

IN THE SUPREME COURT FOR THE STATE OF ALASKA

STATE OF ALASKA; MICHAEL HANLEY,
COMMISSIONER OF ALASKA
DEPARTMENT OF EDUCATION AND
EARLY DEVELOPMENT, in his official
capacity,

Appellants,

v.

KETCHIKAN GATEWAY BOROUGH;
AGNES MORAN, an individual, on her own
behalf and on behalf of her son; JOHN COSS,
a minor; JOHN HARRINGTON, an
individual; and DAVID SPOKELY, an
individual,

Appellees.

Supreme Ct. No. S-15811

Superior Court No. 1KE-14-00016 CI

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FEB 09 2015

APPELLATE COURTS
OF THE
STATE OF ALASKA

OPPOSITION TO EMERGENCY MOTION FOR STAY PENDING APPEAL

Plaintiffs oppose the State's Emergency Motion for Stay Pending Appeal

("Emergency Motion") because no emergency exists that would require the Supreme Court to rush to a decision and because the State has not and cannot establish that it is entitled to a stay.

I. There Is No Emergency.

First and foremost, there is no "emergency" that necessitates the Supreme Court ruling on whether a stay is appropriate. The State has made the very same request of the

Superior Court, and he has agreed to do so, on an expedited basis.¹ Furthermore, the State claims that the February 18 deadline for the Governor to submit his amended budget in accordance with AS 37.07.070 is the reason that it requires emergency relief. Yet the Governor already submitted his amended budget to the legislature last Thursday (February 5, 2015).² It is therefore apparent that the Governor is not waiting for a ruling on the State's request for a stay in this case before meeting the deadline provided for in AS 37.07.070.

Additionally, the Attorney General long ago concluded that the deadlines provided for throughout AS 37.07 (Executive Budget Act) are directory instead of mandatory because of the Governor's constitutional authority for initial budget preparation.³ The Attorney General stated that "*any statutory restriction*" on the Governor's power to recommend appropriations would be a violation of the separation of powers doctrine since the source of the Governor's power to recommend a budget and appropriations is provided

¹ January 30, 2015 Order Setting Schedule (Exhibit 7 to Emergency Motion) ("Scheduling Order"). The State's Claim that the schedule set for the Superior Court to make a decision could be stretched out for another month if Plaintiffs request an evidentiary hearing is curious since the Scheduling Order makes no provision for an evidentiary hearing. Moreover, after preparing its Opposition to both motions, Plaintiffs have concluded that they will not request an evidentiary hearing.

² "Governor Releases Amended Endorsed Budget," Office of the Governor February 5, 2016 Press Release attached as Exhibit A to the February 6, 2015 Affidavit of Louisiana W. Cutler in Support of Plaintiffs' Superior Court Opposition attached as Exhibit A to this Opposition ("Cutler Aff.") .

³ Attorney General's Opinion, File No. 366-464-83, February 28, 1983 ("1983 Attorney General's Opinion"), attached as Exhibit C to the Cutler Aff. included in Exhibit A to this Opposition.

in Article IX, section 12 of the Constitution.⁴ Further, “[a]pplying AS 37.07.070(1) strictly, rather than just as a guide, could prevent the governor from introducing an essential appropriation bill; that would produce a result that is both unconstitutional and unreasonable.”⁵ Here, there is no reason for the Court to conclude otherwise just because the statute has been amended to add additional deadlines such as the one that the State claims is critical here.⁶

Furthermore, it is inevitable that final budget decisions will not be made until the end of the legislative session in April, as is the case every year. Moreover, if the State is correct that an “emergency” exists, the Governor has the statutory power to propose additional appropriations to the legislature in order to address an emergency “at any time” in accordance with AS 37.07.100 and the 1983 Attorney General’s Opinion.⁷

In sum, the so-called “emergency” created by the February 18 dead line is

⁴ *Id.* at 2 (emphasis added).

⁵ *Id.*

⁶ See *S. Anchorage Concerned Coal., Inc. v. Municipality of Anchorage Bd. of Adjustment*, 172 P.3d 768, 771-72 (Alaska 2007) (“If a statute is mandatory, strict compliance is required; if it is directory, substantial compliance is acceptable absent significant prejudice to the other party.” In determining if a statute is considered directory three factors can be examined: “if (1) its wording is affirmative rather than prohibitive; (2) the legislative intent was to create ‘guidelines for the orderly conduct of public business’; and (3) ‘serious, practical consequences’ would result if it were considered mandatory.”); *West v. State, Bd. of Game*, 248 P.3d 689, 698 (Alaska 2010) (citing *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 192 (Alaska 2007)) (“[C]ourts should if possible construe statutes so as to avoid the danger of unconstitutionality.”); *State v. Blank*, 90 P.3d 156, 162 (Alaska 2004) (“[Courts should] narrowly construe statutes in order to avoid constitutional infirmity where that can be done without doing violence to the legislature’s intent.”).

⁷ 1983 Attorney General’s Opinion at 2 (if the statute is not viewed as directory, it would prevent the Governor from “dealing with emergencies and other situations in which the best interests of the state require an appropriation to be submitted after the statutorily specified time.”)

nonexistent.

II. In Accordance with Longstanding Precedent, The Court Should Let The Superior Court Determine Whether Or Not A Stay Is Appropriate In This Case.

In *Powell v. City of Anchorage*, 536 P.2d 1228, 1230 (Alaska 1973) (citation omitted), the Court held that the Superior Court should first consider an application for stay of a judgment because “the stay or suspension of such judgments often involves a delicate balancing of the equities that only the court thoroughly familiar with the case is able to make.” That guidance is especially helpful here since the State has requested that this Court rush to a decision before an unenforceable deadline eight days from now. The Superior Court weighed the arguments made by Plaintiffs and the State and issued a lengthy decision examining the education funding scheme at issue here in light of this Court’s longstanding Anti-Dedication Clause case law.⁸ The Superior Court is the tribunal that is familiar with the record, including the complicated education funding statute.⁹ The Superior Court is the one who has most recently applied the Anti-Dedication Clause case law to the statute.¹⁰ Therefore, Plaintiffs respectfully suggest that the Superior Court is the tribunal that is currently in the best position to apply the balancing of harms test for a stay to the facts presented here, particularly when that balancing is going to be done on an expedited basis.

⁸ Order on Cross Motion for Summary Judgment (“Superior Court Decision”) (Exhibit 2 to Emergency Motion).

⁹ An overview of the education funding statute can be found at 2-5 of the Superior Court Decision.

¹⁰ Superior Court Decision at 7-18.

III. The State Has Not and Cannot Establish That It Is Entitled to A Stay.

The vast majority of the arguments made by the State to this Court are in the process of being made to the Superior Court. Therefore, Plaintiffs incorporate their Opposition to the Emergency Motion for Stay Pending Appeal that the State is filing today in the Superior Court (“Plaintiffs’ Superior Court Opposition”) into this Opposition. Plaintiffs’ Superior Court Opposition is attached as Exhibit A to this Opposition. A summary of the arguments follows.

To obtain a stay of a non-monetary judgment, the moving party needs to show that it will be irreparably harmed if a stay is not granted, and that the non-moving party can be adequately protected from harm, or, in the absence of adequate protection, that the moving party has a clear likelihood of success on the merits. The State has not made the required showing. Instead, the State mischaracterizes the balance of hardships, ignores the fact that Plaintiffs cannot be adequately protected from harm if the stay is granted, and does not demonstrate a clear likelihood of prevailing on the merits before this Court.

The State will not be irreparably harmed for a host of reasons. First, AS 14.17.610(b) provides that any overpayments of State aid to school districts can be adjusted in future fiscal years, there is no requirement that the legislature make up for the lack of RLC payments because it does not have to fully fund education or any other program, and AS 14.17.300 expressly provides that the State can fund education at less than 100% of basic need. Second, the State argued and the Superior Court concluded that the State receives no benefit from the RLC payments. The State is not irreparably harmed by the

absence of a payment from which it receives no benefit. Third, the State's irreparable harm arguments rely on rank speculation about what might happen this legislative session in the absence of a stay and/or how nonparties to the case might be impacted by the Superior Court's Final Judgment. Such speculation does not establish irreparable harm. Fourth, the Superior Court's Final Judgment continues to have preclusive effect even if it is stayed. Fifth, despite its present budget woes, the State has adequate resources to address the absence of the required local contribution provided for in AS 14.17.410(b) and AS 14.12.020(c) ("RLC") if the Governor and the legislature choose to do so. Sixth, the State's mootness argument is not supported by the case upon which it relies and does not comport with Alaska law holding that a legislative change in a statute does not moot a challenge to the previous version of the law. Finally, the uncertainty in school funding that the State claims is created by the Superior Court's Final Judgment for school districts is greatly exaggerated and in any event is not harm to the State.

In contrast, Plaintiffs are harmed and cannot be adequately protected from harm because the Superior Court has ruled that once the RLC is paid, Plaintiff Ketchikan Gateway Borough ("Borough") is not entitled to a refund. Furthermore, even if a refund were to be available, the private party plaintiffs would still be harmed without adequate protection because the Borough has no mechanism to refund them their taxes paid towards the RLC. Therefore, the Court must find that Plaintiffs cannot be adequately protected if the Final Judgment is stayed pending appeal.

Given that the Superior Court has concluded that the RLC funding scheme is an unconstitutional violation of the Anti-Dedication Clause, the State cannot make a showing of clear likelihood of success on the merits because the Superior Court's decision follows longstanding Alaska Supreme Court precedent interpreting the Anti-Dedication Clause. This is not a case of first impression but instead applies settled law which has broadly construed the Anti-Dedication clause over many years. Accordingly, the State has not met its burden of proving its entitlement to a stay, and its Motion must be denied.

IV. The State Has Not Established "Clear Likelihood of Success on the Merits" Simply By Asserting that the Superior Court Decision Is Wrong.

The State claims that the Superior Court Decision "invalidated a longstanding requirement that has existed in some form since pre-statehood."¹¹ The Superior Court expressly held that the RLC was not longstanding and did not qualify as a pre-Statehood exception to the Anti-Dedication Clause.¹² The Superior Court again relied upon Attorney General Opinions for this conclusion which the State apparently seeks to disavow here.¹³

The State also claims that the Superior Court expanded the scope of the Anti-Dedication Clause beyond this Court's precedents with respect to same.¹⁴ The Superior Court carefully considered all of this Court's previous precedents¹⁵ and concluded that this Court has had numerous opportunities to re-examine the Anti-Dedication Clause over the

¹¹ Emergency Motion at 2.

¹² Superior Court Decision at 16-18.

¹³ *Id.* at 18.

¹⁴ Emergency Motion at 2.

¹⁵ Superior Court Decision at 7-16.

years, but has consistently held that a broad interpretation of this constitutional provision is appropriate.¹⁶

The State also argues that the Court misread this Court's precedent and did not discuss each and every one of the State's arguments in the Superior Court Decision.¹⁷ A stay motion is not the proper forum to fully brief the arguments on the underlying merits, particularly in a case like the one presented here where the stay motion is being considered on an "emergency" basis. However, in the instant appeal, where there is no factual dispute, the parties fully briefed all the issues, and the Superior Court applied longstanding precedent in reaching his conclusion, the State has not demonstrated a clear likelihood of success on the merits merely by asserting that the decision was wrongly decided for the same reasons it argued below. The State does not point to any legal conclusion that is so far beyond the parameters of this Court's previous decisions that it might justify a finding of a clear likelihood of success on the merits. Although clearly the State has the right to make all of its arguments in its appeal, finding fault with the Superior Court Decision does not establish the "*clear* likelihood of success on the merits" prong of the stay test. If it is indeed so clear that they will succeed with this Court, they would already have done so at the Superior Court.

Here, the State essentially asks this Court to overrule *State v. Alex*, 646 P.2d 203 (Alaska 1982) and its progeny, cases in which this Court several times reiterated its

¹⁶ *Id.* at 9-10.

¹⁷ Emergency Motion at 13-15.

longstanding interpretation of the Anti-Dedication Clause as broad in scope. In light of the doctrine of *stare decisis*,¹⁸ this is an uphill battle, rendering the likelihood of success even less clear.

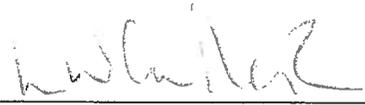
Conclusion

For all of the above stated reasons, the Emergency Motion should be denied.

¹⁸ *State v. Fremgen*, 914 P.2d 1244, 1245 (Alaska 1996) (quoting *State v. Dunlop*, 721 P.2d 604, 610 (Alaska 1986)) (“[S]tare decisis is a practical, flexible command that balances our community's competing interests in the stability of legal norms and the need to adapt those norms to society's changing demands. In balancing these interests, we will overrule a prior decision only when ‘clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent.’ ”); *Beesley v. Van Doren*, 873 P.2d 1280, 1283 (Alaska 1994) (quoting *State v. Souter*, 606 P.2d 399, 400 (Alaska 1980)) (“Under the rule of stare decisis, this court will overrule precedent only ‘where the court is clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent.’ ”).

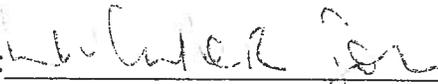
DATED at Anchorage, Alaska this 6th day of February, 2015.

K&L GATES LLP

By: 

Louisiana W. Cutler, ABA #9106028
Jennifer Coughlin, ABA#9306015
Attorneys for Appellees Ketchikan
Gateway Borough, Agnes Moran, John
Coss, John Harrington and David Spokely

KETCHIKAN GATEWAY BOROUGH

By: 

Scott Brandt-Erichsen, ABA #8811175
Attorney for Appellee Ketchikan Gateway
Borough

CERTIFICATE OF FONT AND SERVICE

I hereby certify that the font used herein is Point 13, Times New Roman.

I further certify that on Feb. 9th, 2015, a copy of the foregoing was served on:

by: hand mail fax

Kathryn R. Vogel
Assistant Attorneys General
1031 W. 4th Avenue, Suite 200
Anchorage, AK. 99501

By: Barbara McPauli

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT KETCHIKAN, ALASKA

KETCHIKAN GATEWAY BOROUGH, an Alaska municipal corporation and political subdivision; AGNES MORAN, an individual, on her own behalf and on behalf of her minor son; JOHN COSS, a minor; JOHN HARRINGTON, an individual; and DAVID SPOKELY, an individual;

Plaintiffs,

v.

STATE OF ALASKA; MICHAEL HANLEY, COMMISSIONER OF ALASKA DEPARTMENT OF EDUCATION AND EARLY DEVELOPMENT, in his official capacity;

Defendants.

Case No. 1KE-14-00016CI

FILED in the Trial Courts
State of Alaska First District
at Ketchikan

FEB 09 2015

Clerk of the Trial Courts

By _____ Deputy

OPPOSITION TO EMERGENCY MOTION FOR STAY PENDING APPEAL

Introduction and Summary of Plaintiffs' Arguments

To obtain a stay of a non-monetary judgment, the moving party needs to show that it will be irreparably harmed if a stay is not granted, and that the non-moving party can be adequately protected from harm, or, in the absence of adequate protection, that the moving party has a clear likelihood of success on the merits. Defendants' ("State's") Emergency Motion For Stay Pending Appeal ("Motion") does not make the required showing. Instead, the State mischaracterizes the balance of hardships, ignores the fact

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that Plaintiffs cannot be adequately protected from harm if the stay is granted, and does not demonstrate a clear likelihood of prevailing on the merits before the Alaska Supreme Court.

The State will not be irreparably harmed for a host of reasons. First, AS 14.17.610(b) provides that any overpayments of State aid to school districts can be adjusted in future fiscal years, there is no requirement that the legislature make up for the lack of RLC payments in future appropriations, and AS 14.17.300 expressly provides that the State can fund education at less than 100% of basic need. Second, the State argued and the Court concluded that the State receives no benefit from the RLC payments. The State is not irreparably harmed by the absence of a payment from which it receives no benefit. Third, Defendants' irreparable harm arguments rely on rank speculation about what might happen this legislative session in the absence of a stay and/or how nonparties to the case might be impacted by the Final Judgment. Such speculation does not establish irreparable harm. Fourth, the Final Judgment continues to have preclusive effect even if it is stayed. Fifth, despite its present budget woes, the State has adequate resources to address the absence of an RLC if the Governor and the legislature choose to do so. Sixth, the State's mootness argument is not supported by the case upon which it relies and does not comport with Alaska law holding that a legislative change in a statute does not moot a challenge to the previous version of the law. Finally, the uncertainty in school funding that the State claims is created by the Final Judgment for school districts is greatly exaggerated, and in any event, is not harm to the State.

In contrast, Plaintiffs are harmed and cannot be adequately protected from harm

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because the Court has ruled that once the RLC is paid, Plaintiff Ketchikan Gateway Borough ("Borough") is not entitled to a refund. Furthermore, even if a refund were to be available, the private party plaintiffs would still be harmed without adequate protection because the Borough has no mechanism to refund them their taxes paid towards the RLC. Therefore, the Court must find that Plaintiffs cannot be adequately protected if the Final Judgment is stayed pending appeal.

Given that the Court has concluded that the RLC funding scheme is an unconstitutional violation of the Anti-Dedication Clause, the State cannot make a showing of clear likelihood of success on the merits because the Court's decision follows longstanding Alaska Supreme Court precedent interpreting the Anti-Dedication Clause. This is not a case of first impression but instead applies settled law which has broadly construed the Anti-Dedication clause over many years. Accordingly, the State has not met its burden of proving its entitlement to a stay, and its Motion must be denied.

Finally, it is notable that the State has concocted an "emergency" out of whole cloth in an effort to rush the Court's decision on whether to grant a stay.¹ The State claims that the February 18 deadline for the Governor to submit his amended budget is the source of the emergency. Yet the Governor has already submitted his amended budget to the legislature, and apparently did not feel compelled to wait for the Court's ruling before doing so. Additionally, the Attorney General long ago concluded that the deadlines provided for in the Executive Budget Act are directory instead of mandatory

¹ The State has used the same emergency excuse with the Supreme Court, simultaneously providing the State with two bites at the apple for its stay motion .

because of the Governor's constitutional authority over budget preparation. The so-called "emergency" created by the February 18 deadline is nonexistent.

Argument

I. THE CORRECT STANDARD FOR GRANTING A STAY OF A NON-MONEY JUDGMENT IN THIS CASE.

The standard for obtaining a stay of a nonmonetary judgment is the same as is required for obtaining a preliminary injunction. First, the moving party must face irreparable harm if the Court denies the Motion. Second, if the opposing party can be adequately protected, there must either be serious and substantial questions going to the merits of the case or, if the opposing party cannot be adequately protected, the moving party must show a clear likelihood of prevailing on the merits.² The State argues that it faces irreparable harm if a stay is denied, while Plaintiffs will not suffer any "cognizable legal harm" if the stay is granted, and that therefore all the State has to show is serious and substantial questions going to the merits of the Court's decision that the RLC is unconstitutional under the Anti-Dedication Clause.³

As discussed below, the State will not suffer irreparable harm. Moreover, Plaintiffs cannot be adequately protected, and therefore, the State must meet the higher standard of showing a clear likelihood of success on the merits in order to obtain a stay. That showing has not been made.

II. THE STATE IS NOT FACED WITH IRREPARABLE HARM.

The State argued successfully to this Court that it receives *no* benefit from the

² See *Keane v. Local Boundary Com'n*, 893 P.2d 1239, 1249-50 (Alaska 1995).

³ Motion at 3.

Borough's RLC payment.⁴ The Court accepted this argument, and used it as the basis for denying the Borough's claim to a refund for the RLC previously paid under protest.⁵ Since the State receives no benefit from the RLC, it is not irreparably harmed by the Final Judgment stating that the RLC is unconstitutional and that it no longer has to be paid by the Borough. The State's demand for a stay must be rejected on this basis alone.⁶

The State alleges amorphous and speculative harm that it or third parties might suffer if the stay is not issued when it claims:

- 1) The absence of a stay allegedly creates "uncertainty" about funds available for school district budget preparation;
- 2) The legislature may have to make difficult funding decisions and will be

⁴ See November 21, 2014 Order on Motion and Cross Motion for Summary Judgment ("Order") at 23-25; January 21, 2015 Order On Motion To Reconsider ("Reconsideration Order") at 2.

⁵ See *id.*

⁶ In fact, Defendant should be judicially or otherwise estopped from changing its position and arguing that it would be irreparably harmed if the Borough ceased paying an RLC when it previously successfully argued that it receives no benefit from the RLC. Alaska's quasi-estoppel doctrine is similar to what other jurisdictions call "judicial estoppel." See *Smith ex rel. Smith v. Marchant Enters., Inc.*, 791 P.2d 354, 356 (Alaska 1990) (implicitly equating quasi-estoppel and judicial estoppel). Alaska law recognizes both quasi estoppel and equitable estoppel, either of which could apply here. The elements of equitable estoppel are "the assertion of a position by conduct or word, reasonable reliance thereon by another party, and resulting prejudice." *Wright v. State*, 824 P.2d 718, 721 (Alaska 1992) (citing *Jamison v. Consolidated Utilities, Inc.*, 576 P.2d 97, 102 (Alaska 1978)). Quasi estoppel appeals to the conscience of the court and applies where "the existence of facts and circumstances mak[es] the assertion of an inconsistent position unconscionable." *Id.* Unlike equitable estoppel, ignorance and reliance are not essential elements of quasi estoppel. *Dressel v. Weeks*, 779 P.2d 324, 331 (Alaska 1989). In determining if quasi estoppel applies a court examines: "whether the party asserting the inconsistent position has gained an advantage or produced some disadvantage through the first position; whether the inconsistency was of such significance as to make the present assertion unconscionable; and, whether the first assertion was based on full knowledge of the facts." *Wright*, 824 P.2d at 721 (citing *Jamison*, 576 P.2d at 103)).

in this case.⁸

Furthermore, a stay will not relieve the Governor and the legislature from the need to reconsider reliance on the RLC for school funding before the Supreme Court issues a decision. This is because the stay would bar active enforcement of the Final Judgment but would not render it non-binding. As the U.S. Supreme Court held in *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 189, 61 S.Ct. 513, 85 L.Ed. 725 (1941), the fact that a stay has been granted while a trial court decision is on appeal does not reduce the preclusive effect of that decision:

... [I]n the federal courts the general rule has long been recognized that while appeal with proper supersedeas stays execution of the judgment, it does not—until and unless reversed—detract from its decisiveness.⁹

Second, regardless of whether the Court accepts Defendant's argument that this is

⁸ Additionally, these other municipalities and/or taxpayers will still have the ability to file their own independent lawsuits, and use this Court's decision as authority to get judgments of their own while the appeal is pending, regardless of whether a stay is in place, in accordance with the doctrine of offensive collateral estoppel. See, e.g., *State v. United Cook Inlet Drift Ass'n*, 895 P.2d 947, 951 (Alaska 1995) (holding that non-mutual offensive collateral estoppel may be used against the State).

⁹ See also Restatement (Second) of Judgments § 13, comment f (1982) ("The better view is that a judgment otherwise final remains so despite the taking of an appeal unless what is called an appeal actually consists of a trial de novo; finality is not affected by the fact that the taking of the appeal operates automatically as a stay or supersedeas of the judgment appealed from that prevents its execution or enforcement, or by the fact that the appellant has actually obtained a stay or supersedeas pending appeal.").

Similarly misplaced is Defendant's argument that a stay is necessary to eliminate "uncertainty" with respect to school funding. A stay only prevents the prevailing party from seeking immediate enforcement, but does not repeal the decision or prevent the legislature from considering revisions to school funding which would eliminate the constitutional infirmity identified by the Plaintiffs and confirmed by this Court, based on well-established Supreme Court precedent.

harmful if required to make them under a shortened timetable, before the Supreme Court confirms that the changes are necessary; and

- 3) The appeal may be mooted if the legislature amends the statutes, which the State argues is an irreparable harm because it will eliminate the possibility for review.

None of these arguments withstand scrutiny for the reasons explained below.

A. The State Has the Right to Recover Overpayments of State Aid, but the Plaintiffs Have No Refund Rights Under the Court's Order.

The State's arguments about the damage that could *potentially* be caused if the State goes without RLC payments that the Court has declared to be unconstitutional ignores several basic facts about the relative positions of the State and the Plaintiffs.

In the first place, the "enormous gap"⁷ the State claims is created by the Final Judgment is exaggerated since the relevant number for determining whether to grant the stay is not the hundreds of millions of dollars that the State would have the Court worry about (e.g. the total amount of RLCs paid by municipalities throughout the State in FY 2015), but is instead only the roughly four to five million dollar RLC that would be paid by the Borough annually beginning in FY 2016 and continuing during the pendency of the State's appeal. The immediate impact of granting the stay will be to require the Borough and its taxpayers to continue paying RLCs that the Court has found to be unconstitutional, but such a stay will not directly impact other municipalities or taxpayers who are not parties to this case and therefore, not bound by any stay that might be issued

⁷ Motion at 3.

an issue concerning hundreds of millions of dollars this fiscal year instead of the much smaller amount of the Borough's RLC while the Supreme Court appeal is pending, the State's claim that it will be without a remedy if the Supreme Court reverses the decision is unpersuasive. For example, if the State decides to provide State funding equal to the amount determined to be the total basic need inclusive of RLC payments while the appeal is pending, the State already has a statutory mechanism in place that would make the State whole if the Supreme Court reverses this Court's decision that the RLC is unconstitutional. AS 14.17.610(b) allows the State to recover overpayments of State aid made to support education funding:

Distribution of state aid under (a) of this section shall be made as required under AS 14.17.410. If a district receives more state aid than it is entitled to receive under this chapter, the district shall immediately remit the amount of overpayment to the commissioner, to be returned to the public education fund. The department may make adjustments to a district's state aid to correct underpayments made in previous fiscal years.

Consequently, any excess payments of State aid under AS 14.17.410 would be more than a district would be entitled to receive, and thus recoverable under the State's authority to make itself whole if the Alaska Supreme Court were to reverse this Court's decision.

Third, if the Governor and legislature choose not to make up the difference, the State's irreparable harm argument is even less convincing since the legislature does not have to fully fund basic need or any other funding for education.¹⁰ Given this fundamental fact of fiscal life, the State is crying wolf when it asserts that it will be

¹⁰ Indeed, the State has vigorously asserted this point throughout this proceeding. See, e.g., State's Opposition to Plaintiffs' Partial Motion to Reconsider at 1-2; State's Reply Brief in Further Support of Its Cross Motion For Summary Judgment at 2; State's Emergency Motion For Stay Pending Appeal at 5.

irreparably harmed if the Court does not stay its Final Judgment. This is especially true given AS 14.17.300 which provides that the State may fund education at less than 100% of basic need, triggering a prorated reduction in aid to all school districts.¹¹

Fourth, in applying the legal standard for a stay to the facts of this case, Plaintiffs respectfully urge the Court to resist the State's attempt to make the Court feel responsible for the State's current budget woes. The State dramatically characterizes the Final Judgment as creating an "emergency" because the Governor's amended budget is due February 18 under AS 37.07.070.¹² Clearly, the Governor himself did not view the Final Judgment as creating an emergency because he has already submitted his amended budget to the Legislature without the benefit of the Court's ruling on the stay.¹³

Furthermore, the Attorney General long ago issued an opinion stating that a former version of this statute is directory not mandatory.¹⁴ The Attorney General stated that "*any statutory restriction*" on the Governor's power to recommend appropriations would be a violation of the separation of powers doctrine since the source of the

¹¹ These funding choices also dispense with Commissioner Hanley's statement in paragraph 8 of his affidavit that Federal Impact Aid is also in jeopardy as a result of the Final Judgment. Further, payment of the RLC is only one of many ways available to the State to equalize education funding in order to be eligible for Federal Impact Aid, as explained further in the 1987 House Research Agency report entitled "Public Financing In Alaska", an excerpt of which is attached as Exhibit A to the February 6, 2015 Affidavit of Louisiana Cutler ("Cutler Aff"). The full report is 150 pages but will be provided to the Court upon request.

¹² Motion at 1.

¹³ "Governor Releases Amended Endorsed Budget," Office of the Governor February 5, 2016 Press Release attached as Exhibit B to the Cutler Aff.

¹⁴ Attorney General's Opinion, File No. 366-464-83, February 28, 1983 ("1983 Attorney General's Opinion"), attached as Exhibit C to the Cutler Aff.

Governor's power to recommend a budget and appropriations is provided in Article IX, section 12 of the Constitution.¹⁵ Further, "[a]pplying AS 37.07.070(1) strictly, rather than just as a guide, could prevent the governor from introducing an essential appropriation bill; that would produce a result that is both unconstitutional and unreasonable."¹⁶ There is no reason for the Court to conclude otherwise just because the statute has been amended to add additional deadlines such as the one that the State claims is critical here.¹⁷

Furthermore, it is inevitable that final budget decisions will not be made until the end of the legislative session in April, as is the case every year. The February 18 deadline is a classic red herring. Moreover, if the State is correct that an "emergency" exists, the Governor has the power to propose additional appropriations to the legislature in order to address an emergency "at any time" in accordance with AS 37.07.100 and the 1983 Attorney General's Opinion.¹⁸

¹⁵ *Id.* at 2 (emphasis added).

¹⁶ *Id.*

¹⁷ See also *S. Anchorage Concerned Coal., Inc. v. Municipality of Anchorage Bd. of Adjustment*, 172 P.3d 768, 771-72 (Alaska 2007) ("If a statute is mandatory, strict compliance is required; if it is directory, substantial compliance is acceptable absent significant prejudice to the other party." In determining if a statute is considered directory three factors can be examined: "if (1) its wording is affirmative rather than prohibitive; (2) the legislative intent was to create 'guidelines for the orderly conduct of public business'; and (3) 'serious, practical consequences' would result if it were considered mandatory."); *West v. State, Bd. of Game*, 248 P.3d 689, 698 (Alaska 2010) (citing *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 192 (Alaska 2007)) ("[C]ourts should if possible construe statutes so as to avoid the danger of unconstitutionality."); *State v. Blank*, 90 P.3d 156, 162 (Alaska 2004) ("[Courts should] narrowly construe statutes in order to avoid constitutional infirmity where that can be done without doing violence to the legislature's intent.").

¹⁸ 1983 Attorney General's Opinion at 2 (if the statute is not viewed as directory, it would prevent the Governor from "dealing with emergencies and other situations in which the best interests of the state require an appropriation to be submitted after the statutorily specified time.")

Clearly the State faces budget challenges, but it is inaccurate to portray the State as unable to provide funding for its programs at the level deemed appropriate by the legislature. The State has healthier reserves than all of the other states when measured as a percentage of general funds and when measured by the number of days' worth of general fund revenues in reserve.¹⁹ According to the Department of Revenue's most recently published State revenue forecast in December 2014, the current shortfall caused by the unanticipated oil price drop is both temporary, and in an amount well below the State's cash reserves.²⁰ Moreover, the key driver of the budget shortfall is oil price sensitivity,²¹ not the Final Judgment. The State clearly has adequate resources if it wants to increase state funding for education in light of the Court's ruling that the RLC is unconstitutional. Reductions in spending for State programs in the next legislative session are going to be the result of policy choices, not fiscal necessity. It is the outcome of these policy choices that could "seriously impair[] educational opportunities,"²² not the Final Judgment enforcing the Constitution.

In contrast to the State's decided lack of irreparable harm, Plaintiffs are harmed and cannot be provided adequate protection from that harm because, as noted above, the

¹⁹ Exhibit D to Cutler Aff. (Fiscal 50: State Trends and Analysis, January 29, 2015 Update, the Pew Charitable Trusts). Exhibit D also demonstrates the dramatic increase in the State's reserves from FY 2007 to the present.

²⁰ <http://dor.alaska.gov/Portals/5/Docs/PressReleases/RSB%20Fall%202014%20highres%20page.pdf> at 26 and 30.

²¹ *Id.* at 82. See also Exhibit E to Cutler Aff. (newspaper article in which the Commissioner of Revenue is reported to have told legislators on January 26, 2015 that paying out more in oil and gas production tax credits than the State receives in oil and gas production tax income is not problematic because the State is only experiencing a temporary "cash-flow" problem, "driven by low [oil] prices.").

²² Motion at 4.

Court has held that once the RLC payment has been made, the Borough is not entitled to a refund of that amount. If the RLC is in effect for FY 2016 and subsequent years until the Supreme Court appeal is decided, the Borough will be required to make an RLC payment in an amount equal to 2.65 mills on the full and true value of all taxable property in the Borough as determined by the Department of Commerce, Community, and Economic Development under AS 14.17.510 each year.²³

Additionally, Mr. Bockhorst explains, in his Affidavit at ¶ 4, that the private plaintiffs will be required to pay an allocated portion of the property and sales taxes levied by the Borough to generate the funds to make RLC payments. The Borough establishes the rate of property taxes by June 15 of each year, the deadline established in AS 29.45.240.²⁴ Even if the Supreme Court ultimately decides that the RLC should be refunded, the Borough does not have a record database which would facilitate refund of the taxes levied and collected to return the RLC payment to the individual taxpayers who paid them.²⁵ Moreover, some property owners die, or sell their property to other persons.²⁶ Additionally, to the extent the funds are derived from sales taxes, the taxes are

²³ Another form of harm that the Borough would suffer is described in ¶¶ 5-9 of the February 6, 2015 Affidavit of Dan Bockhorst ("Bockhorst Aff."). If a stay is granted but the Supreme Court ultimately upholds this Court's decision, the Borough would also be prevented from recovering its RLC payments because of the impact of the statutes described in Mr. Bockhorst's affidavit. Because of the interplay between total local contributions (e.g. the RLC and voluntary local contributions) and the cap on voluntary local contributions, the Borough would never recover its RLC payments from the district or the State.

²⁴ Bockhorst Aff. at ¶ 3.

²⁵ *Id.* at ¶ 4.

²⁶ *Id.*

remitted by the merchants with no tracking of the individual taxpayers.²⁷ Thus, it is not possible to refund taxes to the parties who paid them.²⁸

The State can be made whole through AS 14.17.610(b) if the Court's decision is reversed or alternatively, while the decision is on appeal, the State can choose not to make up the lack of RLC payments because it does not have to fully fund education. Plaintiffs, on the other hand, will be irrevocably deprived of significant funds while the decision is on appeal. The State ignores its own statutory and constitutional safety net and glosses over the lack of protection for the Plaintiffs.²⁹

B. The Appeal Will Not Be Mooted if the Legislature Amends the Statutes.

The State relies upon *Artukovic v. Rison*, 784 F.2d 1354 (9th Cir. 1986), for the proposition that mooting an appeal could give rise to irreparable harm and that the appeal will be mooted if the legislature changes the statute before the Supreme Court renders a decision.³⁰ Artukovic sought to stay an order extraditing him to Yugoslavia to stand trial in that country for war crimes committed when Croatia was a Nazi puppet regime. The Ninth Circuit noted that there was a "possibility" of irreparable harm to Artukovic because his habeas claim would be mooted once he was no longer in custody in the United States.³¹ However, after considering the probability of success of Artukovic's appeal and balancing the interests at issue including the public's interest, the Ninth

²⁷ *Id.*

²⁸ *Id.*

²⁹ A.R.C.P. 62(d) and AS 09.68.040(a) provide that the State is not required to post a supersedeas bond in conjunction with obtaining a stay.

³⁰ Motion at p. 4-5.

³¹ *Artukovic*, 784 F.2d at 1356.

Circuit *denied* Artukovic's request for a stay of his extradition to Yugoslavia.³²

Moreover, as the Ninth Circuit noted recently in a case more analogous to this situation, the mere possibility of mootness does not support granting a stay.³³ The Court did not find persuasive the Forest Service's argument that "money and time spent reinitiating consultation may turn out to be wasted if the Court of Appeals rules in its favor ...".³⁴ The Court went even further:

It must be emphasized, however, that "even certainty of irreparable harm has never *entitled* one to a stay ... and a "general balancing of all of the factors remains as the primary guidepost."³⁵

Here, the State speculates about how the legislature might react in alleging irreparable harm without any consideration to or balancing of the tangible harm that it is certain that Plaintiffs will suffer if the Court grants the stay.³⁶

Furthermore, under Alaska Supreme Court precedent, a change of law does not moot challenges to the law previously in effect. At issue in *Atlantic Richfield Company v. State*, 705 P.2d 418, 426 (Alaska 1985), was the constitutionality of the oil and gas separate accounting corporate income tax statute. While the case was underway, the

³² *Id.* at 1356-57.

³³ *Salix v. U.S. Forest Service*, 995 F.Supp.2d 1148, 1151-53 (2014) (irreparable harm not shown by possibility that court ordered Endangered Species Act consultation efforts could result in settlement which would eliminate the need for an appeal or alternatively, that appeal might reverse decision against Forest Service which it sought to have stayed).

³⁴ *Id.* at 1151.

³⁵ *Id.* at 1150 (citations omitted, emphasis in the original).

³⁶ The United States Supreme Court also expressly rejects any such "possibility" standard for granting a stay. *Nken v. Holder*, 556 U.S. 418, 434, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009) (citations omitted) (a stay is not granted because of the possibility of irreparable injury); *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 375, 172 O.Ed.2d 249 (2008) ("the possibility standard ... is too lenient.")

legislature repealed and replaced separate accounting with a modified apportionment tax.³⁷ The Court noted in *ARCO* that the statutory change was primarily intended to avoid a further increase in the possible liability caused if the Supreme Court ultimately concluded that separate accounting was unconstitutional.³⁸ However, the change in law prior to the Supreme Court's ruling had no impact on the Supreme Court's ability to hear claims about the constitutionality of the separate accounting system. Instead, the Supreme Court ruled that separate accounting was in fact constitutional, even though it had long since been repealed and replaced by the new tax regime.³⁹

The same situation exists here. Even if the legislature were to act to replace the RLC before the Supreme Court rules, the Supreme Court would likely proceed to rule on the RLC's constitutionality. Moreover, the issue of whether the current RLC is a violation of the Anti-Dedication Clause would remain relevant to the validity of an attorney's fee award and whether Plaintiffs were appropriately considered the prevailing parties regardless of whether the Legislature decides to revise the funding system.

In short, any change in the statute before the Supreme Court rules will not moot the State's appeal.

C. The State is Not Irrevocably Harmed Because the Legislature May Revise the Education Funding Statute before the Supreme Court Renders a Decision.

The Motion implies that policy makers should not consider a new funding scheme until the Supreme Court rules, and that the State will be irreparably harmed if the

³⁷ 705 P.2d at 422.

³⁸ *Id.*

³⁹ *Id.* at 429-438.

legislature hurries to amend the statute this session.⁴⁰ However, if policy makers use the stay as a reason to put off consideration of changes to the RLC statute until the Supreme Court rules, policy makers will not have been prevented from -- in the words of the State, not Plaintiffs -- "urgently and imprudently overhaul[ing] education funding."⁴¹ If the Supreme Court affirms the present decision in the middle of a legislative session, the legislature may still act quickly to change the system before the session ends.

Alternatively, if the Supreme Court rules when the legislature is not in session and the legislature decides to have a special session to consider statutory changes, the same alleged pressure to act fast and make allegedly "imprudent" decisions could still occur.

Given its clear constitutional duty to decide what and how much to fund, the Final Judgment does not put any pressure on the legislature to move too quickly; all it does is point out to the legislature that education must be funded in conformance with the Constitution. The State does not explain why it would be so damaging for the legislature to consider alternative methods of funding education that comply with the Constitution, or why it is essential for that consideration to be delayed until after the Supreme Court rules. One can certainly conclude that the public interest would be served by policy makers beginning to consider how to reform the education funding system now without feeling rushed, even if they decide to wait to implement any statutory changes until the Supreme Court has spoken.⁴²

⁴⁰ Motion at 5.

⁴¹ *Id.*

⁴² See, e.g., *Keane*, 893 P.2d at 1249 (in deciding whether to grant a stay of a nonmonetary judgment, superior court should be guided by the public interest; under the PLAINTIFFS' OPPOSITION TO MOTION FOR STAY *Ketchikan Gateway Borough, et al. v. State of Alaska*, Case No. 1KE-14-00016CI
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Indeed, the real pressure to make a hurried decision that is being exerted here is the pressure that the State is attempting to put on the Court to rule as quickly as possible on whether to grant the stay, despite the Court's careful consideration of both sides' arguments regarding the Anti-Dedication Clause and the longstanding Supreme Court opinions interpreting it, in the Order. The Anti-Dedication Clause is not some minor nuisance which, as interpreted by the Court, creates a school funding crisis of epic proportions as the State asserts.⁴³ Instead, it was vigorously debated by the Founders who made a conscious decision to include it in our Constitution so that the legislature would annually consider competing needs for the State's resources.⁴⁴ Encouraging the Governor and legislature to face this constitutional responsibility sooner rather than later favors the public interest in upholding the Constitution.

D. Uncertainty as to School Budgets is Not a Harm to the State, Occurs Each Year when the Legislature Considers the Appropriate Level of School Funding, and therefore, is not a Direct Result of the Court's Final Judgment.

Since the school districts are not parties to this proceeding, uncertainty in local school district budgeting does not create an irreparable harm to the State. Moreover, a stay of the Final Judgment would not eliminate uncertainty in school district funding

facts presented, it was in the public interest to deny the stay); *Nken*, 556 U.S. at 427 (citation omitted) ("The public's interest in the 'integrity' of judicial proceedings includes the public interest in the finality of judgments. That is why stays are generally regarded as 'an intrusion into the ordinary processes of administration of judicial review.'").

⁴³ Motion at 4.

⁴⁴ Exhibit A to April 28, 2014 Plaintiffs' Reply in Support of Motion for Summary Judgment and Opposition to Defendants' Cross Motion For Summary Judgment (1975 Alaska Op. Att'y Gen. No. 9, summarizing the constitutional history). This Attorney General's Opinion was relied upon by the Alaska Supreme Court in *State v. Alex*, 646 P.2d 203 (Alaska 1982), the seminal Anti-Dedication Clause case.

because such funding is inherently uncertain since funding levels change and are adjusted throughout the year.⁴⁵ The inevitable uncertainty arises from the many variables which impact school funding such as the final amount of State aid and other state funding for schools as well as student count which varies and is adjusted over the course of the year.⁴⁶ The RLC is not nearly as significant as other variables because it is not a factor in calculating basic need.⁴⁷ Basic need is what sets a district's budget floor.⁴⁸ Basic need varies based upon the base student allocation and student count, and fluctuates widely.⁴⁹ The reality is that uncertainty in school budgets continues throughout the year, even after the legislature adjourns.⁵⁰ Thus, even if the Court requires the Borough to continue to pay the RLC during the pendency of the appeal, uncertainty in school funding will continue. Therefore, the Final Judgment does not cause irreparable harm to the State because this Court found that the RLC is unconstitutional and that the Borough is relieved from its obligation to provide an RLC to the Ketchikan School District.

In sum, neither the law nor the facts support Defendant's contention that it will be irreparably harmed if a stay is not granted for the numerous reasons set forth above.

III. PLAINTIFFS WILL SUFFER IRREPARABLE HARM AND CANNOT BE ADEQUATELY PROTECTED IF THE JUDGMENT IS STAYED.

In contrast, as discussed above in Section II.A, if a stay is imposed, the parties that

⁴⁵ See February 5, 2015 Affidavit of Robert Boyle, Superintendent of the Ketchikan Gateway Borough School District ("Boyle Aff.²").

⁴⁶ Boyle Aff. at ¶¶ 5-7.

⁴⁷ *Id.* at ¶ 10.

⁴⁸ *Id.* at ¶ 4.

⁴⁹ *Id.* at ¶ 4.

⁵⁰ *Id.* at ¶ 5-7.

will be irreparably harmed are the Plaintiffs because the Court has already found that an RLC once paid will not be refunded and because even if a refund were available, it is not possible for the Borough to refund the taxes that were used to fund the RLC. This is the "cognizable financial harm"⁵¹ to Plaintiffs which the State ignores. Thus, the State misses the mark when it argues that the "only" impact of the stay would be that Plaintiffs would have to wait longer to get a final ruling.

Although the State is not required to post a bond in conjunction with its request for a stay, the lack of a bond requirement does not eliminate the need for adequate protection of Plaintiffs as a necessary predicate to granting the stay.⁵² The Motion does not even attempt to place the Plaintiffs in the position they currently occupy, but simply proposes that the current unconstitutional system remain in place, and that the Plaintiffs continue to make unconstitutional payments with no prospect of refund.

IV. THE STATE DOES NOT DEMONSTRATE A CLEAR LIKELIHOOD OF PREVAILING ON THE MERITS.

Because the State cannot show that the Plaintiffs are adequately protected, the State is not entitled to a stay of a non-monetary judgment in the absence of a showing that the State has a clear likelihood of prevailing on the merits.⁵³ The State has not attempted to meet this burden, which would be quite difficult in light of the fact that this

⁵¹ Motion at 6.

⁵² See AS 09.68.040(c) (a litigant requesting a stay may not be excused from protecting those who would be adversely affected because of the "nature of the policy or interest" advocated by the litigant). Nor is the Borough required to post a bond under AS 09.68.040(a). The State's argument that the Borough should continue to pay the RLC is akin to requiring the Borough to post a bond but without any possibility that the Borough would recoup it if Plaintiffs prevail.

⁵³ *Keane*, 893 P.2d 1239 at 1249-50.

Court has just rejected the State's position as a matter of law.⁵⁴ While that is a theoretical possibility where there is substantial doubt as to the correctness of the decision, the decision in the instant case follows inevitably from binding Supreme Court precedent. The court correctly concluded that the current school funding mechanism involved the proceeds of a State tax, dedicated to a particular purpose in a way that was indistinguishable from the mechanism previously found to be unconstitutional in *Alex*.⁵⁵ This is not a case where an issue of first impression is involved, but is instead the application of settled law where the Supreme Court has had numerous opportunities to re-examine the Anti-Dedication Clause over the years, but has consistently held that a broad interpretation of this constitutional provision is appropriate.⁵⁶ The State essentially asks this Court to overrule *Alex* and its progeny. In light of the doctrine of *stare decisis*,⁵⁷ this uphill battle renders the likelihood of success on the merits much less than clear.

While the State urges this court to apply the lower "serious and substantial

⁵⁴ See *Powell v. City of Anchorage*, 536 P.2d 1228 (Alaska 1975) n. 2 (citing to 7 J. Moore, *Federal Practice* 62.05 (2d ed. 1972) for the proposition that "it may be the unusual case in which the trial judge would arrive at the conclusion that appellant is likely to prevail on appeal" after having just concluded that appellant has not prevailed).

⁵⁵ Order at 8-14.

⁵⁶ *Id.* at 9-10.

⁵⁷ *State v. Fremgen*, 914 P.2d 1244, 1245 (Alaska 1996) (quoting *State v. Dunlop*, 721 P.2d 604, 610 (Alaska 1986)) ("[S]tare decisis is a practical, flexible command that balances our community's competing interests in the stability of legal norms and the need to adapt those norms to society's changing demands. In balancing these interests, we will overrule a prior decision only when 'clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent.' "); *Beesley v. Van Doren*, 873 P.2d 1280, 1283 (Alaska 1994) (quoting *State v. Souter*, 606 P.2d 399, 400 (Alaska 1980)) ("Under the rule of stare decisis, this court will overrule precedent only 'where the court is clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent.' ").

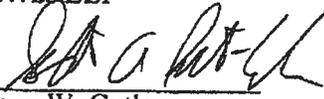
question" standard, that standard is only appropriate when the plaintiffs will be protected from harm. Because the Plaintiffs will suffer irreparable harm if a stay is granted, the State is not entitled to a stay in the absence of a showing that it will prevail on appeal, which it does not make simply by asserting that it will present the same arguments to the Supreme Court that it has presented to this Court.

Conclusion

For all of the above stated reasons, the Motion should be denied.

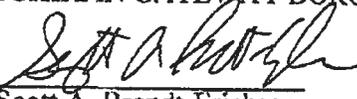
Dated this 9th day of February, 2015.

K&L GATES LLP

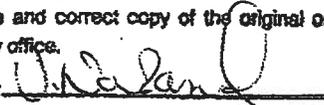
By: 
Louisiana W. Cutler
Alaska Bar No. 9106028

Attorneys for all Plaintiffs

KETCHIKAN GATEWAY BOROUGH

By: 
Scott A. Brandt-Erichsen
Ketchikan Gateway Borough Attorney
Alaska Bar No. 8811175

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

ATTEST: 
CLERK-TRIAL COURTS
State of Alaska
of Ketchikan

K&L GATES LLP
420 L STREET, SUITE 400
ANCHORAGE, ALASKA 99501-1971
TELEPHONE: (907) 276-1969

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT KETCHIKAN, ALASKA

KETCHIKAN GATEWAY BOROUGH, an Alaska municipal corporation and political subdivision; AGNES MORAN, an individual, on her own behalf and on behalf of her minor son; JOHN COSS, a minor; JOHN HARRINGTON, an individual; and DAVID SPOKELY, an individual;

Plaintiffs,

v.

STATE OF ALASKA; MICHAEL HANLEY, COMMISSIONER OF ALASKA DEPARTMENT OF EDUCATION AND EARLY DEVELOPMENT, in his official capacity;

Defendants.

Case No. 1KE-14-00016CI

FILED in the Trial Courts
State of Alaska First District
at Ketchikan

FEB 09 2015

Clerk of the Trial Courts

By _____ Deputy

AFFIDAVIT OF LOUISIANA W. CUTLER IN SUPPORT OF
OPPOSITION TO EMERGENCY MOTION FOR STAY PENDING APPEAL

State of Alaska)
)ss:
Third Judicial District)

Louisiana W. Cutler, being first duly sworn, deposes and states as follows:

1. I am a partner at K & L Gates LLP, attorneys for Plaintiffs Ketchikan Gateway Borough, Agnes Moran; John Coss, John Harrington, and David

AFFIDAVIT OF LOUISIANA W. CUTLER IN SUPPORT OF OPPOSITION TO
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K&L GATES LLP
420 L STREET, SUITE 400
ANCHORAGE, ALASKA 99501-1971
TELEPHONE: (907) 276-1969

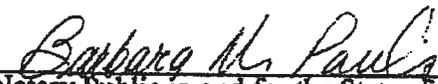
Spokely ("Plaintiffs").

2. I have personal knowledge of the facts contained herein, and am competent to testify thereto.
3. Attached as Exhibit A to this Affidavit is a true and correct copy of an excerpt from the 1987 House Research Agency report entitled "Public Financing In Alaska."
4. Attached as Exhibit B to this Affidavit is a true and correct copy of "Governor Releases Amended Endorsed Budget," Office of the Governor February 5, 2016 Press Release.
5. Attached as Exhibit C to this Affidavit is a true and correct copy of and Attorney General's Opinion, File No. 366-464-83, dated February 28, 1983.
6. Attached as Exhibit D to this Affidavit is a true and correct copy of Fiscal 50: State Trends and Analysis, January 29, 2015 Update, the Pew Charitable Trusts.
7. Attached as Exhibit E to this Affidavit is a true and correct copy of an article published in the Peninsula Clarion on January 26, 2015.

FURTHER YOUR AFFLIANT SAYETH NAUGHT.


 Louisiana W. Cutler

SUBSCRIBED AND SWORN to before me this 6th day of February, 2015.

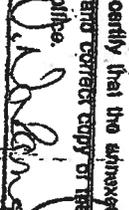

 Notary Public in and for the State of Alaska
 My commission expires: 12/10/2017



AFFIDAVIT OF LOUISIANA W. CUTLER IN SUPPORT OF OPPOSITION TO EMERGENCY MOTION FOR STAY PENDING APPEAL
 SOA, Hanley v. Ketchikan Gateway Borough, et al., S-15811
 Page 2

EXHIBIT A
 Page 23 of 50

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

ATTEST: 

CLERK-TRIAL COURTS
 State of Alaska
 at Ketchikan

K&L GATES LLP
 420 L STREET, SUITE 400
 ANCHORAGE, ALASKA 99501-1971
 TELEPHONE: (907) 276-1969

**PUBLIC SCHOOL FINANCING
IN ALASKA**

**House Research Agency
Alaska State Legislature
February 1987**

House Research Agency Report 87-A

In 1985, the Southwest Region School District filed suit alleging that the State improperly withheld PL 874 payments from that district during the 1984 to 1985 school year. An out-of-court settlement, contingent on legislative appropriation, has been reached between the State and the district. The settlement of this complaint removes the State from additional jeopardy for payments which may have been improperly withheld for FY 85, but not for FY 86 and FY 87. Should it be determined that the State improperly withheld State aid in consideration of PL 874 payments for these or future years, the State may be required to repay all funds improperly withheld. In addition, failure to remedy noncompliance could result in loss of federal funds (pages 25-26).

Equalization of School District Revenues

Equalization is the process by which state aid payments to school districts are adjusted to account for differences in property wealth among those districts. During the past few years, lawsuits in several states have challenged state education financing laws on the grounds that those laws do not adequately equalize state aid. The following education financing strategies are commonly used by states to allocate state aid for education. In many cases, they are used in combination or with modifications that reflect specific characteristics of states:

Flat Grants. Each school district receives the same revenue per student or per instructional unit. To the extent that local revenue is needed to supplement state aid, that revenue is not equalized because wealthier districts can raise more tax revenue per student at the same level of tax effort than can poorer districts (page 27).

Foundation Plans. Each school district is guaranteed a level of State funding, usually established on a per student basis. As a condition of receipt, all districts impose a uniform tax levy. The foundation then pays each district the difference between the local tax yield and the guaranteed level of support. As with flat grants, local revenue raised in excess of the required local contribution is not equalized (page 28).

Percentage Equalizing Plans. Each district is guaranteed state support at a certain percentage of the district's budget. The percentage of each district's budget that is derived from state aid is inversely related to the wealth of the district. Under certain conditions, percentage equalizing plans equalize education resources among districts to a greater extent than foundation plans because all the dollars within a district's budget are equalized, not just those related to the foundation level of support. Alaska's current education financing law uses the percentage equalization concept, but the law restricts the degree of fluctuation in the percentage

of each district's State aid between 97 and 100 percent. This significantly limits the degree of equalization achieved (pages 28-29).

Power Equalizing Plans. These plans refer to the recapture and redistribution of local tax revenue by the state. Under this type of plan, a district which generates revenue (at a uniform tax rate) that exceeds its state aid allocation would return this excess revenue to the state for allocation to other districts (page 29).

Full State Funding. Total expenditures to each district are provided by state or federal sources. Currently, Hawaii is the only state with full state funding (page 30).

Alaska's current education financing law combines the flat grant and percentage equalization strategies. City and borough school districts receive at least 97 percent of their State aid as a flat grant while REAAs receive 100 percent of their State aid as a flat grant. City and borough districts may receive additional funds depending upon their property value. Those districts with per-student property values higher than the statewide average receive no additional aid while those with per student property value less than the statewide average receive relatively more aid. In FY 87, four districts--North Slope, Sand Point, Valdez and Unalaska--had per-student property values which exceeded the statewide average. Consequently, these districts received 97 percent of basic need while other districts received a higher percentage. The current foundation law also contains a secondary allocation designed to encourage local contributions for education in the city and borough districts (pages 34-35).

Although school district revenue derived from State aid is equalized, the tax rates required to generate additional local funds depend upon the property wealth of the district and so are not equalized. Approximately 26 percent of all FY 87 city and borough school district revenues are derived from local sources (page 41).

In addition, funds distributed through the secondary allocation provisions of the foundation program are not equalized. These allocations are based on actual contribution per ADM. The wealthier a district, the more dollars it can contribute for education at a given rate of taxation (page 41).

Relationship Between Property Wealth and Education Revenue. We examined the relationship between the FY 87 property wealth and revenue of Alaska's city and borough school districts. In the absence of a vigorous equalization formula which neutralizes the revenue raising advantage of the wealthier districts, we would expect wealthier districts to have significantly higher revenue per ADM than poorer districts. This is not necessarily the case. The mean budgeted revenue per ADM for the 10 districts with the lowest property value per student is \$10,398 as compared with \$7,847 for the 10 districts with the highest property value per student and

SUMMARY

\$6,888 for the remaining 12 districts. The average revenue per ADM among the REAAs is \$9,193. (In all cases, revenues are adjusted for the geographical differentials used to adjust education costs in the previous foundation formula.) Several factors help to explain these results:

The foundation formula allocates more revenue per student to the smaller single-city districts and REAAs (which have many smaller school sites) than it does to other districts. Among the city and borough districts, smaller single-city districts are among the poorest with regard to property value (page 47).

The current foundation program was designed in part to provide each district with revenue dependent upon revenue received in previous years, which in turn was based on revenue received in FY 83. Because the foundation law that was in effect in FY 83 equalized State aid, current State aid continues to reflect this equalization (page 47).

The degree to which State funds support local school districts mitigates the wealth advantage of some districts. Because State aid provides such a high percentage of the education need of most districts, relatively few local resources are needed to supplement these funds (page 47).

Several characteristics of the State's education financing system may be potentially troublesome. The relationship between a school district's tax generating potential and its education revenue is relatively weak. This is because much of the equalization that does occur is based on the district size, number of schools and other factors unrelated to district wealth. For example, the North Slope and Valdez, the two wealthiest districts in the state, both among the top ten districts in revenue per ADM but levy local taxes at rates below districts with less revenue per ADM (page 48).

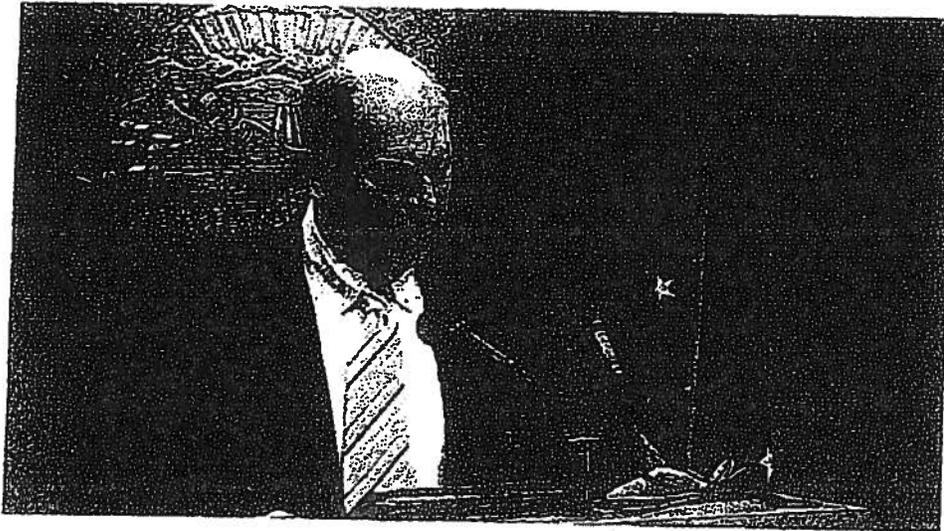
Also, because equalization is not based on district wealth, the current pattern of State aid allocations may be difficult to maintain if State appropriations for education continue to decline. As State aid declines, school districts can either reduce education programs or increase local support to supplement State aid. Under the latter option, wealthier districts will raise more local revenue per pupil for a given level of taxation than poorer districts (pages 48-49).

Finally, compliance with PL 874 is problematic under Alaska's current education financing law. Should compliance be required, the State will have to meet one of the federal equalization tests. Should it be determined that current State law does not equalize revenues sufficiently to meet one or more of these tests, the State would face liability for funds improperly withheld as well as possible suspension of future PL 874 payments (page 49).

[Search]

Governor's Office > Press Room > Full Press Release

GOVERNOR RELEASES AMENDED ENDORSED BUDGET



February 5, 2015 JUNEAU—Governor Bill Walker today released his budget for fiscal year 2016 (July 1, 2015 – June 30, 2016), which he emphasized is a starting point for discussions.

"There are cuts in here, and some will be painful," Governor Walker said. "Our state right now has a \$3.6 billion budget deficit, leading us to draw about \$10 million every single day from savings. I want to be up-front with Alaskans throughout this process."

The fiscal year 2016 budget has more changes than the placeholder budget the Walker administration submitted in December. With the decline in state revenues, the Walker administration cut an additional \$132 million from agencies' unrestricted general fund operating budgets from the December budget, while preserving Governor Walker's vision to maintain essential services and protect reserves.

"We will prioritize the delivery of services and look for ways to provide services at lower costs," said Pat Pitney, Director of Office of Management and Budget. "We will combine services where possible to gain efficiencies."

The administration focused on reducing overhead and administrative costs before reducing services, and worked hard to make sure cuts do not disproportionately impact small, outlying offices where services may be most needed.

The proposed fiscal year 2016 budget reflects a \$240 million reduction in agency unrestricted general fund spending from fiscal year 2015 and eliminates more than 300 positions.

"We'll work to minimize state employee layoffs by eliminating vacant positions and reducing others through retirements, resignations and transfers," Governor Walker said. "However, we are also leading by example. I cut 11 percent of my executive office through leaner staffing and operations."

EXHIBIT A

EXHIBIT B
Page 1 of 2

Page 28 of 50

Some highlights of the budget include:

- Maintaining funding for front-line social workers at Office of Children's Services
- Reducing government overhead. For example, cut \$6 million, which is 22 percent, from administrative functions within the Department of Administration's budget
- Meeting non-negotiable obligations. For example, covered \$257 million of retirement costs.

Governor Walker believes the state can strengthen private, nonprofit, tribal and federal partnerships, and provide state services with less state support while minimizing impacts on Alaska's economy.

"We'll leverage non-state dollars," Governor Walker said. "For example, we anticipate saving \$4 million in the Department of Corrections for inmate health care due to Medicaid expansion."

The proposed budget now moves to the legislature, which will refine the numbers through the legislative process.

Governor Walker encourages all Alaskans to stay active in the budget discussion and make their voices heard so the state can reduce expenditures but continue the level of service important to citizens.

To view Governor Walker's endorsed FY16 proposed budget, visit <https://www.omb.alaska.gov/html/budget-report/fy-2016-budget/amended.html>.

Here is a glossary of terms: <https://www.omb.alaska.gov/html/information/budget-terminology.html>

UGF – unrestricted general funds

PFT – permanent full-time employee

PPT – permanent part-time employee

NP – non-permanent employee

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1983 WL 42481 (Alaska A.G.)

Office of the Attorney General

State of Alaska
File No. 366-464-83
February 28, 1983

Deadline for submitting capital appropriations

*1 Peter McDowell
Director
Office of Management & Budget
Governor's Office

You have orally asked for a quick response to the question of what deadline, if any, applies to the governor's submission to the legislature of bills making appropriations for capital projects. The short answer is that there is none.

The governor's authority for submitting appropriation bills to the legislature derives, primarily, from the following two provisions of the Alaska Constitution:

Article III, Section 18:

MESSAGES TO THE LEGISLATURE. The governor shall, at the beginning of each session, and may at other times, give the legislature information concerning the affairs of the State and recommend the measures he considers necessary. [Emphasis added.]

Article IX, Section 12:

BUDGET. The governor shall submit to the legislature, at a time fixed by law, a budget for the next fiscal year setting forth all proposed expenditures and anticipated income of all departments, offices, and agencies of the State. The governor, at the same time, shall submit a general appropriation bill to authorize the proposed expenditures, and a bill or bills covering recommendations in the budget for new or additional revenues.

Implementing the first sentence of the latter section, the legislature has enacted several provisions in AS 37.07, the Executive Budget Act. AS 37.07.020, 'Responsibilities of the Governor,' requires the governor to 'prepare and submit to the legislature before the fourth legislative day a budget for the succeeding fiscal year.' Under AS 37.07.062, 'Capital Budget,' the general appropriation bill submitted under AS 37.07.020 is to 'contain a separate section for capital outlays.' HB 105, introduced January 21, 1983, complies with those statutes.¹

The legislature has also enacted AS 37.07.070, 'Legislative Review.' That section begins by requiring the legislature to consider the governor's 'proposed comprehensive operating and capital improvements programs and financial plans . . .' and requiring the operating and capital budgets to be separately reviewed. That section also says:

During each regular session of the legislature, legislative review of the governor's supplemental appropriation bills and the governor's budget amendments shall be governed by the following time limits:

(1) Requests by the governor for supplemental appropriations for state agency operating budgets for the current fiscal year may be introduced by the rules committee only through the 45th legislative day.

First of all, that section does not set a time limit for consideration of supplemental appropriation bills for capital items; it mentions only 'operating budgets.' Secondly, that statute is rather strangely worded in that it leads off with the idea that it will be setting a limitation for legislative review of appropriation bills, but then the first paragraph under that lead-in language is worded in terms of a limitation on the introduction of the governor's recommended appropriation bills. Since the governor's authority and responsibility are derived from the constitution, any statutory restriction on the exercise of that authority or responsibility must be viewed as merely a procedural directive to the executive.² To give it greater weight than that could prevent the governor from dealing with emergencies and other situations in which the best interests of the state require an appropriation to be submitted after the statutorily specified time. Such a restriction would violate the separation-of-powers doctrine—a doctrine which the Alaska Supreme Court has held applies in this state. Public Defender v. Superior Court, Third Judicial District, 534 P.2d 947 (Alaska 1975).

² Moreover, nothing in Article II of the Alaska Constitution, the legislative article, restricts the right or power of the legislature to consider appropriation measures submitted after that 45th-day deadline. Similar to the executive's situation, the existing constitutional power and responsibility of the legislature to legislate cannot be restricted by any provision short of a constitutional amendment. Perhaps recognizing this, the statutes do not specify any sanctions for failure to abide by this additional time limitation.

Supporting the conclusion that the 45th-day limitation set in AS 37.07.070(1) is directory rather than mandatory are the fundamental rules of construction that an interpretation which would preserve the constitutionality of a statute is preferred over an interpretation which would require holding it invalid (Sands, Sutherland Statutory Construction, 4th ed., sec. 45.11) and that 'unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result' (Id., sec. 45.12). Applying AS 37.07.070(1) strictly, rather than just as a guide, could prevent the governor from introducing an essential appropriation bill; that would produce a result that is both unconstitutional and unreasonable.

This is consistent with AS 37.07.010, 'Statement of Policy,' which indicates that the basic purpose of the Executive Budget Act is the orderly development and review of a comprehensive system for state program and financial management. The purpose is not arbitrarily to erect barriers to dealing with the state's needs.

Although dealing with a matter of form rather than a deadline, the court in People v. Tremaine, 21 N.E.2d 891 (N.Y. 1939), ruled that, in light of the executive's obligation to prepare a budget, the manner in which the budget and appropriation bills are drafted before submission to the legislature is within the sound discretion of the executive, subject to any guidelines set out in the constitution. Disputes between the executive and the legislative branches concerning such matters basically involve political questions and the courts of often will not decide them. See Saxton v. Carey, 378 N.E.2d 95 (N.Y. 1978). Meeting the statutory deadlines would, of course, avoid the present issue, and that might be the most appropriate course of action.

To summarize: (1) the deadlines set in AS 37.07.020 and 37.07.062 appear to be constitutional under Article IX, Section 12 of the Alaska Constitution and they have been met by HB 105; (2) the 45-day limitation imposed by AS 37.07.070(1) must be construed to be merely directory rather than mandatory; and (3) AS 37.07.070(1) does not refer to capital appropriations.³

Further supporting the conclusion that AS 37.07.070(1) is regarded as merely directory is the fact that, since that deadline's enactment in 1977, there have been numerous instances of supplemental appropriations for operating budgets (as well as capital projects) introduced after the 45th legislative day. Just a few examples are:

1982 Session

³ SB 894—supplemental appropriation to Human Rights Commission for personal services money (377-094-82). Introduced 4/20/82 (100th day).

1981 Session

HB 294—supplemental appropriation to Department of Law for miscellaneous judgments (\$956,000) (377-137-81). Introduced 3/9/81 (57th day).

HB 295—supplemental appropriation to Department of Administration and Department of Transportation and Public Facilities for administrative costs, deferred compensation, and claim settlement for Cold Bay Project (377-142-81). Introduced 3/9/81 (57th day).

HB 296—supplemental appropriation to Department of Public Safety for Public Safety Employees Association (377-142-81). Introduced 3/9/81 (57th day).

HB 297—supplemental appropriation to Departments of Labor and Military Affairs for workers' compensation fund and second injury fund (377-138-81). Introduced 3/9/81 (57th day).

HB 298—supplemental appropriation to University of Alaska for sewage disposal costs, teachers contracts (377-139-81). Introduced 3/9/81 (57th day).

HB 462—special appropriation to provide financing for alternative energy loans (377-162-81). Introduced 4/2/81 (81st day).

HB 463—special appropriation to Alaska Power Authority for power project financing and personnel costs (377-163-81). Introduced 4/2/81 (81st day).

SB 259—supplemental appropriation to Department of Health and Social Services for nursing services (377-141-81). Introduced 3/9/81 (57th day).

SB 267—supplemental appropriation to Department of Fish and Game to reimburse governor's contingency fund for construction costs of crib dam (377-140-81). Introduced 3/11/81 (59th day).

SB 309—supplemental appropriation to Department of Health and Social Services and Department of Public Safety for administrative services and program costs (377-143-81). Introduced 3/19/81 (67th day).

SB 322—supplemental appropriations to various departments to pay prior-year obligations and miscellaneous claims (377-150-81). Introduced 3/24/81 (72nd day).

1980 Session

HB 939—supplemental appropriation to Department of Transportation and Public Facilities for state equipment fleet fuel (377-131-80). Introduced 3/6/80 (53rd day).

HB 959—supplemental appropriation (\$271,354,000) to Alaska Housing Finance Corporation (377-137-80). Introduced 3/17/80 (64th day).

HB 958—supplemental appropriation for confidential unit salary increases (377-138-80). Introduced 3/17/82 (64th day).

Norman C. Gorsuch
Attorney General
Arthur H. Peterson
Assistant Attorney General

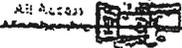
Footnotes

- 1 AS 37.07.060(b)(3), which also sets a 4th-legislative-day deadline, speaks of a report, rather than a bill, containing the governor's capital improvements program.
- 2 Reaching a similar conclusion is the January 16, 1963 Opinion of the Attorney General regarding executive orders and the statute which is now AS 24.30.130(b).
- 3 The time available has not allowed extensive research into the court decisions, statutes, and Constitutional Convention Proceedings. However, this memorandum should suffice for the present.

1983 WL 42481 (Alaska A.G.)

End of Document

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Revenue officials explain tax credit issue flagged by Walker

Posted: January 26, 2015 9:40pm

By Becky Bohrer

JUNEAU — State Revenue department officials told lawmakers Monday that the tax credits that were a source of contention in an opinion piece by Gov. Bill Walker are being paid primarily to small explorers or those developing new oil and gas fields in Alaska.

Walker earlier this month said the state stood to pay out about \$100 million more in oil and gas production credits than it takes in in production taxes this year and about \$400 million more next year. He referenced the 2013 rewrite of Alaska's oil tax law, saying the overhaul occurred with little consideration given to low prices. Giving away more in tax breaks than the state collects is irresponsible and unsustainable, Walker said.

The department, in its fall revenue forecast, projected that the state would pay \$625 million in so-called refundable credits. Revenue Commissioner Randall Hoffbeck told the Senate Finance Committee these are credits primarily to explorers or developers that have no tax liability. He said the credits are split pretty evenly between activity on the North Slope and in Cook Inlet.

The North Slope's major players are not part of the group that would benefit from this category of credits, and they are paying taxes, Hoffbeck said. But production taxes amid low oil prices are forecast to total about \$524 million this year, down from about \$2.6 billion last fiscal year, according to the department.

Committee co-chair Anna MacKinnon, R-Eagle River, said the opinion piece seemed to leave the impression that the problem was with the North Slope's big three companies.

Walker's spokeswoman has said the governor was sharing facts with Alaskans as he and the administration were learning them and that the piece was not a precursor to any legislation. Walker took office in December.

Hoffbeck said there is no systemic problem with the credits themselves. He said this is a cash-flow issue, driven by low prices.

"Investments in the future, when you don't have much revenue, are painful. But they're still investments in the future," Hoffbeck said.

Comments 0

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EXHIBIT E
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EXHIBIT A

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT KETCHIKAN

KETCHIKAN GATEWAY BOROUGH, an Alaska municipal corporation and political subdivision; AGNES MORAN, an individual, on her own behalf and on behalf of her minor son; JOHN COSS, a minor; JOHN HARRINGTON, an individual; and DAVID SPOKELY, an individual;

Plaintiffs,

v.

STATE OF ALASKA; MICHAEL HANLEY, COMMISSIONER OF ALASKA DEPARTMENT OF EDUCATION AND EARLY DEVELOPMENT, in his official capacity;

Defendants.

FILED in the Trial Courts
State of Alaska First District
at Ketchikan

FEB 09 2015

Clerk of the Trial Courts

By _____ Deputy

Case No. 1KE-14-0016 CI

AFFIDAVIT OF DAN BOCKHORST

STATE OF ALASKA)
) ss.
FIRST JUDICIAL DISTRICT)

I, Dan Bockhorst, being first duly sworn, state as follows:

1. I am the Borough Manager for Plaintiff Ketchikan Gateway Borough (Borough) in the above-entitled action. I have

KGB et al. v. SOA et al.
1KE-14-0016 CI
AFFIDAVIT OF DAN BOCKHORST.

EXHIBIT A
Page 37 of 50

Office of the
Borough Attorney
1900 1st Avenue,
Suite 215
Ketchikan, Alaska
99901
(907)228-6635
Fax(907)228-6683

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held that position for more than seven years.

2. I have personal knowledge of and am competent to testify as to the information in this affidavit.

3. If the RLC is in effect for the fiscal year beginning July 1, 2015, then the Borough will be required to make an RLC payment in an amount equal to 2.65 mills on the full and true value of all taxable property in the Borough as determined by the Department of Commerce, Community and Economic Development under AS 14.17.510. Based on the 2015 preliminary assessment roll prepared by the Borough Assessor, it would be necessary for the Borough Assembly to levy an areawide property tax of 3.5 mills to generate sufficient funds to pay the 2.65-mill RLC calculated under AS 14.17.510. The Borough Taxpayer Plaintiffs will be required to pay an allocated portion of the taxes levied by the Borough to generate the funds to make this payment. The Borough levies these taxes by June 15 of each year to comply with AS 29.45.240.

4. Additionally, the Borough does not have a record database which would facilitate refund of the taxes levied and collected to make the RLC payment to the persons who paid them. Some property owners will likely die, or sell their

Office of the
Borough Attorney
1900 1st Avenue,
Suite 215
Ketchikan, Alaska
99901
(907)228-6635
Fax(907)228-6683

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property to other persons in the interim. To the extent the funds are derived from sales taxes, the taxes are remitted by the merchants with no tracking of the individual taxpayers. Thus, it is not possible to refund taxes to the parties who paid them.

5. During the current fiscal year the Borough appropriated \$4,438,076 in taxpayer funds to pay the RLC under AS 14.17.410(b)(2). In addition the Borough appropriated \$3,460,924 in voluntary local contributions to education under AS 14.17.410(c)(2). The total of local cash contributions under AS 14.17.410 authorized by the Assembly for FY 2015 was \$7,899,000. The voluntary local contributions by the Borough totaled \$2,751,086 less than the maximum limit of 23% of basic need.

6. Under the limitations in AS 14.17.410(c), the Borough can make a maximum voluntary local contribution to the District of 23% of the District basic need, or \$ 6,212,010 in FY 2015 for example. The \$7,899,000 paid was \$1,686,990 more than the maximum voluntary contribution.

7. Taking the FY 2015 numbers as an example, if the Borough were compelled by a stay to pay its normal RLC and voluntary contribution, and subsequently the State were compelled to

Office of the
Borough Attorney
1900 1st Avenue,
Suite 215
Ketchikan, Alaska
99901
(907)228-6635
Fax(907)228-6633

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eliminate the deduction for the RLC because Plaintiffs prevailed at the Supreme Court, the Borough would have provided \$ 4,438,076 more to the district than the total amount it had intended. The district might retain \$2,751,086 of this as additional voluntary contributions, and the remaining \$1,686,990 of this amount would be in excess of voluntary contributions. Under existing policies the DEED would deduct these "excessive" contributions from the State Aid under AS 14.17.410. Thus, the Borough would never receive a refund.

8. Even if the State were to make adjustments to underpayment to the district for prior years under AS 14.17.610(b) - effectively paying the amount of the improperly deducted RLC to the district, this same mechanism would divert a large portion of these funds back to the State such that the Borough would never see them.

9. The Borough would be harmed by being compelled to make RLC payments during the life of the stay. This harm would continue each fiscal year until the stay is dissolved.

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Office of the
Borough Attorney
1900 1st Avenue,
Suite 215
Ketchikan, Alaska
99901
(907)228-6635
Fax(907)228-6683

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EXECUTED at Ketchikan, Alaska, this 6th day of February, 2015.

KETCHIKAN GATEWAY BOROUGH

By: [Signature]
Dan Bockhorst
Borough Manager

SUBSCRIBED AND SWORN to before me this 6th day of February, 2015.



[Signature]
Notary Public for Alaska
My commission expires: 5-7-15

Office of the
Borough Attorney
1900 1st Avenue,
Suite 215
Ketchikan, Alaska
99901
(907)228-6635
Fax(907)228-6683

KGB et al. v. SOA et al.
IKE-14-0016 CI
AFFIDAVIT OF DAN BOCKHORST.
Page 5 of 5

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

ATTEST: [Signature]
CLERK-TRIAL COURTS
State of Alaska
at Ketchikan

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT KETCHIKAN

KETCHIKAN GATEWAY BOROUGE, an
Alaska municipal corporation and
political subdivision; AGNES
MORAN, an individual, on her own
behalf and on behalf of her minor
son; JOHN COSS, a minor; JOHN
HARRINGTON, an individual; and
DAVID SPOKELY, an individual;

Plaintiffs,

v.

STATE OF ALASKA; MICHAEL HANLEY,
COMMISSIONER OF ALASKA
DEPARTMENT OF EDUCATION AND
EARLY DEVELOPMENT, in his
official capacity;

Defendants.

CASE No. 1KE-14-00016CI

FILED in the Trial Courts
State of Alaska First District
at Ketchikan

FEB 09 2015

Clerk of the Trial Courts

By _____ Deputy

AFFIDAVIT OF ROBERT BOYLE KETCHIKAN GATEWAY BOROUGE SCHOOL DISTRICT

SUPERINTENDENT

STATE OF ALASKA)

FIRST JUDICIAL DISTRICT) ss.

Robert Boyle, being first duly sworn, states as follows:

1. I have been the superintendent of the Ketchikan Gateway Borough School District (District) since July 1, 2007.

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2. During my time as superintendent I have been responsible for preparation and submission of the annual District budget. Under AS 14.14.060 and KGB Code 2.35.050 the State and the Ketchikan Gateway Borough (Borough) require the District to submit their budget to the local municipality by May 1 each year.

3. The school budget process is ongoing. We begin in the fall of the year prior to the start of the fiscal year, when the Department of Education and Early Development (DEED) provides an estimate of the Basic Need amount calculated based upon estimated student counts and the Base Student Allocation under AS 14.17.470. The School District takes those DEED estimates of our State Aid entitlement, from February through April prepares a proposed budget for approval by the School Board and for submission to the Borough for approval as to total amount.

4. The maximum funding we identify in our budget planning is the Basic Need plus 23% of the Basic Need amount which may be received as voluntary contributions. The minimum we identify is the Basic Need amount. The Basic Need amount is a set entitlement amount based upon the

Office of the
Borough Attorney
1900 1st Avenue,
Suite 215
Ketchikan, Alaska
99901
(907)228-6635
Fax(907)228-6683

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adjusted Average Daily Membership (ADM) of students multiplied by the Base Student Allocation (BSA) in AS 14.17.470. Normally we do not plan on receiving voluntary local contributions to the 23% cap, but we expect substantial voluntary local contributions. The school budget approval process generally centers on how much of the 23% potential voluntary contributions will be funded by the Borough in a given year.

5. The school budget is always variable and uncertain until the legislature adjourns and we know how much money the State is providing in State Aid under AS 14.17.400, supplemental State funds through the Quality School Funding under AS 14.17.480; Pupil Transportation funding under AS 14.09.010, other grant programs such as the direct grants made by CH 18 SLA 2014 and CH15 SLA 2014 which provided special grant funding over 3 years to school districts, and whether the legislature has amended the BSA in AS 14.17.470. For example, the Governor's recent proposal to eliminate the special grant funding in CH 18 SLA 2014 and CH15 SLA 2014 is projected to cost the District \$611,000 in FY 2016 if the legislature makes the cuts recommended by the

Office of the
Borough Attorney
1900 Ist Avenue,
Suite 215
Ketchikan, Alaska
99901
(907)228-6635
Fax(907)228-6683

AFFIDAVIT OF ROBERT BOYLE
ICE-14-00016 CI
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Governor. However, we will not know the outcome of that proposed cut until after the legislature adjourns April 19, 2015.

6. Even after the legislature adjourns, there is some uncertainty until Borough voluntary contributions are established in May of each year. Some uncertainty continues to exist even after the fiscal year begins because the final Basic Need calculation which determines the district entitlement to State Aid is dependent on the final student count which occurs in October.

7. Even after that student count is completed and submitted to DEED, there may be adjustments dependent upon whether DEED accepts or rejects the student count numbers reported. We are never certain where we will end up until the student count process is complete in mid-March, about 1/4 of the way through a given fiscal year. The amounts are always a moving target. For example, the FY 2015 budget, (July 1, 2014- June 30, 2015) is still unsettled.

8. In FY 2014 (July 2013-June 2014) significant changes in funding occurred in February 2014, late in the fiscal year, because DEED rejected several (2) intensive needs

Office of the
Borough Attorney
1900 1st Avenue,
Suite 215
Ketchikan, Alaska
99901
(907)228-6635
Fax(907)228-6683

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student count assertions by the District.

9. In the current fiscal year (July 2014-June 2015) there is still uncertainty as to the Basic Need amount due to disputed treatment of 142 students by DEED, a matter which currently is under appeal to DEED.
10. Each year when I construct the budget I focus on the BSA and the student count for the ADM which make up the Basic Need calculation. The amount of the Required Local Contribution (RLC) is not significant to budget planning because it is not a factor in calculating the District's Basic Need. Rather, the significant issues are the Basic Need amount as determined by the formula, the Base Student Allocation in AS 14.17.470, and the ADM (student count). The only local contribution amounts which are a variable impacting budget planning and preparation, are the amount of the voluntary local contribution, and the amount of contracted services, which are included as part of the voluntary contribution as "in-kind" contributions.

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Borough Attorney
1900 1st Avenue,
Suite 215
Ketchikan, Alaska
99901
(907)228-6635
Fax(907)228-6683

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FURTHER AFFIANT SAYETH NOT

EXECUTED at Ketchikan, Alaska, this 5th day of February, 2015.

KETCHIKAN GATEWAY BOROUGH
SCHOOL DISTRICT SUPERINTENDENT

By: *Robert Boyle*
Robert Boyle
KGBS Superintendent

SUBSCRIBED AND SWORN to before me this 5th day of February,
2015.

(Seal)



Cindy M. Montgomery
Notary Public for Alaska

My commission expires: 5-7-15

Office of the
Borough Attorney
1900 1st Avenue,
Suite 215
Ketchikan, Alaska
99901
(907)228-6635
Fax(907)228-6683

I hereby certify that the annexed instrument
is a true and correct copy of the original on
file in my office.

ATTEST: *[Signature]*

CLERK-TRIAL COURTS

State of Alaska
Ketchikan

AFFIDAVIT OF ROBERT BOYLE
KE-14-00016 CI
Page 6 of 6

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT KETCHIKAN, ALASKA

KETCHIKAN GATEWAY BOROUGH, an Alaska municipal corporation and political subdivision; AGNES MORAN, an individual, on her own behalf and on behalf of her minor son; JOHN COSS, a minor; JOHN HARRINGTON, an individual; and DAVID SPOKELY, an individual;

Case No. 1KE-14-00016CI

Plaintiffs,

v.

STATE OF ALASKA; MICHAEL HANLEY, COMMISSIONER OF ALASKA DEPARTMENT OF EDUCATION AND EARLY DEVELOPMENT, in his official capacity;

Defendants.

FEB 09 2015

**(PROPOSED) ORDER DENYING
EMERGENCY MOTION FOR STAY PENDING APPEAL**

Upon consideration of Defendants' Emergency Motion for Stay Pending Appeal and all related briefing and arguments presented to the Court, the Court hereby orders that the motion is DENIED.

DATED this ___ day of _____, 2015.

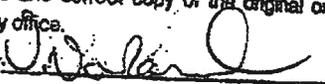
Honorable William B. Carey
Superior Court Judge

(PROPOSED) ORDER DENYING EMERGENCY MOTION
FOR STAY PENDING APPEAL
State of Alaska v. Ketchikan Gateway Borough, 1KE-14-00016CI
Page 1 of 1

EXHIBIT A

Page 48 of 50

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

ATTEST: 

CLERK-TRIAL COURTS

State of Alaska

Ketchikan

K&L GATES LLP
420 L STREET, SUITE 400
ANCHORAGE, ALASKA 99501-1971
TELEPHONE: (907) 276-1989

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**IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT KETCHIKAN**

KETCHIKAN GATEWAY BOROUGH,
an Alaska municipal corporation and
political subdivision; **AGNES MORAN,**
an individual, on her own behalf and on
behalf of her minor son; **JOHN COSS,** a
minor; **JOHN HARRINGTON,** an
individual; and **DAVID SPOKELY,** an
individual;

Plaintiffs,

v.

**STATE OF ALASKA; MICHAEL
HANLEY, COMMISSIONER OF
ALASKA DEPARTMENT OF
EDUCATION AND EARLY
DEVELOPMENT,** in his official
capacity;

Defendants.

FILED in the Trial Courts
State of Alaska First District
at Ketchikan

FEB 09 2015

Clerk of the Trial Courts

By _____ Deputy

Case No. **IKE-14-0016 CI**

CERTIFICATE OF SERVICE

On February 9th, 2015, a true and correct copy of the **Opposition to Emergency Motion for Stay Pending Appeal, Affidavit of Louisiana Cutler in Support of Opposition to Emergency Motion for Stay Pending Appeal, Affidavit of Robert Boyle Ketchikan Gateway Borough School District Superintendent, Affidavit of Dan Bockhorst,**

Certificate of Service
KGB et al. v. SOA et al.
IKE-14-0016 CI
1 of 2

Office of the
Borough Attorney
1900 1st Avenue,
Suite 215
Ketchikan, Alaska
99901
(907)228-6635
Fax(907)228-6683

1 (Proposed) Order Denying Emergency Motion for Stay Pending Appeal, and this
2 Certificate of Service were served on the following people of record in the following action

3 Via: E-Mail:

4 Margaret Paton-Walsh
5 Assistant Attorney General
6 1031 West Fourth Avenue, Suite 200
7 Anchorage, AK 99501

Rebecca E. Hattan
Assistant Attorney General
P.O. Box 110330
Juneau, AK 99801

8 A. Rene Broker
9 Fairbanks North Star Borough
10 P.O. Box 71267
11 Fairbanks, AK 99707

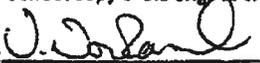
Louisiana Cutler
Plaintiffs' Counsel
420 L Street, Suite 400
Anchorage, AK 99501-1971

12 Kathryn Vogel
13 Assistant Attorney General
14 1031 West Fourth Avenue, Suite 200
15 Anchorage, AK 99501

16 
17 Cindy Covault-Montgomery, CP
18 Certified Paralegal
19 Ketchikan Gateway Borough

20
21
22 Office of the
23 Borough Attorney
24 1900 1st Avenue,
25 Suite 215
26 Ketchikan, Alaska
99901
(907)228-6635
Fax(907)228-6683

27 Certificate of Service
28 KGB et al. v. SOA et al.
29 IKE-14-0016 CI
30 2 of 2

31 I hereby certify that the annexed instrument is
32 a true and correct copy of the original on file in
33 my office.
34 ATTEST: 
35 CLERK — TRIAL COURTS
36 State of Alaska
Ketchikan

IN THE SUPREME COURT FOR THE STATE OF ALASKA

STATE OF ALASKA; MICHAEL HANLEY,
COMMISSIONER OF ALASKA
DEPARTMENT OF EDUCATION AND
EARLY DEVELOPMENT, in his official
capacity,

Appellants,

v.

KETCHIKAN GATEWAY BOROUGH;
AGNES MORAN, an individual, on her own
behalf and on behalf of her son; JOHN COSS,
a minor; JOHN HARRINGTON, an
individual; and DAVID SPOKELY, an
individual,

Appellees.

Supreme Ct. No. S-15811

Superior Court No. 1KE-14-00016 CI

RECEIVED

FEB 09 2015

APPELLATE COURTS
OF THE
STATE OF ALASKA

**(PROPOSED) ORDER DENYING
EMERGENCY MOTION FOR STAY PENDING APPEAL**

Upon consideration of Appellants' Emergency Motion for Stay Pending Appeal and Appellee's opposition to same, the Court hereby orders that the motion is DENIED.

DATED this ____ day of _____, 2015.

Justice of the Alaska Supreme Court

(PROPOSED) ORDER DENYING EMERGENCY MOTION
FOR STAY PENDING APPEAL

State of Alaska v. Ketchikan Gateway Borough, Supreme Ct. No. S-15811
Page 1 of 2

CERTIFICATE OF FONT AND SERVICE

I hereby certify that the font used herein is Point 13, Times New Roman.

I further certify that on Monday, 1/20/15 2015, a copy of the foregoing was served on:

by: hand mail fax

Kathryn R. Vogel
Assistant Attorneys General
1031 W. 4th Avenue, Suite 200
Anchorage, AK. 99501

By: *Andrew M. Pauls*