

Analysis of Hyder's Status Five Years after the KGB's Annexation Was Approved, and What, If Anything, the LBC Should Do Next

I. Determining What the LBC's Intent Was Regarding Hyder by Examining the 2006 KGB Annexation Petition, the Decisional Meeting, and the LBC's Written Decision

Petition

On page 4, the KGB annexation petition states that it is expected that Hyder will be phased into the KGB at a later time. Petition Exhibit K states that current cultural, social, and economic ties between Hyder and the KGB don't justify inclusion at the time.

The petition does not specify "triggers" which would indicate ties justifying annexation. The petition does outline possible circumstances, but not triggers, including Hyder wanting to become a political subdivision [borough or city], economic development within Hyder, Hyder community demand for municipal services, and increase in transportation, communication, and commerce.

Decisional Meeting

Chair Ketchum asked for a motion that the KGB petition would be amended to include Hyder within its boundaries. He mentioned that the best interests and welfare of the state is to try to move local funding for schools to the local level, and out of the state level. Comm. Harcharek said that to leave Hyder as an enclave was a disservice to the state.

Comm. Wilson said that the KGB was so far and so disconnected from Hyder that he favored leaving Hyder as an enclave. He didn't like the idea of an enclave, but the instead of portioning people into a borough when they are so far away and disconnected with hardly any transportation links didn't sit well with him.

Jeanne McPherran said that it was within the LBC's authority to direct staff [meaning the Department] to file a petition if the KGB did not do so on its own, and that the LBC should put a finite time period on it. She said that it would not be LBC staff who would work on a petition.

Commissioner Wilson proposed a motion (if the one on the floor to amend the KGB petition to include Hyder in its boundaries failed) for annexation of Hyder within a five year period. He said that it was obvious that Hyder could only go to one place, the KGB, and that the LBC would not leave it as an enclave forever.

The original motion failed by a 2-2 vote.

Chair Ketchum then moved that the KGB annex Hyder within the next five years. If it did not, the LBC should request that Commerce do so, in consultation with the Department of Education and Early Development (DEED). Ms. McPherren drafted a motion for the chair. The draft stated:

I strongly recommend that the Ketchikan Gateway Borough propose annexation of Hyder within the next five years. This is particularly appropriate in view of its National Forestry receipts revenues during that time period.

If the KGB does not file such an annexation proposal, the Commission should direct DCCED in consultation with the Department of Education and Early Development to develop a petition to propose such annexation in accordance with the Commission's petition requirements and standards of the borough annexation.

Comm. Harcharek said that he would make that motion.

Chair Ketchum rephrased that motion to say that:

the KGB has five years to submit a petition for Hyder to be included in the Ketchikan Borough and if they don't we will recommend, the LBC will recommend to the Department of Commerce and the Department of Ed to in fact make a petition of that nature to include Hyder into the KGB.

Comm. Wilson seconded the motion. Comm. Chrystal said that down the road Hyder will be in the KGB, and that it is not a good thing for it to remain as an enclave. There is nowhere else they could go. Comm. Wilson said that this would give the people a chance to make necessary adjustments between now and then.

Ms. McPherren said that the motion was

The motion is that the KGB propose annexation of Hyder within the next five years and if they do not, that the Commission should direct DCCED to consult with the Department of Education to develop a petition to propose such annexation.

Commissioner Wilson said that he had not felt that the communications, media, and transportation facilities allow for the communication and exchange necessary to develop an integrated borough government. He hoped that this improves over this time period of annexation, and they will have better transportation and communication facilities before they are annexed.

A vote was taken on Commissioner Harcharek's motion. It passed 4 to 0.

Written Decision (issued 12/5/07)

Page 25 of the decision states:

In approving the KGB annexation, as amended, the Commission directed the KGB to file a petition within five years to annex the Hyder area. In that regard, the Commission encourages the KGB to work toward developing communication, transportation, and economic ties between Hyder and the Borough, including working with the State to help develop these ties. The Commission noted that this was particularly appropriate in view of the federal revenues the Borough will be receiving from the newly annexed area. If such a petition is not filed, the Commission committed to directing DCCED to file such a petition. In that event, DCCED should develop a petition in coordination with the DEED and KGB staff.

II. Analysis

In its petition, the KGB made nothing more than a vague expectation that Hyder would be annexed in at a later time. It did not specify the time or what would trigger such an annexation petition.

To determine what the LBC's intent was regarding Hyder, it's important to review the several rephrasings of the motion made at the LBC decisional meeting, and also the written decision. Chair Ketchum made a motion (if the one on the floor to amend the KGB petition to include Hyder in its boundaries failed) for the KGB to annex Hyder within five years, and if not, the LBC would request that Commerce do so in consultation with DEED. Ms. McPherrren's draft said that the LBC should recommend to the KGB that the KGB file within five years, and that the LBC should "direct" Commerce (in consultation with DEED) to develop a petition.

Commissioner Harcharek made that motion. The chair then rephrased it to say that the KGB had five years to file a petition, and that the LBC will recommend that Commerce and DEED file a petition. Finally, Ms. McPherrren restatement said that the KGB had five years to file, and if not, the LBC should direct Commerce to consult with DEED to develop a petition. Commissioner Harcharek did not disagree with either the chair's rephrasing of the motion or Ms. McPherrren's restatement. The LBC then approved the motion.

Commissioner Harcharek's motion strongly recommended that the KGB file an annexation petition within five years. The staff's restatement just before the vote is more emphatic because it states, not recommends, that the KGB propose annexation within five years.

At no time was the department's commissioner mentioned as a potential petitioner. At the time of the hearing and decisional meeting, 3 AAC 110.410(a)(3) said that either the LBC staff or a person designated by the LBC could file a petition if directed to do so by the LBC. 3 AAC 110.410(a)(3) was revised a month later, and no longer mentions staff as possible petitioners. Further, 3 AAC 110.435(a) now specifically states that the LBC staff may *not* act as petitioners.

In sum, the last restatement of the motion states that the KGB had five years to file and if not, the LBC should direct Commerce to develop a petition. The written decision varies in that it specifically directed the KGB to file a petition, and encouraged, not required, the KGB to work to develop ties between Hyder and the borough.

The written decision used language that was not in all of the four versions of the motion. There is nothing that staff is aware of that prevents the written decision from clarifying, expanding, or differing from the verbal decision because the commissioners review the decision, and then vote on it.

III. Recommendation

A little over five years ago (December 8, 2007), the LBC issued its written decision. To this date, no petition has been received from the KGB, nor is one expected. The LBC might wish to discuss its options. The LBC can 1) take no action regarding a petition; 2) repeat its directive that the KGB file a petition (which the KGB would apparently not do), or 3) ask the Commerce commissioner to file a petition. Staff recommends option 1), that the LBC take no action regarding a petition.

Both the final restatement and the written decision indicate that the KGB had five years to file a petition. If not, the LBC should direct Commerce to do so. The motion's language indicates that the LBC did not intend to make the future annexation of Hyder a condition of approval. Rather, it was a deadline and a warning – if you don't do it, we will. The written decision went further, and clearly *directed* the KGB to file a petition.

The LBC does not have the power to mandate that Commerce file a petition, but it can recommend or request that Commerce do so. There are two reasons why the LBC would want to ask Commerce to file a petition. One would be a matter of principle, because at the decisional meeting the LBC gave the KGB five years to file a petition. The written decision directed the KGB to file a petition within five years. The KGB never did, or even tried to do so. The KGB appears to have accepted the benefits of annexation without the concurrent responsibility of following the directive.

The staff feels that it is not wise to expect future action from a petitioner when approving a petition, or for the LBC to promise future action of its own. It is better to expect action before approval, or to let something go. In the recent Dillingham petition, the LBC withheld approval until the petitioner met a condition. That impresses staff as a sound approach to encourage action from a petitioner. Once a petition is granted, a petitioner has little incentive to act in a manner contrary to its wishes. While the KGB cannot be commended for ignoring the LBC's directive, that is not itself a good reason to ask Commerce to file a petition.

The second reason to ask Commerce to file a petition would be if the LBC believed that Hyder should be a part of the KGB. Any petition filed would have to meet the standards of relationship of interests, population, resources, boundaries, best interests of the state (and meeting legislative review standards if the petition uses such a method). One cannot fully evaluate the arguments until a petition is filed, with resulting public comments and briefs.

Based on in the KGB annexation hearing testimony and the DCRA website (http://www.commerce.state.ak.us/dca/commdb/CIS.cfm?Comm_Boro_name=Hyder), it appears that Hyder has close ties with Stewart, BC. DCRA's community information summary for Hyder states that "Due to its isolation from other Alaskan communities and its close proximity to Stewart, British Columbia (population 500), Hyder has many cultural ties with Canada and also receives electric and telephone service from Canadian companies, thus it uses the 250 area code. Hyder is the only community in Alaska not using the 907 area code. Because of its proximity to the border and the lack of banks in Hyder or Stewart, Hyder businesses operate on either U.S. or Canadian currency."

Formerly, all the Hyder kids attended school in Stewart. Then, about 15 years ago the parents wanted their own school and Southeast Islands REAA started operating a school in Hyder . The school closed down about six years ago when the enrollment fell below 10, the level needed to receive state foundation funding. There are 14 Hyder children (all in same family) who are privately homeschooled.

Many parts of the unorganized borough that have opposed being in organized boroughs have claimed little connection with that particular borough. But, those cases do not have as strong a connection with a Canadian community. Hyder's ties to Stewart possibly diminish its ties to the KGB. That does not mean that Hyder's ties to Stewart would make it unlikely for a petition to meet the borough annexation standard of having a sufficient relationship of interests. It is premature to make such an evaluation.

Staff recommends against the LBC taking any present action at all concerning the KGB's annexing Hyder. It does not seem appropriate to ask Commerce to file a petition at this time and to assume the role of petitioner. That recommendation includes not writing the KGB. While any commissioner has the prerogative of discussing the topic at a future LBC meeting, the staff recommends, in the vernacular, to let sleeping dogs lie. If the commission was interested in discussing the issue at a LBC meeting, staff would respectfully caution against doing so unless it was first properly noticed.

Further, "enclave" might not be the correct term to use to describe Hyder. An enclave is an area that is entirely or mostly surrounded by another area. In Hyder's case, it is bordered about equally by both Canada and the KGB. It is not entirely or mostly surrounded by the KGB or Alaska, so it is questionable whether it could be called an enclave. Regardless of the noun used, Hyder is a sliver of the unorganized borough that is not contiguous to any other part of the unorganized borough. That is a legitimate concern, but staff still recommends that the LBC not ask file Commerce to file a petition.

In conclusion, staff recommends that the LBC take no action on a petition at this time. Such a recommendation should not be misconstrued to mean that staff feels such a petition wouldn't meet the necessary standards.