



## Legislation Text

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File #: 18-710, Version: 2

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**TO:** Mayor and Members of City Council

**THRU:** Kristoff Bauer, ICMA-CM - Deputy City Manager

**FROM:** Gerald Newton, AICP - Development Services Director  
Taurus Freeman - Planning and Zoning Divisional Manager  
David Nash, AICP - Senior Planner

**DATE:** March 25, 2019

**RE:**  
Consideration of a Resolution Regarding the Incorporation of the Proposed Town of Rockfish

**COUNCIL DISTRICT(S):**  
All

**Relationship To Strategic Plan:**

Goal II - Diverse and Viable Local Economy

**Executive Summary:**

The Rockfish Community Board has proposed that a new Town of Rockfish be incorporated in the eastern part of Hoke County. This town would be adjacent to the City of Fayetteville. The North Carolina General Assembly has the authority to approve or deny a bill to incorporate. There is a constitutional restriction on this authority based on nearness to an existing municipality. The General Assembly has established the Joint Legislative Commission on Municipal Corporations (the Commission) to study proposals to incorporate and to make recommendations. Pursuant to the rules adopted by the North Carolina House and Senate, a bill to incorporate will not be considered in committee or on the House or Senate floor unless the bill is accompanied by a recommendation from the Commission. The rules have not required a positive recommendation prior to consideration or debate. The Fayetteville City Council can affect the Commission's recommendation by adopting a resolution. It is recommended that the City Council adopt a resolution in opposition to the incorporation of the proposed Town of Rockfish.

**Background:**

**Overview of the Proposal to Incorporate the Town of Rockfish**

An organization named the Rockfish Community Board has proposed that a new Town of Rockfish be incorporated in the eastern part of Hoke County. This town would be adjacent to the City of Fayetteville.

In a letter dated February 27, 2018, Mr. Larry Chason, the Chairman of the Rockfish Community Board, notified Mayor Colvin that the board intended to incorporate the Town of Rockfish. Mr. Chason also said that the incorporators intend to file the petition with the state in the near term (see Incorporation of the Town of Rockfish - Letter).

In the letter, Mr. Chason also said that the boundaries of the Town of Rockfish are not located within the boundary of the City of Fayetteville. He enclosed a map and legal description for review.

The letter also stated that pursuant to 120-166(b)(3), “We anticipate your positive support and look forward to your response.” The letter included a “Legal Notice of Endorsement” prepared under the Mayor’s name. It stated: “This is to memorialize the full and favorable endorsement from the city of Fayetteville concerning the incorporation initiative of the citizens of Rockfish, North Carolina.....Given this day, \_\_\_\_\_, (Date to be filled in).

Based on mapping files submitted to the City on December 13, 2018, City staff has prepared a map of the proposed Town. See PDF map, attached. Also, click the following link for a larger PDF map:

[https://www.dropbox.com/s/2ztjhamf86ohbd5/Boundaries%20of%20the%20Proposed%20Town%20of%20Rockfish ESize Portrait 121418a.pdf?dl=0](https://www.dropbox.com/s/2ztjhamf86ohbd5/Boundaries%20of%20the%20Proposed%20Town%20of%20Rockfish%20ESize%20Portrait%20121418a.pdf?dl=0)

A search on the General Assembly’s website on March 19, 2019 did not find any evidence that an incorporation bill has been filed for the proposed Town of Rockfish.

### **Overview of Incorporation Law in North Carolina**

In North Carolina, a new city may be incorporated in only one way: by an act of the General Assembly. An incorporation act enacts a city’s charter and sets its initial borders. No standards restrict the General Assembly’s discretion in incorporating a city. The legislature may incorporate an area with few people or having a rural character. The legislature can even incorporate an area before urban development exists.

**A Constitutional Restriction** - The single constitutional restriction on the legislature’s power to incorporate is found in Article VII, Section 1, of the state constitution. This restriction says that if a new town is proposed for incorporation within one mile of an existing city with a population of 5,000 or more, or within three miles of a city with 10,000 or more, or within four miles of a city with 25,000 or more, or within five miles of a city of 50,000 or more, then the General Assembly may incorporate the town only if three-fifths of all the members of each house approve the incorporation act.

Some consider this constitutional restriction to be a “protection” for existing cities in North Carolina. Some have argued that this restriction represents the state’s “implicit urban policy”: annexation of urban areas by existing cities should be favored over the incorporation of new cities. (However, this policy was weakened in 2011 and 2012 by changes to the State’s involuntary annexation law.)

**The Role of the Joint Legislative Commission on Municipal Incorporations** - In 1986, the General Assembly created the Joint Legislative Commission on Municipal Incorporations (Commission). This was codified at G.S. 120-158 through 174.

A very useful document explains the role of the Commission. The document is entitled, "Summary of Municipal Incorporation Procedure in North Carolina." It is available on the Legislative Publications page of the North Carolina Legislative Library website. See attached.

Section I of this document says that the Commission is made up of six members: two Senators, two House members, one city manager or elected city official, and one county commissioner or county manager. Section 1 also explains staff support and it says that the Commission may contract with various entities to prepare studies required by law and to perform other services necessary for the review of petitions.

**Section 1 concludes with this very important paragraph:**

"The legislation creating the Commission does not require the Commission to first consider a petition to incorporate before a bill to incorporate can be considered by the House of Representatives or the Senate. **However, in past years, both the House and Senate have adopted rules providing that a bill to incorporate will not be considered in committee or on the House or Senate floor unless the bill is accompanied by a recommendation from the Commission.** The rules have not required a positive recommendation prior to consideration or debate." (Summary of Municipal Incorporation Procedure in North Carolina, Section I, page 1, third paragraph. Emphasis added.)

Have Similar Rules Been Adopted in 2019? Yes. A search on the General Assembly's website on March 19, 2019 shows that the Senate and the House have adopted similar rules for the 2019 session regarding incorporation. (See Senate Resolution 1, adopted January 9, 2019- Rule 42.3. Also, see House Resolution 16, adopted 2/6/19-Rule 35.1.)

**Procedures Used by the Joint Legislative Commission on Municipal Incorporations**-Since the rules of the House and Senate provide that a bill to incorporate will not be considered in committee or on the House or Senate floor unless the bill is accompanied by a recommendation from the Commission, it is important to review the procedures used by the Commission.

Section II of the Procedure document spells out the procedures the Commission will use in reviewing proposed incorporations and in formulating recommendations.

Section IIA sets forth what a petition to incorporate must contain. One key requirement is that the petition must include a list of at least four (4) services to be provided.

Section IIB sets forth Notification Requirements.

Section IIC, Initial Inquiry, says that if previous petition and notice requirements have been met, the Commission will conduct further study.

Section IID discusses the subject of "Nearness to another municipality." This section repeats the constitutional

distances based on city size that were discussed above. For example, if the proposed city is within five miles of a city with a population of 50,000 or more, the Commission may not make a positive recommendation for the proposed incorporation unless the proposed city can show one of the four exceptions in G.S. 120-166(b) applies. The most common exception is that the existing city must adopt a resolution expressly approving incorporation of the proposed city. "It is insufficient for the resolution to state that the municipality's governing body is neutral about incorporation or does not oppose incorporation; it must expressly approve incorporation."

Section IIE discusses the population and population density requirements. This section requires that the permanent population of the proposed city be at least 100 persons. It also requires that the population density must be at least 250 persons per square mile.

Section IIF sets forth the degree to which the proposed city should be developed, in terms of land use. At least 40 percent (40%) must be developed for the following uses: residential, commercial, industrial, institutional, governmental, or open space.

Section IIG states that no part of the proposed city can be within the boundary of an incorporated city.

Section IIH states that a proposed city must prepare and submit a plan for how it will provide a reasonable level of service. This section also says that the Commission will assess the financial impact on the county and on other cities, (i.e., in terms of the redistribution of sales tax revenue).

### **Issues/Analysis:**

Two requirements mentioned in the preceding Background section are discussed below: nearness to another municipality and area unincorporated. In addition, some long-term impacts on the City of Fayetteville are discussed.

**Nearness to another municipality** - This requirement means that the proposed town must not be near an existing city. The proposed Town of Rockfish, if incorporated, would not only be near the City of Fayetteville, it would be adjacent to the City of Fayetteville.

**Conflict with State Constitution** - Being adjacent to the City of Fayetteville means that the Town of Rockfish would be in conflict with a sentence in the state constitution. The sentence says, "The General Assembly shall not incorporate as a city or town, nor shall it authorize to be incorporated as a city or town, any territory lying within ....five miles of the corporate limits of any other city or town having a population of 50,000 or more..." It should be noted that the next sentence in the constitution says, "Notwithstanding the foregoing limitations, the General Assembly may incorporate a city or town by an act adopted by vote of three-fifths of all the members of each house."

**Assumed implications:** If a majority of the votes in the House and Senate are in favor of incorporating Rockfish, but the votes in favor are less than three-fifths, then the incorporation would not be approved.

**How does the Joint Legislative Commission on Municipal Incorporations handle this "Nearness to another**

municipality” standard? According to the Commission’s Procedures document, the Commission may not make a positive recommendation for the incorporation of the proposed city unless the proposed city can show that one of the exceptions [in G.S. 120-166(b)] applies. There are four exceptions possible. Each is discussed below.

- (1) The proposed municipality is entirely on an island that the nearby city is not on. Applicable to Rockfish? No.
- (2) The proposed municipality is separated by a major river or other natural barrier from the nearby city, such that provision of municipal services by the nearby city to the proposed municipality is infeasible or the cost is prohibitive. Applicable to Rockfish? No. Stewarts Creek does separate the proposed Town of Rockfish from the City of Fayetteville, but this is not a major river or other natural barrier that would make the provision of services infeasible or cost prohibitive. An existing road (Barefoot Road) passes over Stewarts Creek and provides access between the City of Fayetteville and the proposed town of Rockfish. NCDOT plans to upgrade Barefoot Road when the I-295-Strickland Bridge Road interchange is built.
- (3) The municipalities within the distances described in subsection (a) of this section by resolution express their approval of the incorporation. According to the Commission’s Procedures, this is the most common exception. Any cities within the distances proscribed...must adopt a resolution expressly approving incorporation of the proposed city. It is insufficient for the resolution to state that the municipality’s governing body is neutral about incorporation or does not oppose incorporation; it must expressly approve incorporation. Applicable to Rockfish? Only if the City Council decides it is willing to adopt a resolution expressly approving the incorporation of Rockfish. It should be noted that Mr. Chason’s letter of February 27, 2018 apparently anticipated this issue; Mr. Chason’s letter included a “Legal Notice of Endorsement.” However, even if the City Council voted in favor of “endorsing” the incorporation, the Legal Notice of Endorsement is not technically a Resolution expressly approving incorporation that would be required by the Commission.
- (4) An area of at least fifty percent (50%) of the proposed municipality has petitioned for annexation to the nearby city under G.S.160A-31 within the previous 12 months before the incorporation petition is submitted to the Commission but the annexation petition was not approved. Applicable to Rockfish? No. No annexation petitions have been submitted.

**Area unincorporated** - This requirement means that the proposed city must be made up of unincorporated area, not incorporated area. No part of the proposed city can be included within the boundary of an incorporated municipality, or within the boundary of a unified government (a county that operates like a city because it meets certain criteria as defined in the General Statutes). In Mr. Chason’s letter of February 27, 2018, he said that the boundaries of the Town of Rockfish are not located within the boundary of the City of Fayetteville. He enclosed a map and legal description for review.

Staff’s Review - Because of the poor quality of the map originally provided by Mr. Chason in his letter of February 27, 2018, it was difficult for City Staff to assess this requirement. Numerous phone calls occurred between April and December. A better map was finally provided on December 13, 2018 by the surveyor working for the Rockfish organization. This allowed City Staff to overlay the proposed Town of Rockfish boundaries on the existing boundaries of the City of Fayetteville. If one zooms in to the common boundary between Cumberland County and Hoke County (which will be the common boundary between the Town of Rockfish-if incorporated-and the City of Fayetteville), one can see that there is some overlap. In certain places, the boundary of the proposed Town appears to be within the City of Fayetteville. However, it is likely that this is a function of different versions of the county boundary used by the property tax mappers in both Hoke County and Cumberland County. The boundary is supposed to be along Stewarts Creek, but it has probably been difficult for the tax mappers to know exactly where this creek is located.

Conclusion: If City staff assumes that the intent is for the boundary of the proposed town to run along

Stewarts Creek, it seems reasonable to assume that there is no real overlap. So, it can be concluded that the proposed town of Rockfish would be made up of unincorporated area.

**Long-Term Impacts on the City** - If the General Assembly incorporates the proposed Town of Rockfish, there might be long-term impacts on the City.

Impact on Growth to the West - One impact is that the City of Fayetteville would never be able to grow westward in the direction of the Town of Rockfish. Hoke County is one of the fastest-growing counties in North Carolina, and much of the growth in Hoke County has been occurring in the eastern part of the County, adjacent to the City of Fayetteville. The upcoming construction of the Interstate-295, Fayetteville's Outer Loop, will probably stimulate even more growth. At the present time, it is not possible for Fayetteville to consider annexing in the direction of Hoke County, due to the changes in the state annexation law enacted in 2011 and 2012, and due to the need for installing utilities in the neighborhoods annexed in 2005. However, it is possible that these laws might be revised in the future. Also, utilities will eventually be installed in the neighborhoods annexed in 2005. But, if Rockfish has been allowed to incorporate, then the City would not be able to even consider growing into the Rockfish part of Hoke County. (Note: It is not believed that there are any state laws prohibiting a City from growing into another county.)

Extension of PWC Utilities into Hoke County-Another possible impact concerns the extension of utilities into Hoke County by the Public Works Commission. There is some evidence that either PWC sewer lines have already been extended into Hoke County in neighborhoods located north of the proposed Town of Rockfish, or that PWC is currently treating sewage from these neighborhoods. If Rockfish is allowed to incorporate, then Rockfish might be able to eventually annex these neighborhoods. If this happens, it would be somewhat ironic for PWC to become the sewer provider for neighborhoods in the Town of Rockfish.

### **Budget Impact:**

NA

### **Options:**

1. Adopt a resolution opposing the incorporation of the proposed Town of Rockfish (recommended).
2. Adopt a resolution expressly approving the incorporation of the Town of Rockfish.

### **Recommended Action:**

Option 1-Adopt a resolution opposing the incorporation of the proposed Town of Rockfish.

Reasons:

1. Opposing the incorporation of the Town of Rockfish would be consistent with the restriction written into the state constitution, which represents a protection for existing cities.
2. Opposing the incorporation of the Town of Rockfish might allow the City to be able to grow westward in the direction of Rockfish in the future. This might not seem very important now, but in the long-term, as more growth occurs in the eastern part of Hoke County, due to the construction of the nearby I-295 Outer Loop, this might turn out to be very important.

Note: If the City Council opposes the incorporation by adopting the negative resolution, then this will probably affect the findings of the Joint Commission. It can be expected that the Commission would make a negative recommendation to the General Assembly. However, the General Assembly could still consider and debate the Rockfish incorporation bill, without a positive recommendation from the Commission. The General Assembly could then still incorporate the Town of Rockfish, if three-fifths of its members in both houses approve the bill.

### **Attachments:**

- Incorporation of the Town of Rockfish - Letter from Mr. Larry Chason, dated February 27, 2018.
- Map of the Proposed Town of Rockfish. (PDF Map)
- Summary of Municipal Incorporation Procedure in North Carolina. Copied from the Legislative Publications page of the North Carolina Legislative Library website.
- Resolution Opposing the Incorporation of the Proposed Town of Rockfish (not yet created)
- Resolution Expressly Approving the Incorporation of the Proposed Town of Rockfish (not yet created)

### **Additional Sources Consulted**

- Lawrence, David. 1996. Chapter 3-"Incorporation, Abolition, and Annexation." In Municipal Government in North Carolina. Second Edition. Institute of Government. Chapel Hill, NC.
- Senate Resolution 1, adopted January 9, 2019- Rule 42.3. (Accessed on March 19, 2019.)
- House Resolution 16, adopted 2/6/19-Rule 35.1. (Accessed on March 19, 2019.)