IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

MUNICIPALITY OF ANCHORAGE,

Plaintiff,

v.

STATE OF ALASKA and
MICHAEL A. BARTON,

Defendants.

Case No. 3AN-05-8951 CI

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

This case concerns the Anchorage Metropolitan Area Transportation Solutions (AMATS) agreement between the State of Alaska and the Municipality of Anchorage. Specifically, it requires a determination as to the validity of a law enacted by the Alaska Legislature in 2004 that changes the manner of selection and composition of the AMATS Policy Committee without the agreement of the Municipality. As discussed below, this court finds that federal law was amended in 2005 to specifically authorize the Alaska Legislature to change the membership and selection of the AMATS Policy Committee without requiring municipal agreement. However, a determination of this portion of the case is deferred until the parties submit additional briefing as to whether that 2005 federal law applies retroactively to validate the 2004 state legislative enactment, as that issue has not been briefed by the parties in this action.

The case also requires a determination as to whether the state legislature may place restrictions on transportation enhancement apportionments for Anchorage

transportation projects. For the reasons discussed herein, the State is entitled to summary judgment on this claim.

FACTS

In 1962, the Federal-Aid Highway Act was enacted and codified at 23 U.S.C. § 134. The Act was the first piece of federal legislation to mandate urban transportation planning as a condition for receiving federal funds in urbanized areas. Two aspects of the Act are particularly significant to this case. First, the Act called for a planning process at the metropolitan or regional level and set the stage for the establishment of Municipal Planning Organizations (MPO's). Second, the Act called for the planning process to be carried out cooperatively between the states and local governments.

Under the federal law, each MPO is to be initially designated either (1) "by agreement between the Governor and units of general purpose local government that together represent at least 75 percent of the affected population," or (2) "in accordance with procedures established by applicable State or local law." 23 U.S.C. §134(d)(1).

On October 1, 2002, the Municipality of Anchorage and the State of Alaska entered into the "AMATS Inter-Governmental Operating Agreement (OA) for Transportation and Air Quality Planning." MOA's Motion for Summary Judgment, Ex. 1. This Agreement designated the Municipality as the MPO. Id. at §1. Additionally, the AMATS OA designated a Policy Committee as the policy board for transportation planning for the MPO in accordance with federal law. Id. at §5. Under the AMATS OA, the Policy Committee is to consist of five members: two Anchorage Assembly members appointed by the Assembly, the Mayor of Anchorage, the Commissioner of the

ADOT&PF[1] and the Commissioner of ADEC[2], or their designees. Id. at §5.2. Additionally, Section 19 of the AMATS OA established that the agreement could only be amended in writing and that any such amendments would be subject to approval by the AMATS Policy Committee, the FHWA[3] and the FTA.[4] Id. at §19. The responsibilities of the Policy Committee include determining the percentage of funds that should be spent on enhancements for eligible transportation projects, consistent with federal law requirements. The AMATS OA was signed by the Mayor of Anchorage and the Governor of Alaska and became effective on October 1, 2002.

In 2003, the Alaska Legislature passed Senate Bill 71. The bill, when enacted, amended AS 19.15 *et seq.* by adding section AS 19.15.025. In contention in this litigation is AS 19.15.025(c), which provides that "[n]ot more than 10 percent of the funds provided to a municipality for participation in federal-aid highway or other eligible projects may be expended from the transportation enhancement apportionment over the life of a transportation improvement program."

In 2004, Senate Bill 260 was passed by the Alaska Legislature. The bill, when enacted, amended and expanded portions of AS 19.20 *et seq.* At issue in this litigation is AS 19.20.210(a), which provides in part that:

> The policy board of a metropolitan planning organization established under AS 19.20.200 for a metropolitan area with a population greater than 200,000 persons shall consist of at least seven voting members. A quorum of the policy board is a majority of the voting members of the board. Four voting members of the board shall be designated by the municipalities that are located partially or wholly within the metropolitan area. Three voting members shall be appointed by the governor.

[1] Alaska Department of Transportation and Public Facilities
[2] Alaska Department of Environmental Conservation
[3] Federal Highway Administration
[4] Federal Transit Administration

In addition, AS 19.20.210(c) provides that "[t]he governor may appoint an additional voting member to the policy board of a metropolitan planning organization." The result of these statutory changes is that the Municipality may appoint four voting members and the governor is able to appoint up to four voting members to the AMATS Policy Committee.

Senate Bill 260 also directed that "the governor shall enter into an agreement with the Municipality of Anchorage to restructure the policy board" to be in conformance with the new law. And it provided that "[i]t is the intent of the legislature that the membership of the policy board ... for AMATS... be restructured in accordance with this Act in a manner that does not constitute a redesignation . . . under federal law." §3 Ch. 119, SLA 2004. This is significant because 23 U.S.C. §134(d)(4) provides that "a designation of a metropolitan planning organization under this subsection or any other provision of law shall remain in effect until the metropolitan planning organization is redesignated under paragraph (5)." And paragraph (5) of that same federal statute provides that a MPO "may be redesignated by agreement between the Governor and [the applicable] units of general purpose local government."

On August 10, 2005, a federal law was enacted entitled Safe, Accountable, Flexible, Efficient Transportation Equality Act: A Legacy for Users (SAFETEA-LU). Section 4404(a) of that law provides that "[i]n the States of Alaska and Hawaii, members of the State legislature may serve on the policy board of a metropolitan planning organization designated under section 134 of title 23, United States Code, if such service is allowed by State law." And Section 4404(b) of that law provides that "[i]n the States of Alaska and Hawaii, a metropolitan planning organization designated under

section 134 of title 23, United States Code, may be redesignated as a result of changes in State law that define new requirements for the metropolitan planning organization policy board." Id. at § 4404(b).[5]

Also in 2005, the Municipality of Anchorage sued the State of Alaska in U.S. District Court, alleging that the above-cited provisions of SB 260 and SB 71 violated federal law and impaired the AMATS OA contract between the State and the Municipality. By order dated June 15, 2005, the federal court granted the State's motion to dismiss that case. Municipality of Anchorage v. Alaska, 393 F.Supp.2d 958 (D. Alaska 2005). The federal court held that the Municipality had not shown "that Congress intended to provide it a private cause of action in federal court to enforce its rights under 23 U.S.C. §134 and its implementing regulations." Id. at 961. The federal court also concluded that the Eleventh Amendment barred an action in federal court against the State for breach or anticipatory breach of the AMATS OA. But the federal court specifically noted that although the Eleventh Amendment prevented the Municipality from suing the State for breach of contract in federal court, "[i]t does not prevent the Municipality from suing the State on a state cause of action at law or in equity in state court." Id. at 962.[6]

On June 20, 2005, the Municipality filed its complaint in this court seeking specific performance of the AMATS OA and an injunction to preclude the State from implementing the disputed provisions of SB 71 and SB 260. The Municipality has asserted five causes of action in its complaint: (1) that SB 260's change in the

[5]Although Alaska had enacted SB 260 to change the composition of a MPO, it does not appear there has been any state legislative enactment in Hawaii that relate to the composition of MPO's in that state.
[6] See Alaska Constitution, Art. II, § 21; AS 09.50.250.

membership and appointment method of the AMATS Policy Committee constitutes a breach of the AMATS OA; (2) that SB 260 violates federal law, and specifically 23 U.S.C. §134(d)(5), because it redesignates the MPO without the agreement of the Municipality; (3) that the 10% transportation enhancements provision contained in AS 19.51.05(c) violates the AMATS Operating Agreement; (4) that the 10% transportation enhancements provision violates federal law by using a preset formula and thereby overriding input from the AMATS Policy Committee; and (5) that the State violated its obligation to cooperate and consult with the Municipality in violation of federal law by threatening to withhold funding for the Anchorage transportation improvement program if the AMATS Policy Committee and Anchorage MPO fail to comply with SB 260 and SB 71.

In June 2005, the parties filed a Joint Stipulation and Order for Preliminary Injunction. On July 6, 2005, pursuant to that stipulation, this court entered a preliminary injunction that enjoined the State from taking any action to enforce any of the disputed provisions of SB 260 and SB 71 pending further order of this court.

On June 12, 2006, Peter Serrano, a transportation planner with the U.S. Department of Transportation submitted a letter to the Municipality that indicated that the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA) concurred with the Municipality that Sections 4404(a) and 4404(b) of SAFETEA-LU did not change the redesignation procedure specified in 23 U.S.C. §134 (d)(5). The letter stated that since the SAFETEA-LU provision used the word "may," it was permissive and not mandatory, and therefore, any change in the composition of the

AMATS Policy Committee "would still require redesignation of the MPO in accordance with the procedures defined in 23 U.S.C. § 134(d)(5)." MOA Opp. Ex. 1.

On June 23, 2006, the State filed a Motion for Summary Judgment and on June 27, 2006, the Municipality filed its Motion for Summary Judgment. The Court heard oral arguments on the both motions on September 21, 2006.

STANDARD OF REVIEW

"Summary judgment is appropriate if the record demonstrates that 'there is no genuine issue as to any material fact and ... any party is entitled to a judgment as a matter of law.'" Estate of Milos v. Quality Asphalt Paving, Inc., 145 P.3d 533, 536 (Alaska 2006) (*quoting* Ak. R. Civ. P. 56(c)). Both parties agree that this case presents purely legal issues that are appropriate for summary judgment.

DISCUSSION

The Municipality's Motion for Summary Judgment asserts five arguments that correspond to the five counts alleged in its complaint.

1. *Is Implementation of SB 260 an Enforceable Breach of the AMATS OA?*

a. Is There a Breach of the AMATS OA?

For its first cause of action, the Municipality asserts that "SB 260 violates the AMATS Operating Agreement, both substantively and procedurally." MOA MSJ at 13. The Municipality asserts that "[s]ubstantively, SB 260 directly contradicts Section 5.2 of the Operating Agreement, which provides that the AMATS Policy Committee has only five voting members" and "[a]s a procedural issue, the Operating Agreement states in

Section 19 that it may be amended only in writing, and such amendments are subject to approval of the AMATS Policy Committee." Id. The Municipality argues that by adding additional members to the Policy Committee and by changing the way in which the members are appointed, SB 260 breaches these provisions of the AMATS OA.

The State does not dispute the fact that the legislative changes to the membership of the Policy Committee are at odds with the terms of the AMATS OA. But the State argues that the Municipality, as a political subdivision of the State, can not pursue a contract claim against the State. Defendant's MSJ at 14-15. In light of the parties' positions on this issue, this court finds that implementing the disputed provisions of SB 260 would constitute a breach of the AMATS OA.

b. Is the 2002 AMATS OA an Enforceable Agreement?

Although the State does not refute the Municipality's assertion that SB 260 would cause a breach of the OA, the State does assert that the 2002 AMATS OA is no longer an enforceable agreement. Specifically, the State asserts that 23 U.S.C. §134(b)(2) "redefines the term 'metropolitan planning organization' to mean the MPO's policy board." Defendants' MSJ at 12. The State adds that "the designation of the Municipality as the MPO in Section 4 of the 2002 Agreement now fails to comply with § 134, since it is the AMATS Policy Committee, and not the Municipality, that should be the MPO." Id. Thus, the State argues that because the MPO is improperly designated, "the MPO for Anchorage metropolitan area will have to be redesignated." Id.

Federal law defines a MPO as "the policy board of an organization created as a result of the designation process in subsection (d)." 23 U.S.C. §134(b)(2). In addition to the provision in the federal statute, the Federal Highway Administration and the

Federal Transit Administration have adopted regulations governing the implementation of the provisions set out in 23 U.S.C. These regulations are set out in 23 C.F.R. §450.[7] Specifically, 23 C.F.R. §450.104 (2003) provides that the term "[m]etropolitan planning organization (MPO) means the forum for cooperative transportation decisionmaking for the metropolitan planning area."

The AMATS OA recognizes that "[o]n April 8, 1976 the Governor of the State of Alaska designated the Municipality of Anchorage as the Metropolitan Planning Organization and identified the Anchorage Metropolitan Area Transportation Study ("AMATS") Policy Committee as the then existing policy body providing the direction of transportation planning in the MPO in accordance with Federal law." §3.2. The 2002 AMATS OA continued the designation of the Municipality as the MPO and in § 4 defined the "MPO" as "the Municipality of Anchorage in its capacity as the Metropolitan Planning Organization." Instead of the MPO being the cooperative transportation decision maker, the AMATS Policy Committee was "established in Section 5.2 of this agreement for the cooperative decision making in accordance with this Agreement." AMATS OA §4.

Based on the definitions set out in 23 U.S.C. §134(b)(2) and 23 C.F.R. § 450.104, the designation in the AMATS OA of the Municipality as the MPO does not comply with current federal law. However, contrary to the State's assertion that the MPO must be redesignated, 23 C.F.R. §450.104 provides that "MPO's designated prior to the promulgation of this regulation remain in effect until redesignated in accordance

[7] 23 C.F.R. § 450 (2003) has been revised as a result of the passage of SAFETEA-LU. The new provisions of 23 C.F.R. §450 are set out in 72 FR 7224 (2007) and will become effective on March 16, 2007.

with §450.106 and nothing in this part is intended to require or encourage such redesignation." Id.

c. Can the State Override the OA by Passing SB 260?

The State argues that even though SB 260 may cause a breach of the AMATS OA, the Municipality, as a creature of the State, must comply with all state statutory requirements. Stated differently, the State asserts that the state constitutional provision that "no law impairing the obligations of contracts . . . shall be passed" is inapplicable to the State's agreement with the Municipality. Alaska Const. Art. I, §15. State's Opp. to MOA's MSJ at 14.

The Municipality counters that the State does not have unlimited control over the Municipality and cites to Native Village of Eklutna v. Alaska Railroad Corp., 87 P.3d 41 (Alaska 2004) in support of its position. The Municipality argues that Eklutna stands for the proposition that the "municipalities in Alaska are not always subservient to the will of the State." MOA Opp. at 11. But the Eklutna case was focused on the Railroad's claim of immunity against local zoning laws, and did not focus on an alleged breach of contract claim against the State by a municipality with respect to a specific agreement entered into with the State. The Municipality also cites to Jefferson v. State, 527 P.2d 37, 43 (Alaska 1974). MOA Opp. at 11. But that case, brought by a private citizen, was described by the supreme court as "a clear case in which statutory authority overrides a provision in a home rule charter" with respect to the operation of a city sewer system, and does not appear to have direct applicability to the issues before this court.

This court agrees with the State's position that a municipality, as a political subdivision of the State, cannot as a general rule sue the State under a breach of

contract theory. But to the extent specific powers may have been conferred on the Municipality by the federal government, then the state legislature would not have the power to impose restrictions or limitations on those powers that were specifically conferred. See Rogers v. Brockette, 588 F. 2d 1057, 1070 (5th Cir.), *cert. denied*, 444 U.S. 827, 62 L. Ed. 2d 35 (1979); City of Philadelphia v. Commonwealth, 838 A.2d 566 (Pa. 2003); City of South Portland v. State, 476 A.2d 690 (Maine 1984). See also 17 E. McQuillin, The Law of Municipal Corporations, (3rd), §49:2, p. 211 (2004). Thus, the determination as to whether the Municipality may maintain this claim against the State requires a determination as to whether the Municipality has been conferred direct, congressionally authorized rights with respect to transportation planning that are protected from state interference. This, in turn, requires a determination as to whether SB 260's intended change in the composition of the AMATS Policy Committee without the Municipality's approval violates federal law. Thus, resolution of the cross-motions for summary judgment with respect to Count I of the Municipality's complaint is inexorably tied to the Municipality's second count, to which this court now turns.

2. *Would Implementation of SB 260 Violate Federal Law?*

a. Does the Federal Court Decision Preclude Consideration of this Issue?

In its June 2005 decision, the U.S. District Court held that the Municipality could not bring a claim against the State seeking compliance with 23 U.S.C. §134, and that an alleged breach of the statute by the State "cannot provide the predicate for an injunction or declaratory relief." Municipality of Anchorage v. Alaska, 393 F.Supp.2d 958, 962 (D. Alaska 2005). The State asserts that this ruling should be accorded *res judicata* effect so as to preclude relitigation of "all claims arising under SB 260." State's MSJ at 9.

The Municipality asserts that the federal court decision should not have any preclusive effect. Instead, it asserts that its claim is "a claim for preemption, which is actionable even if no private remedy exists under 23 U.S.C. §134." Muni. Opp. at 1. It seeks "a declaratory judgment that state statutes are unenforceable because they conflict with federal law." MOA Opp. at 6. And it asserts that the question whether 23 U.S.C. §134 creates a private cause of action was never litigated before the federal court, and thus the federal judge's *sua sponte* determination on that issue should not be accorded preclusive effect. Id. at 5.

In this court's view, the State is interpreting the federal court's decision too broadly. For although that court held there was no private right of action under 23 U.S.C. §134, the federal court expressly contemplated that the state court would be interpreting that federal law in determining whether there had been a breach of the agreement between the State and the Municipality when the state legislature enacted SB 260. In that regard, the federal court noted that the parties disputed whether there had been a valid "redesignation" of the Policy Committee under federal law, and specifically under C.F.R. §450.306(k). On this issue, the federal court held, "[t]he Alaska Supreme Court will have to make this determination" in the context of the breach of contract claim that that court anticipated would go forward in state court. 393 F.Supp.2d at 964. Clearly, the federal court intended the state court to determine whether SB 260 complied with federal law, but anticipated that determination would be made in the context of the breach of contract claim that its decision specifically recognized.

b. Does SB 260 comply with federal law?

The Municipality asserts that SB 260 violates federal law by attempting to redesignate the composition of the AMATS Policy Committee by an invalid means. Pursuant to 23 U.S.C. § 134(d)(4), an MPO that has been designated "shall remain in effect until the metropolitan planning organization is redesignated under paragraph (5)." Section (5) provides that a MPO "may be redesignated by agreement between the Governor and units of the general purpose local government that together represent at least 75 percent of the existing planning area population . . ." 23 U.S.C. §134(d)(5). The Municipality argues that since SB 260 was not the product of such an agreement, it violates this federal law.

Section 134(d)(5) only applies if SB 260 constitutes a "redesignation." Under the federal regulations applicable to AMATS in 2004, adding membership "does not automatically require redesignation of the MPO." 23 CFR §450.306(k). However, when there is a "substantial change in the proportion of voting members on the existing MPO representing the largest incorporated city . . . and the State," then redesignation is required." 23 CFR §450.310(d), (k)(1). The Municipality asserts that since SB 260 changed the voting member balance from 60% municipal / 40% state to a 50/50 balance between state and local appointments (assuming the governor appointed the fourth voting member as authorized by AS 19.20.219(c)), then it constitutes a redesignation under federal law. The State does not directly assert that SB 260 does not constitute a redesignation under federal law, but simply argues that the point is "open to debate." State's Opp. at 5. The State does note that one component of SB 260 provides that the state legislature did not intend that law "to constitute a

redesignation" under federal law. SB 260 Sec. 3. But it is ultimately federal law, and not the state legislature's intent, that determines whether the proposed statutory change to the Policy Committee constitutes a "redesignation" under federal law. And under this court's reading of the applicable federal regulations, the shift in the proportion of state versus local officials on the AMATS Policy Committee that is sought by SB 260 constitutes a redesignation as that term is defined by applicable regulations. As such, under the federal law in effect in 2004, such redesignation of the AMATS Policy Committee could not occur without the agreement of the Municipality, which was not forthcoming at that time.

While acknowledging the limitations set out in 23 U.S.C. § 134(d)(4) & (5), the State argues that SAFETEA-LU §4404(b) created a new option for redesignation of an MPO in Alaska. State MSJ at 3. That uncodified statute, enacted in 2005, provides: "[i]n the States of Alaska and Hawaii, a metropolitan planning organization designated under section 134 of title 23, United States Code, may be redesignated as a result of changes in State law that define new requirements for the metropolitan planning organization policy board."

In response to the State's argument that this new federal legislation conclusively resolves the validity of SB 260 in the State's favor, the Municipality points to a June 12, 2006 letter from a U.S. Department of Transportation planner who indicates that he does not interpret §4404(b) to allow the state legislature to by-pass the requirement of an agreement to redesignate between the Governor and the local government. Referring to §4404(a)'s provision that permits state legislators in Alaska and Hawaii to serve of the policy board's of MPO's, the planner concluded that "such a change would

still require redesignation of the MPO in accordance with procedures defined in 23 USC §134(d)(5)." MOA's Opp., Ex. 1. The Municipality notes that there is a "well settled rule that requires courts to give consideration and respect to the contemporaneous construction of a statute by those charged with its administration, and not to overrule such construction except for weighty reasons." Whaley v. State, 438 P.2d 718, 722 (Alaska 1968) (footnotes omitted). The Municipality, therefore, asserts that the June 12, 2006 letter interpreting SAFETEA-LU § 4404 "is entitled to great weight" in determining whether SB 260 violates federal law. MOA Opp. at 8.

The State counters that such deference is not warranted for an opinion letter interpretation as opposed to a regulatory or administrative determination. State's Reply at 9-12. As enunciated by the U.S. Supreme Court, interpretations contained in formats "such as opinion letters are 'entitled to respect' under our decision in Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944), but only to the extent that those interpretations have the 'power to persuade." Id. (citations omitted). And the State asserts that deference is "warranted only when the language of the regulation is ambiguous." Christensen v. Harris County, 529 U.S. 576, 588 (2000).

This court finds that the letter from the U.S. Department of Transportation planner is not persuasive to the issue before this court. Indeed, the letter appears focused more on §4404(a)'s provision regarding adding state legislators as non-voting members to the board, an issue not before this court. As to §4404(b), the letter asserts that by its use of permissive language -- the term "may" -- (which as the State notes, is also contained in 23 U.S.C. §134(d)(5)), "[s]ection 4404 of SAFETEA-LU does not change th[e] redesignation process." MOA Opp., Ex. 1. The State persuasively argues

that adopting the interpretation proffered by the June 12, 2006 federal DOT letter of SAFETEA-LU §4404(b) would render that statutory provision meaningless. The Alaska Supreme Court has "recognize[d] a presumption that the legislature intended every word, sentence, or provision of a statute to have some purpose, force, and effect, and that no words or provisions are superfluous." Rydwell v. Anchorage Sch. Dist., 864 P.2d 526, 530-31 (Alaska 1993) (*citing* Alaska Transp. Comm'n. v. AIRPAC, Inc., 685 P.2d 1248, 1253 (Alaska 1984). Consistent with this presumption, this court finds that §4404(b) expressly accords to the Alaska Legislature the ability to by-pass the redesignation requirement of 23 U.S.C. §134(d)(5) that specifies that redesignation of MPO's can occur only with the agreement of the Governor and the affected local government.

But what neither party has addressed in the briefing before this court to date is whether §4404(b) (enacted in 2005) should be applied retroactively to validate SB 260 (enacted in 2004). See, e.g., Landgraf v. USI Film Products, 511 U.S. 244, 265 (1994). In this court's view, if SAFETEA-LU §4404(b) is not applied retroactively, then the Municipality is entitled to summary judgment on Counts I and II of its complaint. But if SAFETEA-LU §4404(b) is applied retroactively, then it is the State that is entitled to summary judgment on these counts. Prior to making this determination, this court seeks additional briefing from both parties on this issue. The briefing schedule is set out at the conclusion of this decision.

3. Would Implementation of SB 71 Constitute a Breach of the AMATS OA?

The Municipality's third cause of action asserts that the 10% spending limit established by SB 71, codified in AS 19.15.025(c), violates the AMATS OA by limiting

spending on transportation enhancements without the consent of the AMATS Policy Committee. In the Municipality's view, this law "effectively overrules AMATS' policy of allocating fifteen percent of program funds to transportation enhancements." MOA Opp. at 13, MOA Reply at 18-19.

For the same reasons as set forth above with respect to SB 260, this court finds that the Municipality's breach of contract claim with respect to SB 71 is actionable only in the context of federal law requirements. Thus, the determination as to whether the Municipality may maintain this claim against the State requires a determination as to whether the Municipality has been conferred direct, congressionally authorized rights with respect to transportation enhancements that are protected from state interference. This, in turn, requires a determination as to whether SB 71's provisions on transportation enhancements violate federal law, a question to which this court now turns.

4. Would Implementation of SB 71 Violate Federal Law?

The Municipality's fourth cause of action asserts that one portion of SB 71 violates federal law. The disputed provision of SB 71, codified at AS 19.15.025(c), provides that "[n]ot more than 10 percent of the funds provided to a municipality for participation in federal-aid highway or other eligible projects may be expended from the transportation enhancement apportionment over the life of a transportation improvement program." The Municipality asserts that this portion of SB 71 violates federal law in two respects.

The Municipality first argues that SB 71 violates 23 C.F.R. §450.324(l). This regulation provides as follows:

> Procedures or agreements that distribute suballocated Surface Transportation Program or section 9 funds to individual jurisdictions or modes within the metropolitan area by predetermined percentages or formulas are inconsistent with the legislative provisions that require MPOs in cooperation with the State and transit operators to develop a prioritized and financially constrained TIP and shall not be used unless they can be clearly shown to be based on considerations required to be addressed as part of the planning process.

The Municipality asserts that "the pre-set limit of ten percent set out in SB 71 is a *per se* violation of 23 C.F.R. § 450.324(l) because it contains a "predetermined percentage." MOA Opp. at 14. The State responds by asserting that the above-quoted regulation applies only to limit the use of pre-set formulas when suballocating funds within multi-jurisdictional MPO's. In this regard, the State points to the phrase in the above-cited regulation that indicates the regulation applies to "individual jurisdictions or modes within the metropolitan area." State's Opp. at 15. Since the MPO for Anchorage is not multi-jurisdictional, the State asserts that the concept of suballocation of funds and the regulation itself is inapplicable to SB 71. For its part, the Municipality asserts that this is "an excessively narrow reading" of the regulation, but does not dispute that this particular federal regulation is applicable only to the distribution of funds *within* an MPO rather than *to* the MPO. MOA Reply at 20.

While acknowledging that the particular federal regulation is not directly applicable to SB 71, the Municipality argues that the regulation is illustrative of a fundamental requirement of federal law – "that use of predetermined percentages is inconsistent with the legislative provisions that require a continuous, cooperative and comprehensive planning process." Id. The Municipality asserts that SB 71's limitation on funds from transportation enhancement appropriations violates federal law because

it overrides input from the MPO and therefore negates the possibility of cooperation between the parties. MOA Reply at 21. But federal law does not contain a requirement that all actions of the State regarding funding determinations must be submitted to the local MPO for a vote. The Municipality points to no language in federal transportation law that accords specific powers to the local policy board to insist on that level of cooperation with the state government with respect to such funding determinations.[8] In the absence of a clear statutory indication that such rights have been conferred upon the Municipality at the federal level, the Municipality has failed to demonstrate that SB 71 violates federal law.

More fundamentally, the State argues that SB 71 "creates no limitation whatsoever on the projects the Municipality may build with federal funds." State Opp. at 16. Instead, the State argues "SB 71 actually increases the Municipality's freedom to construct the projects it desires, since it ensures that the State does not unfairly burden the Municipality with restricted funds that may be used only for transportation enhancements." Id. at n. 7. The Municipality disagrees with this interpretation, and asserts that the "clear intent of SB 71 is to limit AMATS' spending on transportation enhancements." MOA Reply at 18. The Municipality notes that the bill's sponsor, Senator Ben Stevens, explicitly acknowledged that the express purpose of SB 71 was to limit AMATS spending on enhancements. MOA MSJ at 18. In response to the State's argument that the Municipality could still spend as much funds as it wishes on

[8] *Cf.* 72 FR 7224, Rules and Regulations *revising* 23 CRF Parts 450 and 500, dated February 14, 2007, at 7227. "Several MPO's and COG's expressed concern about the definition of "coordination" because there is no resolution mechanism if agencies cannot come to agreement. However, such a process is not required by statute and is, therefore, not included in this rule."

transportation enhancements by allocating funds from other budget areas toward transportation enhancement projects, the Municipality responds "[t]his would be possible only if the Municipality engaged in the dishonest practice of labeling transportation enhancement projects as something else." MOA Reply at 18.

Upon careful consideration of this statutory provision, this court agrees with the State's analysis that SB 71 does not limit the amount that AMATS may chose to spend on transportation enhancements. Although its sponsor may have intended a different result, this court agrees with the State's attorney in this case that "the only impact of [the disputed provision of SB 71] is to prohibit the State from allocating a disproportionate share of restricted transportation enhancement funds to a municipality." State MSJ at 21; Affidavit of Jeffery Otteson at pp. 3-4, ¶¶ 5-8. Since the law operates solely as a restriction on the State, and does not impose any actual limitation on spending determinations by the Municipality, the State is entitled to summary judgment on Count IV, and, accordingly, on Count III as well.

5. Did the State Violate its Obligation to Cooperate and Consult with The Municipality in Violation of Federal Law?

The final count of the Municipality's complaint asserts that "the State of Alaska has threatened to withhold funding for the Anchorage transportation improvement program if AMATS and the Anchorage MPO do not comply with SB 260 and SB 71." The Municipality asserts this threat to withhold funds violates the State's obligation under federal law "to consult, cooperate with, and coordinate with the Anchorage MPO." Complaint, p. 7, ¶¶7,8. The Municipality concedes that "Count V of the complaint will be

established as a matter of law, based on the Court's treatment of the four proceeding claims." MOA MSJ at 20. Because this court has deferred its determination with respect to Counts I and II of the Municipality's complaint pending receipt of further briefing, a determination on Count V is deferred as well.

Conclusion

For the foregoing reasons, summary judgment is GRANTED to the State on Counts III and IV of the Municipality's Complaint.

With respect to Counts I, II and V, a decision on those Counts is DEFERRED pending this court's receipt of further briefing from the parties with respect to the retroactivity of SAFETEA-LU §4404(b). Preliminary briefing on this issue from each party shall be filed within 30 days from the date of distribution of this order. Thereafter, each party shall be accorded 10 days to file a response to the other's party's brief.

The Preliminary Injunction entered by this court in July 2005 pursuant to the parties' stipulation remains in full force and effect.

ENTERED at Anchorage, Alaska this 5th day of March 2007.

Sharon Gleason
SHARON L. GLEASON
Superior Court Judge

I certify that on 3-5-07 a copy of the above was mailed/faxed to each of the following at their addresses of record
Judicial Assistant
MOA - McDermott
SOA - Stark