

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

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4 KETCHIKAN GATEWAY BOROUGH,)
AGNES MORAN, JOHN COSS, JOHN)
5 HARRINGTON, AND DAVID SPOKELY)
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7 Plaintiffs,)
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9 v.)
10 STATE OF ALASKA AND MICHAEL)
HANLEY, COMMISSIONER OF ALASKA)
11 DEPARTMENT OF EDUCATION AND)
EARLY DEVELOPMENT)
12
13 Defendants.)
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FILED in the Trial Courts
State of Alaska First District
at Ketchikan
FEB 27 2015
Clerk of the Trial Courts
By _____

Case No. 1KE-14-16CI

ORDER ON EMERGENCY MOTION FOR STAY PENDING APPEAL

15 The State moves the court to stay enforcement of its November 21, 2014 order and the
16 consequent judgment entered on January 23, 2015 pending appeal to the Supreme Court, arguing
17 a stay is necessary due to the purported severity of the irreparable harm to the State in the
18 absence of a stay. Plaintiffs counter that they cannot be adequately protected if this court's order
19 is stayed pending appeal because they will be forced to fund an unconstitutional scheme with no
20 assurances of repayment. For the following reasons, the State's emergency motion for stay
21 pending appeal is **DENIED**.

ARGUMENTS OF THE PARTIES

23 The State asserts six aspects of irreparable harm that would arise from enforcement of
24 this court's order. First, the State argues that any time a court order enjoins a legislatively
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1 approved statute, an irreparable harm results to the State because the State has an interest in
2 seeing its laws enforced.¹ Second, without a stay, the State would be unable to fulfill its duty to
3 establish and maintain a system of schools under Article VII, section 1 of the Alaska State
4 Constitution. Third, at this juncture there is both a lack of sufficient time and a lack of sufficient
5 information for the Alaska legislature to act to comply with this court's order. Fourth,
6 enforcement will result in uncertainty to community school districts and a potential educational
7 funding gap. Fifth, potential legislative action during an appeal risks mootness. Sixth, and
8 finally, the State alleges enforcement of this court's judgment may result in a school funding
9 gap. The State further argues plaintiffs will be adequately protected if a stay is granted because it
10 is unclear whether the plaintiffs would be forced to fund their local schools by any measure
11 different from the RLC amount. Finally, the State argues that the Alaska Supreme Court has the
12 power to overturn precedent relied upon by the court in its November 21 Order.

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14 Plaintiffs reject the State's arguments regarding irreparable harm, arguing the Alaska
15 legislature, a non-party to this case, has absolute control over education funding and can adjust
16 its educational funding scheme to accommodate the court's order. Plaintiffs argue that
17 speculation on what the legislature may, or may not, do following this court's order is
18 inappropriate in an irreparable harm analysis. They argue that there is no risk of mootness
19 because Alaska precedent shows the Alaska Supreme Court will hear cases on appeal after the
20 Alaska legislature changes an unconstitutional statute.² Plaintiffs deny local school districts are
21 counting on RLC funding following this ruling, and allege that defendants are placing
22 responsibility squarely on the court for the various harms the State will accrue as a consequence
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24 ¹ In support of this contention, the State cites *Maryland v. King*, 133 S.Ct. 1
25 (2012) (Roberts, C.J in chambers), provided to the court following oral
argument in a Alaska Rule 77(1) letter.

² *Atlantic Richfield Company v. State* 705 P.2d 418 (Alaska 1985).

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1 of its decision. Plaintiffs finally argue there is no irreparable harm to the State because the State
2 successfully argued it received no benefit whatsoever from the RLC.

3 Plaintiffs state they cannot be adequately protected during a stay pending appeal. The
4 Borough alleges the State wants to be granted a stay, and then "slow roll" the case through the
5 Supreme Court, forcing local communities to fund an unconstitutional scheme for a period of
6 years without the option for repayment or bond. Plaintiffs point out that this court ruled there is
7 no right to repayment from the State in restitution or assumpsit when the Borough pays the RLC
8 to a third party (the KGB school district). Further, plaintiffs present evidence that they would not
9 be able to recover the amount of a forced RLC payment from the KGB school district in the
10 alternative.³ Finally, there is no mechanism in place to refund to the Ketchikan citizenry the
11 value of property taxes taken to fund future unconstitutional RLC payments in the event of a
12 stay. Plaintiffs assert that it is in the public interest for the legislature to correct this
13 unconstitutional scheme now rather than in the potentially distant future. Plaintiff concludes by
14 expressing doubt the State will prevail on appeal because *State v. Alex*,⁴ the precedent relied
15 upon in this court's November 21 order, requires that the anti-dedication clause be construed
16 broadly.
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18 DISCUSSION

19 In considering a stay of judgment pending appeal, the court must apply the same three-
20 part balance of hardships test in a preliminary injunction analysis.⁵ The moving party must show
21 irreparable harm without the potential stay, adequate protection to the non-moving party during
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24 ³ See aff. of Robert Boyle at 6; aff. of Dan Bockhorst at 3-4.

⁴ 646 P. 2d 203 (Alaska 1982).

25 ⁵ *Powell v. Anchorage*, 536 P.2d 1228 (Alaska 1975); *A.J. Industries v. Alaska Public Service Comm.*, 470 P.2d 537, 540 (Alaska 1970).

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1 the stay, and serious and substantial questions going to the merits of the case.⁶ If the moving
 2 party cannot show irreparable harm, or in the alternative, adequate protection to the non-moving
 3 party, then the moving party must present a "clear showing of probable success on the merits."⁷
 4 The determination of whether or not to grant a stay pending appeal "is guided by the 'public
 5 interest.'"⁸

6 **I. The State Has Shown a Form of Irreparable Harm**

7 The State has shown it will suffer a form, at least, of irreparable harm in the absence of a
 8 stay. The first harm cited by the State, that a state is irreparably harmed whenever it is enjoined
 9 from enforcing its validly-enacted laws, has been found to be "a form of irreparable harm" by the
 10 U.S. Supreme Court.⁹ However, this irreparable harm does not necessarily result in an automatic
 11 stay pending appeal in the Federal courts, and it should not do so here.¹⁰

12 The State additionally argues that in the absence of a stay pending appeal, its appeal
 13 could be rendered moot by legislative action on this issue.¹¹ While it is true that mootness is an
 14 irreparable harm under the 9th Circuit's tests for stays pending appeal, this harm is also not
 15 determinative in a stay analysis.¹²

16 The four remaining harms alleged by the State (the duty to establish and maintain a
 17 system of public schools, lack of time and information for the legislature to effectively act,

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 20 ⁶ *State v. Kluti Kaah Native Village of Copper Center*, 831 P.2d 1270, 1272 (1992) (citation omitted).

21 ⁷ *State v. United Cook Inlet Drift Assoc. et. al.*, 815 P.2d 378, (Alaska 1991). See also *Holmes v. Wolf*, 243 P.3d 584, Appendix A (Alaska 2010).

22 ⁸ *Keane v. Local Boundary Com'n* 893 P.2d 1239, 1249 (Alaska 1995).

23 ⁹ See *Maryland v. King*, 133 S.Ct. 1 (2012) (Roberts, C.J in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 98 S.Ct. 359 (1977)).

24 ¹⁰ See *Strange v. Searcy*, ___ S.Ct. ___, 2015 WL 505563 (2015) (denying application for stay presented by Attorney General of Alabama to enforce Alabama laws prohibiting same-sex marriage). See also *De Leon v. Perry*, 975 F.Supp.2d 632 (W.D. Texas 2014) (preliminary injunction granted to bar enforcement of prohibitions against same-sex marriage).

25 ¹¹ State's Emergency Motion for Stay Pending Appeal at 4-5.

¹² See *Artucovic v. Rison*, 850 P.2d 1354, 1356-57 (9th Cir. 1986).

1 uncertainty to local communities, and a potential funding gap in tough economic times) are
2 speculative and can be addressed through legislative action. At this time, it is unclear what the
3 effect of this court's invalidation of the RLC payments will have on the State and local
4 communities. Even with the press of time associated with the current legislative session, the
5 court notes that special sessions have been set on a number of occasions to deal with matters of
6 legislative urgency outside the usual 90 day period during which the legislature sits. Despite the
7 lack of clarity concerning several of the purported forms of harm facing the State, the court
8 concludes that the State has met its burden of showing forms of irreparable harm should the stay
9 be denied.

10 **II. The State Has Not Shown Plaintiffs Would Be Adequately Protected During the Stay**

11 On the other hand, this is only part of the equation. The balance of hardships test also
12 requires that this court consider whether the non-moving party will be adequately protected
13 during a stay pending appeal. The State did not carry its burden to show the plaintiffs would be
14 adequately protected in the event of a stay. In the underlying litigation of this case, the State
15 argued, and the court found, that plaintiffs were not entitled to repayment of their protested
16 Required Local Contribution (RLC) payments. The State argues that the plaintiffs suffer no harm
17 in the event of a stay because it is not clear whether they will pay more, or pay less, to fund
18 education in the absence of the RLC requirement.¹³ But this is not the burden the State must meet
19 under the balance of hardships test. Rather, the State needs to show that if the plaintiffs will
20 suffer harm from a stay pending appeal, plaintiffs will be adequately protected from that harm
21 during the stay.
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25 ¹³ State's Emergency Motion for Stay Pending Appeal at 5-7.

1 It is clear that the plaintiffs will suffer harm without adequate protection if the stay is
2 granted. In the event of a stay, plaintiffs would be forced to pay a considerable amount of money
3 to meet its RLC obligations, with no hope of refund.¹⁴ While the State offers argument to the
4 effect that this is speculative, history shows that the Borough and the individual plaintiffs *do* pay
5 substantial amounts for the required local contribution. The State argued, and the court agreed,
6 that once it is paid, it is gone and can't be paid back. The argument that plaintiffs might not
7 accrue harm misses the point, in this court's view. The State's burden is to show that the
8 plaintiffs will be protected. Arguing scenarios where there *might not* be the harm that long
9 experience shows would accrue if the funding scheme the court has found unconstitutional
10 continued in place does not meet this burden. It does not demonstrate that plaintiffs will be
11 protected, and the State has failed to demonstrate any means by which they *will* be protected.

12 The filing of a supersedeas bond could potentially protect the plaintiffs,¹⁵ and in a typical
13 civil matter is often required. But Alaska Civil Rule 63(e) precludes the court from requiring a
14 supersedeas bond pending appeal of the State under these circumstances. In the absence of the
15 proposal of any type of similar security or protection, the State has not met its burden of showing
16 the plaintiffs would be adequately protected in the event of a stay.

18 **III. The State Has Not Shown Probable Success on the Merits**

19 In the absence of a showing of adequate protection to the plaintiffs, the State is otherwise
20 required to make a showing of probable success on the merits in their appeal in order to obtain
21 the relief sought. The State has also failed to meet this burden. In its November 21 Order, this

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23 ¹⁴ 2.65 mills of the full and true value of the taxable real and personal
property in the Municipal District of Ketchikan, or, approximately \$4.2
million dollars (as measured by the 2014 RLC payment).

24 ¹⁵ See *United Cook Inlet Drift Assoc. et. al.*, 815 P.2d at 378-79 ("[where the
25 injury to the non-moving party is] not inconsiderable and may not be
adequately indemnified by a bond, a showing of probable success on the merits
is required[.]").

1 court applied Alaska Supreme Court precedent which construed the Anti-Dedication Clause of
2 the Alaska State Constitution broadly. Consequently, the court found that the RLC violates the
3 Anti-Dedication Clause. The State argues that the Supreme Court has the power, which this court
4 lacks, to "clarify any existing precedent and uphold Alaska's historic practice of joint state and
5 local funding of public schools."¹⁶ The State also cites an alleged exception to the Anti-
6 Dedication Clause for state-local corporative programs, which is contained within an Attorney
7 General's Opinion from 1975.¹⁷ This court is not inclined to change its mind on this issue that it
8 carefully considered and decided in November. The court does not find that the State has
9 demonstrated a "clear showing of probable success on the merits." Of course, the Supreme Court
10 might review the issue, utilize a different analysis, and come to a different conclusion as to its
11 own earlier decisions. But this court finds that the State has not met its burden of proving that it
12 will, only that it might, and defendants' motion to stay enforcement of the court's judgment will
13 not be granted on this basis.

14 **IV. The Balance of the Hardships and the Public Interest Favors the Denial of a Stay**

15 The court is keenly aware of the public interest in having a viable and effective funding
16 plan for the education of the young people of our State. It also recognizes that it is a complicated
17 matter to devise the plan and that the public interest favors the quick resolution of this matter.
18 The public interest also strongly favors protection of local funds from an unconstitutional
19 funding scheme when there is no, or at best inadequate, protection offered to the Plaintiffs who
20 have successfully argued the unconstitutionality of the required local contribution. The infusion
21 of the public interest into the balancing test for staying the court's judgment works both ways.
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25 ¹⁶ State's Reply in Further Support of Motion for Stay at 10.

¹⁷ *Id.* at 10; 1975 Formal Op. Att'y Gen. 9 at 8 (May 2) (citations omitted).

The court ultimately concludes that it does not require the issuance of a stay, especially in light of this court's determination that the interests of the plaintiffs cannot be protected.

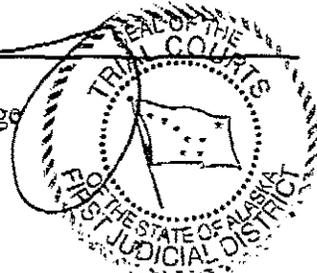
CONCLUSION

Because the State did not show the plaintiffs would be adequately protected during the stay and because the State could not show a clear probability of success on the merits, the State's motion for an emergency stay of relief pending appeal is DENIED.

IT IS SO ORDERED

Dated at Ketchikan, Alaska this 27 day of February 2015.


William B. Carey
Superior Court Judge



CERTIFICATION

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