

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

CITY OF PELICAN, COMMUNITY OF  
ELFIN COVE, CITY OF GUSTAVUS,  
CITY OF TENAKEE SPRINGS,

Appellants,

v.

LOCAL BOUNDARY COMMISSION,

Appellee.

Filed in the Trial Courts  
STATE OF ALASKA, FIRST DISTRICT  
AT JUNEAU

APR 18 2025

By WD Clerk

Case No. 1JU-25 - 0060401

**MOTION AND MEMORANDUM IN SUPPORT OF MOTION TO STAY THE  
LOCAL BOUNDARY COMMISSION'S DECISION APPROVING THE  
FORMATION OF THE XUNAA BOROUGH**

On March 20, 2025, the Local Boundary Commission ("LBC"), contravening the recommendation of its staff, approved the City of Hoonah's Petition for the Dissolution of the City of Hoonah and the creation of the Xunaa Borough by a narrow 3-2 vote.<sup>1</sup> The Appellants, Cities of Pelican, Gustavus and Tenakee Springs (outside of the proposed borough) and the community of Elfin Cove<sup>2</sup> (located inside the proposed borough), now appeal the LBC's deeply flawed decision.

The City of Hoonah petitioned to create a new borough that takes control over

<sup>1</sup> The March 20, 2025 majority decision was attached as Exhibit 1 to the Notice of Appeal. That decision also incorporates the 12/20/2024 majority decision attached as Exhibit 2. Dissenting opinions were provided as Exhibit 3 and 4 with the Notice of Appeal.

<sup>2</sup> Gustavus is a Second-Class City; Pelican is First Class City; Tenakee Springs is a Second-Class City; Elfin Cove is an incorporated non-profit entity in Alaska.

huge areas of land and water without adding any significant population to govern. The original petition requested approval for a new Xunaa Borough of 10,400 square miles of land and water, while limiting services (beyond the minimum required by law) to the current City of Hoonah townsite.<sup>3</sup> To illustrate the overreach of this proposal, consider that the proposed Xunaa borough would be inhabited by approximately 951 residents, and at 10,403 square miles of land and water would be approximately equal to the combined total area of the three closest boroughs: the City and Borough of Sitka (4,808 square miles of land and water),<sup>4</sup> the City and Borough of Juneau (3,082 square miles of land and water)<sup>5</sup>, and the Haines Borough (2,732 square miles of land and water).<sup>6</sup> The proposed borough is also three times larger than the City and Borough of Wrangell,<sup>7</sup> over two and half times larger than the size of the Petersburg Borough,<sup>8</sup> and 33% (3,400 square feet) larger than the Ketchikan Gateway Borough (the largest borough in Southeast Alaska).<sup>9</sup> The area is larger than the states of Rhode Island, Connecticut and

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<sup>3</sup> See Exh. 6 at 2: Select pages of Hoonah's Final Petition. Full petition available on the world wide web at: <https://commerce.alaska.gov/web/dkra/LocalBoundaryCommission/CurrentandPastPetitions/2023CityofHoonahPetition.aspx>, last accessed April 16, 2025.

<sup>4</sup> The City and Borough of Sitka is the second largest incorporated municipality by size in the United States with a population of 8,881, available on the world wide web: <https://www.cityofsitka.com/about-sitka>, last accessed April 15, 2025.

<sup>5</sup> City and Borough of Juneau (a population of 32,739), available on the world wide web: <https://Juneau.org/manager/visitor-information>, last accessed on April 15, 2025.

<sup>6</sup> See the 2035 Haines Borough Comprehensive Plan, at 6, available on the world wide web: <https://www.hainesalaska.gov/media/90051>, last accessed April 15, 2025.

<sup>7</sup> City and Borough of Wrangell is roughly twice the size of Rhode Island with a population of 2,058 and 3,465 square miles of land and water. See the 2010 Wrangell Comprehensive Plan at 1 and 24, available on the world wide web at: <https://www.wrangell.com/planning/comprehensive-plan>, last accessed April 15, 2025.

<sup>8</sup> Petersburg Borough has a population of 3,427 and 3,829 square miles of land and water. See the Certificate of Boundaries, 2013, Alaska Records No. 20123-000103-0 available on the world wide web: <https://www.commerce.alaska.gov/web/dkra/LocalBoundaryCommission/MunicipalCertificates.aspx>, last accessed April 15, 2025.

<sup>9</sup> The Ketchikan Gateway Borough has a population of 13,477 and 6,900 square miles of land and water. See the Ketchikan Gateway Borough land ownership map, available on the world wide web: <https://www.kgbak.us/DocumentCenter/View/4369/KGB-Serviceareas-and-Facilities?bidId=>, last accessed April 15,

Delaware combined.<sup>10</sup> The LBC, in granting the petition, reduced the outer limits of the borough boundary to 3 miles from shore—it is not clear to the Appellants what the updated total square miles is for the proposed borough and this calculation was not provided in the LBC decision.<sup>11</sup>

This massive area contains the small communities of Elfin Cove and Game Creek (both under 25 individuals) and dispersed recreational cabins and lodges. The creation of the Xunaa Borough will prevent large groups of people living in the existing cities of Gustavus, Pelican, and Tenakee Springs from being able to expand and utilize the resources surrounding their communities.

The next step of the LBC process is an election for the residents within the proposed borough to vote on incorporation of the new borough.<sup>12</sup> The vast majority of these residents (other than approximately 50 people) already reside within the current City of Hoonah. The State of Alaska will supervise the election and pay substantial election costs.<sup>13</sup> If the incorporation election is successful, a second election will be held to elect initial municipal officials.<sup>14</sup> The State of Alaska will pay all those election costs as well.<sup>15</sup> A transition to a borough government would then begin; transition must occur within two years of the incorporation.<sup>16</sup> The State will disburse grants for the first three

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2025.

<sup>10</sup> See Encyclopedia Britannica, available on the world wide web: <https://www.britannica.com/topic/largest-U-S-state-by-area>, last accessed on April 15, 2025.

<sup>11</sup> The City of Hoonah disputed this reduction in a responsive brief filed in response to the reconsideration requests.

<sup>12</sup> See AS 29.05.110.

<sup>13</sup> AS 29.05.110(e).

<sup>14</sup> AS 29.05.110(a); AS 29.05.120.

<sup>15</sup> AS 29.05.120(d).

<sup>16</sup> AS 29.05.140.

fiscal years to defray the costs of transitioning to a borough government, starting with the first grant of \$300,000, due 30 days after certification of the election or as soon as appropriated and available.<sup>17</sup> These funds have not been appropriated by the legislature and are nowhere included in LBC's current budget.

This Appeal raises substantial constitutional and statutory issues of first impression. If the incorporation election is successful, it will have created a new borough with vast areas of uninhabited land and water presently in the unorganized borough of the State. The new borough would be home to only approximately 50 new residents who are currently in the unorganized borough. It would have negative effects on the surrounding communities that are not included in the borough. The decision on Appeal may significantly impact every community, school district, and person living and residing in the unorganized borough in Southeast Alaska. The Appellants respectfully request the Court to enter an order precluding the LBC and the City of Hoonah from holding the election for incorporation or any other steps towards incorporation pending this appeal.<sup>18</sup>

## **I. PROCEDURE FOR STAY**

A final decision of the LBC may be appealed to the superior court in accordance with the Administrative Procedures Act.<sup>19</sup> The Administrative Procedures Act grants the Superior Court the authority to enter a stay of an administrative decision.<sup>20</sup> Appellate

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<sup>17</sup> AS 29.05.190.

<sup>18</sup> This appeal does not involve a monetary judgment. The Appellants are exempt from a supersedeas bond. Alaska Appellate Rule 204(d)

<sup>19</sup> See AS 29.06.100(b); 3 AAC 110.620.

<sup>20</sup> AS 44.62.570(g).

Rule 603 also allows for a stay.<sup>21</sup> A stay may not be imposed if the Court finds that a stay would be against the public interest.<sup>22</sup> Public interest warrants a stay of the LBC decision in this matter.

By its decision on March 20, 2025, attached to the Appellants Notice of Appeal, and attached here as Exhibit 1, the next step is the vote for incorporation.<sup>23</sup> The Court has the authority to enter a stay and direct the LBC to not to submit its recommendation for approval to voters until final decision on this Appeal.

## **II. THE REQUESTED STAY WILL CONSERVE STATE RESOURCES AND PRECLUDE UNNECESSARY ELECTIONS**

The Alaska statutes provide that the election for incorporation will be supervised by the director of elections and that these costs will be paid by the state.<sup>24</sup> It will conserve the resources of the City of Hoonah and the State of Alaska to stay the election until the appeal has been decided. If a stay is not granted, and the LBC's decision is overturned on appeal, then this election will have been an unnecessary waste of local and state resources, and it will bring confusion to the voters and cause possible disenfranchisement of Hoonah residents from participating in future elections.

If the incorporation election is successful, a second election will occur to elect initial municipal officials.<sup>25</sup> This is also supervised and paid for by the State of Alaska.<sup>26</sup>

Allowing this election to go to the voters while the appeal is pending is an additional

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<sup>21</sup> See Appellate Rule 603.

<sup>22</sup> AS 44.62.570(g).

<sup>23</sup> The March 20, 2025 decision upheld the original decision of 12/20/2024 attached to the Notice of Appeal as Exhibit 2.

<sup>24</sup> AS 29.05.110(e).

<sup>25</sup> AS 29.05.110(a); AS 29.05.120.

<sup>26</sup> AS 29.05.120(d).

waste of resources and will bring additional confusion to the voters.

After the elections, a transition to a borough government must occur within two years of incorporation.<sup>27</sup> The State of Alaska provides grants for the first three fiscal years to defray the costs of transitioning to a borough government: the first fiscal year the State will grant the amount of \$300,000.<sup>28</sup> The statutes provide that the first grant shall be disbursed within 30 days of the incorporation election or as soon as the money is appropriated and available.<sup>29</sup> There is no provision in the statutes for a refunding of the grant to the State if the appeal is successful and the LBC decision is overturned or remanded.

It is in the public interest to preserve State resources against unnecessary grants and elections. The Appellants argue that a stay should be automatically granted pending an appeal of an LBC decision to create a new Borough. Allowing a vote on the incorporation (and a second vote on the election of officials) to go forward while an appeal into the underlying decision approving a petition for a new borough seems to be the opposite of a fair process and a complete waste of State resources. The Appellants are hard-pressed to come up with an argument or logical reason for why a stay should be denied in an appeal of an LBC decision creating a new borough.<sup>30</sup>

If the stay is granted and the appeal is unsuccessful, the City of Hoonah can then

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<sup>27</sup> AS 29.05.140.

<sup>28</sup> AS 29.05.190.

<sup>29</sup> AS 29.05.190(b).

<sup>30</sup> Appellants are aware of at least one case that denied a stay, however Appellants are not aware of the basis for that denial because the decision on the stay was deemed moot on appeal. (*See Mullins v. LBC*, 226 P.3d 1012 (Alaska 2010). *Keane v. Local Boundary Commission*, 893 P. 2d 1239, 1249 (Alaska 1995) denied a motion for a stay that was filed after the election for incorporation had already occurred.

move forward with the election process after the stay is lifted.

**III. THE REQUESTED STAY IS WARRANTED AND NECESSARY TO PROTECT THE CONSTITUTIONAL AND STATUTORY RIGHTS OF ALASKANS LIVING IN THE UNORGANIZED BOROUGH IN SOUTHEAST ALASKA AND TO ALLOW THE APPEAL PROCESS TO WORK AS INTENDED**

Article X, Section 3 of the Alaska Constitution mandates that the State “shall be divided into boroughs, organized and unorganized.” Thus, the Alaskans residing in the unorganized borough are also entitled to constitutional rights and constitutional protections. The Appellants are municipalities (City of Gustavus, City of Pelican, City of Tenakee Springs) and a community organization (Community of Elfin Cove) representing Alaskans living in the unorganized borough of Southeast Alaska.

The creation of the Xunaa borough will create enclaves of the three existing cities that are left out of the new borough. These enclaves limit the ability of the three existing communities from creating a new regional government.<sup>31</sup> The current structure of existing boroughs in Southeast Alaska combined with the new proposed borough if it was incorporated, also limits the future of self-governance of these communities.<sup>32</sup> For example, the cities of Pelican and Tenakee Springs would be dissolved if they joined the adjacent borough of the City and Borough of Sitka, a unified municipality.<sup>33</sup> The creation of the enclaves means that the existing cities cannot create their own borough (together or

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<sup>31</sup> This was highlighted by the LBC staff in the final report. (See pages from the Final LBC Staff Report, Exh. 5, page 2,4,6). Full report is available on the world wide web: <https://www.commerce.alaska.gov/web/Portals/4/pub/LBC/Petitions/2023%20hoonah%20petition/Xunaa%20Borough%20Final%20Report.pdf>, last accessed April 16, 2025.

<sup>32</sup> Joining the proposed borough (if the incorporation election was successful) would mean that these communities would have a diluted voice or no voice in local government, as the proposed borough contains only an area-wide assembly, and the population of the City of Hoonah greatly exceeds the populations of Pelican and Tenakee Springs.

<sup>33</sup> Final LBC Staff Report, Exh. 5 pgs. 2, 6.

individually). Under the LBC's own regulations, an area proposed for incorporation that contains enclaves is presumed to not meet the boundary standard unless there is evidence to find otherwise.<sup>34</sup> The majority decision of the commission utterly fails to cite any such evidence. The LBC decision approving a petition for a new borough that takes up large swaths of undeveloped land and leaves three existing cities as enclaves is an issue of first impression.

The proposed borough will also take over 630,688 acres of National Forest Land from the Hoonah-Angoon Census Area in the unorganized borough; LBC staff calculated that there is currently 1.98 million acres in that area; this removal constitutes approximately 32% of all the National Forest Land in this area of the unorganized borough.<sup>35</sup> The communities and school districts in the unorganized borough in Southeast Alaska are entitled to a proportionate share of federal National Forest Receipts revenues, which must be used for education or roads. The share for each community and school district is determined by the percentage of land remaining in the unorganized borough.<sup>36</sup> National Forest Land receipts are derived from a calculation of acreage and personal per-capita income; removing 32% of the acreage will result in a substantial reduction of payments to the Appellants and any other communities within this area of the unorganized borough.<sup>37</sup> Because the LBC failed to accurately analyze this issue, the precise financial impact of the approval of this Petition is unknown, but it is clear that it

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<sup>34</sup> 3 AAC 110.060(d).

<sup>35</sup> Exh. 5, pg. 5: Final LBC Staff report.

<sup>36</sup> 3 AAC 132.010 et. seq.

<sup>37</sup> 3 AAC 132.010 et. seq.

would transfer a substantial amount of National Forest Receipts revenue from the communities and school districts in the unorganized borough in this region to the new Xunaa Borough.<sup>38</sup> This was recognized as an issue by LBC staff.<sup>39</sup> The area proposed for the new Xunaa Borough only adds approximately 50 residents--residents that otherwise live in the unorganized borough. The new Xunaa borough will not provide educational services to any new students. Conversely, any communities and school districts in the remaining unorganized borough in this region will be required to continue to provide services with much less funding. 32% of the National Forest Land is a significant area that highlights the needs for this Court's review on appeal.

The analysis by Local Boundary Commission staff recommended that the petition be denied. The decision of the LBC was in direct contradiction of this recommendation. The LBC staff report recommended that the petition be denied in substantial part because of the fundamental unfairness of Hoonah taking large areas of uninhabited land for the purpose of obtaining the national forest revenues and other tax revenues and resources and correspondingly failing to provide any services to those locations. The staff report concluded that the best interests of the State were not served by approving the petition.

The purported reasons why the City of Hoonah wants to create a new borough that includes all this uninhabited land in the unorganized borough includes the following in Hoonah's petition: 1. Waters surrounding the proposed borough represent untapped wealth that through fair and uniform taxation can better the lives of everyone in the

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<sup>38</sup> The Appellants may also lose federal funding under the Payment in Lieu of Taxes program. The LBC did not quantify or analyze this loss of funding.

<sup>39</sup> Exh. 5, pgs. 4-5: Final Staff Report.

borough; 2. Selecting municipal entitlement lands from the State of Alaska will give borough residents the greater ability to support and enhance economic development in the region; and 3. A borough will enfranchise residents of the included region, enabling them to vote on area-wide issues, as “currently, residents outside the City of Hoonah have no say in areawide decisions.”<sup>40</sup> The water and land that the City of Hoonah describes in their petition is utilized by the residents of the Appellant communities. Those communities are surrounded by the water and lands the petitioner claims are rich in resources, yet incorporation of the proposed borough would deny them a seat at any regional government decision-making regarding these resources, and further deny them of any collective benefits.<sup>41</sup> The City of Hoonah wants to take all the uninhabited land and water to increase their land ownership, to obtain revenue from the National Forest Receipts, and to increase revenue by taxing any businesses within the new area to be incorporated into the borough, yet not provide any services to communities in this expansive area.

The LBC’s decision does less than a bare minimum job at trying to explain how the Hoonah petition met two necessary standards for incorporation: the boundaries standard and the best interests of the state.<sup>42</sup> The remaining standards were not analyzed in depth at the decisional meeting or in the written decision.<sup>43</sup> The Appellants contend that the decision by the LBC was an abuse of discretion, was arbitrary and capricious,

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<sup>40</sup> See Exh. 6, pages of the Petition for Incorporation; See also Exh. 5, pg. 3: Final LBC Staff Report.

<sup>41</sup> This was amply described by LBC staff in the Exh. 5, pg.7: Final LBC Staff Report.

<sup>42</sup> See Exh. 1: March 20, 2025 decision.

<sup>43</sup> This will be further fleshed out in the Appellant’s Brief on Appeal.

was contrary to and in violation of the Alaska Constitution, was contrary to and in violation of the statutes and regulations required for Borough formation, and denies them due process and equal protection. Due process and equal protection, as well as Article X, Section 3 of the Constitution required the LBC to fully consider the statutes and regulations and deny incorporation when the petition failed to meet the requirements.<sup>44</sup> These also required the LBC to consider funding loss and resource impacts to Appellants by the creation of a new borough with vast areas of unimproved land, and the corresponding funding windfall to Hoonah.

If the incorporation of the Xunaa Borough is submitted to the voters, and the voters approve the new borough, Appellants, (and possibly other communities and school districts in Southeast Alaska), will have to go forward into the next year with a loss of funding due to a loss of National Forest Receipts. This funding loss will lead to diminished education for students in the affected communities. A stay is warranted and necessary to at least maintain the status quo as to educational funding.<sup>45</sup>

The petition if approved by voters will also set up a sales tax to be collected from any businesses in the new borough.<sup>46</sup> A stay is also warranted to prevent residents and businesses in the proposed new borough from extending personal resources to set up a new system to track sales tax in the new borough (namely businesses in or around Elfin Cove), collect sales tax from their customers, and remit the sales tax to the new borough. A stay would prevent Hoonah from needlessly taxing any businesses in the area for

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<sup>44</sup> See AS 29.05.100(a); Article X Section 3 Alaska Const.

<sup>45</sup> The City of Pelican maintains its own school district.

<sup>46</sup> Exh. 6, pg. 2: Final Petition.

incorporation that may end up not being in a new borough if the case is reversed or remanded on appeal. These expenditures would be for naught if the LBC decision is overturned or remanded on appeal. Conversely, a stay has no adverse impact at all on, and will not prejudice, Hoonah.

This is a case of first impression which could dramatically impact communities throughout the State, in addition to the impact on these Appellants. In light of the importance of these constitutional issues, a stay of the LBC decision is warranted and necessary.

#### **IV. THE APPELLANTS SATISFY THE TEST FOR GRANTING THE MOTION FOR STAY**

Under Appellate Rule 603(a)(2), the Court has discretion to grant a stay, and this determination is to be guided by “the public interest.”<sup>47</sup> The public interest lies in preserving state resources by staying any elections on the proposed Xunaa Borough until the appeal has been decided. The public interest also lies in reducing any confusion for the voters who may vote on the borough and then find the election overturned or remanded on appeal. Public interest lies in maintaining the status quo until there is a decision on appeal.

In general, the Alaska Supreme Court has applied the test for a preliminary injunction to the request for a motion for stay from administrative proceedings, including from decisions of the LBC.<sup>48</sup> This test allows the court to consider: (1) whether the

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<sup>47</sup> *Keane v. Local Boundary Commission*, 893 P. 2d 1239, 1249 (Alaska 1995).

<sup>48</sup> *Keane*, 893 P. 2d at 1249.

Appellants are faced with irreparable harm; (2) whether the opposing party will be adequately protected; and (3) whether the Appellants have raised serious and substantial questions going to the merits of the case.<sup>49</sup> In circumstances where, as here, the Appellants stand to suffer irreparable harm and where the party opposing a stay (here the LBC) can be protected from injury, the Court shall balance the hardships.<sup>50</sup> The Appellants are not required to make a “clear showing of probable success” on the merits.<sup>51</sup>

The Appellants will suffer irreparable harm in at least the following ways:

1. As residents, citizens, and municipalities in the unorganized borough, their constitutional right to the protections of Article X, Sections 1 and 3 of the Alaska Constitution will be rendered meaningless if the new Borough is permitted to be created with a large area of the uninhabited land in the unorganized borough before the Court has addressed the constitutional and statutory issues of first impression upon which the LBC based its decision.
2. The loss of potential federal funding, which by federal law must be used for education or roads, is important and irreplaceable.
3. During the public comment period on the Preliminary Report, the vast majority of the 141 written public comments submitted to the LBC opposed the petition.

The only individuals who provided comments in favor were those individuals

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<sup>49</sup> *Keane*, 893 P.2d at 1249, citing *A.J. Industries, Inc. v. Alaska Public Service Commission*, 470 P. 2d 537 (Alaska 1970). and *Keystone Services, Inc. v. Alaska Transportation Commission*, 568 P. 2d 952, 954 (Alaska 1977).

<sup>50</sup> *Keane*, 893 P.2d at 1249-1250.

<sup>51</sup> *Id.*

who wished to preclude annexation of their property and therefore property tax by the City and Borough of Juneau.<sup>52</sup> Property owners in the other outlying areas did not support the Xunaa Borough.<sup>53</sup> By statute and regulation, the LBC must determine that a petition is in the “best interests of the state” in order to approve the petition. To allow this decision to go to the voters, resulting in the creation of the new borough, denies these Appellants and the public meaningful review, and makes the statutory requirement of the best interests of the state nearly meaningless.

4. The residents in the current unorganized borough slated to be incorporated into the Xunaa Borough will be harmed by trying to implement a point-of-sale tax system in the new borough, only to possibly have the need for the system and any sales tax to be refunded if the appeal is successful. These businesses will be further harmed by the paperwork and effort to attempt to refund any sales tax collected back to customers should the appeal be successful.

Thus, the Appellants have demonstrated that they and their citizens will suffer irreparable harm if the stay is not granted.

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<sup>52</sup> See for example comments by: McPherson, Osborn (2 comments), Harrison. See also letter from Simpson representing Horse and Colt property owners. “[T]hey did not want to be in an organized borough that could subject them to taxation without representation or services.” The support states they would prefer to be left alone, but if not possible, that the support was given on the understanding that their property would never be taxed in the Xunaa Borough. All available on the LBC website, <https://www.commerce.alaska.gov/web/dkra/LocalBoundaryCommission/CurrentandPastPetitions/2023CityofHoonaPetition.aspx>, last accessed on April 15, 2025. These will all be part of the record on appeal.

<sup>53</sup> See public comments by the Johnson Family, the Montgomery family, John and Anna MacKinnon, and D. Manion. All available on the LBC website, <https://www.commerce.alaska.gov/web/dkra/LocalBoundaryCommission/CurrentandPastPetitions/2023CityofHoonaPetition.aspx>, last accessed on April 15, 2025. These will all be part of the record on appeal.

The opposing party can be adequately protected. The LBC has no interest other than to be neutral, objective, act in compliance with the Alaska law, and allow the Court to decide the issues on appeal. The LBC is a representative of the state. A stay will preclude State resources from being needlessly spent on two elections, grants, and corresponding paperwork and administrative time. Even if the LBC seeks to represent the interests of the City of Hoonah, the City of Hoonah is adequately protected because if the Court grants the stay and later affirms the LBC decision, the LBC decision can then be submitted to the voters. Hoonah cannot argue that it will be harmed if a vote is stayed pending the appeal. Hoonah cannot in good faith argue that it has any pressing need for the uninhabited land immediately such that the court should deny a stay. Hoonah cannot argue that it will lose the use of any federal funding because that federal funding must be used for educational purposes, and Hoonah admitted that the new borough will not result in even a single student being added to the Hoonah school system.

The Statement of Points on Appeal filed by the Appellants demonstrates that the Appellants have raised “serious and substantial questions going to the merits of the case.” For the sake of efficiency, Appellants do not repeat each point on Appeal in this motion, but directs the court to that pleading. The appeal is of the LBC’s approval of the petition for a new borough in Southeast Alaska, one which encompasses a vast area of land and water and leaves three existing cities as enclaves. The substantial questions include whether the LBC decision was made in compliance with the Alaska Constitution, Alaska Statutes, and Alaska regulations. The meaning of enclaves and the constitutional issues

are issues of first impression. The decision of the LBC to grant a petition that would create a new borough despite three separate communities resulting in enclaves is an issue of first impression. The court must decide these issues because the LBC does not have jurisdiction to decide issues of constitutional law or statutory interpretation.<sup>54</sup>

*Keane v. LBC* was a case where the superior court denied a stay of incorporation of a City after the vote for incorporation had already occurred, and after a sales tax had already been approved by voters.<sup>55</sup> Keane appealed the LBC decision and filed a motion to stay certification of the election results.<sup>56</sup> The stay was denied. Keane argued that disincorporation of a municipality substantially disrupted the life and livelihood of those associated.<sup>57</sup> The Supreme Court found it persuasive that, unlike here, the election had already been held, and sales tax had already been approved by the voters; in weighing the public interest, it upheld denial of the stay.<sup>58</sup> In the current matter, the election has not yet occurred, so granting a stay would be timely and would conserve state resources.

This Appeal impacts all of the Appellants, and the decision on this appeal may impact other communities and persons in the unorganized borough. The appeal was filed after requests for reconsideration of the decision were filed with the LBC and denied; four separate requests were filed.<sup>59</sup> The courts are charged with interpreting the law,

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<sup>54</sup> *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 36 (Alaska 2007) (citing *Dougan v. Aurora Elec., Inc.*, 50 P.3d 789, 795 n. 27 (Alaska 2002)).

<sup>55</sup> *Keane*, 893 P.2d at 1241.

<sup>56</sup> *Keane*, 893 P.2d at 1241.

<sup>57</sup> *Keane*, 893 P.2d at 1249.

<sup>58</sup> *Keane*, 893 P.2d at 1249.

<sup>59</sup> Requests for reconsideration were filed by: City of Pelican, City of Tenakee Springs, City of Gustavus and Community of Elfin Cove (jointly), and the Gustavus Visitor Association.

including the LBC regulations, Alaska statutes, and the Constitution.<sup>60</sup> Administrative agencies, even quasi-judicial agencies, have limited jurisdiction, and do not have the jurisdiction to decide issues of constitutional law.<sup>61</sup> Constitutional questions are questions of law of which the superior court will substitute its own judgment.<sup>62</sup> The statutes governing the LBC specifically provide that the LBC decisions are appealable to this court.<sup>63</sup> Not only does this court have the legal authority to interpret the statutes, regulations, and Constitutional provisions which govern this case, it is in the public interest to allow the appeal process to play out before irrevocable actions are taken based on the flawed, illegal petition.

## **V. CONCLUSION**

Article X, Section 3 of the Alaska Constitution states that the method by which a borough may be organized shall be prescribed by law. This Court has the authority to enforce the law and judicially review the LBC's decision; a stay of the election and incorporation of the borough until this appeal is decided allows for a complete judicial review. As the Appellants satisfy the test for obtaining a stay as outlined by the Alaska Supreme Court in *Keane v. Local Boundary Commission*, the Appellants respectfully request that the Court enter a stay and prohibit the LBC from submitting the petition to the voters pending the duration of this appeal.

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<sup>60</sup> *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 43 (Alaska 2007).

<sup>61</sup> *Alaska Public Interest Research Group*, 167 P.3d at 36 (citing *Dougan*, 50 P.3d at 795 n. 27).

<sup>62</sup> *Dougan*, 50 P.3d at 794; *Keane*, 893 P.2d at 1239.

<sup>63</sup> See AS 29.06.100(b); 3 AAC 110.620.

DATED this 18<sup>th</sup> day of April, 2025

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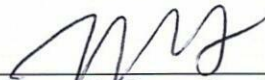
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**Certificate of Service**

On 4/18/25 a true and correct copy of the  
MOTION AND MEMORANDUM IN SUPPORT OF MOTION TO STAY DECISION OF THE LOCAL  
BOUNDARY COMMISSIONS APPROVAL OF THE XUNAA BOROUGH PENDING APPEAL was served on  
the following parties of record:

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/s/ Leith Parson  
Leith Parson

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# FINAL REPORT TO THE LOCAL BOUNDARY COMMISSION

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Regarding the proposal to incorporate the Xunaa Borough



AUGUST 5, 2024

LOCAL BOUNDARY COMMISSION

550 W. 7th Avenue, Suite 1640, Anchorage, AK 99501

Telephone: (907) 269-4559

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Website: <https://www.commerce.alaska.gov/web/dcra/LocalBoundaryCommission.aspx>

consistent with and, in fact, the intention of Alaska's Constitution, supported by Alaska statutes and regulations.

The question of whether the proposed borough "will embrace an area and population with common interests to the maximum degree possible" is challenged by what is essentially a single community borough surrounded by three neighboring municipalities that share natural resources yet are not included in the proposed boundary. Many of the remote properties that are included in the proposed borough boundary are owned by residents of other parts of the state; therefore, the proposal does not extend local government to a significant population. Rather, it offers a refuge for those seeking to avoid annexation by the City and Borough of Juneau.

The coastal communities located along Icy Strait and Chatham Strait profess a strong reliance on subsistence and commercial maritime resources, as well as a desire to protect and preserve these resources. These communities often share marine and air-based transportation methods. If Hoonah is allowed to establish boundaries that include all of Icy Strait and a significant area of the Gulf of Alaska, it could capture revenue, in the form of excise taxes, that could otherwise be distributed to other communities in the region. This has happened before, most notably when the Bristol Bay Borough was formed.

While it may be true that Gustavus could potentially become part of the Haines Borough, the cities of Pelican and Tenakee Springs do not have the same option of joining an adjacent borough without the dissolution of their own municipality. It is incumbent upon the Local Boundary Commission to determine whether it would be in the best interests of the state to allow the incorporation of the proposed borough, given the limited options of the neighboring municipalities to join another borough.

LBC staff sees high value in an updated borough feasibility study that verifies the impacts to shared revenue programs, school funding, administrative responsibilities, and economic opportunities.

Though the residents would vote on the proposal, the petitioner's draft charter does not account for the inclusion of either cities or town-site service areas in addition to the current community of Hoonah. If such a petition were proposed to include one or more of these additional three communities, the charter would also need to be amended to ensure balanced representation on a borough assembly and the appropriate delivery of area-wide services.

Gustavus. Additionally, the City of Pelican and a non-profit community association representing the unincorporated community of Elfin Cove each filed respondent briefs.

On March 12, 2024, the petitioner submitted its reply brief to the public comments and respondent briefs.

### **The Petitioner's Stated Reasons for the Borough Incorporation Proposal.**

The petitioner's reasons for petitioning for incorporation is expressed on Page 3 of the petition:

- Voluntary incorporation is preferable to the potential alternatives of either having a different borough government imposed upon residents by the state or leaving this entire region, except the existing City of Hoonah, unorganized.
- The proposed borough boundaries would encompass all of the Huna Tlingit historic territory. The proposed borough's boundaries likewise encompass most of the Huna Tlingit's core historic and current subsistent hunting and fishing grounds. The ability of the Huna Tlingit to influence the future decisions regarding these lands is of critical importance to the Tribe.
- Borough incorporation will enfranchise residents of the included region, enabling them to vote on issues affecting not only their immediate environs but also borough-wide issues.
- Remote residents make significant use of Hoonah's infrastructure.
- The waters surrounding the proposed borough represent untapped wealth that through fair and uniform taxation can better the lives of everyone within the borough.
- The proposed borough's ability to select municipal entitlement lands will give residents of the borough greater ability to support and enhance economic development in the region, including development of transportation links.
- Incorporation will improve the community of Hoonah's ties with the surrounding area and its ability to plan the future use and development of the region.

### **Public Comments Regarding the Petition.**

During the initial public comment period, the LBC received 142 written comments and two respondent briefs. Twenty-four comments came from residents of Elfin Cove, 33 comments came from residents of Pelican, 29 comments came from residents of Gustavus, 11 comments came from residents of Tenakee Springs, and 18 comments came from residents of Funter Bay, Horse Island, Colt Island, and the Mansfield Peninsula, located along the eastern border of the proposed boundary. LBC staff received three written comments from two individual residents of Hoonah, and a single comment from the community of Game Creek. LBC staff also received resolutions from the City and Borough of Juneau, the City of Angoon, the City of Tenakee Springs, and the City of Gustavus. The Community of Elfin Cove and the City of Pelican filed respondent briefs.

only bolsters the need to consider the neighboring communities that also rely on the region’s resources. LBC staff noted comments from Gustavus, which appear to shift from, “[W]e honestly believe you will be more successful without us,”<sup>29</sup> to the city’s adoption of resolution CY24-05, disputing the qualifications of the petition submitted by the City of Hoonah, which opposes the petition in its current form.

Comments suggesting Pelican and/or Gustavus form their own borough<sup>30</sup> are not useful, as these communities would not meet the borough incorporation standards on their own and would be further hindered if the Xunaa Borough were approved, as the two communities would then be non-contiguous. The City of Gustavus, while opposing the City of Hoonah’s proposal, notes the “establishment of a new borough is in the best interests of the State only if the proposed borough is a true regional government that bridges multiple communities in the region with shared interests, that will serve the needs of the people living in the region now and for the foreseeable future, and that is formed and desired by the people in the region.”<sup>31</sup>

A number of comments received during the initial petition filing period noted that many of the communities have commonalities within the region, with Elfin Cove’s reply brief stating, “Elfin Cove has more in common with the communities of Pelican and Gustavus.”<sup>32</sup>

Both the City of Gustavus and the City of Pelican expressed concerns that, if approved, the Xunaa Borough boundary would have a negative impact on their federal Payment in Lieu of Taxes (PILT) and National Forest Receipts shared revenues. Based on the statutes that govern distribution calculations, LBC staff concur that the impacts would reduce shared revenues through National Forest Receipts.

*Table 4 Shared revenue programs FY2023*

<b>Community</b>	<b>PILT</b>	<b>Shared Fisheries Business Tax*</b>	<b>National Forest Receipts</b>
Hoonah	\$178,909.00	\$753.00	\$265,792.00
Gustavus	\$130,512.00	\$727.00	\$48,255.00
Tenakee Springs	\$24,198.00	\$671.00	\$6,314.00
Pelican	\$18,248.00	\$4,438.00	\$35,585.00

\* does not include payments collected inside municipal boundary and administered by the Department of Revenue

The Secure Rural Schools Program, also known as the distribution of National Forest Receipts, is a program established by the National Forest Service (NFS) to distribute funds to rural counties whose tax base is limited by untaxable Forest Service lands. There are two methods for distributing these funds: 25 percent payments based upon the gross receipts generated on NFS lands during the current fiscal year, or the Secure Rural School payments based upon the average of the three highest payments made to the state during the “eligibility period” of 1987 – 2000. The State of Alaska has chosen the latter method of payment. Under the Secure Rural Schools payment allocation, there are three titles of funding: Title I, Title II, and Title III. The program requires that at least 15 percent, but no more than 20 percent, of each borough’s payment be spent on either Title II or Title III “special projects” with the balance to be spent on

<sup>29</sup> Letter from Gustavus Mayor Mike Taylor, July 14, 2022.

<sup>30</sup> See comments from Harding and Marchbanks.

<sup>31</sup> See City of Gustavus, Alaska Resolution CY24-05.

<sup>32</sup> See comments from Barry, Lombard, Streveler, and Elfin Cove Reply Brief.

the traditional schools and roads categories (Title I). Title II projects are on federal lands, require the use of a 15-member Resource Advisory Committee (RAC) for project review and recommendation, and are administered directly by the Forest Service. Title III projects include a limited list of activities that a borough can undertake and approve itself. Boroughs that receive a total payment less than \$100,000 can elect to spend 100 percent of their payment on Title I schools and roads.

Payments are calculated based upon the acres of federal and NFS lands within an eligible county-equivalent and an income adjustment based on the per-capita personal income for each county-equivalent. The exact calculation for determining the Hoonah-Angoon Census Area's current payments are not made public, nor is it shared with the Local Boundary Commission. According to NFS the calculation is conducted in the following manner: determine the payments from the "eligibility period," determine both the ratio of each county-equivalent's payments from the overall payment to the state and the ratio of Forest Service acres within each county-equivalent to establish the base share, then calculate an income adjustment ratio for each county-equivalent based upon per-capita personal income, and finalize the amount of each county-equivalent's adjusted share of the overall payment through using the above-mentioned ratios.

Each year, depending upon congressional appropriations, the NFS determines full payment base amounts, and distributes the Title I percentage to the State of Alaska for further distribution. Payments for organized boroughs are directly paid to boroughs and can be used at each borough's discretion for schools and/or roads. Payments for the unorganized borough, which are divided among federal Census Areas for purposes of distribution, must be allocated by the state. The state allocates a calculated proportion to each home rule, first class, and second class city within each Census Area based upon student attendance numbers and local and state maintained road miles.

Currently, there are approximately 1.98 million acres of NFS land in the Hoonah-Angoon Census Area. The newly proposed Xunaa Borough would remove approximately 630,688 acres of NFS land from the Census Area. Deriving that the calculation is based upon both acreage and personal per-capita income, it is likely if the proposed boundary is approved, the removal of approximately 630.7 thousand acres from the Hoonah-Angoon Census Area would result in a reduction in payments to the Hoonah-Angoon Census Area and the remaining communities within it. The statute governing the program (*AS 41.15.180*) also supports this noting, "an organized borough's share of income from a national forest shall be proportional to the area of the national forest located within its boundaries."

LBC staff anticipate minimal impact on communities through the PILT entitlement, which is calculated based on a municipality's population rather than its boundaries.<sup>33</sup>

## **Fisheries**

LBC staff contacted the Alaska Department of Fish and Game, consulted with the Community and Regional Affairs Aid and Accountability section, and also contacted the Department of Revenue's Tax Division in drafting this section of analysis. The proposed Xunaa boundary map follows Fisheries Management Area (FMA) 17 and also overlaps with small sections of FMA 16 and 18, but not to an extent that would result in an FMA reassignment. Historically, FMAs and the revenue sharing associated with them have been a multi-agency effort. If any change in revenue sharing or the FMAs were to arise as a result of borough incorporation, it would require the engagement of several agencies and involve a

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<sup>33</sup> 3 AAC 152.010

may be true that Gustavus could conceivably become part of the Haines Borough, the cities of Pelican and Tenakee Springs do not have the same option of joining an adjacent borough without the dissolution of their own municipality. It is incumbent upon the Local Boundary Commission to determine whether it would be in the best interests of the state to allow the incorporation of the proposed borough, given the limited options of the neighboring municipalities to join another borough.

The third subsection<sup>38</sup> states:

(d) Absent a specific and persuasive showing to the contrary, the commission will presume that an area proposed for incorporation that is noncontiguous or that contains enclaves does not include all land and water necessary to allow for the full development of essential municipal services on an efficient, cost-effective level.

The petitioner claims that the proposed boundary does not create enclaves; however, by excluding the communities of Gustavus, Pelican, and Tenakee Springs, the petitioner effectively creates new enclaves within the unorganized borough, limiting the ability for the excluded communities to self-determine a future regional government of their own, with options restricted to joining a nearby borough which may or may not share a contiguous boundary or being annexed by the Xunaa Borough at a later date.

A decision in favor of the petitioner is further complicated when considering the only foreseeable option for the communities of Pelican and Tenakee Springs, aside from joining a prospective Xunaa Borough, would be to join with the City and Borough of Sitka, a unified municipality, the impact of which would be to dissolve each of the two smaller municipalities. Dissolution would reduce the residents' ability toward self-determination on issues of local importance, such as Tenakee Springs' restrictions on motor vehicles within its city limits.<sup>39</sup>

The fourth, fifth, and sixth subsections that consider boundaries state:

(e) If a petition for incorporation of a proposed borough describes boundaries overlapping the boundaries of an existing organized borough, the petition for incorporation must also address and comply with all standards and procedures for detachment of the overlapping boundaries from the existing organized borough. The commission will consider that petition for incorporation as also being a detachment petition.

(f) The boundaries of a borough may not include only a portion of the territory of an existing city government.

(g) Requirements relating to limitation of community, as set out in 3 AAC 110.040(b), do not apply to boroughs.

Nothing in Hoonah's petition proposes to detach any portion of an existing borough or include only a portion of an existing city, so LBC staff did not consider these standards.

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<sup>38</sup> Subsection (c) was repealed on 1/9/2008

<sup>39</sup> [https://tenakeespringsak.com/wp-content/uploads/2023/10/title\\_13\\_vehicles\\_and\\_traffic.pdf](https://tenakeespringsak.com/wp-content/uploads/2023/10/title_13_vehicles_and_traffic.pdf)

### Chapter 3. Conclusion

The Local Boundary Commission is faced with the decision of whether the petitioner's proposed boundary is appropriate. If the Commission believes the boundary is relevant, it may affirm the petition. If the Commission does not believe the proposed borough and its boundary is appropriate, it may deny the petition, modify the petition's boundaries, or alter other components of the petition.

The petitioner states that voluntary incorporation is preferable to the potential alternative of either having a different borough government imposed upon residents by the state or to leaving the entire region unorganized. The framers of Alaska's Constitution conceptualized the entire state as divided into both organized and unorganized boroughs. Victor Rivers, a delegate to the Alaska Constitutional Convention and member of the Committee on Local Government, said during the convention, "we allow for the boroughs remaining unorganized until they are able to take on their local government functions." There is no intent or effort from the LBC to impose borough government formation on the unorganized borough.

Boroughs are intended to be regional forms of government that unify communities of common interest and deliver services on an areawide basis. The petitioner states the boundaries have been drawn to enclose "a geographically distinct and interrelated region dependent on fishing and tourism from the abundant waters within and surrounding the borough, and in which all of the residents of the borough have a common interest." The petitioner further stated that "the waters surrounding the proposed borough represent untapped wealth that, through fair and uniform taxation, can better the lives of everyone within the borough," and has included five years of commercial fishing data, including total catch and commercial value.

To approve the boundary as proposed while excluding the neighboring communities of Gustavus, Pelican, and Tenakee Springs, which are surrounded by the very waters and lands the petitioner claims are abundant and rich in resources, would deny them a seat at any regional government decision-making regarding those resources, not to mention a portion of any collective benefits. The proposed Xunaa Borough charter is drafted in such a way as not to incentivize inclusion of additional communities should they decide to opt into the borough in the future. A borough that fragments the region would create inequality among the communities within and outside the proposed borough boundary. Such a division would not be in the best interests of the state.

By excluding Pelican, Gustavus, and Tenakee Springs, the LBC would eliminate any possibility those three communities could form a contiguous borough, since they would be geographically isolated from one another by the proposed Xunaa Borough boundaries. These municipalities could conceivably join one of the existing boroughs in northern Southeast Alaska, but their prospects to do so are limited. For example, should the cities of Tenakee Springs or Pelican join the unified City and Borough of Sitka, their existing city governments would be dissolved, and local decision-making would be greatly reduced. LBC staff cannot speculate on the interest of such a potential annexation because the City and Borough of Sitka did not submit comments on the initial petition, nor did the Haines Borough.

## **Section 5. General Description of the Area Proposed for Incorporation.**

The proposed Xunaa Borough includes the area currently comprising the City of Hoonah, and the neighboring communities of Game Creek, Elfin Cove, Glacier Bay and Funter Bay, as depicted on the proposed Xunaa Borough Boundary Map (**Exhibit C**). The cities of Gustavus, Pelican and Tenakee Springs are excluded from the proposed borough, and **Exhibits C 1-3** are maps depicting the precise boundaries of those exclusion areas. The proposed borough would adjoin the Yakutat City and Borough and the Haines Borough on the north, the City and Borough of Sitka to the south, and the Juneau Borough to the east, thus enclosing virtually the entire northwest quadrant of Southeast Alaska within an organized borough. The proposed Xunaa Borough's boundary largely coincides with the Department's June, 1997 Model Glacier Bay Borough, except that the cities of Gustavus, Pelican and Tenakee Springs are excluded.

## **Section 6. Reasons for the Petition.**

- Voluntary incorporation is preferable to the potential alternative of either having a different borough government imposed upon residents by the state or leaving this entire region, except the existing City of Hoonah, unorganized;
- As described in detail in §d(i) of **Exhibit E** (the brief), the Xunaa Borough's proposed boundaries would encompass all of the Huna Tlingit's historic territory, save for a portion that was stripped away when the Local Boundary Commission ("LBC") expanded Haines' boundaries to include the lower Chilkat Peninsula. The proposed borough's boundaries likewise encompass most of the Huna Tlingit's core historic and current subsistence hunting and fishing grounds. *Id.* The ability of the Huna Tlingit to influence future decisions regarding these lands is of critical importance to the Tribe;
- The boundaries have been drawn to enclose a geographically distinct and interrelated region dependent on fishing and tourism from the abundant waters within and surrounding the borough, and in which all of the residents of the borough have a common interest. For its part, Hoonah has always had a strong link to Glacier Bay, Cross Sound, Northern Chatham Strait, and Icy Strait, which are part of the natural transportation corridor of the northern part of Southeast Alaska's Inside Passage. The key location of this corridor and its abundance of beauty, fish and wildlife is why the Huna Tlingit, who originated in Glacier Bay, settled in the corridor. This corridor has now become a destination for tourism, commercial fishing and fish processing in which all of the proposed borough communities participate. Moreover, the proposed borough follows natural geography, rooted along Icy Strait and then branching out along the Straits major termini and tributaries;
- The Xunaa Borough has been purposefully structured to honor the wish of the proposed borough's remote residents to live their lives independently. Funter Bay and Elfin Cove are remote, without road access or ferry service (ferry service is limited to the City of Hoonah), and it is difficult, if not impossible, to provide those residing there with a full range of community services. For its part, Game Creek has purposefully chosen an isolated, insular lifestyle. The residents of these areas reside there in order to enjoy their community's isolation, and they desire only limited

services (and the corresponding freedom from local taxation such a property tax). To ensure that these residents can continue to enjoy their remote properties with limited government intrusion, the borough's proposed charter (**Exhibit I**) provides that:

- the Xunaa Borough will not implement taxes on their real property;
  - while a seasonal 1% areawide sales tax described in §11.B of this Petition, *post* will be imposed areawide, no other tax will be imposed outside the Hoonah Townsite Service Area unless, for some reason, the areawide sales tax is limited or invalidated by a court; and
  - no zoning ordinance or building code will be imposed on these remote areas unless changed circumstances warrant convening a local advisory committee to address those changed conditions;
- Borough incorporation will enfranchise residents of the included region, enabling them to vote on issues affecting not only their immediate environs, but also borough-wide issues. Currently, residents outside the city of Hoonah have no say in areawide decisions;
  - Hoonah is the hub of the region proposed for incorporation, and even the proposed borough's more remote residents make significant use of Hoonah's infrastructure;
  - Hoonah is a prosperous community with more than adequate resources to support the new borough. Indeed, it was named 2022 Community of the Year by the Southeast Conference because of its economic vitality and outlook. **Exhibit AA**. Moreover, the waters surrounding the proposed borough represent untapped wealth that, through fair and uniform taxation, can better the lives of everyone within the borough;
  - The proposed Xunaa Borough's ability to select municipal entitlement lands will also give residents of the Xunaa Borough greater ability to support and enhance economic development in the region, including development of transportation links; and
  - The area proposed for incorporation constitutes a natural region, with Hoonah as the hub. Incorporation will improve the community of Hoonah's ties with the surrounding area and its ability to plan the future use and development of the region.

### **Section 7. Legal Descriptions, Maps, and Plats. 3 AAC 110.420(b)(7).**

Petitioner has attached the legal descriptions and maps required by 3 AAC 110.420(b)(7) as **Exhibits C** and **C 1-5**. **Exhibit C-4** provides a legal metes and bounds description of the boundaries of the proposed borough. **Exhibit C** shows a map of that proposed borough, while **Exhibits C1-3** are more detailed maps of the Gustavus, Pelican and Tenakee Springs exclusion areas. **Exhibit C-5** provides a legal metes and bounds description of the boundaries of the Hoonah Townsite Service Area, which will be a service area at the time of borough incorporation. This service area encompasses the former City of Hoonah boundaries.

### **Section 8. Size of the Area Proposed for Incorporation. 3 AAC 110.420(b)(8)(A).**

The area proposed for borough incorporation has 4,246.95 square miles of land and 6157.32 square miles of water, submerged lands, and tidelands, for a total of 10,404.27 square miles.