ALASKA MUNICIPAL BOND BANK AUTHORITY

BOARD OF DIRECTOR'S MEETING

TO BE HELD AT:
TELEPHONIC MEETING
For Participation Call: 1-800-315-6338
With Code 907100#

December 10, 2020

10:00 AM Alaska

333 Willoughby Avenue, 11th Floor
P.O. Box 110405
Juneau, Alaska 99811-405

Phone: (907) 465-2388
Fax: (907) 465-2902
dor.trs.ambba@alaska.gov

AGENDA FOR BOARD OF DIRECTOR'S MEETING

Meeting Place:
TELEPHONIC MEETING
For participation: 1-800-315-6338
Code 907100#
December 10, 2020 at 10:00 a.m.

I. **Call to Order**
II. **Roll Call**
III. **Public Meeting Notice**
IV. **Approval of Agenda**
V. **Minutes of the September 3, 2020 Meeting of the Board of Directors**
VI. **General Business**

- **A.** **Resolution 2020-04 – Rate Notification and Bond Bank Response – City of Ketchikan 2016 Port Revenue Bonds**
- **B.** **Finance Director's Report**
- **C.** **Executive Director's Report**

VII. **Public Comments**

VIII. **Board Comments**

IX. **Adjournment**

STATUS: Active

NOTICE OF PUBLIC MEETING - AMBBA Board of Director's Meeting

AGENDA FOR BOARD OF DIRECTOR'S MEETING:

The Alaska Municipal Bond Bank Authority ('AMBBA') will hold a meeting telephonically at 1-800-315-6338, with passcode 907100, on December 10, 2020, at 10:00 a.m. Alaska.

The public is invited to attend. Individuals who may need special modifications to participate should call (907) 465-2893 prior to the meeting.

Call in: 1-800-315-6338 with passcode 907100#

I. Call to Order
II. Roll Call
III. Public Meeting Notice
IV. Approval of Agenda
V. Minutes of the September 3, 2020 Meeting of the Board of Directors
VI. General Business
A. Resolution 2020-04 – Rate Notification and Bond Bank Response – City of Ketchikan 2016 Port Revenue Bonds
B. Finance Director's Report
C. Executive Director's Report
VII. Public Comments
VIII. Board Comments
IX. Adjournment

Attachments, History, Details

Attachments

AMBBA Agenda 12-10-2020 FINAL.pdf

Revision History

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Project/Regulation #:	
Publish Date:	12/3/2020
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Events/Deadlines:

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MINUTES of the BOARD OF DIRECTORS MEETING

ALASKA MUNICIPAL BOND BANK AUTHORITY

September 3, 2020

I. CALL TO ORDER

Luke Welles called the meeting to order at 10:05 a.m., Alaska Time. Members participated telephonically at 1-800-315-6338, with passcode 907100#.

II. ROLL CALL

Luke Welles
Ken Koelsch
Mike Barnhill
Bruce Tangeman
John Springsteen

OTHERS IN ATTENDANCE:

- Deven Mitchell, Executive Director, Alaska Municipal Bond Bank
- Ryan Williams, Finance Director, Alaska Municipal Bond Bank
- Fred Eoff, Financial Advisor, PFM
- Alex Qin, Senior Analyst, PFM
- Bill Lierman, CIO-Fixed Income, APCM
- Paul Hanson, Portfolio Manager, APCM
- Allison Capps, Client Relationship Manager, APCM
- Doug Goe, Orrick, Herrington & Sutcliffe LLP
- Leslie Krusen, Orrick, Herrington & Sutcliffe LLP
- Greg Blonde, Orrick, Herrington & Sutcliffe LLP
- Eric Whaley, BofA Securities
- Wesley Ellins, BofA Securities

- Eric Wong, BofA Securities
- Laura Janke, RBC Capital Markets
- Tom Yang, RBC Capital Markets

III. PUBLIC MEETING NOTICE

Mr. Williams reviewed the public meeting notice. A copy of the Online Public Notice concerning the date, location, and purpose of the meeting was read for the record. The public notice was officially published on August 19, 2020, on the Alaska Online Public Notice website for the September 3, 2020, meeting date.

IV. APPROVAL OF AGENDA

The agenda was reviewed by the board. Mr. Barnhill moved to approve the agenda as written, and approval was seconded by Mr. Tangeman. There were no objections. An all-in-favor vote was taken for approval of the agenda, and there were five "aye" (yes) votes. The agenda was approved unanimously and adopted by board members.

V. MINUTES of the June 2, 2020, Board of Directors Meeting

The June 2, 2020, minutes of the AMBBA Board of Director's meeting were reviewed by the board. Mr. Tangeman moved to adopt the June 2, 2020, minutes as written, and approval was seconded by Mr. Springsteen. There were no objections. An all-in-favor vote was taken for approval of the June 2, 2020, minutes, and there were five "aye" (yes) votes. The June 2, 2020, minutes were approved unanimously and adopted by board members.

VI. GENERAL BUISNESS

Election of Officers for Fiscal Year 2021

Mr. Welles opened the election of officers for fiscal year 2021 to a nomination by the Board. Mr. Tangeman nominated to retain Mr. Welles as the Chairperson. There were no objections to the nomination. Mr. Welles nominated to elect Mr. Tangeman as the Vice-Chairperson. There were no objections to the nomination. Mr. Welles asked for a motion from the board for Mr. Welles as Chairperson, and Mr. Tangeman as Vice-Chairperson. Mr. Barnhill moved to approve, and Mr. Springsteen seconded the motion. An all-in-favor vote was taken for approval of Chair and Vice-Chair (Welles and Tangeman, respectively), and there were five

"aye" (yes) votes. The positions were approved unanimously and adopted by board members. Mr. Mitchell noted that nomination of officers includes the Treasurer and Deputy Treasury positions, commonly filled by staff to facilitate ongoing administrative operations. Mr. Tangeman moved to approve Mr. Mitchell as Treasurer, and Mr. Williams as Deputy Treasurer, and Mr. Springsteen seconded the motion. An all-in-favor vote was taken for approval of Treasurer and Deputy Treasurer (Mitchell and Williams, respectively), and there were five "aye" (yes) votes. The positions were approved unanimously and adopted by board members.

AMBBA Resolution No. 2020-03

Mr. Welles noted that Resolution No. 2020-03 updates and replaces the resolution adopted during the April 29, 2020, board meeting for the 2020 Series Two Bonds. Mr. Krusen introduced Resolution 2020-03, a series resolution authorizing the issuance of general obligation and refunding bonds, the 2020 Series Two of the AMBBA. Mr. Krusen reiterated that this resolution supersedes in its entirety the prior resolution 2020-02, where the prior resolution is near the expiration authorization of 120 days. Resolution No. 2020-03, now before the board, authorizes an aggregate principal amount of not to exceed $247,890,000 and contemplates both new money and advance refundings of currently outstanding Bond Bank debt. Mr. Krusen mentioned that the issuance is contemplated to be taxable bonds through negotiated sale. Underwriters will be Bank of America, Jefferies and RBC. Maximum true interest costs shall not exceed 4.5% for the 2020 Series Two Bonds. Mr. Krusen reiterated that the resolution identifies a series of advance refunding candidates and grants authority to the Chairman and Executive Director to proceed with those refundings dependent upon market condition at the time of pricing. The authority granted to the Chairman and Executive Director shall expire 120 days after adoption of this Resolution 2020-03 of the Bond Bank. Mr. Mitchell explained that there has been a lot of rate volatility recently, and the financing team is monitoring potential savings for all advance refunding candidates within the Resolution. Mr. Mitchell asked of Mr. Eoff, PFM, could comment on projections for the issuance from the underwriting team. Mr. Eoff noted that there's been interaction with all borrowers relative to release of general analysis, and input has been received on what preferences were from authorized borrowers for underlying loans. Mr. Eoff noted that the recent number run included a little over $200 million in potential advance refunding candidates with an estimate of approximately 6.7 percent in present value savings. Mr.

Whaley, BofA, mentioned that the large range in par amounts is due to underlying borrowers choosing which maturities to refund, based on their own savings thresholds and internal logistics. Mr. Tangeman moved to approve Resolution 2020-03 authorizing the Bond Bank to issue general obligation and refunding bonds, 2020 Series Two, and approval was seconded by Mr. Koelsch. Mr. Williams took a roll call vote with board members, and there were five "aye" (yes) votes and no objections. AMBBA's Resolution 2020-03 was approved unanimously by board members.

Updated Investment Policy Statement for the Bond Bank (Revision to Fund Benchmarks)

Mr. Williams introduced the updated Investment Policy Statement for the Bond Bank, mentioning that the last update was in the Spring of 2017, which at that time included changes to the Custodian accounts minimum cash balance threshold. Mr. Williams noted that the current changes up for discussion in the 9/3/2020 revision were mostly housekeeping in nature, and also included a change to fund benchmarks, which Mr. Williams asked Alaska Permanent Capital Management ('APCM') to cover in more detail. Mr. Hanson, APCM, went into further detail regarding the changes to fund benchmarks. First, the reserve funds have a benchmark that includes the Barclays US Aggregate index, which is an index that holds securities that are not invested in by the Bond Bank with restrictions occurring either in the General Bond Resolutions and/or the Investment Policy Statement due mostly to certain duration standards and potential credit risk. This leads to an inaccurate tracking of that fund benchmark, and the update includes a revision to 100 percent Bloomberg Barclays US 1-5 year Government Bond Index. Second, all references to the Barclays index are now changed to "Bloomberg Barclays" index. Third, the Custodian was changed to a more targeted asset allocation with the proposed deletion of the "plus and minus" range associated with each securities class, now strictly 5 percent 3-month US Treasury, and 95 percent Bloomberg Barclays US 1-5 Year Government Bond Index (from 5% "+/- 2%", and from 95% "+/-3%). There was no additional discussion. Mr. Tangeman moved to approve the updated Investment Policy Statement of the Bond Bank, and approval was seconded by Mr. Barnhill. Mr. Williams took a roll call vote with board members, and there were five "aye" (yes) votes with no objections, and updated investment policy statement was approved unanimously by board members.

AMBBA 2020 Series One – Post-Sale Summary

Mr. Eoff discussed a summary of the pricing for the Bond Bank's 2020 Series One Bonds. This issue was priced on June 24, 2020, and closed on July 7, 2020. Mr. Eoff presented a chart and description of the general market leading up to the sale. Mr. Eoff noted that S&P assigned an 'A+' rating with negative outlook, which was one notch lower than the previous rating assigned to the 2019 Series Three and Four bonds. Also, Moody's replaced Fitch Ratings with this financing and assigned its 'A1' rating with negative outlook (both one notch below the State of Alaska's ratings). The 2020 Series One Bonds were sold through a negotiated sale to an underwriting team consisting of RBC Capital Markets (senior manager), Bank of America Securities, and Wells Fargo Securities. During the order-period the issue was generally very well received with strong oversubscription amounts for all maturities with significant par amounts offered (2020 – 2030). Longer dated maturities (2031-2039) consisted of smaller offering amounts and were not strongly pursued by investors with maturities in 2032 and 2034-2037 receiving no orders. Significant reductions in reoffering yields were proposed for maturity years 2020-2026, reflecting strong oversubscription amounts. Modest reductions were proposed for 2027-2030 and no changes to reoffering yields 2031-2039. Combining 2034-2035 and 2036-2037 into two small term bond maturities was proposed and accepted by the Bond Bank. RBC proposed a firm underwriting offer with unsold balances in the 2032 and the new term maturities 2035 and 2037 in the total amount of $3,810,000. This series achieved a true interest cost of 1.554 percent and were sold to the underwriters with a total underwriter spread of $2.967/$1,000. Mr. Eoff presented tables indicating the initial pricing, final pricing, and all adjustments. Total aggregated savings to all borrowers was $13,315,760, which was approximately 13% of total refunded bond amount. Mr. Eoff noted that in addition to the refunding transactions, new money was provided for borrower capital projects in the communities of City of Ketchikan, Kodiak Island Borough, and the City of King Cove. Mr. Springsteen moved to adopt the 2020 Series One transaction summary as written, and approval was seconded by Mr. Koelsch. There were no objections. An all-in-favor vote was taken, and there were five "aye" (yes) votes. The 2020 Series One transaction summary was adopted unanimously by board members.

Finance Director's Report

Mr. Williams provided an update to the Board on the results of the arbitrage rebate services RFP, with AMTEC as the winning proposer and will remain as the provider. AMTEC will perform these services through Fiscal Year 2023 with two optional two-year renewals. Mr. Williams noted that the Bond Bank has begun the audit process, and is currently working with the contract accounting team (Elgee Rehfeld), as well as with representatives from the independent auditor (BDO). The process is in motion, with an expectation to complete final audited statements and accompanying notes before the statutory deadline of September 30, 2020. Mr. Williams reviewed the portfolio market values and returns as of 7/31/2020. Mr. Tangeman made a motion to adopt the Finance Director's report, and Mr. Koelsch seconded the motion. Mr. Welles conducted an all-in-favor vote, and there were five 'yes' votes, no objections, and the Finance Director's report was adopted unanimously by all board members.

Executive Director's Report

Mr. Mitchell noted that we continue to have discussion with communities on potential future loans. We've had recent discussions with King Cove, who is considering a gas distribution facility. Timing was insufficient for their manager to supply an application for this meeting, but will wait for an application for the Board to consider a potential direct loan out of the Custodian account depending on the size of loan request.

Mr. Mitchell noted that the City of Ketchikan is accepting proposals for a concession agreement with their port, entering into a public private partnership with firm(s) for the operation of their cruise ship port's berthing stations in Ketchikan for a one-time fee. The Bond Bank initially funded this project, and performed a refunding, and Bond are not callable until 2026. We continue to track the process to make sure the tax status of these bonds remains intact. We've had preliminary discussions with bond counsel.

Mr. Tangeman made a motion to adopt the Executive Director's report, and Mr. Barnhill seconded the motion. Mr. Welles conducted an all-in-favor vote, and there were five 'yes' votes, no objections, and the Executive Director's report was adopted unanimously by all board members.

VII. PUBLIC COMMENTS

There were none.

VIII. BOARD COMMENTS

Mr. Koelsch thanked the Board and staff, noting the timely receipt of board packet information and appreciated the depth of information and presentations by all involved.

Mr. Welles mentioned interest in a face-to-face meeting at his place of business in Anchorage, ANTHC, with conference rooms setup for handling appropriate social distancing requirements, as well as facilities that can handle video conferencing for those unable to attend.

Mr. Welles noted that we have not done an investor road-show in 5-6 years, and would like to pursue. We have some great contacts that we can reach out to on the trading side, plus we should monitor the potential for a face-to-face meeting with ratings agencies.

IX. ADJOURNMENT

Mr. Welles adjourned the meeting without objection at 10:53 a.m. Alaska Time.

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Luke Welles, Chairperson

ALASKA MUNICIPAL BOND BANK AUTHORITY

RESOLUTION NO. 2020-04

A Resolution of the Alaska Municipal Bond Bank Authority ('AMBBA' or 'Bond Bank') waiving the recommendation to the City of Ketchikan to hire a rate consultant for not meeting the bond rate covenant for the most recent 2020 calculation period for their port revenue bonds due to the global COVID-19 pandemic

WHEREAS, the City of Ketchikan's port has experienced extreme loss of cruise ship traffic due to the global COVID-19 pandemic; and

WHEREAS, the City of Ketchikan has notified AMBBA staff that they will not meet their bond rate covenant this year for their port revenue bonds; and

WHEREAS, the City of Ketchikan has notified AMBBA that there are sufficient funds on hand to pay this year's debt service; and

WHEREAS, a rate consultant analysis will not provide any useful purpose for setting rates in the future due to the unique nature of the global COVID-19 pandemic's disruption on passenger traffic; and

WHEREAS, paying funds on hand to a rate consultant will only diminish financial flexibility;

NOW, THEREFORE, BE IT RESOLVED THAT AMBBA RECOMMENDS CITY OF KETCHIKAN NOT HIRE A RATE CONSULTANT AS THE FAILURE TO MEET THE PORT REVENUE BONDS RATE COVENANT WAS DUE TO THE GLOBAL COVID-19 PANDEMIC.

Section 1. This Resolution is effective immediately.

DATED AND ADOPTED this 10th day of December, 2020.

_____

Luke Welles, Alaska Municipal Bond Bank Authority, Chairperson

City of Ketchikan

November 30, 2020

Deven Mitchell
Alaska Municipal Bond Bank Authority
Department of Revenue
P. O. Box 110405
Juneau, AK 99811-0405

RE: Violation of Port Revenue Bond Rate Covenant

Dear Deven:

It is with deep disappointment that I must advise the Bond Bank that the City will not be able to satisfy the rate covenant in Section 7.3(a) of Ordinance No. 06-1549. Due to the COVID-19 pandemic, the 2020 Cruise Season for all of Southeast Alaska, including Ketchikan, was cancelled. The City originally projected fees for services of $11.47 million for its Port Enterprise Fund in 2020 but due to the cancellation of the season the projection has been revised downward to less than $100,000.

The only remedy provided in Ordinance No. 06-1549 to correct this violation is for the City to engage the services of a consultant to make recommendations regarding the operations of the Port facilities, rentals, tariffs, fees and charges established for use of the Port facilities. The City is of the opinion that engaging the services of a consultant would not be an appropriate remedy for this particular violation. The cancellation of the 2020 Cruise Season due to the COVID-19 pandemic caused the revenues of the City's Port Enterprise Fund to all but disappear. The rate structure in place and the operations of the Port have demonstrated since 2006, the ability of the status quo to satisfy Section 7.3(a) of Ordinance No. 06-1549.

The City believes that resumption of cruises to the Southeast Alaska by the cruise lines is the correct remedy for this violation. The City is cautiously optimistic that with effective vaccines and anti-viral treatments the pandemic will eventually end and cruises to Southeast Alaska could resume as early as 2021 in a limited capacity. The most likely outcome, however, is for a stronger recovery in 2022. Even with the availability of vaccines and anti-viral treatments, it will take time distribute them into the healthcare system and there remains the question of the demand for cruises. Can prospective passengers afford to take a cruise and will they feel safe traveling on a cruise ship?

Due to a healthy reserve balance, the Port Enterprise Fund was able to make its 2020 debt service payment on its 2016 Port Revenue Bond. The City is reasonably confident that it will be able to make the 2021 debt service payment from either reserves or a combination of reserves and CPV funds. Although satisfying the rate covenant is a high priority for the City, our current goal is to ensure that we have sufficient reserves or cash flows available to make the debt service payments.

As you are aware, I am retiring at the end of November. If you have any questions, please direct them to my successor, Michelle Johansen. Again, I would like to express my appreciation to you, Ryan and the Bond Bank Board for supporting the City of Ketchikan and its projects over the years. Your support has really made a difference to the quality of life that our community enjoys.

Sincerely,

Robert E. Newell, Jr., CPA
Finance Director

cc: Karl R. Amylon, City Manager
Michelle L. Johansen, Finance Director

333 Willoughby Avenue, 11th floor
P.O. Box 110405
Juneau, Alaska 99811-0405

Tel (907) 465-2388
FAX (907) 465-2902
E-mail: ambba@revenue.state.ak.us

TO: AMBBA Board Members **DATE:** December 3, 2020
Luke Welles, Mike Barnhill, Bruce Tangeman, John Springsteen, Ken Koelsch

FROM: Ryan Williams, Finance Director **TELEPHONE:** 907-465-2893

Most Recent Fund Performance and Portfolio Market Values

With the Bond Bank's issuance of the 2020 Series One, the outstanding bonds under the 2010 Resolution were refunded into the 2005 Resolution. Assets in 2010 Resolution Reserve were transferred to the Custodian Account as the reserve requirement went to zero.

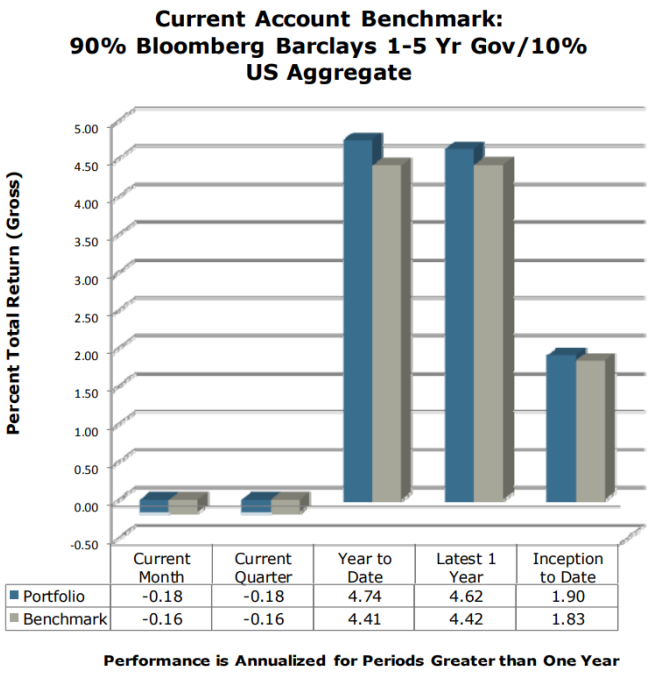
Below depicts the Bond Bank's fund performance and portfolio market values through October 31, 2020:

Alaska Permanent Capital Management Co.
Cash Balance and Portfolio Market Value
October 31, 2020

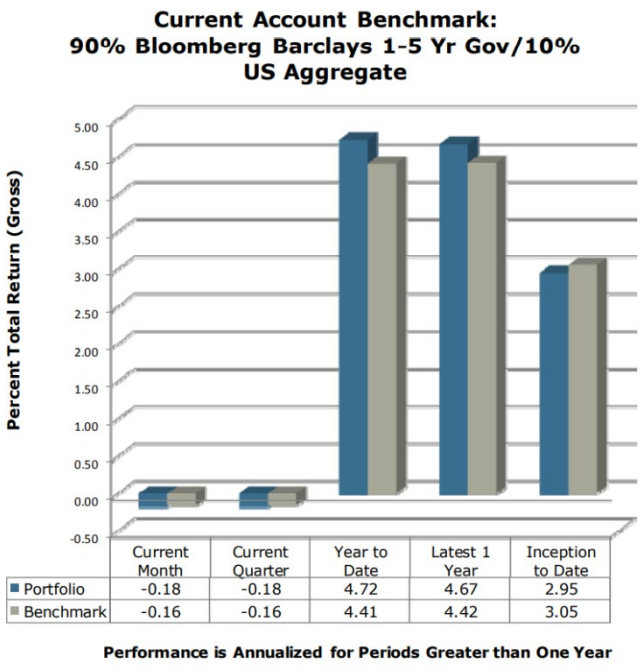
Name	Total Cash	Market Value
AMMBA Custody #180969	598,955	9,836,101
AMBBA GO 2005 SERIES RESERVE FUND-764568	159,082	44,469,213
AMBBA GO 2016 RESERVE	400,937	7,735,395
	1,158,975	**62,040,709**

Performance as of October 31, 2020 for the 2005 and 2016 Reserves, as well as the Bond Bank's Custodian Account:

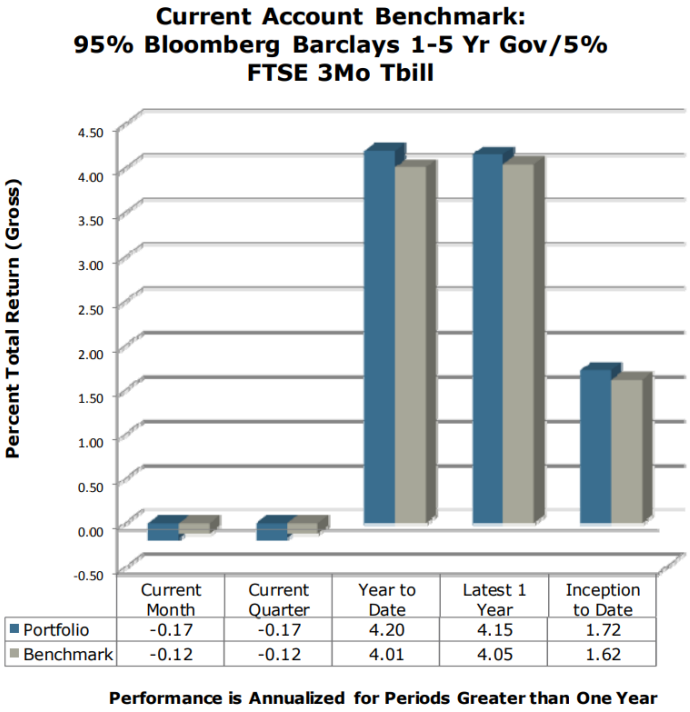
2005:



2010:



Custodian:



Please let me know if you have any questions.

Thank you,

Ryan Williams
Finance Director
Alaska Municipal Bond Bank Authority
Ryan.Williams@Alaska.gov
Cell: (907) 723-1309

ALASKA MUNICIPAL BOND BANK AUTHORITY

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dor.trs.ambba@alaska.gov

TO: AMBBA Board Members **DATE:** December 3, 2020
Luke Welles, Bruce Tangeman, Mike Barnhill,
Ken Koelsch, John Springsteen

FROM: Deven Mitchell, Executive Director **TELEPHONE:** 465-3750

Following are updates on items not covered in the December 10, 2020 Agenda:

On September 4, 2020 the Alaska Supreme Court rendered a decision on the "Forrer" case which delayed the taxable advance refunding that the Board approved at the last meeting. The Alaska Tax Credit Certificate Bond Corporation (ATCCBC) was created to refinance /pay off outstanding oil and gas tax credits by entering an agreement to pay off the credits in exchange for a series of "subject to appropriation" semi-annual payments from the State's general fund. This series of payments would then be pledged to a bond issuance of the ATCCBC. The court case revolved around whether or not ATCCBC bond issues are constitutional or not, based on limitations on debt in Article 8. The court found that in the ATCCBC specific fact set, that the bonds were not constitutional. This decision was broadly written enough that it has caused concern that there may be impact on the Bond Bank program. In an effort to obtain clarity from the Court a Petition for Rehearing was filed asking for clarity and highlighting the Bond Bank program as an example of the potential over-reach of the decision. The Alaska Municipal League filed a brief in support of the State's petition and the Bond Bank program and the Forrer lawyer filed an opposition which are attached. At this point we need to wait and see what the Supreme Court is willing to do. If no action is taken or negative action then we have potential legislation or other alternatives that we will explore and provide to the board for consideration.

In October I was contacted by the Securities and Exchange commission requesting information related to the 2016 Series Three and Four bond sale. The inquiry appears to revolve around whether the bonds were sold to "flipper" accounts as this type of account participation needs to be considered and limited if there are other categories of bond purchasers requesting bonds.

The third quarter ethics report was filed with the Department of law in October.

Ryan and I have had conversations with five municipalities about the potential of borrowing through the Bond Bank for various municipal needs. We have advised them of the current uncertainty of the Bond Bank program and have tried to assist them in finding alternatives if we aren't able to resolve the concerns related to the Forrer decision.

THE SUPREME COURT OF THE STATE OF ALASKA

ERIC FORRER, Appellant, v. STATE OF ALASKA and LUCINDA MAHONEY, Commissioner of the Alaska Department of Revenue in her official capacity, Appellees.	Supreme Court No. S-17377 Superior Court No. 1JU-18-00699 CI O P I N I O N No. 7480 – September 4, 2020

Appeal from the Superior Court of the State of Alaska, First Judicial District, Sitka, M. Jude Pate, Judge.

Appearances: Joseph W. Geldhof, Law Office of Joseph W. Geldhof, Juneau, for Appellant. Laura Fox, William E. Milks, and Mary Hunter Gramling, Assistant Attorneys General, Anchorage, and Kevin G. Clarkson, Attorney General, Juneau, for Appellees.

Before: Bolger, Chief Justice, Winfree, Stowers, Maassen, and Carney, Justices.

STOWERS, Justice.

I. INTRODUCTION

The issues we consider today are not new. The disastrous consequences of runaway state debt weighed heavily on the minds of the Alaska Constitutional

Convention's Delegates as they pooled their collective knowledge and expertise to ensure that the 49th State would not suffer financial missteps of generations past.[1] As Delegate Barrie M. White aptly explained:

> [I]ncurring debt is different from most any other type of legislation in that it not only goes directly to the pocketbook of the people concerned, but all the people of the State, but also to the pocketbook of future generations and that is why . . . so many states, so many local political subdivisions, always require debt to be approved by the people.[2]

Having experienced the Great Depression firsthand,[3] the Delegates desired fiscal responsibility and public accountability; these principles reverberate throughout article IX of the Alaska Constitution. The clearest expression of this collective intent is contained in section 8: "*No state debt* shall be contracted unless authorized by law for capital improvements or . . . housing loans for veterans, and ratified by a majority of the qualified voters of the State who vote on the question."[4] Through this provision, the Delegates sought to prohibit "state debt" of any kind without public approval, subject

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[1] *See, e.g.*, 4 Proceedings of the Alaska Constitutional Convention (PACC) 2424 (Jan. 17, 1956) (statement of Del. Seaborn J. Buckalew) ("Now the only reason that you have any limitations or restrictions on the legislature is to prevent the legislature from impairing the credit of the state. You don't want to get a runaway legislature and deplete the treasury or obligate the people for something that they can't pay for."); 3 ALASKA STATEHOOD COMM., CONSTITUTIONAL STUDIES pt. IX, at 21-23 (1955) [hereinafter CONSTITUTIONAL STUDIES] (providing a brief history of debt limitations in state constitutions).

[2] 4 PACC 2434 (Jan. 17, 1956) (statement of Del. Barrie M. White).

[3] *See* 1 PACC 441-42 (Nov. 30, 1955) (statement of Del. Victor C. Rivers) (detailing economic recovery efforts in Alaska after the Great Depression).

[4] Alaska Const. art. IX, § 8 (emphasis added).

only to a small set of exceptions.[5] Today we are called upon to reaffirm those basic principles.

Anticipating a shortfall of revenue from previously enacted tax incentives, the 30th Alaska State Legislature attempted to offset future fiscal unpredictability by authorizing a discounted buyback of tax credits financed by bonds without pledging the "full faith and credit" of the State. Without a vote of the people, the legislature created a public corporation capable of borrowing up to $1 billion through the issuance of subject-to-appropriation bonds to purchase outstanding oil and gas exploration tax credits, with bondholders to be reimbursed solely at the discretion of future legislatures through appropriations to the new public corporation. A taxpayer brought suit, alleging *inter alia* that the legislature violated the Alaska Constitution's state debt limitation. The superior court granted the State's motion to dismiss, ruling that the legislation did not create "debt" for purposes of the constitutional limitation. We reverse and hold that this financing scheme — even if unforeseeable in the mid-twentieth century — is the kind of constitutional "debt" that the framers sought to prohibit under article IX, section 8 of the Alaska Constitution.

II. FACTS AND PROCEEDINGS

A. History Of Constitutional Debt Limits

Unlike the federal constitution, many state constitutions contain limitations or prohibitions on the debt that state and local governments may incur.[6] The origins of

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[5] Article IX, section 8 also contains exceptions for emergencies and for "redeeming indebtedness outstanding at the time this constitution becomes effective," neither of which is involved here.

[6] Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 908 & n.12 (2003).

state constitutional debt provisions can be found in the early nineteenth century.[7] Following the War of 1812, states sought to improve infrastructure for protection and to encourage westward expansion.[8] State constitutions adopted between 1830 and 1850 thus "encourage[d] internal improvements within the state," such as the construction of turnpikes, canals, and railroads.[9] Toward that end, many states sold bonds pledging their full faith and credit then loaned the proceeds to private corporations to carry out various construction projects.[10]

But states began incurring debt "almost without limit," growing their collective debt from $13 million in 1830 to $100 million in 1838.[11] The bubble eventually burst when it became clear that many corporations could not repay their loans to states and could not generate the projected revenue from their projects.[12] When the

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[7] Susan P. Fino, *A Cure Worse than the Disease? Taxation and Finance Provisions in State Constitutions*, 34 RUTGERS L.J. 959, 965-66 (2003).

[8] *See Attorney Gen. v. Pingree*, 79 N.W. 814, 816 (Mich. 1899); Fino, *supra* note 7, at 965-66.

[9] *Pingree*, 79 N.W. at 816; *see also* Fino, *supra* note 7, at 965-66 (discussing internal improvements); Briffault, *supra* note 6, at 911 (same).

[10] Fino, *supra* note 7, at 967.

[11] *Pingree*, 79 N.W. at 816.

[12] Briffault, *supra* note 6, at 911; *see also Pingree*, 79 N.W. at 816 ("But now, that the great bubble of speculation and inflation was burst, it became plain to the comprehension of the dullest that some of the state projects were wild and chimerical, and they were abandoned altogether.").

nation was besieged by an economic crisis referred to as the Panic of 1837, some states repudiated their debts or defaulted on interest payments as a result.[13]

Before 1840 no state constitution contained a restriction on incurring state debt.[14] After the Panic of 1837 many states revised their constitutions to include restrictions on legislative discretion to create state debt.[15] But within a few decades the booming railway industry made legislatures eager to circumvent those constitutional debt restrictions.[16] The favored means of achieving this was to issue bonds through municipalities, but the economic crisis that followed led to more state constitutional revisions closing that loophole.[17] The next major device for circumventing state debt

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[13] Briffault, *supra* note 6, at 911; *see also Lonegan v. State* (*Lonegan I*), 809 A.2d 91, 95-96 (N.J. 2002) (explaining the origins of New Jersey's Debt Limitation Clause from the Panic of 1837 and the economic crisis's impact on states).

[14] Stewart E. Sterk & Elizabeth S. Goldman, *Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations*, 1991 WIS. L. REV. 1301, 1309.

[15] Briffault, *supra* note 6, at 917. By the mid-twentieth century, nearly every state had adopted some form of debt limitation. *Id.* at 917 n.55; C. Robert Morris, Jr., *Evading Debt Limitations with Public Building Authorities: The Costly Subversion of State Constitutions*, 68 YALE L.J. 234, 240-41 (1958). The general purpose of constitutional debt limits has been described as being based on the reality "that governments are congenital borrowers who often deal unwisely" by resorting to "excessive borrowing" when "caught between the popular pressures for new developments and against additional taxes." *Id.* at 247.

[16] Fino, *supra* note 7, at 977-78; *see also* Morris, *supra* note 15, at 241 (municipalities).

[17] *See* Fino, *supra* note 7, at 977-78; Reuven Mark Bisk, Note, *State and Municipal Lease-Purchase Agreements: A Reassessment*, 7 HARV. J.L. & PUB. POL'Y 521, 525-26 (1984) (explaining that municipal debt restrictions arose from municipalities purchasing railroad stock with borrowed funds "to persuade the railroad to pass through

(continued...)

restrictions was the public authority, which first became popular in the 1930s.[18] In theory, a public authority or public corporation would be a distinct unit from the state for most purposes and could issue bonds, levy charges, and repay its debts without violating constitutional debt restrictions.[19]

B. Proceedings Of The Alaska Constitutional Convention

More than a century after the Panic of 1837,[20] the framers of our constitution sought to preserve the role of the people as a check against the incurrence of unnecessary debt, rather than impose a strict debt limit.[21] The Delegates received extensive materials in advance of the convention, including copies of every state constitution[22] and a collection of reports drafted on behalf of the Alaska Statehood

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[17] (...continued)
its town," but that practice ended with the Depression of 1873).

[18] Briffault, *supra* note 6, at 926-27; Morris, *supra* note 15, at 234-39.

[19] Morris, *supra* note 15, at 234-40; *see also Lonegan I*, 809 A.2d 91, 101-02 (N.J. 2002) (collecting cases); *Schulz v. State*, 639 N.E.2d 1140, 1146 (N.Y. 1994) (explaining that "a public authority would be self-supporting" and "would separate their administrative and fiscal functions from those of the State").

[20] *See* VICTOR FISCHER, ALASKA'S CONSTITUTIONAL CONVENTION, at vii (1975).

[21] In this sense, a "strict" debt limit refers to "[a] ceiling placed on borrowing by . . . [the] government" by "prohibit[ing] the state[] from incurring debt in excess of a stated amount." *Debt Limitation*, BLACK'S LAW DICTIONARY (11th ed. 2019). Such limits are often expressed by a percentage of total revenue; for example, Hawaii prohibits the legislature from issuing general obligation bonds if doing so would cause the total outstanding debt to exceed 18.5% of the average general fund revenues from the prior three years. Haw. Const. art. VII, § 13.

[22] *See* ALASKA STATEHOOD COMM., HANDBOOK FOR DELEGATES TO THE ALASKA CONSTITUTIONAL CONVENTION 4-5 (Nov. 8, 1955) [hereinafter DELEGATE (continued...)

Committee.[23] The report on state finance in particular recognized that strict debt limitations "reflect a fear that the state may borrow itself into insolvency" and "are common in state constitutions."[24] The report viewed the efficacy of such debt limits as "questionable," despite their widespread proliferation, based on the assumption that "[t]he era of heavy borrowing for economic development . . . is long past."[25] The report concluded by noting that a democratically elected legislature and market pressures "seem to make constitutional debt restrictions . . . unnecessary," and thus suggested only a constitutional requirement that the legislature specify the sources for financing appropriations.[26] The Committee on Finance and Taxation,[27] which was responsible for the task of drafting what would become article IX, rejected this reasoning when it included a number of debt restrictions in its initial proposal.[28]

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[22] (...continued)
HANDBOOK], http://www.akleg.gov/pdf/billfiles/ConstitutionalConvention/Folder%20106.pdf.

[23] CONSTITUTIONAL STUDIES, *supra* note 1; *see also State v. Alex*, 646 P.2d 203, 209 n.5 (Alaska 1982) (noting that Delegates to the Constitutional Convention all received the Alaska Statehood Committee's reports).

[24] 3 CONSTITUTIONAL STUDIES, *supra* note 1, pt. IX, at 21.

[25] *Id.* at 23.

[26] *Id.*

[27] The Committee on Finance and Taxation consisted of Delegates Dorothy J. Awes, Frank Barr, James Nolan, Frank Peratrovich, Chris Poulsen, and Barrie M. White, with Leslie Nerland as the Chair. 6 PACC App. V at 104 (Dec. 16, 1955). The Committee appointed Frank Barr as its Vice-Chair and Barrie M. White as Secretary. 1 PACC 264 (Nov. 16, 1955).

[28] *See* 6 PACC App. V at 105-09 (Dec. 16, 1955).

> The Committee did consider for a time allowing the legislature to provide for a debt up to a certain limit, but that was decided against, so at the present time the only debt of the state now which can be allowed is a debt to be paid out of anticipated revenues, that is from year to year, except a debt which must be approved by the people on referendum. In other words, the people are the ones that put the limit on any public debt, any large amount.[29]

The Committee rejected other forms of debt restrictions[30] and specifically rebuffed a suggestion to adopt a strict percentage-based debt ceiling.[31] The Committee reasoned that any amount "would perhaps be either inadequate, too high or too low, and would not offer any protection either way."[32] After "a good deal of consideration," the Committee decided that rather than "leaving it entirely to the legislature" or setting a strict debt limit, it would adopt a reasonable middle ground — "that a referendum be called for and . . . the approval by the qualified voters be obtained."[33] Delegate White summarized this rationale best in the continuation of his statement we quoted at the outset:

> [A] bond proposal to the people via referendum is the greatest way that you can take as a minimum requirement to insure that the credit of the state will not be impaired. . . .

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[29] 2 PACC 1112 (Dec. 19, 1955) (statement of Del. Frank Barr).

[30] *Id.* (statement of Del. Barrie M. White) ("We considered other limitations and discarded them.").

[31] 3 PACC 2302-03 (Jan. 16, 1956) (statement of Del. Leslie Nerland).

[32] *Id.* at 2303.

[33] *Id.* at 2302.

> [T]he basic question here is whether or not you want the people of the state to pass on an incurrence of debt or whether you want to leave it to the legislature.[34]

One proposed amendment would have nevertheless permitted a two-thirds vote of the legislature to contract debt without a public referendum.[35] Delegates in opposition argued that "the people should be allowed to vote on whether or not the state shall become indebted."[36] Delegate White, who also served as Committee Secretary, reiterated that "[i]t is the opinion of the majority of the Committee that such debt should be approved by the voters."[37] Delegates in favor of giving the legislature more control suggested "that two-thirds of each house will more adequately protect the credit of the state" than a public referendum,[38] while some noted that similar provisions had seen success in other state constitutions.[39] Others pointed to the revenue bond exception, reasoning that a strict public referendum requirement would "force the state" to rely on establishing separate corporations and selling revenue bonds, which would in turn "force a much higher interest rate on the taxpayers of Alaska."[40] Those arguments were rejected when the Delegates voted to delete the two-thirds language from the proposed

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[34] 4 PACC 2434 (Jan. 17, 1956) (statement of Del. Barrie M. White).

[35] *Id.* at 2421.

[36] *Id.* at 2432 (statement of Del. W.O. Smith).

[37] *Id.* at 2434 (statement of Del. Barrie M. White).

[38] *Id.* at 2424 (statement of Del. Seaborn J. Buckalew).

[39] *Id.* at 2421-22 (statement of Del. Burke Riley).

[40] *Id.* at 2435-36 (statement of Del. Victor Fischer). The response to this argument was that higher interest rates are "merely an added inducement to go back to the referendum where such issues ought to be." *Id.* at 2437 (statement of Del. Barrie M. White).

amendment.[41] Another proposed amendment would have permitted the legislature to set the voting requirements for municipal bond measures, but that too was defeated.[42] The Delegates preferred to keep the public referendum procedures intact as a check against future legislatures.

Of course, the framers also recognized that an appropriate amount of flexibility would be necessary for the State to meet unforseen financial situations in the future.[43] Section 11 provides that flexibility by permitting the State to issue "revenue bonds . . . when the only security is the revenues of the enterprise or corporation" and eliminating any restrictions on "refunding indebtedness of the State."[44] And because those exceptions might not sufficiently alleviate section 8's debt prohibition, section 10 allows the State to "borrow money to meet appropriations" without restriction, under the sole caveat that "all debt so contracted shall be paid before the end of the next fiscal year."[45] Debate surrounding the anti-dedication provisions in section 7 likewise echoed the Delegates' desire to limit debt by preserving legislative discretion to freely allocate appropriations from the general fund.[46] In providing a select and limited handful of

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[41] *Id.* at 2437-38.

[42] *See* 3 PACC 2335-43 (Jan. 16, 1956).

[43] *See* 1 PACC 9 (Nov. 8, 1955) (statement of Robert B. Atwood, Chair, Alaska Statehood Committee) (noting that Alaskans do not want "unwise restrictions and all the other abhorrent developments that come from an inflexible constitution").

[44] Alaska Const. art. IX, § 11.

[45] *Id.* § 10.

[46] *See id.* § 7; 4 PACC 2364 (Jan. 17, 1956) (statement of Del. Barrie M. White); *id.* at 2368 (statement of Del. Dorothy J. Awes); *id.* at 2409 (statement of Del. Mildred R. Hermann); *id.* at 2413 (statement of Del. Seaborn J. Buckalew); 6 PACC (continued...)

pathways to incur and manage "state debt," the framers sought to balance competing ideals of fiscal restraint and flexibility.[47]

Belying the depth of debate on article IX, section 8, the framers refrained from attaching a technical definition to the term "debt."[48] Instead, section 8 was intended to apply broadly to the contracting of all "ordinary debt."[49] The Delegates entertained varying views on what this restriction encompassed[50]: some referred to section 8 as

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[46] (...continued)
App. V at 111 (Dec. 16, 1955).

[47] *See* 2 PACC at 1109 (Dec. 19, 1955) (statement of Del. Barrie M. White) ("[Article IX] is aimed to assure a sound system of finance and taxation and leave as much leeway to the state as possible and the sound practices to be carried out in the future.").

[48] Other state constitutions reviewed by the Delegates took the opposite approach. *See, e.g.*, Wash. Const. art. VIII, § 1(d) (defining "debt" as "borrowed money . . . secured by the full faith and credit of the state").

[49] 2 PACC 1110-11 (Dec. 19, 1955) (statement of Del. Barrie M. White); *see also id.* at 1112 ("The only limitations here are that *ordinary debts* be submitted to the voters for approval . . . ." (emphasis added)).

[50] The most pertinent opinions are perhaps those of the Committee on Finance and Taxation. In its initial proposal, the Committee noted that it "considered and incorporated in this report many of the ideas contained in convention proposals numbered 3, 4, 6 (Sections 8, 10, 11 and 12), 20 and 41." 6 PACC App. V at 104 (Dec. 16, 1955). Of particular relevance here is Delegate Proposal No. 4, introduced by Delegate R.E. Robertson, which proposed a strict percentage limit for all "current, bonded, and other indebtedness" of the State. Del. Proposal No. 4, § 1, Alaska Constitutional Convention (Nov. 17, 1955), http://www.akleg.gov/pdf/billfiles/ConstitutionalConvention/Folder%20300.pdf. Although the Committee rejected such a restriction, this proposal suggests it was aware that Delegates understood the term "debt" to mean more than just bonded indebtedness. While Delegate Proposal No. 6 dealt with public education, section 12's proposed language bears a striking resemblance to article
(continued...)

limiting the ability to "borrow money,"[51] others as placing limitations on "reasonable borrowing."[52] Still others were more generally concerned with preserving the State's credit.[53] At its narrowest, some Delegates thought of section 8 as applying only to "general obligation bonds," although that was usually when framed as the opposite of "revenue bond[s]."[54] Despite these differences, one commonality is that the Delegates

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[50] (...continued)
IX, section 8 of the Alaska Constitution. *Compare* Del. Proposal No. 6, § 12, Alaska Constitutional Convention (Nov. 17, 1955), http://www.akleg.gov/pdf/billfiles/ConstitutionalConvention/Folder%20300.pdf ("The State shall incur no public school debt without first obtaining sanction of the people of the State in a state-wide referendum . . . ."), *with* Alaska Const. art. IX, § 8. The Committee was therefore well aware of the importance Delegates placed on public referenda for any type of debt approval, even school bonds.

[51] *See* 2 PACC 1112 (Dec. 19, 1955) (statement of Del. Maurice T. Johnson) ("[I]n Section 9 and 10 there seems to be a limitation on the right of the state to borrow money."). At this point in the Convention, "Section 9" referred to what would eventually be split into current sections 8 and 9 of article IX. *See* 3 PACC 2301-04 (Jan. 16, 1956) (renumbering as section 8); 4 PACC 2421-41 (Jan. 17, 1956) (splitting into separate provisions for state and local debts).

[52] 3 PACC 2338 (Jan. 16, 1956) (statement of Del. John H. Rosswog).

[53] *See* 4 PACC 2424 (Jan. 17, 1956) (statement of Del. Seaborn J. Buckalew) ("Now the only reason that you have any limitations or restrictions on the legislature is to prevent the legislature from impairing the credit of the state."); 2 PACC 1112 (Dec. 19, 1955) (statement of Del. Barrie M. White) (noting that the credit of states with a "dollar or percentage [debt] limitation . . . is generally no better than the credit of states that have no debt limitations").

[54] *See, e.g.*, 3 PACC 2303 (Jan. 16, 1956) (statement of Del. Leslie Nerland) ("[Section 11] refers only to the allowance of contracting of *revenue debt* without the restrictions of the previous section on *general obligations*." (emphasis added)); 4 PACC 2393 (Jan. 17, 1956) (statement of Del. Victor C. Rivers) (differentiating between the requirement for a public referendum for "general obligation bonds" as opposed to (continued...)

understood that at its core the objective of section 8 was to control and restrict the issuance of bonds.[55] Thus, the public referendum requirement itself was considered paramount as "a necessary safeguard against excessive bonding."[56] The people of the Territory of Alaska subsequently ratified the Delegates' proposed Alaska Constitution on April 24, 1956.[57]

C. The 2003 And 2006 Oil And Gas Exploration Tax Credits

The saga of the transferrable oil and gas exploration tax credits begins with the decline of oil and gas production in Cook Inlet. Facing a maturing oil field and shrinking revenues,[58] the legislature in 2003 sought to prolong the life of existing

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[54] (...continued)
"revenue bond[s]"). The framers did not discuss "subject-to-appropriation" bonds, as this concept would not be developed until almost a decade later. *See Schulz v. State*, 639 N.E.2d 1140, 1148 (N.Y. 1994) (noting that the term " 'moral obligation' debt" was "apparently coined in the 1960's to describe appropriation-risk bonds that could not legally bind the Legislature beyond a session").

[55] *See, e.g.*, 3 PACC 2302 (Jan. 16, 1956) (statement of Del. Leslie Nerland) ("Section [8] is one regarding the contracting of bonded indebtedness . . . ."); *id.* at 2317 (statement of Del. Maurice T. Johnson) ("[W]ith reference to Section 8 . . . the one on the matter of bonded indebtedness . . . ."); *id.* at 2336 (statement of Del. Victor Fischer) ("I'm not against requiring a referendum before a local government unit can issue bonds . . . ."); *id.* at 2342 (statement of Del. Edward V. Davis) ("[U]nits of local government, as well as the state, should be governed by some basic rules before they can bond."); *see also* 2 PACC 941 (Dec. 16, 1955) (statement of Del. Ralph J. Rivers) ("Bonding would be to borrow . . . .").

[56] 3 PACC 2337 (Jan. 16, 1956) (statement of Del. Leslie Nerland).

[57] *See* Act of July 7, 1958, Pub. L. No. 85-508, § 1, 72 Stat. 339, 339 (providing for the admission of the State of Alaska into the Union).

[58] Minutes, S. Res. Comm. Hearing on S.B. 185, 23d Leg., 1st Sess. 2-3 (May 6, 2003) (testimony of Mark Myers, Dir., Div. of Oil and Gas, Dep't of Nat. Res.), (continued...)

operations in the region by reducing the amount of royalties owed,[59] which in turn would help preserve Alaskans' jobs in the oil and gas industry.[60] Aside from rescuing the Cook Inlet oil fields, the legislature also created new, transferrable exploration tax credits[61] to encourage production in marginal fields, thereby spurring job growth and future revenue.[62] The transferability of these credits was intended to assist small, independent "wildcat" explorers by permitting these future tax reductions to be sold on the existing market in exchange for capital to fund current operations.[63]

Three years later a new form of transferrable tax credit was introduced.[64] The 2006 oil and gas exploration tax credits were passed alongside a new production tax,[65] which restructured the prior oil and gas royalties regime to shift away from a gross

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[58] (...continued)
http://www.akleg.gov/PDF/23/M/SRES2003-05-061610.PDF.

[59] *See* ch. 59, § 2, SLA 2003 (codified as amended at AS 38.05.180(f)(6)).

[60] Minutes, S. Res. Comm. Hearing on S.B. 185, 23d Leg., 1st Sess. 22 (May 5, 2003) (statement of Gary Carlson, Senior Vice President, Forest Oil Corp.), http://www.akleg.gov/PDF/23/M/SRES2003-05-051534.PDF.

[61] *See* ch. 59, § 3, SLA 2003 (codified as amended at AS 43.55.025).

[62] Minutes, S. Fin. Comm. Hearing on S.B. 185, 23d Leg., 1st Sess. 9-10 (May 13, 2003) (statement of Sen. Thomas Wagoner, Sponsor), http://www.akleg.gov/PDF/23/M/SFIN2003-05-131641.PDF.

[63] Minutes, S. Fin. Comm. Hearing on S.B. 185, 23d Leg., 1st Sess. 8-9 (May 14, 2003) (statement of Dan Dickinson, Dir., Tax Div., Dep't of Revenue), http://www.akleg.gov/PDF/23/M/SFIN2003-05-140940.PDF.

[64] Ch. 2, § 13, TSSLA 2006 (codified as amended at AS 43.55.023).

[65] *Id.* § 25 (codified as amended at AS 43.55.160).

tax on production to a tax on net revenues.[66] Governor Frank Murkowski's transmittal letter explained that the overhaul was necessary for "encouraging investment in the state" and that it would "provide fiscal certainty for future generations of Alaskans."[67] The legislature heard testimony that the new tax credits would stimulate reinvestment in the State and have an immense impact on the economics of oil and gas exploratory operations.[68] These transferrable tax credits could then be used by the recipient to reduce its production taxes in any given year,[69] or they could be sold to another producer who could then use the transferred credits to reduce its own tax liability.[70] The recipient could likewise request the Department of Revenue to purchase its tax credits, subject to availability of annual legislatively appropriated funds.[71] The legislature subsequently created an oil and gas tax credit fund (Fund) to facilitate discretionary purchase of both

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[66] *See* 2006 Senate Journal 2258-62 (governor's transmittal letter for precursor bill); Minutes, H. Fin. Comm. Hearing on H.B. 3001, 24th Leg., 3d Sp. Sess. 3-4 (July 25, 2006) (statement of Robynn Wilson, Dir., Tax Div., Dep't of Revenue), http://www.akleg.gov/PDF/24/M/HFIN2006-07-251017.PDF (explaining the difference between gross and net taxes as applied to oil production).

[67] 2006 House Journal 4221-22.

[68] Minutes, *supra* note 66, at 9-10 (statement of Pedro van Meurs, Consultant, Office of the Governor).

[69] Ch. 2, § 13, TSSLA 2006 (codified as amended at AS 43.55.023(a), (c)); *see also* ch. 59, § 3, SLA 2003 (codified as amended at AS 43.55.025(a)-(b), (f), (i)).

[70] Ch. 2, § 13, TSSLA 2006 (codified as amended at AS 43.55.023(d)); *see also* ch. 59, § 3, SLA 2003 (codified as amended at AS 43.55.025(g)-(h)).

[71] Ch. 2, § 13, TSSLA 2006, *repealed by* Ch. 1, § 67, SSSLA 2007.

2003 and 2006 tax credits,[72] once again reliant on appropriations from the legislature.[73] At no time was the State under any obligation to purchase tax credits.

Despite the legislature's good intentions, oil prices plummeted in the latter half of 2014,[74] and Alaska began to face serious budgetary constraints.[75] The purchase of the combined 2003 and 2006 oil and gas exploration tax credits soon became "unsustainable," and responding to "challenging fiscal times," Governor Bill Walker signed a partial veto to reduce the legislature's annual appropriation to the Fund.[76] The legislature phased out the tax credits in 2016,[77] effectively terminating the program in 2017.[78] However, the tax credits that had already been issued remained in circulation, with an estimated $800 million in outstanding requests for purchase and another $200 million expected.[79] Governor Walker proposed his solution in House Bill (HB) 331.[80]

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[72] Ch. 1, § 46, SSSLA 2007 (codified as amended at AS 43.55.028).

[73] AS 43.55.028(b)(1).

[74] *See generally* Minutes, H. Fin. Comm. Hearing on Revenue Forecast, Oil and Gas Tax Credits, and FY 16 Budget Overview, 29th Leg., 1st Sess. (Jan. 27, 2015), http://www.akleg.gov/PDF/29/M/HFIN2015-01-271330.PDF (discussing the causes of the 2014 oil price decline and its potential effects on Alaska's budget).

[75] 2018 House Journal 2341.

[76] 2015 House Journal 1324-25.

[77] Ch. 4, 4SSLA 2016.

[78] Ch. 3, SSSLA 2017.

[79] 2018 House Journal 2341.

[80] *See* Committee Substitute House Bill (C.S.H.B.) 331, 30th Leg., 2d Sess. (2018).

D. HB 331 Rationale, Main Provisions, And Legislative History

In his transmittal letter, Governor Walker described HB 331 as "the next vital step in resolving the State's oil and gas tax credit obligation."[81] In the wake of falling oil prices and the State's reluctance to purchase outstanding tax credits, small producers faced many difficulties borrowing money to complete various projects.[82] Legislators heard firsthand accounts from participants in the oil and gas industry on how the tax credit program was essential for encouraging small producers to invest in Alaska,[83] and how uncertainty surrounding discretionary State purchase of those tax credits had already resulted in stalled projects and the loss of hundreds of jobs.[84] Rather than wait several years for a full payment, those small producers preferred to take a discount in exchange for certainty.[85] Financiers likewise testified how the tax credits had been monetized to secure loans for various exploratory projects[86] and that some small producers had already defaulted on their loans and were unable to access additional

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[81] 2018 House Journal 2341.

[82] *Id.*

[83] Minutes, H. Fin. Comm. Hearing on H.B. 331, 30th Leg., 2d Sess. 15 (Apr. 23, 2018) (statement of Kara Moriarty, CEO, Alaska Oil & Gas Ass'n), http://www.akleg.gov/PDF/30/M/HFIN2018-04-231335.PDF; *id.* at 18-19 (statement of Pat Foley, Senior Vice President, Caelus Alaska).

[84] *Id.* at 20-21 (statement of Pat Foley, Senior Vice President, Caelus Alaska); *id.* at 22-23 (statement of Jeff Hastings, CEO, SA Exploration).

[85] *Id.* at 13 (statement of Thomas Ryan, Managing Dir., Structured Fin. Grp., ING Capital, LLC).

[86] Minutes, H. Res. Comm. Hearing on H.B. 331, 30th Leg., 2d Sess. 7 (Apr. 4, 2018) (statement of Thomas Ryan, Managing Dir., Structured Fin. Grp., ING Capital, LLC), http://www.akleg.gov/PDF/30/M/HRES2018-04-041337.PDF.

equity due to uncertainty about future tax credit purchases.[87] Some legislators framed the goal of HB 331 as to "salvage" small producers "on the edge" that have "put Alaskans to work," but who still "owe their creditors many millions of dollars" and are now "barely hanging on."[88] At the same time, because HB 331 created a process that would purchase those tax credits at a discount, other legislators reasoned that the bonds would be "revenue-neutral," with the discount paying for interest on the proposed bonds.[89]

HB 331 attempts to accomplish both the governor's and the legislature's policy goals by creating a public corporation to issue and sell bonds, using those proceeds to purchase tax credits at a discount, and then repaying bondholders via a predictable schedule of future legislative appropriations.[90] First, the bill establishes the Alaska Tax Credit Certificate Bond Corporation (Corporation) within the Department of Revenue.[91] The Corporation's board of directors consists of three commissioners from

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[87] *Id.* at 10-11 (statement of Peter Clinton, Managing Dir., Credit Restructuring, ING Capital, LLC).

[88] S. Floor Deb. on C.S.H.B. 331, 30th Leg., 2d Sess. 3:42 (May 11, 2018) (statement of Sen. Peter Micciche), https://www.ktoo.org/gavel/video/?clientID=2147483647&eventID=2018051073.

[89] H. Floor Deb. on C.S.H.B. 331, 30th Leg., 2d Sess. 1:10 (May 3, 2018) (statement of Rep. Ivy Spohnholz), https://www.ktoo.org/gavel/video/?clientID=2147483647&eventID=2018051020.

[90] *See* 2018 House Journal 2342; Mike Barnhill & Ken Alper, Dep't of Revenue, HB331: Oil & Gas Tax Credit Bond Proposal Presentation to Commonwealth North, 30th Leg., 2d Sess. 10-14 (Mar. 30, 2018), http://www.akleg.gov/basis/get_documents.asp?session=30&docid=53914 (presented to H. Res. Comm.).

[91] AS 37.18.010.

the Executive Department: the Commissioner of Commerce, Community, and Economic Development; the Commissioner of Administration; and the Commissioner of Revenue.[92] Although the Corporation has the power to contract for services related to bond sales,[93] it has no employees.

Second, the Corporation is empowered to issue up to $1 billion in bonds, with that bonding authority to expire on December 31, 2021.[94] Bonds may be issued subsequent to a bond resolution fixing their terms.[95] Proceeds from bond sales — after covering issuance and administration costs — will be used to purchase outstanding tax credits through the existing Fund[96] at a discount of up to 10 percent.[97] Furthermore, bonds may be issued only if the Corporation finds that the discount rate would exceed the interest costs by 1.5 percent or more annually.[98] The Corporation may also refund bonds if doing so would be in the State's best interest, and it is authorized to separately issue refunding bonds and contract with a refunding trustee.[99] To facilitate this, the

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[92] AS 37.18.020.

[93] AS 37.18.030(e).

[94] AS 37.18.030(a)-(b).

[95] AS 37.18.060; *see also* AS 37.18.050 (describing the parameters of bond terms).

[96] AS 37.18.010; AS 43.55.028. The bond proceeds would be used to purchase both types of oil and gas exploration tax credits issued under AS 43.55.023 and AS 43.55.025, as well as claims for non-transferrable tax credits under existing programs in AS 43.20.046, AS 43.20.047, and AS 43.20.053.

[97] AS 43.55.028(*l*)-(m).

[98] AS 37.18.080.

[99] AS 37.18.090. If necessary, the Corporation is also permitted to provide (continued...)

Corporation may establish a reserve fund to hold money appropriated by the legislature for bond repayments,[100] as well as accrued interest on bond proceeds.[101] The reserve fund exists solely for the purpose of payments on the interest and principal of bonds.[102]

Finally, HB 331 makes all bond repayments "subject to appropriation,"[103] and the legislature is not explicitly required to deposit money in the reserve fund.[104] Certain bondholders can bring an enforcement action in state court to compel payment of their bonds,[105] although HB 331 limits lawsuits on the constitutionality or validity of the bill or of any bonds to be filed within 45 days after the Corporation adopts a bond resolution.[106] Perhaps in apprehension of just such a constitutional challenge, HB 331 contains several disclaimers:

> The bonds do not constitute a general obligation of the state and are not state debt within the meaning of art. IX, sec. 8, Constitution of the State of Alaska. Authorization by the

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[99] (...continued)
security for bonds by entering into credit-enhancement agreements. AS 37.18.050(b).

[100] AS 37.18.040(a)(1).

[101] AS 37.18.030(a).

[102] AS 37.18.040(b). The Corporation must also set a "required debt service reserve" threshold via resolution, and it may not issue further bonds if the amount on deposit in the reserve fund falls below that threshold. AS 37.18.040(f), (j). But it can deposit bond proceeds to meet that threshold and is permitted to issue bonds for the purpose of replenishing the reserve fund to the required amount. AS 37.18.040(f).

[103] *See* AS 37.18.040(i); AS 43.20.046(e); AS 43.20.047(e); AS 43.20.053(e); AS 43.55.028(e).

[104] AS 37.18.040(g) ("the legislature *may* appropriate" (emphasis added)).

[105] AS 37.18.070.

[106] AS 37.18.110.

> legislature and ratification by qualified voters of the state is not required under art. IX, sec. 8, Constitution of the State of Alaska.[107]

Aside from differences in policy preferences among legislators the questionable constitutionality of the bonding arrangement in HB 331 generated its fair share of controversy. At the outset, the Legislative Affairs Agency provided a memorandum doubting whether HB 331 could qualify under any constitutional exception for incurring debt.[108] The memorandum cited a Georgia case[109] interpreting similar constitutional debt restrictions for the proposition that "a public corporation may not be used for the purpose of circumventing" article IX, section 8.[110] The Department of Law responded with its own analysis, arguing that subject-to-appropriation bonds "do not constitute a form of 'constitutional debt,' "[111] and the Governor formally requested an opinion from the Attorney General.[112] Rather than attempt to fit HB 331 within any

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[107] AS 37.18.030(c); *see also* AS 37.18.040(g) ("Nothing in this subsection creates a debt or liability of the state.").

[108] Emily Nauman, Legislative Affairs Agency, Memorandum on Constitutionality of HB 331, 30th Leg., 2d Sess. 3-7 (Apr. 13, 2018), http://www.akleg.gov/basis/get_documents.asp?session=30&docid=56309.

[109] *State Ports Auth. v. Arnall*, 41 S.E.2d 246, 254 (Ga. 1947).

[110] Nauman, *supra* note 108, at 7; *see also* H. Floor Deb. on C.S.H.B. 331, *supra* note 89, at 12:40 (statement of Rep. David Guttenberg) (praising the legal analysis in the Legislative Affairs Agency memo).

[111] William E. Milks & Mary H. Gramling, Dep't of Law, Memorandum on HB 331, Alaska Tax Credit Certificate Bond Corporation Legislation, 30th Leg., 2d Sess. 1 (Apr. 27, 2018), http://www.akleg.gov/basis/get_documents.asp?session=30&docid=56443.

[112] STATE OF ALASKA, DEP'T OF LAW, OP. ATT'Y GEN., 2018 WL 2092127, at (continued...)

exception under article IX, the Attorney General relied heavily on a New Jersey case[113] to argue that "subject-to-appropriation debt is not subject to the restrictions of article IX, section 8."[114] But state officials testifying before the legislature took a broader approach, framing HB 331 on several occasions as simply refunding existing debt[115] or as potentially qualifying as a revenue bond.[116]

Legislators in favor of the bill tried to pigeonhole HB 331 into one of the established exceptions for article IX, section 8. Despite the discretionary nature of the existing program for tax credit purchases, the most common refrain was that HB 331 was

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[112] (...continued)
*1 (May 2, 2018) [hereinafter OP. ATT'Y GEN.].

[113] *Lonegan v. State* (*Lonegan II*), 819 A.2d 395 (N.J. 2003).

[114] OP. ATT'Y GEN., *supra* note 112, at *6; *see also* Minutes, H. Fin. Comm. Hearing on H.B. 331, 30th Leg., 2d Sess. 22 (Apr. 27, 2018) (statement of Mike Barnhill, Deputy Comm'r, Dep't of Revenue), http://www.akleg.gov/PDF/30/M/HFIN2018-04-270906.PDF (arguing that subject-to-appropriation bonds are not state debt under article IX and noting that the administration was not "attempt[ing] to seek an exemption").

[115] Minutes, *supra* note 86, at 23 (statement of Sheldon Fisher, Comm'r, Dep't of Revenue) (reasoning that HB 331's impact on Alaska's credit rating would be minimal as "one form of obligation would be converted into a different form of obligation").

[116] Minutes, H. Res. Comm. Hearing on H.B 331, 30th Leg., 2d Sess. 9-10 (Apr. 6, 2018) (statement of Deven Mitchell, Exec. Dir., Alaska Mun. Bond Bank Auth., Dep't of Revenue), http://www.akleg.gov/PDF/30/M/HRES2018-04-061303.PDF (noting that bonding format had not been finalized and "it could also be structured . . . potentially as a revenue bond" (omission in original)). *But see* Deven Mitchell, Dep't of Revenue, Memorandum on Debt Potentially Impacted by Broad Interpretation of "Debt" in Alaska Constitution, 30th Leg., 2d Sess. 2 (Apr. 16, 2018), http://www.akleg.gov/basis/get_documents.asp?session=30&docid=56197 ("[T]he intention of using a public corporation to issue bonds . . . was not to fall into the exception clause in the Alaska Constitution . . . .").

"refunding indebtedness" under section 11.[117] The floor debates were replete with such statements: "This bill goes a long way towards fulfilling our promise and redeeming that unpaid debt."[118] "It's far better that we do this and finance our debt than pay it all back at once."[119] "Obviously, we're not really incurring new debt, . . .we're changing the nature of existing debt."[120] "[T]his is not new debt."[121] "I don't believe we're taking on a debt. We're already in debt here."[122] "The bond package before us is really a mechanism to refinance the current debt at a discounted rate . . . ."[123]

Some legislators also likened HB 331 to revenue bonds,[124] noting "that if we owe $100 and we only have to pay $90, there was some kind of revenue in

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[117] *See* Alaska Const. art. IX, § 11 ("The restrictions do not apply to indebtedness to be paid from special assessments on the benefited property, nor do they apply to refunding indebtedness of the State or its political subdivisions.").

[118] H. Floor Deb. on C.S.H.B. 331, *supra* note 89, at 12:29 (statement of Rep. Dan Saddler).

[119] *Id.* at 12:32.

[120] *Id.* at 12:37 (statement of Rep. Andrew Josephson).

[121] *Id.* at 12:42 (statement of Rep. David Talerico).

[122] *Id.* at 2:56 (statement of Rep. George Rauscher), https://www.ktoo.org/gavel/video/?clientID=2147483647&eventID=2018051026.

[123] S. Floor Deb. on C.S.H.B. 331, *supra* note 88, at 4:18 (statement of Sen. Anna MacKinnon).

[124] *See* Alaska Const. art. IX, § 11 ("The restrictions on contracting debt do not apply to debt incurred through the issuance of revenue bonds by a public enterprise or public corporation of the State or a political subdivision, when the only security is the revenues of the enterprise or corporation.").

between."[125] To further leave open the revenue bond argument, the House Finance Committee amended HB 331 to ensure that interest from overriding royalty agreements would be "separately account[ed] for" in the general fund as "revenue."[126] The Committee also rejected an amendment that would have explicitly disclaimed any reliance on the revenue bond rationale within the bill's text.[127]

HB 331 passed the House on May 3,[128] passed the Senate on May 11,[129] and Governor Walker signed it into law on June 20, 2018.[130]

E. Proceedings

Eric Forrer brought suit against the State and the Commissioner of the Department of Revenue, in his official capacity,[131] on May 14, 2018 — only three days after HB 331 passed the Senate. Forrer's original complaint primarily sought declaratory and injunctive relief on the grounds that the bonding scheme in HB 331 violated multiple

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[125] S. Floor Deb. on C.S.H.B. 331, *supra* note 88, at 4:17 (statement of Sen. Anna MacKinnon).

[126] Minutes, *supra* note 114, at 15-17. The legislature then "may appropriate" any "revenue" gained from those overriding royalty agreements into the Corporation's reserve fund. AS 44.37.230(i). The State has never relied on this section in defense of HB 331.

[127] Minutes, *supra* note 114, at 21-24.

[128] 2018 House Journal 3563.

[129] 2018 Senate Journal 3091.

[130] 2018 House Journal 3849.

[131] The Commissioner at the time Forrer initially filed suit was Sheldon Fisher, then Bruce Tangeman replaced him in this action, followed in 2020 by the current Commissioner, Lucinda Mahoney. *Forrer v. State*, No. S-17377 (Alaska Supreme Court Order, Feb. 24, 2020).

sections of article IX of the Alaska Constitution. The State did not answer Forrer's complaint but instead moved to dismiss for failure to state a claim.[132] The State supported its motion to dismiss with a 40-page memorandum and appended "a thick volume of legislative history for HB 331." The superior court ruled that the "inclusion of statutory history in support of a motion to dismiss . . . does not convert [it] into a motion for summary judgment."[133] The case was amenable to resolution without further briefing, in the superior court's reasoning, because the controversy turned entirely on "questions of law." The superior court rejected the State's arguments that the article IX, section 11 exceptions for revenue bonds or refunding indebtedness applied to HB 331. Nonetheless, the superior court granted the State's motion to dismiss on the grounds that HB 331 did not "create a legally enforceable debt" under the framework announced in *Carr-Gottstein Properties v. State* upholding a lease-purchase agreement against an article IX, section 8 challenge.[134] Forrer appeals.

Forrer argues on appeal that the superior court erred by granting the State's motion to dismiss without accepting all of his allegations as true and without converting it into a motion for summary judgment.[135] Forrer also renews his constitutional

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[132] *See* Alaska R. Civ. P. 12(b)(6).

[133] The superior court also relied on Delegates' statements from the Alaska Constitutional Convention to reach its decision. Motions to dismiss must be converted to motions for summary judgment when "matters outside the pleading are presented to and not excluded by the court." Alaska R. Civ. P. 12(b); *see also* Alaska R. Civ. P. 56 (summary judgment).

[134] 899 P.2d 136, 144 (Alaska 1995) (per curiam).

[135] Forrer specifically argues that the superior court was wrong "to address the merits of [his] constitutional claims in the context of a Motion to Dismiss." We interpret this as reviving his prior argument that the procedural posture should have been treated (continued...)

arguments against HB 331 in respect to article IX, section 7,[136] section 8,[137] and section 10.[138] We do not reach Forrer's arguments on section 7 and section 10.[139]

III. STANDARD OF REVIEW

We review de novo the grant of a motion to dismiss under Alaska Civil Rule 12(b)(6).[140] "In reviewing a Rule 12(b)(6) dismissal, we liberally construe the complaint and treat all factual allegations in the complaint as true."[141] We have consistently held that dismissals under Rule 12(b)(6) "should be granted only if 'it appears beyond doubt that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief.' "[142]

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[135] (...continued)
as that of summary judgment.

[136] Alaska Const. art. IX, § 7 (prohibiting dedicated funds).

[137] *Id.* § 8 (restricting the contracting of "state debt").

[138] *Id.* § 10 (permitting interim borrowing).

[139] To the extent that article IX, section 10 serves as another exception to the debt restrictions in section 8, the State has never argued that this exception applied; in fact, it has conceded that the bonds to be issued under HB 331 would not be repaid within a year. We likewise decline to endorse Forrer's interpretation of section 10 as an independent restriction that prohibits all "long-term debt."

[140] *Robinson v. Alaska Hous. Fin. Corp.*, 442 P.3d 763, 768 (Alaska 2019) (quoting *Clemensen v. Providence Alaska Med. Ctr.*, 203 P.3d 1148, 1151 (Alaska 2009)).

[141] *Id.* (quoting *Patterson v. Walker*, 429 P.3d 829, 831 (Alaska 2018)).

[142] *Id.* (quoting *Clemensen*, 203 P.3d at 1151).

Issues of constitutional interpretation are also reviewed de novo.[143] We have explained that when we interpret the constitution, we first "look to the plain meaning and purpose of the provision and the intent of the framers."[144] "Legislative history and the historical context" assist in our task of defining constitutional terms as understood by the framers.[145] While we have also said that we consider "precedent, reason, and policy,"[146] policy judgments do not inform our decision-making when the text of the Alaska Constitution and the framers' intent as evidenced through the proceedings of the Constitutional Convention are sufficiently clear.[147]

IV. DISCUSSION

A. The Superior Court Did Not Err When It Declined To Convert The State's Motion To Dismiss Into A Motion For Summary Judgment.

In the superior court proceedings, Forrer argued that the State, by attaching a number of legislative history materials to its motion to dismiss, automatically converted the motion into one for summary judgment. The superior court ruled otherwise, noting

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[143] *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017).

[144] *Id.* (quoting *Hickel v. Cowper*, 874 P.2d 922, 926 (Alaska 1994)).

[145] *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 90 (Alaska 2016).

[146] *Nelson v. State*, 440 P.3d 240, 243 (Alaska 2019) (quoting *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 260 (Alaska 2004)).

[147] *See Se. Alaska Conservation Council v. State*, 202 P.3d 1162, 1176-77 (Alaska 2009) (holding that courts must "enforce the considered judgment of the founders" regardless of any "attractive idea" or "deserving purpose" supporting the legislature's attempt to circumvent constitutional restrictions); *cf. Curran v. Progressive Nw. Ins. Co.*, 29 P.3d 829, 833 (Alaska 2001) ("[P]ublic policy can guide statutory construction but cannot override a clear and unequivocal statutory requirement.").

that "statutory history is legal material to be analyzed; it is not evidence of facts."[148] The court also disregarded a number of Forrer's allegations as "unwarranted factual inferences and conclusions of law," then proceeded to dismiss Forrer's suit under Civil Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

The superior court correctly concluded that the State's motion to dismiss was proper despite the State's submission of statutory history materials not in the pleadings. Rule 12(b) provides that when "matters outside the pleading are presented to and not excluded by the court, the motion [for dismissal] shall be treated as one for summary judgment and disposed of as provided in Rule 56." Although trial courts retain discretion over whether to convert a motion to dismiss in many instances, we have previously observed that "a court is *required* to do so only if it considers matters outside the pleadings."[149] Whether matters fall "outside the pleading" depends on the nature of those matters — while courts may not generally consider affidavits on a motion to dismiss,[150] "courts may consider materials . . . subject to 'strict judicial notice,' " such as "statutes and regulations, [or] matters of public record."[151] The ministerial act of judicial

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[148] *See Cox v. Estate of Cooper*, 426 P.3d 1032, 1042 (Alaska 2018).

[149] *Bachner Co. v. State*, 387 P.3d 16, 25 (Alaska 2016) (emphasis in original).

[150] *See Phillips v. Gieringer*, 108 P.3d 889, 892 (Alaska 2005) ("[A] court's inquiry on a motion under Rule 12(b)(6) essentially is limited to the content of the complaint, while summary judgment ' "involves the use of pleadings, depositions, answers to interrogatories, and affidavits." ' " (quoting *Martin v. Mears*, 602 P.2d 421, 426 n.5 (Alaska 1979))).

[151] *Pedersen v. Blythe*, 292 P.3d 182, 185 (Alaska 2012) (quoting *Martin*, 602 P.2d at 426 n.6).

notice is only required when the "question is one normally decided by the trier of fact."[152]

In contrast, issues of constitutional and statutory interpretation are decidedly questions of law,[153] for which resort to drafting history to clarify the meaning of language is common practice.[154] This is true even in the limited scope of Rule 12(b)(6) motions to dismiss.[155] Moreover, "strict judicial notice" is particularly unnecessary when the complaint itself relies upon those sources. Forrer implicitly called upon the court to exercise "sound judicial interpretation" of the Alaska Constitution, which we have previously noted may require referring to debates of the Constitutional Convention.[156] Nor can Forrer rightly complain about the State attaching HB 331's legislative history to its motion to dismiss when Forrer himself explicitly relies on "statements and testimony before the Alaska Legislature" from various State officials in his complaint. Forrer cannot selectively cherry-pick statements from certain officials in his complaint and then preclude the court from reviewing the bill's history in its entirety. Judicial notice was therefore not required when the superior court considered HB 331's legislative history and the drafting history of the Alaska Constitution as interpretive

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[152] Alaska R. Evid. cmt. 201(a).

[153] *See, e.g.*, *Premera Blue Cross v. State, Dep't of Commerce, Cmty. & Econ. Dev., Div. of Ins.*, 171 P.3d 1110, 1115 (Alaska 2007).

[154] *See, e.g.*, *Alaska Ass'n of Naturopathic Physicians v. State, Dep't of Commerce, Cmty. & Econ. Dev., Div. of Corps., Bus. & Prof'l Licensing*, 414 P.3d 630, 634 (Alaska 2018); *Wielechowski v. State*, 403 P.3d 1141, 1147 (Alaska 2017).

[155] *See Basey v. State, Dep't of Pub. Safety, Div. of Alaska State Troopers, Bureau of Investigations*, 408 P.3d 1173, 1175-76 (Alaska 2017).

[156] *See Wielechowski*, 403 P.3d at 1147; *State v. Alex*, 646 P.2d 203, 208-10 (Alaska 1982).

aids.[157] Nor was the mere proffer of publicly available legislative history[158] by the State enough to require the superior court to convert its motion to dismiss into a motion for summary judgment.

Forrer also faults the superior court's treatment of his factual allegations. In ruling on the State's motion to dismiss, the superior court excluded Forrer's submitted affidavits from consideration and expressly rejected several of Forrer's legal conclusions that were "style[d] [as] assertions of fact." We have previously explained that "even on a motion to dismiss, a court is not obliged to accept as true 'unwarranted factual inferences and conclusions of law.' "[159] The "facts" alleged by Forrer in this instance fall

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[157] This is not to suggest that judicial notice is *never* required for materials commonly considered part of a bill's legislative history. *See, e.g.*, *McPhail v. Latouche Packing Co.*, 8 Alaska 297, 302-04 (D. Alaska 1931) (weighing whether courts can take judicial notice of the dates of a bill's presentment to the governor and adjournment of the legislature as recorded in the legislature's journal when the controversy involved whether a bill was properly enacted). But many courts allow the consideration of legislative history as an interpretative aid without judicial notice. *See, e.g.*, *Quelimane Co. v. Stewart Title Guar. Co.*, 960 P.2d 513, 524 n.9 (Cal. 1998), *as modified* (Sept. 23, 1998) ("A request for judicial notice of published [legislative history] material is unnecessary. Citation to the material is sufficient."); *cf. Cox v. Estate of Cooper*, 426 P.3d 1032, 1034, 1041-42 (Alaska 2018) (upholding an Alaska Rule 77(k) motion for reconsideration of summary judgment where the moving party attached legislative history materials not previously presented to the court). *But see Territory of Alaska v. Am. Can Co.*, 358 U.S. 224, 226-27 (1959) (taking judicial notice of a statute's legislative history to aid in interpretation).

[158] The legislative history in question "consist[ed] of a copy of the enrolled bill and transcripts of the house and senate committee proceedings and floor debates." All of these materials are available in some form on the legislature's public website. *See* ALASKA ST. LEGISLATURE, http://www.akleg.gov (last visited June 9, 2020).

[159] *Haines v. Comfort Keepers, Inc.*, 393 P.3d 422, 429 (Alaska 2017) (quoting *Dworkin v. First Nat'l Bank of Fairbanks*, 444 P.2d 777, 779 (Alaska 1968)).

under the latter category.[160] And as illustrated above, the superior court was right to exclude materials outside the pleadings — e.g., affidavits — for purposes of a motion to dismiss.[161] Furthermore, factual assertions such as those Forrer alleges make little difference as a legal matter when considering the constitutionality of a statute on its face. Instead, this is an example of a case that presents no material factual dispute and can be resolved purely through the exercise of legal reasoning. It was proper here for the superior court to disregard Forrer's alleged "facts" and rule on the motion to dismiss without converting it into a motion for summary judgment.

B. HB 331 Contracts "State Debt" Prohibited By Article IX, Section 8.

1. Subject-to-appropriation bonds are contrary to the plain text of the Alaska Constitution and the framers' intent.

Our first step when presented with a question of constitutional law not squarely addressed by precedent is to consult the plain text of the Alaska Constitution as clarified through its drafting history.[162] Article IX, section 8 provides:

> No state debt shall be contracted unless authorized by law for capital improvements or unless authorized by law for housing loans for veterans, and ratified by a majority of the qualified voters of the State who vote on the question. The State may,

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[160] For example, Forrer claims that it was error for the superior court not to accept his allegation that "[t]he bonds created by HB 331 establish an obligation . . . to pay money to bond holders in the future." Whether the bonds authorized by HB 331 create an obligation is a matter of statutory interpretation — a question of law, not fact. *See In re Hospitalization of Paige M.*, 433 P.3d 1182, 1186 (Alaska 2018), *reh'g withdrawn* (Feb. 4, 2019). The superior court was correct to disregard Forrer's conclusory statements.

[161] *See* Alaska R. Civ. P. 12(b); *Martin v. Mears*, 602 P.2d 421, 426 n.5 (Alaska 1979).

[162] *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017) (quoting *Hickel v. Cowper*, 874 P.2d 922, 926 (Alaska 1994)).

> as provided by law and without ratification, contract debt for the purpose of repelling invasion, suppressing insurrection, defending the State in war, meeting natural disasters, or redeeming indebtedness outstanding at the time this constitution becomes effective.[163]

We do not interpret constitutional provisions in a vacuum — the document is meant to be read as a whole with each section in harmony with the others.[164] Terms and phrases chosen by the framers are given their ordinary meaning as they were understood at the time,[165] and usage of those terms is presumed to be consistent throughout.[166] Although we may look to other jurisdictions' experiences with interpreting similar constitutional terms,[167] each state constitution's debt provisions are different and must be interpreted

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[163] Alaska Const. art. IX, § 8.

[164] *Cf. Rydwell v. Anchorage Sch. Dist.*, 864 P.2d 526, 528 (Alaska 1993) ("Whenever possible, this court interprets each part or section of a statute with every other part or section, so as to create a harmonious whole."); 73 AM. JUR. 2D *Statutes* § 96, Westlaw (database updated May 2020); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 167-69 (2012) (whole-text canon); *id.* at 180-82 (harmonious-reading canon). While these are canons of *statutory* construction, we have recognized that "[t]he basic principles for interpreting statutes apply to constitutions." *Thomas v. Bailey*, 595 P.2d 1, 4 (Alaska 1979).

[165] *Hickel*, 874 P.2d at 926; *see also Citizens Coal. for Tort Reform, Inc. v. McAlpine*, 810 P.2d 162, 169 (Alaska 1991) (relying on a 1966 dictionary to determine the plain meaning of article XI, section 7).

[166] *See Fancyboy v. Alaska Vill. Elec. Coop., Inc.*, 984 P.2d 1128, 1133 (Alaska 1999) ("We assume as a rule of statutory interpretation that the same words used twice in the same statute have the same meaning."); SCALIA & GARNER, *supra* note 164, at 170-73 (presumption of consistent usage).

[167] *See Citizens Coal. for Tort Reform*, 810 P.2d at 166-67.

in light their purpose and relevant history.[168] Legal dictionaries and treatises also recognize that

> [t]he word "debt," appearing in a constitution or statute fixing a debt limit for municipalities, does not have a fixed legal signification but is used in different statutes and constitutions in senses varying from a very restricted to a very general signification. Its meaning, therefore, in any particular statute or constitution is to be determined by construction.[169]

The Alaska Constitution does not define the term "debt" as used in article IX, unlike some other state constitutions that explicitly limit the term to those obligations backed by the state's "full faith, credit and taxing powers."[170] But the text of section 8 identifies two primary characteristics of "debt": (1) the debt must be "contracted," implying a volitional act, potentially involving a contract or other promise of repayment; and (2) it must be for a specific "purpose," only a handful of which are permissible.[171] Whether the State's "full faith and credit" is pledged is not an express consideration.[172]

Section 10 sheds further light on the contours of section 8: "The State and its political subdivisions may *borrow money* to meet appropriations for any fiscal year in anticipation of the collection of the revenues for that year, but *all debt so contracted*

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[168] *See id.* at 170 (citing *Thomas*, 595 P.2d at 4).

[169] *Debt*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969); *accord* 56 AM. JUR. 2D *Municipal Corporations, Etc.* § 526, Westlaw (database updated May 2020).

[170] Minn. Const. art. XI, § 4; *see also* Haw. Const. art. VII, § 12; Or. Const. art. XI-Q, § 2(2); Wash. Const. art. VIII, § 1(d).

[171] *See* Alaska Const. art. IX, § 8.

[172] *See Hickel v. Cowper*, 874 P.2d 922, 927-28 (Alaska 1994) ("We are not vested with the authority to add missing terms or hypothesize differently worded provisions in order to reach a particular result.").

shall be paid before the end of the next fiscal year."[173] Section 10 provides the sole means for the legislature to borrow funds for any purpose — not just those enumerated in section 8 — but with the strict caveat of repayment within a year.

Section 11 adds one final parameter to the constitutional meaning of "debt":

> The restrictions on contracting debt do not apply to debt incurred through the issuance of revenue bonds by a public enterprise or public corporation of the State or a political subdivision, when the only security is the revenues of the enterprise or corporation. The restrictions do not apply to indebtedness to be paid from special assessments on the benefited property, nor do they apply to refunding indebtedness of the State or its political subdivisions.[174]

Again, the act of "contracting debt" explicitly includes "the issuance of . . . bonds," aside from the narrow exception of "revenue bonds."[175] Section 11 also exempts "refunding indebtedness" previously contracted under section 8.[176] Where section 10 provides a

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[173] Alaska Const. art. IX, § 10 (emphasis added).

[174] *Id.* art. IX, § 11.

[175] The fact that only "revenue bonds" are specifically excluded likewise suggests that all other types of bonds are included under the maxim of *expressio unius est exclusio alterius*. *See Alaska State Comm'n for Human Rights v. Anderson*, 426 P.3d 956, 964 n.34 (Alaska 2018).

[176] The State argues that the term "indebtedness" is broader than "state debt" and should encompass any "unavoidable, pre-existing financial obligation of the State." The only concrete example of "indebtedness" from the text is that of "special assessments on the benefited property" — in other words, local taxes levied on properties within a service area. *See generally Fink v. Municipality of Anchorage*, 424 P.3d 338 (Alaska 2018) (discussing special assessments for roads and sewers). A municipality's power to establish a "service area" and "levy[] . . . assessments" flows directly from the constitution. Alaska Const. art. X, § 5 (organized boroughs); *see also id.* § 6 (granting the legislature the same power over unorganized boroughs). Thus the term (continued...)

narrow exception to section 8's limits on permissible purposes, section 11 clarifies that revenue bonds and certain types of non-volitional obligations are not "debt" proscribed by article IX, section 8.

The debt provisions in article IX thus form a cohesive whole, with sections 10 and 11 providing narrow exceptions to the blanket restriction in section 8.[177] This interpretation comports with how Delegates discussed these provisions,[178] as well as their broader understanding of "debt" as "borrow[ed] money,"[179] usually in the context of issuing bonds.[180] In *Village of Chefornak v. Hooper Bay Construction Co.*, we likewise held that article IX, section 9's restrictions on local debts "are applicable only where a political subdivision has endeavored to borrow money, via the issuance of bonds or other

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[176] (...continued)
"indebtedness" at most also encompasses sums the State owes through the operation of other constitutional provisions. *See, e.g.*, *Vill. of Chefornak v. Hooper Bay Constr. Co.*, 758 P.2d 1266, 1270 (Alaska 1988) (holding that court-ordered money judgment was not "contracting debt" for purposes of article IX, section 9). The controversy before us does not present such a situation, so we need not address the scope of this exception.

[177] Because these exceptions apply to different aspects of section 8, they appear to be mutually exclusive. In other words, the legislature could not borrow unlimited funds under section 10, then restructure the resulting debt under section 11 to circumvent section 10's one-year repayment requirement.

[178] *See, e.g.*, 2 PACC 1112 (Dec. 19, 1955) (statement of Del. Frank Barr) ("[T]he people are the ones that put the limit on any public debt . . . .").

[179] *Id.* (statement of Del. Maurice T. Johnson).

[180] *See, e.g.*, 3 PACC 2302 (Jan. 16, 1956) (statement of Del. Leslie Nerland) ("[T]he contracting of bonded indebtedness . . . should in each case be approved by a majority of the qualified voters . . . .").

paper indebtedness."[181] We noted at the time "that every previous Alaska case involving section 9 . . . [or its] parallel constitutional provision applicable to state debts has concerned bonding issues."[182] We concluded that "a judgment entered upon a settlement stipulation" did not fall under the article IX restrictions against contracted debt.[183] *Carr-Gottstein Properties v. State* likewise interpreted " 'debt' as a term of art used to describe an 'obligation' involving borrowed money" in upholding a lease-purchase agreement where there was no "promise to pay . . . rents accruing in the future."[184] As we explain below, HB 331 also fails to satisfy the *Carr-Gottstein* three-prong test for constitutionally permissible "debt."

Against this background the State argues that the Delegates' silence on "subject-to-appropriation debt" evinces an intent to not prohibit new "forms of debt." The State selectively cites passages from the Constitutional Convention debates to support its narrower understanding of "debt" as encompassing only "bonds pledging the 'full faith and credit of the state.' " As discussed above, we look to the Delegates' debates and statements in interpreting the constitution.[185] Undercutting the State's

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[181] 758 P.2d at 1270.

[182] *Id.* at 1269.

[183] *Id.* at 1269-70.

[184] 899 P.2d 136, 142 (Alaska 1995) (per curiam) (quoting Bisk, *supra* note 17, at 537).

[185] *See, e.g.*, *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 92-95 (Alaska 2016) (reviewing Delegates' debate over state-local cooperative programs to determine constitutionality); *Sonneman v. Hickel*, 836 P.2d 936, 938-39 (Alaska 1992) (giving particular weight to Delegate White's statements for intent of article IX, section 7, as he was "the spokesman for the committee which drafted [that] section"); *Abood v. League of Women Voters of Alaska*, 743 P.2d 333, 341-43 (Alaska 1987) (considering Delegates' (continued...)

argument, there was only a single, passing mention of the phrase "full faith and credit" during the Constitutional Convention, and it appeared in the context of a debate concerning voter requirements for statewide bond elections:

> The *full faith and credit* of the state is explained on every bond issue, and that is a debt service that applies to all taxpayers . . . , and I don't think that we want to compel a registration of all property within the state . . . just in order to have a tax roll so people can be qualified to vote as property owners in statewide elections. I think everybody should vote in a statewide election.[186]

Delegates knew that other state constitutions defined "debt" to include full faith and credit,[187] but omitted such language. As we mentioned before, the Delegates had a wide array of opinions on the meaning of "debt," ranging from general obligation bonds to all borrowed money, or even any act that might impugn the State's credit.[188] It should come as no surprise, therefore, that neither *Chefornak* nor *Carr-Gottstein* mentioned "full faith and credit" when discussing "debt" in the article IX context.[189]

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[185] (...continued)
own policy on closed meetings to deny implied constitutional right of public access to legislative meetings).

[186] 3 PACC 2346 (Jan. 16, 1956) (statement of Del. Ralph J. Rivers) (emphasis added). Because Delegate Ralph J. Rivers was not a member of the Committee on Finance and Taxation, see 6 PACC App. V at 104 (Dec. 16, 1955), this passing reference is afforded no greater weight than the varied opinions of the other Delegates.

[187] *See* DELEGATE HANDBOOK, *supra* note 22, at 4-5 (noting that Delegates were provided copies of all state constitutions, including those proposed for Hawaii and Puerto Rico).

[188] *See supra* Part II.B.

[189] We have used the phrase "full faith, credit and resources" only once before (continued...)

In support of its narrow interpretation of "debt," the State cites past decisions in which we considered dispositive whether the State's credit was pledged. But the State misconstrues our precedents. In *DeArmond v. Alaska State Development Corp.*, we considered a constitutional challenge against one of the first Alaska corporations created to issue revenue bonds.[190] Of primary concern was whether the legislature's start-up loan to the bond-issuing corporation and the corporation's use of expected bond proceeds was a use of "public funds" or "public credit" that was not "for a public purpose" as required by article IX, section 6.[191] Because the corporation clearly served a public purpose, and because the challenged revenue bonds were "backed only by the resources and credit of the corporation," we held that "[t]he credit of the state is not being pledged."[192] We said nothing of article IX, section 8. *Walker v. Alaska State Mortgage Ass'n* also involved revenue bonds, but the challenge included a claim under article IX, section 8.[193] The bulk of argument revolved around other constitutional

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[189] (...continued)
in our decisions regarding state debt, and that was because the language itself appeared in the text of the bonding proposition at issue. *See Thomas v. Rosen*, 569 P.2d 793, 798 (Alaska 1977) (Boochever, C.J., dissenting). The State likewise argues that our reasoning in *Thomas* supports its position, but that case involved a gubernatorial veto to reduce the total amount of general obligation bonds the legislature submitted to the voters for approval. *Id.* at 794 (majority opinion).

[190] 376 P.2d 717, 719-20 (Alaska 1962).

[191] *Id.* at 721; Alaska Const. art. IX, § 6 ("No tax shall be levied, or appropriation of public money made, or public property transferred, *nor shall the public credit be used*, except for a public purpose." (emphasis added)).

[192] *DeArmond*, 376 P.2d at 722.

[193] 416 P.2d 245, 253 (Alaska 1966). Although we did not use the term "revenue bond" in *Walker*, we upheld the challenged bonds as being "backed only by the (continued...)

provisions[194] and we dismissed the section 8 challenge with very little discussion, noting only that "our holding in *DeArmond* is controlling here."[195]

The State reads much into these two cases, but it overlooks the fact that both concerned revenue bonds with dedicated revenue streams — not "subject-to-appropriation" bonds — and our constitution contains a specific, limited exception for revenue bonds.[196] *DeArmond*'s statements on "credit," accordingly, are concerned only with the "public purpose" clause of section 6, and *Walker*'s statements on "debt" merely reflect the understanding that revenue bonds are a constitutional exception to the constitutional restriction on debt. *DeArmond* and *Walker* would be relevant here only if the bonds issued pursuant to HB 331 qualified as "revenue bonds." We address that alternative argument further below, but for obvious reasons, we hold they are not.

Instead, the argument the State would have us adopt to uphold HB 331 relies on logic the framers resoundingly rejected. Rather than strict application of the procedures mandated by article IX, section 8, the State contends that the "preservation

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[193] (...continued)
resources and credit of the corporation." *Id.* In so deciding, we cited *DeArmond* and a handful of cases from other jurisdictions unambiguously discussing revenue bonds. *See Orbison v. Welsh*, 179 N.E.2d 727, 737-38 (Ind. 1962); *Sigman v. Brunswick Port Auth.*, 104 S.E.2d 467, 469 (Ga. 1958); *State ex rel. Thomson v. Giessel*, 60 N.W.2d 873, 877 (Wis. 1953); *cf. Book v. State Office Bldg. Comm'n*, 149 N.E.2d 273, 283-84 (Ind. 1958) (upholding lease-purchase agreements under revenue bond theory). We further note that the Association's enabling act clearly provided a means of producing revenue, i.e., the sale of mortgages, and directed any bonds to be made "payable out of any revenues or monies of the Association." Ch. 103, § 8, SLA 1961.

[194] *See Walker,* 416 P.2d at 249-53 (discussing Alaska Const. art. III, §§ 22, 26; *id.* art. IX, § 6).

[195] *Id.* at 253.

[196] *See* Alaska Const. art. IX, § 11.

of annual discretion in elected representatives is sufficient to effectuate the policies underlying debt limitations." The State apparently forgets that the Delegates considered and rejected just such an amendment that would have permitted the legislature to create debt with a two-thirds vote.[197] We struggle to comprehend why we should judicially create such a power now but checked only by a simple majority vote. The State also makes the argument that "modern financial markets provide their own separate check on imprudent borrowing, because interest rates reflect the affordability of debt for a borrower and the risk of nonpayment." But our constitution already identifies who holds the final check against imprudent borrowing: the people.[198] Delegates discussed similar interest rate arguments surrounding the aforementioned two-thirds debt amendment.[199]

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[197] *See* 4 PACC 2421-38 (Jan. 17, 1956).

[198] Alaska Const. art. IX, § 8 (requiring all "state debt" to be "ratified by a majority of the qualified voters of the State who vote on the question"); *see also* 2 PACC 1112 (Dec. 19, 1955) (statement of Del. Barrie M. White) (explaining that "no dollar debt limitation" was deemed necessary because section 8 required all "ordinary debts be submitted to the voters for approval"); 4 PACC 2434 (Jan. 17, 1956) (statement of Del. Barrie M. White) ("[A] bond proposal to the people via referendum is the greatest way . . . to insure that the credit of the state will not be impaired.").

[199] *See* 4 PACC 2435-36 (Jan. 17, 1956) (statement of Del. Victor Fischer) (describing how bond markets dictate interest rates based on "the ability to repay and the faith that the bond payers have in the governmental entity," and arguing that the public referendum requirement would compel the legislature to "sell[] bonds to establishments and separate corporations," thereby "forcing a much higher interest rate on the taxpayers of Alaska"). *But see id.* at 2436-37 (statement of Del. Barrie M. White) ("[I]f bonding the state via a special authority should result in higher interest rates, that is merely an added inducement to go back to the referendum where such issues ought to be."). Notably this back-and-forth centered on the wisdom of revenue bonds, which are explicitly permitted under article IX, section 11 — at no point did any Delegate intimate that higher interest rates *alone* would suffice to protect the State's credit against imprudent bonding schemes.

Committee on Finance and Taxation Chair Leslie Nerland's comments on this issue are instructive:

> Allowing two methods by which a state or political subdivision may provide for bonded indebtedness cannot help but cause favoritism by the bond investment houses for one method or the other, and I think there is no doubt but that this would result eventually in the bonds of the state being classed into two different categories and there is not much question . . . which issue would take the lowest interest rate. . . . [P]utting these two methods implies that we are trying to seek out the most expedient way at the time that the bond issue was required . . . [which] would eventually result in two classifications on general obligations of the State of Alaska . . . .[200]

The framers adopted this reasoning,[201] but the State now attempts to seek the opposite — sanctioning subject-to-appropriation bonds would create "two classifications" of bonded indebtedness under very different interest rates, solely for the sake of legislative expedience. Where the framers expressly considered and rejected the State's line of logic, we cannot in good conscience adopt it a mere six decades after-the-fact.

We need not formulate a bright-line test to delineate "debt" from "non-debt" in this instance. The plain text of the constitution and the Delegates' unambiguous rejection of the State's arguments control our decision today. As the State points out, rejecting its position "would prevent the State from ever engaging in this kind of financing" as the intended purpose — to facilitate the purchase of oil and gas exploration tax credits — is not one permitted under article IX, section 8.[202] This may be true, but

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[200] *Id.* at 2434-35 (statement of Del. Leslie Nerland).

[201] *Id.* at 2437-38 (striking the two-thirds language by a vote of 29-19).

[202] Alaska Const. art. IX, § 8 (limiting types of debt permitted by referendum (continued...)

we have no power to rewrite constitutional provisions "no matter how clearly advantageous and publicly supported" a policy may appear to be. Only section 10 permits the contracting of short-term debt without restriction on purpose,[203] but the State has expressly rejected any reliance on that provision. If the State intends to utilize financing schemes similar to HB 331 in the future, it must first seek approval from the people — if not through a bond referendum then through a constitutional amendment.[204] Although we hold the constitution's debt restriction unambiguously prohibits the bonding scheme here, we address the State's other arguments below to reaffirm our conclusion.

2. The subject-to-appropriation bonds established by HB 331 do not satisfy our test from *Carr-Gottstein*.

Both Forrer and the State rely heavily on competing interpretations of the framework for "state debt" we announced in *Carr-Gottstein Properties v. State*.[205] In *Carr-Gottstein* we affirmed in a three-sentence per curiam opinion a superior court ruling upholding the constitutionality of one particular lease-purchase agreement;[206] we then

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[202] (...continued)
to "capital improvements" and "housing loans for veterans").

[203] *Id.* art. IX, § 10 (permitting interim borrowing "to meet appropriations" but requiring "all debt so contracted [to] be paid before the end of the next fiscal year"). It may be possible to restructure HB 331 in such a way as to rely entirely on section 10, but we decline to hypothesize what such a bonding scheme would look like or whether it would be as financially advantageous.

[204] *See id.* art. XIII, § 1.

[205] 899 P.2d 136 (Alaska 1995) (per curiam).

[206] *Id.* at 137.

attached two of the superior court's orders as appendices.[207] The controversy involved a contract for the Alaska Court System to lease a property from the Alaska Department of Natural Resources (DNR), with a purchase option upon conclusion of the lease.[208] The building was owned by a private entity.[209] DNR assigned its rights to a bank as trustee, which then sold certificates of participation as negotiable instruments entitling holders to a percentage share of the lease payments.[210] Lease payments were to be made biannually from legislative appropriations,[211] subject to "a non-appropriation clause and other terms which limit the recourse of the [certificate] holders to the leased property."[212] The State asserted that in the event of non-appropriation "it would not 'forfeit' its equity; instead, it would . . . receive the surplus proceeds of the sale or reletting of the property after paying the outstanding principal owed under the lease."[213]

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[207] *Id.* at 137 n.1.

[208] *Id.* at 138.

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] *Id.* at 144.

[213] *Id.* at 141. The *Carr-Gottstein* court did not find the issue of losing equity significant, noting that in *Norene v. Municipality of Anchorage*, 704 P.2d 199 (Alaska 1985), we "approve[d] of lease-purchase agreements as a threshold matter," even though "the municipality would lose its equity in leased land if it decided not to purchase the property at the end of the lease." *Carr-Gottstein*, 899 P.2d at 142. We now disavow this characterization. Our decision in *Norene* concerned whether the "land swap" in question met the definition of a lease-purchase agreement under Anchorage Municipal Code 25.20.060. 704 P.2d at 202-03. *Norene* did not involve a constitutional challenge, and we did not attempt to fashion a constitutional definition of lease-purchase agreements.
(continued...)

To determine whether the lease-purchase agreement was permissible under article IX, section 8, the superior court surveyed Alaska precedent on constitutional "debt,"[214] analogous cases from other jurisdictions,[215] and a student-written law review note.[216] It ultimately formulated a three-prong test: "The court upholds the lease agreement in the case at bar where the lease (1) contains a non-appropriation clause; (2) limits recourse to the leased property; and (3) does not create a long-term obligation binding future generations or Legislatures."[217] The court unfortunately sowed some confusion with its additional comment that "[w]here a lease-purchase agreement does not require a future legislature to appropriate funds, the agreement is not a long-term binding obligation to repay borrowed money pursuant to article IX, section 8, and is not 'debt'

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[213] (...continued)
Nor did *Norene* involve borrowing instruments — the funds involved came straight from appropriations, the lease was for only one year, and the dispositive issue was whether the whole transaction was valued at more than $1 million. Id.

[214] *Carr-Gottstein*, 899 P.2d at 141-42 (first discussing *DeArmond v. Alaska State Dev. Corp.*, 376 P.2d 717 (Alaska 1962); then discussing *Walker v. Alaska State Mortg. Ass'n*, 416 P.2d 245 (Alaska 1966); then discussing *Norene*, 704 P.2d at 199; and then discussing *Vill. of Chefornak v. Hooper Bay Constr. Co.*, 758 P.2d 1266 (Alaska 1988)).

[215] *Id.* at 141 (discussing *Book v. State Office Bldg. Comm'n*, 149 N.E.2d 273 (Ind. 1958); then discussing *State ex rel. Thomson v. Giessel*, 72 N.W.2d 577 (Wis. 1955)). The court also noted that 21 other states permitted lease-purchase agreements under their constitutions. *Id.* at 143 n.7.

[216] *See id.* at 142 (quoting Bisk, *supra* note 17, at 537).

[217] *Id.* at 144 (citing generally Bisk, *supra* note 17).

as defined by the Alaska Supreme Court."[218] The superior court here likewise found this language confusing and circuitous.[219]

The State essentially argues for a two-part test, combining *Carr-Gottstein*'s first and third prongs into a single question — whether repayment of borrowed money is "subject to appropriation" — and rephrasing the second prong as whether there is "recourse against the State on default."[220] In contrast, Forrer argues that the *Carr-Gottstein* test implicitly contained a fourth prong limiting its application to lease-purchase agreements.[221] The State's reformulation is not convincing. The *Carr-Gottstein* court would not have included a third prong if it did not think it was necessary. Nor is it immediately apparent to us why *Carr-Gottstein*'s reasoning cannot extend beyond lease-purchase agreements. But we decline the State's invitation to eliminate any

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[218] *Id.* at 142-43 (footnote omitted).

[219] The superior court sought clarification from the parties during oral argument several times: "Regarding those three factors . . . aren't No. 1 and 3 the same? . . . [I]t contains a non-appropriation clause, and that's No. 1. No. 3 does not create long-term obligation binding future generations or legislatures. Isn't that what a non-appropriation clause does?" "I think those first and third factors are the same thing."

[220] The State draws on the "term of art" language that *Carr-Gottstein* used to describe the word "debt" as it appears in the constitution. 899 P.2d at 142. Relying on that phrase, the State argues that although subject-to-appropriation bonds "are a kind of 'debt,' they are not 'state debt' . . . because they are subject to appropriation, and bondholders have no recourse against the State on default."

[221] Forrer argues that *Carr-Gottstein* created only a "narrow judicially wrought exception" based on considerations unique to the context of lease-purchase agreements. He contends that "the borrowing of money is significantly different than entering into a lease-purchase agreement," noting that bondholders would have "no recourse to property" and failing to appropriate funds would negatively impact Alaska's credit rating, effectively "bind[ing] future legislatures." HB 331 therefore fails on multiple prongs of Forrer's *Carr-Gottstein* test.

of the three prongs — it is abundantly clear that the *Carr-Gottstein* court did not find a non-appropriation clause alone sufficient to uphold the lease-purchase agreement involved as constitutional. We look to the sources cited and specific facts discussed in *Carr-Gottstein* for assistance as we address each prong in turn.

The first prong is formalistic in nature and merely asks whether a subject-to-appropriation clause exists in the challenged contract or legislation.[222] There is little dispute that the first prong is met: the bonds are repeatedly referred to by the parties as "subject-to-appropriation" and HB 331 is replete with disclaimers stating as much.[223]

The second prong requires the challenged arrangement to "limit[] recourse to the leased property."[224] The *Carr-Gottstein* court reasoned that a corporation's "independent nature" was not dispositive, but it placed substantial value on the fact that the lease-purchase agreement contained "other terms which limit the recourse of the

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[222] Although the *Carr-Gottstein* court appeared to rely heavily on a student note for its test, 899 P.2d at 144 & n.10, the student note's proposed three-prong test bears little resemblance: "Does there exist an unconditional obligation extending beyond the current fiscal year? Does failure to appropriate funds in the future subject the government entity to suit? Are other government assets ultimately subject to claim?" Bisk, *supra* note 17, at 544-45. The student note concludes that "[w]here a valid nonappropriation mechanism is present, the answer to all of the above questions is negative — no debt is created." *Id.* at 544. If the *Carr-Gottstein* court intended to adopt this test verbatim then it would have. *Compare id.* at 544-45, *with Carr-Gottstein*, 899 P.2d at 144. Instead, the court fashioned its own three-prong test relying on the specific context presented before it, i.e., that the agreement "contain[ed] a non-appropriation clause and other terms which limit the recourse of the [certificate] holders to the leased property." *Carr-Gottstein*, 899 P.2d at 144.

[223] *See* AS 37.18.030(c); AS 37.18.040(g).

[224] *Carr-Gottstein*, 899 P.2d at 144.

[certificate] holders to the leased property."[225] The property in question was privately owned, although the title was held by DNR as lessor.[226] Because the property was not a state asset, the State would not be liable in the event of non-appropriation, and any outstanding payments to certificate holders could be sought from the sale or reletting of the building.[227] The State appears to believe that this factor is satisfied because HB 331 "limits recourse even further" by the fact that there is no property, only a nominally independent corporation.[228] But that is not what the *Carr-Gottstein* test explicitly requires: recourse must be constrained to an identifiable asset that is not government-owned. Even proceeding under the assumption that the lack of a tangible res is not fatal to this analysis, HB 331 provides that bondholders' sole recourse *is* to government assets, i.e., legislatively appropriated funds, held by the Corporation.[229] Thus the State fails to meet the second prong of the *Carr-Gottstein* test.

The third prong finally asks whether there exists a long-term obligation.[230] Relying on the student note cited by the *Carr-Gottstein* court, we consider whether the challenged arrangement "extend[s] beyond the current fiscal year," and whether failing

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[225] *Id.*

[226] *Id.* at 138.

[227] *Id.* at 141.

[228] But legislators found this point far from reassuring, instead expressing concern that HB 331 created little more than a "sham corporation" with "zero revenue." S. Floor Deb. on C.S.H.B. 331, *supra* note 88, at 3:59 (statement of Sen. Bill Wielechowski); *see also* AS 37.18.020 (designating three executive branch commissioners as the Corporation's board of directors).

[229] AS 37.18.070.

[230] *Carr-Gottstein*, 899 P.2d at 144.

to appropriate subjects the lessee to suit where "government assets" can be seized.[231] In *Carr-Gottstein* there was no long-term obligation on the legislature to make annual appropriations because the penalty for non-appropriation was termination of the lease agreement and reversion of the property to the lessor.[232] But here, the Corporation's sole function is to borrow money over several years to facilitate the purchase of existing oil and gas tax credits rather than permit those credits to be applied to future oil production taxes.[233] HB 331's very purpose, then, is to create a long-term obligation even though there was none previously. The *Carr-Gottstein* court's reasoning on this prong is particularly evident in its rejection of the argument that the lease-purchase agreement created an " 'equitable, moral or contingent' duty to appropriate funds," specifically because the State would "not lose all equity upon termination of the agreement."[234] Forrer thus contends that HB 331 fails under this prong as future legislatures would feel enormous pressure to appropriate funds due to the potential negative impact on Alaska's credit rating. The State does not dispute this characterization; instead it rationalizes that the lease-purchase agreement approved in *Carr-Gottstein* would also have resulted in a

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[231] Bisk, *supra* note 17, at 544-45. We again note the differences between these tests, as the student note required such obligations to be "unconditional," *id.* at 544, whereas the *Carr-Gottstein* court conspicuously omitted such language. 899 P.2d at 144.

[232] *Carr-Gottstein*, 899 P.2d at 142-44; *see also* RESTATEMENT (SECOND) OF PROPERTY, LAND. & TEN. § 10.1 (AM. LAW INST. 1977).

[233] The State characterizes the Corporation's purpose as replacing these tax credits with subject-to-appropriation bonds to amortize the State's financial obligations and ensure greater predictability in oil tax revenues. *See* Minutes, *supra* note 86, at 18, 21-24 (statements of Sheldon Fisher, Comm'r, Dep't of Revenue). But the State was never *obligated* to purchase these tax credits in the first place.

[234] *Carr-Gottstein*, 899 P.2d at 144 n.9 (distinguishing *Montano v. Gabaldon*, 766 P.2d 1328 (N.M. 1989)).

credit downgrading if the non-appropriation clause were exercised. But the *Carr-Gottstein* court did not consider the State's credit rating in its decision — instead, as far as the court was concerned, no adverse consequences would result from non-appropriation and the legislature was truly free to exercise its discretion. In the procedural posture presented here, Forrer's factual allegations are presumed true. We need not decide whether a potential credit downgrade alone suffices to create debt — what matters is that this fact precludes the State from succeeding on *Carr-Gottstein*'s third prong. The State's goal of spreading out its financial obligations is a reasonable one, but the means it chose violates both article IX, section 8, and multiple prongs of the *Carr-Gottstein* test.

3. The cases from other jurisdictions cited in support of permitting subject-to-appropriation bonds are unpersuasive.

In support of its narrower interpretation of our constitutional debt restriction, the State resorts to decisions of other jurisdictions for persuasive authority. The State relies heavily on a 32-case string citation of court decisions supporting the so-called majority view in *Lonegan v. State* (*Lonegan II*).[235] But the vast majority of those cases concern revenue bonds, lease-purchase agreements, or the construction or maintenance of some sort of physical property, and *none* of them concern the type of solely appropriation-backed bonds contemplated by HB 331.[236] Revenue bonds are permitted outright under article IX, section 11, and we have already indicated our

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[235] 819 A.2d 395, 404 n.2 (N.J. 2003) (4-3 decision).

[236] From our perspective, only four of the cited cases involve non-revenue-producing projects — mostly for road construction — for which subject-to-appropriation bonds could be described as "moral obligations." *See Wilson v. Ky. Transp. Cabinet*, 884 S.W.2d 641, 642-44 (Ky. 1994); *Schulz v. State*, 639 N.E.2d 1140, 1149 (N.Y. 1994); *In re Okla. Capitol Improvement Auth.*, 958 P.2d 759, 776 (Okla. 1998); *Dykes v. N. Va. Transp. Dist. Comm'n*, 411 S.E.2d 1, 9-10 (Va. 1991) (on rehearing).

approval of subject-to-appropriation lease-purchase agreements as noted above.[237] We briefly explain why the cases provided by the State fail to persuade us.

Lonegan II concerned a constitutional challenge to revenue bonds for education facilities.[238] A narrow majority issued broad pronouncements on what constitutes debt for purposes of the New Jersey Constitution,[239] but to rely on those statements is to ignore the unique factual scenario.[240] Of equal concern in *Lonegan II* was that the legislature had already extensively relied on subject-to-appropriation bond financing for the state's fiscal policy.[241] The court explained that attempting to create rules "at this late date . . . could have unintended consequences,"[242] and it was "unwilling

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[237] The State relies on *Schowalter v. State*, 822 N.W.2d 292 (Minn. 2012), but that case concerned bonds relying exclusively on tobacco settlement revenues — the Alaska legislature enacted a similar arrangement, which we upheld as a revenue bond in *Myers v. Alaska Hous. Fin. Corp.*, 68 P.3d 386, 393-94 (Alaska 2003).

[238] 819 A.2d at 397.

[239] *Id.* at 402 ("Under our case law, only debt that is legally enforceable against the State is subject to the Debt Limitation Clause."); *id.* at 407 ("We . . . agree with the majority of state courts interpreting their own constitutions that the restrictions of the Debt Limitation Clause do not apply to appropriations-backed debt."). Three of the seven justices dissented. *See id.* at 407 (Long, Verniero, and Zazzali, JJ., dissenting).

[240] The same court concluded earlier in the litigation that debt authorized for educational purposes — the lawsuit's primary target — was "*sui generis*" due to constitutional provisions on school funding that "separately authorize[] state-backed school bonds without reference to the Debt Limitation Clause." *Lonegan I*, 809 A.2d 91, 105-06 (N.J. 2002).

[241] *Lonegan II*, 819 A.2d at 401-02.

[242] *Id.* at 397.

to disrupt the State's financing mechanisms."[243] The dissent pointed out that three-fourths of New Jersey's debt was subject-to-appropriation, totaling nearly $11 billion.[244] Any default on its obligations to appropriate funds would thus have resulted in "severe and unacceptable harm to New Jersey's credit rating."[245] If anything, New Jersey's example in this arena counsels greater caution, not blind imitation.

Fults v. City of Coralville involved revenue bonds for construction and urban renovation.[246] The challenged urban renewal area was expected to "provide sufficient revenue to fund the project" by increasing the value of the property tax base,[247] and the city issued subject-to-appropriation bonds to finance the construction of a hotel to achieve those ends.[248] This arrangement was challenged by property owners alleging, *inter alia*, that the "bonds caused the city to exceed its constitutional debt limit."[249] In rejecting an "argument that the city [was] attempting to do indirectly what it may not do directly," the court relied on a Utah case to claim that "[i]f the express terms of the city's agreement do not offend the constitution, then the purpose alone will not render the agreement unconstitutional."[250] However, the reasoning of the Utah case cited for that

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[243] *Id.* at 407.

[244] *Id.* at 409 (Long, Verniero, and Zazzali, JJ., dissenting).

[245] *Id.*

[246] 666 N.W.2d 548, 551 (Iowa 2003).

[247] *Id.* at 551 n.1.

[248] *Id.* at 551.

[249] *Id.* at 552.

[250] *Id.* at 558-59 (citing *Mun. Bldg. Auth. of Iron Cty. v. Lowder*, 711 P.2d 273, 280 (Utah 1985)).

point is not reassuring: "Of course the Act is intended to permit avoidance of the constitutional debt limitations. It is the very rigidity of those limitations that has led the courts to narrowly construe them and the legislature to actively assist local government in avoiding them."[251]

The State additionally discusses *In re Oklahoma Capitol Improvement Authority*[252] and the New York case *Schulz v. State*[253] in its briefing,[254] both of which involved bonds for transportation projects to be paid for via dedicated revenue streams from increased transportation taxes and fees.[255] While these cases thus more closely resemble revenue bonds, this type of dedicated funding is explicitly prohibited under our constitution.[256] We cannot help but note that constitutional lines between revenue bonds, lease-purchase agreements, and subject-to-appropriation bonds have been blurred in many jurisdictions due to incremental legislative experimentation and successive judicial application of stare decisis.[257] Regardless, the transportation and construction bond

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[251] *Lowder*, 711 P.2d at 279-80.

[252] 958 P.2d 759 (Okla. 1998).

[253] 639 N.E.2d 1140 (N.Y. 1994).

[254] The State also mentions *Dep't of Ecology v. State Fin. Comm.*, 804 P.2d 1241 (Wash. 1991), but that case concerned only lease-purchase agreements, *id.* at 1242, and does nothing to advance the State's argument here.

[255] *See In re Okla. Capitol Improvement Auth.*, 958 P.2d at 764; *Schulz*, 639 N.E.2d at 1142.

[256] *See* Alaska Const. art. XI, § 7.

[257] *See, e.g.*, *Lonegan II*, 819 A.2d 395, 397 (N.J. 2003) (4-3 decision) (relying on "over fifty years of precedent" and "the need to maintain stability" to uphold subject-to-appropriation bonds); *Schulz v. State*, 606 N.Y.S.2d 916, 921 (N.Y. App. Div. 1993) (continued...)

contexts at least present something with revenue-generating potential with which to retire bonds should the legislature fail to appropriate funds.[258] This case is immediately distinguishable from any others cited by the State — there is no res. Bondholders under HB 331 ostensibly hold promises of payment from little more than a shell corporation of the State.

C. The Superior Court Correctly Concluded That HB 331 Did Not Qualify For Any Other Exceptions To "State Debt" In Article IX.

In the alternative, the State argues that HB 331 fits within one or both of the exceptions under article IX, section 11. The superior court rejected those claims, and we agree that the State's arguments are unfounded.

1. HB 331 is not "refunding indebtedness of the State" under article IX, section 11.

Article IX, section 11 states in part that section 8's "restrictions do not apply to . . . refunding indebtedness of the State or its political subdivisions."[259] In support of its contention that this exception applies to HB 331, the State — directly contradicting its claims elsewhere that HB 331 is *not* debt — cites numerous instances

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[257] (...continued)
(conceding that challenged bonds "have all the earmarks of a long-term State obligation" but relenting to "inescapable conclusion" dictated by "applicable precedent"); *Hayes v. State Prop. & Bldgs. Comm'n*, 731 S.W.2d 797, 804 (Ky. 1987) (4-3 decision) (relying on need for "stability to the law" in upholding purported revenue bond supported only by "incremental taxes"). We are thus in the fortunate position of being able to learn from the missteps of other jurisdictions, in much the same way as the framers did when drafting article IX. *See supra* Part II.B.

[258] *See, e.g.*, *Tpk. Auth. of Ky. v. Wall*, 336 S.W.2d 551, 554 (Ky. 1960) (noting that the public authority could raise tolls to satisfy bondholder claims if turnpike lease were terminated). This same reasoning underlies our approval of certain lease-purchase agreements. *See Carr-Gottstein Props. v. State*, 899 P.2d 136, 144 (Alaska 1995).

[259] Alaska Const. art. IX, § 11.

during the committee and floor debates on HB 331 where legislators characterized the arrangement of issuing bonds to purchase outstanding tax credits as simply restructuring an existing debt.

While Section 11's exception was discussed only briefly during the Constitutional Convention, that brief description is instructive: "Section 11 . . . allows for refunding of debt by the *calling of current bonds and issuing of new ones* at lower interest rates without the referendum."[260] The Committee on Finance and Taxation's commentary also suggests that the indebtedness to be refunded would already have been contracted pursuant to a section 8 referendum.[261] This makes logical sense, as there would be no reason for a second referendum just to save taxpayer money through lower interest rates when the original debt was already approved by the voters.

So understood, this provision would be unavailable for restructuring other obligations not incurred via section 8 money-borrowing. In general, we fail to see how a tax credit — essentially a voluntary reduction in future revenue to incentivize present investment — could itself ever be the subject of refunding indebtedness under article IX, section 11. As the Delegates observed, the purpose of this limited exception was to permit the restructuring of bonds already approved by voters.

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[260] 2 PACC 1111 (Dec. 19, 1955) (statement of Del. Barrie M. White) (emphasis added).

[261] 6 PACC App. V at 111 (Dec. 16, 1955) ("In a period when interest rates fall, a government may save large amounts of money if it can pay off its old high-rate obligations with new funds borrowed at lower rates. This process, here permitted, is called refunding, and the restrictions on the contraction of *original debt* are unnecessary; they are here made inapplicable." (emphasis added)).

2. HB 331 does not establish "revenue bonds" for the purposes of article IX, section 11.

The State lastly claims that the subject-to-appropriation bonds authorized by HB 331 qualify as revenue bonds under article IX, section 11. The State admits, however, that the Corporation would have no actual revenues, only the funds appropriated by the legislature. While we have previously addressed constitutional challenges to revenue bonds in *DeArmond*[262] and *Walker*,[263] in neither case did we have to determine whether the challenged bonding arrangements actually qualified as section 11 "revenue bonds."[264] We find it nevertheless significant that the legislature's sole appropriation of $150,000 in *DeArmond* was to be later reimbursed by the corporation,[265] and the association challenged in *Walker* was "expected to be self-supporting."[266] The superior court here likewise found the State's arguments dubious and summarily refuted them with statements from the Constitutional Convention.

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[262] 376 P.2d 717, 721-25 (Alaska 1962).

[263] 416 P.2d 245, 249-53 (Alaska 1966).

[264] *DeArmond* did not involve a challenge under our constitutional debt restrictions. 376 P.2d at 721-25 (discussing Alaska Const. art. III, § 22; *id.* art. IX, §§ 4, 6). *Walker* did include a challenge under article IX, section 8, but we did not discuss or interpret section 11. 416 P.2d at 253.

[265] *DeArmond*, 376 P.2d at 720.

[266] *Ault v. Alaska State Mortg. Ass'n*, 387 P.2d 698, 700 (Alaska 1963). Although this assertion only appeared in an affidavit, which we noted was defective and insufficient to support summary judgment, the affidavit was unopposed and we did not take issue with that particular statement of fact. *See id.* at 700-01 & n.5. The plaintiff was substituted after remand on *Ault*, hence the difference in case names. *Walker*, 416 P.2d at 247 n.1. The question whether the association would truly be self-supporting did not resurface in *Walker*, so we presume that fact was not seriously in dispute.

A resort to contemporaneous dictionaries reveals that the term "revenue bond" had a distinct meaning at the time of Alaska's statehood. Webster's New International Dictionary defined the term as "[a] bond issued by a public agency authorized to build or acquire a revenue-producing project and payable solely out of revenue derived from the project."[267] Ballentine's Law Dictionary likewise described "revenue bond" as being "issued by a public body payable solely from a special fund arising from the revenues accruing from operation of an enterprise or project for the construction, operation, and maintenance of which the bond was issued."[268] Delegates to the Constitutional Convention reiterated this understanding of "revenue bond," noting that the section 11 exception would be available only when "the enterprise financed by the debt will be self-sustaining."[269] The generation of rents or other revenues to repay those bonds was considered a necessity; Delegates thus pointed to public utilities as general examples,[270] including the "Eklutna project"[271] as a more specific example. The Committee on Finance and Taxation's commentary on section 11 provided similar insight.[272] The revenue bond structure insulates the State from indebtedness because the

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[267] *Revenue Bond*, WEBSTER'S NEW INT'L DICTIONARY (2d ed. 1959).

[268] *Revenue Bond*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969).

[269] 2 PACC 1112 (Dec. 19, 1955) (statement of Del. Barrie M. White).

[270] 3 PACC 2303 (Jan. 16, 1956) (statement of Del. Leslie Nerland).

[271] 4 PACC 3422 (Jan. 28, 1956) (statement of Del. John S. Hellenthal). *See generally* Act of July 31, 1950, Pub. L. No. 628, 64 Stat. 382 (authorizing construction of the Eklutna hydroelectric generating plant).

[272] 6 PACC App. V at 111 (Dec. 16, 1955) ("When the state or its subdivisions can contract debts for special purposes (for example, to build a toll bridge) without pledging more than the improvement or the revenues from the enterprise, such debt is (continued...)

bond is tied to a specific "self-sustaining" enterprise, such as a toll road or a public utility, so that any liability may be levied from the separate revenue stream. In contrast, HB 331 lacks any insulating wall because the bonds are not tied to any self-sustaining enterprise; bond payments would be made solely from annual legislative appropriations.

Against this backdrop, the State points to the Alaska Statehood Committee's report on state finance to argue that the framers understood revenue bonds simply as any means that "do not pledge the full faith and credit of the state."[273] But as we explained above, the framers rejected much of that report's reasoning when they adopted the restrictions against contracting debt in section 8.[274] Moreover, the constitution's plain text draws a clear and meaningful distinction between the terms "revenue" and "appropriations."[275] The presumption of consistent usage, which states that words are "presumed to bear the same meaning throughout a text,"[276] is not a canon of construction we cast aside lightly — especially when those terms appear multiple times within the same article.

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[272] (...continued)
permitted without referendum.").

[273] 3 CONSTITUTIONAL STUDIES, *supra* note 1, pt. IX, at 23.

[274] *See supra* Part II.B.

[275] *See* Alaska Const. art. IX, § 10 ("The State and its political subdivisions may borrow money to meet *appropriations* for any fiscal year in anticipation of the collection of the *revenues* for that year . . . ." (emphasis added)); *id.* § 16 ("*appropriations* of *revenue* bond proceeds" (emphasis added)).

[276] SCALIA & GARNER, *supra* note 164, at 170; *accord Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007); 73 AM. JUR. 2D *Statutes* § 140, Westlaw (database updated May 2020).

The State nonetheless insists that "[t]he precise nature of a public corporation's 'revenues' . . . has no constitutional significance," relying heavily on the Kentucky opinion *Wilson v. Kentucky Transportation Cabinet*[277] for this proposition. But *Wilson* is unpersuasive, as the court expansively construed prior precedent to reach its outcome. *Wilson* involved a transportation bond, although the affected roads were admittedly "nonrevenue producing."[278] The court upheld the arrangement as a revenue bond by proclaiming that what matters is "the revenue produced by the payments from the biennial appropriations of the General Assembly and not the revenues which the tolls on the roads might produce."[279] The *Wilson* court cited two previous Kentucky cases also upholding transportation bonds — the first of which, *Turnpike Authority of Kentucky v. Wall*, involved revenue bonds backed by tolls and dedicated fuel taxes.[280] Biennial lease payments thus consisted of "the difference between the amount of rent agreed upon in advance and the *revenues actually produced by the project*."[281] The *Wall* court noted that if the turnpike lease were not renewed, "the right to establish and collect the *revenues* of the project passes to the Authority, . . . [and] if the *revenues* should prove insufficient to service the bonds the Authority could increase the tolls."[282] In other words, the *Wall* court never considered the lease payments to have been a source of "revenue."

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[277] 884 S.W.2d 641, 643 (Ky. 1994) (4-1-2 decision).

[278] *Id.* at 642-43.

[279] *Id.* at 643.

[280] 336 S.W.2d 551, 553-54 (Ky. 1960).

[281] *Id.* at 553 (emphasis added).

[282] *Id.* at 554 (emphasis added).

In the other case cited by the *Wilson* court — *Blythe v. Transportation Cabinet of Kentucky* — the court disposed of constitutional claims against a financing scheme similar to that in *Wall* with very little discussion, assuming the facts were "identical to those presented" in *Wall*.[283] The *Blythe* court never indicated what sources of revenue actually backed the challenged "revenue bonds" as none had been issued.[284] The *Wilson* court then reached its conclusion on the observation that "[t]here were no tolls involved in *Blythe*, and in *Wall*, the tolls were never represented to be sufficient to pay the lease payments."[285] *Wilson*, therefore, construed *Blythe* as standing for the proposition that a dedicated revenue stream (toll roads) was not necessary — a proposition never stated in *Blythe* — paving the way to completely recast *Wall* as though it approved of legislative appropriations as an acceptable form of "revenue."[286] Regardless of *Wilson*'s questionable reasoning, one indelible difference makes Kentucky precedent unavailing here: revenue bonds are a creature of judicial creation in Kentucky,[287] whereas we are limited by our constitution.

Finally, the State argues that, because the House Finance Committee at one point rejected a proposed amendment to officially disclaim the "revenue bond" theory

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[283] 660 S.W.2d 668, 669 (Ky. 1983) (4-3 decision). Arguably this assumption appears to have been a result of the procedural posture of appeal from judgment on the pleadings. *See id.* at 671 (Vance, J., dissenting).

[284] *Id.* at 669-70 (majority opinion).

[285] *Wilson v. Ky. Transp. Cabinet*, 884 S.W.2d 641, 643 (Ky. 1994) (citations omitted).

[286] *Id.*

[287] *Hayes v. State Prop. & Bldgs. Comm'n*, 731 S.W.2d 797, 803 (Ky. 1987); *see also Wilson*, 884 S.W.2d at 643-45 (detailing the ever-expanding definition of and evolving rationales for revenue bonds and serial leases in Kentucky).

for HB 331, it was therefore thought of as a viable rationale by legislators. That same Committee did in fact amend HB 331 by adding a provision to separately keep track of revenues from overriding royalty agreements,[288] which the Committee viewed as an attempt to leave the door open for revenue bond arguments.[289] And yet that provision in AS 44.37.230(i) is not cited once in any of the State's briefs throughout this litigation — even Committee members recognized at the time that the discretionary nature of that language would not solve "the constitutionality problem."[290] Seeing as legislators never truly believed that HB 331 created revenue bonds, to now somehow conclude otherwise would require ignoring all of this history. Granting the State's request would give to the legislature a broad power specifically withheld by the framers.[291] We hold that subject-to-appropriation bonds are not revenue bonds under

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[288] AS 44.37.230(i) ("The department shall separately account for the revenue collected from an agreement that the department deposits in the general fund. The legislature *may appropriate* the annual estimated balance in the account to the . . . reserve fund established under AS 37.18.040." (emphasis added)); Minutes, *supra* note 114, at 15-17 (adopting Amendment 5).

[289] Minutes, *supra* note 114, at 21-24 (discussing purpose of Amendment 5 and rejecting Amendment 9, which would have disclaimed "revenue bond" theory).

[290] *Id.* at 16 (statement of Rep. Paul Seaton, Co-Chair, H. Fin. Comm.); *see also id.* (statement of Mike Barnhill, Deputy Comm'r, Dep't of Revenue) (doubting whether proposed amendment "addressed the constitutional concerns expressed to the committee"). An April 13 memorandum from the Legislative Affairs Agency analyzing HB 331 ensured that Committee members were fully aware of the potential constitutional issues beforehand. *See* Nauman, *supra* note 108, at 6-7 (contemplating "a substantial risk that . . . HB 331 will be found by a court to be unconstitutional" due to unlikelihood that contemplated bonds "could meet even the basic definition of a 'revenue bond' ").

[291] *Cf. Hickel v. Cowper*, 874 P.2d 922, 925 (Alaska 1994) ("Nor does the legislature's role in making appropriations somehow alter or increase its authority to define constitutional terms merely because the terms contain the word 'appropriation.' (continued...)

article IX, section 11. Thus, we conclude that HB 331 violates Alaska Constitution article IX, section 8, and that no other constitutional provisions provide an exception that would validate the subject-to-appropriation bonds.[292]

D. Severability

Having decided that the subject-to-appropriation bonds in HB 331 violate article IX, section 8, we must now determine whether any of the remaining provisions are salvageable. Laws duly enacted by the legislature are endowed with a presumption of constitutionality,[293] and even if one or more sections of a law are constitutionally infirm, AS 01.10.030 directs us to excise those portions to save the remainder if this is possible.[294] A provision is severable if "the portion remaining . . . is independent and complete in itself so that it may be presumed that the legislature would have enacted the valid parts without the invalid part."[295] However, when the invalidation of a central pillar "so undermines the structure of the Act as a whole," then "the entire Act must fall."[296]

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[291] (...continued)
This court retains the same power to interpret constitutional terms regardless of the subject matter of the term.").

[292] Temporary borrowing regardless of purpose is permissible, but only if any debt is repaid before the end of the next fiscal year. Alaska Const. art. IX, § 10. The State has admitted that HB 331 does not qualify for this exception.

[293] *State v. Schmidt*, 323 P.3d 647, 655 (Alaska 2014).

[294] Although we have held that the general clause in AS 01.10.030 "creates an even weaker presumption" than a specific severability clause. *Lynden Transp., Inc. v. State*, 532 P.2d 700, 712 (Alaska 1975).

[295] *Sonneman v. Hickel*, 836 P.2d 936, 941 (Alaska 1992) (citing *Jefferson v. State*, 527 P.2d 37, 41 (Alaska 1974)).

[296] *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 633 (Alaska 1999).

Because HB 331 was specifically requested by Governor Walker, we consider his transmittal letter as a strong indication of what the bill was intended to accomplish.[297] The transmittal letter introduced HB 331 as "a bill to create a State corporation authorized to issue bonds for the purpose of purchasing oil and gas exploration tax credits."[298] Each of the four paragraphs describing the workings of HB 331 referenced "bonds" in one way or another.[299] Although HB 331 accomplishes more than just establishing a corporation for issuing subject-to-appropriation bonds — it also provides a means for negotiating overriding royalty interest agreements — even those provisions are inexorably linked to the proposed bonds.[300] Furthermore, HB 331 contains no express saving clause, and we have uncovered no indication within the legislative history that either the Governor or the legislature ever intended the other portions of HB 331 to be stand-alone provisions. Nor does the State argue for severability here. Because the subject-to-appropriation bonds are the central pillar around which other minor provisions were erected, we hold that HB 331 is unconstitutional in its entirety.

V. CONCLUSION

HB 331 violates the limitation placed on contracting debt under article IX, section 8 of the Alaska Constitution. We REVERSE the superior court's decision granting the State's motion to dismiss based on article IX, section 8, and AFFIRM the

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[297] *See Flisock v. State, Div. of Ret. & Benefits*, 818 P.2d 640, 645 (Alaska 1991); *State, Div. of Agric. v. Fowler*, 611 P.2d 58, 60 (Alaska 1980).

[298] 2018 House Journal 2341.

[299] *Id.* at 2342-43.

[300] *See, e.g.*, AS 44.37.230(b) ("The department may enter into an overriding royalty interest agreement . . . with an applicant that requests a purchase . . . from money . . . from the Alaska Tax Credit Certificate Bond Corporation reserve fund . . . .").

superior court's decision rejecting the State's arguments under section 11. We VACATE the award of attorney's fees and REMAND for further proceedings.

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SUPREME COURT FOR THE STATE OF ALASKA

ERIC FORRER Appellant,	)	
vs.	)	Supreme Court No.: **S-17377**
STATE OF ALASKA and LUCINA MAHONEY, Appellees.	)	

Superior Court Case No. **1JU-18-00699 CI**

RESPONSE TO PETITION FOR REHEARING

The State's Petition Fails to Conform to with the Appellate Rules

Appellate Rule 506(a)(1) limits a motion for a rehearing to "a matter previously decided by the court." The State's petition seeks to litigate an issue not previously raised, failing to meet the essential requirement set out in Rule 506 (a)(1) and (a)(2), specifically, that: 1. the court "overlooked, misapplied or failed to consider a statute, decision or principle directly controlling," or that 2. "the court overlooked or misconceived a material fact or proposition of law. Significantly, the State observes that the extensive historical recitation and thorough analysis rendered by the court in this case is correct and not worthy of a rehearing. Yet the State requests insertion of language related to a different bond instrument not challenged by Forrer or addressed by the trial court or on appeal.

The State's Unusual Proposal May Alter Constitutional Law

The State belatedly seeks to alter the court's opinion essentially by advancing a new claim unrelated to the *Forrer* analysis and holding.[1] Supposedly seeking "clarification," the State asks the

[1] The State admits raising an issue about debt that is "structurally much different from HB 331" and that was "not at issue in this case." ***Petition for Rehearing*** at 1, 2.

court to qualify the applicability of *Forrer* in the context of state corporate revenue bonds, specifically requesting inserted language opining about the Municipal Bond Bank Authority (AMBBA) and providing additional statements of fact and law about an issue that was never litigated.

Forrer apprehends the AMBBA's ability to leverage the state's credit by referencing a legislative appropriation in the revenue bond context is desirable but wonders if the concept is constitutional. While the text the State directs the court to add initially appears to suggest a "neutral" position as to such bonding mechanisms, the full measure of the prose offered by the State implies the court harbors a more definitive belief about the constitutionality of such schemes without regard to factual and legal circumstances known to the court at this time.[2] Realistically, the circumstances the State now belatedly seeks to address require a factually sensitive, more particularized inquiry to resolve the issue. And the seeming urgency by which the State now calls for insertion of language at this late date suggests that the proposed modifications may be of such import as to be inappropriate for relief based on a petition for a rehearing.

Because the State's request depends on facts and law not in play, and on claims never raised by Forrer nor issues ever brought up by the State except perhaps tangentially, Forrer is unable to agree that the State's proposed changes are necessary or prudent. With the State's petition raising new issues not relevant to Forrer's dispute or the court's decision, the unconventional petition effectively amounts to a request for the court to issue an *advisory opinion.*[3]

Application of the *Forrer* Decision to Revenue Bonds Issued in the Future Should be Left to the State's Bond Counsel

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2 Forrer notes the State's ***Petition for Rehearing*** was grounded on argument and devoid of affidavits or other factual material that would typically accompany a request for relief.

3 "[T]his court should not issue advisory opinions or resolve abstract questions of law." *State v. American Civil Liberties Union of Alaska*, 204 P.3d 364, 368-69 (Alaska 2009); *cf. Laverty v. Alaska R.R. Corp.*, 13 P.3d 725, 729 (Alaska 2000) (noting the court's disfavorable view toward "hypothetical adjudications [and] advisory opinions").

The State's concerns raised by its petition appear grounded in the prospect of continued leveraging of the state's credit in the context of state public entity revenue bonds. Taking the State's assertions regarding the bonds at face value, Forrer believes the State wishes to implicate Alaska's creditworthiness and its general fund in a situation where a *bona fide* governmental bonding entity's revenues for a proper Article IX, Section 11 debt instrument are insufficient and the entity's reserves are inadequate to satisfy the necessary debt servicing. To allay the "significant uncertainty" it says the court "has unfortunately created," the State recommends the court splice certain language into its opinion as reassurance for itself and parties not involved in this case. Neither Forrer nor the State ever raised the question whether a constitutionally permissible revenue bond debt program so poorly structured in terms of sufficient revenue or adequate reserves could call upon a further "moral obligation" to be sufficed by the legislature.

According to the State's unsupported factual arguments, the "conservative" financial markets apparently desire recourse to the legislature if revenue streams or reserves for bonds that are issued go bust. The degree to which any particular bond market is "conservative" seems speculative and another example of an unsupported contention by the State. But based on this fear, the State advocates for added text preserving a state corporation's "ability to request the legislature to financially support a reserve fund." The State characterizes this concept as a "moral obligation," a term not precisely defined. And nowhere in the State's briefing is it made obvious how the language would be applied. Does it establish some sort of call on the legislature to appropriate funds in the event of revenue bond default? Does the language actually distinguish a legitimate revenue bond program from the scheme struck down here? Is there really, as a matter of fact, some financial advantage to inserting some form of the "moral obligation" language in a revenue bond proposal?

Complicating matters, the State furnishes the example of the AMBBA, which apparently acts as both borrower and lender of funds. The State mentions that *in addition to* a mandate to seek

legislative appropriations "to replenish a reserve fund in the event of borrower payment default," the AMBBA's bonds "include a non-binding moral obligation pledge from the State." What does this pledge entail, between and among which parties does it function, and how is it operationally distinguishable from the unconstitutional HB 331 bonds? Furthermore, while the State's proposal supposedly addresses the "long-standing" bonding programs like the AMBBA context, what would its implications be toward other similar but not identical or "less long-standing" bonding schemes?

The issues the State's petition raises places Forrer in the unenviable position of addressing items of constitutional consequence while given insufficient evidentiary and legal premises to assess them. Forrer therefore believes the appropriate course of action would be to deny the State's petition instruction. If however, the State is correct that the revenue bonds in question are actually constitutional—as well as the "moral obligation" pledge(s) apparently backing them—Forrer expects that State bond counsel can distinguish them from the unconstitutional bonds authorized by HB 331 in a manner that will allay outstanding uneasiness among AMBBA's borrowers and lenders.[4]

The State was Aware of this Issue and Should Have Raised it before *Forrer* was Decided

Forrer finds one aspect of the State's petition particularly troublesome—the notion that the court's decision raises "unintended negative consequences."[5] The State's contention that there are theoretical negative effects to state bond ratings and bond marketability is an exercise in *post hoc* rationalization. The State and its team of legal and financial advisors were in command of abundant

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[4] The State claims that it "relied on established law and precedent to structure [such] important existing programs." ***Petition for Rehearing*** at 5. If true, where *Forrer* actually places the State in a predicament, the State could attempt to defend AMBBA and similar arrangements on the ground that *Forrer* should apply only prospectively. *See State v. Fairbanks North Star Borough*, 736 P.2d 1140, 1144 (Alaska 1987) (explaining propriety of non-retroactivity of civil precedent when "1. the holding is one of first impression and was not foreshadowed in earlier decisions; 2. there has been justifiable reliance on an alternative interpretation of the law; 3. the purpose and intended effect of the holding is best accomplished by prospective application; 4. undue hardship would result from retroactive application" (alteration omitted)).

[5] ***Petition for Rehearing*** at 5.

information necessary to foresee problems resulting from a potentially adverse ruling, yet did not address them in court proceedings. In fact, the State was aware of the revenue bond "cross-collateralized" issue it now indicates as a surprise requiring "clarification."[6] The State apparently elected to ignore any collateral impacts an adverse decision and ignored any alternative or what might be characterized as "hedge" arguments that would have allowed the court to properly deal with the issue it now belatedly raises.

For example, apparently to both reassure legislators that HB 331 was constitutional as well as disquiet its detractors, during legislative consideration the State released a memorandum from the State Debt Manager to the Revenue Commissioner addressing the alleged impact of a "broad interpretation" of "debt" under the Alaska Constitution.[7] The memorandum explained that if HB 331's non-supporters were correct, such would be "highly disruptive," indeed "likely invalidat[ing] multiple forms of existing debt in Alaska."[8] According to the memorandum, one example of "Subject to Appropriation" debt apparently so similar to HB 331 as to be at supposed risk were those "commonly used within the municipal bond market."[9] The memorandum additionally explains how the municipal bonds presently leverage the State's credit.[10]

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6 *See, e.g.*, **Testimony of Deven Mitchell** discussing Alaska Municipal Bond Bank Authority and the State of Alaska's Moral obligation pledge, ***Appellate Excerpt*** at 141.

7 Memorandum from Deven Mitchell, Debt Manager, Treasury Division, to Sheldon Fisher, Commissioner, Department of Treasury, "Debt Potentially Impacted by Broad Interpretation of 'Debt' in Alaska Constitution," at 1 (Apr. 16, 2018). *See* Attachment 1. Mitchell was heavily involved in the legislative proceedings on HB 331, representing the administration in various hearings on SB 176/HB 331, and on at least two occasions, met with Senator Bill Wielechowski hoping to prevent Wielechowski's release of Legislative Legal Division's unfavorable legal memo. *See **Affidavit of Senator Bill Wielechowski*** at ¶¶ 14, 15 and 19 – 27, attached.

8 *Id.* at 2.

9 *Id.*

10 *Id.*

The memorandum is evidence that the State was cognizant of the potential impacts that Forrer's litigation could have on other forms of state debt, including the AMBBA revenue bonds now raised by its petition. The memo even suggests the State may have believed that the AMBBA "subject to appropriation" bonds were not unlike the HB 331 bonds which the State now concedes the court properly concluded were unconstitutional. The degree to which confusion existed among officials of the State in regard to HB 331 or how application of an adverse ruling might impact other debt instruments is an arguable proposition. But Forrer believes the contention that the court's decision in this case created unanticipated consequences is false and is left pondering whether the State seeks a backdoor route by which potentially unconstitutional debt can be incurred. The State's failure to properly apprise the court in the normal course of litigation on this point likely does not justify the kind of unusual relief sought.

Conclusion

Forrer never expected to act as either an advocate for the State or in defense of the court. His interest was on behalf of the public, primarily in regard to Article IX, Section 8 of the Alaska Constitution. In any event, the State's request does not disturb Forrer's prevailing ruling. The State's petition should be denied but if the court decides that adding language to its *Forrer* opinion appropriately placed in a new footnote that would elucidate the issue and settle doubts otherwise causing state revenue bonding uncertainty (so long as Forrer or another plaintiff maintain the ability to challenge this issue directly in the future), Forrer does not oppose such language.

DATED this 12th day of October 2020 at Juneau, Alaska.

LAW OFFICE OF
JOSEPH W. GELDHOF

Joseph W. Geldhof
Alaska Bar # 8111097

Sonja Kawasaki PER TELEPHONIC APPROVAL
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THE STATE of ALASKA
GOVERNOR BILL WALKER

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Memorandum

TO: Sheldon Fisher, Commissioner, Department of Revenue

FROM: Deven Mitchell, Debt Manager, Treasury Division

DATE: April 16, 2018

SUBJECT: Debt potentially impacted by broad interpretation of "debt" in Alaska Constitution

You have asked me to summarize existing Alaska debt that could be called into question if the Alaska Courts adopted a broad interpretation of the word "debt" as the term is used in the Alaska Constitution, art IX, sections 8 and 11.

By way of background, during my involvement in State of Alaska debt issuances since 1997, the Department of Revenue, Treasury Division and the Alaska courts have narrowly interpreted the word "debt" as it is used in the Alaska Constitution. Constitutional debt is only debt that pledges the full faith and credit of the state. Such constitutional debt essentially gives the courts the power to appropriate debt service if there is a default by the legislature in appropriating debt service.

In reliance on advice from the Department of Law as well as external bond counsel firms, and their reading of case law from Alaska and other states, the State has issued a variety of debt that does not fall within the narrow description of debt under the Alaska Constitution. These are debt types that do not pledge the full faith and credit of the state, and therefore do not require a vote of the people. Neither do these debt types provide authority to a court to compel payment of debt service. Accordingly, these debt types are governed by neither section 8 nor section 11 of article 9, Alaska Constitution.

A broad reading of the constitution -- in other words an interpretation of "debt" to include <u>all debt</u>, whether or not it confers the power of appropriation on the courts to compel debt service -- would be highly disruptive, and would likely invalidate multiple forms of existing debt in Alaska.

The State has $237 million of outstanding Subject to Appropriation bonds secured only by an annual appropriation commitment of the State. They are:

- Matanuska-Susitna Lease Revenue Bonds to Fund the Goose Creek Correctional Facility
- State of Alaska's Certificates of Participation issuance to fund the Alaska Native Tribal Health Consortium's Residential Housing Facility

ATTACHMENT 1
PAGE 1 OF 2

An additional State bond issuer that may be impacted by a broad interpretation of constitutional debt is the University of Alaska. As the University relies on the State for three quarters of its revenue (through general fund appropriations for operations and debt service as well as tuition scholarships flowing from the State), this interpretation might limit the University's bond issuance program security to those revenues derived from sources other than the State. The University currently has $311 million of debt outstanding that may well be downgraded several credit ratings and the University could lose access to the municipal market with this interpretation.

Another authorized, but unissued Subject to Appropriation obligation is an amount of $300 million for the Knik Arm Crossing. This is described as revenue debt, but was to be backed by a Subject to Appropriation pledge of the State with the knowledge that toll revenue would be deficient for some period of time and the only payments for debt service would be coming from the State's general fund.

We understand concern has been expressed regarding the marketability of Subject to Appropriation debt. This concern is misplaced. In the municipal bond market, Subject to Appropriation obligations are typically rated 1 credit notch off of the credit that has authorized and supports them. In short, Subject to Appropriations bonds carry specific rating criteria in the Municipal Bond market, are a well understood and commonly used financing tool, and will be highly rated based on the State of Alaska's credit.

Finally, if the broad view of constitutional "debt" is adopted, the State would likely be unable to issue pension obligation bonds as currently authorized. We note that the issuance of these bonds have been approved in many locations throughout the country, and that two nationally recognized bond counsel firms have determined that the pension obligation bond structure in Alaska is permissible under Alaska law.

The State's position with respect to HB 331/SB 176 is that the proposed obligation is a commitment recognized by and commonly used within the municipal bond market as a "Subject to Appropriation" obligation. Subject to Appropriation obligations are not considered debt for constitutional purposes as any legislature can choose not to appropriate. While there are negative ramifications for not appropriating such as State credit downgrades and loss of access to capital markets, there are negative ramifications for a wide array of annual appropriations. For example, if the state does not appropriate for other core financial obligations such as pension funding, public safety, or required industry oversight it would similarly be facing negative credit rating action.

Also, please note that the intention of using a public corporation to issue bonds with HB 331/SB 176 was not to fall into the exception clause in the Alaska Constitution, Art. IX, Section 11. Initially the Department proposed having the State Bond Committee issue the subject to appropriation bonds, but instead decided to follow the existing Alaska Pension Obligation Bond Corporation model.

ATTACHMENT 1
PAGE 2 OF 2

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E mail: joeg@alaskan.com; sonja.kawasaki@gmail.com
Counsel for Eric Forrer

SUPREME COURT FOR THE STATE OF ALASKA

ERIC FORRER Appellant,	)	
vs.	)	Supreme Court No.: **S-17377**
STATE OF ALASKA and LUCINA MAHONEY, Appellees.	)	

Superior Court Case No. **1JU-18-00699 CI**

AFFIDAVIT OF BILL WIELECHOWSKI

State of Alaska)
) ss.
Third Judicial District)

Bill Wielechowski, on his oath, states and affirms the following:

1. I am the Alaska State Senator for District H, a district located in Anchorage, Alaska.
2. I have served in my capacity as a state senator since 2007.
3. I am a licensed attorney in the State of Alaska; Alaska Bar #0505035.
4. The matters I am addressing in this affidavit are based on my direct experiences and true to the best of my recollection.
5. During the second session of the 30th Alaska Legislature in 2018, the administration elected to introduce bills in both houses authorizing the

issuance of up to one billion dollars in bonded indebtedness for the purpose of satisfying outstanding oil and gas exploration tax credits.

6. As part of my duties as a legislator, and based on my training as an attorney, I evaluated the proposed measure seeking to authorize the issuance of up to one billion dollars in bonds in order to pay off outstanding oil and gas exploration tax credits.
7. After discussions with my staffer, an attorney, and in light of my concerns, I requested the legislature's nonpartisan Legislative Affairs Agency's Legal Division attorneys to examine the constitutionality of the proposal, particularly under Article IX, Section 8, the State Debt provision, and its exceptions.
8. I first publicly raised the possible constitutional infirmity on February 21, 2018, during the first legislative hearing on the proposal, which was on the introduced senate companion bill, Senate Bill 176 (SB 76), in the Senate Resources Committee where I sat as a member at that time.
9. My initial concerns about the constitutionality of the proposal was largely dismissed by the proponents within the administration seeking to advance the measure. *See e.g.*, Hearing on S.B. 176, Senate Resources Committee, at 4:34:00-4:39:05; 4:54:20-4:55:10; Minutes (PDF), at 18, 22 (February 21, 2018), *available at* http://www.akleg.gov/basis/Meeting/Detail?Meeting=SRES%202018-02-21%2015:30:00; Letter from Deven Mitchell, State Debt Manager & Bill Milks, Assistant Attorney General, to Senator Cathy Giessel, Chair, Senate Resources Committee, Re: SB 176; Alaska Tax Credit Certificate Bond Corporation (Mar. 2, 2018) (responding to Senator Wielechowski hearing concerns by explaining administration's justification for

proposal's constitutionality). [BW Attachment A] *See also* Press Release, Alaska Department of Law, "Tax Credit Bonds are Constitutional Under Alaska Law," (Apr. 18. 2018) (countering public release of Senator Wielechowski's requested legal opinion by explaining department's "careful review[]" of the law; citing *Carr-Gottstein Properties v. State*; and publicly apprising of Attorney General Jahna Lindemuth's legal opinion that "there are no constitutional concerns with this bill"). [BW Attachment B]

10. After superficial introductory treatment, the administration and legislative majority leadership rapidly advanced the borrowing scheme under HB 331, which the legislature ultimately enacted and Governor Bill Walker signed into law.

11. In response to my request for a legal opinion in regard to SB 176/HB 331, legislative attorneys issued a legal memorandum outlining what I believed to be significant constitutional problems with the proposed legislation, particularly in regard to Article IX, Section 8 of the Alaska Constitution and in examining case law precedent.

12. Prior to the enactment of HB 331, I attempted to raise my concerns in various one-on-one meetings with multiple other legislators about the constitutional issues.

13. In addition, prior to the enactment of HB 331, issues related to its constitutionality were raised by myself and other legislative committee members, by individuals testifying publicly before the committees tasked with reviewing the bill, and by multiple legislators during floor debates.

14. On several occasions, individuals from the administration seeking to advance passage of HB 331 sought private meetings with me about my

concerns and to deter my release of the memo by legislative attorneys demonstrating an opinion potentially adverse to the proposal and administration's unwavering position about its lawfulness.

15. Administration officials who sought these meetings included the governor's chief of staff; representatives from the Department of Law, including the attorney general herself; and the Department of Revenue's state debt manager.

16. In response to my pointed questions directed at the individuals charged with promoting HB 331, I was repeatedly informed that the legislation was constitutional and concerns related to the unconstitutionality of the measure were ill-founded.

17. In response to my concerns about the constitutionality of HB 331, the officials from the administration were adamant that the proposed borrowing scheme was constitutional according to the *Carr-Gottstein* case.

18. I studied the *Carr-Gottstein* case and after consultation with my staff and counsel from the Legislative Affairs Agency continued to believe HB 331 was problematic.

19. During at least one visit from a Department of Law assistant attorney general and the state debt manager, my staff and I explained our believed distinctions between the *Carr-Gottstein* case and the HB 331 bonds, to attempt to advise them of their likely misreliance.

20. I informed the officials from the administration I would not release the legal opinion by legislative attorneys if the administration would withdraw HB 331 from legislative consideration.

21. The administration refused to withdraw the proposal, and I publicly released the legislative legal opinion.

22. From my observation of hearings and testimony and other actions, including the private meetings the administration sought with me, the state debt manager was highly involved with the administration's desire to pass HB 331 and assisted the administration with his debt knowledge, experience, and advice in so doing.

23. I believe the state debt manager recognized the existence of various bond instruments that were presently utilized by the state and its public corporations, because he repeatedly used them as examples to suggest that the HB 331 bonds would also be constitutional.

24. For example, when I initially raised by Article IX, Section 8 concerns in the first hearing on the measure, the state debt manager observed the state's use of "subject to appropriation" debt in other aspects of present public financing. *See* Hearing on S.B. 176, Senate Resources Committee, at 4:34:00-4:39:05; Minutes (PDF) at 18 (February 21, 2018), *available at* http://www.akleg.gov/basis/Meeting/Detail?Meeting=SRES%202018-02-21%2015:30:00.

25. Later, the Department of Revenue commissioner released a memo from the state debt manager presumably describing multiple forms of state debt that could be at risk as unconstitutional, if I were correct about the constitutionally suspect HB 331 bonds. *See* Memorandum from Deven Mitchell, State Debt Manager, to Sheldon Fisher, Revenue Commissioner, *Debt Potentially Impacted by Broad Interpretation of 'Debt' in Alaska Constitution* (Apr. 16, 2018). [BW Attachment C]

26. Among the forms of debt currently carried by the state, the state debt manager's memorandum notes the existence of municipal bonds that

apparently included an element of "subject to appropriation" debt servicing, though the explanation was not given in detail.

27. The memorandum's mention of municipal bonds and their marketability and the exercise itself of examining the various debt vehicles already utilized by Alaska would suggest that the State was aware of the municipal bonds it now cites as inadvertently, shortsightedly impacted by the Supreme Court in its opinion in *Forrer v. State.*

28. I did not understand why the officials of the State were so confident in their belief that HB 331 was constitutional at the time.

Further Your Affiant Sayeth Naught

Bill Wielechowski

Senator, District H
Alaska State Legislature
Alaska Bar #0505035

DATED: October 12, 2020

THE STATE of ALASKA
GOVERNOR BILL WALKER

Department of Revenue
TREASURY DIVISION
333 Willoughby Avenue, 11th Floor
PO Box 110405
Juneau, Alaska 99811-0405
Main: 907.465.2300
Fax: 907.465.2389

Memorandum

TO: Sheldon Fisher, Commissioner, Department of Revenue

FROM: Deven Mitchell, Debt Manager, Treasury Division

DATE: April 16, 2018

SUBJECT: Debt potentially impacted by broad interpretation of "debt" in Alaska Constitution

You have asked me to summarize existing Alaska debt that could be called into question if the Alaska Courts adopted a broad interpretation of the word "debt" as the term is used in the Alaska Constitution, art IX, sections 8 and 11.

By way of background, during my involvement in State of Alaska debt issuances since 1997, the Department of Revenue, Treasury Division and the Alaska courts have narrowly interpreted the word "debt" as it is used in the Alaska Constitution. Constitutional debt is only debt that pledges the full faith and credit of the state. Such constitutional debt essentially gives the courts the power to appropriate debt service if there is a default by the legislature in appropriating debt service.

In reliance on advice from the Department of Law as well as external bond counsel firms, and their reading of case law from Alaska and other states, the State has issued a variety of debt that does not fall within the narrow description of debt under the Alaska Constitution. These are debt types that do not pledge the full faith and credit of the state, and therefore do not require a vote of the people. Neither do these debt types provide authority to a court to compel payment of debt service. Accordingly, these debt types are governed by neither section 8 nor section 11 of article 9, Alaska Constitution.

A broad reading of the constitution -- in other words an interpretation of "debt" to include all debt, whether or not it confers the power of appropriation on the courts to compel debt service -- would be highly disruptive, and would likely invalidate multiple forms of existing debt in Alaska.

The State has $237 million of outstanding Subject to Appropriation bonds secured only by an annual appropriation commitment of the State. They are:

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BW ATTACHMENT A
PAGE 1 OF 2

An additional State bond issuer that may be impacted by a broad interpretation of constitutional debt is the University of Alaska. As the University relies on the State for three quarters of its revenue (through general fund appropriations for operations and debt service as well as tuition scholarships flowing from the State), this interpretation might limit the University's bond issuance program security to those revenues derived from sources other than the State. The University currently has $311 million of debt outstanding that may well be downgraded several credit ratings and the University could lose access to the municipal market with this interpretation.

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We understand concern has been expressed regarding the marketability of Subject to Appropriation debt. This concern is misplaced. In the municipal bond market, Subject to Appropriation obligations are typically rated 1 credit notch off of the credit that has authorized and supports them. In short, Subject to Appropriations bonds carry specific rating criteria in the Municipal Bond market, are a well understood and commonly used financing tool, and will be highly rated based on the State of Alaska's credit.

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The State's position with respect to HB 331/SB 176 is that the proposed obligation is a commitment recognized by and commonly used within the municipal bond market as a "Subject to Appropriation" obligation. Subject to Appropriation obligations are not considered debt for constitutional purposes as any legislature can choose not to appropriate. While there are negative ramifications for not appropriating such as State credit downgrades and loss of access to capital markets, there are negative ramifications for a wide array of annual appropriations. For example, if the state does not appropriate for other core financial obligations such as pension funding, public safety, or required industry oversight it would similarly be facing negative credit rating action.

Also, please note that the intention of using a public corporation to issue bonds with HB 331/SB 176 was not to fall into the exception clause in the Alaska Constitution, Art. IX, Section 11. Initially the Department proposed having the State Bond Committee issue the subject to appropriation bonds, but instead decided to follow the existing Alaska Pension Obligation Bond Corporation model.

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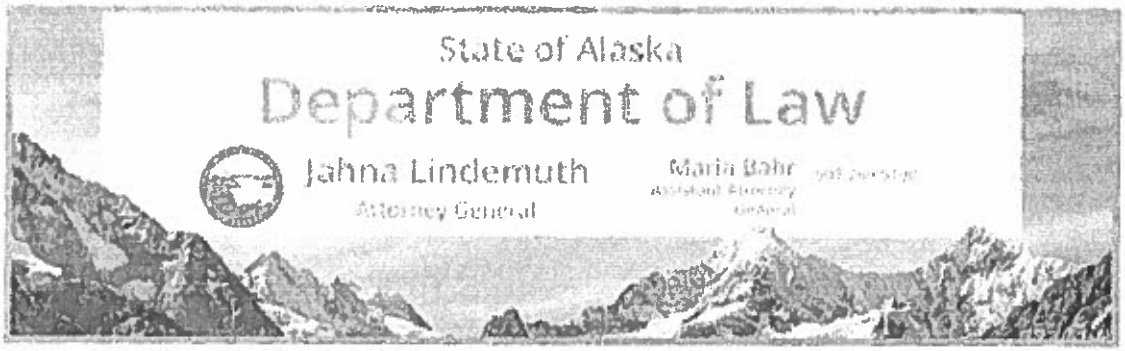

Tax Credit Bonds are Constitutional under Alaska Law

April 18, 2018 (Anchorage, AK) -- The Governor proposed legislation, SB 176 ("An Act Establishing the Alaska Tax Credit Certificate Bond Corporation"), which would authorize the issuance of bonds to pay off the state's tax credit liability in a lump sum rather than paying it down incrementally over the coming years. The State currently has an obligation to certain small oil and gas exploration companies of roughly $800 million. Before the Governor proposed the legislation, the Department of Law in conjunction with outside bond counsel carefully reviewed the legality of the bill under Alaska law, including the constitutional limitations on state debt. In response to inquiries from Senator Wielechowski who opposes the bill, legislative counsel issued an opinion stating there is a "substantial risk" a court would find the tax credit bonds to be unconstitutional. The Department of Law disagrees with the legislative counsel's opinion published today.

"The proposed tax credit bonds in SB 176 are not general obligation bonds under the Alaska Constitution," says Attorney General Jahna Lindemuth. "We've carefully reviewed the legal issues and are confident that these bonds are lawful under Alaska law." The Department of Law has determined that tax credit bonds are a form of "subject to appropriation" debt that is permitted under Alaska law, as addressed in the Alaska Supreme Court's 1995 decision *Carr Gottstein Properties v. State*. A majority of courts outside of Alaska that have addressed the issue have also concluded that "subject to appropriation" debt is a lawful form of financing. The debt proposed in SB 176 is also consistent with long established bond issuance practice in Alaska. "The proposed financing in SB 176 will provide the basis for a successful issuance of securities," states Lindemuth, "and there are no constitutional concerns with the bill."

CONTACT: Assistant Attorney General Bill Milks at bill.milks@alaska.gov

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BW ATTACHMENT B
PAGE 1 OF 1

THE STATE
of ALASKA
GOVERNOR BILL WALKER

Department of Revenue
TREASURY DIVISION
State Office Building
333 Willoughby Avenue, 11th Floor
PO Box 110405
Juneau, Alaska 99811-0405
Main: 907.465.2320
Fax: 907.465.2580

March 2, 2018

Senator Cathy Giessel
State Capitol, Room 427
Juneau, Alaska, 99801

Re: SB 176; Alaska Tax Credit Certificate Bond Corporation

Dear Senator Giessel,

This letter is in response to an issue raised by Senator Wielechowski at the Senate Resources hearing on February 21, 2018. Senator Wielechowski suggested that the proposed tax credit bonds might be considered state debt not permitted under art. IX, section 8 of the Alaska Constitution without approval of the voters. This is not the case. As set forth below, the proposed legislation would authorize the issuance of subject to appropriation bonds which is a form of financing that has been utilized in the past by the state and has not been considered to be unconstitutional state debt.

Article IX, section 8 of the Alaska Constitution describes a category of debt usually referred to as "general obligation" bonds that are issued by the state, backed by the full faith and taxing authority of the state, approved by the voters, and generally limited to capital improvements and housing projects for veterans. The proposed tax credit bonds in SB 176 are not general obligation bonds under art. IX, section 8. In fact, the bill expressly provides at page 2, lines 20-21 that the bonds "do not constitute a general obligation of the state and are not state debt within the meaning of art. IX, section 8, Constitution of the State of Alaska." Instead, the tax credit bonds would be subject to appropriation debt which means that the legislature is not legally committed to make annual debt payments. Subject to appropriation debt has been issued by state entities in the past and has not been considered by the Alaska Supreme Court to be unconstitutional debt. For example, the Alaska Supreme Court in *Carr-Gottstein Properties v. State* decided that a lease-purchase agreement did not involve the issuance of unconstitutional debt because any financial obligation of the state was subject-to-appropriation. 899 P.2d 136, 142-44 (Alaska 1995).

In reliance on the Alaska Supreme Court's precedents such as *Carr-Gottstein*, the State has issued Certificates of Participation to fund buildings, utilized public corporations to issue lease revenue bonds to fund buildings, and the legislature has authorized public corporations to issue revenue bonds and authorized the issuance of pension obligation bonds. All of these financing mechanisms do not bind appropriation power but instead are subject to appropriation financing arrangements. Similarly, all of these arrangements do not involve any revenue pledge other than the State's subject to appropriation commitment.

BW ATTACHMENT C
PAGE 1 OF 2

In sum, tax credit bonds are a form of subject to appropriation debt that is permitted under Alaska law. The proposed financing in SB 176 will provide the basis for a successful issuance of securities as there are no constitutional infirmities with the bill.

Sincerely,

Deven Mitchell
State Debt Manager
Department of Revenue

Bill Milks
Assistant Attorney General
Department of Law

BW ATTACHMENT C
PAGE 2 OF 2

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TELEPHONE (907) 276-5152, FAX (907) 276-8433

IN THE SUPREME COURT FOR THE STATE OF ALASKA

ERIC FORRER, Appellant, v. STATE OF ALASKA and LUCINDA MAHONEY, Commissioner of the Alaska Department of Revenue in her official capacity, Appellees.	)	Supreme Court No. S-17377

Trial Court Case No. 1JU-18-00699CI

STATEMENT OF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REHEARING

The Alaska Municipal League ("AML") is a voluntary, nonprofit, nonpartisan statewide organization consisting of 165 cities, boroughs, and unified municipalities, representing over 97 percent of Alaska's population. AML's mission is to safeguard the interests, rights, and privileges of Alaska's municipalities, and to study and advocate for effective solutions to the unique challenges facing local governments across the state.

AML urges this Court to grant the State of Alaska's Petition for Rehearing. AML agrees with the State that this Court's September 4, 2020 Opinion inadvertently "created significant uncertainty about debt that is structurally much different" from the legislation that was the subject of this case.[1] In dicta, the Court appears to have misconceived an important proposition of law and/or a material fact regarding revenue

[1] Petition for Rehearing at 1 (citing HB 331).

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bonds other than the HB 331 instruments that were the subject of the litigation.[2] Contrary to the Court's mention that subject-to-appropriation bonds are not revenue bonds, some state bonding authorities that include a discretionary moral obligation pledge—*i.e.*, bonds that are primarily secured by a separate asset or revenue stream but may also be partially "subject to appropriation"—are valid revenue bonds under article IX, section 11 of the Alaska Constitution.[3]

The State's briefing in this case may have contributed to the confusion by erroneously implying that HB 331 was similar to other forms of "subject-to-appropriation mechanisms," like Alaska Municipal Bond Bank Authority ("AMBBA") bonds.[4] According to the State, "moral obligation debt consists of bonds that are secured by a reserve fund to which the legislature can choose to appropriate money and which serves as a backstop to prevent default."[5] The State offered AMBBA bonds as an example of bonds that are partially subject-to-appropriation because they contain a moral obligation pledge. However, the State's brief did not accurately explain the crucial differences between "subject-to-appropriation mechanisms" with moral obligation pledges, like the AMBBA, and HB 331, which provided for bonds to be exclusively repaid through discretionary appropriations.

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2 *See* Alaska R. Appellate P. 506(a)(2).

3 *Cf.* Opinion at 60-61 ("We hold that subject-to-appropriations bonds are not revenue bonds under article IX, section 11.").

4 *See* Appellee Br. at 37-38.

5 *Id.*

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Importantly, unlike the bonds authorized under HB 331, AMBBA bonds are indisputably "revenue bonds" because they are secured and repaid by revenues received from the borrowers, *e.g.*, municipalities or universities.[6] And yet, AMBBA bonds also include an additional discretionary moral obligation pledge, in which AMBBA commits to seeking discretionary appropriations from the Legislature to cover bond repayments only in the event that the borrowers default *and* AMBBA's statutorily created Reserve Fund[7] has been depleted.[8]

Thus, for AMBBA bonds, appropriations from the Legislature served not just as a "backstop to prevent default,"[9] but as an optional backstop to the backstop. This fact is made clear to bond purchasers: "[bonds] do not directly, indirectly or contingently obligate the State of Alaska to levy any form of taxation or make any appropriation for payment. . . . Neither the faith and credit nor the taxing power of the State of Alaska is pledged for the payment [of the bonds]."[10] Because AMBBA bonds

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6 *See* Alaska Const. art. IX, § 11; AS 44.85.130(a) ("Each bond and note must contain on its face a statement to the effect that the bond bank authority is obligated to pay the principal and interest on the instrument only from revenues or funds of the bond bank authority and that the state is not obligated to pay the principal or interest and that neither the faith and credit nor the taxing power of the state is pledged to the payment of the principal of or the interest on the bond or note.").

7 *See* AS 44.85.270.

8 *See* Alaska Municipal Bond Bank, Official Statement for the Bond Bank's General Obligation Bonds at Appendix E-24, (April 16, 2019), available at http://www.fnsb.us/fs/General%20Obligation%20Bonds/Official%20Statement%20for%20the%20Bond%20Bank's%20General%20Obligation%20Bonds.pdf. Section 906(D) of the Bond Bank's authorizing resolution describing this process is attached as Exhibit A.

9 Petition for Rehearing at 2.

10 Alaska Municipal Bond Bank, *supra* note 8 at 1.

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were intended to be repaid solely by the borrowers—not the State—there is no doubt that AMBBA bonds qualify as "revenue bonds" for purposes of article IX, section 11, even if they contain an additional discretionary "subject-to-appropriation" provision.

The Petition for Rehearing asks this Court to clarify that the holding in *Forrer* was necessarily limited to ruling on the constitutionality of the bonding authority created by HB 331.[11] AML has no qualm with the central holding that HB 331 is unconstitutional, but respectfully suggests that the Opinion's language was unfortunately overbroad and will likely lead to serious and unintended consequences for revenue bond programs that clearly meet the requirements under article IX, section 11 but also include discretionary subject-to-appropriation mechanisms. The Opinion should not have taken for granted that all bonds with "subject-to-appropriation mechanisms" are similar to HB 331 and likewise do not qualify as revenue bonds.[12] AML submits that the Court could not have intended its ruling to be so sweeping when the novel program created by HB 331 was the focus of its analysis.[13]

The State's Petition for Rehearing cannot overstate the importance of this issue; AMBBA bonds are essential to Alaskans. The AMBBA has provided an important service for dozens of municipalities that would otherwise struggle to issue bonds

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[11] Petition for Rehearing at 5.

[12] *See* Opinion at 60-61.

[13] *See* Appellant Br. at 38 ("Not surprisingly, at least to Forrer, all five of the debt situations advanced by the Department of Revenue during testimony are distinguishable from HB 331."); Reply Br. at 14 ("The kind of debt proposed by HB 33[1] will, for the first time in Alaska's history, sanction the use of long-term debt to pay for the State of Alaska's operating budget.").

without the AMBBA's technical assistance, resources, and proven track record of financing successful capital improvement projects across Alaska. Every year, AMBBA bond issuances result in millions of dollars of direct savings to Alaskan municipalities that in turn provide direct benefits to their residents, all of which would be foregone if the AMBBA's role is needlessly restricted.

The uncertainty caused by the Court's inadvertent assumption that HB 331 was characteristic of all "subject-to-appropriations bonds," and consequently, that all bonds with a "subject-to-appropriation mechanism" cannot be revenue bonds, poses unnecessary risks to the ability of Alaska municipalities to raise revenues through the AMBBA. AML respectfully requests that the clarification proposed by the State be added to the Opinion as a footnote to the sentence on pages 60-61 stating that subject-to-appropriation bonds are not revenue bonds.

Dated this 9th day of October 2020 at Anchorage, Alaska.

LANDYE BENNETT BLUMSTEIN LLP
Attorneys for Alaska Municipal League

s/ Matt Mead
Matt Mead, Alaska Bar No. 0711095
Andrew Erickson, Alaska Bar No. 1605049

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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2020,
a copy of the foregoing was emailed on:

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s/ Cheri Woods
Cheri Woods

EXHIBIT A

Upon failure of a Governmental Unit to make any principal or interest payment on the date specified in, and as required by, the applicable Loan Agreement securing payment of the Municipal Bonds, the Trustee shall immediately notify the Executive Director of the Bank who shall then take the following actions:

(i) the Executive Director shall within two days of the Governmental Unit's failure to make the Municipal Bonds Payment pursuant to the terms of the Loan Agreement, contact such Governmental Unit and request payment;

(ii) in the event payment is not made by the Governmental Unit pursuant to (i) above, the Trustee shall make up such deficiencies from the Reserve Fund . . .

(iii) in the event payment is not made by the Governmental Unit pursuant to (i) above, and the Reserve Fund is drawn upon to make up such deficiency pursuant to (ii) above, the Executive Director shall initiate intercept proceedings with the applicable State agencies . . .

(iv) in the event amounts collected pursuant to (iii) above are insufficient to replenish the amounts held in the Reserve Fund to the Reserve Fund Requirement, the Executive Director shall contact the Governor of the State and the State legislature as set forth in Section 911(B) of this Resolution . . . .[1]

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[1] Alaska Municipal Bond Bank, Official Statement for the Bond Bank's General Obligation Bonds at Appendix E-24, (April 16, 2019), available at http://www.fnsb.us/fs/General%20Obligation%20Bonds/Official%20Statement%20for%20the%20Bond%20Bank's%20General%20Obligation%20Bonds.pdf.