

MAY 18 2020

By Deputy

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

ERIC FORRER
Plaintiff,

vs.

STATE OF ALASKA
and LUCINDA MAHONEY,
Commissioner of the Alaska
Department of Revenue
in her capacity as an official of
the State of Alaska.
Defendants.

1JU-20-00644 Civil

**APPLICATION FOR A PRELIMINARY INJUNCTION and
OTHER RELIEF**

Plaintiff, Eric Forrer ("Forrer"), on behalf of the public, through counsel, makes application for a Preliminary Injunction and any other necessary equitable relief in the above-reference case. Forrer seeks equitable relief necessary to protect the Alaska Constitution and the public interest as supported in the accompanying memorandum and affidavits.

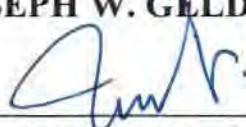
Given the potential for harm to the public and the degree to which the Alaska Legislature and Alaska Governor appear to be inclined to ignore express terms of the Alaska Constitution Forrer also requests the court schedule a

1 hearing on an expedited basis on the issue of whether relief should be afforded
2 to Forrer and the public for the reasons outlined in the accompany motion for
3 expedited proceedings.
4

5 This application is accompanied by a *Verified Memorandum in Support*
6 *of a Preliminary Injunction, Exhibit A, a proposed Preliminary Injunction*
7 *and a proposed Order Scheduling a Preliminary Injunction Hearing.*
8
9

10 **DATED** this 17th day of May, 2020 at Juneau, Alaska.
11

12 **LAW OFFICE OF**
13 **JOSEPH W. GELDHOF**

14 
15 _____
16 Joseph W. Geldhof
17 Alaska Bar # 8111097

18 **Certification**

19 I certify that a copy of this Application,
20 a verified memorandum in support,
21 Exhibit A and two proposed Orders were sent by FAX
22 [(907) 76-3697] to: Attorney General Clarkson,
23 counsel for the State of Alaska and Lucinda Mahoney.
24

25 I further certify that a copy of this Application,
26 a verified memorandum in support, Exhibit A and
27 two proposed Orders were sent by were sent by via U.S.P.S.
28 by inserting the documents in a U.S.P.S. postal box in
Douglas, Alaska to: Attorney General Clarkson,
counsel for the State of Alaska and Lucinda Mahoney
at the following address:
1031 West 4th Street, Suite # 200
Anchorage, Alaska 99501

DATED: MAY 17, 2020

By: 

Joseph W. Geldhof

MAY 18 2020

By Deputy

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**SUPERIOR COURT FOR THE STATE OF ALASKA
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ERIC FORRER)
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vs.)

STATE OF ALASKA)
and LUCINDA MAHONEY,)
Commissioner of the Alaska)
Department of Revenue)
in her capacity as an official)
of the State of Alaska.)
Defendants.)

1JU-20-00644 Civil

**VERIFIED MEMORANDUM IN SUPPORT OF A PRELIMINARY
INJUNCTION OR OTHER EQUITABLE RELIEF**

Introduction

Eric Forrer ("Forrer") on behalf of the public, seeks equitable relief in the form of a preliminary injunction. In the alternative, if the legal representatives for the State of Alaska do not respond to the commencement of the legal action in the above-referenced case, Forrer seeks equitable relief in the form of a temporary restraining order.

More particularly, Forrer asks this court conduct a hearing during the afternoon of May 18 or at the court's earliest convenience on May 19, 2020. The

1
2 basis for seeking expedited equitable relief is outlined in the *Motion for Expedited*
3 *Consideration* filed simultaneously with the *Application for a Preliminary*
4 *Injunction and Other Relief* in this case.

5
6 In this case, Forrer believes the substantial funds allocated by the Congress
7 of the United States to Alaska for mitigation and amelioration of the impact
8 caused by the COVID-19 pandemic need to be allocated as soon as possible for
9 the relief of Alaska's citizens. These funds will be generically referred to as the
10 CARES Act funds.
11

12 Forrer believes the CARES Act funds should be allocated and dispersed by
13 the State of Alaska as soon as possible. However, the funds must be allocated by
14 the Alaska Legislature according the provisions of Article IX, Section 13 and
15 other provisions in the Alaska Constitution.
16

17 It is clear to Forrer that there is tremendous public and political pressure to
18 withdraw CARE Act funds provided by the federal government currently harbored
19 in the Alaska treasury. While Forrer apprehends the need to expeditiously allocate
20 and distribute the funds, it is Forrer's position that the Alaska Legislature must act
21 to withdraw the CARE Act funds in the Alaska treasury according to the Alaska
22 Constitution and not simply whip the funds out of the treasury based on
23 generalized sentiments about fiscal harm or political expediency.
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26 Forrer believes that fear, along with the desire on the part of some
27 legislative and other political leaders calling for expediency has created an
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1
2 environment that enhances the temptation to hustle money out of the Alaska
3 Treasury. The obvious harm Alaskans are suffering as a result of the COVID-19
4 pandemic is causing fear in Forrer's view. The fear on the part of Alaska's
5 citizens is creating political discontent that is unfortunately manifested in near
6 political paralysis on the part of the legislature and leading to the dangerous
7 situation where a measured application of fundamental constitutional standards is
8 overwhelmed. And yet, the Alaska Legislature is in session and appears likely to
9 convene in the very near future to take up the allocation of CARES Act funds in
10 short order.
11

12
13 In order to protect the CARES Act funds currently believed to be
14 sequestered in the Alaska treasury and also insure that the constitutional strictures
15 contained in Article IX, Section 13 (as well as other mandatory provisions of the
16 Alaska Constitution are followed), Forrer believes equitable relief in the form of a
17 preliminary injunction is needed. The underlying basis for this request for short-
18 term equitable relief is not to cause harm to the public, but rather to facilitate the
19 expeditious and considered passage of a constitutional act by the legislature
20 allocating the CARES Act funds. Forrer recommends the court enjoin withdrawal
21 of the CARES Act funds deposited in the Alaska treasury for 72 hours
22 commencing from a time on Monday, May 18, 2020 the court determines is
23 appropriate. Issuance of an injunction will afford the Alaska Legislature to take
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2 up a bill,¹ with sufficient time ² to adopt an act that allocates the funds in a
3 measured and constitutional manner. Granting the requested equitable relief will
4 protect the public, afford the Alaska Legislature with an opportunity to act
5 according to constitutional mandates, and likely spur a resolution of the
6 underlying dispute the instant litigation presents and allow for dismissal of this
7 lawsuit. But most importantly this action will ensure that the Alaska Constitution
8 is adhered to and not disregarded in the name of political expediency.
9

10 11 **Procedural & Factual Background**

12 Forrer filed a *Complaint for Declaratory Relief and Potential Equitable*
13 *Relief* in this dispute on May 13, 2020. Due to limitations as a result of the
14 COVID-19 pandemic, the lawsuit initiated by Forrer was assigned a judicial
15 reference number and accepted for filing by the Clerk of the Court on May 14,
16 2020.
17

18 Essentially, the complaint filed by the Forrer in this action was advanced in
19 order to convince the Alaska Legislature to convene and allocate the CARES Act
20 federal funds in accord with the Alaska Constitution. Forrer brought the instant
21 lawsuit on Wednesday, May 13, 2020 because a fraction of the Alaska Legislature
22 adopted an allocation plan for the CARES Act funds on Monday, May 11, 2020.
23 This fractional slice of the Alaska Legislature is constitutionally sanctioned by the
24
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26

27 ¹ See, e.g., Article II, Section 13. (Form of Bills).

28 ² See, Article II, Section 14 (Passage of Bills).

1
2 Alaska Constitution and referred to as the "legislative council."³ Pursuant to
3 statutory law,⁴ the legislative council operates through a political entity designated
4 as the Legislative Budget and Audit Committee ("LB&A"), an interim committee
5 consisting of a small number of members designated by the Alaska Senate and the
6 Alaska House. The LB&A essentially serves to address financial matters and
7 other monitoring topics when the legislature is not in session.
8

9
10 On May 13, 2020, while the Alaska Legislature was in recess but still in
11 session, the LB&A adopted an allocation plan for the CARES Act funds in a vote
12 that was somewhat contentious. Essentially, a faction of the fractional legislative
13 body adopted a spending plan for the CARES Act funds submitted by the
14 administrative branch of government. The spending plan adopted by the LB&A
15 purported to appropriate approximately \$1.5 billion in CARES Act federal
16 funding using the Revised Program Legislative Request process ("RPL"). These
17 RPS allocations adopted by the LB&A are summarized as follows:
18
19

20 CATEGORY I

21 The sum of **\$506 million** for programs for which authorization or
22 appropriations previously made by the Alaska Legislature likely existed.
23 The sum in this category was allocated by the LB&A on May 11, 2020, in
24 the following manner:
25

26
27 ³ See, Article II, Section 11. (establishing legislative council and interim committees).

28 ⁴ AS 24.20 et seq.; see, e.g., AS 24.20.060 (powers of the legislative council).

1
2 A. **\$381 million** in Health and Social Services costs, including about
3 \$50 million targeted for nonprofits. This allocation was apparently
4 believed by LB&A to be authorized via "open ended" receipt authority to
5 expend federal funds already adopted by the legislature.

6 B. **\$125 million** pertaining to allocations for education, public safety,
7 transportation and the University of Alaska activities that the LB&A
8 believed could be expended according to the RPL process.

9
10 **CATEGORY II**

11 The LB&A appears to have believed other allocations of the CARES Act
12 Fund could be spent via the RPL process. As a result, the LB&A acted on
13 May 11, 2020, allocating the following CARES Act funds:

14 C. **\$52 million** for the Alaska Department of Transportation & Public
15 Facilities focused on airport support and work related to the Whittier
16 Tunnel.

17 D. **\$10 million** for homeless support via the Alaska Housing Finance
18 Corporation or some other agency of the State of Alaska.

19
20 **CATEGORY III**

21 The LB&A allocated the sum of **\$958 million** on May 11, 2020 in
22 CARES Act funding to programs for which authorization or
23 appropriations by the Alaska Legislature did not exist. The allocation in
24 this category of funding for which no authorization or federal receipt
25 authority existed was made by the LB&A in the following manner:

26 E. **\$100 million** to assist the commercial, charter and subsistence
27 fishing industry through a process to be administered by the Alaska
28 Department of Commerce and Community & Economic

1
2 Development.⁵

3 F. **\$290 million** for small business relief in a lightly described
4 program to be administered by Alaska Department of Commerce and
5 Community & Economic Development.

6 G. **\$568 million** in municipal assistance, allocated in two separate
7 streams of funding as follows:

8 1. **\$257 million** according to a single RPL that would divert
9 CARES Act funds through as a super-sized payment using the
10 existing Community Assistance (revenue sharing) program and
11 seemingly based largely on a per-capita formula.

12 2. **\$311 million** according to 200 separate RPL's, that
13 would allocate CARES Act funds to a plethora of Alaskan cities,
14 boroughs as well as many unincorporated communities. The
15 purported allocation of this unwieldy category of CARES Act funds
16 was supposedly based on various economic impacts alleged to be
17 impacting local government entities, however some analysis
18 suggests the stated economic impacts on local govern were not
19 grounded in genuine metrics or an ascertainable analytical
20 construct.⁶ but the formula is almost entirely based on an estimate
21 of lost tax revenue.
22

23 ⁵ There is some speculation that the federal government may reduce a portion of this
24 funding.

25 ⁶ In the event, the allocation of CARES Act funds was possibly an exercise in
26 administrative and legislative spit-balling in an attempt to come up with a plausible
27 justification for using restricted CARES Act funding for activities that may or may not be
28 consistent with federal law. A more likely plausible basis for the allocation formula used to
divvy up this particular pot of money is based on historic sales tax and other historic revenue
data from the various entities slated to receive the CARES Act funding allocated by the
LB&A in this category.

1
2 **Argument and Basis for Equitable Relief According to Standard of Review**

3 The subject of this suit and the request for injunctive relief is grounded in
4 a need to protect and preserve the Alaska Constitution. An injunction requiring
5 that the CARES Act funds stay safely sequestered in treasury of the State of
6 Alaska until the funds are properly allocated and authorized to be withdrawn
7 according to basic constitutional principles is what Forrer seeks.
8

9 Relief from this court in the form of an injunction or other necessary short-
10 term equitable relief in order to protect Alaska's most basic organizational
11 document is appropriate.
12

13 The Alaska Legislature is seemingly poised to convene, has the ability to
14 act and likely will act to allocate the CARES Act funds. By enjoining withdrawal
15 of the CARES Act funds deposited in the Alaska treasury according to the
16 allocation of the LB&A interim committee on May 11, 2020, the judiciary can
17 protect and preserve the fundamental constitutional principles that guide the
18 allocation of public funds.
19

20 Failure to sequester the CARES Act funds for a limited period of time may
21 result in irreparable harm to Alaska's most fundamental constitutional principles.
22 In the event the funds are withdrawn improperly and without valid constitutional
23 authorization, unwinding the unconstitutional transaction will be an exercise in
24 forensic futility. At best, the judiciary will be placed in the unlovely position of
25 declaring that the allocation of the funds was unconstitutional but without a
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2 genuine remedy. Better to grant limited equitable relief now that protects the
3 CARES Act funds for the short period of time necessary for the legislature to act
4 in an appropriate manner.
5

6 Granting equitable relief for a short period of time is not impermissible
7 meddling by the judiciary in legislative matters or otherwise encroaching on the
8 constitutional separation-of-powers doctrine. Equitable relief requiring the
9 CARES Act funds remain in the treasury of Alaska until the legislature acts
10 according to the Alaska Constitution is appropriate in the circumstances.
11

12 One challenge in this dispute is to define what the case is not about as much
13 as what Forrer believes is essential. In Forrer's view, this dispute is about
14 adhering to Alaska's constitution. Nothing more and nothing less.
15

16 Forrer is not intent on disputing the merits of the allocations designated by
17 the LB&A committee on May 11, 2020. Forrer has no interest in meddling in how
18 the legislature decides to allocate the CARES Act funding, whether the legislature
19 should take up other measures when the legislature convenes or any of the other
20 political matters that seem to swirl endlessly around the legislature. Forrer is a
21 carpenter and boatbuilder, not a butcher. He has no interest in participating in the
22 legislatures deliberations which are sometimes referred to as "sausage making."
23 Forrer is more than content to leave the difficult task of allocating the CARE Act
24 funds to the legislature. All Forrer wants is for the legislature to do its job and act
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2 constitutionally when designating how the CARES Act funds are to be withdrawn
3 from the treasury.

4 Forrer notes there has been much hue-and-cry among portions of the
5 legislature as well as a slice of the public that the LB&A has the power to
6 appropriate funds using the LPR process. Forrer disagrees with this contention in
7 the firm belief that Article IX, Section 13 and other constitutional requirements
8 are the lodestar by which the ship of state in Alaska is steered when spending
9 public funds. The actions by an interim committee like the LB&A allocating huge
10 sums of public money while the legislature is in session are worth the same value
11 as the paper they are printed on in terms of constitutional significance and nothing
12 more. At best, the allocations can be considered as recommendations for the
13 legislature to consider when the legislature convenes.
14

15
16 Viewed through the lens of constitutional analysis, the allocations by the
17 LB&A on May 11, 2020 are unconstitutional according to Article IX, Section 13
18 and other provisions of the constitution, including Article II, Sections 11, 13, 14
19 and 15.
20

21
22 But even conceding (which Forrer will do for purposes of informing the
23 court in regard to this convoluted issue but without conceding any aspect of the
24 issues in question), that a portion of the CARES Act funds the LB&A allocated
25 might have some force of law and permit withdrawal of a portion of these federal
26 funds from the treasury, there are significant constitutional issues related to large
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2 hunks of the LB&A allocation. For purposes of argument and perhaps in order to
3 assist the court (and perhaps the legislature and administration), resolve the entire
4 CARES Act funding issue, Forrer believes the allocation by the LB&A and the
5 attempt to justify expenditure of the funds described in the Category A spending,
6 *supra*, might be lawful if the legislature was not in session and the legislative
7 council believed action was needed.
8

9
10 Were the legislature not in session, allocation of the funding set out in
11 Category A might be appropriate and lawful because there appears to exist proper
12 appropriation or federal receipt authority previously conferred by the legislature
13 and approved by the governor for withdrawing and spending CARES Act funds
14 for the items listed in the Category I according to the RPL process
15

16 Likewise, with regard Category II, *supra*, Forrer believes the allocation by
17 the LB&A is conceivably consistent with past practices, even if the supposedly
18 requisite authority for spending the funds is dodgy.
19

20 Turning to the Category III, *supra*, allocations, Forrer believes the proposed
21 withdrawal of CARES Act funds from the treasury using the RPL rubric adopted
22 by the LB&A on May 11, 2020, presents significant constitutional and other
23 possible legal problems.⁷ Based on analysis centered on the Alaska Constitution
24

25
26 ⁷ Forrer is challenging the allocation of CARES Act funds and the withdrawal of those
27 funds from the treasury on constitutional grounds. Whether allocation of a portion of these
28 funds is consistent with federal law, including standards for spending the CARES Act
funding adopted by the federal government is not a point of contention for Forrer and not
implicated by the lawsuit he filed. But, Forrer notes, substantial questions have been raised

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2 and law, Forrer believes there is no existing authority in acts passed by the
3 legislature and reviewed by the governor that would afford the LB&A authority to
4 use the RPL process to allocate expenditures of nearly one billion dollars in
5 CARES Act funding. The fraught nature of the RPL allocative process and resort
6 to using the RPL process while the legislature is in session was addressed in a
7 memorandum opinion by the Legislative Affairs Agency.⁸ [Attached as **Exhibit**
8 **A**].
9

10
11 Regardless of the machinations of the LB&A and whether the allocations
12 rendered by that interim committee are sound from a fiscal and political
13 perspective, from a legal perspective their acts are not constitutionally valid and
14 cannot be used as authority to circumvent the constitutional standards required by
15 the Alaska Constitution. In the present circumstance, the legislature is not out of
16 session. The legislature is, as a matter of fact, in session and apparently set to
17 convene on May 18, 2020.
18

19
20 The legislature has the ability to act in accord with the Alaska Constitution
21 by adopting an expenditure act allocating the CARES Act funds consistent with
22 the formula ginned up by the LB&A or according to the considered deliberations
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25
26 about the propriety of using CARES Act funds for municipal revenue sharing, as is
27 seemingly contemplated by the May 11, 2020 LB&A allocation. Conceivably, the
28 legislature could appropriate CARES Act funds in a manner consistent with the Alaska
Constitution that would be incompatible with federal law or regulatory guidelines, an issue
not being challenged by Forrer in this litigation.

⁸ Megan Wallace, Director, *Cares Act RPLs – May 1st Submission* (May 5, 2020).

1
2 by the entire legislature. All Forrer seeks is for the entire legislature to adopt a bill
3 allocating the CARES Act funds in a constitutional way.

4 Forrer believes the legislature must adopt a bill in accordance with express
5 standards set out in the Alaska Constitution for making expenditures of public
6 funds, including the CARES Act funds. Forrer believes mere "ratification" of the
7 allocation adopted by the LB&A on May 11, 2020 is insufficient to make a valid
8 expenditure of public funds according to the Alaska Constitution, not least being
9 that such ratification would obliterate the power of Alaska's executive branch to
10 veto or reduce public funds authorized by the legislature.⁹

13 While Forrer believes the various provisions of the Alaska Constitution
14 calling for adoption of public spending according to measured and obvious
15 procedures are clear, he acknowledges the paucity of case law pertaining to this
16 subject. There does not appear to be substantial appellate court guidance in
17 Alaska on how the public spending can be altered or adjusted during difficult
18 situations. The most obvious case that addresses the issue of public spending
19 during financially difficult times is *Fairbanks North Star Borough v. State*,¹⁰ a
20 case stemming from a decision by then Governor Sheffield to cut previously
21 adopted expenditures made by the legislature according to the appropriations
22 process sanctioned by Article IX, Section 13 and other relevant constitutional and
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27 ⁹ Article II, Section 15.

28 ¹⁰ 753 P.2d. 1158 (Alaska 1988).

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2 legal provisions. The *North Star Borough* case certainly involves the expenditure
3 of public funds and the central issue addressed by the court was whether
4 previously appropriated funds could be unilaterally impounded by the governor.
5 Ultimately, the legislature enacted a measure that ratified and approved the
6 restrictions the governor had sought to impose. The ratification was characterized
7 by the court as a “curative statute”¹¹ that served to finally put to rest a long-
8 standing dispute between the executive and legislative branches of government as
9 well as interests who were impacted by the chopped appropriations. But the
10 predicate to the ratification question that was upheld in the *North Star Borough*
11 case was the affirmation of the earlier judicial ruling that the governor’s
12 impoundment of appropriated funds was unconstitutional.¹²

13
14
15
16 In the present case before this court, great care and extreme caution should
17 be given to adopting the “ratification” model. Ratification by the legislature is not
18 some talisman that can be invoked to adopt the allocation made by the LB&A’s
19 allocation of public funding on May 11, 2020, and immunize the allocation from
20 constitutional scrutiny.
21

22
23 In the *North Star Borough* case, the legislature ratified the governor’s
24 unconstitutional attempt to impound a lawful appropriation that conformed with
25 the Alaska Constitution. The legislative ratification in *North Star Borough* was
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27
28 ¹¹ *Id.* at 1160.

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2 related to impoundment and reduction of spending, not additional spending as is
3 the situation at bar. Because the *North Star Borough* case dealt with reductions
4 to valid appropriations previously made by the entire legislature, not proposals
5 rendered by a faction of the legislature which were not validly adopted according
6 to the Alaska Constitution to increase funding, ratification of all the LB&A
7 allocations made on May 11, 2020 is highly problematic. In simple terms, large
8 portions of the LB&A's allocations are incapable of being ratified because there
9 was no underlying appropriation consistent with constitutional standards or other
10 authorization like federal receipt authority that would justify a constitutional
11 expenditure. Put another way, it is impossible for the legislature to ratify
12 something they have not done in a constitutional manner.
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16 To be sure, *North Star Borough* is useful for gaining a degree of awareness
17 about how to address public funding in times when there are economic hardships.
18 What North Star Borough does not do is sanction the idea that the legislature can
19 pass a bill "ratifying" the decision by a faction of the legislature to allocate funds
20 for which no previous authorization or appropriation has been made. There is no
21 known federal receipt authority or authorization in existing law or a valid
22 appropriation for much of the CARES Act funding held in the treasury. In
23 constitutional terms, especially with respect to the Category III items allocated by
24 LB&A there is nothing to ratify.
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12 *Id.* at 1159; *see also, State v. Fairbanks North Star Borough*, 736 P.2d 1140 (Alaska 1987).

1
2 Forrer believes more is needed than an act ratifying what has not taken
3 place in constitutional terms but then altered like the impoundment situation in
4 *North Star Borough*. Instead, the legislature needs to present the executive
5 branch with an appropriate bill that conforms to the Alaska Constitution, including
6 affording the Governor's constitutional right to review legislation.¹³

8 In order to protect the CARES Act funds believed to be in the Alaska
9 treasury and allow for adoption of an expenditure of the funds according to the
10 Alaska Constitution, equitable relief is justified.

12 When reviewing Forrer's request for equitable relief, Alaska Rule of Civil
13 Procedure 65 governs preliminary injunctions. Forrer and the public may obtain a
14 preliminary injunction by meeting one of two standards: the heightened "probable
15 success on the merits" standard or the more lenient "balance of hardships"
16 standard.¹⁴ "Where the injury from [a] preliminary injunction is not
17 inconsiderable and may not be adequately indemnified by a bond, a showing of
18 probable success on the merits is required before a . . . preliminary injunction can
19 be issued."¹⁵ "The balance of hardships standard requires balancing the harm
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26 ¹³ See, e.g., Article II, Sections 15, 16 & 17.

27 ¹⁴ See, e.g. *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014).

28 ¹⁵ *North Kenai Peninsula Road Maintenance Service Area v. Kenai Peninsula Borough*,
850 P.2d 636, 639 (Alaska 1993).

1
2 plaintiff will suffer without the injunction against the harm the injunction will
3 impose on the defendant.”¹⁶

4
5 The court may issue a preliminary injunction under the balance of hardships
6 standard “when three factors are present: (1) the plaintiff must be faced with
7 irreparable harm; (2) the opposing party must be adequately protected; and (3) the
8 plaintiff must raise serious and substantial questions going to the merits of the
9 case; that is, the issues raised cannot be frivolous or obviously without merit.”¹⁷

10
11 Here, the plaintiff, Eric Forrer and the public and most importantly the
12 Constitution that was drafted by the citizens of Alaska and ratified by the citizens
13 will be obviously harmed if the legislature and governor of the State of Alaska
14 fails to conform to the constitution and lets the CARES Act funds in the treasury
15 be expended without a valid constitutional act. Forrer, on behalf of the public and
16 in the interest of the Alaska Constitution asks only that this court exercise its
17 equitable power to maintain the *status quo* by keeping the CARES Act funds in
18 the treasury for a period of 72 hours, a time framework that will not only protect
19 the funds from unconstitutional expenditure but also likely spur resolution of this
20 matter.
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24 Entry of a preliminary injunction under either in favor of the Forrer and the
25 public should be narrowly drawn to protect the Alaska Constitution but without
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28 ¹⁶ *Alsworth*, 323 P.3d at 54.

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2 encroaching on any of the duties or options of the legislature or the governor.
3 Forrer only seeks to hold the CARES Act funding in a safe harbor for a short
4 period of time while the legislative and executive branches decide how to properly
5 allocate the funds. The funds are in a safe harbor at present, the treasury of the
6 State of Alaska. They should stay there until the legislature acts according to the
7 Alaska Constitution, at which time Eric Forrer will agree to a dismissal of this
8 case and go back to building the boat on which he is working.
9
10

11 Conclusion

12 For the reasons set out in this memorandum, the court should enter a
13 preliminary injunction directing the Commissioner of Revenue to maintain the
14 CARES Act funds currently in the Alaska Treasury until such time as a valid
15 expenditure is adopted by the Alaska Legislature and signed into law or allowed to
16 become law by the Governor without signature as provided for by Article II,
17 Section 17.
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28 ¹⁷ *Id.* at 54 (internal citations and quotations omitted).

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VERIFICATION

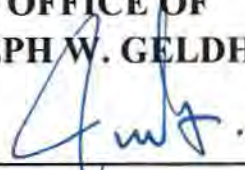
Upon my oath, I swear I have read and understand the memorandum above, and that the facts and underlying basis for the arguments contained in the above memorandum are complete, true and accurate to the best of my knowledge.

DATED this 17th day of May, 2020 at Auke Bay, Alaska.


Eric Forrer

DATED this 17th day of May, 2020 at West Juneau, Alaska.

**LAW OFFICE OF
JOSEPH W. GELDHOF**


Joseph W. Geldhof
Alaska Bar # 8111097

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
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MEMORANDUM

May 5, 2020

SUBJECT: Cares Act RPLs – May 1st submission
(Work Order No. 31-LS1806)

TO: Representative Chris Tuck
Attn: Aurora Hauke

FROM: Megan A. Wallace
Director

You have asked for a review of the RPLs submitted by the governor on May 1, 2020.¹

RPL Analysis

1) RPL #08-2020-0250 - Community Assistance Payments - \$257,548,754²

The governor originally cited an FY 20 appropriation to the Department of Commerce, Community, and Economic Development (DCCED), community and regional affairs, as appropriation authority.³ This appropriation contains federal receipt authority. The governor could not rely on a community assistance appropriation as the appropriation authority for the RPL, because there is no FY 20 community assistance appropriation,⁴ and the FY 21 community assistance appropriation contains no federal funding that would make it eligible for the RPL process. The FY 20 appropriation to the DCCED, community and regional affairs essentially funds the Division of Community and Regional Affairs' operations. As part of that appropriation and allocation, there was \$636,900 allocated for the following grants:

- Alaska Maritime Safety Education, Boat Receipts - \$196.9

¹ On May 1, 2020, the Legislative Budget and Audit Committee (LB&A) approved RPLs # 05-2020-0074, 05-2020-0075, 05-2020-0076, 12-2020-4049, 25-2020-8766, and 45-2020-0002.

² The original amount of this RPL was \$562,500,000.

³ See sec. 1, ch. 1, FSSLA 2019, page 5, line 28.

⁴ The governor vetoed the \$30,000,000 FY 20 community assistance appropriation on three separate occasions. See sec. 33(a), ch. 1, FSSLA 2019, sec. 11(a), ch. 2, SSSLA 2019, and sec. 16(c), ch. 7, SLA 2020.

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- Kawerak, Inc. for Essential Air Service to Little Diomedé - \$200.0
- Rural Utility Business Assistance Program - \$160.0
- Life Alaska Donor Services, Anatomical Gift Awareness Fund - \$30.0
- Unavailable Revenue to grant to Life Alaska Donor Services due to reduced annual donation trends to the fund - \$50.0

The appropriation cited as authority for this RPL provides no community assistance function; therefore the purpose of the RPL is not the same as the appropriation it seeks to increase. Because the RPL process may not be used to establish a new appropriation or change the purpose of an existing appropriation, it does not comply with AS 37.07.080(h).

The governor has added AS 44.33.020(a)(20) as statutory authority for this expenditure.⁵ AS 44.33.020(a)(20) provides:

(a) The Department of Commerce, Community, and Economic Development shall . . .

(20) administer state and, as appropriate, federal programs for revenue sharing, community assistance, grants, and other forms of financial assistance to community and regional governments;

While the above provision appears to give DCCED sufficient authority to disburse CARES Act funds to local governments as community assistance payments, the statute does not set out any specific distribution criteria, and there is none elsewhere in the Alaska Statutes. Based on testimony by OMB before the House Finance Committee on April 24, 2020, the governor modified the formula for community assistance payments the legislature established in AS 29.60.850 - 29.60.879. Instead of relying on the existing statutory formula the governor developed a new formula by applying portion of the statutory community assistance payment formula, adjusted by selected data collected by DCCED. It is my understanding that this formula was further adjusted for certain communities under the May 1, 2020 RPLs.⁶ The governor has cited no authority, and there does not appear to be any, that would allow for the governor to develop the new community assistance payment formula used in this RPL, absent legislative action.

⁵ The governor previously cited AS 29.60.850 - 29.60.879 (community assistance) and AS 37.05.315 (grants to municipalities) as statutory authority for this RPL.

⁶ The governor also submitted new RPLs #08-2020-0260 - 08-2020-0382 for COVID-19 Community Directs Costs for a total of \$311,024,132. Each of these RPLs uses the same appropriation and statutory authority discussed above for RPL #08-2020-0250. For the same reasons, RPLs #08-2020-0260 - 08-2020-0382 do not comply with AS 37.07.080(h).

Based on the foregoing, in my opinion, this RPL does not comply with AS 37.07.080(h), as it is not an increase to an existing appropriation item, but instead attempts to create a new appropriation, which requires legislative action.⁷

2) RPL #08-2020-0251 - Small Business Relief - \$290,000,000

The governor continues to cite DCCED, investments, as the appropriation authority for this RPL. These appropriations contain no federal receipt authority. Therefore, there is no federal receipt authority to increase by RPL and for that reason alone this RPL does not comply with AS 37.07.080(h).

Further, the purpose of this appropriation does not appear to be for providing small business loans, especially to the extent proposed. The RPL now proposes:

The Investments Section of the Department of Commerce, Community and Economic Development in cooperation with the Alaska Industrial Development and Export Authority (AIDEA), the existing Sustaining Alaska's Future Economy (AK SAFE) program, and Alaska Regional Development Organizations (ARDORs) will provide assistance to Alaska businesses based on the size, assets, resources, financial history, and needs of the business in the form of grants.

ARDORs will be allocated \$750,000.00 of the total amount for the purpose of facilitating the grant program and assisting small businesses in applying for State programs. Information related to how the ARDORs facilitated the grant process and assisted businesses in accessing resources made available by the State will be included in the annual ARDOR report, required under AS 44.33.896(e).

While the RPL provides that ARDORs will be allocated \$750,000, it does not specify where the remaining funds will be allocated. Will the remaining funds go to the AK SAFE program, or will they remain in DCCED? In addition, if AIDEA is going to make loans, the legislature might consider instead appropriating funds directly to those entities.⁸

⁷ As previously advised, any CARES Act funds appropriated to municipalities "must be used for actions taken to respond to the public health emergency." As of May 5, 2020, U.S. Treasury guidance continues to advise that "[f]und payments may not be used for government revenue replacement." See <https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Frequently-Asked-Questions.pdf>

⁸ The CARES Act guidance from the U.S. Department of Treasury specifically authorizes payments to small businesses, noting that eligible expenditures include those "related to

Nevertheless, this RPL does not comply with AS 37.07.080(h), and appears to create a new appropriation, which requires legislative action.

3) RPL #08-2020-0054 - COVID - 19 Economic Stimulus for Alaskan Fisheries - \$100,000,000

The governor continues to cite DCCED, executive administration, commissioner's office, as the appropriation authority. There is no federal funding attached to these appropriations to which the CARES Act funds may be added and no federal receipt authority. In addition, the funding for this allocation is primarily for personal services funded from interagency receipts. There is no money appropriated to the grants line. It is not clear why the governor cited this as appropriation authority. Therefore, this RPL does not comply with AS 37.07.080(h).

The legislature did not contemplate and did not provide authority for the commissioner to make these types of stimulus payments.⁹ The statutory authority cited, AS 44.33.020, only provides the general duties of the department. Because there is no statutory authority specifically outlining a program for fishery stimulus payments, the legislature may need to specifically determine how these funds are to be distributed. In my opinion, this RPL attempts to create a new appropriation, which requires legislative action.

4) RPL #25-2020-8771 - Statewide Aviation and Rural Airport System CARES FAA Funding - \$49,000,000

This RPL increases the amounts appropriated in the fiscal year 2020 and fiscal year 2021 operating budgets to the Department of Transportation and Public Facilities for administration and support and allocated to the commissioner's office by a total of \$49 million.¹⁰ According to the RPL, "CARES Act Airport Grants will be used for statewide aviation and rural airport system operating and maintenance expenses, where additional expenditure needs have occurred due to the COVID-19 public health emergency." The RPL provides that the federal funds will increase the funding allocated

the provision of grants to small businesses to reimburse the costs of business interruption caused by required closures." Therefore, the CARES Act funds can ultimately be used to provide small business loan, but probably not through the RPL process.

⁹ Indeed, other fishery disaster funds have been appropriated to the Department of Fish and Game in the capital budget. See sec. 1, ch. 3, FSSLA 2019, page 4, lines 6 - 10 (Pacific Coastal Salmon Recover Fund; Pink Salmon Disaster - 2106 Gulf of Alaska). Therefore, I doubt the legislature contemplated the commissioner of DCCED would be distributing fishery disaster funds.

¹⁰ See sec. 1, ch. 1, FSSLA 2019, page 32, lines 30 - 31; sec. 1, ch. 8, SLA 2020, page 32, lines 24 - 25.

to the commissioner's office for fiscal years 2020 and 2021 and the commissioner will allocate the funding to state owned airports. There does not appear to be federal funding attached to these appropriations and, as a result, there is no federal receipt authority to be increased through the RPL process. In addition, the funding for these allocations is primarily for personal services.

As statutory authority for the RPL, the governor cites AS 37.20.010 and AS 44.42.060.¹¹ While these statutes authorize the governor and the commissioner to accept federal funds on behalf of the state, an expenditure of federal funds must be consistent with the purpose of the underlying appropriation. The purposes of the appropriations cited in this RPL do not appear to provide for operating and maintenance expenses associated with state owned airports. Thus, the expenditures described in the RPL appear to be inconsistent with the purposes of the appropriation authority cited. The funding described in the RPL does not appear to supplement the underlying appropriations cited and, because there are no federal funds attached to those appropriations, there is insufficient appropriation authority to support the RPL. Therefore, this RPL does not comply with AS 37.07.080(h).

**5) RPL #25-2020-8772 - MSCVC & Whittier Access and Tunnel 5001(d)
CARES funding - \$3,034,100**

This RPL increases the amounts appropriated in the fiscal year 2020 and fiscal year 2021 operating budgets to the Department of Transportation and Public Facilities for administration and support and allocated to the commissioner's office by a total of \$3,034,100.¹² According to the RPL, "[f]unding will be used to cover unbudgeted and unanticipated personal services costs and expenditures related to ensuring continuity of operations and program delivery within this appropriation." The RPL provides that the federal funds will increase the funding allocated to the commissioner's office for fiscal years 2020 and 2021 and the commissioner will allocate the funding to measurement

¹¹ AS 37.20.010 provides:

The governor is authorized to accept on behalf of the state all federal grants and transfers of property of an emergency, transitional, or omnibus nature upon conditions imposed by the federal government.

AS 44.42.060 provides:

The commissioner may apply for and accept, on behalf of the state, grants from the federal government or an agency of it, or from another state, a foundation, or any person, for any of the functions or purposes of the department.

¹² See sec. 1, ch. 1, FSSLA 2019, page 32, line 31; sec. 1, ch. 8, SLA 2020, page 32, line 25.

standards and commercial vehicle compliance (MS/CVC), northern region highway and aviation, and Whittier access and tunnel. There does not appear to be federal funding attached to these appropriations and, as a result, there is no federal receipt authority to be increased through the RPL process. In addition, the funding for these allocations is primarily for personal services.

The governor cites AS 37.20.010 and AS 44.42.060 as statutory authority. While these statutes authorize the governor and the commissioner to accept federal funds on behalf of the state, an expenditure of federal funds must be consistent with the purpose of the underlying appropriation. Expenses related to MS/CVC, northern region highway and aviation, and Whittier access and tunnel do not appear to be within the scope of the appropriations cited in the RPL. Thus, the expenditures described in the RPL appear to be inconsistent with the purposes of the appropriation authority cited. The funding described in the RPL does not appear to supplement the underlying appropriations cited and, because there are no federal funds attached to those appropriations, there is insufficient appropriation authority to support the RPL. Therefore, this RPL does not comply with AS 37.07.080(h).

Other Legal Issues

If, despite the legal issues described above, LB&A approves these RPLs or the governor moves forward and expends funds after the 45-day waiting period under AS 37.07.080(h), that expenditure would likely constitute an unconstitutional delegation of the legislature's power of appropriation.

In *State v. Fairbanks North Star Borough*, an Alaska law that authorized the governor to administratively reduce the amount of an appropriation was found to be an unconstitutional delegation of legislative power.¹³ AS 37.07.080(g)(2), which has since been repealed, read:

(g) The governor may direct the withholding or reduction of appropriations to a state agency at any time during the fiscal year only if the governor determines that

(1) the planned expenditures can no longer be made due to factors outside the control of the state which make the expenditure factually impossible; or

(2) estimated receipts and surpluses will be insufficient to provide for appropriations.

In support of its decision that AS 37.07.080(g)(2) was an unconstitutional delegation of legislative power to the executive branch, the Alaska Supreme Court found that the statute would permit the governor to cut the entire budget for a particular department or

¹³ *State v. Fairbanks North Star Borough*, 736 P.2d 1140 (Alaska 1987).

project and the governor could effectively veto a project by using the process in AS 37.07.080(g)(2) even when the legislature had overridden the governor's veto.¹⁴

Similarly, if the governor asserts that AS 37.07.080(h) authorizes the expenditure of funds in the manner set out in the RPLs described above, if challenged, a court would likely find that the governor's interpretation of AS 37.07.080(h) would result in an unconstitutional delegation of the legislature's power of appropriation. AS 37.07.080(h) allows the governor to increase an existing appropriation but does not permit the creation of a new appropriation or change the purpose of an existing appropriation. As described above, these RPLs attempt to create new appropriations because the appropriations cited to increase federal receipts are inconsistent with existing authority and the purpose for the proposed expenditures. If the governor expends funds in accordance with the RPLs and those expenditures are challenged, a court would likely find that the RPLs do not comply with AS 37.07.080(h). Further, a court would likely find that if AS 37.07.080(h) allowed the governor to create a new appropriation, as proposed in the RPL, the statute itself would be an unconstitutional delegation of the legislature's power of appropriation.

If LB&A were to approve the above RPLs, I strongly recommend that the legislature ratify those expenditures at a later date if the legislature supports the appropriations. In 1987, the legislature retroactively ratified the actions of Governor Sheffield in impounding the appropriations previously discussed. Governor Sheffield impounded ten percent of funds intended for municipalities under AS 37.07.080(g), which became the subject of litigation. Later, the legislature went back and considered each of the impoundments and ratified Governor Sheffield's actions. The municipalities challenged the ratification, and the Alaska Supreme Court upheld the power of the legislature to retroactively ratify the actions of Governor Sheffield.¹⁵ In *Fairbanks North Star Borough*, the court explained:

A curative statute is

a statute passed to cure defects in prior law, or to validate legal proceedings, instruments, or acts of public and private administrative authorities which, in the absence of such an act would be void for want of conformity with existing legal requirements, but which would have been valid if the statute had so provided at the time of enacting.¹⁶

The Court also held that:

¹⁴ *Id.* at 1143.

¹⁵ *Fairbanks North Star Borough v. State*, 753 P.2d 1158 (Alaska 1988).

¹⁶ *Id.* at 1159 - 1160.

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Courts have uniformly upheld the validity of curative legislation where (1) the legislature originally had the power to authorize the acts done, and (2) there is no unconstitutional impairment of vested rights as a result of the act's passage.¹⁷

While ratification may be an option, it is also not without risk. Just as Governor Sheffield's impoundment was challenged (successfully), if LB&A approves the RPLs or if the governor moves forward with expenditures after the 45-day wait period, the expenditures may still be subject to challenge and litigation until the legislature ratifies the expenditures.¹⁸ Further, if the legislature fails to subsequently ratify the expenditures, the expenditures will be subject to challenge.

If you have any questions, please advise.

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¹⁷ *Id.* at 1160.

¹⁸ If the expenditures were challenged, the legislature may consider reconvening to approve the expenditures.