campground, parking area, and ranger station. Immediately thereafter, Dyea Road enters the Klondike Gold Rush National Historical Park. From this point on, Dyea Road remains within the Klondike Gold Rush National Historical Park. (The boundaries of the Park are shown on the map that appears on the preceding page.) At mile 9.6, Dyea Road crosses the Tayia River. Here, Dyea Road becomes more primitive. Milepost 10 is four-tenths of a mile past the Tayia River crossing.

Miles 10 – 13. Dyea Road continues in a northerly direction; at mile 10.8, it crosses West Creek. At this point, Dyea Road becomes even more primitive and branches off in various directions. One branch extends another one-half

mile in a northerly direction, the designation of the road on the U.S.G.S. map ends approximately at mile 11.5; however, population data for the locality have been reported to the State Demographer as far as milepost 13.

The following table provides a breakdown of the State Demographer's 2005 population data along Dyea Road by milepost.[58] The figures for mileposts 7 – 13 are shown in the shaded area of the table below to reflect the population of Dyea. The data indicate that 29 individuals live along that portion of Dyea Road.

Table 3-2. 2005 Population Along Dyea Road

Segment of Dyea Road	2005 Population
Milepost 0-1:	9
Milepost 1-2:	5
Milepost 2-3:	12
Milepost 3-4:	37
Milepost 4-5:	8
Milepost 5-6:	9
Milepost 6-7:	7
Milepost 7-8:	**5**
Milepost 8-9:	**4**
Milepost 9-10:	**1**
Milepost 10-11:	**15**
Milepost 11-12:	**1**
Milepost 12-13:	**3**
Unknown:	3

Source: Alaska Department of Labor and Workforce Development

The population along the six-mile portion of Dyea Road from milepost 7 to milepost 13 is equivalent to less than 5 persons per mile of road. LBC Staff finds that such a population density is not reflective of a circumstance in which individuals reside in a "close geographical proximity that allows frequent personal contacts characteristic of neighborhood living."

[58] The State Demographer emphasized that the locations are self-reported data. In other words, the locations listed are those reported by the residents themselves.

3. Some restrictions exist in terms of public access to and the right to reside in portions of Dyea.

The provisions of 3 AAC 110.920(b)(1) state that, absent a specific and persuasive showing to the contrary, the Commission will presume that a population does not constitute a community if public access to or the right to reside at the location of the population is restricted.

Residential development is expressly prohibited in the territory covered by the Dyea Flats Management Plan.[59] (See, SMC 16.08.020-D-6.) Moreover, at least 19 of the 29 residents along Dyea Road from milepost 7 to 13 live within the Klondike Gold Rush National Historical Park. That represents nearly two-thirds of the identified population of the locality.

Dyea Freight Yard at Height of Klondike Gold Rush

Dyea includes portions of Klondike Gold Rush National Park, which was established in 1976. Initially, the National Park Service proposed onerous restrictions on the right to access privately owned lands within the Klondike Gold Rush National Park. For example, in April 1980, the Park Superintendent issued the Park's first land acquisition plan. The plan contained a section that outlined compatible and incompatible land uses for private landowners in the Park. The Park Service describes that part of the 1980 plan as follows:

> That section prevented "construction or development of any kind" on undeveloped land; it also prohibited "replacement of a major structure with one that is substantially different in size, location or purpose from its predecessor" on developed land.

(Klondike Gold Rush Administrative History, Chapter 8: Administering the Dyea Area, National Park Service.)

[59] As noted above, the LBC Staff recognizes that the Dyea Management Plan is currently under review. Moreover, LBC Staff acknowledges a pending conveyance of some 932 acres of land in the Dyea area by the State of Alaska to the Skagway city government is pending. This latter development is addressed in subpart 6.

The National Park Service admits that its plan immediately ran into a barrage of criticism, primarily in response to the "incompatible use" statement. After months of discord, the National Park Service ultimately accommodated a number of local concerns regarding access to the Park. However, agency rules barred it from doing so for all concerns. As reflected by the Park Service:

> As a result of the hubbub that began with the April 1980 issuance of the draft land acquisition plan, the NPS learned--painfully--that it was unwise to demand land-use controls from Dyea residents, particularly from those whose property did not impinge on the historic townsite area. The agency learned a great deal about what activities were important to those residents. It tried to accommodate some of those activities, but agency rules prevented the acceptance of others. The visits, in March 1981, of Douglas Warnock and John Cook did a great deal to bridge the communications gap that had separated the NPS from local residents during the previous year. Thereafter, the antagonistic feelings between the NPS and Dyea residents began to dissipate.

(Id. Emphasis added.*)*

While cooperation and amicable relations between the National Park Service and local interests seem generally evident today, it is axiomatic that, at least to some extent, public access to the Klondike Gold Rush National Historical Park is restricted. Restrictions on the Klondike Gold Rush National Historical Park include those limitations imposed by the City of Skagway on the Dyea Flats portion of the Park.[60]

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4. Dyea lacks characteristics that render it a discrete and identifiable social unit.

The provisions of 3 AAC 110.920 state that in determining whether a settlement comprises a community, the Commission may consider whether the 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.

There is no public school at Dyea. The only public school within the entire proposed Skagway borough is a school serving kindergarten through twelfth grade located near the intersection of 15th Avenue and Main Street in the Skagway townsite. That location is just three blocks north and one block west of milepost 1 of the Dyea Road

[60] Prohibited uses of Dyea Flats designated by SMC 16.08.020D include: 1. Commercial activities including tours not permitted, rentals, retail sales or any other uses where compensation is made or offered; 2. Grazing; 3. Unrestricted road vehicles and ATV access; 4. Camping outside of designated areas without a City permit; 5. Subdivision and/or sale of public lands; and 6. Residential, industrial and commercial structures or other intensive developments.

(the intersection of 12th Avenue and State Street). Given the close proximity of the Skagway School to Dyea (mileposts 7 – 13 of the Dyea Road), the sparse population of Dyea (29 residents), the small enrollment in the Skagway School District (only about 40 percent of the minimum size prescribed by the Legislature for new districts), and the fact that district enrollment is declining (more than 20 percent in the past five years), it seems reasonable to conclude that Dyea is not likely to gain a school in the foreseeable future.

In addition to being without a public school, Dyea lacks other public "service centers" typically associated with a bona fide community. In particular:

- Dyea lacks a U.S. Post Office. The only U.S. Post Office in the proposed Skagway Borough is located at 641 Broadway in the Skagway townsite.
- Dyea lacks a fire hall. The only fire hall in the proposed Skagway borough is at 501 State Street in the Skagway townsite.
- Dyea lacks a police station. The only police station in the proposed Skagway borough is at 7th Avenue and Spring Street in the Skagway townsite.
- Dyea lacks a public library. The only public library in the proposed Skagway borough is at 769 State Street in the Skagway townsite.

Furthermore, Dyea has no grocery stores, medical facilities, restaurants, banks, gas stations, or other private sector service centers characteristic of a bona fide community.

In terms of numbers and sources of employment and commercial operations in the Dyea vicinity, the most evident is the Chilkoot Trail Outpost, a bed and breakfast operation.[61] The Chilkoot Trail Outpost is located across from the National Park Service campground at Dyea. It offers eight individual cabins that will accommodate up to 36 guests in ten private quarters.

Additionally, Robert Murphy, owner of Chilkoot Horseback Adventures, operates a horseback riding tour on the Dyea Flats and a dog sled operation on his property in the vicinity.[62] Dyea Dave, Frontier Excursions, and Klondike Tours and Taxi, operate bus or taxi service between Skagway and Dyea. Additionally, Chilkat Guides, a Haines-based business, operates a rafting operation on the Taiya River, which passes through Dyea.[63]

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61 See http://www.chilkoottrailoutpost.com/

62 See http://www.chilkoothorseback.com/

63 See Skagway News, March 24, 2006; see also http://www.chilkatguides.com/index.html

The existence of a lodge or bed and breakfast operation is not dependent upon a community, and such operations by themselves are not an indication of a community. Neither are the other limited commercial operations in the vicinity noted above.

As noted in subpart 2 of this part of the report, the Skagway City Manager certified that the entire 432.1-square-mile tax zone in which Dyea is located ("Zone 5") had just $477,100 in taxable real and personal property in 2005. That represents less than two-tenths of one percent of the 2005 assessed value of taxable property within the proposed borough. Moreover, all the Zone 5 property was classified as residential; none was classified as commercial or industrial. A comparison of the property values in each of the five differential property tax zones within the Skagway city boundaries is provided below for comparison:

Table 3-3. 2005 Assessed Value of Taxable Property in the City of Skagway as Determined by the City of Skagway

Property Type	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5
Residential	$ 2,778,000	$ 48,764,860	$11,012,200	$ 5,077,800	$477,100
Vacant land	4,616,400	10,098,810	3,325,800	698,900	0
Commercial	50,140,300	12,301,400	819,700	36,600	0
Industrial	494,200	64,879,200	7,645,100	9,982,600	0
Apartment	0	1,776,500	0	0	0
Mobile Homes Parks	0	348,700	0	0	0
Mobile Homes	247,500	3,524,000	0	69,000	0
Total	$58,276,400	$141,693,470	$22,802,800	$15,864,900	$477,100

The figures above represent the 2005 assessed value of taxable property within the corporate boundaries of the City of Skagway as that value was determined by the City of Skagway under AS 29.45.110(a). That law provides that:

> The assessor shall assess property at its full and true value as of January 1 of the assessment year, except as provided in this section, AS 29.45.060, and 29.45.230. The full and true value is the estimated price that the property would bring in an open market and under the then prevailing market conditions in a sale between a willing seller and a willing buyer both conversant with the property and with prevailing general price levels.

The sum of the total values for the five differential tax zones equals $239,114,670. The local assessed value is distinct from the full and true value of taxable property determined by the State Assessor under AS 14.17.510 and AS 29.45.110. The State Assessor determined that the 2005 full and true value of taxable property in the City of Skagway was $258,322,400.

As noted earlier in this subpart, Dyea lacks a public school, U.S. Post Office, fire hall, police station, public library, grocery stores, medical facilities, restaurants, banks, gas stations, and other private sector service centers characteristic of a bona fide community. Additionally, LBC Staff finds no factors concerning voting, voter registration, and precinct boundaries that suggest Dyea is a separate community. Voters in Dyea are registered to vote in the Skagway Precinct. The Skagway City Hall, located near the intersection of 7th Avenue and Spring Street in the Skagway townsite, is the polling place for Dyea residents.

Based on the foregoing, the LBC Staff finds that Dyea lacks the characteristics that render it a discrete and identifiable social unit.

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5. The population of Dyea is dependent upon Skagway.

The provisions of 3 AAC 110.920(b)(2) state that absent a specific and persuasive showing to the contrary, the Commission will presume that a population does not constitute a community if the population is adjacent to a community and is dependent upon that community for its existence.

As reflected in subpart 4 above, there is no school, post office, fire station, public library, or polling place located at Dyea. Moreover, employment, medical needs, transportation, commerce, and other fundamental requirements of Dyea residents are generally met by facilities and individuals in the nearby Skagway townsite.

Rather than offering "specific and persuasive" evidence to overcome the presumption set out in the law, the Petitioner admitted in these remand proceedings that Dyea residents depend upon Skagway for their needs. Specifically, the Petitioner stated:

> Dyea residents depend upon Skagway for most of their social, cultural and economic needs, while maintaining a distinctly rural lifestyle.

(*Supplemental Brief*, p. 9.)

Based on the foregoing, the LBC Staff finds that the population of Dyea is generally dependent upon residents and facilities located in the nearby Skagway townsite for public and private sector needs.

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6. It is premature to reasonably predict what, if any, impact the pending conveyance of some 932 acres of land in Dyea to the Skagway city government will have in terms of the extent to which Dyea is a bona fide community.

The LBC Staff is aware that the City of Skagway will soon receive title from the State of Alaska to some 932 acres of land in and around Dyea. The land in question comprises Tracts A and B of Alaska State Lands Survey 97-61. The Skagway city government was granted management authority over those lands ten years ago in 1996.

Earlier this year, the City of Skagway Planning and Zoning Commission, with input from the City Council and interested members of the public, and in coordination with the Comprehensive Plan, Dyea Management Plan, and the Coastal Management Plan, presented a vision for the land to be conveyed to the City from the State of Alaska from Dyea point running North along the Dyea Road. That area is designated as Tract B of Alaska State Land Survey # 97-61 on Plat # 2006-3 dated February 3, 2006.[64] That vision provided for the following five fundamental principles (emphasis added, punctuation in original):

1. To preserve the natural beauty of the area
   a. First and foremost is to preserve the tip of the Dyea point as a park in perpetuity **for the citizens of Skagway**.
   b. To allow only for **low density housing with lot sizes of at least 1 acre**.
   c. **To prohibit business including tourism business bases** except for the **possible future limited commercial development** in the area outlined on Sheet 4 of 5 of Plat Map 2006-3 running in a straight line between Monuments #36 and 39 West of the Taiya River.
   d. To create green belts and establish set back requirements adequate to preserve the view shed.
   e. To create small roadside parks and picnic areas, view points and scenic overlooks
2. To preserve a trail right-of-way for future development
   a. To plat a trail right of way from Smugglers Cove to Dyea Point in this land disposal and any future land disposals.
   b. Wherever possible to provide public beach access to the reserved 50' beach area.
3. To allow private ownership of land in the area provided that:
   a. The area be **low density housing** and recreation property.
   b. The area have a mix of lot sizes as dictated by the topography and access not to exceed 10 acres.
   c. That the land sale includes terms of ownership that would keep it from being resold for profit.
   d. Lots are not subdividable.
   e. Reserve areas for future dumpster station/Public Works shop/Fire Department or other Municipal need.[65]
4. To provide access to private lots with:
   a. Adequate road easements for fire and rescue
   b. Reserve 50' easement allowing for a buffer greenbelt.
   c. Access to private lots with necessary easements.
5. To allow alternative water and sewer systems:
   a. As allowable by State Law
   b. Driven by development

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[64] See http://www.skagway.org/vertical/Sites/{7820C4E3-63B9-4E67-95BA-7C70FBA51E8F}/uploads/{74095DA8-BC21-488F-9CB8-B4E589C4C392}.PDF

[65] While local officials and residents recently expressed their vision that a portion of those lands be reserved for "future dumpster station/Public Works shop/Fire Department or other Municipal need" such plans for the future do not provide any evidence that a public works shop, firehall, or other substantial municipal facility will ever be built there. Even if some local public facility such as a firehall is eventually constructed at Dyea, that development would have to be evaluated in light of all applicable factors regarding whether Dyea could then be reasonably characterized as a community.

As is reflected in an April 21, 2006, article in the *Skagway News,* conveyance of that land, in time, "could establish not only affordable lots but a variety of parcels including high-end lots, recreational cabin lots and even commercial lots in Dyea proper." At this point, however, it is impossible to reasonably predict the extent, if any, to which the land acquisition will alter the degree to which Dyea reflects the characteristics of a community as defined in 3 AAC 110.990(5). The April 21, 2006, article appears below:

> **Land sale faces growing number of questions**
> **Too many variables likely to delay fall sale**
>
> In a series of recent meetings, issues concerning the municipal entitlement lands were raised that will definitely affect the surveying, subdivision, and eventual sale of the land. The city had hoped that a land sale in the fall of 2006 could provide affordable lots to those in Skagway looking for a place to build a home, but with unforeseen obstacles popping up from different places, it is starting to look unlikely that the land could be made available at such an early date, or if the land will even be affordable to the average buyer.
>
> In his report to City Council on April 6, Ward said that one issue that hasn't been discussed is that while some people would benefit from lower priced lots in the newly acquired state lands, the entire community would benefit from higher priced lots. Ward said future meetings with Planning and Zoning could establish not only affordable lots but a variety of parcels including high-end lots, recreational cabin lots and even commercial lots in Dyea proper.
>
> This issue was discussed at a Public Works special meeting on April 11. The meeting also addressed the surveying of land in the area, and the fact that only one bid was received for this work, from Kalen and Associates.
>
> Councilman Dan Henry said the sale of the land should ultimately help citizens of Skagway offset property taxes and questioned whether the objective was simply providing land to would-be buyers, or if the sale should garnish the highest dollar amount to ultimately benefit the city.
>
> Councilmember Lisa Cassidy suggested the proposed subdivisions be considered in separate sections, with the Dyea Point area coming first. She added that the "mixed density" of some portions of that area could make parcels of land more affordable. Henry said it was doubtful that any of the land in and around Dyea Point would be considered "affordable."
>
> Concerning the bid for surveying the land, those at the meeting were disappointed by the fact that only one bid was received and a representative from Kalen and Associates was not present at the meeting.

Members said portions of the bid seemed out of tune with reality, such as extremely high travel costs and the overall timeframe of the survey, part of which allotted less than a month to build a road accessing the property.

The committee recommended that council reject the bid calling it non-responsive and decided to set up a new Request for Proposals that might divide the land into sections so work could be competed sooner, rather than later.

Some Skagway residents are expressing concern over a broad range of topics concerning Dyea such as potential traffic problems on the Dyea Road, quality of life issues with the possibility of many new homes in the area, and the use of public property by private business.

In a letter, Nola Lamken stated tour buses often speed down the Dyea Road during the summer and that it has become common habit rather than the exception. She said parked buses and cars on the flats have created a disturbance and questioned further development in the area.

Another letter, from Wayne Greenstreet, addressed the land sale issue by saying that the city should develop roads and septic system infrastructure prior to any sale. He wants to see all right-of-ways and easements in place and added that he could not see all of this happening by the fall.

Other issues with the property that remain to be tackled do concern potential septic problems and access to the property, which will have to be coordinated with Dyea Point resident Bruce Weber. There also is an issue with the state over who controls mineral rights.

Councilman Dave Hunz said, “The state stuff is as big as the Weber issue.”

The city had hoped to use gravel in the municipal land for projects such as road construction, but it is unclear whether the state is going to relinquish rights to that resource.

At a meeting immediately following the Public Works meeting, members of City Council and the Mayor discussed a Patent Draft concerning the land. The draft was issued by the State of Alaska and was presented by Ward at the April 6 council meeting. The state said that the city had 10 days to respond to the document.

The alarm by the council over the draft document stems from the fact that the state will retain land rights over natural resources and archaeological and historic materials, as well as the inclusion of a 50-foot buffer around roads that remain in control of the state. This could potentially cut back the 932 acres of entitlement land by as much as 200 acres.

> Still, it is unclear if the language of the document is normal for this type of land exchange or even if the 50-foot buffer has already been excluded from the total acreage.
>
> The portion of the draft causing the most trepidation concerns the archaeological aspects. Questions raised included whether or not archaeological surveys would have to be done by property owners on a regular basis, and which areas specifically would be targeted for such surveys.
>
> Henry said that the city should request more clearly defined language concerning those areas and criticized the short 10-day review period.
>
> The council also requested that the state clarify the archaeological issues, whether or not the city has rights to gravel and sand, and if the 50-foot buffer is included as part of the entitlement land.
>
> As of deadline, the city had not heard back from the state.
>
> As for the eventual decision on land subdivision and sale Ward said, "... Everyone will have the opportunity to be heard and the ultimate subdivision will be the result of this input as well as the practical and feasible issues that arise in this field."

Despite the fact that the Skagway city government has had management authority over the land in question for a decade, there is little or no evidence to suggest that the acquisition of some 932 acres of land in the Dyea area by the Skagway city government will substantially alter the character of Dyea to the extent that it can be reasonably characterized as a bona fide community as defined under 3 AAC 110.990(5). Regardless of what might happen with respect to the 932 acres in question, future potential is not evidence of a present community.

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7. Summary of findings that Dyea is not a separate community.

In sum, the LBC Staff found in this section of the report that

- The existence of a Dyea Community Advisory Board provides no evidence that Dyea is a discrete and identifiable social unit.
- The formally recognized importance of Dyea Flats to residents and citizens of Skagway, particularly in terms of the "opportunity it provides to escape the City environs" provides evidence that Dyea is not a discrete social unit, but rather is an extension of the community of Skagway.

- While Dyea (recognized above as the area roughly between mileposts 7 – 13 of Dyea Road) reasonably appears to have slightly more than 25 inhabitants; those residents do not live in a close geographical proximity that is characteristic of neighborhood living.

- While cooperation and good relations between the National Park Service and local interests certainly seems to be at a high level generally, it is axiomatic that, at least to some extent, public access to the Klondike Gold Rush National Historical Park, including Dyea Flats, is restricted.

- There is no school, U.S. Post Office, fire station, public library, polling place, or other service center in Dyea.

- Sources of employment and commercial operations in the Dyea vicinity are very limited and not characteristic of a community.

- There are no factors concerning voting, voter registration, and precinct boundaries that suggest that Dyea is a separate community.

- Dyea residents generally depend upon Skagway to serve their social, cultural, and economic needs.

- It is premature to reasonably predict what, if any, impact the pending conveyance of lands in and around Dyea to the Skagway city government and subsequent development of those lands might have in terms of the extent to which Dyea is a bona fide community as defined in the law applicable to these proceedings.

Based on those findings, LBC Staff concludes that Dyea is not a community as determined under 3 AAC 110.920. Therefore, the proposed Skagway borough encompasses only one community. Further, LBC Staff finds nothing in the facts recounted above to suggest a reasonable basis to overcome the presumptive requirement for multiple bona fide communities.

Part D. The proposed Skagway borough does not comprise an *area* with a population that is large and stable enough to support borough government.

LBC Staff conducted its review of the population of the proposed Skagway borough during the 2001 – 2002 proceedings in the Preliminary Report at pp. 44- 55 (R. 215 – 226). Readers are encouraged to review that earlier work.

State law (3 AAC 110.050(b)) provides that, absent a "specific and persuasive showing to the contrary," the Commission will presume that a population is not large enough and stable enough to support a proposed borough government unless at least 1,000 permanent residents live in that proposed borough.

In judging whether the population of a proposed borough is large and stable enough, 3 AAC 110.050(a) calls on the Commission to consider total census enumerations, durations of residency, historical population patterns, seasonal population changes, age distributions, and other relevant factors.

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1. The presumptive minimum population threshold should not be easily overcome.

The presumptive minimum population lawfully set out in 3 AAC 110.050(b) for incorporation of a borough is two and one-half times greater than the minimum population required by 3 AAC 110.030(b) to form a home-rule or first-class city in Alaska. The significantly greater presumptive minimum population for incorporation of a borough is a clear reflection of fundamental distinctions between a borough government and a city government.

The presumptive-minimum-population size of a proposed borough should not be overcome lightly. The provisions of 3 AAC 110.050(a) call on the Commission to consider (1) total census enumerations, (2) durations of residency, (3) historical population patterns, (4) seasonal population changes, (5) age distributions, and (6) other relevant factors when evaluating the size and stability of the population of a proposed borough. If those factors convince the Commission that a population under 1,000 residents within an *area* is large and stable enough to support borough government, the lawfully established presumption may be overcome.

While the law presumes that at least 1,000 permanent residents are needed to meet the standard, it is certainly possible that specific facts in a case might lead the Commission to conclude that a borough population must be even greater than 1,000 to be sufficiently large and stable to operate a borough.

2. Census enumerations show that the number of residents of the proposed Skagway borough is well below the presumptive minimum established in law.

The number of permanent residents in the proposed Skagway borough is significantly less than the 1,000 residents presumed to be the minimum number required to meet the population standard for borough incorporation. The State Demographer estimates that the 2005 population of the proposed Skagway borough was 834. The estimate for 2005 is the most recent figure available.

The population of the proposed Skagway borough would have to grow by 20 percent just to reach the 1,000-person threshold.

3. Historical population patterns show that Skagway's general population is shrinking, not growing.

The 2002 Preliminary Report noted that the proposed Skagway borough had a population of 862 residents. That figure was based on 2000 Census data, which were the most recent population data available at that time (R. 220).

The population of the proposed Skagway borough has shrunk over the past half decade. In 2005, there were 28 fewer residents of the proposed Skagway borough compared to five years earlier. In relative terms, that represents a 3.2 percent population loss.

In the 2002 Preliminary Report, LBC Staff also examined student enrollment in the context of historical population patterns. The LBC Staff report noted that student enrollment ("average daily membership" or ADM[66]) in the Skagway City School District was lower in Fiscal Year 2002 (measured in October 2001) than at any point in at least the prior fourteen years (R. 221-221).

The enrollment decline in the Skagway City School District has continued since the 2001 - 2002 proceedings. The October 2001 ADM in the City of Skagway School District was 120.20 full-time-equivalent students.[67] The official figure for 2005 — the latest available — shows that ADM has dropped to 109.25 full-time-equivalent students.

The drop in enrollment represents a loss of 10.95 full-time-equivalent students or 9.1 percent of enrollment over the past four years. In the past five years, school enrollment has dropped from 136.75 full-time-equivalent students to 109.25 full-time-equivalent students. That represents a loss of 27.5 full-time-equivalent students or

[66] AS 14.17.990(1) defines "average daily membership" as "the aggregate number of full-time equivalent students enrolled in a school district during the student count period for which a determination is being made, divided by the actual number of days that school is in session for the student count period for which the determination is being made."

[67] *See* http://www.eed.state.ak.us/stats/QuickFacts/ADM.pdf.

20.1 percent of enrollment over the slightly longer period. (As discussed in subpart 5 below, the 2005 figure of 109.25 ADM is not comparable to the 2000 and 2001 figures. The comparable figure for 2005 shows even greater losses in enrollment.)

The drop in the population and student enrollment over the past five years is also reflected in Permanent Fund dividend (PFD) application data.[68] In 2000, there were 854 PFD applications from Skagway. Five years later in 2005, the figure had fallen to 818. That represents a decline of 4.2 percent.

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4. Age distribution patterns show that Skagway's population under 18 years of age, which is already disproportionately small in comparison to the state as a whole, is shrinking at a greater rate than Skagway's general population.

The applicable State law calls for the LBC to consider age distribution patterns when examining the size and stability of the population of a proposed borough. Age distribution patterns can be crucial to the exercise of what the Alaska Supreme Court characterized in *Mobil Oil* as the Commission's broad power to reach basic policy decisions to decide in the unique circumstances presented by each petition whether borough government is appropriate.

One example of the particular importance of age distribution patterns to the application of the population standard is reflected in fundamental public policy expressed by the Alaska State Legislature regarding boroughs and the delivery of public education in Alaska. AS 14.12.010(2) provides that "each organized borough is a borough school district." Thus, formation of a new borough results in the creation of a new school district. However, a superseding State law enacted by the Alaska Legislature in 1986 provides that a new school district with fewer than 250 students cannot be created, except if the Education Commissioner finds that such would serve the best interests of both the State and the proposed new district.

The 250-student threshold sets a target that reflects a fundamental policy of the Alaska State Legislature concerning minimum economies of scale for new school districts. Specifically, AS 14.12.025 provides that:

> Notwithstanding any other provision of law, a new school district may not be formed if the total number of pupils for the proposed school district is less than 250 unless the commissioner of education and early development determines that formation of a new school district with less than 250 pupils would be in the best interest of the state and the proposed school district.

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[68] *See* http://www.pfd.state.ak.us/annualreports/index.aspx.

In terms of statewide age distribution patterns, it is noted that currently one in every five Alaskans is enrolled in a public school ("pre-elementary" through grade 12).[69] If a proposed borough has a disproportionately higher student population – say one in every four residents – it would meet the 250-student threshold if it had 1,000 residents. Conversely, if a proposed borough has a disproportionately smaller student population compared to the statewide average, it would require substantially more than 1,000 residents to meet the 250-student threshold.

LBC Staff observed in its 2002 Preliminary Report that the number of young people among the population of the proposed Skagway borough was disproportionately small compared to the state as a whole (R. 223). At the time, only about one in four residents of the proposed Skagway borough was under the age of 25. The comparable statewide figure was substantially greater – about two of every five Alaskans were less than 25 years old. In 2000, students enrolled in the Skagway public school comprised just under 16 percent of Skagway's population (136.75 / 862).

Based upon contemporary school enrollment and Alaska Permanent Fund dividend (PFD) application data, it appears that the already relatively small proportion of young people among Skagway's population has diminished substantially over the past five years.

The student population of the proposed Skagway borough is a significantly smaller proportion of its total population than is the case for the state as a whole. The exact proportion of all Alaskans attending public school is 53.4 percent higher than is the case for Skagway.[70] Between 2000 and 2005, the proportion of Skagway's students among its general population dropped from 136.75 ADM in a population of 862 to 109.25 ADM in a population of 834. That represents a 17.6 percent decline in the proportion of students among Skagway's total population.

The drop in the already disproportionately small population among the young in Skagway is also clearly reflected in PFD application data for the past five years. As noted above, 854 individuals from Skagway applied for PFD dividends in 2000. Of those, adults filed 675 of the applications and the remaining 179 (21.0 percent) were submitted for children.[71] However, in 2005, the number of PFD applications submitted on behalf of Skagway children dropped to 144. That represents a decline

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69 Total public school enrollment reported by the Department of Education and Early Development in 2005 was 133,288. That figure is 20.1 percent of the State Demographer's estimate of the 2005 population of Alaska (663,661).

70 In Skagway, the 109.25 students enrolled in 2005 represented 13.1 percent of Skagway's total 2005 population of 834. For the state as a whole, the 133,288 students enrolled in 2005 amounted to 20.1 percent of Alaska's total 2005 population of 663,661. The seven percentage point greater figure for the state as a whole is, in relative terms, 53.4 percent greater than the comparable figure for Skagway ([20.1 – 13.1] ÷ 13.1 = 0.534).

71 For purposes of PFD applications, "children" are those who have not yet had their eighteenth birthday as of the application deadline for that year.

of 35 (19.6 percent) in the proportion of child application compared to the figure for 2000. In contrast, the number of PFD applications from Skagway adults dropped by only 1 (from 675 to 674) during the past five years. The drop in the number of adult applications amounted to only 0.1 percent.

Comparing PFD application data for Skagway to that of entire state further corroborates the increasing disparity in the age distributions between Skagway and the rest of the state. In 2000, 21 of every 100 PFD applications from Skagway were submitted for children; the figure for the entire state was nearly 31 applications for children for every 100 Alaskans. The statewide figure in 2000 was 46.7 percent higher than the figure for Skagway.

Five years later, the number of PFD applications for children from Skagway dropped to 17.6 percent of Skagway's total population. In 2005, the number of PFD applications from children throughout Alaska was 29.1 percent of the total. The statewide figure in 2005 was 65.3 percent higher than the figure for Skagway (compared to 46.7 percent five years earlier).

5. The proposed Skagway borough is subject to significant seasonal population changes.

The official 2005 enrollment figures for Skagway noted in subparts 3 and 4 above reflect a student population of 109.25 full-time-equivalent students. However, LBC Staff notes that only 98.90 full-time-equivalent students were enrolled in the Skagway City School District at the time of the student count used by other school districts in Alaska – the 20-school-day period ending the fourth Friday in October 2005.[72] However, because of the significant seasonal population change in Skagway that occurs annually by October the Commissioner of the Alaska Department of Education and Early Development allowed, under AS 14.17.600(b),[73] Skagway to

72 AS 14.17.600(a) states as follows:

> Within two weeks after the end of the 20-school-day period ending the fourth Friday in October, each district shall transmit a report to the department that, under regulations adopted by the department, reports its ADM for that counting period and other student count information that will aid the department in making a determination of its state aid under the public school funding program. For centralized correspondence study, the October report shall be based on the period from July 1 through the fourth Friday in October. The department may make necessary corrections in the report submitted and shall notify the district of changes made. The commissioner shall notify the governor of additional appropriations the commissioner estimates to be necessary to fully finance the public school funding program for the current fiscal year.

73 AS 14.17.600(b) states as follows:

> Upon written request and for good cause shown, the commissioner may permit a district to use a 20-school-day counting period other than the period set out in (a) of this section. However, a counting period approved under this subsection must be 20 consecutive school days unless one or more alternate counting periods are necessary to permit a district to implement flexible scheduling that meets the district's needs and goals without jeopardizing the state aid for which the district would ordinarily be eligible under this chapter.

count the number of students during an earlier 20-day-counting period. The official enrollment figure for 2005 (109.25 students) reflects the student count during that earlier period.[74] The drop in enrollment following the early student count in 2005 amounted to 9.5 percent. That represents a significant seasonal population change. The Department of Education and Early Development also allowed an early count for Skagway in 2004.

It is notable that early enrollment counts in Skagway did not occur prior to 2004. Thus, the 2000 enrollment figure and the 2005 figure discussed in subpart 3 above are not equivalent measures. If one were to compare the student enrollment in Skagway during the 20-school-day period ending the fourth Friday in October 2000 (136.75) with the student enrollment during the 20-school-day period ending the fourth Friday in October 2005 (98.90), it would represent a decline in enrollment amounting to 27.7 percent over the past five years. Moreover, the proportion of the current student population among the total population would drop to approximately two in seventeen, rather than two in fifteen.

Using 98.9 as the enrollment figure would also put Skagway that much farther from the 250-student threshold for establishment of a new school district. Proponents of the Skagway borough might argue that the Skagway city government already operates a school district and that nothing would change in that respect if a Skagway borough is formed. However, that same logic would allow the creation of borough school districts with as few as 11 students – just over 4 percent of the minimum student population prescribed by the Alaska State Legislature.[75] The current enrollment of the Skagway city school district is far below the 250-student threshold whether one uses the 109.25 or the 98.9 ADM figure.

In terms of the contemporary relevance of the 1986 legislative policy regarding the minimum size of new school districts, it is noteworthy that the 2003 Alaska State Legislature directed that "the Local Boundary Commission identify opportunities

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[74] Under AS 14.17.905, the "basic need" (level of fundamental financial aid that a school district is entitled to receive under State law) is reduced sharply if enrollment falls below 100. In the case of Skagway, an enrollment of 98.9 students in 2005 would have generated $1,033,629 in basic need. However, by allowing Skagway to use the earlier count of 109.25 full-time-equivalent students, Skagway generated $1,248,049 in basic need for 2005. The alternate count generated a level of basic need that was 20.7 percent greater than the count under AS 14.17.600(a).

[75] The Pelican City School District had an ADM of 11.20 in 2004. The figure for 2005 increased to 13.6.

for consolidation of schools, with emphasis on school districts with fewer than 250 students, through borough incorporation, borough annexation, and other boundary changes."[76] (Chapter 83, SLA 2003.)

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6. The relevant facts in this case militate heavily in favor of the presumptive requirement for a minimum of 1,000 residents.

If the population of the proposed Skagway borough were much closer to the 1,000-resident threshold; if the number of Skagway residents were growing rather than falling; if Skagway's student population were disproportionately higher than the statewide average; if that higher proportion of young population were stable or growing; and if there were no significant seasonal loss of population, such evidence might serve as a reasonable basis to overcome the presumptive requirement that the proposed Skagway borough must have at least 1,000 permanent residents.

However, the clear facts in these proceedings provide evidence that leads to the opposite conclusion. Specifically:

1. The population of the proposed Skagway borough is far below the 1,000-resident threshold – *the number of residents of the proposed Skagway borough would have to grow by 20 percent just to reach the 1,000 person threshold*.

2. The number of Skagway residents is declining – *in the past five years there was a 3.2 percent drop in the total population and a 4.2 percent drop in PFD applications*.

3. Skagway's young population is disproportionately smaller than the statewide average – *the proportion of students among Alaska's population in 2005 was 53.4 percent greater than Skagway's (the figure would jump to 68.9 percent if one uses the Skagway student count for the period ending the fourth Friday in October 2005); additionally the proportion of 2005 PFD applications from Alaska's children was 65.3 percent greater than Skagway's*.

4. The disproportional nature of the age distributions among the population of Skagway is becoming increasingly disparate – *in 2000, the proportion of PFD applications from children through the state was 46.7 percent greater than it was in Skagway; five years later the figure rose to 65.3 percent*.

5. Skagway's population is subject to significant seasonal population changes – *in 2005, public school enrollment dropped 9.5 percent between the beginning of school and October.*

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[76] The results of the Commission's review are published in *School Consolidation: Public Policy Considerations and a Review of Opportunities for Consolidation,* Local Boundary Commission and Alaska Department of Education and Early Development, February 2004.

LBC Staff finds that the specific facts in these proceedings militate strongly against overcoming the presumptive requirement for at least 1,000 permanent residents. The facts in this case actually suggest that Skagway might need a population in excess of 1,000 to meet the applicable population standard.

Part E. The boundaries of the proposed Skagway borough do not encompass an *area* that conforms generally to natural geography and includes all areas necessary for full development of municipal services.

1. Lawfully adopted borough boundary standards give great weight to REAA boundaries.

The duly adopted standards of the LBC (3 AAC 110.060(c)) provide that

> 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.

As addressed in the 2002 LBC Staff Preliminary Report, the standards for REAA boundaries set by the Alaska Legislature are strikingly similar to the statutory standards for boroughs.[77] (Preliminary Report pp. 110 – 112; R. 281 – 283.) The provisions of 3 AAC 110.060(c) stem from the Commission's recognition that the standards for setting REAA boundaries closely parallel those for organized boroughs. The similarities between the two sets of boundary standard are reflected in the following characterization of REAA boundaries expressed in 1979, just four years after those boundaries were first established:

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[77] AS 14.08.031 provides as follows (emphasis added):

Sec. 14.08.031. Regional educational attendance areas. (a) The Department of Commerce, 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.

(c) Military reservation schools shall be included in a **regional** educational attendance area. However, operation of military reservation schools by a city or borough school district may be required by the department under AS 14.12.020 (a) and AS 14.14.110. Where the operation of the military reservation schools in a **regional** educational attendance area by a city or borough school district is required by the department, the military reservation is not considered part of the **regional** educational attendance area for the purposes of **regional** school board membership or elections.

(d) U.S. Bureau of Indian Affairs schools shall be included in a **regional** educational attendance area boundary.

AS 14.08.031(a) provides that REAA boundaries follow regional boundaries set 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. The use of regional lines was not intended to be exclusive as shown by AS 14.08.031(b) prescribing certain characteristics for REAAs.

> "As far as practicable, each regional educational attendance area shall contain an integrated socio-economic, linguistically and culturally homogeneous area. In the formation of REAAs, consideration shall be given to the transportation and communication between communities that comprise the area. Where-ever possible, municipalities, other governmental or regional corporate entities, drainage basins, and other identifiable geographic features shall be used in describing the boundaries."

Taken together, these two sections suggest that REAA boundaries are to follow, rather than cross, regional corporation boundaries where they contact them and conform to natural or other predetermined boundaries. This is how the State Department of Community and Regional Affairs, which was charged with administering the act in consultation with the State Department of Education, interpreted it in a series of informational meetings in rural areas around the state in July and August, 1975. Later they began implementing it similarly when hearings were held in numerous bush locations regarding proposed boundaries. The result of the hearings was a division of the state into some 21 REAAs. Originally 20 REAAs were created by C&RA, but after a meeting of residents of REAA 17 and the Governor, REAA 21 (including Whittier and Tatitlek) was created on September 24, 1975, dividing REAA 14 along the boundary between the Chugach and Ahtna Regional Corporations.

Frequent mention has been made of the fact that the statutory characteristics for boundary selections of the REAAs are similar to the standards for borough incorporation. (Emphasis added.)

(Senator Arliss Sturgulewski and Representative Bill Parker, Co-Chairs, Alaska State Legislature Joint Senate and House Community and Regional Affairs Committee, August 4, 1979.[78])

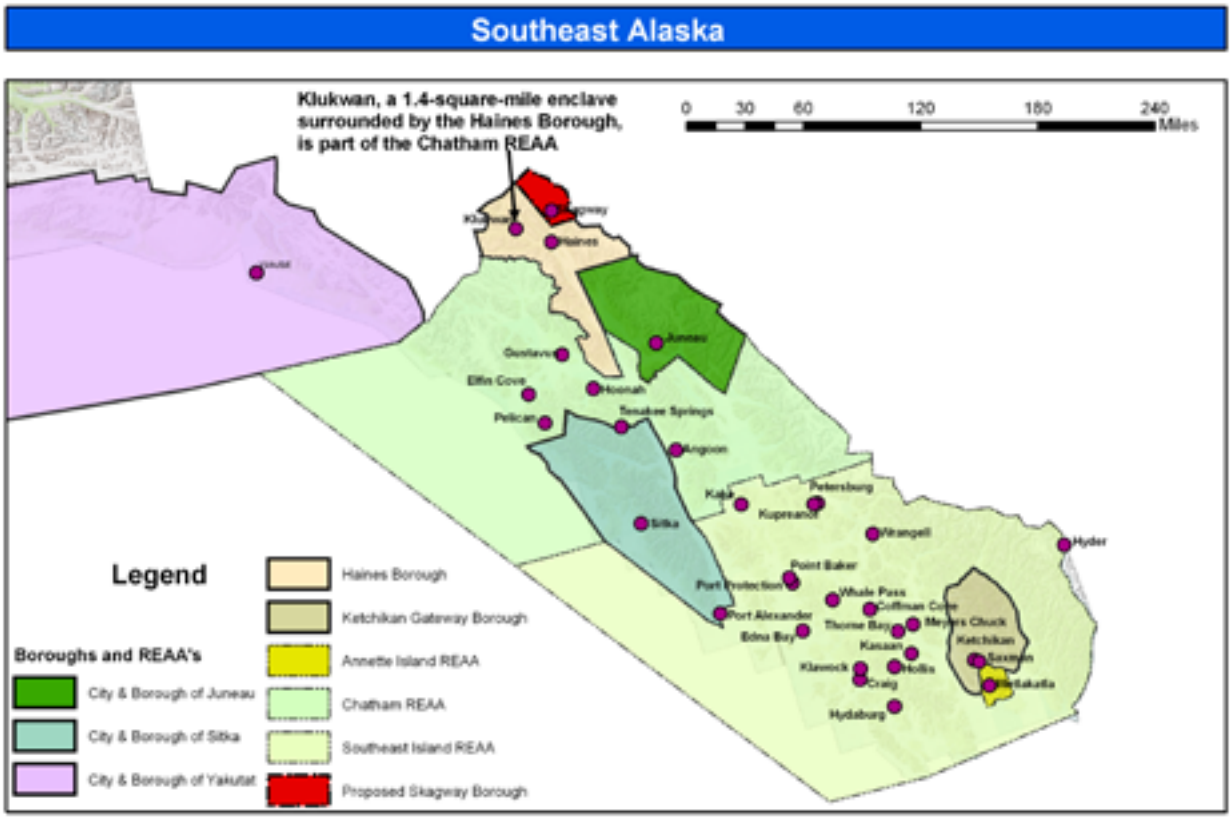
It is important to note that the agency required to make the REAA boundary determinations is the same agency that is required to serve as staff for the Commission. The twenty original REAAs blanketed the entire unorganized borough

[78] The joint committee's goal was to develop "rural policy for the State of Alaska." The characterization of REAAs above is excerpted from materials compiled by the joint committee "to provide an overview of the unorganized borough as it exists today." *Id.*

which, at the time, comprised some 470,901 square miles.[79] Thus, the average size of each of the original REAAs was approximately 23,545 square miles. When the twenty-first REAA was added, the size dropped slightly to an estimated 22,424 square miles.

The proposed Skagway borough is part of the Chatham REAA.[80] The Chatham REAA encompasses a total of 20,776 square miles of lands and submerged lands.[81] The proposed Skagway borough is a very small fraction of that area. Specifically, the proposed Skagway borough encompasses just 2.1 percent of the total area within the Chatham REAA.

Figure 3-8: Boundaries of Existing Southeast Alaska Boroughs, Existing Southeast Alaska REAAs, and the Proposed Skagway Borough



[79] When REAAs were first formed, five of the existing sixteen boroughs did not exist. The stated estimated size of the unorganized borough in 1975 is simply the difference between the total land and water within the corporate boundaries of the State of Alaska and the current amount of land and water within the corporate boundaries of the eleven boroughs in existence in 1975. The LBC Staff recognizes that in a few cases, the current boundaries of those eleven boroughs is different than their boundaries that were in place in 1975. However, those differences are relatively minor in the context of the issue at hand.

[80] As a first-class city in the unorganized borough, the City of Skagway is not subject to the jurisdiction of the Chatham REAA. Nonetheless, as explained in the Preliminary Report at p. 111 (R. 282), Skagway is within the boundaries of the Chatham REAA. That interpretation is clearly contemplated by the standard in 3 AAC 110.060(c). To contend otherwise is to make the nonsensical argument that the LBC's standard mandates that all new boroughs must be formed with enclaves excluding every home-rule and first-class city. The lawfully adopted standards for borough incorporation (3 AAC 110.060(d)) presume that a proposed borough containing 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.

[81] The Chatham REAA is comprised of three noncontiguous components. One is a 20,331.5-square-mile area encompassing Gustavus, Elfin Cove, Pelican (like Skagway, also a first-class city), Hoonah (also a first-class city), Tenakee Springs, and Angoon. Another is a 1.4-square-mile territory encompassing Klukwan. Klukwan is surrounded by the Haines Borough. The last is the 443.1 square miles within the Skagway city boundaries.

2. The Chatham REAA boundaries are perhaps not the best boundaries for a borough encompassing Skagway; however, the Petitioner's alternative boundary proposal does not satisfy the requirements that allow an exception to the mandate.

When 3 AAC 110.060(c) is applied in this case, it requires that a borough encompassing Skagway to conform to the boundaries of the Chatham REAA, unless the Commission determines 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*.

In 2002, LBC Staff found that including Skagway within the boundaries of the Upper Lynn Canal Model borough would be a better alternative than including it in a Chatham REAA borough. (Preliminary Report pp. 110 – 112; R. 281 – 283.) That position reflected the conclusion that the alternative boundary scenario was better suited to the public interest in a full balance of the standards for incorporation of a borough.

For the multitude of reasons reflected throughout Section III of this report and the record of the 2001 – 2002 proceedings, the Skagway borough proposal fails to meet the test that would allow use of the Petitioner's boundaries as an alternative to those of the Chatham REAA.

3. The Petitioner recognizes that its own proposal does not meet the boundary standards for borough incorporation.

Staff finds that the Petitioner's own statements admit that its proposal does not meet the boundary standard. In its 2002 comments, the Petitioner acknowledged that the framers of Alaska's Constitution intended that each borough embrace a large, natural region. The Petitioner went on to imply, however, that the standard could not be met in this case because of an action of the Commission 38 years ago. Specifically, the Petitioner stated:

> Article X, Section 3 of Alaska's Constitution promotes boroughs that encompass large and natural regions. The Petitioner does not disagree with the intent of the founders who drafted the language. Large, natural regions would certainly be preferred. However, Skagway is land-locked through no action of its own, but by the action of a previous Local Boundary Commission when that Commission voted to allow the formation of the Haines Borough!

(Tim Bourcy, Mayor, City of Skagway, *Written Comments of the City of Skagway, Petitioner, Concerning the Preliminary Report . . .*, p. 7 (July 27, 2002) (R. 431).)

Article X, section 3 – the constitutional provision that the Petitioner admits to being a reflection of the framers' intent that boroughs encompass large and natural regions – has been characterized by the Alaska Supreme Court as a constitutional mandate and overarching provision under which all statutory standards for borough incorporation are to be applied. Specifically, the Supreme Court stated:

> To avoid conflict with the **constitutional mandate** that each borough "embrace an area and population with common interests to the maximum degree possible," the provisions of AS 29.05.100(a) dealing with the rejection, acceptance, and alteration of proposed boroughs must be interpreted to **require that the LBC apply the statutory standards for incorporation in the relative sense implicit in the constitutional term "maximum degree possible."** In other words, AS 29.05.100(a) must be construed to mean that, in deciding if the statutory standards for incorporation have been met, the LBC is required to determine whether the boundaries set out in a petition embrace an area and population with common interests to the maximum degree possible.

(Petitioners for Incorporation of City and Borough of Yakutat v. Local Boundary Commission, 900 P.2d 721, 725 (Alaska 1995) (emphasis added).)

Although the Petitioner acknowledges that the framers of our Constitution called for boroughs that embrace large and natural regions, it implies that its alternative boundary proposal is permissible because the Commission alledgedly erred 38 years ago in 1968 when it approved a petition for incorporation of the Haines Borough. That action, the Petitioner notes, resulted in "Skagway [being] land-locked" by the Haines Borough.

Former Constitutional Conventional Delegate Victor Fischer, in association with Thomas Morehouse, characterized the Haines Borough as an entity that "Neither conforms well to any consistent borough model, whether of the urban or regional type, nor even to the very general legal standards for boroughs set forth in the 1961 borough act." *Borough Government in Alaska,* p. 109. There is no question that setting borough boundaries in the post-1963 Mandatory Borough era has been challenging.[82] However, as noted in Section III-B of this report, the Alaska Supreme Court has acknowledged in *Mobil Oil, Valleys Borough, and Yakutat* that the Commission "has been given a broad power to decide in the unique circumstances presented by each petition, whether borough government is appropriate." Past errors and post-1963 political difficulties are no legitimate basis to forsake the fundamental constitutional principles and the legal standards for borough incorporation.

Rather than remedy what the Petitioner perceives as a 38-year-old error in forming the Haines Borough, the Petitioner's proposal would compound it by disregarding the direction of the framers of our Constitution set out in article X, section 3. It is stressed that the Petitioner's implied assertion that the Skagway borough proposal

[82] Readers interested in learning more about those challenges and the early history of borough incorporation efforts in the Lynn Canal area, including multiple unsuccessful attempts to incorporate a Haines Borough, are referred to Appendix B in this report.

is warranted because Skagway is "land-locked" could also be argued by residents of Klukwan who might, someday, then advocate for formation of a 1.4-square-mile Klukwan borough.

Beyond the obvious conflict with article X, section 3, the Petitioner's proposal would also be at odds with provisions in the Local Government Article that distinguish between city governments and borough governments. Those conflicts were outlined in Section III-B of this report.

In an earlier proceeding, on July 27, 1979, the City of Skagway petitioned the Commission to expand the City's corporate boundaries to the exact boundaries involved in the 2002 borough incorporation proposal and this remand proceeding. In the 1979 petition, the City of Skagway stated:

> Enlargement of the City of Skagway's boundaries to 431 square miles might be considered large for a city, <u>but it is a mere paucity by present borough standards prevailing in the state</u>.

(R. 390 emphasis added.)

The 2002 Preliminary Report on the Skagway Borough proposal reported the 1979 position of the City of Skagway. In the Petitioner's written comments on the 2002 Preliminary Report, the Mayor of the City of Skagway emphatically reaffirmed the City's 1979 position. Specifically, the Mayor stated:

> [T]he Petitioner feels it is important to understand the context in which the "mere paucity" statement was made. Quoting from the 1979 petitioner's brief: "Lastly the Council acknowledges a legislative trend toward classification of all lands in the State and toward elimination of the unclassified borough. Enlargement of the City of Skagway's boundaries to 431 square miles might be considered large for a city, but it is a mere paucity by present borough standards prevailing in the state." **<u>The Petitioner wishes to point out that the writer was absolutely correct in 1979!</u>** There was no provision for Skagway to become a unified city/borough government at that time, and their ONLY independent option was to opt for expansion of the City of Skagway into the territory to protect their state land selection.

(R. 448, emphasis added.)

Mayor Bourcy's 2002 comments on behalf of the Petitioner indicated that the 1979 interpretation was made in the context of legislative pressure to organize boroughs. It is unclear to LBC Staff how legislative pressure to form boroughs would reasonably affect any objective interpretation of the constitutional and statutory standards for borough formation. Given the Petitioner's perception that legislative pressure has some bearing, it is noted that legislative pressure to organize boroughs has been greater during the past few years than it was twenty-seven years ago. Current or past

legislative pressure to form boroughs provides no reason to give short shrift to the constitutional and statutory standards for borough incorporation. Keep in mind that it was shortly after the 1979 pronouncement by the Petitioner that the Legislature enacted the 250-student minimum requirement for creation of new school districts. As noted earlier, the 2003 Legislature expressed continued interest in that standard.

Skagway's 2002 comments also indicated that there "was no provision for Skagway to become a unified city/borough government at that time." The relevance of that observation is also unclear to LBC Staff since Skagway is not now proposing to become a "unified city/borough government." The pending proposal to incorporate a Skagway borough and concurrently dissolve the Skagway city government could have been filed in 1979.

Lastly, Skagway's 2002 comments indicated that expansion of the City's boundaries was the "ONLY independent option . . . to protect their state land selection." Again, it is unclear how such has any relevance to borough incorporation standards.

LBC Staff notes that the constitutional standards for borough incorporation have not changed since they took effect in 1959. Moreover, the statutory standards for borough incorporation are substantially the same as those that existed when Skagway first expressed its views about the borough standards in 1979.

Part F. Article X, section 3 of Alaska's Constitution promotes boroughs that embrace large, natural regions; it is a mandate under which all statutory borough standards are to be applied.

As reflected in Section III-E of this supplemental report, the Petitioner itself stated that the intent of article X, section 3 is to "promote[] boroughs that encompass large and natural regions."

The foundation for that view, which has long been advocated by LBC Staff and many others with a statewide perspective, is found in the fourth sentence of article X, section 3. That sentence provides that "[e]ach borough shall embrace an area and population with common interests to the maximum degree possible." That provision is particularly significant with regard to the area properly included within a borough. By itself, the sentence does not indicate the territorial or socioeconomic scale at which the commonality of interests ought to be evaluated. However, the minutes of both the Alaska Constitutional Convention and the Local Government Committee provide compelling evidence as to the framers' intent with respect to the character and scope of boroughs.

The preliminary draft of article X, was distributed to members of the Local Government Committee on December 7, 1955.[83] As initially presented, the now fourth sentence was part of Section 1 and read: "The standards to be applied in the establishment of the _____ [borough][84] shall include, but not be limited to, such factors as population, geography, economic interests, and transportation to the end that, to the maximum extent possible, each _____ [borough] shall embrace an area and population with common interests."[85] During review of that preliminary draft, the Committee changed the provision to read: "To the maximum extent possible, each _____ [borough] shall embrace an area and population with common interests."[86] Further changes were made for inclusion in the second draft, including changes in the sections covering "the large unit of local government and its classes."[87] During Committee review through December 8, 1955, the pertinent sentence was modified to read: "Each _____ [borough] shall embrace an area and population with common interests to the maximum extent possible.[88]

By December 12, 1955, the revisions to article X included more sections, with the pertinent sentence located in Section 3 and revised to read: "Each _____ [borough] shall embrace, to the maximum extent possible, an area and population with common interests."[89] On December 14, 1955, the Committee reviewed the fourth draft of the Article and made final corrections.[90] The following day, the Committee "reviewed around forty names for possible use in designating the local government district to be established in the Local Government Article. . . . [T]he committee agreed to use the term "borough".[91] The fourth draft of the local

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83 Minutes of the Committee on Local Government of the Alaska Constitutional Convention (hereinafter, MCLG Minutes), December 7, 1955.

84 At that time, the name of the new regional local government had not been determined. Ultimately, the name selected on December 15, 1955, was *borough*.

85 James Patrick Doogan collection, Series 7 Committee Records, Box 7 Folder 7, Archives and Manuscript Department, Consortium Library, University of Alaska Anchorage. Mr. Doogan was a delegate to the Alaska Constitutional Convention and a member of the Local Government Committee.

86 *Id*.

87 MCLG Minutes, December 8, 1955.

88 Doogan Collection, *supra*.

89 *Id*.

90 MCLG Minutes, December 14, 1955.

91 MCLG Minutes., December 15, 1955. It is noteworthy that *city* was not among the names considered for the new local government unit being created by article X The Committee considered the following names: county, town, township, shire, parish, borough, precinct, burg, burgar, tundraburg, nunat, minupuk, authority, municipal district, rural municipality, division, circle, unit, areas, syzygy, couperie, ganglion, aurora, environ, locus, venue, aerie, polaris, commonwealth, poloria, mural district, rurban district, tundarea, constellation, munit, compos, dompass local unit, ruripality, political unit, district, unitality, denali, province, department, canton. (*Id.*)

government article, as corrected, was submitted as the Committee's proposal to the Constitutional Convention.[92] As submitted by the Committee, the wording of the pertinent sentence read as it had on the previous day but included the name of the new local government unit, *borough*; i.e., it read, "Each borough shall embrace, to the maximum extent possible, an area and population with common interests."[93]

From the changes, corrections, and clarifications made during Committee development of the Local Government Article and through its review and enrollment and engrossment, it seems abundantly clear that the phrase "to the maximum extent possible" modified both area and population, not just the words "common interests" as some have argued.

The Local Government Article, identified as Proposal No. 6, was first introduced to the Constitutional Convention on December 19, 1955, together with a commentary on the article. In that commentary, the Local Government Committee stated: "The 'borough' area-wise, is the larger of the two local government units. Cities would be located within boundaries of the boroughs."[94] Following its introduction and first reading,[95] the article was returned to the Local Government Committee for "additional work, primarily to cut out the excess language, eliminate duplication and resolve conflicts."[96]

Over the next several weeks, the Local Government Article underwent several changes, including changes to section 3. However, the wording of the area-and-population sentence was unchanged, i.e., "Each borough shall embrace, to the maximum extent possible, an area and population with common interests."[97] Designated as Proposal 6/a, the revised Article X was introduced to the Convention on January 18, 1956. Between its introduction and January 24, 1956, article X went through its second reading, consideration, and enrollment and engrossment. Throughout that process, the area-and-population section remained unchanged; i.e., it continued to read: "Each borough shall embrace, to the maximum extent possible, an area and population with common interests."[98]

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92 *Id.*

93 Doogan Collection, *supra*.

94 Report of the Committee on Local Government, December 15, 1955, p. 1.

95 Appendix V, Minutes of the Constitutional Convention.

96 MCLG Minutes, December 15, 1955.

97 Appendix V, Minutes of the Constitutional Convention.

98 Doogan Collection, *supra*.

It was during review of article X by the Style and Drafting Committee that section 3 was reorganized, with the area-and-population sentence becoming the fourth sentence, and revised to read in its present form: "Each borough shall embrace an area and population with common interests to the maximum degree possible." It is essential to remember, however, that the Style and Drafting Committee was not authorized to change the sense or purpose of any proposal.[99] According to the Permanent Rules of the Constitutional Convention of Alaska, the Style and Drafting Committee's duties and functions were to:

> [E]xamine and edit all proposals for inclusion in the constitution which are referred to it for the purposes of avoiding inaccuracies, repetitions, inconsistencies, or poor drafting. The committee shall have the authority to rephrase or to regroup proposed language or sections . . . but shall have no authority to change the sense or purpose on any proposal referred to it.[100]

It is important to note that the rephrasing of the pertinent sentence is substantially the same as that considered by the Local Government Committee on December 8 (*supra*),[101] which was then changed by the Local Government Committee to place the qualifying phrase "to the maximum extent possible" in the middle of the sentence, the position in which it stayed through enrollment and engrossment. Considering that the Style and Drafting Committee could not make substantive changes to a proposal, LBC Staff believes that the intent of the Committee framers is that "to the maximum extent possible" applies to both area and population, not just to common interests.[102]

During consideration of the proposed Local Government Article on January 19, 1956, John Rosswog, Chairman of the Committee on Local Government ("Committee"), responded to a question from delegate John Coghill about the intent of the Committee regarding the language that each borough must embrace an area and population with common interests to the maximum degree possible.

John Coghill

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

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99 *Alaska's Constitutional Convention*, pp. 60 - 65, 257.

100 Id., p. 257 (emphasis added).

101 The word *extent* was changed to *degree* by the Style and Drafting Committee.

102 With all due respect to the Style and Drafting Committee, it appears that rather than clarifying the intent of the pertinent sentence, moving the qualifying phrase to the end of the sentence turned it into a misplaced modifier. The phrase's placement in the middle of the sentence, as proposed by the Committee, more accurately and clearly reflects the Committee's concepts in creating the new unit of government.

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, pp. 2620 – 2621 (1963).)

A similar question arose on the floor of the Convention later that same day. Delegate Barrie White inquired about the 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.

James 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.)

Additionally, the following dialogue concerning the size of boroughs occurred among Delegate James Hurley, Committee Chairman John Rosswog, Committee member Eldor Lee, and Delegate John Hellenthal.

James Hurley

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. 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.

Eldor 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?[103]

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.

(*Id.*, pp. 2641 - 2642.)

On January 20, 1956, delegate Katherine Nordale revisited the question about the meaning of the fourth sentence of Section 3. Vic Fischer, Local Government Committee Secretary responded.

Katherine Nordale

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

NORDALE: Yes. Then "the maximum extent possible" refers to the common interests, not to the area, the size?

V. FISCHER: No, that is right.

(*Id.*, p. 2711.)

[103] It is worth noting that election districts were used by the Alaska Legislature to define the prospective boundaries of each of the eight regions that were required to form boroughs under the 1963 Mandatory Borough Act.

The January 20, 1956, exchange between delegate Nordale and Fischer is included here only because others have suggested that it reflects a viewpoint that conflicts with those of other members of the Committee on Local Government expressed during the proceedings of January 19, 1956. While LBC Staff concedes that the exchange between Delegates Nordale and Fischer is perhaps ambiguous, a thorough reading of the minutes and materials of the Local Government Committee, those of the Constitutional Convention, and documents published by Mr. Fischer leads to an interpretation that it is consistent with the views expressed the previous day (January 19, 1956) on the very same point by Committee Chair John Rosswog and Committee member James Doogan.[104]

Moreover, it is noteworthy that Committee Chairman John Rosswog, and members James Doogan and Eldor Lee – all of whom spoke in the formal session on January 19 about the size of boroughs – were present during the January 20 exchange between Delegates Nordale and Fischer.[105] If Delegate Fischer's January 20 remarks regarding such a fundamental issue had been interpreted as being in conflict with the views expressed on January 19 by Committee Chairman Rosswog,[106] Committee member Doogan,[107] and Committee member Lee,[108] it is difficult to conceive that none of those delegates would have addressed the conflict.

The Committee's formal views concerning the general size of boroughs are clearly stated in its December 19, 1955, *General Discussion of Local Government Under Proposed Article*. That document provides:

> Under terms of the proposed article, all of Alaska would be subdivided into boroughs. Each would cover a large geographic area with common economic, social and political interests. (Emphasis added.)

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[104] Even assuming, for the sake of argument, that Delegate Fischer's exchange with Delegate Nordale reflected views that conflicted with those expressed by other members of the Committee, those conflicting views would not prevail. The Alaska Supreme Court has held that an interpretation of a standing committee at the Constitutional Convention that was "diametrically opposed" to the view of a single delegate "stands on more solid footing than an opinion voiced by any individual member of the convention and may be resorted to by this court in determining the intent of the constitutional convention." *Walters v. Cease*, 388 P.2d 263, 265 (Alaska 1964) (emphasis added).

[105] *See* roll call, *Proceedings*, p. 2696.

[106] "[W]e would not want too small a unit, because that is a problem that has been one of the great problems in the states."

[107] "[B]oroughs 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.. . . [T]hey 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." (Emphasis added)

[108] "[W]e 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." (Emphasis added.)

Local Government Committee meeting during the 1956 Alaska Consititutional Convention.

The Committee's *General Discussion of Local Government Under Proposed Article* was submitted to the Constitutional Convention delegates along with the proposed Local Government Article. It is a formal record included in Appendix V to the Minutes of the Constitutional Convention.

Moreover, LBC Staff's reading of the dialogue between Delegates Nordale and Fischer is consistent with views expressed by Mr. Fischer in other contexts. For example, in his book *Alaska's Constitutional Convention,* Mr. Fischer notes

> As the committee was evolving these principles, its members agreed that <u>some type of unit larger than the city and smaller than the state</u> was required to provide both for a measure of local self-government and for performance of state functions on a <u>regionalized</u> basis. . . . The result was the borough concept – an areawide unit that while different from the traditional form of the counter, was <u>in effect a modernized county</u> adapted to Alaska's needs."

(Alaska's Constitutional Convention, pp. 118-119 (emphasis added, footnotes omitted).)

Similar statements are made in *Borough Government in Alaska* (p. 37). Moreover, in his *Alaska's Constitutional Convention,* Mr. Fischer observes that

> When the local government article came before the convention, the delegates did not question the need of an *areawide unit*. Similarly, they accepted without argument most of the basic concepts evolved by the committee, even though many ideas were quite tentative and subject to further evolution upon statehood.
>
> Most of the floor discussion on local government involved questions and explanations; there were few proposals for substantive amendments. . . .

(Alaska's Constitutional Convention, p. 120 (emphasis added).)

One of the most direct judicial interpretations of the constitutional framework for boroughs is reflected in a 1977 ruling by Judge James K. Singleton. In an appeal of the Commission's decision to reject a proposal to carve an Eagle River-Chugiak borough out of the Anchorage borough, Judge Singleton stated:

> The constitution mandates that in setting boundaries the commission strive to maximize local self government, i.e., as opposed to administration by the state government, but with a minimum of local government units preventing where possible the duplication of tax levying jurisdictions. See art. X, sec. 1. Further, the constitution tells us that each borough should embrace an area and population with common interests to the maximum degree possible. See art. X, sec. 3. Finally, while the constitution encourages the establishing of service areas to provide special services within organized boroughs it cautions that "a new service area shall not be established, if, consistent with the purposes of this article, the new service can be provided by an existing service area, by incorporation as a city, or by annexation to a city . . . " See art. X, sec. 5.
>
> The constitution is thus clear that <u>if large local governmental entities can provide equal services small governmental entities shall not be established</u>.
>
> . . . .
>
> Appellants' criticism of each of the commission's fact findings is based on the false assumption that the question to be decided is limited to whether Chugiak-Eagle River could survive if independent while the commission correctly recognized that <u>the true question posed by constitution and statute is whether the area could function as part of the [Anchorage borough]. It is only if the facts support a negative answer to this question, e.g. that the [Anchorage borough] either couldn't or wouldn't furnish needed services, that the commission could lawfully permit detachment.</u>
>
> . . . .
>
> In reaching these conclusions, I have not overlooked the sincere aspirations of appellants for political autonomy or their strongly held belief, so eloquently argued by their counsel, that Chugiak-Eagle River will be better governed if governed separately from Anchorage. But decision for union or separation is political, not judicial and committed by constitution, statute and regulation to the Local Boundary Commission not the court. Thus my views regarding the wisdom of the proposed secession are irrelevant. A judge must always remember that his function is a limited one, to apply the law to the facts before him, not to use a strained interpretation of statutes or constitution

> to foist his political, ethical and moral views on the parties or the public. To forget this limitation is to abandon the judicial restraint without which an independent court cannot be permitted to function in a republic.

(Chugiak-Eagle River Borough Association v. Local Boundary Commission, No. 76-104, slip op. (Alaska, March 16, 1977) (emphasis added.))

LBC Staff notes that Judge Thomas Stewart, former Secretary to the Constitutional Convention and retired Superior Court Judge stated recently:

> I personally do not believe the Constitutional framers envisioned the "very large" boroughs that we see in Alaska today.
>
> . . . .
>
> The framers of the Alaska Constitution envisioned that boroughs would encompass the geographic area actually used by the people of a particular area. The governments of Haines and Skagway are separate and distinct and the residents of Haines and Skagway use separate and distinct geographic areas for commerce and recreation. The communities are not [sic] reliant upon each other neither for their economies nor for transportation services. I am aware that the Haines Borough passed a resolution of support for the Skagway Borough petition. Such a resolution should have substantial influence on the Local Boundary Commission because it confirms what the delegates at the convention intended, namely that a borough should encompass the geographic area actually used by the people seeking to form the borough. The area proposed in the Skagway borough petition does encompass the entire geographic area based on the economic, social, and cultural ties of the people using that area.

Letter from Judge Thomas B. Stewart, December 14, 2005.[109]

In a 1996 review of the Local Government Article of Alaska's Constitution, sponsored by the Commission, Judge Stewart outlined similar views regarding the nature of boroughs:

> Judge Thomas Stewart: My strong thought is, that the legislature and the governor, and the Department and the Commission, have failed to give weight to that word. You are talking about local government, not regional government. And too many of the boroughs that have been formed, are regional in nature, and in my judgment, never should have been. If there are taxable properties

[109] Staff interprets Judge Stewart's use of Alaska Superior Court, First Judicial District stationery on which to express his views as inadvertent and in no way intended to reflect an opinion of the Court, since it is that Court in which the appeal of this case was pursued and remanded to the Commission.

out there like Prudhoe Bay, that should have been in an unorganized borough administered by the State. Barrow has no business managing Prudhoe Bay -- that, they never used. They didn't have anything to do with it. It's not local. It's regional, in my judgment. And you should confine those boundaries down to the land surface that the local people have traditionally used, that have those characteristics of population, geography, economy, transportation that are local. The word "local" has not been adequately recognized.

Left to Right: Judge Thomas Stewart, Victor Fischer, Dr. George Rogers, and Bob Hicks, panel members at the 1996 LBC Review of the Local Government Article of Alaska's Constitution

Bob Hicks: Are you saying that "local" for boroughs should be a very, very small equivalent of a very small county, shouldn't be that expansive . . . ?

Judge Thomas Stewart: Absolutely.

Bob Hicks: Then how do we deal with this one -- "common interest to a maximum degree" -- when we talk about all of these factors here? Each borough shall embrace an area that is of common geography and population to a maximum.

Judge Thomas Stewart: Because to a maximum degree, the local unit has those common interests. And the moment you start moving away from local, then they don't have those common interests.

(*Transcript - Review of Article X of the Alaska Constitution*, pp. 23 – 24, February 13 and 14, 1996.)

A no-less prominent public figure disagreed with Judge Stewart's characterization of boroughs. Constitutional Convention Delegate Victor Fischer, also participated in the 1996 review of the Local Government Article and reacted to Judge Stewart's comments by declaring, "We finally have a disagreement." *Id.* p. 25.

Mr. Fischer proceeded to offer his view of the nature of a borough:

> Vic Fischer: The concept in the Constitution is a two, actually a three tier level. You have the State level, you have the city level, and between the State and the cities, you have a regional borough. The boroughs were conceived as regional units.
>
> If Naknek wants to have its own local, local, local, local area, they form a city. Dillingham is a city. There are lots of cities there. You cannot get more local than a city. You don't need a borough to create a city. Juneau-Douglas has done this. But essentially they've taken in a lot of hinterlands because you have combined a city and what would be a regional borough. But if you were talking of strictly local, you would draw the boundary right around the settled area out the highways a little bit, and that would be the City of Juneau-Douglas. Then you don't need a borough for the other side of the island.
>
> So, essentially we have to think of terms of one local level is the city, and the other local level, is the local regional level. Just as you have the Kenai Peninsula as a whole series of cities, each of which has its own local interest. Then you have the local regional interests that comes together as the borough, which does regional planning and education.

(Id., p. 26.)

Judge Stewart responded by stating:

> <u>I don't really have an argument with you Vic</u>. But let me put a little different picture on that -- <u>he's better informed than I am. He was on the committee, and I wasn't a delegate, and I didn't deal with it that closely</u>. . . .

(Id., (emphasis added).)

By letter dated January 29, 2006, former Commission Chairman Kevin Waring addressed Judge Stewart's letter of December 14, 2005. Mr. Waring first observed that "Anyone would be reluctant to debate Judge Stewart on a constitutional issue, but in this case, *he is in debate with the Alaska Supreme Court, the legislature, past decisions of the Commission, and the facts. His viewpoint illuminates the policy choice [the Skagway] petition poses."* (Mr. Waring letter, p. 3, emphasis added.)

Mr. Waring also addresses Judge Stewart's comments during the Commission's 1996 review of the Local Government article. In discussing what he termed a 'minimalist view of boroughs" by Judge Stewart, Mr. Waring noted that:

> The Alaska Supreme Court, in Mobil v. the Local Boundary Commission, found *explicitly* that Alaska's largest borough, the North Slope Borough at 94,770 square miles, met the constitution's geography standard.[110]. . .
>
> . . . .
>
> The Court's finding that "[boroughs] are meant to provide local government for regions as well as localities and encompass lands with no present municipal use" and its rejection of "limitation of community"[111] as applied to boroughs can be compared to the regulatory restrictions on city boundaries in 3 AAC 110.040(b) and (c). The comparison invites the question whether a city's boundaries could simultaneously obey these regulatory restrictions and satisfy the territorial standards of Article X, Section 3.
>
> The Mandatory Borough Act of 1963 is the earliest and most telling legislative policy statement on the appropriate territorial scale of boroughs. The [Legislature] modeled the boundaries of the eight mandated boroughs on state house election district boundaries. . . . The average area of the mandated boroughs was well in excess of 10,000 square miles.
>
> . . . .
>
> The Commission itself has approved eight borough incorporation petitions outside the Mandatory Borough Act. [The] average area of those boroughs exceeds 25,000 square miles.
>
> On the other hand, the area of the city of Skagway is 443 square miles.[112]

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110 [Footnote 6 in original.] In a footnote about the flexibility of the borough concept, the Court instructively quotes this excerpt from T. Morehouse:

> (Two) recognizable types of boroughs now exist in Alaska: the *regional borough*, generally covering an extensive area including several widely dispersed small communities, incorporated and unincorporated, and the *urban borough*, having a population concentrated primarily in a single urban core area, characteristically overspilling the boundaries of a central city. It could be anticipated that the local governmental system will evolve in the two directions of unification and regionalism associated with these basic physical and socio-economic patterns. . . .

LBC Staff takes the view that the City of Skagway does not fit either the unification or regionalism model.

111 *See* discussion in Section III-B of this report regarding the limitation-of-community doctrine.

112 [Footnote 9 in original.] Most of Skagway's territory consists of unpopulated federal national forest and park lands and state lands not open for settlement. Skagway's petition notes that Skagway is Alaska's largest (in area) city. It is also Alaska's most sparsely populated city with about 2 persons per square mile. Skagway's city boundaries would not meet the city incorporation standards in above-cited 3 AAC 110.040(b) and (c).

> In short, the minimalist view goes against every borough incorporation mandated by legislature, approved by the Commission, and affirmed by the Alaska Supreme Court. . . .[113]

It is noteworthy that later in the above-cited 1996 review, Judge Stewart seemed to express the view that a borough must have multiple communities.

> Bob Hicks: Well, we have two levels of local governments. We have the cities and we have a borough. Why do you say it's not local? You have a lot of plausible arguments, I'm not arguing with you -- I'm playing a devil's advocate here.
>
> Judge Thomas Stewart: Because it is the community that's the focus – the central focus of it. Barrow, doesn't really, has not traditionally had, and it goes beyond their interests today. It's only out to reach a tax base that wasn't really there.
>
> Bob Hicks: So the city should be the central focus of the formation of the borough?
>
> Judge Thomas Stewart: No. The formation of the borough, it seems to me, comes when you have more than one concentration of population, that does have common interests, that can be operated by that second level of government, the borough, but not whether it was only one, like Barrow.
>
> Vic Fischer: It seems to me though, that the North Slope Borough's really a perfect example of a region that has a common interest. It's an ethnic region, it does have a series of . . .
>
> Dr. George W. Rogers: . . . regional corporation as its boundaries . . .regional corporation, Native association before the borough was formed. Their communities, Point Hope all the way to Kaktovik have a common language, a common tradition of whaling. It's very much an integrated culture. One problem they've had is you can't say they have a common sort of transportation as a common link. They've been trying to deal with that by establishing some local linkages, air linkages. But I would say that, that is, in terms of a regional borough, it's a very, very logical unit. Just like the NANA region is.

(*Id.*, pp. 85-86.)

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[113] Mr. Waring's letter, pp. 3-6 (some footnotes omitted).

Part G. The best interests of the State are not served by the Skagway borough proposal.

1. The principle that municipal boundaries must reflect the broad public interest is manifest in the Alaska Constitution, Alaska Statutes, and standards adopted by the Commission.

Section III-A of this supplemental report notes that the Commission was created by the framers of Alaska's Constitution to advance the broad public interest in establishing and altering municipal governments. The importance of the Commission in terms of implementing the vision of the Constitutional Convention Delegates is reflected in the fact that the framers operated under the principle that, "unless a grave need existed, no agency, department, commission, or other body should be specified in the constitution."[114] The authors of our Constitution made specific provisions for just five boards or commissions and one agency.[115] Among those very few are the LBC and the local government agency whose functions include that of serving as LBC Staff.

In providing for the LBC, the framers of our Constitution recognized that a critical need existed for an independent body to render objective fundamental policy decisions from a statewide perspective based on the unique circumstances presented by each proposal. The framers understood that intense local interests, left unchecked, would typically produce improper boundaries for cities and boroughs -- the State's fundamental political subdivisions. The Alaska Supreme Court observed that circumstance forty-four years ago:

> 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 areawide 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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[114] Victor Fischer, *Alaska's Constitutional Convention*, p. 124.

[115] In addition to the LBC, the other boards or commissions are the Commission on Judicial Conduct, the Judicial Council, the University of Alaska Board of Regents, and the Redistricting Board for the Alaska Legislature.

Consistent with the unmistakable intent of the framers of Alaska's Constitution that the broad public interest prevail over parochial interests in setting municipal boundaries, the Alaska State Legislature has placed into statutory law an explicit mandate that the Commission may only approve a borough incorporation petition if the Commission determines that creation of the proposed borough "is in the best interests of the state." (AS 29.05.100.) If formation of a proposed borough is not in the best interests of the state, the Legislature has directed that the Commission "shall reject the petition."

The Constitution and the statutes do not explicitly define the best interests of the state with respect to borough formation. That task was left to the Commission, which is best suited through its experience and expertise to properly delineate the specifics of that broad standard.

The Commission has adopted regulations (3 AAC 110.065 and 3 AAC 110.980) to implement and make specific the requirement pertaining to the best interests of the state in the context of borough incorporation. Additionally, as noted in Section III-E of this report, the LBC may grant borough status to an area other than that conforming to an REAA only if the Commission determines that the different area is better suited to the "public interest" in a full balance of the borough incorporation standards.

Not surprisingly, the Commission's regulations regarding the State's best interest cite core constitutional provisions in setting out factors it will consider. In particular, the Commission wants to know:

- Would creation of the proposed borough advance *maximum local self-government*?
- If the proposed borough is formed, would it promote a *minimum of local government units*?

Advancement of maximum local-self government and promotion of a minimum of local government units are the cornerstones of the principles of local government in Alaska, set out in the very first section of the Local Government Article of Alaska's Constitution.

In judging the best interests of the state, the Commission also must consider the answers to two very basic questions:

- Will the proposed borough relieve the state government of the responsibility of providing local services?

- If the proposed borough is formed, will it likely expose the state government to unusual and substantial risks as the prospective successor to the borough in the event of the borough's dissolution?[116]

Under 3 AAC 110.980, the Commission outlines that it makes best-interests determinations on a case-by-case basis, reflecting applicable provisions of the Constitution of the State of Alaska, Commission regulations, and based on a review of the broad policy benefit to the public statewide. Lastly, the Commission considers whether a proposal serves the balanced interests of local citizens, affected local governments, and other relevant public interests.

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2. The Skagway borough proposal would constitute a nominal change in the existing form of government that advances parochial interests rather than the State's interest in maximum local self-government.

Article X, section 1 of the Alaska Constitution provides as follows:

> **Purpose and Construction.** 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. A liberal construction shall be given to the powers of local government units. (Emphasis added.)

As noted in Section III-F of this report, the revised proposed Local Government Article ("Committee Proposal 6/a") was introduced at the Alaska Constitutional Convention on January 18, 1956. The *Commentary on Local Government Article* by the Committee on Local Government at the Constitutional Convention (January 18, 1956) offered the following explanation of Section 1:

> This section states the purpose and intent of the Article; to promote democratic self-government below the state level, guarding the interests and welfare of all concerned in a framework which will foster orderly development and prevent the abuses of duplication and overlapping taxing entities.

As reflected in the Commentary, the "maximum local self-government" clause of Section 1 is advanced whenever areas of Alaska are brought within the jurisdictional boundaries of a municipal government (i.e., whenever "democratic self-government below the state level" is achieved).

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[116] It is only if this question is answered in the affirmative that it has bearing on the best interests of the State. In other words, if a proposed new borough would likely expose the State government to risks as the borough's prospective successor, this would weigh heavily in the requisite best-interests determination. However, if it would not place the State at risk, the circumstance does not militate in favor of a best interest determination. Creating a Skagway borough would not expose the State government to any greater risks as the prospective successor in the event of dissolution than the State is already exposed to with respect to the City of Skagway. Therefore, this factor is accorded no weight in the examination of this standard.

Currently, Alaska's unorganized borough encompasses an estimated 374,843 square miles of lands and submerged lands. Of that, an estimated 2,996 square miles lie within the jurisdictional boundaries of the 98 city governments within Alaska's unorganized borough.

The principle of maximum local self-government is achieved whenever a proposed borough would extend municipal jurisdiction to significant areas and people currently outside municipal jurisdiction. In this case, however, all 443.1 square miles and all 834 residents of the proposed Skagway borough are already within the boundaries of the Skagway city government. The Skagway borough proposal is being advanced by its proponents to serve the parochial interests of Skagway rather than the broad public interests of the State.

The Skagway Mayor at the time the Petition was filed was quoted as saying that, "The government switch would change nothing but the name" and that he favored the proposal "as a way to avoid being annexed by the nearby Haines Borough." (R. 173.)

At the July 2002 LBC Staff informational meeting on the proposal, then City Council member Mike Korsmo echoed those sentiments when he noted that the proposal was 'a mere change in the name of the local government from the City of Skagway to the Skagway borough.' (R. 546.) At that same meeting, then City Councilmember Dan Henry stated as follows:

> Yes, what would change, if, in fact, in name we change from "City of Skagway" to "Municipality" i.e., a borough, would be that we would not have to wait for the other shoe to drop. And I think that is what has been the driving force for this Petition to begin with, number one. Number two, once that door closes – and I certainly hope and pray that is what happens – that we incorporate as our own borough – once that door closes, it then becomes that much more difficult from a political position for Haines to annex us, if that, in fact, did come up again. If we are just sitting out here as a little satellite then it would be much easier. . . . So there would be some security for the citizens of this community.

(R. 548.)

When the Commission rejected the Petition in 2002, it, too, noted that the proposal was "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." (R. 734; see also R. 172-173). The Commission noted further that:

> 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.

(R. 756.)

The LBC Staff finds no indication that the Skagway borough proposal would serve the best interests of the State by advancing maximum local self-government.

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3. The Skagway borough proposal does not promote a minimum of local government units.

As noted above, the first section of the local government article also promotes a minimum number of local government units. The Local Government Committee's commentary of January 18, 1956, states that Section 1 of the Local Government Article was intended to promote a "framework which will foster orderly development and prevent the abuses of duplication and overlapping taxing entities."

Thus, the "minimum number of local government units" clause is best served by promoting the smallest possible quantity of local governments within the framework set forth by the authors of our Constitution. The framers of our Constitution were particularly concerned about avoiding the creation of small borough governments that would result in their overabundance. This is clearly reflected in Mr. Fischer's account of the Constitutional Convention when he wrote that the Local Government Committee took the view that boroughs "should be large enough to prevent too many subdivisions in Alaska" and that they "should cover large geographic areas with common economic, social, and political interests." *Alaska's Constitutional Convention,* p. 119.

As noted in subpart 1, today there are 98 city governments in the unorganized borough. Those city governments comprise 60.5 percent of the local governments in Alaska. In 2005, those 98 cities were inhabited by an estimated 61,742 residents – 9.3 percent of Alaska's total population. Thus, that group of city governments constitute more than 60 percent of all local governments in Alaska, but serve less than 10 percent of the state's residents. Those circumstances led the Alaska Municipal League previously to declare:

> Article X of the Constitution also states, "The purpose of this article is to provide for maximum local self government with a minimum of local government units." In the Unorganized Borough the opposite is true. There is currently a minimum of local self-government with a maximum of local government units.

(See, Report of the Local Boundary Commission to the First Session of the Twenty-Fourth Alaska Legislature, p. 100 (January 2005).)

The Skagway proposal would have the LBC grant borough status to one of the 98 city governments in Alaska's unorganized borough. That is an anathema to the constitutional principles of local government in multiple respects. It promotes parochial interests over the State's best interests. It also promotes a borough that

does not embrace a large and natural region. Furthermore, it creates excess numbers of borough governments. Finally, it removes critical distinctions between a city government and a borough.

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4. The Skagway borough proposal would not relieve the state government of the responsibility of providing local services.

As reflected above, changes brought about by the Skagway borough proposal would be nominal. It would convert the Skagway city government into a borough. It would provide no relief to the State of Alaska in terms of the State's responsibility to provide local services.

Section IV - Supplemental Conclusions and Recommendations

Based on the record on appeal and these remand proceedings, LBC Staff concludes that the Petition for incorporation of a Skagway borough fails to meet applicable standards under the State Constitution and Commission regulations, fails to meet the standards for incorporation under AS 29.05.031, and is not in the best interests of the State. Therefore, in accordance with AS 29.05.100, it is recommended that the Commission reject the petition.

Within 30 days of the Commission's decision in this matter, the Commission must file as a public record a written statement explaining all major considerations leading to that decision. (3 AAC 110.570(f).) Within 18 days of the filing of that decisional statement, the Petitioner or others may, under 3 AAC 110.580, request the Commission to reconsider its decision. The Commission may also order reconsideration on its own motion within 20 days of the filing of the decisional statement.

The Commission's decision may be appealed to the Superior Court under the Alaska Rules of Appellate Procedure, 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.

This supplemental report emphasizes the following four standards applicable to the LBC's decision.

First, the proposed Skagway Borough does not comprise an area with a population that is interrelated and integrated as to its social, cultural, and economic activities. That determination is based foremost on the conclusion the proposed Skagway borough does not encompass at least two communities which the law (3 AAC 110.045(b)) formally and explicitly presumes must be the case to meet the applicable standard. As defined by 3 AAC 110.990(5) and determined under 3 AAC 110.920, Dyea is not a community. Skagway is the only community in the proposed Skagway borough. No specific and persuasive showing to the contrary — a requisite to overcome the lawfully adopted presumption — has been made in these proceedings.

Second, the proposed Skagway borough does not comprise an area with a population that is large and stable enough to support borough government. That determination is based largely on the fact that the population of the proposed Skagway borough is only 834, well below the minimum of 1,000 permanent residents which 3 AAC 110.050(b) lawfully presumes must be in place to meet the standard. The requisite specific and persuasive showing to the contrary necessary to overcome the lawful presumption, is lacking in these proceedings. Indeed, the specific facts in this case articulated in Section III-D of the supplemental report suggest that Skagway might need more than 1,000 residents to meet the applicable population standard.

Third, the boundaries of the proposed Skagway borough do not conform generally to natural geography or include all areas necessary for full development of municipal services. That determination is based principally on the conclusion that the proposed Skagway borough does not comprise the entire Chatham REAA which the law (3 AAC 110.060(c)) mandates. An exception to that mandate may be granted only if the Commission determines 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. The Petitioner's alternative boundary proposal fails to qualify for the exception.

Fourth, the Skagway borough proposal clearly serves the parochial interests of the citizens of Skagway; however, it does not serve the broader public interests. It does not promote maximum local self-government. Neither does it promote a minimum of local government units. Lastly, it does nothing to relieve the State of the burden to provide local services.

For these reasons, it is recommended that the Commission reject the Petition for incorporation of a Skagway borough.

Appendix A
Borough Incorporation Standards

Applicable Standards Under the Constitution of the State of Alaska

Article X, 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.

Applicable Standards Under the Alaska Statutes

AS 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, and is large and stable enough to support borough government;

2) the boundaries of the proposed borough or unified municipality conform generally to natural geography and include all areas necessary for full development of municipal services;

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;

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

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.

Applicable Standards Under the Regulations of the Local Boundary Commission

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.

(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.

(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.

(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.

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.

(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.

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.

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.

(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.

(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.

(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.

(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.

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.

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.

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.

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.

3 AAC 110.970. Determination of essential city or borough services. (a) If a provision of this chapter provides for the identification of essential borough services, the commission will determine those services to consist of those mandatory and discretionary powers and facilities that, as determined by the commission,

(1) are reasonably necessary to the territory; and

(2) cannot be provided more efficiently and more effectively

(A) through some other agency, political subdivision of the state, regional educational attendance area, or coastal resource service area; or

(B) by the creation or modification of some other political subdivision of the state, regional educational attendance area, or coastal resource service area.

(b) The commission may determine essential borough services to include

(1) assessing and collecting taxes;

(2) providing primary and secondary education;
(3) planning, platting, and land use regulation; and
(4) other services that the commission considers reasonably necessary to meet the borough governmental needs of the territory.

(c) If a provision of this chapter provides for the identification of essential city services, the commission will determine those services to consist of those mandatory and discretionary powers and facilities that, as determined by the commission,
(1) are reasonably necessary to the community; and
(2) cannot be provided more efficiently and more effectively
(A) through some other agency, political subdivision of the state, regional educational attendance area, or coastal resource service area; or
(B) by the creation or modification of some other political subdivision of the state, regional educational attendance area, or coastal resource service area.

(d) The commission may determine essential city services to include
(1) levying taxes;
(2) for a city in the unorganized borough, assessing and collecting taxes;
(3) for a first class or home rule city in the unorganized borough, providing primary and secondary education in the city;
(4) public safety protection;
(5) planning, platting, and land use regulation; and
(6) other services that the commission considers reasonably necessary to meet the local governmental needs of the community.

3 AAC 110.980. Determination of best interests of the state. If a provision of AS 29 or this chapter requires the commission to determine whether a proposed municipal boundary change or other commission action is in the best interests of the state, the commission will make that determination on a case-by-case basis, in accordance with applicable provisions of the Constitution of the State of Alaska, AS 29.04, AS 29.05, AS 29.06, and this chapter, and based on a review of
(1) the broad policy benefit to the public statewide; and
(2) whether the municipal government boundaries that are developed serve
(A) the balanced interests of citizens in the area proposed for change;
(B) affected local governments; and
(C) other public interests that the commission considers relevant.

3 AAC 110.990. Definitions

Unless the context indicates otherwise, in this chapter

(1) “borough” means a general law borough, a home rule borough, or a unified municipality;

(2) “coastal resource service area” means a service area established and organized under AS 29.03.020 and AS 46.40.110 - 46.40.180;

(3) “commission” means the Local Boundary Commission;

(4) “commissioner” means the commissioner of community and economic development;

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

(6) “contiguous” means, with respect to territories and properties, adjacent, adjoining, and touching each other;

(7) “department” means the Department of Community and Economic Development;

(8) “mandatory power” means an authorized act, duty, or obligation required by law to be performed or fulfilled by a municipality in the course of its fiduciary obligations to citizens and taxpayers; “mandatory power” includes one or more of the following:

(A) assessing, levying, and collecting taxes;

(B) providing education, public safety, public health, and sanitation services;

(C) planning, platting and land use regulation;

(D) conducting elections; and

(E) other acts, duties, or obligations required by law to meet the local governmental needs of the community;

(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;

(10) “permanent resident” means a person who has maintained a principal domicile in the territory proposed for change under this chapter for at least 30 days immediately preceding the date of acceptance of a petition by the department, and who shows no intent to remove that principal domicile from the territory at any time during the pendency of a petition before the commission;

(11) “political subdivision” means a borough or city organized and operated under state law;

(12) “property owner” means a legal person holding a vested fee simple interest in the surface estate of any real property including submerged lands; “property owner” does not include lienholders, mortgagees, deed of trust beneficiaries, remaindermen, lessees, or holders of unvested interests in land;

(13) “regional educational attendance area” means an educational service area established and organized under AS 14.08 and AS 29.03.020 ;

(14) “witnesses with expertise in matters relevant to the proposed change” means individuals who are

(A) specialists in relevant subjects, including municipal finance, municipal law, public safety, public works, public utilities, and municipal planning; or

(B) long-standing members of the community or region that are directly familiar with social, cultural, economic, geographic, and other characteristics of the community or region.

Applicable Provisions Under the Federal Voting Rights Act

Federal law (42 U.S.C. § 1973) subjects municipal consolidations in Alaska to review under the federal Voting Rights Act. This federal requirement ensures that changes in voting rights, practices, and procedures (including those brought about by consolidation) will not result in "*a denial or abridgement of the right of any citizen of the United States to vote on account of race or color*" or because a citizen is a "*member of a language minority group*." (42 U.S.C. § 1973)
The aspects of the federal Voting Rights Act applicable to the pending consolidation are set out in regulations of the U.S. Department of Justice at 28 C.F.R. Part 51 Subpart F. These include the following:

§ 51.52 Basic standard.

(a) *Surrogate for the court*. Section 5 provides for submission of a voting change to the Attorney General as an alternative to the seeking of a declaratory judgment from the U.S. District Court for the District of Columbia. Therefore, the Attorney General shall make the same determination that would be made by the court in an action for a declaratory judgment under section 5: Whether the submitted change has the purpose or will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. The burden of proof is on a submitting authority when it submits a change to the Attorney General for preclearance, as it would be if the proposed change were the subject of a declaratory judgment action in the U.S. District Court for the District of Columbia. See *South Carolina v. Katzenbach*, 383 U.S. 301, 328, 335 (1966).

(b) *No objection*. If the Attorney General determines that the submitted change does not have the prohibited purpose or effect, no objection shall be interposed to the change.

(c) *Objection*. An objection shall be interposed to a submitted change if the Attorney General is unable to determine that the change is free of discriminatory purpose and effect. This includes those situations where the evidence as to the purpose or effect of the change is conflicting and the Attorney General is unable to determine that the change is free of discriminatory purpose and effect.

§ 51.53 Information considered.

The Attorney General shall base a determination on a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any investigation conducted by the Department of Justice.

§ 51.54 Discriminatory effect.

(a) *Retrogression*. A change affecting voting is considered to have a discriminatory effect under Section 5 if it will lead to a retrogression in the position of members of a racial or language minority group (i.e., will make members of such a group worse off

than they had been before the change) with respect to their opportunity to exercise the electoral franchise effectively. See *Beer v. United States,* 425 U.S. 130, 140-42 (1976).

(b) *Benchmark*. (1) In determining whether a submitted change is retrogressive the Attorney General will normally compare the submitted change to the voting practice or procedure in effect at the time of the submission. If the existing practice or procedure upon submission was not in effect on the jurisdiction's applicable date for coverage (specified in the Appendix) and is not otherwise legally enforceable under section 5, it cannot serve as a benchmark, and, except as provided in subparagraph (b)(4) of this section, the comparison shall be with the last legally enforceable practice or procedure used by the jurisdiction.

(2) The Attorney General will make the comparison based on the conditions existing at the time of the submission.

(3) The implementation and use of an unprecleared voting change subject to section 5 review under § 51.18(a) does not operate to make that unprecleared change a benchmark for any subsequent change submitted by the jurisdiction. See § 51.18(c).

(4) Where at the time of submission of a change for section 5 review there exists no other lawful practice or procedure for use as a benchmark (e.g., where a newly incorporated college district selects a method of election) the Attorney General's preclearance determination will necessarily center on whether the submitted change was designed or adopted for the purpose of discriminating against members of racial or language minority groups.

§ 51.55 Consistency with constitutional and statutory requirements.

(a) *Consideration in general*. In making a determination the Attorney General will consider whether the change is free of discriminatory purpose and retrogressive effect in light of, and with particular attention being given to, the requirements of the 14th, 15th, and 24th amendments to the Constitution, 42 U.S.C. 1971(a) and (b), sections 2, 4(a), 4(f)(2), 4(f)(4), 201, 203(c), and 208 of the Act, and other constitutional and statutory provisions designed to safeguard the right to vote from denial or abridgment on account of race, color, or membership in a language minority group.

(b) *Section 2*. Preclearance under section 5 of a voting change will not preclude any legal action under section 2 by the Attorney General if implementation of the change demonstrates that such action is appropriate.

§ 51.56 Guidance from the courts.

In making determinations the Attorney General will be guided by the relevant decisions of the Supreme Court of the United States and of other Federal courts.

§ 51.57 Relevant factors.

Among the factors the Attorney General will consider in making determinations with respect to the submitted changes affecting voting are the following:

(a) The extent to which a reasonable and legitimate justification for the change exists.

(b) The extent to which the jurisdiction followed objective guidelines and fair and conventional procedures in adopting the change.

(c) The extent to which the jurisdiction afforded members of racial and language minority groups an opportunity to participate in the decision to make the change.

(d) The extent to which the jurisdiction took the concerns of members of racial and language minority groups into account in making the change.

§ 51.58 Representation.

(a) *Introduction*. This section and the sections that follow set forth factors--in addition to those set forth above--that the Attorney General considers in reviewing redistrictings (see § 51.59), changes in electoral systems (see § 51.60), and annexations (see § 51.61).

(b) *Background factors*. In making determinations with respect to these changes involving voting practices and procedures, the Attorney General will consider as important background information the following factors:

(1) The extent to which minorities have been denied an equal opportunity to participate meaningfully in the political process in the jurisdiction.

(2) The extent to which minorities have been denied an equal opportunity to influence elections and the decisionmaking of elected officials in the jurisdiction.

(3) The extent to which voting in the jurisdiction is racially polarized and political activities are racially segregated.

(4) The extent to which the voter registration and election participation of minority voters have been adversely affected by present or past discrimination.

§ 51.59 Redistrictings.

In determining whether a submitted redistricting plan has the prohibited purpose or effect the Attorney General, in addition to the factors described above, will consider the following factors (among others):

(a) The extent to which malapportioned districts deny or abridge the right to vote of minority citizens.

(b) The extent to which minority voting strength is reduced by the proposed redistricting.

(c) The extent to which minority concentrations are fragmented among different districts.

(d) The extent to which minorities are overconcentrated in one or more districts.

(e) The extent to which available alternative plans satisfying the jurisdiction's legitimate governmental interests were considered.

(f) The extent to which the plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial boundaries.

(g) The extent to which the plan is inconsistent with the jurisdiction's stated redistricting standards.

§ 51.60 Changes in electoral systems.

In making determinations with respect to changes in electoral systems (e.g., changes to or from the use of at-large elections, changes in the size of elected bodies) the Attorney General, in addition to the factors described above, will consider the following factors (among others):

(a) The extent to which minority voting strength is reduced by the proposed change.

(b) The extent to which minority concentrations are submerged into larger electoral units.

(c) The extent to which available alternative systems satisfying the jurisdiction's legitimate governmental interests were considered.

Appendix B
Challenges in Forming Boroughs in the Post-1963 Mandatory Borough Era and History of Borough Formation in the Lynn Canal Area

Despite constitutional provisions that encourage borough formation wherever regions have the fiscal and administrative capacity to operate boroughs, few incentives exist to promote voluntary borough incorporation. With the exception of the 1963 Mandatory Borough Act (Chapter 52 SLA 1963), proposals to incorporate boroughs in Alaska have been initiated only when local voters perceive it is in their interest to do so.

Today, more than 50 years after Alaskans ratified the Constitution of the State of Alaska, an estimated 374,843 square miles – 57 percent of Alaska – remain outside organized boroughs. Contemporary borough incorporation proposals are made in a piecemeal fashion, rather than considering a broad vision of the entire state. Locally initiated proposals often "cherry-pick" boundaries to the maximum local benefit.

The current circumstances are a sharp contrast to the policy reflected in the 1963 Mandatory Borough Act, passed by the Alaska Legislature and signed into law by Governor Egan, to mandate borough formation for eight specific regions. Those eight boroughs today account for 95.8 percent of all residents of organized boroughs in Alaska.

The 1963 Legislature acted with the expressed intent of promoting the fundamental constitutional principle of providing for "maximum local self-government with a minimum of local government units." Had the 1963 Legislature followed the policy in place today, Alaska's local government landscape would be much different than it is currently.

Indeed, John Rader, sponsor of the 1963 Mandatory Borough Act, was motivated, in part, by a concern that if the 1963 Legislature did not act, "A great opportunity to create something of value could be lost." Victor Fischer and Thomas Morehouse examined "the problem of implementation" of the borough concept in *Borough Government in Alaska,* pp. 67-69. A more contemporary and detailed examination of statewide public policy issues relating to borough formation is set out in the *Report of the Local Boundary Commission to the First Session of the Twenty-Fourth Alaska Legislature,* pp. 85 - 145 (January 19, 2005).

The remainder of Appendix B addresses the early history of borough formation in the Lynn Canal area.

In the late 1940s, prior to statehood, residents of Haines formed an independent school district. Residents in eight other areas of Alaska also established independent school districts under Territorial law.

Independent school districts were not recognized under Alaska's Constitution, which took effect on January 3, 1959. The Constitution provided that the legislature must enact measures for the transition of independent school districts into governmental forms that were recognized under the Constitution.

The 1961 Legislature enacted a law which provided that independent school districts must be dissolved on July 1, 1963. The 1961 Legislature also enacted the first laws providing standards and procedures for borough incorporation.

When the 1963 legislature convened, all nine independent school districts, including the one in Haines, remained in existence. Only one borough had formed – that being in an area of the state that did not encompass a special school district.

Representative John L. Rader considered the lack of action to integrate the independent school districts by forming boroughs to be the "greatest unresolved political problem of the State." Specifically, Mr. Rader stated:

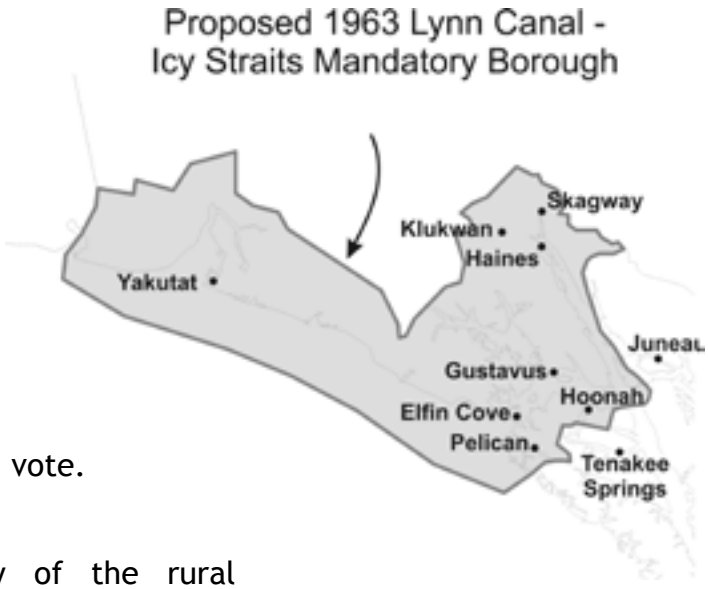
> My experience as the Anchorage City Attorney and the State Attorney General led me to believe that the greatest unresolved political problem of the State was the matter of boroughs. As near as I could see, no reasonable solutions were being propounded. A great opportunity to create something of value could be lost. A state of the size, population density, and distribution of Alaska makes State administration of local problems impossible. Anyone who had ever worked in Alaska on the local level or on the State level could see the frustrations of honest attempts repeatedly failing because of the simple fact that there was no governmental structure upon which to hand necessary governmental functions. I therefore decided to do what I could.

(*Metropolitan Experiment in Alaska,* p. 93.)

To address his concern, Representative Rader introduced a bill during the 1963 Legislature that extended the deadline for elimination of independent school districts and also mandated borough incorporation for nine regions of the state. Those included (1) Ketchikan and the Annette Island Indian Reservation, (2) the greater Sitka area, (3) the greater Juneau area, (4) Haines-Skagway-Icy Strait-Yakutat, (5) the greater Kodiak Island area, (6) Kenai Peninsula, (7) the greater Anchorage area, (8) Matanuska-Susitna valleys, and (9) Fairbanks-Delta-Tok areas. Representative Rader explained:

> We considered many areas as possibilities for mandatory borough incorporation. However, after looking over the available information on taxable wealth, I concluded that the areas we proposed as boroughs, together with cities such as Nome, Wrangell, Petersburg, Cordova, Valdez, and others not included in any boroughs, encompassed roughly 90 per cent of the taxable wealth in the State and approximately 80 per cent of the population. These cities had not outgrown their corporate boundaries and did not have significant suburban development. Nor was it necessary to the tax equalization features of the bill that they be within a borough.

Figure B-1. Map of the Ninth Mandatory Borough Originally Proposed by Representative Rader



(*Id.*, p. 102.)

Through the particular efforts of Representative Morgan W. Reed of Skagway, the Haines-Skagway-Icy Strait-Yakutat area was excluded from the bill by the House of Representatives.[B-1] The bill passed the House with 27 votes in favor – six more than the required minimum; however, it passed the Senate by only 1 vote. John Rader noted:

> It is probably true that many of the rural representatives who voted for the bill would have voted against it had their areas been included. Actually, most of these areas could not possibly have supported or operated a borough successfully.[B-2] Surprisingly, even through I had therefore omitted great expanses of rural undeveloped areas, the representatives from these areas still feared the bill because they realized that it provided for a general tax equalization and that they were the only ones who were not being "equalized." They were easily persuaded by some of the opponents of the bill that they would be "equalized" by the next legislature. This was particularly true in the Senate, where one of my strong supporters on the last day on the last critical vote switched his vote from "Yes" to "No" after being persuaded that the next step would be further equalization affecting

[B-1] Additionally, the Annette Island Indian Reservation and military reservations were also excluded from the bill.

[B-2] Although Mr. Rader perceived that "most" of the areas excluded from the Mandatory Borough Act "could not possibly have supported or operated a borough successfully," seven boroughs have formed since the Mandatory Borough Act was passed. Further, in the 1980's LBC Staff's predecessor, DCRA, conducted borough feasibility studies of most of the unorganized borough. Those studies concluded that with the possible exception of one region, the study areas had the financial capacity to support borough government. (See *Synopsis of Borough Feasibility Studies Conducted During 1988 and 1989*, DCRA, September 1989.)

> his area. The people who were continuing to benefit from the inequity of taxes recognized that if the bill passed, they would have a hard time politically maintaining the inequity in the future because their numbers would be diminished substantially. People benefiting from tax inequities do not like to discuss tax reforms; they never know when reform will finally reach home.

Id., p. 117.

Governor Egan subsequently signed the act into law on April 12, 1963. Section 1 of the act stated as follows:

> **Declaration of Intent.** It is the intention of the legislature to provide for maximum local self-government with a minimum number of local government units and tax-levying jurisdictions, and to provide for the orderly transition of special service districts into constitutional forms of government. The incorporation of organized boroughs by this Act does not necessarily relieve the state of present service burdens. No area incorporated as an organized borough shall be deprived of state services, revenues, or assistance or be otherwise penalized because of incorporation. . . .

(Chapter 52, Session Laws of Alaska, 1963.[B-3])

Although the Haines-Skagway-Icy Strait-Yakutat area was excluded from those regions required to form boroughs under the Mandatory Borough Act, the general provisions of the 1963 law still required the Haines Independent School District to transition to a constitutionally recognized form of government by July 1, 1964.

In March of 1964, the LBC approved a proposal to form a first class borough in Haines. However, the proposal was rejected by the voters. The Haines Independent School District was dissolved on July 1, 1964, in accordance with the general provisions of the Mandatory Borough Act.

In response to the dissolution of the Haines Independent School District, the Commissioner of the Department of Education formed the Haines-Port Chilkoot Special School District under an obscure statutory provision in August of 1964. Displeased by the action taken by the Commissioner of the Department of Education, the legislature repealed authority for special school districts in 1966. Notwithstanding the action by the legislature, the Haines-Port Chilkoot Special School District continued to operate.

[B-3] While the Mandatory Borough Act promised that boroughs would not be deprived of State revenues or penalized because of incorporation, the fact that many areas were allowed to remain unorganized precluded the fulfillment of that promise from the very beginning. More than thirty-five years after the Mandatory Borough Act was passed, organized boroughs received billions of dollars less in State education foundation aid compared to the level of State aid those areas would have received had they been unorganized.

In the Spring of 1967, the LBC approved a petition to incorporate a second class borough in Haines. However, voters rejected that proposal as well. In October of that year, the State Attorney General advised the Department of Education that it must discontinue funding for the Haines-Port Chilkoot Special School District because that district had no legal basis.

Following the action by the State Attorney General's office, the City of Haines and second class City of Port Chilkoot each organized city school districts. The State school district served students outside the two cities. Thus, three school districts served a total of 346 students in the Haines area in 1967.

A third proposal to form a borough – again, a second class borough – was prepared. However, like the two preceding borough proposals, the third proposal to form a borough in Haines was rejected by the voters.

Residents of the Haines area subsequently lobbied the legislature to create a new class of borough, the third class boroughs — a municipal school district with taxing powers. Unlike other organized boroughs, a third class borough had no mandatory areawide planning, platting, and land use regulation powers.

On May 28, 1968, voters in Haines petitioned to incorporate a third class borough. The Commission subsequently approved the proposal. On August 28, 1968, voters in Haines approved incorporation of the Borough by a vote of 180 to 61. The Borough was incorporated following certification of the election results on August 29, 1968.

The original boundaries of the Borough encompassed approximately 2,200 square miles. Klukwan, located about 21 miles north of Haines along the Haines Highway, and the military petroleum distribution facility at Lutak Inlet were excluded from the Borough. The eastern and northern boundaries of the Haines Borough also created a 443.1-square mile enclave encompassing Skagway.

In 1974, the Haines Borough petitioned for annexation of approximately 420 square miles to the south. The area proposed for annexation encompassed the commercial fish processing facility at Excursion Inlet as well as an estimated 442,354 acres of Tongass National Forest lands.[B-4] The annexation was approved by the LBC and took effect following review by the Legislature in 1975.

[B-4] The January 1968 Local Affairs Agency's report on the Haines Borough incorporation estimated that there were 474,000 acres of National Forest lands within the area proposed for incorporation. There are currently 916,354 acres of National Forest lands within the Haines Borough according to Community Financial Assistance, DCRA, (Fiscal Year 1998). Thus, it is estimated that the 1975 annexation added 442,354 acres of National Forest lands to the Haines Borough, an increase of 93.3% of such lands within the Borough.