



September 4, 2007

Local Boundary Commission
Department of Commerce, Community, and Economic Development
550 West Seventh Avenue, Suite 1770
Anchorage, Alaska 99501-3510

Dear Local Boundary Commission Members:

Attached you will find comments regarding the LBC preliminary report in the matter of the petition of the Ketchikan Gateway Borough for legislative review annexation of approximately 4,701 square miles to the Ketchikan Gateway Borough.


The comments detail the city's concerns regarding the proposed annexation. There are a number of problematic areas in the preliminary report that the LBC must address prior to the issuance of a final report and the holding of a public meeting where comments and testimony can be offered. These problematic areas will require careful consideration by the LBC before the annexation petition is again the subject to Commission action.

Among the many issues that the LBC must address regarding this proposed annexation is the equity of requiring many small communities to collectively forfeit some \$1.3 million in education and other funding every year to the Ketchikan Gateway Borough, which in turn will face no proportional requirement to deliver public services to the area subject to annexation.

Please note that the attached comments are also those of the Prince of Wales Community Advisory Council.

Thank you for considering our comments.


Sincerely,


Jon Bolling
City Administrator

Cc: Governor Sarah Palin
Senator Albert Kookesh
Representative Bill Thomas
Ketchikan Gateway Borough
City of Wrangell
Annette Island Indian Community
Meyers Chuck Community Association
Prince of Wales Community Advisory Council

**IN THE MATTER OF THE PETITION OF THE KETCHIKAN
GATEWAY BOROUGH FOR LEGISLATIVE REVIEW ANNEXATION
OF APPROXIMATELY 4,701 SQUARE MILES TO THE KETCHIKAN
GATEWAY BOROUGH**

**COMMENTS ON BEHALF OF THE CITY OF CRAIG AND THE PRINCE
OF WALES COMMUNITY ADVISORY COUNCIL IN RESPONSE TO
THE PRELIMINARY REPORT OF THE STAFF OF THE DEPARTMENT
OF COMMUNITY, COMMERCE AND ECONOMIC DEVELOPMENT**



Jon Bolling, Craig City Administrator, and
Prince of Wales Community Advisory Council Chairman

9/4/07

Date

I. INTRODUCTION

On April 16, 1999, the Local Boundary Commission (hereafter LBC) denied the Annexation Proposal of the Ketchikan Gateway Borough because “the proposal fails to serve all the relevant principles established in the Constitution of the State of Alaska.” (Statement of Decision, 1999, p. 14) The 1998 Annexation Proposal petitioned to annex essentially the same uninhabited area as the present proposal and it excluded the communities of Hyder and Myers Chuck. The current petition excludes the community of Hyder.

To accept KGB’s petition, the LBC must find that it meets “the relevant principles established in the Constitution.” The 1998 Proposal did not do so because Hyder was excluded.¹ Thus, the LBC’s proper course in order to be consistent with the principles established in the Alaska Constitution is to deny this petition because, again, Hyder is excluded.

The City of Craig does not advocate that the LBC should require KGB to amend the Petition to include Hyder. KGB has been emphatic in its refusal to include Hyder. Equally as emphatic have been the residents of Hyder against being annexed by the KGB. The proper constitutional decision is to deny the Petition for the same constitutional reasons the LBC denied the 1998 Proposal. The Alaska Constitution has not changed. The Alaska Supreme Court has not entered any decision since 1999 upon which the LBC could rely to reverse its 1999 decision. Therefore, the City of Craig respectfully requests that the LBC reject the recommendation of the Preliminary Report, and deny the Petition.

¹ Myers Chuck was also excluded. However, the LBC left no doubt in its Statement of Decision that the reason that the 1998 Proposal did not meet constitutional standards was the exclusion of Hyder. There is no suggestion that the Proposal would have been accepted, and thus found constitutional, by the LBC, if the Proposal had included Myers Chuck, but not Hyder.

II. LBC STAFF'S RECOMMENDATION TO "APPROVE THE KGB PETITION WITHOUT CONDITION OR AMENDMENT IS CONTRARY TO THE LBC'S DECISION IN 1999 AND CANNOT BE RECONCILED WITH THAT DECISION OR STAFF'S RECOMMENDATION IN 1998

The 1998 Petition by the KGB is functionally identical to this Petition except as follows:

1. Myers Chuck would be annexed under this Petition;
2. The boundaries creating the Hyder "enclave" would not divide a natural drainage.

Of significance, none of the factual basis for the LBC's denial of the 1998 Petition has changed. The LBC noted in denying the 1998 Petition:

1. KGB refused the invitation of the LBC to amend its Petition to include Hyder and Myers Chuck (Statement of Decision, 1999, p. 3);
2. "Residents of Meyers Chuck and Hyder have expressed strong opposition to being included in a borough and the Borough has expressed little interest in annexing those communities. **Such an arrangement would poorly serve the State's long-term interests.**" (Statement of Decision, 1999, p. 8, emphasis added);
3. "If the Borough's annexation proposal were approved, the Borough would have little or no incentive to further extend its boundaries to include Hyder and Myers Chuck." (Statement of Decision, 1999, p. 8);
4. "...the constitution calls for boundaries to embrace an area of common interests to the maximum degree possible. Without Myers Chuck and Hyder, this standard cannot be met." (Statement of Decision, 1999, p. 11);

5. "...the Borough's annexation proposal significantly undercuts its own ability to effectively address planning needs by excluding Myers Chuck and Hyder."
(Statement of Decision, 1999, p. 12);
6. "The State would be left with the responsibility for the education of students in those communities. The State currently contracts directly with the school district in Stewart, British Columbia for the education of Hyder students." (Statement of Decision, 1999, p. 12);
7. "Because the annexation petition excludes Hyder and Meyers Chuck, the Commission considers the proposal to fail in terms of promoting maximum local self-government." (Statement of Decision, 1999, p. 13);
8. "Further, the proposal fails to serve all relevant principles established in the Constitution of the State of Alaska." (Statement of Decision, 1999, p. 14).

None of these circumstances have changed since 1999. KGB again deliberately excludes Hyder. Without addressing a single significant changed fact or circumstance, the Preliminary Report now recommends that the Petition be approved.

1. KGB has again refused to include Hyder in the area proposed to be annexed.

It is apparent that the LBC found it significant that the 1998 annexation proposal did not include Hyder. The LBC gave the KGB the opportunity to amend the petition to include Hyder. It refused. Seven years later it files another petition deliberately excluding Hyder. The reality is that the KGB will never voluntarily annex Hyder. Given the expense that would be involved, meaning it would have to provide schools and other mandatory borough services, why would it if it can annex the uninhabited lands, receive

approximately an additional \$1,200,000 in National forest receipts revenue, and not have to provide services?

LBC staff's conclusion that the LBC's interpretation of Article X, Section 1 of the Alaska Constitution is "unduly restrictive" is wrong, biased, and indefensible.

(Preliminary Report, p. 17) In the absence of changed facts, which there are none, and none were identified in the 117 page Preliminary Report, the LBC should not change its interpretation of the Constitution solely because of an unsupported new legal opinion offered by LBC staff.²

2. The residents of Myers Chuck and Hyder remain unanimously opposed to annexation.

The Preliminary Report acknowledges that the residents of Myers Chuck and Hyder remain adamantly and unanimously opposed to annexation by KGB. In conjunction with KGB's adamant opposition to annexing Hyder, the long-term state's best interests again would be "poorly served" by allowing the annexation without Hyder. These facts are the same as used by the LBC to deny the Petition in 1998, and no basis is shown in the Preliminary Report that changes the importance of these facts to the LBC. They were important in the denial of the petition in 1999; they should be equally important in denying this petition.

3. If the petition is approved, KGB will have no incentive to annex Hyder in the future.

² The LBC has access to the Department of Law for legal opinions regarding the interpretation of the Alaska Constitution. If there has been an opinion from the Department of Law that the LBC has been interpreting the Constitution in an "unduly restrictive" manner, the LBC should make that opinion part of the record.

The LBC was correct in 1999. Why would KGB annex Hyder and have to provide schools and all mandated borough services if it could obtain all of the additional National Forest receipts revenues through this annexation and avoid the expense of providing services? The Preliminary Report has no answer. Indeed, the Report essentially acknowledges that KGB will never annex Hyder. In order to justify the fact that KGB is never going to annex Hyder, LBC staff came up with the new concept of creating official enclaves within boroughs, completely contrary to the historical position of the LBC. What is particularly disconcerting about LBC staff's new position is that the \$1,200,000 that would go to KGB upon annexation, with no corresponding obligation to provide services, will result in a direct loss of school funding dollars to the other Southeast Communities who do have the obligation to provide schools, such as the City of Craig. The LBC was honest in its assessment in 1999—KGB has no incentive to annex Hyder. The LBC should be honest again in 2007—KGB still has no incentive to annex Hyder if this petition is approved.

4. The Constitution has not changed—the KGB petition cannot meet the constitutional standard to embrace an area of common interests to the maximum degree possible without the annexation of Hyder.

Despite 25 pages of discussion, primarily related to snippets of the Constitutional Convention, and LBC staff's disagreement with the decision of the Superior Court in *Petitioners for the Dissolution of the City of Skagway and the Incorporation of the Skagway Borough v. Local Boundary Commission*,³ the Report fails to cite to a single fact or changed circumstance such that this constitutional standard can now be met without the annexation of Hyder.

³ 1JU-02-0124 CI, September 20, 2005)

The Preliminary Report goes so far as to recommend that the LBC change the words of the Constitution. The Preliminary Report states that this constitutional standard is satisfied if “the post annexation boundaries of the borough would embrace a population that is interrelated and integrated with respect to social, cultural, an economic characteristics and activities.” (Preliminary Report, p. 115) That is not what the Constitution says or mandates. As applied to this petition, the statement is meaningless. This Petition would “embrace” a population of no more than 25 people, probably only 14. Article X, Section 2 cannot be so lightly disregarded. The LBC stated clearly in 1999 that, without Hyder, the Constitutional standard could not be met. The LBC’s application and interpretation of the Constitution was correct. The LBC did not say that without “Hyder or Myers Chuck, one or the other” the Constitutional standard could not be met. The LBC should not reinterpret such an important Constitutional mandate without any new facts or new circumstances that would justify such a significant shift in the historical interpretation of this provision of the Constitution by the LBC.

5. The exclusion of Hyder continues to undercut the ability of the KGB to meet its own planning needs.

In “considering the best interests of the State of Alaska,” in its 1999 decision, the LBC stated clearly that the planning needs of the proposed borough, as annexed, must include Hyder. As the only community in the area of the KGB model boundaries with roads, schools, land use issues (commercial, industrial, and residential development), and tourism growth, the planning needs in the nine years since that decision have increased, not decreased. Thus, the planning needs have increased. These are the facts. In considering these facts in 1999, the LBC rejected the proposed annexation without Hyder. In order to reverse its 1999 decision, without being totally arbitrary and

capricious, the LBC must cite to new facts that warrant approval of the petition, in the “best interests of the state,” without the inclusion of Hyder.

The Preliminary Report does not provide any new facts upon which the LBC could rely to reverse its 1999 decision. The preliminary report makes the remarkable statement that “creating the 205-square mile Hyder enclave would not initially impede ‘the full development of essential borough services on an efficient, cost-effective level.’” (Preliminary Report, p. 88) The annexation proposal does not include any land or community that needs “services.” By excluding Hyder, it goes without saying that the services presently provided by the State in Hyder “would not be impeded.” The Preliminary Report is saying that since the annexed area has no need for services, the exclusion of Hyder would not “impede” the “full development” of no services! As a constitutionally created body, with a mandate to act in the best interests of the State, how can the LBC act in a constitutional manner and reverse its 1999 decision on such a basis? A reversal of its 1999 decision would be arbitrary and capricious if the LBC adopts the double-speak of the preliminary report.

6. The state will continue to be left with the responsibility for providing education services to Hyder students.

It is a simple fact that this proposal does not relieve the State of any of its current responsibilities and obligations in the area proposed to be annexed. The important obligation is the provision of school services. It cost money to provide school services in Hyder. KGB wants the additional \$1,200,000 in yearly revenues, and does not want to have to spend any of it on providing any services in the area to be annexed, in particular it wants no part of providing school services in Hyder. This was a significant factor in the LBC’s recommendation against the proposal in 1998. It was a significant factor in

the LBC's denial of the petition in 1999. Nothing has changed. Hyder needs a school system. The state provides the school system.⁴ KGB does not want to have the obligation of providing the school system. The proposal excludes Hyder so that KGB does not have to provide educational services in Hyder. What facts are the LBC going to rely on to reverse the 1999 decision and now say it is in the best interests of the State to continue to require the State to provide the educational services in Hyder and yet allow KGB to annex all the uninhabited land and collect the additional \$1,200,000 annually? None are advanced in the Preliminary Report.

The people of the State have to rely on the Commissioners to maintain constitutional and policy consistency, that is, to again deny this Petition based on the same best interests of the state and constitutional principles as resulted in the 1999 Decision.

7. The exclusion of Hyder continues to mean that the petition does not promote maximum local self-government.

Promoting maximum local self-government is a constitutional mandate for consideration of a borough proposal. (Article X, Section1) As the LBC stated in its 1999 Decision, "the annexation proposal seeks to add 99.6 percent of the area within the Borough's model boundaries not already within its corporate boundaries, but excludes 87.7 percent of the residents of that area." The current petition, which includes Myers Chuck, but still not Hyder, continues to essentially grab all the land, but take no responsibility for the people. As the Preliminary Report states, the population of Myers

⁴ The school system in Hyder is provided by the Southeast Island School District at state expense.

Chuck is reported at 14, but is probably less. Therefore, the same factual scenario is presented to the LBC as the one rejected by the LBC in 1999.⁵

The LBC upheld the Article X, Section 1 mandate in 1999 by properly denying the annexation proposal because it excluded Hyder. The LBC has no basis to conclude that the mandate of Article X, Section 1 can now be satisfied by granting a petition for nearly the same area that still excludes Hyder.

8. With the exclusion of Hyder, the petition again fails to serve all relevant principles established by the Alaska Constitution.

We continue to stress that nothing has changed since the LBC concluded that KGB's annexation of this area, without including Hyder, fails to serve all the relevant principles established by the Alaska Constitution. (Statement of Decision, 1999, p. 14) The Constitutional principles have not changed. The best interests of the state standard has not changed. The LBC's constitutional obligations to all the people and the communities in the state—including the people and communities in the unorganized borough—has not changed. Hyder remains the only community in the area that needs essential services. Hyder remains the only community in the area where the State is presently providing all the essential services that would be provided by a borough. And, KGB continues to exclude Hyder from the proposed annexed area. Based on the facts and the Constitution, the LBC's decision must remain the same, and deny the Petition. There is no conceivable Constitutional basis, and no benefit to the State, for the LBC to reverse its 1999 Decision.

⁵ The Preliminary Report remarks that the inclusion of Myers Chuck in this petition is a “notable” difference from the 1998 proposal. We assume the LBC staff used the word “notable” only to signify a technical difference, not that the inclusion of Myers Chuck while excluding Hyder is meaningful in any sense.

III. LBC STAFF’S STATEMENT THAT THE ALASKA CONSTITUTION MANDATES ANNEXATION HAS NO BASIS IN THE CONSTITUTION OR ALASKA CASE LAW

Article X, Section 3 of the Alaska Constitution states: “The entire State shall be divided into boroughs, **organized and unorganized.**” (emphasis added) The Constitution does not say that the State must be divided into only “boroughs.” The Constitution is silent as to annexation of lands in the unorganized borough. The Constitutional article further states: “Methods by which boroughs may be organized, incorporated, merged, consolidated, reclassified, or dissolved shall be prescribed by law.” Again, the Constitution does not mention annexation. By its plain language, Article X, Section 3 does not equate the formation of a borough with annexation of land from the existing unorganized borough by an already formed borough. The Constitution does encourage the formation of boroughs, as stated by the Alaska Supreme Court in *Mobil Oil Corp. v. Local Boundary Commission*.⁶ The Alaska Supreme Court did not say that the Constitution encourages the formation of boroughs or the annexation of land in the unorganized borough by an already formed borough. The new Constitutional interpretation offered in the Preliminary Report would rewrite the Constitution, and deny important Constitutional protection to the people in the unorganized borough.

The Preliminary Report does not cite to any Alaska Supreme Court case that interprets the Constitution as mandating or encouraging the annexation of lands in the unorganized borough by an existing borough. We are not aware of any. Both under the Constitution and the “balanced bests interests of the state” standard (19 AAC 10.200), annexation is not the same as the formation or incorporation of a borough.

⁶ 518 P. 2d 92 (Alaska 1974)

In *Port of Valdez Co., Inc. v. City of Valdez*, the Alaska Supreme Court noted that the LBC had a statutory duty to develop standards for “borough annexation.”⁷ If the formation of boroughs and the annexation of land in the unorganized borough were the functionally the same acts under Article X, Section 3 of the Alaska Constitution, there would be no need for mandated annexation standards. The Alaska Supreme Court would not specifically point out that there are “three purposes underlying the statutory requirement of annexation standards.”⁸ Principles related to constitutional interpretation and statutory interpretation require that provisions and statutes not be read as superfluous. By imposing a separate legislative requirement related to annexation standards, and with the Alaska Supreme Court specifically noting the distinction of annexation, the formation of boroughs and the annexation of land in the unorganized borough by an existing borough, are not constitutionally the same.

Despite lengthy quotes from the Alaska Constitutional Convention, the preliminary report fails to quote anything that equates borough formation under the Constitution with the annexation of land in the unorganized borough by an existing borough. Importantly, the Preliminary Report quotes a draft version of Article X, Section 3 of the Constitution, which was not adopted. (Preliminary Report, p. 25) The draft version of Article X, Section 3 would have divided the state into boroughs—there is no mention of unorganized boroughs. By rejecting that draft version, the delegates made a clear choice to provide constitutional status to the unorganized borough (s).

The Preliminary Report fails to address the constitutional issues of Article X, Section 3 as to the annexation of land in the unorganized borough by an existing borough.

⁷ Preliminary Report of DCRA, October 1998, p. 25, quoting 522 P. 2d 1147, 1155 (Alaska 1974)

⁸ 522 P. 2d at 1155

In the Preliminary Report prepared by the same LBC staff person in 1998, the Report concluded that the KGB proposal, without Hyder, “would seriously diminish the significance of this principle” [referencing Article X, Section 3]. (Preliminary Report, 1998, p. 80-81) The “principle” embodied in Article X, Section 3 has not changed. The only thing that has changed is that the same LBC staff person recommends ignoring the Constitutional principle of Article X, Section 3 for reasons not explained anywhere in the report. The LBC staff went on record in 1998 stating unequivocally that annexation of this area without Hyder violated the principles of Article X, Section 3. The LBC agreed in its 1999 decision. The LBC has the obligation to the State to maintain its consistency in the interpretation and application of constitutional principles, and as such, must again deny this Petition because it excludes Hyder.

Rather than be consistent in the interpretation of Article X, Section 3 advanced and followed by the LBC staff in 1998, the Preliminary Report ignores Article X, Section 3, and argues that Article X, Section 1 makes “no distinction” between borough formation and the annexation of land from the unorganized borough by an existing borough. (Preliminary Report, p. 16) The Report cites to two Alaska Supreme Court cases involving the interpretation of Article X, Section 1. (Preliminary Report, p. 14). Neither of those cases involved the issue of whether the standards for annexation of land from the unorganized borough by an existing borough is encouraged or mandated by the Constitution in the same manner as the formation of boroughs. Indeed, the Report highlights that section of the *Mobil Oil* case that specifically says “Our constitution encourages **their creation.**” (Preliminary Report, p. 15, underlining in Report, bold emphasis added) Without citation to any other case, or even to anything from the

constitutional convention, the Preliminary Report states: “borough incorporation and borough annexation are equally encouraged by article X, section 1, whenever the applicable standards are satisfied.” This interpretation of the Constitution offered in the Preliminary Report is not supported by the language of the Constitution, existing Alaska case law, and the applicable statutes and regulations.

Because the people and communities of the unorganized borough are afforded specific constitutional status and protection, the LBC cannot constitutionally equate borough formation with the annexation of land from the unorganized borough by an existing borough. In particular, the LBC cannot accept a tortured interpretation of Article X, Section 1, such that annexation can be used as a vehicle to increase its National Forest Receipts revenues without in fact minimizing local government units.

The KGB petition neither maximizes “local self-government” nor minimizes “local government units.” It is undisputed that none of the area to be annexed has any need for “local self-government.” It is also undisputed that the area to be annexed does not “minimize” the local government units because Hyder, which does need borough services, is excluded and may incorporate as a city—thus increasing the local government units. Nothing from the Constitutional convention would be supportive of the interpretation of the Constitution offered by the LBC staff, that is, the Constitution encourages borough formation and the annexation of land in the unorganized borough equally, regardless of the detrimental impact on the people and communities in the unorganized borough, and particularly the devastating loss of school funding in those communities.

The Constitutional significance of creating boroughs is specifically to provide necessary services that are currently being provided by the State. Thus, when an area seeks to form a borough, it must provide necessary services, such as schools. That is why the formation of boroughs is encouraged by Article X, Section 1 and Section 3. The Constitution cannot be similarly interpreted to encourage the annexation of land from the unorganized borough by an existing borough which does not provide any necessary service, particularly schools, in the proposed annexed area, and will in fact seriously impair the provision of school services by the communities in the unorganized borough directly as a result of the annexation. The KGB petition will not provide any necessary services in the area to be annexed, and thus, cannot satisfy the purpose and intent of Article X, Section 1 and 3 of the Alaska Constitution.

IV. LBC STAFF’S STATEMENT THAT THE LBC HAS A POLICY ALLOWING THE CREATION OF ENCLAVES IS CONTRARY TO THE LBC’S 1999 STATEMENT OF DECISION

In its Statement of Decision denying the KGB annexation proposal in 1999, the LBC stated: “The annexation proposed by the Borough create [sic] enclaves. The Commission has a formal policy to avoid enclaves within boroughs as reflected in 19 AAC 10.200(2).” (Statement of Decision, 1999, p. 13) The present Petition creates a Hyder enclave. (Preliminary Report, p. 86) LBC staff admit that the Haines Borough is the only borough in the state with an enclave—Klukwan. (Preliminary Report, p. 87) LBC staff admit that the creation of the Klukwan enclave was a “public policy” issue that “would not exist with respect to the proposed Hyder enclave.” (Preliminary Report, p. 88) Thus, there is no “public policy” impediment to the inclusion of Hyder in the KGB. Therefore, the approval of this Petition with a Hyder enclave would be the first enclave

ever created by the LBC where it is admitted that no reason exists at all for the enclave except that KGB does not want the obligation of providing services to Hyder. Rather than evidencing a historical “policy” of creating enclaves, approval of this Petition would contravene the Constitution, applicable statutes, the regulations, and every prior decision of the LBC with respect to the analysis of enclaves proposed as part of a borough formation or annexation. The preliminary report offers no reasonable or persuasive reason for such a dramatic reversal of LBC policy and precedent.⁹

LBC staff’s “conclusion” that the Hyder enclave “should be annexed to the KGB” if “a Prince of Wales Island Borough were formed,” fundamentally ignores the regulation precluding enclaves and makes the condition of annexation of Hyder unrelated to any Constitutional, statute or regulation related to borough formation or annexation. Hyder is in the KGB borough boundaries, constitutionally, statutorily, and in accordance with LBC regulations. It is under those standards that this Petition must be reviewed. There is no constitutional provision, statute or regulation that allows an existing borough to annex land in the unorganized borough, specifically excluding the only populated area, under the novel hypothetical concept that if some other area is later formed as a borough, then the enclave “should” be annexed. By what mechanism? The LBC staff does not explain how the LBC can force or order or direct that Hyder be annexed by the KGB if a Prince of Wales Borough is formed. Equally as important, there is no standard in the

⁹ As addressed below, the Preliminary Report was written by LBC staff person, Dan Bockhorst. Mr. Bockhorst has applied for the position of Ketchikan Gateway Borough Manager. Without question, he has a substantial conflict of interest. It cannot escape the scrutiny of the LBC, nor will it escape the scrutiny of the Alaska courts, that the Preliminary Report authored by Mr. Bockhorst recommends that the LBC reverse its historical policy on enclaves, which will benefit the KGB directly by allowing it to receive an additional \$1,200,000 annually without the provision of any services at all in the annexed area because of the creation of the Hyder enclave. As a minimum, the LBC should, in fairness to the people of the State as whole, and the people in the Southeast communities in the unorganized borough, hire an independent staff person, who has never worked for DCCED or Mr. Bockhorst, to prepare a new Preliminary Report.

Constitution, statutes, or regulations which allows the KGB the benefit of excluding Hyder from its borough until other communities form a different borough—which would not include Hyder. The impact of the LBC’s staff recommendation is clear—if the LBC approves this Petition, Hyder will never be annexed into the KGB. The Preliminary Report misrepresents the historical policy of the LBC against creating enclaves, and then creates a fictional “possibility” of later annexation of Hyder that the LBC staff, and the LBC, knows will never happen. Therefore, the LBC should continue to maintain its historical policy against enclaves, clearly stated in the 1999 decision, and deny this Petition.

V. THE LBC MUST TAKE INTO ACCOUNT THE CONFLICT OF INTEREST OF THE LBC STAFF PERSON WHO PREPARED THE PRELIMINARY REPORT IN ASSESSING WHY LBC STAFF HAS CHANGED ITS POSITION AS TO THE KGB PETITION

The LBC is a “quasi-judicial” body, according to the Preliminary Report. (Preliminary Report, p. B-4) The LBC must provide a fair hearing and review of petitions, according to the Preliminary Report. (Preliminary Report, p. B-4) The Preliminary Report acknowledges that Alaska courts will review decisions of the LBC “to determine whether a fact finder has shown bias such as prejudgment of the facts or issues or a personal bias for or against an issue or a participant in the proceeding.” (Preliminary Report, p. B-4)

A judge is required not only to avoid bias and avoid any impropriety, a judge must avoid the appearance of bias and the appearance of impropriety. For example, it would be an unquestionable appearance of impropriety if a judge’s law clerk prepared a memorandum for the judge with a recommended decision in favor of one party in a case

where the law clerk was seeking employment with that party. The LBC is in no different situation.

The author of the Preliminary Report wants to be employed by the KGB as its Borough Manager. The Preliminary Report was completed as of June 30, 2007. The Borough position became open in June of 2007, when the KGB Borough manager resigned.

It cannot be disputed that this Preliminary Report represents a complete reversal of the recommendation of the same LBC staff in its Preliminary Report in 1998. It also cannot be disputed that nothing has changed except this petition includes Myers Chuck—a totally inconsequential change under the Alaska Constitution, applicable statutes, applicable regulations, and the best interests of the state standard. The Preliminary Report fails to offer any distinguishing Constitutional or factual reason for the reversal of the LBC staff position. If the LBC considers this Preliminary Report and approves the Petition, the appearance of bias and impropriety will undoubtedly result in judicial review of the decision.

The LBC has two choices. It can reject the recommendation of the LBC staff, and deny the Petition because that would be the factually and legally correct decision. The denial of the Petition would be consistent with the Constitutional principles the LBC is obligated to uphold and apply. The denial of the Petition will be consistent with the 1999 Decision.

The second choice is for the LBC to remove the Preliminary Report from the record and to retain an independent consultant to prepare a report not tainted with the appearance of bias and conflict of interest enveloping this Preliminary Report.

We urge the LBC to carefully scrutinize this problem. The people of this State are entitled to not only a fair decision that is in the best interests of the state, the people of the State are entitled to a decision that all can feel is free from any potential bias or conflict. Under the circumstances presented by the author of the Preliminary Report having applied to be the KGB borough manager, and having recommended the approval of this Petition—a complete reversal from the same author’s position in 1998 on annexation of this area without Hyder—the people of this State cannot have any confidence in a decision being free of bias if the LBC relies on the Preliminary Report and approves the Petition.

VI. THE PETITION CANNOT MEET THE BEST INTERESTS STANDARDS WHEN THE PRELIMINARY REPORT ADMITS THAT THE STATE WILL BE REQUIRED TO CONTINUE TO PROVIDE ALL NECESSARY SERVICES TO HYDER AND THE ANNEXATION WILL NOT RELIEVE THE STATE OF ANY RESPONSIBILITIES

The Preliminary Report acknowledges that the best interests of the standard applies to the proposed annexation of land from the unorganized borough to the existing KGB, including by legislative review, pursuant to 3 AAC 110.195. (Preliminary Report, p. 100) In order to be in the best interests of the State, the petition must demonstrate that the proposed annexation “will relieve the state government of the responsibility of providing local services. (3 AAC 110.195(3)) LBC staff identifies two “areas” “in which the KGB would relieve the State of responsibility of providing local services...Those are education and platting.” (Preliminary Report, p. 92)

After admitting that the proposed annexation will not in fact result in the provision of education services in the area proposed to be annexed, the LBC staff notes that in 2011 the KGB required local contribution to its existing school system, may increase by

\$15,197. (Preliminary Report, p. 93) LBC staff then acknowledges this potential increase is “not particularly significant.” (Preliminary Report, p. 94) Unexplainably, the next sentence reads: “Thus, KGB provides a significant financial relief to the State in terms of responsibility for delivery of education services. (Preliminary Report, p. 94) The alleged “financial relief” to the state of \$15,197 cannot be both “not particularly significant” and “a significant financial relief.”

The Preliminary Report fails to discuss the burden that remains on the State by KGB not annexing Hyder. That burden on the State is currently approximately \$174,000 to provide education services in Hyder, and can only be projected to go up. In essence, without any discussion, rationale, or reasoning, LBC calls the \$15,000 increase in KGB’s school contribution “significant relief” to the State, and makes no characterization of the \$174,000 State must expend because KGB does not want the responsibility of providing the school system in Hyder. Similarly, LBC makes no comparison of the \$15,000 increase in 2011 in KGB’s school contribution with the more than \$1,000,000 additional revenues KGB will get annually. The \$15,000 contribution is less than 10% of what the State will continue to pay to serve Hyder. The \$15,000 contribution is approximately 1% of the additional National Forest receipts KGB will receive, and KGB would receive nearly four additional years of the dramatically higher receipts before even paying the additional \$15,000 school funding contribution. The Preliminary Report fails to offer any actual analysis of the best interests of the state standard under A.S. 29.06.040(a) and 3 AAC 110.195(3).

The Preliminary Report devotes all of three sentences to how the petition will supposedly relieve the state of “plattig” responsibility and this aspect of the application

of 3 AAC 110.195(3). Without identifying any potential planning, platting, or land use regulation necessary within the proposed annexed area, LBC staff concludes that “the power and duties for platting within the area proposes for annexation would shift from the State to the KGB.” (Preliminary Report, p. 94) That the “powers and duties” would shift is a given—what is important under the best interests standard is how this proposed annexation in fact relieves the state of “the responsibility of providing local services.” (3 AAC 110.195(3). The state does not provide any local services in the proposed annexed area, including platting. No local services would be provided by the state in the foreseeable future. KGB does not propose to provide any local services in the area to be annexed, nor does it anticipate providing any local services in the foreseeable future. 3 AAC 110.195(3) cannot be met by KGB agreeing to provide nothing in the area where nothing is currently provided and nothing is needed. 3 AAC 110.195(3) is stated in the affirmative and with mandatory language—“will.” “Will” this petition “relieve the state government of the responsibility of providing local services?” The answer is factually and legally easy—the record is undisputed—the answer is a resounding no.¹⁰

VII. THE PETITION CANNOT BE CONSTITUTIONALLY IN THE BEST INTEREST OF THE STATE WHEN THE ONLY REASON FOR THE ANNEXATION IS TO GARNER OVER \$1,000,000 ANNUALLY IN FEDERAL FUNDS THAT PRESENTLY IS DISTRIBUTED THROUGHOUT THE COMMUNITIES OF SOUTHEAST ALASKA AND NO SERVICES WILL BE PROVIDED BY KGB IN THE ANNEXED AREA WITH THOSE FUNDS

¹⁰ The proportion of private land in the area proposed to be annexed is so small that if a private land owner sought some platting service in the future, it would be such minimal relief to the State that it could not properly be characterized as the State being relieved of the burden of providing local services. If the cost savings would be a benefit to the State, the Preliminary Report would have quantified the benefit.

The City of Craig is very concerned about the impacts on the school children of Craig and all the Southeast communities in the unorganized borough if the LBC approves the petition request submitted by the Ketchikan Gateway Borough.

1. National Forest Receipts Revenues

We believe the LBC is well aware of the financial impacts to the communities and school districts of the unorganized borough that will result from the proposed annexation. The proposed annexation will remove up to \$1.2 million annually from the budgets of regional school districts and transfer that funding to the KGB, whose proposed annexation would add exactly zero students to the KGB School District.¹¹ This impact was not anticipated when the model borough boundaries were adopted because communities like Craig, which have precisely the same legal obligation to support local schools as do boroughs, did not receive NFR payments until 1993. The entire model borough boundary issue should be revisited and revised to account not just for the NFR impacts, but for other relevant issues that may have changed since 1992.

2. Best Interest Finding

The Best Interest Findings section of the preliminary report fails to properly apply the provisions of 3 AAC 110.980. The report does not reasonably weigh the impacts of the proposed annexation on affected local governments nor does it relieve the state of significant financial obligations that could otherwise be assumed by the KGB. In addition, the report fails to note that proposed annexation also reduces state revenues.

¹¹ LBC staff's discussion of the amount of national forest receipts that will be transferred to the KGB as a result of this petition is identical to the its discussion of the amounts in 1998. LBC staff ignores what has actually been received by the communities during the intervening nine years. The loss to the communities, and corresponding windfall to the KGB is in fact closer to the \$1,200,000 than LBC staff's "projection" of "roughly \$286,000 annually." To use that substantially lower figure is not justified, misleading, inaccurate, unreasonable, and unfair.

A) Provision of Local Services – 3 AAC 110.195(3)

The preliminary report fails to recognize the financial detriment to the State of Alaska should the annexation be approved. The proposed annexation does not relieve the State of Alaska of the cost to deliver state services in proportion to the area subject to annexation. The petition seeks the financial benefits that the annexation will bring but rejects including in the annexation the four percent of the model borough boundary that would bring with it the responsibility typically required of local government: education funding. The petition proposes to annex 4,701 square miles of the area within the KGB model borough boundaries, but exclude the 205 square miles of the model borough boundaries that would require the actual delivery of local government services. The result of this is that the State of Alaska, through the Southeast Island School District REAA, will continue to be responsible for the full \$174,000 cost of educating the 16 students in Hyder. Were this area included in the annexation petition, the state's obligation would be reduced by the borough's four mill equivalent requirement.

While the petition proposes to avoid the cost of providing education to Hyder, the petition would also reduce revenue to the State of Alaska to provide those same education services. Currently the state receives national forest receipts funding that provide education funding to the three REAAs in Southeast Alaska. The Preliminary Report fails to account for this loss of state funding, which would have totaled more than \$280,000 in the current fiscal year. Ironically, this funding loss occurs because the approval of the petition increases the KGB's national forest receipts funding at the expense of the State of Alaska.

B) Affected Local Governments – 3 AAC 110.980(2)(B) and (C)

The preliminary report fails to account for the losses suffered by affected local governments as called for in 3 AAC 110.980(2)(B) and (C). The reduction in education and other funding that will result from the proposed annexation is substantial, as shown below.

Home Rule	FY 2007 Ed. Receipts	Income Loss Ed. Funding	Income Loss Road Funding	Income Loss Project Funding
Petersburg	\$ 914,381	\$ 201,164	\$ 15,236	\$ 41,806
Wrangell	\$ 571,788	\$ 125,793	\$ 7,963	\$ 25,840
First Class				
Craig	\$ 594,437	\$ 130,776	\$ 6,380	\$ 26,497
Hoonah	\$ 257,409	\$ 56,630	\$ 6,209	\$ 12,140
Hydaburg	\$ 112,085	\$ 24,659	\$ 4,230	\$ 5,581
Kake	\$ 179,336	\$ 39,454	\$ 9,566	\$ 9,470
Klawock	\$ 209,638	\$ 46,120	\$ 7,028	\$ 10,268
Pelican	\$ 25,087	\$ 5,519	\$ 896	\$ -
Skagway	\$ 168,900	\$ 37,158	\$ 8,222	\$ 8,767
Second Class				
Angoon	-	-	\$ 5,294	-
Coffman Cove	-	-	\$ 10,698	-
Gustavus	-	-	\$ 20,659	\$ 3,956
Kasaan	-	-	\$ 5,831	-
Port Alexander	-	-	\$ 861	-
Tenakee Springs	-	-	\$ 1,721	-
Thorne Bay	-	-	\$ 23,847	\$ 4,566
REAA'S				
Annette Island	\$ 537,333	\$ 118,213	\$ 23,677	\$ 19,140
Chatham	\$ 368,934	\$ 81,165	-	\$ 13,141
Southeast Island	\$ 373,545	\$ 82,180	-	\$ 13,306
Total Annual Loss		\$ 948,832	\$ 158,317	\$ 194,477
Aggregate loss of funding				\$ 1,301,626

Every affected local government that has commented to date on this proposed annexation has gone on record in opposition, due to severe impacts to education funding. These comments demonstrate that there is broad agreement among the affected local governments that public interests are not served by the proposed annexation. For its part, the preliminary report fails to address how the losses detailed above, losses that negatively impact twelve school districts, sixteen cities, and 2,700 K-12 public school

students, are in the best interests of the State. When weighing the claims of the preliminary report against the multiple community statements against the proposed annexation, it is not reasonable or fair for the LBC to ignore the specific academic harm identified by the communities of the region.

LBC staff offers no justification at all for recommending the transfer of nearly \$1,200,000 per year in academic funding presently shared by sixteen cities and twelve school districts in Southeast Alaska to the Ketchikan Gateway Borough with absolutely no increase in either the number of students to serve or education services in the Ketchikan Gateway Borough. LBC staff offers no justification at all for not only recommending that the KGB be the recipient of this additional \$1,200,000, at the expense of all the other Southeast Communities in the unorganized borough, but in addition, recommending the exclusion of Hyder from the annexation even though Hyder is within the model borough boundaries and Hyder does have education services presently provided and paid for by the State. The LBC must carefully scrutinize why LBC staff has so dramatically changed its recommendation from 1998, even though the annexation petition is essentially identical, and neither the facts supporting the denial nor the reasons supporting the denial by the LBC in 1999 have changed.

VIII. CONCLUSION

The people of the State of Alaska should expect, and receive, fairness and consistency from the LBC. The Constitution is the Constitution—it cannot be manipulated to achieve a desired result. The best interests of the State standard for annexation of land from the unorganized borough is also a constant—it should not be manipulated to achieve a desired result.

What possible constitutional, statutory, regulatory, or best interest of the State reason can the LBC rely on to approve this Petition, with Hyder excluded, after having rejected the nearly identical petition as not justifiable under the Alaska Constiution because Hyder was excluded in the 1998 annexation proposal? The LBC will not find an answer to that question in the Preliminary Report.

Despite a 117 page report, with attachments, the LBC staff is not able to cite to a single comment from any person or community in this State in support of this Petition. All comments we are aware of to date in response to the Petition oppose the Petition. The LBC has a Constitutional obligation to consider the voice of a unanimous people against this Petition.

We request that the LBC reject the recommendation of the LBC staff and deny the annexation petition of the KGB.