

Municipal Incorporation Guide



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Municipal Incorporation Guide

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Preface

This is a revision of a publication originally produced in 1992 and revised in 1994. It is designed to assist residents of unincorporated communities in Washington to understand the process by which a community can become incorporated as a city and to help a community decide whether to incorporate. The Municipal Research and Services Center (MRSC) believes that it is important to provide factual information on the municipal incorporation process to communities contemplating or beginning incorporation efforts.

If an incorporation election is successful, the initial city council will immediately confront a more demanding process, that of creating a functioning and viable municipal corporation. Unlike a private corporation which may start small with only a few customers, a municipal corporation will immediately have, in most cases, thousands of customers – its residents. To assist areas that are organizing a new city after a successful incorporation election, MRSC prepared a publication entitled *The New City Guide*, Report No. 54 (February 2002). With these two publications, MRSC hopes to provide an informative framework for navigating the incorporation process and for making the initial decisions that a new city will face.

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Richard Yukubousky
Executive Director

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Introduction

Sixteen new cities have emerged in the past 15 years from the unincorporated areas of the state. A number of factors, some old and some new, account for this surge of incorporations. Most significant among the new factors is the rapid pace of urbanization that has occurred in the past three decades, particularly in the Puget Sound basin. As a result of this urbanization and of the disorderly growth that many feel has accompanied it, the 1990 state legislature passed the Growth Management Act (GMA). The GMA was intended to provide cities and counties with the means of exercising greater control over how this growth and urbanization occurs and with the means of financing public improvements necessitated by this growth. This legislation has, to some extent, encouraged incorporation efforts by offering more effective tools for growth management and by creating in unincorporated communities a perceived need to incorporate soon or be annexed to the neighboring jurisdiction or be included within its designated “urban growth area.”¹

Whether the result of the GMA or not, the most basic reason that areas attempt to incorporate is to exercise local control over community character and destiny. The idea of local control with its accompanying responsibilities may not, however, be appealing to those areas that are content with county government or that desire to eventually become a part of a nearby incorporated community.

The purpose of this publication is not to promote incorporation, but rather is to help an area to decide whether or not to incorporate by explaining the statutory process of incorporation, the options available to incorporating communities, and the factors that need to be considered during the incorporation process.

What is a City (or Town)?

A city is a municipal corporation, a public corporate entity that derives its existence from the state, with specific boundaries and taxing powers. Its primary purpose is

to regulate the local or internal affairs of the territory . . . incorporated, and secondarily to share in the civil government of the state in the particular locality.²

A city may enter into contracts, may sue and be sued, may require licenses for the conduct of business within the city, may grant franchises, may acquire and operate certain public utilities, may furnish police and fire protection, may adopt and enforce regulations governing the physical development of the community, and may purchase and sell or otherwise use and dispose of real and personal property.³

A county, also a political subdivision of the state and a municipal corporation, is, unlike a city, directly a creation of the state. A new county may not be created by the vote of its residents; it may be created only by the legislature.⁴

¹Counties planning under the GMA must designate urban growth areas “within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature.” RCW 36.70A.110(1). Each city and town in a GMA county must be included within an urban growth area. *Id.* New cities may be incorporated in those counties only within an urban growth area. RCW 36.93.150(2).

²McQuillin, *Municipal Corporations*, §2.07.10 (March 2006).

³See RCW 35.22.280; 35.23.010; 35.24.010; 35.27.010; 35A.11.010.

⁴*Cedar County Committee. v. Munro*, 134 Wn.2d 377 (1998).

Another basic distinction between a county and a city is that county government is essentially designed to provide services to rural, less densely populated areas located outside city boundaries and urban growth areas, while city government is essentially designed to provide services to urban areas. A county's services and responsibilities are regional in nature. This distinction is strengthened by the GMA, which defines “urban governmental services” as “those governmental services historically and typically delivered by cities.”⁵

A further difference between cities and counties lies in the revenue sources that are available to each. For example, a city has authority to enact business and occupation and utility taxes, while a county does not. Also, state collected taxes are allocated differently between cities and counties.

A perhaps more significant, but less tangible difference between cities and counties lies in the different perceptions that city and county residents may have of their respective governments. The extent to which these perceptions differ depends, of course, upon the particular local situation and upon the expectations of the residents. It is this intangible element which may be of crucial significance in the success or failure of an incorporation effort.

Pros and Cons of Incorporation

Local Control

The idea of local control over the provision of public services, patterns of land use, and community character and identity is the basic reason that communities incorporate or attempt to do so. This may be a significant advantage of incorporation, assuming that there already exists a sense of community that includes some consensus as to community goals and some shared vision of future development. The absence of such a consensus may make it difficult to successfully incorporate.

Local Accountability

Hand in hand with the idea of local control is the idea of local accountability of public officials and governmental bodies for their decisions. Where the residents of an unincorporated community may feel neglected or ignored by county officials, who serve a broader constituency, those of an incorporated municipality have more direct influence over their elected local officials. There is, of course, no guarantee that municipal officials will be more responsive to the constituency of the new city.

Provision of Services

A newly incorporated city may choose to provide its own municipal services, such as fire and police departments and utilities. It may contract with another governmental entity for such services for an interim period or longer. Or it may, with respect to some of those services, become a part of a special purpose district, such as a fire or water-sewer district, that provides such services within its boundaries. Whether providing its own services is advantageous to a community depends on two basic considerations: whether the existing services are being provided at a satisfactory level and whether a community, if it incorporates, will possess an adequate revenue base to satisfactorily provide its own services. One of the basic purposes of an incorporation study is to address these issues.

Certain services may be more accessible as a result of incorporation. For example, it may no longer be necessary to travel to the county seat to obtain required land use or building permits. However, a newly

⁵RCW 36.70A.030(16).

incorporated city may not, at least initially, be able to provide certain services and may choose to contract with the county for continuation of service delivery.

Clearly, however, the potential exists for an incorporated area to provide a more satisfactory level of services that focuses on the particular local situation. Existing (preincorporation) services in unincorporated areas, such as police, that cannot be provided by a local special purpose district are provided on a county-wide basis and may not adequately address the purely local concerns of a unincorporated community. For example, a significant reason for the incorporation of the city of SeaTac was the perception by its residents that the county police were not effectively dealing with crime and prostitution in the area.

Land Use and Development

As noted above, the issue of local control prominently involves the ability of a community to govern its land use and development based upon its own goals and visions of community character. The GMA, enacted in 1990, is intended to enhance the ability of local governments (counties and cities) that plan under its provisions to manage growth and to provide the necessary services to sustain growth. It also mandates county-wide planning and encourages regional planning efforts. Arguably, however, the GMA, by enhancing the ability of *both cities and counties* to manage growth, does not provide any additional advantage to advocates of incorporation.

Cost to Taxpayers

The estimated cost to taxpayers of a proposed incorporation is often a deciding factor in an incorporation election. The specter of raised taxes has proven to be an effective weapon against some incorporation efforts. However, the actual cost to taxpayers of incorporating is very difficult to accurately forecast in advance and is dependent upon the individual circumstances of the area being considered for incorporation. A special effort should be made to address the potential revenues and expenditures of an incorporated community and their effect upon service delivery and upon the individual taxpayer.

One of the basic difficulties of using cost as a factor in the pro and con analysis of an incorporation is that it is greatly dependent upon the decisions of a future city council whose makeup will not be known until after the decision to incorporate. The council eventually elected may make decisions that result in reduced or increased taxes or other costs based upon its perception of community needs or desires. (However, some of these revenue decisions, such as imposing a business and occupation tax,⁶ are subject to statutory referendum procedures.) Some residents of an area considered for incorporation may perceive a need for *increased* taxes to support better public services and facilities. On the other hand, increased taxes may not be necessary for an increased level of services if revenues are sufficiently greater as a result of incorporation. Others may want lower taxes no matter what. A decision by the electorate to incorporate may not be a clear mandate of any kind with respect to this issue, and may result in greater or lesser taxpayer costs consistent with or contrary to predictions.

A thorough incorporation study can, however, address these financial issues under various assumptions and provide information helpful not only to voters on the issue of incorporation but also to the future elected officials who will be making the initial decisions regarding these issues, should the voters choose incorporation. Fiscal impact evaluation, though not an exact science, is an essential aspect of the preincorporation process in that it provides a basis to assess the potential costs of incorporation to the individual taxpayer.

⁶See RCW 35.21.706.

Community Identity

Clearly, incorporation of an area will result in a change in and a heightening of community identity by more explicitly defining the community by the boundaries of the incorporated area. Incorporation may serve to create an autonomous community identity separate from the larger unincorporated area or from surrounding cities. By establishing or enhancing community identity and creating greater local control over future identity, incorporation may stimulate increased community involvement and concern.

Impacts on Other Governmental Entities

Incorporation will definitely have some impact upon the county and upon the special purpose districts with jurisdiction in the area incorporated. The county and some special districts will lose revenues from a reduction in their tax bases, which may affect their abilities to provide services. On the other hand, the county may have been expending more funds providing services than it was receiving in revenues. Incorporation may also increase the costs of providing services to the remaining unincorporated areas as a result of the reduced economies of scale.

A fire district, if it loses territory and assets to the new city, may be forced to reduce its level of service to its remaining service area. This may have some effect on insurance rates in that area.

Again, these are impacts that should be considered and evaluated in the incorporation study.

The Incorporation Process

Chapter 35.02 RCW sets out a uniform procedure for incorporation of an area as a second class city or a noncharter code city.⁷ Any contiguous unincorporated area having at least 1500 inhabitants may incorporate as a city. RCW 35.02.010. However, any area of less than 3000 inhabitants that lies within five air miles of a city of a population of 15,000 or more may not incorporate. RCW 35.02.010. An area within a county that plans under the Growth Management Act may incorporate only if it lies within a designated urban growth area. RCW 36.93.150(2).

All incorporations that have occurred since adoption of the Optional Municipal Code, Title 35A RCW (providing for the code city classification), have established noncharter code cities.⁸ The reason for this is the flexible and broad grant of home rule authority that the statutory scheme has granted code cities. “Home rule” refers to the authority of a local government to carry out its responsibilities in matters of local concern with a minimum of control by the state legislature and without reliance upon the legislature to grant it authority to act. A code city, like a first class city, has the same power to legislate with respect to local matters within its corporate limits as does the state itself, except where the state reserves that power to itself or where the exercise of that power by a code city is expressly prohibited by the state constitution or by the legislature. In contrast, a second class city has much more limited powers. It has only those powers expressly granted it by statute or those that are necessarily implied from those expressly granted.

In sum, as the state has urbanized and the desire for greater local self-government has increased, code city status represents a generally more appealing choice. If the incorporation petition fails to specify the classification of the proposed city, the petition is deemed to propose a code city.⁹

The chart on the following page summarizes the basic steps in the incorporation process.

Notice of Proposed Incorporation (RCW 35.02.015)

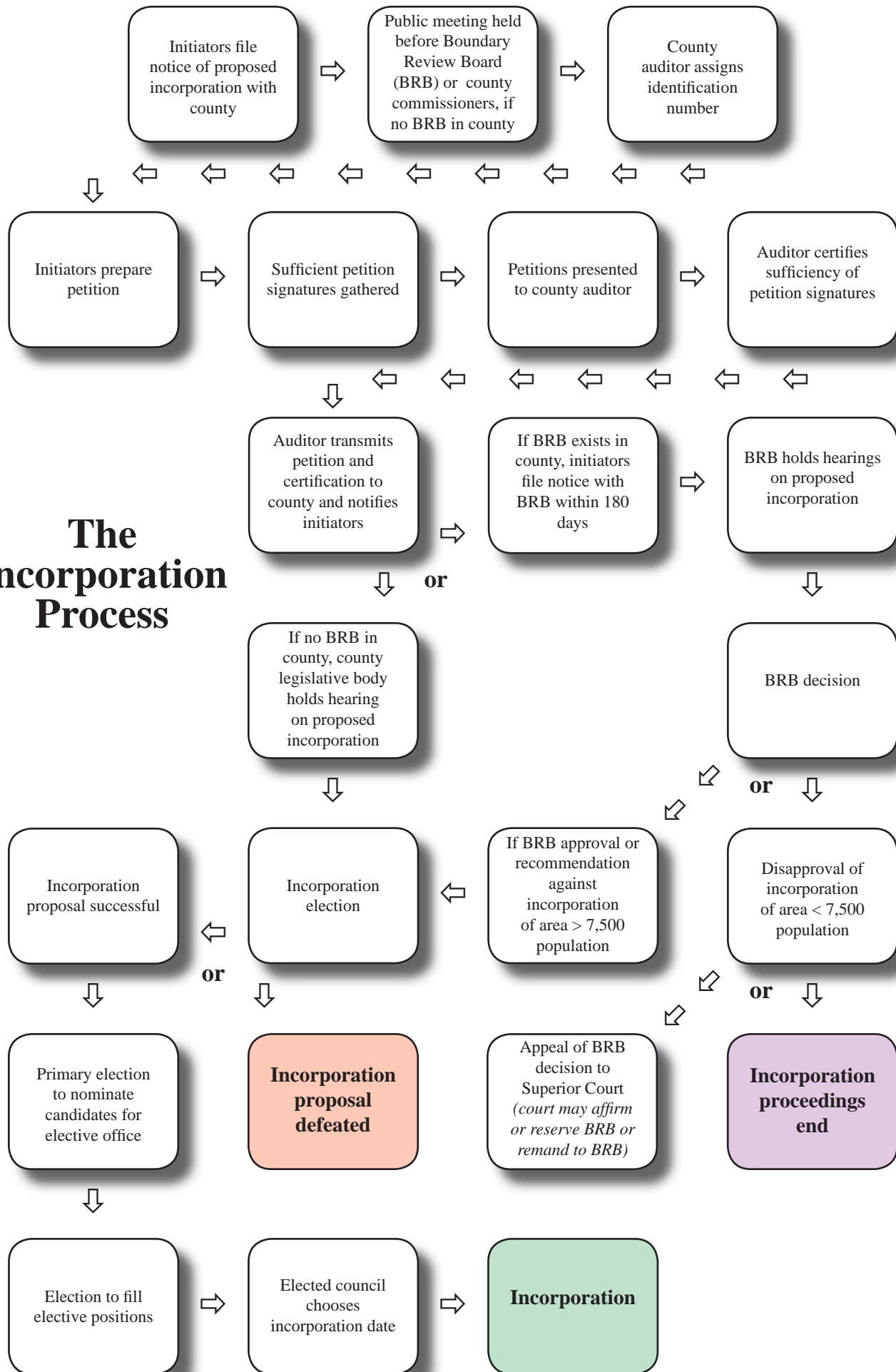
The first step in the incorporation process is to file a notice of the proposed incorporation with the legislative authority of the county in which all or the major portion of the proposed city is located. The notice must contain the information that is required for the incorporation petition, (see page 7 and discussion below), with the exception of the identification number (which the county has not yet provided) and the designation of the last date the petition may be filed with the county. A \$100 filing fee and an affidavit from the person filing the notice stating that he or she is a registered voter residing in the proposed city must accompany the notice.

⁷As a result of 1994 statutory amendments, the threshold population required to incorporate as a city is now 1500, up from 300. Consequently, it is no longer possible to incorporate as a town, which must, at least initially, have a population of less than 1500. Also, there is no statutory process to incorporate as a first class city, which is governed by a charter.

⁸The *Code City Handbook*, MRSC Report No. 37 (March 1997), provides detailed information on the code city classification.

⁹RCW 35.02.030.

The Incorporation Process



Public Meeting on Proposed Incorporation (RCW 35.02.015)

The second step requires the county legislative authority to “promptly” notify the boundary review board (BRB) of the proposed incorporation. The BRB must then hold a public meeting on the proposed incorporation. If the county has no BRB, the county legislative authority holds the public meeting. The meeting is intended to provide a forum where persons favoring and opposing the proposed incorporation can state their views. It does not have any procedural effect on the incorporation process other than to provide this forum.

The meeting is to be held “near” the proposed city, and at least one notice of it must be published in a newspaper of general circulation in the area proposed to be incorporated ten days prior to the meeting.

Identification Number for Proposed Incorporation (RCW 35.02.017)

Within one day of the public meeting, the county auditor must provide an identification number for the proposed incorporation to the person who filed the notice of the proposed incorporation. This number must be included on the incorporation petition.

Petition for Incorporation

Contents of the Petition

The information in the incorporation petition need not be the same as that in the notice of the proposed incorporation that was filed with the county auditor to begin the incorporation process. For example, the boundaries may be different, the population larger or smaller, etc. A petition to incorporate an unincorporated area is required by statute (RCW 35.02.030) to contain the following:

- An indication whether the proposed city or town will be a noncharter code city operating under Title 35A RCW or a city operating under Title 35 RCW. (The statute states specifically that, if the petition does not indicate this, the petition is deemed to propose incorporation as a code city.)
- The proposed form or plan of government (mayor-council or council-manager).¹⁰ If none is indicated, the petition shall be deemed to propose the mayor-council form or plan.
- A description of the proposed city boundaries;
- The name of the proposed city;
- An estimate of the number of inhabitants of the proposed city;
- A request that the city be incorporated;
- The identification number provided by county auditor; and
- The last date by which the petition may be validly filed, as determined under RCW 35.02.020.

¹⁰See pages 10-12, for a discussion of the mayor-council and council-manager forms.

Form of the Petition

The petition must conform to the requirements of RCW 35A.01.040.¹¹ Those requirements, as applied to an incorporation petition, can be summarized as follows (though the statute should be specifically consulted to ensure compliance with its provisions):

- The text of the petition must be a concise statement of the action sought by petitioners (compliance with the incorporation petition requirements in RCW 35.02.030 will satisfy this requirement);
- An accurate legal description of the area proposed for incorporation and, if practical, a map of the area;
- Numbered lines for signatures with space provided beside each signature for the name and address of the signer and the date of signing;
- An optional warning statement (on each signature sheet) that is set out in RCW 35A.01.040; and
- Petitions must be printed or typed on single sheets of “white paper of good quality.”

RCW 35A.01.040 also contains rules regarding the validity and withdrawal of signatures on a petition. If the proposed city is located in more than one county, the petition must be prepared in a form so as to indicate the different counties in which the signers reside.

Signing of the Petition

To be sufficient to initiate an incorporation proposal, the petition must be signed by registered voters who reside within the boundaries of the proposed city equal in number to at least ten percent of the number of voters residing within those boundaries. RCW 35.02.020. Information on the number of voters residing within the proposed boundaries can be obtained from the county auditor. It is important that the auditor be presented with an adequate and accurate description of the proposed boundaries so that an accurate voter count may be obtained.

Filing of the Petition with the County Auditor: Auditor’s Duties

An incorporation petition signed by the requisite number of voters must be filed with the county auditor *no later than* 180 days after the date of the public meeting on the proposed incorporation, or the next business day if the 180th day is not a regular business day. RCW 35.02.020. After the petition is filed with the auditor, the following must occur:

- Within 30 days of receiving the petition, the auditor must determine whether the petition contains a sufficient number of valid signatures. RCW 35.02.035.
- If the proposed city is located in more than one county, the auditor who receives the petition must immediately provide a copy of the petition to the auditor of the other county or counties in which the proposed city is located. Each of these other auditors must certify the number of valid signatures on the petition and transmit the certification to the auditor of the county with whom the petition was originally filed, who shall determine if there is a sufficient number of valid signatures. RCW 35.02.035.

¹¹See <http://www.mrsc.org/GovDocs/S35incorppt.pdf> for an example of an incorporation petition.

- If the petition is certified as having sufficient signatures, the auditor must transmit the petition and the certification to the legislative authority of the county or counties in which the proposed city is located. RCW 35.02.035.
- Within five days of the determination of sufficiency, the certifying auditor must notify those who submitted the petition of its sufficiency. The notice must be by certified mail and may also be by telephone. RCW 35.02.037.
- If a boundary review board or boards exist in the county or counties in which the proposed city is located, the petitioners must, after the determination of sufficiency, file notice of the proposed incorporation with the board or boards.¹² RCW 35.02.037.

Withdrawal of Petition or Substitution of New Petition

The petition may be withdrawn by a majority of its signers before, but not after, certification by the auditor. This same limitation applies to substitution of a new petition that either embraces other or different boundaries, proposes a different classification, or proposes a different form of government. RCW 35.02.150.

Competing Incorporation and Annexation Proposals (RCW 35.02.155)

Even after the filing of the incorporation petition, territory proposed for incorporation may be annexed by another city. For a period of 90 days after an incorporation petition is filed with the county auditor, an annexation involving territory proposed for incorporation may be initiated (by petition or council resolution) and may proceed through the statutory annexation process. Territory that is ultimately annexed as a result of an annexation being initiated during this 90-day period will be withdrawn from the incorporation proposal.

Alternatively, if an annexation involving territory proposed for incorporation is initiated during this 90-day period, the BRB, at its option, may consider the proposals simultaneously.

Any annexation proposal involving territory proposed for incorporation that is initiated after this 90-day period may not proceed unless: (1) the BRB (in counties where one exists) modifies the boundaries of the proposed annexation to exclude the territory proposed for incorporation; (2) the BRB disapproves the incorporation and the proposed city has a population of less than 7500; or (3) the incorporation proposal is defeated at the election.

If an annexation is initiated before an incorporation petition is filed or during the 90-day period discussed above, no territory in the proposed annexation may be incorporated as part of a new city unless: (1) the BRB removes the territory from the proposed annexation; (2) the BRB or annexation review board rejects the annexation; or (3) the city council rejects the proposed annexation or the voters defeat the ballot proposition for the annexation.

A mayor, particularly a full-time one, can form and implement a vision for the city's future and focus on that plan.

Political independence and full-time status make it possible for the mayor to participate in regional activities and issues. It may be easier for a city to be involved in processes that result in regional coordination and decisions.

¹²See page 17, for the procedure for filing this notice and initiating boundary review board review of the proposed incorporation.

Choosing the Form of Government for the Proposed City

The most significant decision concerning the administration and operation of the proposed city that must be made by the initiators of the proposed incorporation is choosing the form of government that the new city will have. Consequently, this publication will discuss and compare briefly the mayor-council and council-manager forms of government.¹³

Whichever form is chosen, the decision cannot be reversed and another form adopted until after six years of operation under the chosen plan. Abandonment of one plan and adoption of another must ultimately be decided at a special election. RCW 35.18.290-.310; RCW 35A.06.030-.050.

Mayor-Council Form – General Characteristics

Under the mayor-council form, which operates in 227 of the state's 281 cities, a popularly elected mayor has general administrative authority and is vested with the power of appointment and removal of city employees and appointed officials. The council sets the city's policies and the mayor carries out those policies. The mayor attends and presides over council meetings but does not vote, except in the case of a tie.¹⁴

Council-Manager Form – General Characteristics

Under the council-manager form, the only elected officials are the councilmembers, who select a city manager as the chief executive and administrative officer. The city manager, a professionally-trained administrator hired for an indefinite term, is vested with the power of appointment and removal of city officials and employees. The manager carries out the policies adopted by the council. The council is, however, prohibited from interfering with the manager's administration. The council selects a mayor from among its members or, in a code city, the mayor may be directly elected by the people. The mayor retains all the rights and duties of a councilmember, although he or she presides over council meetings and is the ceremonial head of the city. The mayor has no regular administrative duties.

Although only 53 of the 281 Washington cities have the council-manager form,¹⁵ the last 17 successful incorporations, beginning with Ocean Shores in 1970, have been as council-manager (and code) cities. In addition and during the same period of time, eleven cities have changed from either the mayor-council form (8) or the commission form (3) to the council-manager form. Only two cities during this period have changed from the council-manager to the mayor-council form. Clearly, the current trend is to operate under the council-manager form.

Arguments for the Mayor-Council Form (And Against the Council-manager Form)

Patterned after our traditional federal and state governmental structures, the mayor-council is the most familiar form, providing checks and balances within the framework of a separation of powers between the

¹³There are actually three possible forms – mayor-council, council-manager, and commission. The commission form, used now by only one city in the state, is not available to areas that incorporate as code cities. Because of this and the fact that it is disappearing as a form of city government in this state, it will not be discussed here.

¹⁴However, a code city mayor may break a tie vote only “with respect to matters other than the passage of any ordinance, grant, or revocation of franchise or license, or any resolution for the payment of money.” RCW 35A.12.100.

¹⁵Nevertheless, council-manager cities include approximately 45 percent of the incorporated population of the state and constitute approximately one-half of the cities in the 5,000-100,000 population range.

legislative and executive branches. Where the veto power is available, the mayor may serve as a check on ill-considered or hasty council action.

The city has, in the mayor, a political spokesman with a high degree of visibility. The mayor is the focus of political leadership who will, presumably, take cognizance of local politics and interest groups in administering the city's affairs. A mayor, particularly a full-time one, is more accessible to the public.

The mayor is elected for a fixed term and may be removed during that term only through the recall process. The mayor is subject to periodic review and possible removal by the voters at the municipal election. Of course, the voters may have a long wait before being able to electorally remove a mayor who demonstrates incompetency at the beginning of his or her term.

A city may create a city administrator or supervisor position and fill it with a skilled administrator to minimize possible weaknesses in the mayor's management background. This option enables a city to gain some of the advantages of a council-manager administration while retaining the mayor council form and its advantages. Also, this may enable a mayor to focus more, for example, on developing a vision for the city's future and on regional issues of importance to the city. Some local government observers have suggested that the trend of mayor-council cities to operate with a city administrator actually represents a convergence of these two forms of government.

In smaller cities (perhaps with 2,000 or less population), the salary for a professional administrator may be more than such cities can afford. A part-time mayor, on the other hand, may serve with little or no pay.

Arguments for the Council-Manager Form (And Against the Mayor-Council Form)

The council-manager plan is the only plan of local government that specifically mandates that there be a trained administrator. The statutes governing the council-manager plan specifically require that the manager be chosen "solely on the basis of his executive and administrative qualifications with special reference to his actual experience in, or his knowledge of, accepted practice in respect to the duties of his office." RCW 35.18.040; RCW 35A.13.050. The plan is intended to promote a more business-like and efficient city administration.

Since the city manager need not be a city resident (until appointed as the manager) and is most often recruited from outside the city, the pool of qualified candidates is much larger than the pool of individuals who may be inclined and qualified to be mayor in the council-manager form.

The council-manager form better provides for the administration of city business without the influence of politics. The result is greater objectivity in administrative decisionmaking, greater continuity in administration, and less likelihood of administrative fluctuations by reason of political pressure.

Because the city manager is responsible to the entire city council and the administration of the city is theoretically free from political intrusion, greater stability and continuity of administration over time is achieved. Some argue, however, that there is no greater stability or continuity since the average tenure of a city manager is approximately four to five years.

This form of government provides a greater opportunity than does the mayor-council form for removal of an incompetent administration (or for retention of a capable one). There is, similarly, less danger of abuse of authority with a city manager than with a mayor in the mayor-council form.

The council-manager form removes ceremonial duties from the chief administrative officer; those duties are vested with the mayor chosen by the council (or elected by the voters in some cities).

More distinct separation is provided between city administration, handled by the manager, and the legislative, policy issues, handled by the council. There is, however, likely to be more effective cooperation between the council and the city administration because the manager is the council's employee.

Incorporation Study

At some point early in the incorporation process, it likely will be necessary that some sort of study of the proposed incorporation be prepared. This study should analyze the impacts of an incorporation both within and without the boundaries of the proposed city. There is no statutory requirement of an incorporation study per se; however, if a proposed incorporation is reviewed by a boundary review board, that board is statutorily-mandated to consider an extensive list of factors affecting the proposal.¹⁶ RCW 36.93.170. Accordingly, the board must be presented with sufficient information on which to assess these factors. Some boards require preparation of a formal study. Although there are no similar statutorily-mandated factors that a county legislative authority must consider if the proposal is not reviewed by a boundary review board, the county legislative authority may wish to have before it similar information on the effects of a proposed incorporation.

Another important use of an incorporation study is to inform the voters regarding the proposed incorporation. A comprehensive and thoroughly researched incorporation study may help to ensure that the decision to incorporate will be an informed one.

A thorough incorporation study may also be useful to the new city officials if incorporation is approved by the voters. The information provided in such a study can help to guide initial decisionmaking.

Who Should Prepare and Who Should Pay for an Incorporation Study?

Up until about thirty years ago, the proponents of an incorporation, if anyone, typically prepared an incorporation study to provide answers to the many questions raised by the issue of incorporation. More organized efforts were the result of committees made up of representatives from various organizations and groups, as well as individual citizens, who had special interests in the area proposed to be incorporated. For example, a 1960 "Report of Mercer Island Study Group" identifies the study group as being "formed from representatives of the Community Clubs, the Chamber of Commerce, the Junior Chamber of Commerce, Mercer Island Lions Club, Recreation Council, Mercer Island Beach Club, and from members-at-large." The group interviewed experts in the field of government and developed its own reports in updating a 1953 study on governmental options for the island.

In 1971, the state legislature passed the State Environmental Policy Act (SEPA), and applied its provisions to proposed incorporations. As a result, proposed incorporations were accompanied by preparation of an Environmental Impact Statement, which functioned to a great extent as an incorporation study by analyzing the myriad impacts of that proposed action. In 1982, however, the legislature amended SEPA to specifically exclude incorporation of a city or town from its coverage. RCW 43.21C.220; RCW 36.93.170.

More recent incorporation studies have been for the most part prepared by professional consultants. The data and analysis necessary for the larger incorporations are generally beyond the capabilities of informal incorporation groups. Professionally prepared incorporation studies can, however, be costly.

For the most part, the costs of incorporation studies of recent incorporation attempts have been born by the county governments in which the incorporations have been proposed. Incorporation initiators should contact

¹⁶See pages 18-19.

the boundary review board, if there is one for their county, or the county legislative authority if no board exists, to determine what procedures exist for preparation and financing of incorporation studies. This should be done early in the process to ensure timely preparation of a study.

Whatever the genesis or whoever pays the cost, a thorough and comprehensive incorporation study now appears to be an essential requisite of the incorporation process.

Elements of an Incorporation Study

Although there is no statutory requirement of an incorporation study, such a study should, at least in those counties which have a boundary review board, address the factors that the boundary review board must, pursuant to RCW 36.93.170, consider. In general, however, an incorporation study might address many, if not all, of the following:

- Background on incorporation process, including statutory requirements, discussion of the form of government proposed, discussion of boundary review board review process (if applicable), and the transition period after election.
- Revenue sources available to local governments.
- Background information on the proposed city, including:
 - area included in proposed city
 - current estimate of population and future projections
 - proximity to other populated areas
 - existing land uses and housing
 - identification of prime and productive agricultural areas, if any
 - per capita assessed valuation
 - physical characteristics (e.g. topography, natural boundaries, and drainage basins)
 - community profile, including nature of local economy, assessed value, income and employment, community facilities, and community identity (as determined by survey of residents)
- Current services provided to community by:
 - county
 - special purpose districts (fire, water, sewer, library, irrigation etc.)
 - school districts
 - other county-wide authorities
 - state
- Operations of new city:
 - Analysis of tax and revenue options

- fire protection: establish own department, annex to fire protection district, or contract for service with a district
 - library service; establish own library system, annex to library district, contract with library district, or provide no library services
 - tax options
- Revenue estimates:
 - property taxes
 - other taxes and fees (e.g., sales tax, real estate excise tax, business license fees, building and planning fees, etc.)
 - state shared revenues
 - grants
 - fines and forfeitures
 - interest/investments
 - miscellaneous revenue
- Expenditures – proposed budget:
 - operating expenditures
 - staff levels
 - public safety
 - services delivery
 - public works
 - building department
 - planning department
 - parks and recreation
 - legal services
 - administration costs
 - other expenses
 - capital facilities and equipment expenditures
- Land use policy:
 - county comprehensive plan
 - county zoning regulations
 - community plans, if any

- county-wide planning policies, and multi-county planning policies in counties with population of 450,000 or more, if the county plans under the Growth Management Act (RCW 36.70A.210)
 - established urban growth areas, if any
 - shoreline management programs and policies, if any
 - development of new city's comprehensive plan, shoreline master program (if required), and environmental policies
 - coordination of new city's plans and policies with those of neighboring or nearby jurisdictions and with county
- Provision of services by new city and impacts upon current service providers:
 - public safety
 - public works
 - roads
 - surface water management
 - solid waste/recycling
 - judicial, legal, and correction services
 - public health
 - animal control
 - fire
 - water
 - sewer
 - parks and recreation
 - library
- Analysis of alternatives:
 - annexation to neighboring jurisdiction
 - reduced city alternatives
 - no action

Boundary Review Board Review

The 1967 legislature created boundary review boards in class AA and class A counties¹⁷ to provide an independent review agency at the local level that would have the authority and responsibility to oversee and regulate municipal and special district boundary changes, whether by annexation or incorporation. Boundary review boards may also now be created in any other county by following the procedure set out in RCW 36.93.030. The legislature created these boards based upon the following statutory purpose:

The legislature finds that in metropolitan areas of this state, experiencing heavy population growth, increased problems arise from rapid proliferation of municipalities and haphazard extension of and

¹⁷The 1994 legislature abolished the classification scheme for counties.

competition to extend municipal boundaries. These problems affect adversely the quality and quantity and cost of municipal services furnished, the financial integrity of certain municipalities, the consistency of local regulations, and many other incidents of local government. Further, the competition among municipalities for unincorporated territory and the disorganizing effect thereof on land use, the preservation of property values and the desired objective of a consistent comprehensive land use plan for populated areas, makes it appropriate that the legislature provide a method of guiding and controlling the creation and growth of municipalities in metropolitan areas so that such problems may be avoided and that residents and businesses in those areas may rely on the logical growth of local government affecting them.

RCW 36.93.010.

There now exist boundary review boards in the following counties: King, Pierce, Spokane, Snohomish, Clallam, Yakima, Kittitas, Kitsap, Thurston, Whatcom, Cowlitz, Skagit, Grant, Walla Walla, Benton, Douglas, Pacific, and Skamania. With the exception of the first four listed boards that were mandated by statute, the boundary review boards listed were created by resolutions of the respective county legislative bodies. Three counties – Franklin, Chelan, and Clark – have disbanded their boundary review boards under RCW 36.93.230. This statute allows a county that is subject to the Growth Management Act (GMA) to disband its board when the county and the cities and towns within it have all adopted comprehensive plans and consistent development regulations under the GMA.

Authority of the Boundary Review Board with Respect to Incorporation Proposals (RCW 36.93.150)

A boundary review board must review any incorporation proposed in the county in which it is located. A BRB may do any of the following with respect to an incorporation proposal:

- Approve the proposal as submitted.
- Modify (and approve) the proposal by adjusting boundaries to add or delete territory, subject to the following rules:
 - If the population of the proposed incorporation is 7500 or more, the BRB may not add or delete territory that constitutes 10 percent or more of the total area included within the proposal. However, the BRB may not delete territory so as to reduce the population below 7500. The area from which the ten percent may be added or deleted is the area that remains *after* the BRB, as discussed below, removes territory outside an urban growth area, removes territory annexed by a city, or removes territory for a competing annexation proposal.
 - The BRB *must* remove territory from the proposed incorporation that is not included within an urban growth area, even if the territory includes the *entire* area of the proposed incorporation. Under the GMA, urban growth areas are established around cities in counties subject to that legislation, and they are intended to define the geographic limits of growth characterized as “urban.” The intent of the removal requirement is to prevent the incorporation of new cities in rural areas in counties subject to the GMA. However, there is some question whether the county legislative authority in GMA counties that do not have a BRB are subject to this requirement when reviewing an incorporation proposal.
 - The BRB must remove territory that is annexed by a city.

- The BRB may remove territory of a competing annexation proposal that is initiated within the 90-day period following the filing of the incorporation petition.
- Disapprove a proposal for incorporation of an area of less than 7,500 population. If the board disapproves the proposed incorporation, it may not proceed. An incorporation proposal may be reinitiated with the board after 12 months have passed since the date of disapproval.
- Recommend against incorporation of an area with a population of 7,500 or more. The BRB may not disapprove a proposed incorporation of this size. When the BRB recommends against incorporation, the proposal is still submitted to the voters under the same schedule as if the BRB had approved the proposal. There is some question whether the board may recommend against incorporation *and* modify the boundaries subject to the ten percent restriction. This question will need to be resolved either by the courts or by the legislature.

Procedure for Board Review

Each board adopts its own rules of procedure that should be consulted prior to filing a notice of intention regarding a proposed incorporation. The boards and the incorporation initiators are, however, subject to the following statutory procedural requirements:

- The initiators of a proposed incorporation in a county in which a boundary review board has been established must file a notice of intention with the board within 180 days of when the incorporation is proposed.¹⁸ RCW 36.93.090. The initiators must pay a \$50 fee. RCW 36.93.120.

The notice of intention must contain the following (RCW 36.93.130):

- the nature of the action sought (i.e., incorporation of the designated area);
- a brief statement of the reasons for the proposed incorporation;
- the legal description of the boundaries proposed to be created;
- a county assessor's map, or another map acceptable to the board at its discretion, that designates the proposed boundaries.

Boundary Review Board Hearing (RCW 36.93.160)

- When its jurisdiction is invoked, the board must set the date, time, and place for a public hearing on the incorporation proposal.
- If the proposed city or town is located in more than one county, a public hearing must be held in each county, before the boundary review board of each county in which one exists, or before the county legislative authority or authorities where there is no boundary review board. Joint public hearings may be held by two or more boundary review boards. RCW 35.02.039.
- The board must give notice of the hearing to the following:

¹⁸Unfortunately, the statute is not clear as to exactly when the 180-day period begins based on “when it is proposed.” However, in a recent decision, the state supreme court held that, with respect to an annexation proposal, an annexation is “proposed” for purposes of this statute when the initiators of the annexation file their petition with the city. *Snohomish County Fire Protection District v. Wash. State Boundary Review Board*, 155 Wn.2d 70 (2005).

- the governing body of each governmental unit having jurisdiction within the area proposed to be incorporated;
 - the governing body of each city within three miles of the boundaries of the area proposed to be incorporated; and
 - the incorporation initiator(s).
- Notice of the hearing must be given as follows:
 - by publication in any newspaper of general circulation in the area of the proposed incorporation at least three times, the last publication of which must be at least five days prior to the hearing date;
 - by posting for five days in ten places in the area proposed to be incorporated; if the board is considering adding territory to the area proposed, the notice must include such territory.
- A verbatim record (e.g., tape recorded transcription or transcription by a court reporter) must be made of all testimony presented at the hearing. A copy of the transcript of the testimony must be provided to any person or governmental unit, upon request and payment of reasonable costs.
- The board has the power to issue subpoenas to any public officer and to compel the production by that officer of any records, books, documents, public records, or public papers.

Boundary Review Board Decision

- The board must, within 45 days of the conclusion of the hearing, file its written decision, which must set forth its reasons for the decision. RCW 36.93.160(4). The decision must be filed with the county legislative body and with the clerk of each governmental unit directly affected.
- The board is statutorily required in reaching its decision to consider the following factors affecting an incorporation proposal (as well as other relevant factors) (RCW 36.93.170):
 - population and territory of the area proposed to be incorporated;
 - population density;
 - land area and land uses;
 - comprehensive plans and development regulations;
 - per capita assessed valuation;
 - topography, natural boundaries, and drainage basins, proximity to other populated areas;
 - the existence and preservation of prime agricultural soils and productive agricultural uses;
 - the likelihood of significant growth in the area and in adjacent incorporated and unincorporated areas during the next ten years;
 - location and most desirable future location of community facilities;

- municipal services and need for municipal services;
- present cost and adequacy of governmental services and controls in area;
- prospects of governmental services from other sources;
- probable future needs for such services and controls;
- probable effect of proposal or alternative on cost and adequacy of services and controls in area and adjacent area;
- the effect on the finances, debt structure, and contractual obligations and rights of all affected governmental units; and
- the effect of the proposal or alternative on adjacent areas, on mutual economic and social interests, and on the local governmental structure of the county.

These are factors that an incorporation study in a county in which there is a boundary review board should also address.

- In reaching its decision, the board is required to “attempt to achieve” the following objectives (RCW 36.93.180):
 - preservation of natural neighborhoods and communities;
 - use of physical boundaries, including but not limited to bodies of water, highways, and land contours;
 - creation and preservation of logical service areas;
 - prevention of abnormally irregular boundaries;
 - discouragement of multiple incorporations of small cities and encouragement of incorporation of cities in excess of ten thousand population in heavily populated urban areas;
 - dissolution of inactive special districts;
 - adjustment of impractical boundaries;
 - incorporation as cities or towns or annexation to cities or towns of incorporated areas which are urban in character; and
 - protection of agricultural and rural lands which are designated for long term productive agricultural and resource use by a comprehensive plan adopted by the county.

The board may not modify or disapprove a proposed incorporation unless there is evidence on the record (hearing testimony and all information, comments, studies, data, etc., presented to the board) to support a conclusion that the proposed incorporation is inconsistent with one or more of the above objectives. RCW 36.93.150(5). A decision to modify or deny a proposed incorporation must be made in writing pursuant to a motion, and it must be supported by appropriate written findings and conclusions based on the record. Id.

Appeal of Boundary Review Board Decision (RCW 36.93.160(5))

- If the decision is by a panel of the board (not less than five members) and is not unanimous, or if it is not made by a majority of the members of the entire board, it is appealable to the entire board within ten days. Appeals are on the record, which must be furnished by the appealing party, although the board may at its discretion allow the introduction of additional evidence and argument.
- Decisions by the entire board on appeal and unanimous decisions by a panel of the board are final unless a notice of appeal is filed in the superior court within 30 days of the decision. Those entitled to appeal are any governmental unit affected by the decision and any person owning real property or residing in the area affected by the decision.
- The filing of an appeal within the ten-day appeal period in the superior court stays the effective date of the board's decision until the appeal is either withdrawn or adjudicated. On appeal, the superior court may not review any evidence other than that on the record of the hearing before the board.
- On appeal, the superior court may do any of the following:
 - affirm the board's decision;
 - remand to the board for further proceedings; or
 - reverse the board's decision "if any substantial rights have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
 - In violation of constitutional provisions, or
 - In excess of the statutory authority or jurisdiction of the board, or
 - Made upon unlawful procedure, or
 - Affected by other error of law, or
 - Unsupported by material and substantial evidence in view of the entire record submitted, or
 - Clearly erroneous."¹⁹
- The decision of the superior court may be appealed to the appellate courts in the manner in which other civil cases are appealed.

Disbanding of Boundary Review Board

A county legislative authority may disband the boundary review board after the county and the cities and towns within it have adopted comprehensive plans and consistent development regulations pursuant to the Act. RCW 36.93.230.

¹⁹A decision "is clearly erroneous when, although there may be evidence to support it, the reviewing court on the entire record is left with the firm and definite conviction that a mistake has been committed." *Dep't of Ecology v. Pub. Util. Dist. No. 1*, 121 Wn.2d 179, 204 (1993).

Review in Counties Without a Boundary Review Board – or If the Board Does Not Take Jurisdiction

When County Review Is Necessary

- The legislative authority of the county in which the city is proposed must hold a public hearing on the proposed incorporation if no boundary review board exists in the county. RCW 35.02.039.
- The hearing must be held within 60 days of when the county auditor notifies the legislative authority of the sufficiency of the incorporation petition.
- The hearing may be continued to other days but may not extend more than 60 days beyond the initial hearing date.
- If the proposed city is located in more than one county, a public hearing must be held in each of the counties by the respective county legislative bodies, although the hearings may be held jointly.

Notice of Hearing by County

The notice of the public hearing by the county legislative body must be by one publication, not more than ten or less than three days prior to the hearing date, in one or more newspapers of general circulation within the area proposed to be incorporated. The notice must include the time and the place of the hearing. (RCW 35.02.040.)

County Legislative Body's Decisionmaking Authority

If the county legislative authority holds a public hearing on the proposed incorporation:

- It has jurisdiction only over that portion of the proposed incorporation located within the boundaries of the county. RCW 35.02.070(3).
- It must establish the boundaries of the proposed city. RCW 35.02.070(1).
- It may modify the incorporation proposal by changing boundaries to add or delete territory, subject to the same restrictions that apply to the BRB. (Whether this means that the county legislative body has the authority to remove territory that is outside of an urban growth area is not entirely clear.)
- It must determine the population within the boundaries it has established. RCW 35.02.070(1).
- It must disapprove the proposed incorporation if, without decreasing the area proposed, the population does not conform to the requirements of RCW 35.02.010, dealing with threshold population requirements. It may not otherwise disapprove a proposed incorporation. RCW 35.02.070(2).

Clearly, the county legislative body possesses much less authority over a proposed incorporation than does a boundary review board. See pages 16-17, *supra*.

Elections on Incorporation

An election must be held on the proposed incorporation if the boundary review board approves or modifies and approves the proposal (or regardless of approval, if the proposed population is greater than 7,500), or if the county legislative body does not disapprove the proposal under RCW 35.02.070(2) (for having insufficient population). RCW 35.02.078.

The election on incorporation is to be held at the next special election date (specified in RCW 29A.04.330) that occurs 60 or more days after the final hearing by the county legislative authority or authorities or after the approval or modification and approval by the boundary review board or boards. RCW 35.02.078. The special election dates specified in RCW 29A.04.330 are: (1) the first Tuesday after the first Monday in February; (2) the second Tuesday in March; (3) the first Tuesday after the first Monday in April; (4) the fourth Tuesday in May; (4) the day of the primary election as specified by RCW 29A.04.310 (the third Tuesday of the preceding August); and (5) the first Tuesday after the first Monday in November.

The county legislative authority or authorities must call for the election and, if incorporation is approved at the election, must then call for elections to elect the elected officials for the new city. Separate elections must be held, first, to nominate candidates for elective positions and, second, to fill the elective offices from those nominated.

If the incorporation is defeated at the election, with the vote in favor receiving 40 percent or less of the total vote, no new election on the question of incorporation for the area or any portion of the area proposed to be incorporated may be held for a period of three years from the date of the election at which incorporation was defeated. RCW 35.02.078.

Election on Question of Incorporation

- *Notice of election.* The notice of the incorporation election must be in accordance with RCW 29A.52.350, which provides that the notice must be published not more than ten nor less than three days before the election in one or more newspapers of general circulation in the county. The notice must include the ballot title and the hours during which the polls will be open, and must note that the election will be held at the regular polling places in each precinct, giving the address of each polling place. In addition, RCW 35.02.100 requires that the notice describe the boundaries of the proposed city, its name, and the population, as determined by the county legislative authority or the boundary review board.
- *Ballots.* The ballots for the election on the question of incorporation must contain the words “for incorporation” and “against incorporation” or equivalent language. RCW 35.02.110.
- *Conduct of election.* The election must be conducted in accordance with the general election laws of the state, as modified by the incorporation statutes in ch. 35.02 RCW.
- *Voters' qualifications.* No person may vote on the question of incorporation or for the nomination and election of the initial elected officials unless he or she is a qualified electors²⁰ of the county, or of any one of the counties in which the proposed city is located, *and* has resided within the limits of the proposed city for at least 30 days before the election date. RCW 35.02.090.

²⁰Under article 6, section 4 of the state constitution, a qualified elector is, unless otherwise disqualified, one who is 18 years of age or over, is a United States citizen, and who has lived in the state, county, and precinct for 30 days preceding the election.

- *Certification of results.* The city will become incorporated if a majority of the votes cast are for incorporation. If the proposed city is located within more than one county, the auditors of the county or counties in which the smaller portion or portions of the proposed city is located must forward a certified copy of the election results to the auditor in the county in which the major portion is located. This auditor must add these totals to the total in his or her county and certify the results to each of the county legislative authorities. RCW 35.02.120.

Primary Election to Nominate Candidates

The primary election to nominate candidates for elective office must be held at the next special election date that occurs 60 or more days after the (successful) election on the question of incorporation. RCW 35.02.078.

- *Filing by candidates.* Each candidate for an elective position must file a declaration of candidacy with the auditor of the county in which all or a major portion of the city is located, although exactly when they may file that declaration is, as a result of 2006 legislation, uncertain.²¹ The elective positions are determined by the laws governing the classification of the city and the form of government specified in the incorporation petition and by the population of the city as determined by the county legislative body or the boundary review board where applicable. Any candidate may withdraw his or her declaration at any time within five days after the filing deadline. RCW 35.02.086.
- *Notice of election.* Must be provided as in RCW 29A.52.350, as discussed, supra. In addition, the names of all candidates for nonpartisan offices (all elective city offices) are to be published separately with the designation of the office for which they are candidates, but without party designation.
- *Election ballot.* The candidates' names are to appear on the ballot alphabetically in groups under the designation of the respective titles of offices for which they are candidates. Candidates' names on the ballot need not be rotated. RCW 35.02.110.

Election to Fill Elective Positions

This election must be held at the next special election date, as specified in RCW 29A.04.330, that occurs 30 or more days after certification of the primary election results. RCW 35.02.078. The notice and ballot requirements, discussed above, apply.

Liability of Newly Incorporated City for Costs of Elections

A newly incorporated city is liable for its proportionate share of the cost of all elections, after the election on the question of incorporation, at which an issue relating to the city is placed before the voters, as if the city was in existence after the incorporation election. RCW 35.02.125.

²¹In ESB 6236 (Ch. 344, Laws of 2006), the legislature amended the state primary election date and, consequently, the filing period for that primary election. However, in changing the candidate filing date for the state primary election, the legislature amended RCW 35.02.086 with respect to the candidate filing period for the primary for an interim city council of a to-be-incorporated city to make that period occur only in June. That obviously presents a problem for primary elections for an interim city council, which can occur at any special election date during the year. We assume that the 2007 legislature will address and correct this problem, but 2007 legislation should be checked to make sure.

Effective Date of Incorporation

The city will be officially incorporated at a date from 180 to 360 days after the election on the question of incorporation, as specified in a resolution adopted by the city council. An “interim period” will exist between the time the newly elected officials are elected and qualified and this official date of incorporation. During this interim period, the elected officials will have the power, among other things, to:

adopt ordinances and resolutions which shall become effective on or after the official date of incorporation, and to enter into contracts and agreements to facilitate the transition to becoming a city or town and to ensure a continuation of governmental services after the official date of incorporation.

RCW 35.02.130. During this interim period, the council has the responsibility to (or begin to), among other things, hire staff, provide for city hall and other facilities, develop a budget, prepare a comprehensive plan and zoning regulations, contract for or otherwise provide essential services, establish the basic authority, structure, and mechanisms for financing city activities, contract for insurance, establish council procedures, and establish a salary schedule and benefit program and a personnel policy for city officials and employees.

The powers and duties of the interim city council, as well as the laws to which it is subject, are identified in RCW 35.02.130 - .210.