

STATE OF ALASKA
LOCAL BOUNDARY COMMISSION

In the Matter of the Petition by the City of
Hoonah for Incorporation of the Xunaa
Borough as a Home Rule Borough, and
Dissolution of the City of Hoonah

PETITIONER’S BRIEF ON RECONSIDERATION

Petitioner City of Hoonah opposes reconsideration of the Local Boundary Commission’s recent decision to approve the Petition,¹ with the narrow exception of the seaside borough boundary. As discussed below, the Local Boundary Commission properly approved the Petition after considering the relevant issues and, on reconsideration, should do so once again. This time, however, it should not alter the petitioned-for boundaries.

I. Background

On November 12, 2024, the Commission held a decisional meeting and approved the Petition.² On December 17, 2024, the Commission met and approved its written decision,³ discussed the dissenting opinion,⁴ and granted a request for additional time to file requests for reconsideration, extending that deadline to January 15, 2025. On December 20, 2024, the Commission issued its written decision. On January 14, 2025, the Gustavus Visitors Association⁵ filed its request for reconsideration, and on January 15,

¹ Petition of the City of Hoonah for Incorporation of the Xunaa Borough as a Home Rule Borough, and Dissolution of the City of Hoonah (dated June 28, 2023) (accepted for filing Nov. 20, 2023) [hereinafter Petition].

² See Transcript of Decisional Meeting (Nov. 12, 2024) [hereinafter Transcript].

³ Decision of the Local Boundary Commission (Dec. 20, 2024) [hereinafter Decision].

⁴ Statement of Dissent to the Decision of the Local Boundary Commission (Dec. 20, 2024) [hereinafter Dissent].

⁵ Request for Reconsideration by the Gustavus Visitors Association (Jan. 14, 2025) [hereinafter GVA Request]. The GVA Request was purportedly submitted on behalf of the “Gustavus Visitors Association” by its president, Leah Okin. For the purposes of this brief, the Petitioner assumes, without admitting, that said group is in fact the Alaska nonprofit corporation “Gustavus Visitor’s Association” and that the discrepancy in name and omission of information were merely errors. *Compare id.*, and 3 AAC 110.580(d), *with* <https://www.commerce.alaska.gov/cbp/main/Search/Entities> (last visited Jan. 30, 2025) (entity # 91630), *and* <https://www.commerce.alaska.gov/cbp/businesslicense/search/License> (last visited Jan. 30, 2025) (entity # 925576).

2025, the Cities of Pelican,⁶ Tenakee Springs,⁷ and Gustavus and the community of Elfin Cove⁸ filed theirs.

On January 21, 2025, the Commission met and granted reconsideration on two issues: whether the Petition met the standards for 1) boundaries and 2) best interests of the state. The subsequent decisional meeting will be “limited to those two issues.”⁹

II. Procedural Posture for Reconsideration

Pursuant to 3 AAC 110.580, after the Commission has granted a request for reconsideration, or ordered reconsideration on its own, the petitioner may file “a responsive brief describing in detail the facts and analyses that support or oppose the decision being reconsidered.”¹⁰ Within 90 days after receiving the responsive brief, the Commission will hold a decisional meeting and, within 30 days after that, “issue a decision on reconsideration.”¹¹ What is precisely at stake is somewhat unclear: *Does the “decision on reconsideration” merely replace the original decision where the two conflict, or is the slate wiped clean, with the Commission left to write an entirely new decision? Does opposing “reconsideration” mean supporting “the decision being reconsidered” or opposing it?*

This ambiguity was underscored at the recent meeting “to consider

⁶ Request by the City of Pelican for Reconsideration of the Decision of the Local Boundary Commission (Jan. 15, 2025) [hereinafter Pelican Request]. The Pelican Request was signed by three attorneys, one for the City of Pelican and two whose affiliations were not identified. *Id.* at 21.

⁷ City of Tenakee Springs’ Request for Reconsideration (Jan. 15, 2025) [hereinafter Tenakee Springs Request].

⁸ Request for Reconsideration by City of Gustavus and Elfin Cove (Jan. 15, 2025) [hereinafter Gustavus and Elfin Cove Request]. The Gustavus and Elfin Cove Request was signed by one attorney for the City of Gustavus and community of Elfin Cove. *See id.* at 56. It notes that Paul Johnson (apparently a resident of the proposed borough) “joined as part of the Elfin Cove group” and John MacKinnon (apparently a part-time resident of the proposed borough) “joined with Elfin Cove” in the request. *See id.* at 1 nn.2, 179. Neither signed the request nor accompanying affidavits. Neither appear to be directors or officers of the community of Elfin Cove. *See* <https://www.commerce.alaska.gov/cbp/main/Search/Entities> (last visited Jan. 30, 2025).

⁹ In this brief, quotations from the January 21, 2025 meeting are based on audio recordings supplied by Commission staff, not a transcript or other formal record.

¹⁰ 3 AAC 110.580(f).

¹¹ 3 AAC 110.580(g).

reconsideration.”¹² Before the relevant motion was made, the Commission went into executive session to address concerns about whether there had been a violation of the Open Meetings Act during the November 12 decisional meeting, which was an issue raised in several of the requests for reconsideration.¹³ As stated by Commissioner Wood after the executive session and during discussion on the motion, “the reason for the motion is to cure this potential [Open Meetings Act] defect, and this arguable point will be taken off the table. But it will necessitate some further work down the line in terms of a decisional meeting related to [boundaries and best interest of the state].”

The motion before the Commission was that the Commission “*accept the requests for reconsideration* submitted by [the Gustavus Visitors’ Association, City of Pelican, City of Tenakee Springs, City of Gustavus, and the community of Elfin Cove] and that the Commission permit the Petitioner, City of Hoonah, to *respond to the . . . requests for reconsideration* within 10 days . . . and that *reconsideration be limited to two issues*: the Commissioners’ decision that the Petitioner’s Petition met the standards for boundaries and best in interests of the state.”

For the purposes of complying with these limitations, the Petitioner assumes without conceding that when the Commission “accepted” the requests for reconsideration it was granting them to the extent they raised either of the two standards issues. The GVA Request, for example, does not seem to raise either issue, and was thus not truly granted. Further, because the Commission has granted the requests and allowed briefing on two specific issues, it appears that the forthcoming decision will replace the initial decision only with respect to those two issues. And because the Commission has granted the requests, allowed a responsive brief, and prepared to schedule a decisional meeting, it appears that

¹² See State of Alaska Notice of a Local Boundary Commission (LBC) Meeting to Consider Reconsideration of Xunaa Borough Decision, <https://aws.state.ak.us/OnlinePublicNotices/Notices/View.aspx?id=218158> (Jan. 15, 2025) (last visited Jan. 30, 2025).

¹³ *E.g.*, Tenakee Springs Request, 10–12; Gustavus and Elfin Cove Request, 2–7; Pelican Request, 18–20 (asserting that “[t]he use of executive session is highly constrained by state law” and that the reason given for the executive session was “not a legally appropriate basis for executive session” but providing no authority or argument supporting these assertions).

opposing reconsideration itself would be futile.

If these assumptions and conclusions differ from those of the Commission, the Petitioner respectfully requests that the Commission grant the Petitioner, as the case may be, 1) the opportunity to oppose the requests for reconsideration and 2) additional time to more fully brief the issues that the Commission will in fact be reconsidering. These matters are of great importance to the Commission, the Petitioner, the Respondents, the groups that filed requests for reconsideration, and the public. If to correct a mistake in the procedural posture of this matter, time for clarity and full pertinent briefing would be proper under 3 AAC 110.660, as it would help secure the Commission's reasonable, speedy, and inexpensive final determination without working injustice, making a substantially uninformed decision, or neglecting constitutional principles and the broad public interest.

The Petitioner opposes the requests for reconsideration for their respective failures to prove any of the grounds for reconsideration set forth in 3 AAC 110.580(e). However, given the above, the Petitioner will proceed with discussing what it understands to be the only two decisions that will be reconsidered: that incorporation of the proposed borough meets the standards for 1) boundaries and 2) best interests of the state.

III. Discussion

The standards for boundaries and best interests of the state are based in the constitution, set forth in statute, and expanded upon in regulation. The Petition satisfies these standards under each of these somewhat different formulations.

A. The Petition Satisfies the Boundary Standard.

The Alaska Constitution provides for the state to be divided into boroughs established “according to standards provided by law,” including “population, geography, economy, transportation, and other factors,” with each borough “embrac[ing] an area and population with common interests to the maximum degree possible.”¹⁴ Alaska Statute 29.05.031(a)(2) provides a standard for the boundaries of boroughs: a proposed borough may incorporate when its boundaries “conform generally to natural geography and include

¹⁴ ALASKA CONST. art. X, § 3.

all areas necessary for full development of municipal services.”

Implementing these laws, 3 AAC 110.060 provides that the boundaries of a proposed borough “must be on a regional scale suitable for borough government, and must include all land and water necessary to provide the full development of essential municipal services on an efficient, cost-effective level.”¹⁵ The Commission will presume that a proposed borough that “contains enclaves does not include all land and water necessary to allow for the development of essential municipal services on an efficient, cost-effective level” unless there is a specific and persuasive showing to the contrary.”¹⁶

To evaluate whether a proposed borough meets these requirements, the Commission “may consider relevant factors” such as land use, ethnicity and cultures, transportation patterns and facilities, natural geographical features and environmental factors, and industrial, commercial, and resource development within the proposed borough.¹⁷ The Commission may also consider model borough boundaries; regional boundaries such as those for existing regional educational attendance areas, federal census areas, regional Alaska Native Corporations, and national forests; and whether the proposed borough will embrace an area and population with common interests to the maximum degree possible, promote maximum local self-government, promote a minimum number of local government units, and will have the optimum boundaries for the region.¹⁸

On these various factors, the Commission misstated the extent of consideration that is mandatory.¹⁹ Both the statute and regulation state that the boundaries of the proposed borough should 1) conform generally to natural geography and 2) include all land and water necessary to provide the development of essential municipal services.²⁰ The regulation then

¹⁵ 3 AAC 110.060(a).

¹⁶ 3 AAC 110.060(d).

¹⁷ 3 AAC 110.060(a)(1)–(7).

¹⁸ 3 AAC 110.060(b).

¹⁹ See Decision 24 (“The [boundary] standard requires the Commission to review the following criteria: [3 AAC 110.060]”).

²⁰ See AS 29.05.031(a)(2) (“An area that meets [the criteria] may incorporate. . . .”); 3 AAC 110.060(a) (using “must”).

adds a requirement that the boundaries be “on a regional scale suitable for borough government.”²¹ It also provides a list of things that *may* be considered in determining whether these criteria have been met.²² The Commissioners largely agreed that the proposed borough satisfied the permissive criteria, and their debate was on just two criteria: 1) whether the proposed boundaries “are the optimum boundaries for that region in accordance with art. X, sec. 3, Constitution of the State of Alaska” and 2) whether the proposed borough “will embrace an area and population with common interests to the maximum degree possible.”²³ Article X, section 3 of the Alaska Constitution does not require perfect boundaries, of course, but rather boundaries that “embrace an area and population with common interests to the maximum degree possible.” Thus, the two criteria that were the source of the Commissioners’ debate are, by virtue of their constitutional origin, mandatory to consider. The others are not, although the Petitioner and the Commissioners agree that those other factors favor incorporation.

The Commission evaluated the Petition on the boundary standard, including its constitutional underpinning and the various mandatory and permissive factors included in the regulation, and concluded that the Petition was sufficient. That remains true, and the Commission should not turn reverse its conclusion. However, the Commission also arbitrarily decided to limit the western boundary to three miles into the ocean. That decision is not supported by law, and should be reconsidered so as to approve the petitioned-for boundaries.

²¹ 3 AAC 110.060(a).

²² 3 AAC 110.060(a). *See Murphy v. Fairbanks N. Star Borough*, 494 P.3d 556, 569 n.80 (Alaska 2021) (“‘May’ is generally permissive. . . .”) (citing *Gerber v. Juneau Bartlett Mem’l Hosp.*, 2 P.3d 74, 76 (Alaska 2000)); *Petitioners for Incorporation of City & Borough of Yakutat v. Loc. Boundary Comm’n*, 900 P.2d 721, 724 (Alaska 1995) (citations omitted) (discussing discretionary “may” versus mandatory “shall”); *see also Biden v. Texas*, 597 U.S. 785, 802 (2022) (“This Court has ‘repeatedly observed’ that ‘the word “may” clearly connotes discretion.’”) (quoting *Opati v. Republic of Sudan*, 590 U. S. 418, 428 (2020)); *Nat. Res. Def. Council, Inc. v. Perry*, 940 F.3d 1072, 1078 (9th Cir. 2019) (citing *Washington v. Harper*, 494 U.S. 210, 221 (1990)) (“The word ‘will,’ like the word ‘shall,’ is a mandatory term”).

²³ Decision 24–25 (quoting 3 AAC 110.060(a)(6) and 3 AAC 110.060(a)(3), respectively).

**1. *The Xunaa Borough Embraces an Area and Population with
Common Interests to the Maximum Degree Possible.***

The proposed borough embraces an area and population with common interests to the maximum degree possible, thereby satisfying Article X, section 3 of the Alaska Constitution. A borough that embraces an area and population with common interests *to the maximum degree* is neither possible nor desirable. If it were, the whole universe, or at least the whole of Alaska, might very well be in one borough. The Alaska Constitution recognizes this by requiring only the maximum degree *possible*.²⁴

There is no debate about whether the area and population included in the proposed borough share common interests—they do.²⁵ For example, the Petition goes into great depth showing the interconnectedness of the area and population in terms of social, cultural, and economic characteristics, both historic and contemporary.²⁶ The area and population also largely conforms to the model borough, which the Commission recognizes as encompassing an area and population that has common interests.²⁷

Rather, the debate has centered around whether the proposed borough does not embrace enough—namely, the cities of Gustavus, Tenakee Springs, and Pelican, which share things in common with the proposed borough but are not included. The record is replete with facts about why these cities were not included, namely that they do not wish

²⁴ *Petitioners for Incorporation of City & Borough of Yakutat v. Loc. Boundary Comm’n*, 900 P.2d 721, 725 (Alaska 1995) (“To avoid conflict with the constitutional mandate . . . statutory standards for incorporation [must be applied] in the relative sense implicit in the constitutional term ‘maximum degree possible.’”).

²⁵ See, e.g., Decision 17–18 (“The areas within the proposed Borough are clearly compatible.”); Tr. 34–35 (“[W]e can observe that there are a number of common interests for all these communities . . . Sure, there’s some differences between folks that might live in towns and those that might live -- we would call it here the Bush -- but they’re all one and part of the same general area with the common interests in lifestyles. . . . [W]e [should not] ignore the fact that [the] model borough boundaries study has already identified these communities as having common interests.”); Dissent 2 (urging the Petitioner and other cities “to work together . . . [to serve] their common interests”); Dissent 3 (emphasizing “maximum degree possible,” not “common interests”).

²⁶ See e.g., Petition, Ex. E §§ d, h.

²⁷ See Petition, Ex. E at 23; Decision 26; Dissent 4 (quoting LOC. BOUNDARY COMM’N, MODEL BOROUGH BOUNDARIES (rev. June 1997)); Tr. 33–35 (same).

to be.²⁸ As the Petitioner has addressed, those cities are in the model borough, but of course that is a model, not a mandate.²⁹ The record is also replete with discussion of why it may be desirable for those cities to be included in the prospective borough, but why ultimately it is not possible.³⁰

Even the dissent did not go so far as to assert that the Petition failed in this regard; rather, it simply expressed that the qualifier “possible” “may call for greater efforts or more difficult circumstances than what exist here,” while noting that “a minority of commenters . . . seem open to negotiations with the City of Hoonah.”³¹ Such commenters were members of the public—apparent residents of the cities that were not included in the proposed borough—and while the Petitioner welcomes such expressions, it has done so in the past to those very same cities, to no avail. Some public comments baselessly stated that this was not the case,³² a contention that was picked up by the Commissioners’ discussion and in

²⁸ See Petition, Ex. E 25–27 (citations omitted).

²⁹ See 3 AAC 110.060(b) (stating that “the commission may consider . . . model borough boundaries for the area”); see also Petition, Ex. E 27 (noting that every other borough in Southeast Alaska varies from the models, even though they were approved under the former 3 AAC 110.060, which made conforming to model borough boundaries a presumption to be overcome).

³⁰ See, e.g., Petition, Ex. E 25–27; see also Decision 28–29 (citations omitted) (“We find that regardless of the effort put forth by the Petitioner, none of these neighboring municipalities would have agreed to participate in this proposed Borough.”).

³¹ Dissent 10.

³² Compare Transcript of Public Hearing 181 [hereinafter Public Hearing Transcript] (City of Pelican Mayor Patricia Phillips stating, “there were no further follow[-]through discussions to continue public outreach” after 2017), with Petition, Ex. F 14 (listing series of letters and e-mails between the Petitioner and Mayor Phillips in June 2022–October 2022, as well as a presentation before the Pelican City Council and Mayor Phillips’ follow-up statement regarding it). Compare Public Hearing Tr. 160 (Gustavus community member stating, “I wasn’t on the [Gustavus] city council at the time, but when I heard that we received a letter from Hoonah about this next petition go round, I went to look at it and as I recall, it was just a single page, maybe two. And I remember asking, you know, was there more than this? And there wasn’t [sic] there was no phone call, there were no follow up meetings.”), with Public Hearing Tr. 165 (Gustavus community member, city council member, and former mayor stating, “The city of Hoonah invited Gustavus, Pelican and Tenakee Springs to join them”), Petition, Ex. U (June 23, 2022 letter from City of Hoonah to City of Gustavus), and Petition, Ex. V (July 14, 2022 letter from City of Gustavus to City of Hoonah, stating “[W]e must once again respectfully decline your offer. . . . We honestly believe you will be more successful without us. . . . We are sorry to throw cold water on your proposal. We sincerely wish you success in meeting the needs of your community. But we believe success is best assured if the Xunaa Borough boundary does not extend beyond midchannel in Icy Strait and excludes Gustavus”). See

requests for reconsideration, also without support.³³ The fact, supported by the record, is that the Petitioner has attempted to work with these cities on a borough encompassing the entire region, but that these cities do not want to take part.³⁴ The Petition respects those cities' wishes by not attempting to include them in a borough they oppose. The Petitioner should not be faulted for this, and incorporation should not be prevented because of it.

Given the interrelated and admittedly elliptical borough incorporation standards, the dissent merely questioned whether the majority decision "may be mistaken." As all of the Commissioners recognized to one extent or another, ultimately, the Petition's exclusion of these three cities was simply a bow to the reality that these cities are not presently aligned with the Petitioner. This is not a reason to prevent incorporation of the Xunaa Borough. Instead, it is a reflection of why the Alaska Constitution does not rigidly require boroughs to embrace areas and populations with common interests to the utmost degree.

**2. *The Xunaa Borough Conforms Generally to Natural Geography
and Includes All Areas Necessary for Full Development of
Municipal Services.***

The proposed borough conforms generally to natural geography and includes all

Petition, Ex. F 11–21 (detailing Petitioner's communications with potentially interested parties, including to the City of Tenakee Springs, which went unanswered); Public Hearing Tr. 171 (City of Hoonah attorney stating, "[W]e clearly asked [the City of Gustavus] to be a part of this process back in 2022. . . . [W]e said to them we'd be delighted to attend an upcoming city council meeting . . . their response was, no council member saw the need to reconsider the city's policies . . . opposing the formation of a borough. So this idea that there was no outreach is false. There was outreach to Gustavus. We sent two letters to Tenakee Springs. . . . [B]ecause they'd never responded to those letters, so I even tracked down their attorney and they still didn't respond"); Public Hearing Tr. 184 (City of Hoonah City Administrator stating, "We've done extensive outreach. The record reflects the fact I've done extent of outreach [sic]. Recently done outreach, Pelican said no, Gustavus said no, Tenakee has been not responsive for three, five years. Doesn't matter what form is, email, fax, or letters, they don't reply to anything. . . . We've been collaborating for 30 years and gotten nowhere.").

³³ See Tr. 126:20–129:18 (discussion regarding the extent to which the record supported some commenters' assertions that the City of Hoonah had not done enough to engage with the cities that were eventually excluded from the Petition). In this discussion, Commissioner Wood requested a point of information regarding where in the staff report it was that people in excluded cities were open to further discussion about borough formation, despite letters Commissioner Trotter referenced that indicated those cities had declined further participation—the point was not followed up on.

³⁴ See Public Hearing Tr. 12 ("Local Boundary Commission staff acknowledges the work that the community of Hoonah did to reach out to these neighboring communities, all of which declined to participate in this borough petition process."). See also *supra* note 32.

areas necessary for full development of municipal services, thereby satisfying Alaska Statute 29.05.031(a)(2).

On the issue of natural geography, there is again not debate except as to the cities that have not been included.³⁵ As the Petition states, the proposed borough conforms the natural geography of the area, following the waters of Icy Strait’s tributaries and termini as well as the mountains of the Chilkat Range, diverting from nature to match the boundaries of the adjacent organized boroughs and the international border with Canada.³⁶

The Commission also emphatically concluded that the proposed borough has the capacity to provide municipal services, which is likewise not contested.³⁷ Here too, the Petition went into great detail regarding the Xunaa Borough’s ability to deliver and develop municipal services.³⁸ The only argument relates to the cities that were not included, as well as the community of Elfin Cove, which was included.³⁹ The complaint that the Xunaa Borough would not provide services to cities outside the borough hardly warrants exposition. The complaint that the Petitioner is intent on “only providing services (beyond

³⁵ Compare Decision 25 (“The commission members agreed the boundaries do conform to natural geography of the region . . .”), with Tenakee Spring Request at 7 (“The Xunaa Borough boundary clips off the northern bit of Chichagof Island at Tenakee rather than following the natural geography.”).

³⁶ See Petition, Ex. C4, Ex. E 23.

³⁷ E.g., Decision 19–20 (“The record has established that the City of Hoonah’s government has operated quite well over the years while at the same time maintaining exceptional services. Likewise, it has kept up with technological changes and operates efficiently. . . . This level of functioning will transition well to the Borough. . . . Given the sophisticated nature of the economic development in and around Hoonah . . . the level of competency to provide services has been aptly demonstrated.”); *id.* at 21 (“[T]he City of Hoonah does an admirable job of providing municipal services in an efficient and cost[-]effective manner. . . . The city of Hoonah has a demonstrated record of reliable government services and financial solvency.”); *id.* at 25 (“The commission members agreed the boundaries . . . includes all land and water necessary to provide the full development of essential municipal services on an efficient, cost-effective basis.”); *id.* at 33 (“The petitioner is already doing much of this work in the city of Hoonah. And because the population outside of what will soon to be the Hoonah Townsite Service Area is sparse, and because the petitioner is not proposing to provide additional services outside of what is currently the City of Hoonah, the commission believes the petitioner will have little trouble extending these powers to the borough and the standard is met.”).

³⁸ See, e.g., Petition, §§ 6, 14; *id.* at Ex. E §§ g, l.

³⁹ See, e.g., Gustavus and Elfin Cove Request 12 (“Borough services would only be applied in the current City of Hoonah.”); Tenakee Springs Request 5 (noting that the enclave issue bears on whether a proposed borough includes all necessary areas).

the minimum required by law) to the current City of Hoonah townsite” is similarly feeble.⁴⁰ It admits from the outset that the Xunaa Borough would be providing the municipal services that are required. Furthermore, the provision of services was designed in this way specifically to respect remote community members’ desire to retain their independent lifestyles.⁴¹

Therefore, as the Commission has already concluded, the Xunaa Borough conforms generally to natural geography and includes all areas necessary for full development of municipal services.

3. *The Proposed Boundaries Conform Generally to Natural Geography, are on a Regional Scale Suitable for Borough Government, and Include all Land and Water Necessary to Provide the Full Development of Essential Municipal Services on an Efficient, Cost-Effective Level.*

As discussed in section III.A.2, *supra*, the proposed boundaries conform generally to natural geography and include all land and water necessary to provide the full development of essential municipal services on an efficient, cost-effective level, thereby satisfying two of the three criteria in 3 AAC 110.060(a).⁴² The proposed boundaries are also on a regional scale suitable for borough government, thereby satisfying the third criterion in 3 AAC 110.060(a), as reflected by the Xunaa Borough’s conformity to the model borough boundaries. Again, the only disagreement has centered around the cities that were not included, as well as some remote communities outside what is now the City of Hoonah that were included.

Again, as discussed in this brief, in the Petition, and at the Commission’s meetings, the proposed boundaries satisfy the requirements of 3 AAC 110.060(a) by conforming generally to natural geography, being a regional scale suitable for borough government, and including all land and water necessary to provide the full development of essential

⁴⁰ Gustavus and Eflin Cove Request 1.

⁴¹ See Petition § 5, Ex. E at 2, 17.

⁴² The regulation adds on to the statute, stating that the full development is to be to “essential” municipal services “on an efficient, cost-effective level.” In either the statutory or regulatory formulation, this requirement is satisfied. See *supra* note 37.

municipal services on an efficient, cost-effective level.

a. The Proposed Boundaries are the Optimum for the Region in Accordance with the Alaska Constitution and They Embrace an Area and Population with Common Interests to the Maximum Degree Possible.

As discussed in section III.A.1, *supra*, the proposed boundaries are in accordance with these criteria from the Alaska Constitution. While there is contention that the proposed boundaries are not perfect, they needn't be. Some might argue that the boundaries could be better, but that is not the standard. That there is arguably room for improvement is not a reason to stop all improvement. The requirement is that the proposed boundaries embrace an area and population with common interests to the maximum degree possible. The Xunaa Borough's boundaries satisfy that requirement.

b. The Other Factors Weigh in Favor of the Proposed Boundaries.

The permissive factors of 3 AAC 110.060(a)–(b) weigh in favor of the proposed boundaries. These are discussed in detail in the Petition,⁴³ and as they are clear and as the Petition has largely not been questioned on them, the Petitioner will not readdress them here. One request for reconsideration, however, challenged the relevance that historic Alaska Native use of the land and water in the proposed borough has on incorporation,⁴⁴ presumably as integrated into these factors, despite the Decision not including any mention of this and the request providing no authority against it.

In particular, the City of Pelican attacked the Commission for “inappropriately rely[ing] on historical Tribal use as a factor justifying” the proposed boundaries.⁴⁵ While this attack recognized, as it must, that Alaska Native people have long used the land and water in the area, it questioned why this was relevant and even whether considering this might be unconstitutionally discriminatory. The human geography of a region is so obviously relevant to its political demarcation that, without this ill-founded attack, it would

⁴³ *E.g.*, Petition, Ex. E § h.

⁴⁴ *See* Pelican Request 14–15.

⁴⁵ *Id.*

not be necessary to explain. Yet, the regulations make this explicit anyway, noting that the Commission may consider “land use and ownership patterns,” “ethnicity and cultures,” “existing and reasonably anticipated transportation patterns and facilities,” and “existing and reasonably anticipated industrial, commercial, and resource development,” among other factors.⁴⁶ Such factors clearly inform whether an area and population share common interests. Looking at historical use is not the same as implementing discriminatory policy, however. The attack suffers similar weaknesses when it conflates the concept of citizenship with race and the concept of municipal incorporation with “taking away from other communities the rights to use lands, waters, and resources simply because they are primarily inhabited by more recent settlers in Alaska.”⁴⁷

The Petitioner urges the Commission not to reconsider its decision on such feigned grounds, and to instead reaffirm its conclusion that the boundaries of the proposed borough conform generally to natural geography, are on a regional scale suitable for borough government, and include all land and water necessary to provide the full development of essential municipal services on an efficient, cost-effective level, and that the other relevant factors such as transportation, commercial and economic activity, ethnicity, and culture were satisfied.

4. *The Xunaa Borough Does Not Contain Enclaves.*

The proposed borough does not contain enclaves, as the Commission correctly concluded in its original decision.⁴⁸ Nonetheless, several of the requests for reconsideration argue that the borough would turn the cities of Tenakee Springs, Gustavus, and Pelican into enclaves. When a proposed borough does contain enclaves, there is a presumption that the borough does not include all land and water necessary to allow for the full development of essential municipal services on an efficient, cost-effective level, which can be overcome

⁴⁶ 3 AAC 110.060(a).

⁴⁷ Pelican Request at 15 n.39.

⁴⁸ See Decision 27 (“We find that no enclaves are created by the Borough boundaries, although as previously noted, these municipalities will be surrounded by boroughs.”).

with a specific and persuasive showing to the contrary.⁴⁹ Since the Xunaa Borough does not contain enclaves, no presumption exists. However, even if such presumption existed, it has been overcome by the specific and persuasive showing that the Xunaa Borough in fact does include all land and water necessary to allow for the full development of essential municipal services on an efficient, cost-effective level.

The term “enclave” is not defined in the Local Boundary Commission laws, but it is well understood in international law, where boundary disputes between governments are more common.⁵⁰ An enclave is an “[a]n isolated part of a country’s territory *entirely surrounded by the territory of one foreign country*, so that any communication with the main part of the country must pass through the territory of the foreign country.”⁵¹ To truly be an enclave, a territory must be enclosed by a foreign territory.⁵² Lesotho is a classic example: it is entirely surrounded by South Africa. The Vatican City is another: it is enclosed by Italy. By contrast, no one would consider Switzerland an enclave, even though it does not touch the ocean and is entirely surrounded by other nations. This comports with common usage of the word as well.⁵³ It also comports with the usage in the regulation, which states that the

⁴⁹ 3 AAC 110.060(d).

⁵⁰ See, e.g., Case Concerning Right of Passage over Indian Territory (Portugal v. India), Judgment, 1960 I.C.J. Rep. 6 (Apr. 12, 1960) (Portugal seeking redress for India having prevented passage from one Portuguese possession to another, where both possessions were entirely surrounded by India and were thus enclaves, which entitled private persons to free passage between the two). The term is also used in the context of federal jurisdiction over federal land and installations located within a state or territory, such as post offices and military bases. See, e.g., *Kelly v. Lockheed Martin Servs. Grp.*, 25 F. Supp. 2d 1, 3 (D.P.R. 1998).

⁵¹ *Enclave*, BLACK’S LAW DICTIONARY (12th ed. 2024) (emphasis added); accord Tobias H. Irmischer, *Enclaves*, in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW (rev. Sept. 2007) (“An enclave in international law is an isolated part of the territory of a State, which is entirely surrounded by the territory of only one foreign State”).

⁵² See *id.*; EVGENY VINOKUROV, A THEORY OF ENCLAVES 10 (2007).

⁵³ See MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/enclave> (defining “enclave” as “a distinct territorial, cultural, or social unit enclosed within or as if within foreign territory”); CAMBRIDGE ADVANCED LEARNER’S DICTIONARY & THESAURUS, <https://dictionary.cambridge.org/dictionary/english/enclave> (“a part of a country that is surrounded by another country”); CAMBRIDGE ACADEMIC CONTENT DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/enclave> (“an area that is different from the larger area or country surrounding it, or a group of people who are different from the people living in the surrounding area”). Cf. *State v. University of Alaska*, 624 P.2d. 807, 809 (1981) (“A group of real

presumption applies only if the proposed area “*contains* enclaves.”⁵⁴ An area could not “contain” an enclave unless that area completely surrounded it. To use those words otherwise would render them meaningless. Klukwan is an enclave because it is contained within the Haines Borough. By contrast, the City of Gustavus would be surrounded by the Xunaa Borough and the Haines Borough. Similarly, the Cities of Tenakee Springs and Pelican would be surrounded by both the Xunaa Borough and the City and Borough of Sitka. Thus, the Xunaa Borough would not contain any of these cities. An enclave is, as understood by the regulation, a territory that is wholly inside one other territory. The Xunaa Borough would not contain enclaves, and thus the presumption does not apply.

Even if the Commission were to apply the presumption, in derogation of the technical and common meaning of “enclave,” the Commission should still conclude that presumption has been overcome. The presumption that would follow is merely that the borough would “not include all land and water necessary to allow for the development of essential municipal services on an efficient, cost-effective level.”⁵⁵ There has been a specific and persuasive showing to the contrary, and therefore the presumption has been overcome.

As discussed in section III.A.2, *supra*, there is no doubt or lacking record that the Xunaa Borough would contain sufficient land and water for the development of efficient, cost-effective essential municipal services. Instead, the arguments against are that the borough should contain the excluded cities. Some seem to go further, attacking the Petition for not addressing the borough’s provision of municipal services to these cities⁵⁶—but, again, those cities are not in the proposed borough. This is not a fault, but a feature.⁵⁷ Those

estate developers . . . wished to build a housing development All the proposed land for the development, consisting of about 710 acres, is a privately owned inholding within the boundaries of Chugach State Park. Between this enclave of private land and the park boundary are two sections of land”).

⁵⁴ 3 AAC 110.060(d) (emphasis added).

⁵⁵ 3 AAC 110.060(d).

⁵⁶ See Gustavus and Elfin Cove Request 31; Pelican Request 14.

⁵⁷ See Petition, Ex. E 34 (“Petitioner excluded the three communities of Gustavus, Pelican and Tenakee

cities were excluded because they do not wish to be part of the borough. They are seeking to prevent the incorporation of a borough that they will not be a part of, and in doing so they do not even allege that the borough would be unable to provide for those people who would actually live there.

The community of Elfin Cove, for its part, opposes incorporation and is in the proposed borough. It is a nonprofit corporation that provides some limited services to a remote community that does not wish to be intruded upon by additional government services.⁵⁸ The Petition respects this by not attempting to force such government services onto the community.⁵⁹ Again, even the objections the community of Elfin Cove has to incorporation do not bear upon the sufficiency of the Xunaa Borough's land and water in the provision of municipal services.

5. *The Proposed Boundaries, Not Those Altered by the Commission, Should be Approved.*

The Commission approved the Petition to incorporate the Xunaa Borough but reduced the borough's boundary from approximately ninety miles into the ocean to approximately three. The reasoning for this reduction was scant, solely citing the Submerged Lands Act and a definition in Alaska fish and game regulations.⁶⁰ Neither demand such a restriction on borough boundaries. Additionally, Commission precedent cuts directly against such a restriction. Because the Commission's alteration of the borough boundaries is not supported by law and is contrary to precedent, the Commission should reconsider its decision on altering the petitioned-for boundaries and restore the boundaries to those included in the Petition.

a. *The Submerged Lands Act Does Not Restrict the Seaward Boundaries of a Borough.*

The Submerged Lands Act arose after a series of cases in which the U.S. Supreme

Springs in order to avoid disharmony.”).

⁵⁸ Gustavus and Pelican Request ¶ 8.i; Petition, Ex. E § k.

⁵⁹ Petition, Ex. E § d.

⁶⁰ Decision 29–30 (citing Submerged Lands Act, Pub. L. 83–31, 67 Stat. 29 (codified at 43 U.S.C. § 1301 *et seq.*); 5 AAC 39.975(13)).

Court ruled that the federal government, not the states, had authority to land underneath territorial waters.⁶¹ The act partially abrogated these cases by confirming title to the states up to a line three miles from the coast (with a caveat for the Great Lakes).⁶² The act also recognized the authority of subsequently admitted states to extend their boundaries to that line (or to international boundaries in the case of states bordering the Great Lakes) “or any other body of water traversed by such boundaries.”⁶³ However, the act explicitly refrained from limiting states’ claims beyond the three-mile line:

Any claim heretofore or hereafter asserted . . . indicating the intent of a State so to extend its boundaries is approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State’s seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.⁶⁴

In other words, a state has title to submerged lands out to three miles from its coast, and a state may have title to submerged lands beyond that default three-mile line based on history, state constitution, or congressional grant.⁶⁵ After the Submerged Lands Act, the U.S. Supreme Court recognized a historic claim by Texas and a constitutional claim by Florida, both to three marine leagues (approximately 10.4 miles) into the Gulf of Mexico.⁶⁶

The Commission’s reliance on the Submerged Lands Act is incorrect, both under

⁶¹ See generally LAURA K. WELLES, CONG. RSCH. SERV., RL32912, *Federal-State Maritime Boundary Issues* (May 5, 2005).

⁶² See Submerged Lands Act § 4, 43 U.S.C. § 1312; Avrum M. Gross, *The Maritime Boundaries of the States*, 64 MICH. L. REV. 641 (1966) (discussing abrogation of cases that led to the Submerged Lands Act); *United States v. Alaska*, 521 U.S. 1, 5 (1997) (same).

⁶³ Submerged Lands Act § 4, 43 U.S.C. § 1312.

⁶⁴ *Id.*

⁶⁵ See *United States v. Louisiana*, 363 U.S. 1, 24–25 (1960) (“[W]e find a clear understanding by Congress that the question of rights beyond three miles turned on the existence of an expressly defined state boundary beyond three miles. . . . It was recognized that if the legal existence of such boundaries could be established, they would clearly entitle the respective States to submerged land rights to that distance . . .”).

⁶⁶ See *id.* (recognizing claims by Texas and Florida, but rejecting claims by Louisiana, Mississippi, and Alabama).

the plain language of the act and U.S. Supreme Court case law, and therefore must be reconsidered.

b. State Law Does Not Restrict the Seaward Boundaries of a Borough.

The Commission also cited to 5 AAC 39.975(13) in support of its conclusion that the state does not extend beyond a three-mile line.⁶⁷ That regulation merely defines “waters of Alaska” for certain uses in Title 5 (Fish and Game), Part 1 (Commercial and Subsistence Fishing and Private Nonprofit Salmon Hatcheries). It is not on point, and certainly does not limit the state’s own jurisdiction. In fact, the state asserts jurisdiction over fisheries far beyond three or even thirty miles from the coast.⁶⁸

A closer citation would be Alaska Statute 44.03.010, which was discussed in the Petition⁶⁹ and which provides,

The jurisdiction of the state extends to water offshore from the coast of the state as follows:

- (1) the marginal sea to its outermost limits as those limits are from time to time defined or recognized by the United States of America by international treaty or otherwise;
- (2) the high seas to the extent that jurisdiction is claimed by the United States of America, or to the extent recognized by the usages and customs of international law or by agreement to which the United States of America or the state is a party;
- (3) submerged land including the subsurface of submerged land, lying under the water mentioned in this section.

But by its very text, that statute does not restrict the state’s jurisdiction to a three-mile limit.⁷⁰

⁶⁷ See Decision 29–30.

⁶⁸ See, e.g., 5 AAC 29.010–.025, .100 (regulating fisheries in the Fairweather Grounds, which are approximately 64 miles seaward of the nearest coast); ALASKA DEPARTMENT OF FISH AND GAME, CHART 5 - REGION 1, SOUTHEAST ALASKA (10th ed., June 2024), https://www.adfg.alaska.gov/static/fishing/PDFs/commercial/maps/chart05_salm_shell_all.pdf (visualizing same).

⁶⁹ Petition, Ex. E 28.

⁷⁰ See *State v. Jack*, 125 P.3d 311 (Alaska 2005) (finding that AS 44.03.010(2), in the context of a criminal case, grants Alaska jurisdiction to the extent the United States has jurisdiction). “The ‘marginal sea’ encompasses at least all of the state’s territorial waters, generally extending three miles from the coast.” *Id.* at 317 (citing *United States v. Maine*, 469 U.S. 504, 513 (1985); *State v. Sieminski*, 556 P.2d 929, 930

Other statutes in the same chapter confirm this. Alaska Statute 44.03.030 provides, “This chapter does not limit or restrict . . . jurisdiction over or ownership of other water or land under other water inside or forming part of the boundaries of the state” Alaska Statute 44.030.040 provides, “Nothing in the statute or in this chapter is a waiver or relinquishment of jurisdiction over or ownership by the state of an area to which jurisdiction or ownership extends under another provision or rule of law.”

When considering the incorporation of the Aleutians East Borough, the Commission relied on Alaska Statute 44.03.010 to alter boundaries to conform to a rough three-mile limit.⁷¹ The Commission’s unsupported assertion then was that “[i]t is commonly understood” that the statute limits state jurisdiction “to an area three geographical (nautical) miles (18,228 feet) seaward of the land,”⁷² though this did not appreciate the distinction between geographical and nautical miles or the Alaska Statutes’ express lack of such a limit, and has since been contradicted by the state’s own assertions,⁷³ the Alaska Supreme Court,⁷⁴ and by the mileage claimed by the United States.⁷⁵ Clearly, then, the state’s boundaries are not so limited.

c. The Commission’s Precedent Dictates that the Proposed Boundaries are Permissible.

Unlike in this case, the Commission did not restrict the boundaries of the City and Borough of Yakutat to an arbitrary boundary “three miles out in the water” from the “legal

(Alaska 1976)). The “high seas” is much murkier, but cannot apply to property ownership, unlike criminal conduct. *See id.* 315–16.

⁷¹ *See* Statement of Decision, 1, *In the Matter of the Petition for Incorporation of the Aleutians East Borough* (July 24, 1987).

⁷² *Id.*

⁷³ *See supra* notes 68, 70.

⁷⁴ *See supra* note 70.

⁷⁵ *See, e.g.*, Proclamation No. 5928, 3 C.F.R. 547 (1988) (proclaiming U.S. territorial sea out to 12 nautical miles); Proclamation No. 2667, 10 Fed. Reg. 12303-01 (Oct. 2, 1945) (proclaiming U.S. jurisdiction over continental shelf); *see also* CAITLIN KEATING-BITONTI, CONG. RSCH. SERV, *Outer Limits of the U.S. Extended Continental Shelf: Background and Issues for Congress*, R47912 (Feb. 7, 2024) (discussing claims by the United States over the continental shelf surrounding Alaska).

coastline.”⁷⁶ There, the Commission noted that Yakutat’s seaward boundaries extend to the limits of the state. By approving the boundaries in this manner, the Commission afforded the City and Borough of Yakutat the ability to exercise authority up to the extent permitted by law. The Commission must follow its precedent by treating the Xunaa Borough in the same manner. Even if that case somehow did not have precedential value, a definition of borough boundaries that refers to the full extent of the state’s boundaries is more manageable for the Commission and less susceptible to potential conflicts or subsequent changes.

There is nothing in state or federal law that requires the Commission to adhere to an ill-defined three-mile limit. The Xunaa Borough’s proposed seaside boundary extends into the Gulf of Alaska beyond the three-mile line and into waters that were historically the province of the Huna Tlingit.⁷⁷ It is not the province of the Commission to resolve the location of a boundary with respect to the federal government or any other nation, especially when Commission precedent is in line with the Petition. Therefore, the Commission must approve the boundaries of the Xunaa Borough as they are in the Petition.

B. The Petition Satisfies the Best-Interest-of-the-State Standard.

Alaska Statute 29.05.100 provides that, in addition to applicable constitutional and regulatory standards, the Commission must consider whether incorporation “is in the best interests of the state.” The relevant regulation, 3 AAC 110.065, provides that the Commission “may consider relevant factors,” including whether incorporation would (1) promote maximum local self-government, (2) promote a minimum number of local government units, (3) relieve the state government from providing local services, and (4) be reasonably likely to expose the state government to unusual and substantial risk as the prospective successor to the borough in the event the borough dissolves.⁷⁸

⁷⁶ Compare Decision 29, with *In the Matter of the Petition to Dissolve the City of Yakutat and Incorporate the City and Borough of Yakutat* (see Petition, Ex. E 29 n.52 regarding date of the Yakutat decision).

⁷⁷ See Petition, Ex. E 27.

⁷⁸ See 3 AAC 110.981 (determination of maximum local self-government), .982 (minimum number of local government units). The factors in these two regulations are listed as those that the Commission “will” consider; however, they are applicable only by virtue of themselves being factors in 3 AAC 110.065, which are listed as those that the Commission “may” consider. Therefore, the factors in all three regulations are optional things that the Commission can consider, not necessarily things it must consider. See *supra* note 22.

When considering the promotion of maximum local self-government, the Commission may consider whether incorporation “would extend local government on a regional scale to a significant area and population of the unorganized borough.”⁷⁹ When considering the promotion of a minimum number of local government units, the Commission may consider whether “a new borough will be created from the unorganized borough and whether the proposed boundaries maximize an area and population with common interests.”⁸⁰ These are essentially a gloss on the constitutional goals of providing “maximum local self-government with a minimum of local government units” and embracing “an area and population with common interests to the maximum degree possible.”⁸¹ Likewise, the “best interests” arguments raised in the requests for reconsideration are a gloss on the other objections that the requesters have to incorporation. To the extent they are relevant to this reconsideration, those arguments have been addressed above.

As the Petition stated, incorporation of the Xunaa Borough is in the best interests of the state. It promotes maximum local self-government by bringing organized, local government to a significant area of the state that encompasses a population significant for the area. It does this without introducing an additional layer of government, thereby

⁷⁹ 3 AAC 110.981. When the proposed change is the dissolution of a city in the unorganized borough, the Commission may consider whether the proposal substantiates that (A) the provision of local government is no longer necessary or supportable or (B) the local government needs could be better provided by a different governmental organization. *See* 3 AAC 110.981(12). The change at issue here is a borough incorporation which, by operation of law, would also cause the dissolution of the City of Hoonah. *See* AS 29.06.450(c). Consideration of this factor is not mandatory. *See supra* note 78. In any event, the Petition goes into great detail regarding the provision of local government by the current city and proposed borough, and thus this factor is satisfied. *See, e.g.*, Petition §§ 6, 14–15, 18; *see also* Decision 19 (“The record has established that the City of Hoonah’s government has operated quite well over the years while at the same time maintaining exceptional services. . . . This level of functioning will transition well to the Borough.”).

⁸⁰ 3 AAC 110.982. Consideration of this factor is not mandatory. *See supra* note 78. In any event, as the Petition addressed, a new borough will be created from the unorganized borough, swapping one unit of government for another, thereby keeping the number of local governments to a minimum (without descending into either anarchy or a single, unorganized borough). Additionally, the proposed borough embraces, to the maximum degree possible, an area and population with common interests. *See, e.g.*, Petition, Ex. E at 2–13, 24–28; Decision at 28–29.

⁸¹ ALASKA CONST. art. X, §§ 1, 3.

keeping the number of local governments to a minimum. It would relieve the state from the responsibility of providing education as well as planning, platting, zoning, and land use regulation. Consolidating educational services is particularly beneficial to the state at a time when funding is scarce and planning is a high legislative and executive priority.⁸² There is nothing to make one think that the borough would dissolve, but if it did, there would be no unusual or substantial risk leaving the state government exposed. Finally, it would create opportunities for further regional planning and economic development.

It is no secret that there are neighboring communities that do not wish to see a borough incorporated in this region. The record shows just how intractable these communities are in their views on incorporation. While incorporating the Xunaa Borough is in the best interests of the state, forcing unwilling communities together is not.⁸³ The Petitioner could have included those communities in the proposed borough, but it recognized that doing so would not be in anyone's best interest, including the state. The Commission, similarly, should recognize that the solution is neither a shotgun wedding nor ceaseless marriage counseling. Instead, it is to allow incorporation and let the communities themselves decide.

With the Xunaa Borough incorporated, neighboring communities remain free to stay in the unorganized borough or to join one of several neighboring organized boroughs. The process of organization has been started by the Petitioner, but "this isn't a closed book, we're getting started, and now we can open it up to include these three communities. And they could be added at piecemeal or all at once" or not at all if they so choose.⁸⁴ In this way, the Petition affords them the greatest possible flexibility and, in so doing, reflects the

⁸² See Corinne Smith, *Alaska Lawmakers Introduce Bill for Major Boost in School Funding*, ALASKA BEACON (Jan 28, 2025, 4:00 AM) (discussing "a major historical shortfall in funding" and quoting Alaska Legislative Finance Division director stating "There are 19 districts that are Regional Education Attendance Areas with no municipal government and no taxing power. 'So their only source of funding is the state or federal government.'").

⁸³ Tr. 114:1–7 ("[Petitioner] just about got out of the barrel and they're being pulled back down by the very people . . . who ignored them, said, no, we don't want to join you, but now we don't want you advancing. That's not in the best interests of the state; it's simply not.")

⁸⁴ Tr. 132–33.

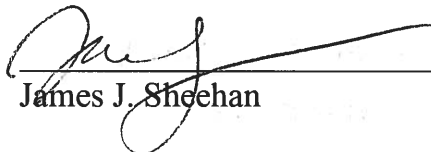
constitution of this state, by leaving to the people, in order to secure and transmit to succeeding generations their heritage of political, civil, and religious liberty, the right to chart their own futures.

IV. Conclusion

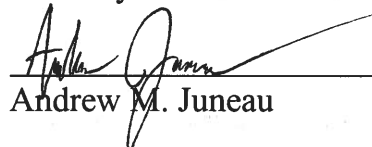
The Petition satisfies the manifold constitutional, statutory, and regulatory requirements, both up for reconsideration and not. In particular, incorporation of the Xunaa Borough meets the standards for boundaries and best interests of the state. Therefore, for the reasons discussed above, as well as in the Petition and subsequent briefing, the Petitioner respectfully requests that the Commission approve the Petition.

Dated this 31st day of January 2025 at Juneau, Alaska.

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