

1
2 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
3 FIRST JUDICIAL DISTRICT AT KETCHIKAN, ALASKA

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

11 Plaintiffs,

12 v.

13 STATE OF ALASKA; MICHAEL HANLEY,
14 COMMISSIONER OF ALASKA
15 DEPARTMENT OF EDUCATION AND
16 EARLY DEVELOPMENT, in his official
17 capacity;

18 Defendants.

Case No. 1KE-14-00016CI

19 **MEMORANDUM IN OPPOSITION TO DEFENDANT STATE OF ALASKA'S**
20 **MOTION FOR ATTORNEYS' FEES**

21 Ketchikan Gateway Borough (Borough), by and through its counsel of record,
22 hereby opposes the Motion for Attorneys' Fees filed by the State of Alaska in the above
23 captioned matter. Defendant State filed a Motion for Attorney's Fees after the deadline for
24 such motion had passed. Defendant State seeks an award of attorney's fees under AK. R.
25 Civ. P. 82 in the amount of \$28,037.21, an amount asserted to be 20% of the State's
26 reasonable actual attorney fees incurred. Defendant seeks an award only against Plaintiff
Borough, not against any private party plaintiffs.

Plaintiff Borough opposes the Motion for Attorney's Fees for three reasons: 1)

Defendant's motion is time barred and they have waived the right to seek attorney's fees;

KGB et. al. v. SOA et. al.

Memorandum in Opposition to Defendant SOA Motion for Attorneys' Fees

Page 1 of 13

1 2) Defendants are not clearly the prevailing party; and 3) any attorney's fees awarded
2 should be prorated and awarded only on work performed opposing the Borough's claim
3 for reimbursement of funds paid under protest because the Borough is a public interest
4 litigant on the main issue in this case, the constitutionality of the Required Local
5 Contribution (RLC).

6
7 **A. Defendant's Motion is Time Barred.**

8 Initially, Defendant's Motion for Attorney's Fees should be denied as it is untimely.
9 Rule 82 provides in the relevant part that "failure to file and serve the request within 10
10 days, or such other time as the court may allow, will be construed as a waiver of the party's
11 right to recover." Here the State failed to file its motion within the time permitted under
12 Rule 82. Thus, the State has waived the right to recover, and the present Motion for
13 Attorney's Fees is time barred. The arguments offered in opposition to the State's Motion
14 for Leave to Late File Motion for Attorney's Fees and Bill of Costs are incorporated herein
15 by reference on this point.

16
17 **B. The State did not clearly prevail in this case.**

18 Second, it is not clear that the State was the prevailing party. Although the State
19 obtained a reversal on appeal, it is not clear that the State prevailed in obtaining a ruling
20 that the RLC is not an unconstitutional dedicated tax. Two of the four justices deciding
21 the case wrote concurring opinions indicating that they had "considerable doubt about the
22 constitutionality of the required local contribution" (Chief Justice Stowers' concurrence at
23 38), and "If the public schools clause requires that the statewide school system be funded
24 to a constitutionally acceptable minimum by the State, then the RLC is likely an
25 unconstitutional dedicated tax." (Justice Winfree's concurrence at 44). While the Supreme

26 KGB et. al. v. SOA et. al.
Memorandum in Opposition to Defendant SOA Motion for Attorneys' Fees
Page 2 of 13

1 Court reversed the decision of this court, it did not unequivocally hold that the RLC was
2 constitutional under the anti-dedication clause. The Borough did not prevail in the
3 Supreme Court, but it is not clear that the State's defense of the RLC prevailed either. The
4 most that can reasonably be said is that the State did not lose. The State did prevail on the
5 Borough's claim for a refund of money paid under protest on an unjust enrichment theory.

6
7 **C. The Borough is a Public Interest Litigant.**

8 Third, the Borough qualifies as a public interest litigant. On constitutional claims
9 AS 9.60.010 addresses costs and attorney fees allowed a prevailing party. Subsection (c)
10 of this statute addresses public interest litigants. This statute provides:

11 “(c) In a civil action or appeal concerning the establishment, protection,
12 or enforcement of a right under the United States Constitution or the
13 Constitution of the State of Alaska, the court

14 (1) shall award, subject to (d) and (e) of this section, full reasonable
15 attorney fees and costs to a claimant, who, as plaintiff, counterclaimant,
16 cross claimant, or third-party plaintiff in the action or on appeal, has
17 prevailed in asserting the right;

18 (2) may not order a claimant to pay the attorney fees of the opposing
19 party devoted to claims concerning constitutional rights if the claimant
20 as plaintiff, counterclaimant, cross claimant, or third-party plaintiff in the
21 action or appeal did not prevail in asserting the right, the action or appeal
22 asserting the right was not frivolous, and the claimant did not have
23 sufficient economic incentive to bring the action or appeal regardless of
24 the constitutional claims involved.”

25 Thus there are 3 elements which, if present, will preclude awarding attorney fees
26 and costs against an unsuccessful plaintiff: 1) the civil action was brought concerning a
constitutional right; 2) the action asserting the right was not frivolous; and 3) the party did
not have sufficient economic incentive to bring the action regardless of the constitutional
claims involved.

KGB et. al. v. SOA et. al.
Memorandum in Opposition to Defendant SOA Motion for Attorneys' Fees
Page 3 of 13

1 Here the first two factors are easily satisfied. The Anti-Dedication Clause was the
2 major issue in this case, and the one that was the subject of most of the briefing, argument
3 and analysis. The constitutional issues raised in this case were clearly not frivolous, as
4 evidenced by the split amongst the opinions of the Supreme Court justices hearing the case,
5 and the issue of first impression upon which the two Justice majority opinion based its
6 decision.¹

7
8 The focus here is on the third factor, economic incentive. It is undeniable that one
9 of the Borough's claims was an unjust enrichment claim for a refund of monies paid under
10 protest. However, the claim for refund was a very minor portion of the case, and was not
11 the motivating factor in the Borough bringing the case. Here, the overwhelming majority
12 of the work performed in the case was related solely to the constitutionality of the RLC.
13 Very little time or effort was devoted to the issue of whether the Borough would be entitled
14 to a refund of RLC payments. Notably, the State has failed to allocate or provide a
15 breakdown of the time spent on the refund claim. If this time cannot be separated, recovery
16 for that time should be denied as well.

17
18 This court has discretion to apportion fees. AK. R. Civ. P. 82(b)(3)(F) and (K)
19 authorize the court to vary an award based upon "(F) the reasonableness of the claims and
20 defenses presented by each side;" and "(K) other equitable factors deemed relevant." Here
21 the constitutional claims were important public policy issues decided by the majority of
22 the court as questions of first impression. See Supreme Court Opinion at 27. Additionally,

23
24
25 ¹ Justice Stowers did not join in this conclusion, and Justice Winfree clearly found
26 the majority opinion as to what constitutes a cooperative effort unpersuasive. See
Opinion at 40-41.

KGB et. al. v. SOA et. al.

Memorandum in Opposition to Defendant SOA Motion for Attorneys' Fees

Page 4 of 13

1 both AS 9.60.010(c) and the position of Plaintiffs calls for equitable apportionment
2 between the constitutional claim and the unjust enrichment claim under Rule 82(b)(3)(K).

3 The Alaska Supreme Court has held that the court has discretion to apportion fees
4 as between claims. See Alaska State Bank v. General Ins. Co., 579 P.2d 1362, 1369-70
5 (Alaska 1978). Rule 82 gives the court discretion to apportion the fees in this case
6 according to the claims litigated. The Borough maintains that this equitable apportionment
7 authority in Rule 82 also authorizes the court, in an appropriate case, to apportion the award
8 in relation to those claims which are public interest litigation and those which are not. This
9 is consistent with the language used in AS 9.60.010(c)(2) referring only to claims
10 concerning constitutional rights.

12 Here the litigation concerning the constitutionality of the RLC was public interest
13 litigation. The State implicitly recognizes this by waiving the claim for fees from the
14 private party Plaintiffs. Accordingly, the determinative question for whether the Borough
15 is a public interest litigant on its constitutional challenge to the RLC is whether the Borough
16 was motivated by financial interest. The fact that there could have been a financial benefit
17 to the Borough is not dispositive on the financial interest analysis. In City of Kotzebue v
18 State, 166 P.3d 37 (Alaska 2007) the court evaluated whether Kotzebue's claims were
19 motivated by financial interest. The court wrote:

21 "Under *Eyak*, the fact that a litigant seeks monetary relief is not by itself
22 conclusive. Rather, the court must look to the facts of the case to
determine the litigant's primary motivation for filing suit.

23 Our decisions addressing this element illustrate how we have
24 applied it in a variety of situations. For instance, we have held that claims
25 dealing with subsistence use of natural resources qualify for public-
interest status. We have also accorded public-interest-litigant status to a
homeowners group that attempted to curtail use of a private airstrip,

1 noting that the group's "consistent emphasis on health and safety to the
2 virtual exclusion of economic concerns" indicated that its action "was
3 designed to vindicate a strong public policy" and that the group "would
4 not have had 'sufficient economic incentive to bring the lawsuit even if
5 it involved only narrow issues lacking general importance.' "

6 By contrast, we have generally declined to find public-interest-
7 litigant status when employees have sued for increased salaries or
8 reinstatement to their jobs; in these cases we have emphasized that the
9 prospect of a job or an increase in salary usually provides a sufficient
10 economic incentive to motivate the suit. Even more to the point, in an
11 action for increased funding brought against the state by a borough and
12 a local school district, we approved an award of fees against the
13 borough and the district. We found no abuse of discretion in the trial
14 court's order denying them public-interest status, because both stood to
15 gain financially from the funding increases they sought. We emphasized
16 that "[w]here the sums at stake in a suit are large enough to prompt suit
17 regardless of the public interest, public[-]interest litigant status will be
18 denied." City of Kotzebue at 46-47 (footnotes omitted)

19 Here the State did not address this analysis. The constitutional claim here would
20 have had the same impacts on all boroughs in the state. The Fairbanks North Star Borough
21 recognized the important public policy issue and devoted significant time and funding to
22 participation as an amicus party throughout the superior court proceedings and the Supreme
23 Court proceedings. The Ketchikan Gateway Borough Manager communicated with
24 officials of many other boroughs in the state regarding the public policy issues at stake,
25 and while he received support for the arguments, those other communities, save Fairbanks,
26 were concerned about retribution if such a claim were brought. See Affidavit of Dan
Bockhorst. Such fears appeared justified as shortly after the suit was filed the Governor
made threats to Ketchikan as to adverse financial consequences from filing the suit. See
Affidavit of Dan Bockhorst.

KGB et. al. v. SOA et. al.
Memorandum in Opposition to Defendant SOA Motion for Attorneys' Fees
Page 6 of 13

1 This is a very important fact to remember because it shows that the Ketchikan
2 Gateway Borough, as a community, stood to lose much more in funding from bringing the
3 suit than it would have gained from prevailing. This threat of retaliation was sufficient to
4 prevent many other communities from participating or bringing claims. The threat of
5 retaliation for asserting a constitutional claim is the bedrock upon which the public interest
6 litigant doctrine is built. Here, communities which stood to gain much more than
7 Ketchikan, such as Anchorage which pays nearly \$100 million per year in RLC payments,
8 were intimidated from bringing a suit due to fear of retaliation. In this circumstance it can
9 hardly be said that the Ketchikan Gateway Borough was motivated by economic interests
10 when it brought and maintained the constitutional claim.

12 The Borough, while nominally seeking substantial funds through their unjust
13 enrichment claim, did not bring the case to obtain such funds. The Borough pursued this
14 case not for the financial gain a refund would provide, but for the underlying issue of the
15 constitutionality of the education funding system. Any funds recovered would have gone
16 to benefit a third party, the Ketchikan School District. See affidavit of Dan Bockhorst. The
17 Borough recognized that there was potential for financial benefits from the challenge to the
18 RLC, but the motivation was the culmination of a multi-year effort to remove disincentives
19 to borough formation and promote equity across the state between Borough school districts
20 and Regional Educational Attendance Areas. See Ketchikan Gateway Borough Resolution
21 2117 attached as Attachment A to the affidavit of Dan Bockhorst and Resolution 2473
22 (attachment A to the affidavit of Dan Bockhorst). While the potential for financial benefit
23 from elimination of the RLC is obvious, the Borough did not have an expectation of
24 substantial financial gain. See Affidavit of Dan Bockhorst.

26 KGB et. al. v. SOA et. al.
Memorandum in Opposition to Defendant SOA Motion for Attorneys' Fees
Page 7 of 13

1 The State did not see the situation differently. The State argued to this court, and
2 to the Supreme Court that even after a decision in the Borough's favor it was unknown
3 whether the Borough would pay even a dollar less. "a stay imposes no cognizable financial
4 harm on the borough."² At the hearing on the State's Motion for a Stay Ms. Vogel argued
5 to this court that: "The big question mark is would they [the Borough] pay even a dollar
6 less if this court denied the stay? And the answer is, we don't know.... We know what they
7 pay right now. We don't know what they would pay if a stay was denied."³

8
9 Further, as noted on page 6 of the Supreme Court's opinion, that the Borough
10 routinely contributed funds to the Ketchikan Gateway Borough School District far in
11 excess of the RLC.⁴ Further, the majority opinion of the Supreme Court held that the RLC
12 was part of a state and local cooperative program with a history stretching back to pre-
13 statehood. See Supreme Court opinion at 26. This conclusion implicitly finds that the
14 Borough voluntarily participated in funding education at the level provided. The Supreme
15 Court could not have rationally found the RLC to be a cooperative program if it did not
16 also conclude it is voluntary. If it was voluntary, then there could not be any significant
17 financial interest at stake because the Borough would have the discretion to simply not pay,
18 and the constitutionality or unconstitutionality of the RLC would not dictate the Borough's
19 educational spending choices.
20

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

² State of Alaska Emergency Motion for Stay Pending Appeal filed in the Supreme Court, State of Alaska February 3, 2015, at 12. See also January 28, 2015, Motion for Emergency Stay filed in the Superior Court at 8.

³ See excerpt from the February 20, 2015, hearing on the State's Motion for Emergency Stay attached to the Affidavit of Dan Bockhorst as Attachment C.

⁴ See also State of Alaska Brief of Appellant in the Supreme Court at 30 and Reply Brief of Appellant State of Alaska in the Supreme Court at 15.

KGB et. al. v. SOA et. al.

Memorandum in Opposition to Defendant SOA Motion for Attorneys' Fees

Page 8 of 13

1 This is consistent with the arguments offered by the State in this case. As the state
2 pointed out several times, there was no guarantee that if the Borough prevailed the State
3 would not simply enact a different system which cost the same amount to local taxpayers.⁵
4 The fact that the Borough included a claim for recovery of funds paid under protest, which
5 was an equitable claim under theory of unjust enrichment, does not negate the public
6 interest character of the constitutional claim. Where, as here, the vast majority of the work
7 on the case was on a constitutional issue upon which the State argued to this court and to
8 the Supreme Court would not necessarily result in the Borough paying a dollar less.⁶ The
9 State should not now be heard to argue that the constitutional claim challenging the RLC
10 was one upon which the Borough expected to receive financial gain.

12 The State asserts that this case is like Matanuska-Susitna School District v. State,
13 931 P.2d 391, 403 (Alaska 1997), and the Borough is not “immunized” from an award of
14 fees because there were private party public interest litigants in the case. (State’s Motion
15 for Attorney’s Fees against the Ketchikan Gateway Borough at 2, footnote 1). The State
16 makes an unsupported logical leap and assumes that 1) the Borough is not a public interest
17 litigant; and 2) the Borough is responsible for all fees awarded, even for work performed
18 on behalf of private party plaintiffs from whom the State seeks no recovery.

20 The Decision in Matanuska Susitna Borough School District v. State, 931 P.2d
21 391 (Alaska 1997) is not controlling. In that case the State argued, and the court found,
22 that the Matanuska-Susitna Borough sought to gain from bringing the suit either by
23 increased state funding or by decreased taxes. Speculation may lead one to believe that the

25 ⁵ Transcript of the Hearing on the State’s Emergency Motion for Stay, February 20, 2015, at 12,
Attachment C to the Affidavit of Dan Bockhorst.

26 ⁶ Id.
KGB et. al. v. SOA et. al.
Memorandum in Opposition to Defendant SOA Motion for Attorneys’ Fees
Page 9 of 13

1 constitutional question here could lead to increased funding or decreased taxes, but here
2 the State chose a strategy in which it argued that the rejection of the RLC as
3 unconstitutional would not be expected to result in a financial gain to the Borough. It
4 argued to the Supreme Court that the Borough's choice to provide substantial funds in
5 addition to the RLC showed that the Borough would pay these funds anyway;⁷ the State
6 argued to this court that the invalidity of the RLC had no palpable financial impact on the
7 Borough. It cannot now be heard to argue that the Borough had a substantial economic
8 incentive to bring the suit. The strategy pursued by the State in this litigation distinguishes
9 it from Matanuska Susitna Borough School District v. State.

11 In addition, the Court in Matanuska Susitna Borough School District v. State
12 considered and distinguished City of Valdez v. Copper Valley Electric Association, 740
13 P.2d 462, 466 (Alaska 1997) on the basis that the Matanuska Susitna Borough and the
14 School District were not "in the best legal position to sue" because they lacked equal
15 protection rights as against the State. This shortcoming is not applicable here, and the
16 rationale in CVEA is apt, and dictates a finding that the Borough was a public interest
17 litigant.

19 In CVEA the electric association had admittedly, a good deal of self-interest at
20 stake, but sought to provide power cost assistance to customers of Valdez. "The customers
21 of CVEA would have received the benefits from the lawsuit, and CVEA was probably in
22 the best legal position to sue." CVEA at 466. Here, unlike in Matanuska Susitna
23 Borough School District v. State, where the court dismissed the Mat-Su Borough's equal
24 protection claims because the Mat-Su Borough had no equal protection rights, and thus

25 _____
26 ⁷ Oral Argument before the Supreme Court at 1:05:40-1:07:15.
KGB et. al. v. SOA et. al.
Memorandum in Opposition to Defendant SOA Motion for Attorneys' Fees
Page 10 of 13

1 lacked of standing, the State did not challenge the standing of the Borough to bring its
2 constitutional claim. Here the Borough was. Like CVEA, the best party to bring the
3 constitutional claim on behalf of its taxpayers.

4 Further, setting aside the fact that the State argued strenuously that even with the
5 Borough prevailing on the constitutional claim there was no guarantee of a reduction in
6 Borough expenses for education, when the potential financial benefits are examined
7 closely, it is clear that this is a situation like CVEA. If the RLC were declared
8 unconstitutional the financial benefits, if any, would accrue to taxpayers across the State,
9 not to the Borough as an entity. If the state were to replace the RLC with state funds and
10 the tax burden on residents in municipal school districts were reduced, the benefits would
11 have been to the taxpayers, not the Borough as an entity. If the State were to instead come
12 up with a new system which required payments in some other form, then there would be
13 no financial benefit.

14
15 If instead the State were to provide no additional funds, and there was a potential
16 shortfall in education funding, then it would be a question for the Borough to determine
17 whether to levy taxes and allocate taxpayer dollars to that purpose. In this situation the
18 Borough is simply a pass through for the taxpayers, and does not reap any intrinsic benefit
19 from the provision or lack of State funds to replace the RLC. The benefit or the burden
20 falls on the taxpayers, incrementally on each one, but not in amounts sufficient to motivate
21 a lawsuit. Like the CVEA, the beneficiaries are the customers (taxpayers) of the Borough.

22
23 Significantly the Borough has the power in any given year to raise or lower taxes.
24 It can levy more taxes than are required for services and build a reserve fund, or it can levy
25 less in taxes than it spends and expend some of its reserves. With respect to school funding,

26 KGB et. al. v. SOA et. al.
Memorandum in Opposition to Defendant SOA Motion for Attorneys' Fees
Page 11 of 13

1 the clear evidence and argument in this case showed that the Borough routinely provided
2 millions of dollars per year more than it was required to pay towards education. In any
3 given year the Borough would have, and does have, the power to decline to provide the
4 millions of dollars it makes in voluntary contributions. If the Borough wanted to recoup
5 an amount equivalent to the RLC for its treasury or for other Borough uses, then it would
6 be much easier and more certain to levy taxes or reduce expenses for voluntary
7 contributions in such amounts as necessary to obtain such a "financial benefit". The
8 Borough does not need to bring a suit such as this to obtain a funds for itself. If the
9 "financial benefit" which might have resulted was reduced tax rates, that is a benefit to the
10 taxpayers, not the Borough. This fact illustrates how the true beneficiaries of the claim in
11 this case are the taxpayers, not the Borough as an entity. Further, the beneficiaries would
12 be the taxpayers in municipalities across the State, not just Ketchikan. Like CVEA, the
13 Borough is a public interest litigant which brought suit on behalf of its customers. In these
14 circumstances, the Borough qualifies as a public interest litigant as to the work and time
15 spent litigating the constitutionality of the RLC. That time should be apportioned, and any
16 award should be only the amount under Rule 82 for time spent litigating the Borough's
17 refund claim.
18
19
20

21 **D. Reasonableness for Fees.**

22 Plaintiff Borough does not dispute that the reasonableness of the amount of the fees.

23 The fees sought would be reasonable under a timely filed motion under Rule 82 seeking
24 fees from the non-prevailing party in a normal case not involving constitutional questions.

25 The Borough opposes any award of fees to Defendant State in this case, but if an award as

26 KGB et. al. v. SOA et. al.

Memorandum in Opposition to Defendant SOA Motion for Attorneys' Fees

Page 12 of 13

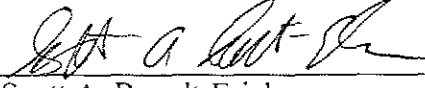
1 against the Borough is justified, it should be no more than that amount associated with the
2 Borough's unjust enrichment claim for a refund of monies paid under protest. Where, as
3 here, the State has not identified that portion of time spent on the unjust enrichment claim,
4 the court should deny an award for that work as well.
5

6
7 **CONCLUSION**

8 The State has failed to timely seek an award of fees. The Borough is a public
9 interest litigant on its constitutional claims, and the State has failed to identify any fees
10 expended only on the unjust enrichment claim. Plaintiffs respectfully request that
11 Defendant State's Motion for Award of Attorneys' against the Ketchikan Gateway
12 Borough Fees be denied.
13

14 Dated this 8th day of February, 2016.

15 KETCHIKAN GATEWAY BOROUGH

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

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,

Plaintiffs,

v.

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

Defendants.

Case No. IKE-14-00016 CI

AFFIDAVIT OF DAN BOCKHORST

STATE OF ALASKA)
) ss.
FIRST JUDICIAL DISTRICT)

Dan Bockhorst, being first duly sworn, states as follows:

1. I am the Borough Manager for Plaintiff Ketchikan Gateway Borough in the above-entitled action. I have held this position for more than eight years.
2. I have personal knowledge of and am competent to testify as to the following information.

- 1
2
3 3. The Ketchikan Gateway Borough Assembly has been urging the State Legislature to
4 treat municipal school districts and non-municipal school districts fairly for the past 8
5 years. Resolutions expressing this policy objective have been approved on numerous
6 occasions, and are summarized in Ketchikan Gateway Borough Resolution 2473
7 (attached as attachment A), adopted April, 2013. These sentiments were expressed as
8 early as October 20, 2008, when the Assembly adopted Resolution 2117 (attached as
9 attachment B) which recognized the deterrent effect on borough formation. These
10 resolutions requested fair and equitable treatment for all School Districts, and sought to
11 remove a major impediment to accomplishing the constitutional goal of organizing the
12 entire state into boroughs.
13
14 4. This issue is one which was recognized and supported by other borough governments
15 including the Bristol Bay Borough which passed its Resolution 2009-32 in support of
16 the issue. See Attachment C.
17
18 5. Prior to filing the litigation I met with officials from the Matanuska Susitna Borough,
19 the Kenai Peninsula Borough, the Municipality of Anchorage, and the Fairbanks North
20 Star Borough regarding pursuing claims challenging the fairness of treatment of
21 municipal school districts. While these officials expressed support for the public policy
22 objective, they expressed concern about retribution from the legislature should they
23 participate in a challenge.
24
25 6. When the Borough did file the suit the State showed these concerns to be justified when,
26 on February 6, 2014 Governor Parnell told the Ketchikan Daily News that “Ketchikan

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

could suffer in capital appropriations from Juneau as a result of the Ketchikan Gateway Borough's lawsuit." Parnell was quoted saying the suit "is an easy excuse" for legislators to turn down appropriations for Ketchikan. See Attachment D.

7. The Fairbanks North Star Borough participated in the case through both the superior court and the Supreme Court proceedings, appearing at oral arguments and filing extensive briefing in an amicus capacity. The Fairbanks North Star Borough, and the other boroughs I communicated with regarding the litigation, were similarly situated and would enjoy identical benefits if the case were successful. The only point which distinguished the potential impacts of the case on the Ketchikan Gateway Borough from other boroughs was the claim for a refund of monies paid under protest.

8. The Ketchikan Gateway Borough Assembly did not pursue the above captioned case for purposes of securing funds for Borough operations. While there was potential for financial benefits to the Borough, the Borough Assembly and I recognized at the outset of the case that prevailing may not actually result in any more funds for schools in Ketchikan or relief to taxpayers, but it was hoped that any system which replaced the current RLC would be more equitable to all residents of the state. We recognized that if the RLC were eliminated, the State legislature would likely replace it with a similar arrangement, but one which would be constitutional and which would treat all residents more equitably. We did not count on an actual reduction in the local costs to fund education.

9. In recognition of the speculative nature of financial benefits, and the fact that the

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

objective was equitable and adequate school funding rather than a windfall, the Assembly determined that any funds recovered would be dedicated to the benefit of the Ketchikan Gateway Borough School District. To this end, in May 2014 the Assembly adopted ordinance 1712 codifying KGBC Chapter 4.65 which created a special schools reserve fund dedicated to school expenditures, and required that any proceeds received as a result of the above captioned case would be deposited in that fund for the use and benefit of the Ketchikan Gateway Borough School District.

10. Attached as attachment E is a true and correct copy of page 12 of the transcript from the February 20, 2015, oral argument on the Motion for Emergency Stay filed in the Superior Court.

11. Further your affiant sayeth naught.

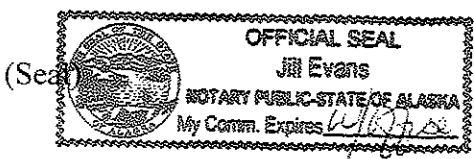
EXECUTED at Ketchikan, Alaska, this 8 day of February, 2016.

KETCHIKAN GATEWAY BOROUGH

By: *Dan Bockhorst*
Dan Bockhorst
Borough Manager

SUBSCRIBED AND SWORN to before me this 8 day of February 2016.

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



Jill Evans
Notary Public for Alaska
My commission expires: 11/17/16

KETCHIKAN GATEWAY BOROUGH

RESOLUTION NO. 2473

A Resolution of the Assembly of the Ketchikan Gateway Borough Urging Hearings by the Education Committees of the Alaska State Senate and the Alaska State House Regarding Full State Funding of "Basic Need;" and Also Urging Introduction of Legislation to Repeal the Invidious Required Local Contribution for Schools

RECITALS

- A. WHEREAS**, in November 2007, the Borough Mayor wrote to Governor Palin, Senator Stedman, Representative Johansen, and the mayors of each of the other sixteen organized boroughs then extant to express concern about the required local contribution for schools and the 1963 promise in Chapter 52 SLA 1963 that boroughs would not be penalized or receive reduced State financial assistance; and
- B. WHEREAS**, in 2008, the Borough Mayor and Manager met with then-Lieutenant Governor Sean Parnell regarding concerns over the required local contribution for schools; and
- C. WHEREAS**, October 20, 2008, the Assembly adopted Resolution No. 2117 urging relief from the required contribution. A copy of that resolution was sent to Governor Palin, Senator Stedman, then-Representative Johansen, the Commissioner of the Alaska Department of Education and Early Development (DEED), the Commissioner of the Alaska Department of Commerce, Community, and Economic Development (DCCED, the constitutional "local government agency"), and the State Attorney General. On September 8, 2008, Governor Palin responded that she had "asked the departments of Law; Commerce, Com; and Education and Early Development to review the material provided and the issues brought forward." The Borough provided to each of the other 33 municipal governments subject to the required local contribution, a copy of the letter in which Governor Palin requested the review by key agencies. On July 3, 2009, Governor Palin resigned from office. The Borough was never advised whether the review by the three agencies noted ever took place, nor the results if such review was conducted; and
- D. WHEREAS**, in November 2008, the Borough brought the issue of the required local contribution to the fore during the Alaska Municipal League's 2008 annual local government conference, which was held in Ketchikan; and
- E. WHEREAS**, in 2008, the Ketchikan Gateway Borough School Board also adopted a

resolution (#09-03) supporting the Borough's policy concerns regarding the matter; and

- F. **WHEREAS**, in 2009, the Assembly adopted Resolution 2182 expressing, again, policy concerns regarding the required local contribution; and
- G. **WHEREAS**, in 2009, the Borough Manager made a presentation on the topic during the Alaska Municipal Management Association's annual meeting. The Bristol Bay Borough Assembly adopted a resolution similar to Ketchikan's Resolution 2182.
- H. **WHEREAS**, in January of 2011, the Ketchikan Gateway Borough Assembly adopted Resolution 2296 calling on the legislature to eliminate the required local contribution penalty. A copy of Resolution 2296 was sent to Senator Stedman, Representative Johansen, and the Alaska Municipal League; and
- I. **WHEREAS**, in 2009, the Assembly adopted Resolution 2297 opposing the repeal of the 50% Rule which was enacted in 2001 to reduce the annual increase of the required contribution. A copy of Resolution 2297 was sent to Senator Stedman, Representative Johansen, and the Alaska Municipal League; and
- J. **WHEREAS**, in June of 2011, the Borough retained the services of Robert Hicks, an esteemed Alaska attorney with 40 years' of experience in municipal and education law to evaluate the Borough's concerns over the required local contribution. On February 17, 2012, Mr. Hicks presented to the Borough his first of three planned volumes of work. Volume I comprised a 61-page analysis of education funding accompanied by 75 pages of appendices.
- K. **WHEREAS**, On February 21, 2012, Mayor Kiffer, Assembly Member Moran, School Board Member Harrington, and the Borough Manager met with the DEED Commissioner to present Mr. Hicks' Volume I report and to discuss the topic. A similar meeting was held the following day with Assembly Member Moran, School Board Member Harrington, the Borough Manager, and the DCCED Commissioner; and
- L. **WHEREAS**, On July 25, 2012, the Borough Mayor and Borough Manager met with Lieutenant Governor Mead Treadwell. A prominent topic of discussion was the Borough's concern over the required local contribution; and
- M. **WHEREAS**, On November 14-15, 2012, Assembly Member Moran and the Borough Manager met on the topic in separate sessions with officials of the Municipality of Anchorage, Fairbanks North Star Borough, Matanuska-Susitna Borough, and Kenai Peninsula Borough; and

- N. WHEREAS**, on December 5, 2012, Assembly Member Moran and the Borough Manager held a follow up meeting collectively with officials of the Municipality of Anchorage, Fairbanks North Star Borough, Matanuska-Susitna Borough, and Kenai Peninsula Borough; and
- O. WHEREAS**, Assembly Member Moran and the Borough Manager also communicated on the matter with officials of the City of Hydaburg, City of Klawock, and the Petersburg Borough; and
- P. WHEREAS**, On January 4, 2013, the Mayor and Manager met with Peggy Wilson, the Ketchikan House District Representative regarding the matter; and
- Q. WHEREAS**, Assembly Member Moran, a member of the Alaska Municipal League Board of Directors; addressed the Borough's policy concerns about the required local contribution at length with the AML Board and the Alaska Conference of Mayors in early February 2013; and
- R. WHEREAS**, in February 2013, Assembly Member Moran, Assembly Member Glen Thompson, and the Borough Manager met in Juneau on the matter with six legislators, five legislative aides, and two top officials of the Alaska Department of Education and Early Development regarding the matter.

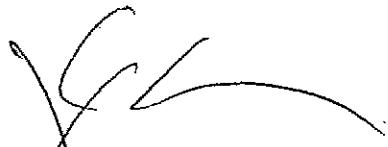
NOW, THEREFORE, IN CONSIDERATION OF THE ABOVE FACTS, IT IS RESOLVED BY THE ASSEMBLY OF THE KETCHIKAN GATEWAY BOROUGH as follows:

Section 1. The Assembly hereby urges Senator Bert Stedman and Representative Peggy Wilson to immediately arrange for hearings by the Education Committees of the Alaska State Senate and the Alaska State House regarding full State funding of "Basic Need;"

Section 2. The Assembly hereby further urges Senator Bert Stedman and Representative Peggy Wilson to work with their colleagues to introduce legislation to repeal the invidious required local contribution for schools.


Section 3. This Resolution shall be effective immediately upon adoption.

ADOPTED this 1st day of April, 2013.



Dave Kiffer, Borough Mayor

ATTEST:



Kacie Paxton, Borough Clerk

APPROVED AS TO FORM:



Scott A. Brandt-Erichsen, Borough Attorney

EFFECTIVE DATE: APRIL 1, 2013			
ROLL CALL	YES	NO	ABSENT
Bailey	✓		
Moran	✓		
Painter	✓		
Phillips	✓		
Rotecki	✓		
Thompson	✓		
Van Horn	✓		
Mayor (tie votes only)			
4 AFFIRMATIVE VOTES REQUIRED FOR PASSAGE			

KETCHIKAN GATEWAY BOROUGH

RESOLUTION NO. 2117

A RESOLUTION OF THE ASSEMBLY OF THE KETCHIKAN GATEWAY BOROUGH URGING SENATOR BERT STEDMAN AND REPRESENTATIVE KYLE JOHANSEN TO PROMOTE LEGISLATION TO REPEAL OR MITIGATE THE ONEROUS AND DISCRIMINATORY STATE TAX ON MUNICIPALITIES THAT OPERATE SCHOOL DISTRICTS

RECITALS

WHEREAS, the 1963 Alaska State Legislature passed, and Governor Egan signed into law, the "Mandatory Borough Act" (Chapter 52, SLA 1963), dictating that certain regions of Alaska – those encompassing Ketchikan, Juneau, Sitka, Kodiak Island, Kenai Peninsula, Anchorage, the Matanuska-Susitna valleys, and Fairbanks – form organized boroughs by January 1, 1964; and

WHEREAS, Section 1 of the Mandatory Borough Act promised that, "No area incorporated as an organized borough shall be deprived of state services, revenues, or assistance or be otherwise penalized because of incorporation;" and

WHEREAS, key State agencies have acknowledged that "contrary to the express intent of the 1963 Mandatory Borough Act, organized boroughs are being severely deprived of State services, revenues, or assistance and are being penalized because of incorporation" (See: *School Consolidation – Public Policy Considerations and a Review of Opportunities for Consolidation*, p. 54, February 2004, Department of Education and Early Development, Local Boundary Commission, with assistance by the Department of Commerce, Community and Economic Development); and

WHEREAS, the most fiscally onerous of the penalties imposed by the State of Alaska on boroughs is the "required local contribution" for schools dictated by AS 14.17.410(b)(2), which agencies have characterized as a State tax and which will reduce FY 2009 State education funding to the Ketchikan Gateway Borough by more than \$5 million and to all boroughs by \$211,255,410 (a 35 percent increase in the penalty over the prior five years); and

WHEREAS, Article I, Section 1 of the Constitution of the State of Alaska prescribes that "all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State;" and

WHEREAS, more than one-third of Alaska's school districts – those operated by regional educational attendance areas – are exempt from the required local contribution provisions of AS 14.17.410(b)(2) that apply to organized boroughs as well as home-rule and first-class cities in the unorganized borough; and

WHEREAS, in *Matanuska-Susitna Borough School Dist. v. State*, 931 P.2d 391 (Alaska 1997), the Alaska Supreme Court rejected a constitutional challenge of the required local contribution – codified then as AS 14.17.025(a) – when it affirmed that "Boroughs are not entitled to equal protection under the Alaska Constitution" and concluded further that:

The individual plaintiffs have not shown that they pay higher taxes as a result of the required local contribution, or that invalidating AS 14.17.025(a) would result in savings to them as taxpayers. . . .

...

Assuming that the individual plaintiffs' interests as taxpayers actually are impaired by the school funding laws, these interests are not interests afforded much weight under our equal protection analysis. "The interest involved here, freedom from disparate taxation, lies at the low end of the continuum of interests protected by the equal protection clause."

and;

WHEREAS, Chief Justice Rabinowitz and Justice Matthews indicated in *Matanuska-Susitna Borough School Dist. v. State* that any remedy regarding concerns over the required local contribution must be pursued through the legislative and executive branches rather than the judicial branch, stating, specifically, "Here, as with State spending decisions, any available remedy must be pursued through majoritarian processes rather than through the courts;" and

WHEREAS, Article X, Section 1 of Alaska's Constitution encourages the creation of borough governments (*See Mobil Oil Corporation v. Local Boundary Commission*, 518 P.2d 92, 101 (Alaska 1974)); yet, on the eve of the fiftieth anniversary of the creation of the State of Alaska, more than half the geographic area of Alaska lies outside organized boroughs; and

WHEREAS, multiple studies in the post-mandatory-borough era have indicated that the biggest deterrent to voluntary formation of boroughs is the financial penalties that result; the late Jay Hammond expressed the matter well when he wrote in *Tales of Alaska's Bush Rat Governor*, (page 149), that "Attractive enough on paper, in practice, the organized borough concept had little appeal to most communities. After all, why should they tax themselves to pay for services received from the state, gratis?;" and

WHEREAS, Governor Sarah Palin, showing strong leadership in exploring fundamental public policy concerns with the status quo, recently directed the Alaska Departments of Law, Education, and Commerce, Community, and Economic Development (DCCED) to evaluate concerns expressed by the Ketchikan Gateway Borough relating to the required local contribution for schools; and

WHEREAS, in the face of growing concern and frustration over AS 14.17.410(b)(2), taxpayers and citizens of boroughs and cities that operate municipal school districts are increasingly likely to address their concerns and frustrations through a citizens' initiative.

NOW, THEREFORE, IN CONSIDERATION OF THE ABOVE FACTS, IT IS RESOLVED BY THE ASSEMBLY OF THE KETCHIKAN GATEWAY BOROUGH, ALASKA as follows:

Section 1. The Ketchikan Gateway Borough Assembly hereby urges Senator Bert Stedman and Representative Kyle Johansen to promote legislation to repeal or mitigate AS 14.17.410(b)(2), the onerous and discriminatory State tax on municipalities that operate school districts.

Section 2. The Borough Manager shall provide a copy of this resolution to:

- The Honorable Sarah Palin, Governor;
- The Honorable Bert Stedman, State Senator, District A;

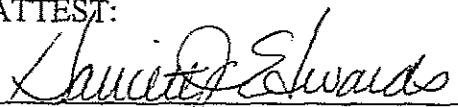
- The Honorable Kyle Johansen, State Representative, District 1;
- The Honorable Emil Notti, Commissioner, DCCED;
- The Honorable Larry LeDoux, Commissioner, Dept. of Education and Early Development; and
- The Honorable Talis Colberg, State Attorney General.

Section 3. This resolution is effective upon adoption.


ADOPTED this 20th day of October, 2008.



 Dave Kiffer, Borough Mayor

ATTEST:


 Harriett Edwards, Borough Clerk

Approved as to form:


 Scott A. Brandt-Erichsen, Borough Attorney

EFFECTIVE DATE: October 20, 2008			
ROLL CALL	YES	NO	ABSENT
THOMPSON	✓		
PHILLIPS	✓		
SALAZAR	✓		
GIBBONS	✓		
PAINTER	✓		
HARRINGTON	✓		
SHOEMAKER	✓		
MAYOR (Tie Votes Only)			
4 AFFIRMATIVE VOTES REQUIRED FOR PASSAGE			

WHEREAS, more than one-third of Alaska's school districts – those operated by regional educational attendance areas – are exempt from the required local contribution provisions of AS 14.17.410(b)(2) that apply to organized boroughs as well as home-rule and first-class cities in the unorganized borough; and

WHEREAS, Chief Justice Rabinowitz and Justice Matthews indicated in *Matanuska-Susitna Borough School Dist. v. State* that any remedy regarding concerns over the required local contribution must be pursued through the legislative and executive branches rather than the judicial branch, stating, specifically, “Here, as with State spending decisions, any available remedy must be pursued through majoritarian processes rather than through the courts;” and

WHEREAS, Article X, Section 1 of Alaska's Constitution encourages the creation of borough governments (*See Mobil Oil Corporation v. Local Boundary Commission*, 518 P.2d 92, 101 (Alaska 1974)); yet, on the eve of the fiftieth anniversary of the creation of the State of Alaska, more than half the geographic area of Alaska lies outside organized boroughs; and

WHEREAS, multiple studies in the post-mandatory-borough era have indicated that the biggest deterrent to voluntary formation of boroughs is the financial penalties that result; the late Jay Hammond expressed the matter well when he wrote in *Tales of Alaska's Bush Rat Governor*, (page 149), that “Attractive enough on paper, in practice, the organized borough concept had little appeal to most communities. After all, why should they tax themselves to pay for services received from the state, gratis?;” and

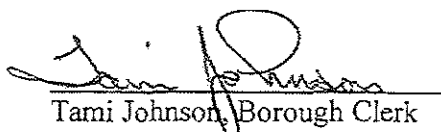
WHEREAS, the Bristol Bay Borough urges Senator Hoffman and Representative Bryce Edgmon to promote legislation to repeal or mitigate AS 14.17.410(b)(2), the onerous and discriminatory State tax on municipalities that operate school districts.

NOW THEREFORE, BE IT RESOLVED THAT, the Bristol Bay Borough urges the Alaska Municipal League to make this a priority item for the upcoming legislature to repeal or mitigate AS 14.17.410(b)(2), the onerous and discriminatory State tax on municipalities that operate school districts.

ADOPTED AND APPROVED BY THE ASSEMBLY OF THE BRISTOL BAY BOROUGH,
ALASKA this 2nd day of November, 2009.


Daniel O'Hara, Mayor

ATTEST:


Tami Johnson, Borough Clerk



Parnell warns of possible fallout from Ketchikan suit

By NICK BOWMAN
Daily News Staff Writer

Ketchikan could suffer in capital appropriations from Juneau as a result of the Ketchikan Gateway Borough's lawsuit against the state, Gov. Sean Parnell told the Daily News on Thursday.

Parnell said the suit "is an easy excuse" for legislators to turn down appropriations for Ketchikan. Lawmakers are currently meeting in Juneau for the second session of the 28th Legislature, which closes in April.

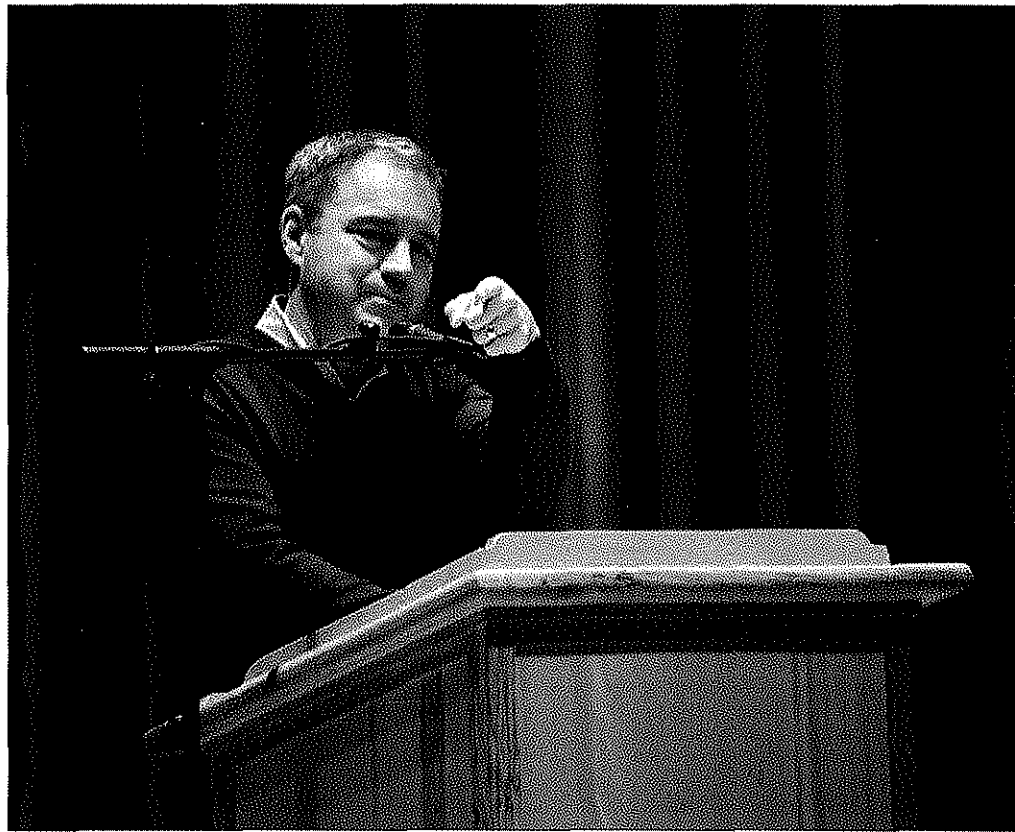
"I do want to address this issue of how the lawsuit is viewed by legislators and by me because it does shade or color the reaction to Ketchikan requests," he said. "It's an inevitable consequence that if Ketchikan is the driving force behind a lawsuit that could result in more financial exposure to the state, legislators and I few requests from Ketchikan through that lens."

The borough has filed a suit in Ketchikan Superior Court seeking to strike down the required local contribution — the mandatory portion of school funding that organized boroughs and first-class cities pay to local school districts.

School districts in unincorporated areas of Alaska, called Regional Education Attendance Areas by the state, are entirely funded by the state.

Residents opposed to the suit have argued that a court case would hurt Ketchikan's relationship with the state and sink the community's chances — including the City of Ketchikan — of winning funding from the Alaska Legislature.

Those concerns apparently have been validated as Parnell said that reluctance on the part of lawmakers to support appropriations would be an unintended consequence of the suit.



Gov. Sean Parnell participates in a Q-and-A at Ketchikan High School on Thursday.

"With that uncertainty out there of the lawsuit, it's a pretty tough sell to legislators to go ask for hydro projects and to go ask for — it may seem unconnected because it's a school district thing and it's a local property

tax thing, but it all comes from the same pocket: The state's pocket," Parnell said. "It just really made it easy for legislators to say no to Ketchikan's projects."

The Swan Lake Dam is the top pri-

ority coming out of Ketchikan. It was chosen by the Lobbying Executive Committee — the joint committee between the city, borough and City of Saxman.

See 'Parnell,' page 12

Ketchikan mail sorting returning

By MARJORIE CLARK
Daily News Staff Writer

Sen. Mark Begich announced Thursday after a meeting with Postmaster General Patrick Donohoe that mail sorting will return to Ketchikan.

Begich said the Ketchikan Post Office will start processing mail again as soon as Monday. Mail originating in Ketchikan for delivery to Ketchikan will be processed in the local office. All other mail will be processed in Juneau, as has been the process since August.

He said Ketchikan would not receive a new sorting machine, but said the volume of local mail would be manageable to sort by hand. He said one of the ideas generated in the meeting with Donohoe involved having separate drop boxes at the Post Office for mail that would remain in Ketchikan, mail for delivery on Prince of Wales Island and all other mail.

He also said that packages from Ketchikan for delivery to the Lower 48 have been going to Juneau to be sorted. This process will change to have packages go to Anchorage for sorting. While Anchorage is farther away, it is a hub and sorting and shipping should happen faster at that location, he said.

Begich also said Donohoe agreed to reverse a rate increase on standard post shipments for delivery to rural Alaska communities. The cost to ship standard packages had increased by 50 percent last week.



Mark Begich

SEAK Professional Services, LLC

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT

KETCHIKAN GATEWAY BOROUGH,)
)
Plaintiff,)
vs.)
STATE OF ALASKA,)
)
Defendant.)

No. 1KE-14-00016 CI

VOLUME I

TRANSCRIPT OF ORAL ARGUMENT

BEFORE THE HONORABLE WILLIAM CAREY
Superior Court Judge

Ketchikan, Alaska
February 20, 2015
11:18 a.m.

APPEARANCES:

FOR THE PLAINTIFF: LOUISIANA CUTLER
K & L Gates LLP
420 L Street, Suite 400
Anchorage, Alaska 99501

FOR THE DEFENDANT: KATHRYN VOGEL (TELEPHONIC)
Attorney General's Office
1031 West Fourth Avenue
Suite 200
Anchorage, Alaska 99501

DISCLAIMER

Transcripts Prepared for the Alaska Court System
The Alaska Court System accepted this transcript based on either review of a random sample or without review because the transcriber's work has consistently met Court System Standards. Because it is possible that this transcript may contain some errors, the Court System encourages parties to listen to the recordings of critical portions of the proceedings and bring any significant errors to the ACS Transcript Coordinator's attention immediately. Audio played in court has been completed to the best of the transcriber's knowledge.

1 required local contribution costs. What we don't know is how
2 much the stay costs. So, in other words, yes, under the status
3 quo they pay a required local contribution. But if a stay is
4 -- or by status quo I mean under the required local
5 contribution system, that's how much they would pay next year.
6 But the big question mark is would they pay even a dollar less
7 if this Court denied the stay? And the answer is, we don't
8 know. We don't know if there would be a property tax imposed
9 by the state that would charge 2.65 mils to the people of
10 Ketchikan. We don't know if there would be -- and this would
11 be new for the State of Alaska -- a tax on boroughs, such that
12 the borough was paying the exact same amount of money. We
13 don't know if Ketchikan would voluntarily pay that amount of
14 money, if the state was showing no signs of raising revenue to
15 pay for the required local contribution itself. And we don't
16 know if there was some other solution for raising revenue, how
17 much it would cost the people of Ketchikan or borough. So,
18 yes, we know what they pay right now. We don't know what they
19 would pay if a stay was denied.

20 And I think that this would be a different analysis if
21 there was a showing that Ketchikan was paying money that the
22 state was somehow obligated to pay, and therefore it really
23 would be, you know, the equivalent of paying a bond. But in
24 fact, what the court found is that right now, Ketchikan pays
25 money to the school districts. And they're paying to educate