



THE STATE
of **ALASKA**
GOVERNOR BILL WALKER

Department of Law

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March 24, 2017

SENT VIA FIRST CLASS MAIL AND EMAIL

Howard S. Trickey, Esq.
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Re: *Kasayulie v. State* Consent Decree and Settlement Agreement

Dear Mr. Trickey,

Thank you for your letter of March 3, 2017. As set forth below, we look forward to continuing to work constructively with your clients on the important issue of equity for rural school construction. And in that spirit, we respond to your letter. We note, however, that your letter begins with some assertions regarding alleged breaches by the state of the settlement agreement in *Kasayulie v. State*. We will first briefly respond to those assertions and then address our areas of common ground.

Alleged breach of settlement agreement

As you know, the focus of the *Kasayulie* litigation was whether rural Alaska schools were disadvantaged in regard to school construction funding in comparison to non-rural schools. The court found that the state's funding structure disadvantaged rural schools. The case was settled after the legislature established a process in statute for money to be available to fund construction for REAA schools.¹ Your letter contends that the state has not complied with the *Kasayulie* Consent Decree and Settlement Agreement ("Agreement") in three ways.

First, it contends that construction of one of the five school projects identified in the Agreement, the Kivalina school, "was to be funded in an amount sufficient to provide for the construction of the school by July 1, 2015," and that "no school has been constructed."² All five projects of the Agreement were identified as they appeared on the November 2010 CIP list, based on applications previously submitted by each district and

¹ AS 14.11.025 and AS 14.11.030.

² Letter of Howard Trickey dated March 3, 2017, p. 2; *see also* p. 4.

costs reviewed by DEED. The other four school construction projects identified in the Agreement received funding as envisioned in the Agreement.

The Kivalina K-12 project was identified in the agreement as a "*school renovation/addition*" and "for reference" the cost of the project according to the November 2010 list was identified as \$14,724,714.³ The agreement provided that the appropriation for the "renovation/addition" was to be determined by the November 2013 Capital Improvement Project process.⁴ Additionally, the parties expressly recognized that the viability of this school renovation/addition project was in question given erosion issues and that the legislature might not fund the project because of those issues. If the legislature declined to fund the project or placed contingencies on the project, the lack of funding or contingencies would "have no effect on the settlement, and cannot be used by plaintiffs to reopen this litigation."⁵

The anticipated concerns about constructing a renovation/addition to this school in light of erosion problems became a reality. The Northwest Arctic Borough School District did not submit a grant application for a Kivalina school renovation/addition in advance of the November 2013 process (for a FY 15 appropriation). Instead, on September 3, 2013, the District submitted a grant application to DEED for a K-12 Kivalina *replacement school*. The grant amount requested was \$100,065,442. On the November 5, 2013 CIP list, DEED listed the reviewed project budget as \$54,046,749. The state share for the project on the November 2013 CIP list was \$43,237,399; this is the amount that the legislature has to date appropriated for a Kivalina replacement school. The Kivalina replacement school is planned to be built approximately 7 miles inland from the existing community and school. Road access to the site does not yet exist.

To summarize: The Agreement did not contemplate a replacement school and instead acknowledged that the renovation/addition project might not be viable due to erosion issues and that a lack of funding arising out of these issues would have no effect on the settlement. Nonetheless, an appropriation of \$43,237,400 has been made for a replacement school which exceeds by almost three-fold the stated expectation of the parties that the state would pay in the neighborhood of \$14,724,714 for a school renovation/addition. In these circumstances, there has been no breach. Instead, the legislature has undertaken to provide funding beyond the requirements of the Agreement to support the construction of a replacement school at the proposed site when construction at the site becomes possible.

Second, it is contended that the state has breached the Agreement because there were no expenditures from the REAA Fund in FY 16. The letter does not cite any provision of the Agreement that was violated by the lack of expenditures from the fund in

³ Agreement, p. 6.

⁴ *Id.*

⁵ Agreement, pp. 6, 7.

FY 16. Significantly, the REAA fund was capitalized at \$38,789,000 for FY 16 under the formula established under AS 14.11.025. No funds were expended from the fund for FY 16 for two reasons: the amount in the REAA fund was inadequate to fund the next REAA/small municipality project on the FY 16 CIP list; and an unfunded municipal school district project preceded the next REAA project on the FY 16 CIP list. The FY 16 appropriation remained in the REAA fund and after the appropriation for FY 17, the REAA fund was adequate to fund three REAA projects in FY 17. The Coalition points to no authority that prohibits the carry-over of funds in this way. Given these facts, we do not believe that a claim for breach of the settlement on this issue is well-supported.

Finally, it is contended that Governor Walker's partial veto of the appropriation to the REAA/small municipal district fund in the FY17 budget was a breach of the Agreement because the partial veto "deprived REAA school projects of their proportionate share of general funds for school construction and again put urban school funding ahead of rural school funding." The governor reduced school construction funding for FY 17 by 25 percent for both districts eligible for the REAA/small municipal district fund as well as districts eligible for debt reimbursement. Funding was thus not reduced disproportionately for rural schools. In particular, the appropriation for school debt reimbursement was reduced by \$30.5 million dollars and the appropriation for rural school construction was reduced by \$10.4 million dollars. Given that appropriations for both urban and rural school construction were reduced proportionately in FY 17, we do not believe that the 2017 partial veto placed rural schools at a disadvantage in relation to districts eligible for debt reimbursement.

Accordingly, based on the facts as we know them, we are not convinced that the state is in breach of the Agreement. For this reason, the state does not agree to toll the statute of limitations. Nonetheless, the state is willing to discuss the ways in which the state has common ground with your clients as we both seek to ensure that school construction funding is equitably distributed to rural communities.

Discussion Points

We understand that your clients seek a separate CIP list with one set of priorities for both construction and major maintenance projects funded from the REAA/small municipal district fund. Your letter mentioned that the Coalition was drafting legislation that would clarify that REAA funds can be used for major maintenance projects as well as new construction. Since your letter, you have forwarded a proposed new subsection, AS 14.11.013(f), with additional conforming changes, that would obligate DEED to maintain a separate priority list for projects eligible for funding under AS 14.11.025. From your draft, you are also suggesting that projects eligible for funding under 14.11.025 would retain their eligibility for other grant funding. The state is not opposed to the concept of separate lists, but the logistics, revised rating systems, and relationship between the two lists would be subjects for further discussion. This process should help


secure success, but the Administration cannot commit to support any particular legislation until it is before the Governor for signature.

In your letter, you request a commitment from DEED to continue to expend funds from the REAA/small municipal district fund without additional appropriation. This action was taken in the first fiscal year following the interpretation of the Attorney General's Office on this subject. You have not cited any reason for your concern in this regard. You have also requested that the state agree that funding would not lapse under AS 37.25.020 or AS 14.11.008. Currently, the state does not have authority to waive these statutory requirements, although revisions in AS 14.11.008 are currently under consideration in HB 135. Also, according to your letter, the Coalition is currently drafting legislation "to clarify emergency situations that affect REAA funding, add an inflation cap to the REAA fund, grant REAAs access to loans or bonds, and extend the REAA funding mechanism." You have requested the commitment of the Administration to support these legislative proposals of the Coalition. The Administration is open to considering these proposals as they become further developed, but again the Administration cannot make any commitments until the legislation is before the Governor for signature.

We agree that the state should be vigilant to ensure that school construction funding is equitably distributed to all communities. We would like to continue to work with the Coalition to achieve this goal. We look forward to hearing from you in follow-up to this letter.

Sincerely,

JAHNA LINDEMUTH
ATTORNEY GENERAL

By: 
Luann E.B. Weyhrauch
Assistant Attorney General

LBW/ckm

cc: Governor Bill Walker
Jahna Lindemuth, Attorney General
Dr. Michael Johnson, Commissioner, Department of Education & Early Development
Pat Pitney, Director, Office of Management and Budget