

ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 8672

10730 HOUSE COMMUNITY & REGIONAL AFFAIRS

dialing code is not in use. It also set forth the steps it would take to encourage and support State efforts to deploy comprehensive emergency communications networks.¹⁸ Recently, the Commission also addressed the issues of non-initiated handsets¹⁹ and TTY compatibility.²⁰ In July 2002, the Commission reluctantly granted non-nationwide Tier II (mid-sized regional carriers) and Tier III (small carriers) temporary, limited relief from the Phase II implementation deadlines.²¹ Summaries of the Commission's wireless E911 requirements and decisions that led to them are available on the agency's web site (<http://www.fcc.gov/enhanced/>).

2.2.4 Technical Description of Wireless E911

In Section 2.1, above, I described the basic steps that must occur in delivering an E911 call on the wireline network. A similar set of things must happen in handling a wireless E911 call. Basically, four things have to happen: the subscriber has to be located, the PSAP serving that location must be determined, the voice conversation has to be routed to that PSAP and finally the callback number/mobile directory number and location information must be delivered to the PSAP. As I indicated before, in the wireline environment, an ordinary telephone number is associated with a particular line (local loop) that serves a particular physical address. While the telephone number associated with a particular loop serving a given address may change from time-to-time (e.g. when subscribers move) the associated data bases are comparatively static. This is clearly not the case with mobile wireless where the location of the customer may be continuously changing even within the duration of a single call.

Recall that in Phase I, the location information is simply the cell site/sector receiving a 911 call. In Phase I implementations, a set of unique pseudo telephone numbers is assigned to each cell site/sector. In a mobile wireless network, the equivalent of a wireline carrier's End Office is known as a Mobile Switching Center ("MSC"). When a MSC receives a 911 call, a processor associated with the switch knows the cell site/sector where the call is coming from and selects an unused pseudo telephone number from the set associated with the cell site/sector. The MSC then forwards the call and pseudo telephone number to the E911 Control Office. The Selective Router Data Base contains

¹⁸ Implementation of the 911 Act, The Use of N11 Codes and other Abbreviated Dialing Arrangements, *Fifth Report and Order* CC Docket No. 92-105, *First Report and Order* WT Docket No. 00-110, *Memorandum Opinion and Order on Reconsideration* CC Docket No. 92-105 and *Order* WT Docket No. 00-110, FCC 01-351 (2001)

¹⁹ *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Non-Initialized Phones*, CC Docket No. 94-102, Report and Order, FCC 02-120 (rel. April 29, 2002). Non-initialized handsets are those phones for which there is not an existing service agreement.

²⁰ *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, Order, FCC 02-1540 (2002).

²¹ See *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems Phase II Compliance Deadlines for Non-Nationwide CMRS Carriers*, CC Docket No. 94-102, Order to Stay, FCC 02-210, rel. July 26, 2002.

information that associates the pseudo telephone number (and its associated cell site/sector) with a particular PSAP. The E911 Control Office or Selective Router then forwards the call with the pseudo telephone number to the PSAP's CPE. When the MSC forwards the call to the E911 Central Office, the associated processor also sends (or "pushes") the call back number of the mobile unit and Phase I location information to the ALI data base. When the PSAP's CPE receives the call and pseudo telephone number from the E911 Control Office it queries the ALI data base using the pseudo telephone number and receives in return the call back number and cell/site sector information. The call back number and location information is then displayed to the dispatcher.²²

Before I turn to Phase II implementations, two observations are in order. First, because of the use of pseudo telephone number, the existing E911 infrastructure can be used for Phase I implementations with minimal or no modifications. The pseudo telephone number is simply substituted for the ANI information and everything else essentially operates as it did for wireline E911. This is not the case with Phase II implementations. Second, as noted before, these functions could be performed more efficiently with modern digital, common channel signaling techniques that eliminate many of the limitations associated with CAMA signaling. Stated more directly, the wireline E911 system, while reliable, was jury-rigged upon a dead-end CAMA technology that continues to constrain the evolution of wireless E911 service.

In Phase II, the wireless carrier must deliver the callback number and the location (latitude and longitude or "XY" coordinates) of the caller. As I will discuss in more detail later, much of the early activity in wireless E911 was associated with discovering/inventing, developing, evaluating and selecting methods for locating mobile units to meet the Phase II requirements. Broadly speaking, there are two basic types of solutions – network-based solutions and handset-based solutions. In the case of network-based solutions, receivers at known locations (i.e., at base stations) measure the direction or, more typically, the time of arrival of the signal emitted by the mobile unit. In the case of the latter, having a timing reference and knowing the speed that the radio signal travels is a constant (i.e., the speed of light), it is possible to estimate the range of the mobile unit from the base station. With three base stations at known locations making the measurements, it is possible to unambiguously estimate the location of the mobile unit. There are many refinements to this basic triangulation technique including using combinations of angle-of-arrival (direction) and field strength, for example. Systems like this are referred to as network-based solutions for the rather obvious reason that the measurements and calculations are done in the network.

In a handset-based solution, the situation is reversed with the handset making the measurements and the calculations. In one approach, the handset measures the time of arrival of signals transmitted from Global Positioning System ("GPS") satellites and uses a similar triangulation techniques to calculate its position. In the most commonly used

²² The description contained in the paragraph is intended to be illustrative only. The description generally reflects what is called the Non-Call Path Associated Signaling ("NCAS"). Other solutions include Call Associated Signaling ("CAS") and Hybrid CAS.

approach, some of required processing is actually carried out in the network to improve the performance of the system. The system I am referring to is known as Assisted GPS ("A-GPS"). Likewise, another commonly used approach, known as Enhanced Observed Time Difference of Arrival ("E-OTD"), is regarded as a hybrid system because the required measurements are distributed between the handset and the network.

The delivery of the location or XY information to meet the Phase II requirements is more complicated than the delivery of Phase I information. It is more complicated for several reasons. First, unlike the cell site/sector information, the geographic coordinates may not be immediately available because of the time it takes to perform the required measurements and calculations. Second, the amount of information to be transferred (the geographic coordinates and, possibly, confidence information) is greater and, third, the location data may need to be refreshed during the call in order to improve the accuracy or to follow a caller that is moving. Because the existing, underlying E911 network is typically unable to carry the additional information due to constraints in the signaling network or Selective Router or to handle refresh requests and responses, a separate data link and interface is required between the ALI data base and wireless carrier's Mobile Positioning Center ("MPC"). Implementation of this data link requires selection and installation of an interface and various data base upgrades.

Although the details vary depending upon the capabilities of the legacy network elements and the interface or interfaces chosen, call processing in Phase II implementations is similar to that described for Phase I since the same basic steps are required. When a wireless carrier's MSC receives a 911 call, the Position Determination Equipment ("PDE") locates the mobile terminal either at the start of the call or while the call is in progress. The MPC uses the XY coordinates to interrogate a Coordinate Routing Data Base ("CRDB"). The CRDB returns the information necessary to forward the call to the proper E911 Control Office or Selective Router. The MSC forwards the call and Phase I pseudo telephone number to the E911 Control Office. The E911 Control Office uses the information stored in the Selective Router Data Base to deliver the call and pseudo telephone number to the proper PSAP. When the MPC locates the mobile terminal, it also pushes the pseudo telephone number, call back number and location information (XY coordinates) to the ALI data base over the separate data link. When the PSAP's CPE receives the call and pseudo telephone number from the E911 Control Office or Selective Router, it queries the ALI data base using the pseudo telephone number. The ALI data base returns the call back number and Phase II location information which is then processed and made available to the dispatcher. Note that during the call, the location information can be refreshed over the data link between the MPC and the ALI data base.²³

²³ As in the case of the Phase I, the description contained in this paragraph is intended to illustrative only. The details vary depending upon the protocols chosen and other factors. The process described assumes routing based upon the Phase II information but routing on Phase I information is also possible as described in Section 4.2 below

Subject: RE: here's the agenda

Date: Tue, 20 Apr 2004 17:10:14 -0800

From: "Becky Gay" <bgay@aidea.org>

To: "Mary Siroky" <Mary_Siroky@Legis.state.ak.us>

Mary, Somehow I already lost the agenda! Can you send it again and I am requesting a change of order to accommodate Robert Wilkinson, as noted below. Thanks again for the excellent opportunity.

On Bridge:

Task Force members to present:

Robert Wilkinson: 822-3211 CEO, Copper Valley Electric (Agenda change: This presenter needs to be right after Tom Boutin since it turns out he has to drive up to Lake Louise same morning for his Board meeting and should leave by nine a.m. He will speak briefly on SouthCentral Coastal area needs.)

Other Task Force members:

Wayne Carmony: General Mgr. Matanuska Electric 761-9211

Rick Eckert, Finance Mgr. Homer Electric 235-3353

Steve Haagenson, President/CEO, Golden Valley Electric 452-1151

Staff, Bernie Smith AEA 269-4643

Remember, our Chairman Mike Barry is trying to make it in the night before, but doesn't look promising. He would be on teleconference, but he is on the plane down at same time. If you need to see him face-to-face afterward, please let us arrange that! Becky

-----Original Message-----

From: Mary Siroky [mailto:Mary_Siroky@Legis.state.ak.us]

Sent: Tuesday, April 20, 2004 4:43 PM

To: Becky Gay

Subject: Re: here's the agenda

Becky I need the names and number of folks who want to be on the bridge and I will get them added.

mary

Becky Gay wrote:

> Mary, That looks great! Also, I would like to have the other members
> of the Task Force on the bridge if that is okay, since they may want
> to weigh in or answer questions. That is the same list we were using
> to get titles, fyi. Can I also have a bridge access for AEA here, so
> staff can be on standby for PCE detail, etc. Bernie Smith also helped

> with the Task Force, so he will be on standby as well. Thanks for
> sending me the right number and setting up the opportunity. Becky

>

> -----Original Message-----

> From: Mary Siroky [mailto:Mary_Siroky@Legis.state.ak.us]

> Sent: Tuesday, April 20, 2004 3:50 PM

> To: Becky Gay

> Subject: here's the agenda

Summit Telephone Company

Both Cleary Summit and Chena Hot Springs have a Special Access DSO circuit into the Fairbanks Northstar Borough E911 system. We provide an alternate route to an 800# that goes to the Alaska State Troopers in Fairbanks.

Coldfoot has no E911 access, we route all 911 calls to the 800# at AST in Fairbanks.

Bristol Bay Telephone Co-op

We don't have access to a psap in any of the 7 communities we serve.

United Utilities

75 cents per month per line in Bethel

Ketchikan Public Utilities

All of our customers have access to the local PSAP which is in Ketchikan. Just for the record, we are required by the Ketchikan Municipal Code to charge a \$.75 per line E911 charge to our customers and remit to the local PSAP.

Dan

Cordova Telephone Co-op

We do not collect anything for our PSAP in Cordova. I suspect the day will come the City will ask, they had visited this issue a few years ago, but were going after grant money to fund their 911 system, I don't believe they ever received the money.

Copper Valley Telephone Co-op

Your questions are easy, as with most of these issues the answers are much more difficult. The devil is always in the details!

CVTC has 6,200 access lines spread over 9,400 square miles in six (6) exchanges. Valdez with its 3,400 lines will start applying a .75 cent surcharge in May for its local PSAP. Question, should this group or others who are already paying for a local PSAP pay for a statewide toll free PSAP.

Regarding our remaining 2,800 CVTC lines, should they be required pay 2-5 cents per line per month for the ability to hear a live person on the other end of a 911 call? For calls placed from Mentasta 107 miles from Glennallen, McCarthy an 1 1/2 air taxi ride or a 3 1/2 hour drive

from Glennallen, Chitina 45 minute drive from Glennallen or Tatitlek a 45 minute ride by air taxi or a 2 1/2 hour trip by boat from Valdez, is there a value for that? I'm not sure!

At some level there is but if it truly is an emergency, house on fire, heart attack, gun shot wound. I'm not sure the PSAP will be able to provide a lot of help.

The 911 calls from the above exchanges (not Valdez) are currently routed to Glennallen State Troopers when the office is occupied. When the office is not occupied the calls are routed to Fort Rich. It's my understanding that at times the calls are routed to a recorded announcement. I'm not sure how many 911 calls from these communities we currently route to the Troopers. ✓

With respect to costs for routing calls, if it were set up on an 800 call basis through either AT&T or GCI they should be able to give you a better idea on costs. They may be able to give you a flat rate, per minute or per call quote. Mary Laird at GCI or Elisabeth Parks at AT&T? ✓

Apologize for the long answer!

Tim

Alaska Power & Telephone *Jim Harper*

I'm going to double check but in our remote locations we route them LD to the nearest trooper station... the same as other telco's would have to do... again I'll double check but that is my recollection... it has been over 5 years since I've dealt with that issue... ✓

EVERY location we serve routes a 911 call to some authority, be it the local PD or routed to closest state trooper office. Yes, these are not E911 calls (E911 uses a database to know who the caller is and GIS systems to locate the caller) but in most rural areas E911 isn't practical, there are no maps or even street address. ✓

✓ Only one community we serve is attempting to get a PSAP and that is Wrangell. We might remind others that many communities are eligible for aid from homeland security and those funds can cover E911. See this link.

http://www.sitnews.us/0404news/041304/041304_ketchikan_security.html

Alaska State Legislature



Representative Cheryll Heinze

TO: Representative *Carl* Morgan, Chairman
House Community & Regional Affairs Committee

DATE: February 20th, 2004

I would request that you schedule HB ⁴⁹⁹453 for a hearing before your committee.

Enclosed are:

1. HB 499
2. Sponsor Statement
3. NENA July, 2003 Report on Range of 9-1-1 Surcharges
4. Excerpts from the FCC's Sept. 2002 Hatfield Report

An expanded committee packet will be delivered to your office as soon as it has been finished.

Sincerely,

A handwritten signature in cursive script that reads "Cheryll Heinze".

Representative Cheryll Boren Heinze

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB 499
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: DCED
 Title 911 Systems RDU Regulatory Commission of Alaska (399)
 Component Regulatory Commission of Alaska
 Sponsor Representative Heinze
 Requester House Community & Regional Affairs Component No. 2417

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()	0.0	0.0	0.0	0.0	0.0	0.0
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
1141 - RCA Receipts						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2004) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time	0	0	0	0	0	0
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

The RCA interprets this legislation to require it to adopt generally accepted industry standards for multi-line telecommunications systems. This aspect can be undertaken as part of the Commission's regular work load. If it is the intent of the Legislature that the Commission would be responsible for ensuring compliance with the standards, then some fiscal impact could arise.

Prepared by: Mark K. Johnson, Commissioner, Chair Phone (907) 276-6222
 Division Regulatory Commission of Alaska Date/Time 2/27/04 5:37 PM
 Approved by: Edgar Blatchford, Commissioner Date 2/27/2004
 Agency Department of Community & Economic Development

Alaska State Legislature

House Special Committee on Economic Development; International Trade & Tourism
REPRESENTATIVE CHERYLL BOREN HEINZE, CHAIR

SESSION

State Capitol
Juneau, Alaska 99801-1182
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716 W. Fourth Ave.
Anchorage, Alaska 99501-2133
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Sponsor Statement HB 499

“An Act relating to 911 systems”

HB 499 is designed to modernize Alaska's 911 statutes to help bring us into line with Federal mandates. The bill makes three necessary changes to current statutes: it modifies surcharge limitations, makes the Governor responsible for certification and collection of surcharges, and ensures that all emergency calls get routed through an appropriate public safety answering point.

HB 499 would change municipalities' cost recovery options in regards to their 911 systems. Currently most municipalities are absorbing some of the costs of upgrading and maintaining their 911 facilities because the surcharge caps are too low to cover the expense. HB 499 would increase the surcharge limit to \$2.00 a month for both wire line and wireless users allowing municipalities to spread the cost evenly among phone users.

This bill also makes minor changes in the amount of surcharges paid by wire line customers with more than 100 local exchange lines, prepaid wireless customers and municipalities with a population of 100,000 people or more to make sure the surcharges are spread out more equitably.

HB 499 would provide for transitional cost recovery for both Phase I and Phase II Enhanced 911 (E-911) service as allowed under FCC proceedings entitled “Revision of the Commission's Rules to Ensure Compatibility with Enhanced 9-1-1 Emergency Calling Systems.” (CC Docket No. 94-102; RM-8143).

This legislation also acknowledges issues associated with multi-line telecommunications system operators and the responsibilities associated with 911 call routing. It further mandates that all wire line instruments used to originate a 911 emergency call be routed to a Public Safety Answering Point.

Finally, changes to current Alaska statutes would make the Governor responsible for certifying the collection and use of all 911 surcharges. This will allow municipalities the opportunity to make applications for federal grants to upgrade their 911 systems and mitigate some of the costs associated with this essential service. This legislation is necessary to provide the quality of emergency response services that Alaskans deserve, which is why I strongly urge your support of this bill.

**COMMITTEE: House
Community and Regional
Affairs Standing Committee**

**SUBJECT:
HB 461-EMERGENCY SERVICES
DISPATCH/911 SURCHARGE**



DATE: March 2, 2004

PLEASE SIGN IN

PLEASE PRINT:
NAME & TITLE

ADDRESS

PHONE

REPRESENTING

(No acronyms unless for a state agency,
please)

DO YOU
WANT TO
TESTIFY ?

Mark Johnson, Chief Community Health & EMS	P.O. Box 110616 Juneau, AK 99811-0616	465-5035	Dept. of Health & Soc. Services	Yes
E-mail address:	mark_johnson@health.state.ak.us			
Kevin Rutchie	217 2nd St	5861325	AK Power League	yes
E-mail address:				
Alexander Wochman	224 4th St. S.W.	523-3200	GLB	
E-mail address:				
E-mail address:				
E-mail address:				

HB

515

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB 515
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: DCED
 Title Municipal Water & Sewer Utilities RDU RCA Audits & Investigations (508)
 Component RCA Audits & Investigations
 Sponsor Labor & Commerce
 Requester House Community & Regional Affairs Component No. 2740

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	(45.7)	(61.0)	(61.0)	(61.0)	(61.0)	(61.0)

CAPITAL EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
CHANGE IN REVENUES (1141)	(45.7)	(61.0)	(61.0)	(61.0)	(61.0)	(61.0)

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
1141 - RCA Receipts	(45.7)	(61.0)	(61.0)	(61.0)	(61.0)	(61.0)
TOTAL	(45.7)	(61.0)	(61.0)	(61.0)	(61.0)	(61.0)

Estimate of any current year (FY2004) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This legislation would remove the Municipality of Anchorage d/b/a AWWU (water and sewer utilities) from Regulatory Commission of Alaska (RCA) oversight. The RCA Audits & Investigations component will see a reduced workload as a result of this legislation. The RCA's budget is funded through the Regulatory Cost Charge (RCC) mechanism and direct charge mechanisms. No general funds are allocated for support of the agency.

AWWU is expected to pay a total of approximately \$406,550 in RCCs in FY 2004. The RCA estimates \$45.7 of this reduction would occur in RCA Audits & Investigations. Some RCCs would be realized in FY 2005 if an effective date of July 1, 2004 is assumed.

Prepared by: Mark K. Johnson, Commissioner, Chair Phone (907) 276-6222
 Division Regulatory Commission of Alaska Date/Time 3/3/04 5:30 PM
 Approved by: Edgar Blatchford, Commissioner Date 3/3/2004
 Agency Department of Community & Economic Development

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB 515
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: DCED
 Title: Municipal Water & Sewer Utilities RDU: Regulatory Commission of Alaska (399)
 Component: Regulatory Commission of Alaska
 Sponsor: Labor & Commerce
 Requester: House Community & Regional Affairs Component No. 2417

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	(258.8)	(345.6)	(345.6)	(345.6)	(345.6)	(345.6)

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES (1141)	(258.8)	(345.6)	(345.6)	(345.6)	(345.6)	(345.6)
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
1141 - RCA Receipts	(258.8)	(345.6)	(345.6)	(345.6)	(345.6)	(345.6)
TOTAL	(258.8)	(345.6)	(345.6)	(345.6)	(345.6)	(345.6)

Estimate of any current year (FY2004) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time	-2	-2	-2	-2	-2	-2
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*
 This legislation would remove the Municipality of Anchorage d/b/a AWWU (water and sewer utilities) from Regulatory Commission of Alaska (RCA) oversight. The RCA's budget is funded through the Regulatory Cost Charge (RCC) mechanism and direct charge mechanisms. No general funds are allocated for support of the agency. The RCC is recalculated each year and allows the agency to recover its operating costs through an assessment on the revenues of the utilities and pipeline carriers it regulates.

 AWWU is expected to pay a total of approximately \$406,550 in RCC's in FY 2004. The RCA estimates loss of this revenue will result in the loss of 2 positions within the agency for a total reduction of \$258.8 in this component. The precise distribution of operating expense reductions has not been determined at this time. Some RCC's would be realized in FY 2005 if an effective date of July 1, 2004 is assumed.

Prepared by: Mark K. Johnson, Commissioner, Chair Phone (907) 276-6222
 Division: Regulatory Commission of Alaska Date/Time 3/3/04 5:36 PM
 Approved by: Edgar Blatchford, Commissioner Date 3/3/2004
 Agency: Department of Community & Economic Development

ALASKA STATE HOUSE OF REPRESENTATIVES

Alaska State Capitol
Juneau, Alaska 99801
Room 432



Phone (907)-465-4954
Fax# (907)-465-2418

Representative Tom Anderson

MEMORANDUM

Date: February 24, 2004

To: Representative Carl Morgan, Chair
House Community & Regional Affairs Committee

From: Representative Tom Anderson, Chair *T.A.*
House Labor & Commerce Committee

Re: HB 515

I would request you schedule HB 515 for a hearing before your committee at your earliest convenience. If your committee schedule allows, March 4th would be the soonest we could coordinate the appropriate witnesses to testify.

This legislation would require an exemption from regulation by the Regulatory Commission of Alaska (RCA), something that every other municipally owned utility in Alaska, except one, already enjoys (the City of Pelican requested continued RCA regulation of its water utility when it was sold). Anchorage as the largest, most highly sophisticated city in the state is fully capable of soundly regulating its own municipally owned utilities. Self-regulating Anchorage's water utility would save ratepayers money and enhance local control.

Anchorage has extensive experience regulating other municipally owned enterprises. The Port of Anchorage, Merrill Field, and Solid Waste Services are all financially sound and provide first class customer service. Actually, Anchorage has self-regulated its public utilities for more years than have state regulators. RCA regulation is slow, expensive and partially duplicates the review process that the municipal administration and assembly already apply. AWWU ratepayers pay in excess of \$500,000 per year to the RCA to cover the cost of regulation. The greater cost is in the form of regulation lag, the delay in obtaining approval of a requested rate change.

Thank you for your consideration of this request. Please contact Josh Applebee at 4954 in my office if you have any additional questions.

Anchorage Water and Wastewater Utility

SELF-REGULATION FOR MUNICIPAL WATER AND SEWER UTILITIES

Introduction

The Municipality of Anchorage and the Anchorage Assembly have designated "Regulating Anchorage's Own Water/Wastewater Utilities" as an important municipal legislative priority for 2004. This bill would exempt AWWU from regulation by the Regulatory Commission of Alaska (RCA), the same status that every other municipally owned water/wastewater utility in Alaska, except one. Anchorage as the largest, most highly sophisticated city in the state, is fully capable of properly regulating its own municipally owned utilities. Self-regulating Anchorage's water/wastewater utility will save rate-payers money and enhance local control.

Why is the MOA requesting exemption from RCA Regulation?

Except for the City of Pelican, **no other municipally owned water/wastewater utility is regulated by the RCA.** (Pelican requested regulation of its water utility by the RCA.)

AWWU has provided its customers excellent service, low, stable rates and sound finances, as well as continuity of management. Over the years, the mayor and assembly have made sound decisions in their oversight of municipally owned utilities. Municipal public hearings are held on any proposed rate increase. Municipal regulation will continue to balance consumer protection with the financial soundness of the public utility. It will require the utilities to continue to operate on a sound business basis. The process will be accountable to local people, more responsive, timely and economical than current RCA regulation.

Local Regulation of Municipal Water and Wastewater Utilities

The Municipality is directly accountable to the ratepayers served by the utilities. They are the voters. The Municipality is more responsive to local needs. The MOA has experience successfully regulating enterprise activities. Anchorage has extensive experience regulating other municipally owned enterprises. The Port of Anchorage, Merrill Field and Solid Waster Services are all financially sound and provide first class customer service. Actually, Anchorage has regulated its own public utilities for more years than have state regulators. Local regulation is faster, less structured and more economical. Public hearings are held by the Municipality on rate matters.

The MOA believes the current RCA regulation processes and procedures are cumbersome, slow, expensive, and non-responsive to local needs. AWWU ratepayers paid about \$350,000 in 2003, and are projected to pay about \$500,000 in 2004, to the

RCA to cover the cost of regulation. The greater cost is in the form of regulatory lag, the delay in obtaining approval of a requested rate change. It was designed for private utilities and is not entirely appropriate for municipal utilities. Despite a legislative mandate to speed up processing of regulatory filings, the commission still faces a substantial backlog of work. Ratepayers are required to pay for the expensive RCA regulatory process as a surcharge on every bill, whether or not their utility has a case pending. For example from 1993 until 2003 AWWU never had a rate increase from the RCA or the APUC, yet ratepayers have paid a regulatory assessment to the RCA as part of every bill.

What will self regulation accomplish?

Self regulation has worked effectively in other Alaskan communities, in Anchorage with the Port of Anchorage, Merrill Field and Solid Waste Services and across the nation. The MOA has a proven track record of effectively regulating the Port of Anchorage, Merrill Field and Solid Waste Services, which are all financially strong and highly reputable enterprises. Self regulation has proven to be cost effective, timely and responsive to local needs, while protecting consumer rights.

The Municipality in 1991 petitioned the APUC (predecessor to the RCA) to exempt AWWU and the electric utility from regulation. The Commission split evenly, by a 2-2 vote, on the question of exempting the electric utility and AWWU. The opinion by the commissioners who opposed self-regulation cited competition by the electric utility and telephone utility then owned by Anchorage with other utilities as the primary reason why AWWU should remain regulated by the state. No commissioner suggested that water/wastewater competition with another utility was present. Nor is there competition here today.

Section 711 of the Alaska Public Utilities Regulatory Act was amended as recently as the year 2000 by SB 324 to protect Ketchikan's public utilities, which have been self-regulated for 50 years, from the risk of regulatory takeover by the RCA in light of possible telephone competition. This bill expands that municipal exemption to any municipally owned water or wastewater utility that is not directly competing with another utility. AWWU fits this bill.

History of Regulation of AWWU

AWWU is two separate utilities, both subject to economic and service area regulation by the Regulatory Commission of Alaska (RCA). The Water Utility (AWU), a former City of Anchorage utility, has been under RCA regulation since inception of the Alaska Public Utilities Commission (APUC) in 1970. Anchorage Sewer Utility (ASU), which was formerly owned by the Greater Anchorage Area Borough, was voluntarily submitted to the APUC for regulation in 1971. The umbrella organization, Anchorage Water and Wastewater Utility (AWWU), was formed in 1975, following unification; however, the two utilities continue to be separate enterprise funds and to be regulated as separate utilities with separate certificates and tariffs by the RCA (formerly APUC).

Local Regulation of Municipal Water and Wastewater Utilities

The Municipality of Anchorage (MOA) owns Anchorage Water and Wastewater Utilities. HB 515 would provide the MOA the same regulatory responsibility over these utilities as state law provides to every other municipally owned water/sewer utility in Alaska except Pelican. Local regulation of these utilities is overdue because:

- 1) The Municipality is directly accountable to the ratepayers served by the utilities. They are the voters.
- 2) The Municipality is more responsive to local needs.
- 3) The MOA has experience successfully regulating enterprise activities. They are financially sound.
- 4) With a single exception, no other municipally owned water and wastewater utility in the state is economically regulated.
- 5) Local regulation is faster, less structured and more economical.
- 6) Public hearings are held by the Municipality on rate matters.

The Regulatory Commission of Alaska (RCA) process is lengthy, costly and inflexible. It was designed for private utilities and is not totally appropriate for our municipal utilities.

Ratepayers are required to pay for the expensive RCA regulatory process as a surcharge on every bill, whether or not their utility has a case pending. For example from 1993 until 2004 AWWU never had a rate increase from the RCA or the APUC, yet ratepayers must pay a regulatory assessment to the RCA as part of every bill. (There was a slight rate reduction for wastewater in 2001.)

Despite a legislative mandate to speed up processing of regulatory filings, the commission still faces a substantial backlog of work.

Last year the agency was controversial. The battle over its sunset extension required a special session to resolve.

RCA commissioners turn over frequently and often lack experience in utility regulation before their appointment.

The process is generally not responsive to local needs and differences.

The rates, services and practices of Solid Waste Services are under the local control of the Mayor and Assembly.

HB

560

Ohogamiut Traditional Council
P.O. Box 49
Marshall, AK 99585
Phone: (907) 679-6517/6598 FAX: (907) 679-6516

May 5, 2004

Representative Carl Morgan
FAX: 907-465-2197

RE: HB 560 and SB 396: Stopping Alaska Railroad From Decimating Eklutna Lands

Dear Rep. Morgan:

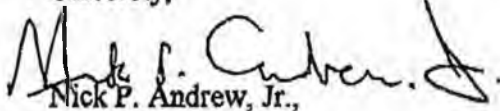
It has come to the attention of the Ohogamiut Tribe that the Alaska legislature may vote and pass HB 560, and SB 395, which would exempt the Alaska Railroad from municipal zoning within the Greater Anchorage Area. We as a federally recognized tribe strongly urge you not to support the bill's that would alter and desecrate culturally significant land owned by the Native Village of Eklutna.

We as fellow Alaska's First People akin to the Eklutna Tribe stand together for their God given rights to defend land that was theirs since time beyond beginning. The Alaska Railroad has trespassed on their land without consent in the past destroying sacred sites, and again seek to take more land without regard for Eklutna's sovereignty as a legitimate government in the name of progress and profit.

Thank you.

Ohogamiut Traditional Council
Nicholas Boots, President

Sincerely,


Nick P. Andrew, Jr.,
Tribal Administrator

CC: Representative Mary Kapsner
Representative Richard Foster
Senator Lyman Hoffman
Senator Georgianna Lincoln
Senator Donny Olsen
Native Village of Eklutna, Lee Stephan, CEO

TALKEETNA COMMUNITY COUNCIL, INC.
P. O. BOX 608
TALKEETNA, ALASKA 99676

RESOLUTION OPPOSING SB 395 AND HB 560

WHEREAS, the SB 395 and HB 560, both of which, using identical language, exempt the Alaska Railroad from local planning, platting, and land use regulation, have been introduced in the Alaska State Senate and Alaska State House of Representatives, respectively, and are proceeding to the floor of each body, and

WHEREAS, the Community of Talkeetna has recently developed a number of plans and regulations, and

WHEREAS, the Alaska Railroad has participated, as regards lands owned by them, in the public process as such plans and regulation were developed, and

WHEREAS, the Community of Talkeetna appreciates such participation, and

WHEREAS, the Community of Talkeetna believes that it is vital, in the face of dramatic growth, for the community to guide and influence its future, and

WHEREAS, the Community of Talkeetna believes that good policy decisions can only be made if all stakeholders meaningfully participate in such decisions, and

WHEREAS, these bills would be expected to undermine the ability of the Community of Talkeetna to guide and influence its future.

THEREFORE, BE IT RESOLVED, that the Talkeetna Community Council opposes SB 395 and HB 560 and urges members of the Alaska State Senate and Alaska State House of Representatives to vote against these bills.

Adopted unanimous'y by the Talkeetna Community Council, this 3rd day of May, 2004

/s/ Ruth Wood

Ruth Wood, Chair

P.O. Box 766
Talkeetna, AK 99676
May 1, 2004

Representative Carl Morgan
Alaska State House of Representatives

Via Fax: 465-2197

Dear Representative Morgan:

I wish to express my strong opposition to HB 560, which would exempt the Alaska Railroad from local planning, platting, and land use regulations.

I think of HB 69 and it is deja-vu all over again. Good public policy can never be formulated when major stakeholders, in this case railbelt communities, are excluded from the decision making process. This bill prevents local communities and individuals from participating in the decisions that affect them, and that is not what our system of public participation and democracy is all about.

Here in Talkeetna, in recent years, we have developed a Community/Tourism Plan, a Riverfront Plan, a Special Land Use District (SPUD), and a Main Street Plan. The railroad has offered input and perspective, with regard to railroad lands, as these plans and the SPUD regulation were developed. Sometimes the railroad and the community agree, sometimes not. But we have a dialogue which I hope, optimistically, will lead to mutually agreeable goals, strategies, and solutions. But, for this dialogue and give and take to work, the community and railroad must be on a reasonably equal footing. This bill subordinates the interests of the community to those of the railroad, which makes it next to impossible to arrive at decisions that are in the public interest. We live here, and we have a right to a say in what and how things happen in our community.

This is an issue of enormous consequence, and should be afforded thoughtful debate and due consideration of the many interested parties. The public is not well served by rushing it through.

I urge you to do all you can to ensure this bill does not become law.

Sincerely,

[signed]

John Strassenburgh
733-6874

ARRC Response to Native Village of Eklutna Statements

The Native Village of Eklutna is circulating a memorandum urging legislators to reject section 1 of HB 560 and SB 395, which would exempt the Alaska Railroad from municipal zoning. This memorandum contains a number of misleading or incorrect points.

The Alaska Railroad has operated a rock quarry near the Village of Eklutna since at least the 1940s. The Quarry is used by the Railroad to obtain rock for riprap and ballast necessary for the continued safe operation of the Railroad. It does not produce gravel. After the Railroad was transferred to state ownership in the 1980s, the native corporation for the Village of Eklutna, Eklutna, Inc., entered an agreement with the Railroad allowing the Railroad to continue to operate the Quarry. Under this agreement, once the Railroad ceased to operate the Quarry, the land would be transferred to Eklutna, Inc.

Until the Native Village of Eklutna challenged the Railroad's continued operation of the Quarry, the Quarry was considered to be both a valid grandfather right under the Anchorage municipal code and an immune activity of the railroad. Although the Alaska Supreme Court eventually rejected the Railroad's argument that it had grandfather rights, and decided that the legislature had not clearly stated that the Railroad was immune from zoning, the Alaska Railroad's positions were undeniably reasonable. The recent decision did not say that the Railroad was not immune; it simply adopted a different (and time consuming) test for determining whether or not it was immune. In both Supreme Court decisions, Justices Matthews and Bryner dissented and argued strongly that the Alaska Railroad's position was correct; that is, that the Railroad had valid grandfather rights to continue to operate the Quarry, and that the Alaska legislature had intended for the Railroad to be immune.

It is also important to remember that section 1 of the pending bills, HB 560 and SB 395, does not address the Eklutna Quarry only, but the operation of the Railroad throughout its system. The Railroad runs through a number of Boroughs and Municipalities from Seward to Fairbanks, and is subject or potentially subject to zoning in each of them. The Alaska Supreme Court's recent decision states that the legislature has not clearly stated whether the Railroad is immune. It therefore requires the Railroad – in every instance in which zoning might apply – to first attempt to comply with zoning, and then, if the zoning rules interfere with the Railroad's operation, to litigate whether it is immune. When the issue is litigated, the Supreme Court has required that the lower courts apply a multi-factor balancing test that may lead to different results in different cases or before different judges. Even the Alaska Supreme Court admitted, in adopting the test, that the test "does not yield highly predictable results." Slip. Op., at 31.

NVE's argument that the Supreme Court's adoption of the balancing of interests test alleviates the need for the legislature to address this topic is particularly troublesome. The balancing of interests test is intended as a means of determining what the legislature would have intended in a particular situation in the absence of clear direction from the legislature. It would be far better to have the legislature express its own intent, through legislation, than have a superior court guess what the legislature would have done, based on factors adopted not by the legislature but by the Supreme Court, and then have the Supreme Court re-evaluate these same factors (and possibly reach a different result) on appeal.

Contrary to NVE's argument, the balancing of interests test is not similar to the rules currently applicable to DOT&PF. While the governor can exempt DOT&PF from zoning in particular instances, AS 35.30.030, and thus avoid both the local process and endless litigation in the appropriate instance, the balancing of interests test **requires** the Railroad to both participate in the zoning process and litigation before it can avoid the application of zoning to a particular project. Only at the end of this process, which can be expected to take at least several years, would the Railroad be declared immune from local zoning.¹ This delay may often be sufficient to kill an otherwise viable and important state project.

¹ Similarly, the preemption of local zoning provided by the Interstate Commerce Commission Termination Act ("ICCTA") will only probably be recognized after litigation.

The Native Village of Eklutna is willing to urge you to reject HB 560 and SB 395 (section 1), identical bills which would exempt the Alaska Railroad from municipal zoning, and treat it differently from any other state agency.

This blanket exemption is being pushed by the railroad in reaction to a March 12, 2004 ruling of the Alaska Supreme Court that occurred in a case between the railroad and the native village of Eklutna. The railroad is operating a gravel pit adjacent to the village. The village has been trying to get the railroad to comply with local zoning for years.

The railroad is claiming that it needs a blanket exemption from local zoning because otherwise it cannot operate. This is simply not true, for a number of reasons.

First, the Supreme Court's ruling would not in fact cause interference with essential railroad operations. The Supreme Court case adopts the balancing of interests test. It is the test which has been adopted by the vast majority of courts who have addressed the issue of government immunity in the last thirty years. It has been found to constitute good and enlightened public policy in the area of zoning.

The test adopted is fair for everyone. It would require that the railroad comply with local zoning when compliance would not create a hardship for it. It would immunize the railroad from local zoning when compliance with local zoning would interfere with their operations. It is quite similar in fact to the requirements placed on DOTPF and other state agencies under Title 35 of the Alaska Statutes. DOTPF operates throughout the entire state, is generally required to comply with local zoning but can be immune from such zoning in appropriate cases. In short, the recent Supreme Court decision does not create the adverse impacts suggested by the railroad. Under the system, the public and local officials get to have input, but the essential operations of the railroad are not hindered. SB 395 would on the other hand eliminate all public input, all input from local governments, and eliminate any need for the railroad to consider any legitimate public or local interest.

Second, under the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. §701, State or local economic regulation which would significantly interfere with rail operations is prohibited in any event. In other words, if a State or municipal government was attempting to prevent a railroad from constructing or operating or discontinuing a rail line, that regulation would be prohibited by the federal law. Thus, the railroad doesn't need a blanket exemption from local zoning to protect it from regulation which would be preempted by federal law in any event.

Third, a railroad doesn't need wholesale governmental immunity from local zoning to operate. Most railroads are owned by private companies, not government agencies. Seven railroads operate the vast majority of rail freight operations in the United States - all seven are privately owned, all seven lack governmental immunity from local zoning, and yet all seven continue to operate and grow. Union Pacific is the largest, and operates in some 23 different states, without the kind of blanket immunity which the railroad here is claiming is mandatory.

In short, the railroad's suggestion that it needs protection is false. It already has substantial protections against local economic regulatory interference, under the balancing test adopted by the Supreme Court and under ICCTA, both of which protect the railroad from application of local zoning which would interfere with necessary rail operations.

This involves a site directly adjacent to the Native Village of Eklutna. The site consists of two hills, which are the namesake of the Village and which have significant historical and cultural significance to the people of the Village and to Dena'ina Athabaskan in general. Approximately one-half of the largest of the two hills is located on land owned by the railroad. The other one-half is located on land previously owned by National Bank of Alaska, and now owned by Wells Fargo. The significance of the site is set out in an extensive report commissioned by the railroad itself, known as the Fall report. It was conducted by James Fall, an anthropologist who works for the State Department of Fish and Game. The railroad has never questioned the findings of the Fall Report, or the significance of the site.

Prior to 1995, the railroad's use of the site in question was quite sporadic and limited. NBA's use was virtually nonexistent. This changed when the railroad leased out the site to a private contractor to operate a gravel pit. At about the same time, NBA also decided it wanted to begin using its land as a gravel pit. These operations would have eventually caused the destruction of the hills for which the Village is named. These events prompted two lawsuits.

First, NBA sought a conditional use permit from the Municipality of Anchorage. Gravel pit operations are a conditional use in the zoning district in which the property is located. The Village appealed the grant of the permit, first to the Board of Adjustment and eventually to the Alaska Supreme Court. The Supreme Court reversed the Board, holding that the Board was required to, and had not, considered the cultural significance of the site in the permitting process. Native Village of Eklutna v. Bd. of Adjustment/National Bank of Alaska, 995 P.2d 641 (Alaska 2000). NBA has not since refiled to obtain a permit.

Second, at about the same time the Village also brought an action against the contractor operating the pit located on the railroad property. The contractor did not have a conditional use permit which, as indicated above, was a requirement of local zoning. The contractor brought the railroad into the case. First the superior court, and then the Alaska Supreme Court, held that the contractor's use of the site required a conditional use permit. Alaska R.R. Corp v. Native Village of Eklutna, 43 P.3d 588 (Alaska 2002). The contractor and the railroad did not apply for a permit. Instead, the arrangement between the contractor and the railroad was terminated and the contractor moved off the property.

The third lawsuit began in January of 2001 and resulted in the March 12, 2004 decision to which the railroad is currently responding. Native Village of Eklutna v. Alaska Railroad Corporation, Alaska Supreme Court Slip Opinion No. 5787 - March 12 2004. After the private contractor moved off the site, the railroad then decided to operate the site itself. The Village sued the railroad since the railroad also did not have a conditional use permit to operate a gravel pit. The railroad claimed it didn't need a permit because it was immune from zoning. The Village, and the Municipality of Anchorage which had eventually joined the lawsuit, stated that the railroad was not immune from zoning and needed a permit to operate. The Alaska Supreme Court held that the railroad was not automatically immune from zoning. It utilized the 'balancing of interests' test, adopted by the vast majority of courts who have addressed the issue of governmental immunity in the last twenty years. The system adopted by the Court is fair to everyone. It requires the railroad to comply with local zoning when it can do so without hardship. It permits the railroad to obtain immunity from local zoning when local zoning would interfere with its operations. It is not unlike the process established for other state agencies under Title 35 of the Alaska Statutes, including DOTPF, which operates across the state.



Fairbanks North Star Borough

Office of the Mayor

809 Pioneer Road

P.O. Box 71267

Fairbanks, Alaska 99707-1267

907/459-1300

Fax 907/459-1102

Email mayor@co.fairbanks.ak.us

May 3, 2004

Via Facsimile – 465-2827

The Honorable Albert Kookesh
Member – House Transportation Committee
State Capitol
Juneau, AK 99801

Dear Representative Kookesh:

HB 560 proposes to explicitly exempt the Alaska Railroad Corporation from Municipal ordinances that provide for planning, platting and land use regulation. In its present form the proposal removes the local public process for local scrutiny and citizen input on land use.

In its present form, the administration of the Fairbanks North Star Borough opposes the legislation. However, after consultation with counsel for the ARRC, it appears reasonable to adopt the following amendment to the bill:

AS 42.40.390

- (c) By January 10 of each year, the corporation shall provide notice to municipalities of any new land use proposed for that year by the corporation within municipal boundaries. The corporation shall provide amended notice if a proposed land use is changed or an additional land use is proposed during the course of the year. Except in the event of an emergency, an affected municipality shall have at least 30 days after its receipt of the notice to provide advisory comment to the corporation. In the event of an emergency, the corporation will provide notice to an affected municipality promptly after the event.

It is our opinion that this approach meets the needs of the Alaska Railroad Corporation and the Fairbanks North Star Borough. Given that the ARRC disagrees, it is appropriate that a legislative sub-committee / municipal task force be appointed to study the issue for as long as is necessary to come to a reasonable conclusion.

Sincerely,

Jim Whitaker, Mayor



Fairbanks North Star Borough

Office of the Mayor

809 Pioneer Road

P.O. Box 71267

Fairbanks, Alaska 99707-1267

907/459-1300

Fax 907/459-1102

Email mayor@co.fairbanks.ak.us

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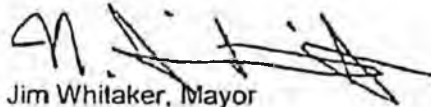
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Sincerely,



Jim Whitaker, Mayor

non railroad activities
should be exempted -
if this exemption -

Original legislation that
created RR probably did not
intend to grant them
exemptions of ~~exemptions~~
planning & zoning of them
for all their property.



NATIVE VILLAGE OF EKLUTNA

4/30/04

Our Tribe urges you to reject HB 560 and SB 395, identical bills which would exempt the Alaska Railroad from municipal zoning, and treat it differently from any other state agency.

The railroad has been blowing up the namesake of the village of Eklutna to operate a gravel pit. The village has been fighting the railroad, and an adjacent landowner (NBA), for many years to stop it and to enforce municipal zoning, and has been successful in court. In the cases of Native Village of Eklutna v. Alaska Railroad Corporation, Slip Opinion No. 5787 - March 12 2004; Alaska R.R. Corp v. Native Village of Eklutna, 43 P.3d 588 (Alaska 2002); and Native Village of Eklutna v. Bd. of Adjustment/National Bank of Alaska, 995 P.2d 641 (Alaska 2000), the Alaska Supreme Court has noted that the site is culturally and historically significant and that that significance should be considered during the conditional use permitting process.

The railroad doesn't want to have to go before the public. It wants to be able to blow up this culturally significant site without any consideration for anything but its own economic interests. That is why the railroad is pushing for passage of these bills. It has nothing to do with the reasons set out in the "Sponsor Statement" that has been provided.

The railroad should have been more upfront about its real agenda. Please don't pass this bad law. If the railroad is exempt from zoning, it would be able to blow up cultural sites, place gravel pits and other noxious uses directly in residential areas, and completely fail to take into account the interests of the residents, or the public.

*Delto are of
Michael
Lamereway*

Thank You,

Lee Stephan
Lee Stephan
Chief Executive Officer

*Muni also joined in on the lawsuit.
The granite outcroppings were what the village
Historical Significant*

26339 Eklutna Village Rd. • Chugiak, Alaska 99567 • (907) 688-6020 • Fax (907) 688-6021

*Consider the RR's operation landless
#1 priority of the village
Rocks of blasting have been known to land on folks houses.*



NATIVE VILLAGE OF EKLUTNA

4/30/04

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Thank You,

Lee Stephan,
Chief Executive Officer



NATIVE VILLAGE OF EKLUTNA

CONFIDENTIAL
FAX TRANSMITTAL

DATE: 4-30-04

Attn: Bill Williams, Peggy Wilson,
Beth Kertula Bruce Weyhrauch, Albert Kookesh,
Carl Morgan Hugh Fate, David Guttenberg,
James Holm, Nick Stepovich, John Coghill,
John Harris

FROM: Lee Stephan

TITLE: Chief Executive Officer

NATIVE VILLAGE OF EKLUTNA
26339 EKLUTNA VILLAGE RD.
CHUGIAK, ALASKA 99567
TELEPHONE (907) 688-6020
FAX (907) 688-6021

FAX#: _____

TOTAL PAGES: 3 (INCLUDES TRANSMITTAL SHEET)

REFERENCE TO: HB 530 + SB 395

MESSAGE: URGENT: Stop Legislation for Road Bill. Please forward to appropriate person to act immediately on this bill

Confidentiality Notice

This transmission is intended only for the individual(s) to whom it is addressed, and may contain information that is privileged and confidential. If the reader of this message is not the intended recipient, you are hereby notified that disclosure, distribution or copying of this information is strictly prohibited. If you have received this transmission in error, you may not read the information contained within. Please notify the sender of the error immediately at the listed phone number, fax number, and/or address. Thank You.

The Native Village of Eklutna is writing to urge you to reject HB 560 and SB 395, identical bills which would exempt the Alaska Railroad from municipal zoning, and treat it differently from any other state agency.

The railroad has been blowing up the namesake of the village of Eklutna to operate a gravel pit. The village has been fighting the railroad, and an adjacent landowner (NBA), for many years to stop it and to enforce municipal zoning, and has been successful in court. In the cases of Native Village of Eklutna v. Alaska Railroad Corporation, Slip Opinion No. 5787 - March 12 2004; Alaska R.R. Corp. v. Native Village of Eklutna, 43 P.3d 588 (Alaska 2002); and Native Village of Eklutna v. Bd. of Adjustment/National Bank of Alaska, 995 P.2d 641 (Alaska 2000), the Alaska Supreme Court has noted that the site is culturally and historically significant and that that significance should be considered during the conditional use permitting process.

The recent Supreme Court decision does not create the adverse impacts suggested by the railroad. It would simply require that the railroad first attempt to comply with local zoning. If it is not satisfied with the response it receives from local zoning officials, then the railroad can assert that it should be immune from the zoning law and request that the different interests presented - both that of the railroad and the public - be reviewed and considered. The rule adopted by the Court simply ensures that the public has a forum to be heard on issues which may significantly effect it.

The railroad doesn't want to have to go before the public. It wants to be able to operate without any input whatsoever from the public. It wants to be able to blow up this culturally significant site without any consideration for anything but its own economic interests. That is why the railroad is pushing for passage of these bills. It has nothing to do with the reasons set out in the "Sponsor Statement" that has been provided.

The railroad should have been more upfront about its real agenda. Please don't pass this bad law. If the railroad is completely exempt from zoning, and the public hearing process, it would be able to blow up cultural sites, place gravel pits and other noxious uses directly in residential areas, and completely fail to take into account the interests of the residents, or the public.

Notice: This opinion is subject to correction before publication in the PACIFIC REPORTER. Readers are requested to bring errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, phone (907) 264-0608, fax (907) 264-0878, e-mail corrections@appellate.courts.state.ak.us.

THE SUPREME COURT OF THE STATE OF ALASKA

NATIVE VILLAGE OF EKLUTNA,)	
)	Supreme Court No. S-10270
Appellant,)	
)	Superior Court No.
v.)	3AN-01-04169 CI
)	
ALASKA RAILROAD)	<u>OPINION</u>
CORPORATION and)	
MUNICIPALITY OF ANCHORAGE,)	[No. 5787 - March 12, 2004]
)	
Appellees.)	
_____)	
)	
MUNICIPALITY OF ANCHORAGE,)	
)	Supreme Court No. S-10279
Cross-Appellant,)	
)	
v.)	
)	
ALASKA RAILROAD)	
CORPORATION,)	
)	
Cross-Appellee.)	
_____)	

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Mark Rindner, Judge.

Appearances: Sara E. Heideman, Hedland, Brennan, Heideman & Cooke, Anchorage, for Appellant. William S.

Cummings, Ashburn & Mason, Anchorage, for Appellee/Cross-Appellee Alaska Railroad Corporation. William W. Whitaker, Assistant Municipal Attorney, and William A. Green, Municipal Attorney, Anchorage, for Appellee/Cross-Appellant Municipality of Anchorage.

Before: Fabe, Chief Justice, Matthews, Eastaugh, Bryner, and Carpeneti, Justices.

FABE, Chief Justice.

MATTHEWS, Justice, with whom BRYNER, Justice, joins, dissenting.

I. INTRODUCTION

This is the third appeal arising out of the Alaska Railroad Corporation's quarry operations on culturally significant land adjacent to the Native Village of Eklutna, which lies within the boundaries of the Municipality of Anchorage. Eklutna sought a preliminary injunction to enjoin the Railroad from blasting and all other quarry activities, arguing that the Railroad does not have a conditional use permit to operate a gravel pit in that area as Anchorage Municipal Code (AMC) 21.40.240(D)(4) requires. The Municipality of Anchorage intervened as a plaintiff. The trial court denied Eklutna the preliminary injunction and entered judgment as a matter of law in favor of the Railroad, concluding that the Railroad is not subject to local planning and zoning ordinances. Eklutna and the Municipality of Anchorage appeal. Because the legislature did not clearly express its intent to exempt the Railroad from local zoning laws, we reverse and remand.

II. FACTS AND PROCEEDINGS

A. **Factual History**

1. **Cultural significance and history of the Eklutna quarry site**

The quarry is located on one of two hills, or “knobs,” adjacent to Eklutna. Dr. James Fall, a cultural anthropologist, prepared a report for the Railroad that explained the Eklutna quarry site’s significance as the source of the village’s name:

The Dena’ina name for the village [of Eklutna] is “Idlughet,” “The Place by the Plural Objects” The “plural objects” referenced in these place names are the two hills, or to use the term used by many Eklutna residents today, the “knobs,” located between the village and Knik Arm, just north and east of the community.

For purposes of this appeal, the parties agree that Eklutna considers the knobs within the quarry property to be culturally significant.

The Alaska Railroad, at the time owned by the United States government, owned and operated the Eklutna quarry from an undetermined date in the 1940s until 1985.¹ In 1985, under the Alaska Railroad Transfer Act of 1982, the Railroad was turned over to the State of Alaska, which operated it through the then newly created Alaska Railroad Corporation.² In 1987 Eklutna, Inc. and the Alaska Railroad Corporation entered into an agreement settling their respective claims over property under the Alaska

¹ *Alaska R.R. Corp. v. Native Vill. of Eklutna*, 43 P.3d 588, 590 (Alaska 2002).

² 45 U.S.C. §§ 1201-1214 (1982).

Native Claims Settlement Act³ and under the Alaska Railroad Transfer Act.⁴ Under that agreement, the Alaska Railroad Corporation was granted the land containing the quarry until it ceases to use the land “in connection with furnishing mass or bulk transportation,” at which time the land is to be conveyed to Eklutna.

2. Previous proceedings regarding the Eklutna quarry

The larger of the two Eklutna knobs has been the subject of two previous appeals before this court. In July 1995 the National Bank of Alaska, which owned part of the quarry operated by the Railroad, filed an application for a conditional use permit to conduct a granite mining operation there.⁵ The Municipality of Anchorage’s Planning and Zoning Commission approved the conditional use permit, and the Anchorage Board of Adjustment and the superior court affirmed this decision.⁶ We reversed and remanded in 2000, concluding that “the Board’s finding that ‘no cultural resources will be adversely affected’ was unsupported by substantial evidence in light of the whole record.”⁷

The second case, *Alaska Railroad Corp. v. Native Village of Eklutna*, arose after the Railroad entered into a licensing agreement in 1995 granting Damco Paving Corporation the exclusive use of the quarry for commercial quarrying operations in

³ 43 U.S.C. §§ 1601-1629 (1971).

⁴ 45 U.S.C. §§ 1201-1214 (1982).

⁵ *Native Vill. of Eklutna v. Bd. of Adjustment*, 995 P.2d 641, 642 (Alaska 2000).

⁶ *Id.* at 643.

⁷ *Id.* at 645.

exchange for the Railroad receiving royalty payments for the rock quarried.⁸ In 1997 Eklutna filed suit to enjoin Damco's quarrying operations, alleging that the quarry was a nonconforming use of the land and that neither the Railroad nor Damco had sought a conditional use permit to proceed with the commercial quarrying operation.⁹ In May 1999 the superior court granted judgment in favor of Eklutna, requiring Damco to obtain a conditional use permit before it could continue with quarrying operations.¹⁰ We affirmed in February 2002.¹¹ Not addressed in that decision was the question now before us: whether the Railroad enjoys sovereign immunity from local zoning laws in its own operation of the quarry.

3. Quarry operations in recent years

After the superior court entered its decision in *Alaska Railroad Corp.* in May 1999,¹² the Railroad resumed direct operation of the quarry. The Railroad began removing rock and other materials from the quarry in May or June 2000, and it blasted in the quarry on July 26, 2000.

On January 12, 2001, the Railroad notified Eklutna that "no operations or blasting would occur at the site until March, 2001." However, at a January 19, 2001 meeting, the Railroad informed Eklutna that blasting would occur on January 26, 2001.

B. Procedural History

⁸ 43 P.3d 588, 590 (Alaska 2002).

⁹ *Id.*

¹⁰ *Id.* at 589.

¹¹ *Id.* at 592-95.

¹² *Id.* at 590.

On January 22, 2001, Eklutna filed a complaint and motion for preliminary injunction to stop the blasting. Following expedited briefing, an evidentiary hearing, and oral argument, the trial court denied Eklutna's request for a preliminary injunction. Although the trial court recognized that "[t]hese hills are vital cultural resources for the Village inhabitants and the Denaina Athabascan Indians as a people," it concluded that the municipal ordinance could not prevent the Railroad's quarry operation and entered final judgment in favor of the Railroad as a matter of law, because "the legislature intended that [the Railroad] not be subject to local planning and zoning ordinances."

On March 1, 2001, the Municipality of Anchorage moved to intervene in the litigation in order to seek declaratory relief endorsing its position that the Railroad must comply with municipal zoning. The superior court set aside its judgment while it considered the Municipality's motion. After granting the motion to intervene and reviewing supplemental briefing by the parties, the court reinstated its previous final judgment. Eklutna appealed the judgment and the Municipality filed a cross-appeal against the Railroad.

III. DISCUSSION

A. Standard of Review

We review a grant of summary judgment *de novo*.¹³ To obtain summary judgment, the moving party must prove the absence of a genuine factual dispute and its entitlement to judgment as a matter of law.¹⁴ All reasonable inferences of fact must be

¹³ *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 603 (Alaska 1999).

¹⁴ *Id.*

drawn in favor of the nonmoving party.¹⁵ Because this appeal presents an issue of first impression before this court, we adopt the rule of law that is most persuasive in light of precedent, reason, and policy.¹⁶

B. The Railroad Is Not Immune from Local Zoning Laws.

The Railroad maintains that it is not subject to the Municipality of Anchorage's zoning ordinance, which would require it to obtain a conditional use permit before operating the quarry. It argues that the Alaska Railroad Corporation Act¹⁷ (ARCA) and its legislative history show that the legislature intended the Railroad to be immune from such laws. It further argues that even if ARCA does not evidence express legislative intent to immunize the Railroad, Alaska law presumes that the legislature intends state instrumentalities to be immune from local zoning in the absence of a legislative statement to the contrary. Eklutna and the Municipality (collectively "Eklutna") maintain that because there is no clear and express provision in the statute regarding whether the Railroad is immune from local land use regulation, a balancing of interests test should apply to determine the legislature's intent.

We hold that ARCA provides no clear indication of the legislature's intent with regard to local land use authority over the Railroad and that Alaska law does not presume state immunity to local zoning. Left with unclear indications of intent and no presumption of immunity, we turn to a balancing of interests test to determine whether the legislature intended to subject the Railroad to local zoning ordinances.

¹⁵ *McGlothlin v. Municipality of Anchorage*, 991 P.2d 1273, 1277 (Alaska 1999).

¹⁶ *Taranto v. North Slope Borough*, 992 P.2d 1111, 1113 (Alaska 1999).

¹⁷ AS 42.40.010 et seq.

1. **No provision of the Alaska Railroad Corporation act clearly indicates legislative intent to exempt the Railroad from local zoning.**

At the outset, it is important to note that ARCA created a state entity with a unique combination of private and public powers and immunities. Although it is “an instrumentality of the state,”¹⁸ the Railroad is not part of the Department of Transportation and Public Facilities (DOTPF) and is not subject to certain financial and procedural requirements to which other state agencies are subject, such as the State Procurement Code, the Fiscal Procedures Act, and the Executive Budget Act.¹⁹ With the Railroad’s unique status within the state government in mind, we examine several provisions of ARCA to determine whether the legislature intended to immunize it from local zoning.

- a. **Alaska Statute 42.40.920(b)**

Alaska Statute 42.40.920(b) lists statutes from which the Railroad is exempt. It provides:

- (b) Unless specifically provided otherwise in this chapter, the following laws do not apply to the operations of the corporation:

....

- (3) AS 35

Title 35 of the Alaska Statutes is entitled “Public Buildings, Works, and Improvements” and authorizes DOTPF to construct almost all public works in the state.²⁰ Alaska Statute 35.30.020 provides: “A department shall comply with local planning and zoning

¹⁸ AS 42.40.010.

¹⁹ See AS 42.40.920(b)(4)-(6).

²⁰ See AS 35.05.010.

ordinances and other regulations in the same manner and to the same extent as other landowners.” In AS 35.95.100(3), “department” is defined as DOTPF “unless the context requires otherwise.” Other sections of Title 35 refer to “the department”; this section’s shift to “a department” (emphasis added) implies that it subjects any department to local zoning.²¹ If AS 35.30.020 applied to the Railroad, then the Railroad would be subject to local zoning. The Railroad argues that the converse must be true: by releasing it from AS 35.30.020, the Railroad claims, ARCA indicates legislative intent to immunize it from such authority. This argument assumes that in the absence of AS 35.30.020, the Railroad would be immune to local zoning. As discussed in Part III.B.2 below, that assumption is faulty. The provision exempting the Railroad from Title 35 shows only the legislature’s desire that the Railroad not be treated as a subdivision of DOTPF and that DOTPF not control construction of Railroad projects. ARCA’s legislative history supports this reading.²²

b. Alaska Statute 42.40.930

Alaska Statute 42.40.930 provides: “If provisions of this chapter conflict with the provisions of other state law, the provisions of this chapter prevail.” The Railroad argues that this statute “preempts the application of local zoning.” But this provision describing how to sort out conflicts among state laws gives us no insight into

²¹ *But see Rabbit Creek Shooting Range Improvement*, 1981 Informal Op. Att’y Gen. 867, 867-68; 1981 WL 38706, at *1 (Alaska, July 13, 1981).

²² *See First Reading of HB 512 before the House Transp. Standing Committee* at 0275 (Alaska, May 13, 1984) (statement of Mark Hickey) (describing steps taken by drafters to ensure that Railroad was free of DOTPF oversight); *House Transp. Standing Comm. meeting on HB 512* at 0145 (Alaska, Feb. 22, 1984) (statement of Chairwoman Representative Cato) (“[T]he senate . . . [was] told they would have to put [the Railroad] under one of the departments. They chose the Department of Commerce and Economic Development as they felt that was where it belonged rather than under DOT/PF.”).

the relationship between the state law creating the Railroad and local ordinances that may apply to it.

c. Alaska Statute 42.40.935

Alaska Statute 42.40.935, entitled "Railroad facilities code compliance," provides that within two years after the date of transfer, the Railroad "shall develop and adopt a plan to achieve compliance with," among other laws, "building and related safety codes applicable to facilities of the [Railroad]."²³ The Railroad employs the canon *expressio unius est exclusio alterius* to argue that this provision implies that the legislature intended immunity for the Railroad. The statute's express application of certain local regulations, the Railroad argues, implies that other local regulations, omitted from mention, do not apply. At the heart of the Railroad's argument is an interpretation of AS 42.40.935 subjecting the Railroad to local safety and building regulations. The words of the statute show that this reading is faulty. For the statute to do what the Railroad claims, it would need another clause, stating explicitly that local safety codes govern the Railroad. Instead, it assumes the existence of "codes applicable to the facilities of the [Railroad]." The effect of the statute is to lay out a procedure for compliance with codes whose authority pre-exists the provision, not to subject the Railroad to that authority. This section of the statute does not list the local ordinances to which the Railroad is subject, so *expressio unius* does not apply and the fact that zoning is not mentioned sheds no light on whether the legislature intended to immunize the Railroad.

The assumption that the Railroad is not the exclusive authority on its property is reflected in at least one other section of ARCA. The section laying out the

²³ AS 42.40.935(b).

Railroad's general powers, AS 42.40.250, grants the Railroad authority to "maintain a security force to enforce municipal ordinances . . . with respect to violations that occur on or to" Railroad property. This section similarly takes no action to require that municipal ordinances apply on Railroad property, instead starting from the assumption that they do. This bolsters the claim that the Railroad is subject to zoning — if the legislature assumed that local safety and building regulations apply, it is a fair inference that it also assumed that land use regulations apply.

d. Alaska Statute 42.40.390

Alaska Statute 42.40.390, entitled "Land Use Rules," provides:

The board [of the Alaska Railroad Corporation] may adopt exclusive rules governing land use by parties having interests in or permits for land owned or managed by the corporation. The power conferred by this section is exercised for the common health, safety, and welfare of the public and to the extent constitutionally permissible, may not be limited by the terms and conditions of leases, contracts, or other transactions.

The Railroad argues that "[t]his grant of power to the ARRC's board to adopt 'exclusive rules governing land use' by its lessees and permittees would be rendered ineffective if the [Railroad] was also subject to possibly conflicting zoning ordinances in each of the municipalities in which it operates."

This provision presents some evidence that the legislature intended to exempt the Railroad from local zoning laws. Its reference to "exclusive rules" might indicate that no other government's rules would apply on Railroad land. But the term "exclusive" could also be read as a choice-of-law provision — if the Railroad Board

promulgated rules conflicting with local ordinances, the Railroad's regulations would govern, but in the absence of a conflict, local rules are unaffected.²⁴

An examination of the provision's legislative history shows that it should not be read as a clear declaration that the legislature intended to shield the Railroad from local land use regulation. At a Senate Transportation Committee hearing on the Railroad bill, Tamara Cook, a lawyer from the Legislative Affairs Agency, asked the committee whether the provision was meant to supersede municipal land use regulation.²⁵ Senator Moss, the committee chairman, replied that it was not.²⁶ Dave Walsh, a member of the Alaska Railroad Transfer Team, said, without contradiction from any legislator or witness, that he did not think "this section . . . allows the railroad to ignore local law."²⁷ In a memorandum the next month, Cook again pointed out that the statutory language might be read to immunize the Railroad; the memo suggested that if the provision was meant to provide this immunity, it ought to be clarified.²⁸ At a hearing following the memo, committee member Senator Halford declared that he thought the statute should

²⁴ The Railroad Board has not promulgated any such regulation. Contrary to the dissent's assertion (dissent at 49 n.12) a choice-of-law rule does not grant any immunity or authority, but only resolves conflicts between laws.

²⁵ *Hearing on SJR 43 and SB 352 Before the Senate Transp. Standing Comm.* (Alaska, Feb. 22, 1984) (statement of Tamara Cook, Deputy Director of the Division of Legal Services, Legislative Affairs Agency).

²⁶ *Id.* (statement of Senator Moss).

²⁷ *Id.* (statement of Dave Walsh).

²⁸ Memorandum from Tamara Cook, Deputy Director of the Division of Legal Services, Legislative Affairs Agency to Senator Moss, Chairman, Senate Transp. Comm. 2 (March 12, 1984) ("If . . . the purpose of the section is to exclude rail property from municipal land use regulation, that should be done specifically. I would recommend that the section be clarified or eliminated.").

protect “[R]ailroad operations” from local regulation.²⁹ He asserted that the provision as it was worded would do so.³⁰ Senator Gilman agreed that local zoning authority would be problematic, but nevertheless moved to delete AS 42.40.390.³¹ Although he acknowledged Senator Halford’s concern, he argued the provision should be deleted because it was originally added to ensure that Railroad bonds would be tax exempt under a federal law. The law had recently been changed to explicitly give the Railroad tax-exempt status, regardless of whether it had land-use authority, so the section was no longer necessary.³² A third senator then noted that the Railroad’s status as a tax-exempt bonding authority was again in question, and the provision was restored in response.³³ The record of the meeting reflects no further discussion of local zoning authority.

This series of events suggests that AS 42.40.390 should not be read as clearly granting the Railroad immunity from zoning ordinances. Most importantly, different members of the responsible committee, on separate occasions, denied that the provision was intended as a shield against local regulation — once by an explicit denial and once by assigning an entirely different purpose to the section. The possible immunizing effect was brought to the committee’s attention, and one of its members expressed an interest in providing such protection. The committee had before it explicit advice from Legislative Affairs on how to address that concern and ensure immunity.

²⁹ *Hearing on SB 352 Before the Senate Transp. Standing Comm.* (Alaska, March 15, 1984) (statement of Senator Halford).

³⁰ *Id.*

³¹ *Id.* (statement of Senator Gilman).

³² *Id.*

³³ *Id.* at 307, 321 (statement of Senator Faiks, motion of Senator Gilman).

It chose not to take action. It is often an error to make much of legislative inaction,³⁴ but in this context, with the problem and solution plainly before it, we see the legislature's decision as at least suggesting that AS 42.40.390 was not intended as a shield against local regulation. Senator Halford's view of the provision indicates that he did intend such an exemption, but we cannot say the rest of the committee, let alone the legislature, agreed with him. Whatever it does stand for, AS 42.40.390 is not a clear indication of legislative intent to exempt the Railroad from local zoning.

e. **Alaska Statute 42.40.250(13)**

The dissenting opinion also enlists AS 42.40.250(13), which authorizes the Railroad to "apply to the state, the United States, and foreign countries or other proper agencies for the permits" required for its operation.³⁵ The list does not include "municipalities" or "political subdivisions" of the state, as the dissent points out, but other sections of ARCA do, and a former, unenacted version of ARCA was amended to drop inclusion of municipalities. The dissent concludes that the legislature must have intended that the Railroad should not have to obtain permits from local authorities. This logic has two essential flaws. First, it ignores the words "or other proper agencies," which clearly includes municipalities, regardless of whether they were explicitly mentioned in other sections of the statute. Second, it relies on changes made to a version of the act that failed to pass. The legislature rejected the bill that had been amended to drop the requirement of compliance with municipal regulations. We cannot give that

³⁴ See *Cnty. For Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989) ("Ordinarily, Congress' silence is just that — silence.").

³⁵ Dissent at 52-53.

amendment any weight in our inquiry.³⁶ If anything, we might imply from this history that the legislature was opposed to the exemption, since it turned down the bill that included it.

2. The legislature did not create the Alaska Railroad relying on a presumption that state instrumentalities are immune from local zoning.

The legislature did not express in ARCA a clear intent to immunize the Railroad from local zoning regulations; nor is there anywhere in the legislation a clear expression that the Railroad is to be subject to them. We must therefore decide how to determine the legislature's intent in order to fill that statutory gap. The Railroad argues that "Alaska first adopted its statutory scheme governing relations between the State and localities" at a time when the black-letter rule was that states and state agencies were exempt from municipal zoning in the absence of express statutory language to the contrary. This presumption, it argues, answers the question left unresolved by ARCA; because there is no clear statement that local zoning applies to the Railroad, the legislature must have intended that it does not.

The Railroad points to the fact that in Alaska "there are no statutes expressly stating that a state agency is not subject to local zoning, but there are at least

³⁶ Cf. *Westlands Water Dist. v. Natural Res. Def. Council*, 43 F.3d 457, 462 (9th Cir. 1994) (refusing to "transfer[]" legislative history from one bill to another); *Troy Gold Industries, Ltd. v. Occupational Safety & Health Appeals Bd.*, 231 Cal. Rptr. 861, 868 n.6 (Cal. App. 1986) ("[A] single unenacted bill . . . is meaningless as an expression of legislative intent as are statements of the individual legislators in favor of the rejected bill."); 2A NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTR.* § 48:01, at 411 (6th ed. 2000) ("[S]tatements made by persons in favor of a rejected or failed bill are meaningless . . .").

two that expressly provide for compliance with local zoning.” As examples of statutes in which the Alaska Legislature rejected any presumption of immunity, the Railroad cites

AS 18.55.100(a)(7)³⁷ AS 40.15.200,³⁸ AS 35.30.020,³⁹ and AS 22.05.025(a)(2)⁴⁰ — all of which expressly require an agency (or several) to comply with local zoning laws. These statutes, the Railroad argues, reflect a baseline presumption that state instrumentalities are immune from local zoning. Without such a presumption, state instrumentalities would be subject to local authority with no legislative action, and these statutes would be superfluous.

The presumption of immunity the Railroad seeks is a form of the state's sovereign immunity. When a party invokes a background rule granting it immunity, stated by neither the courts nor the legislature of Alaska, it would do well to confront how to square that rule with this court's unambiguous summation of the common law of

³⁷ “[T]he [Alaska Housing Financing C]orporation has all powers necessary to . . . provide, subject to the applicable planning, zoning, sanitary, and building laws, ordinances, and regulations for the construction, improvement, alteration, or repair of a housing or public building project . . .” AS 18.55.100(a)(7) (emphasis added).

³⁸ “All subdivisions of land made by the state, its agencies, instrumentalities, and political subdivisions are subject to . . . home rule ordinances or regulations governing subdivisions, and shall comply with ordinances and other local regulations . . . in the same manner and to the same extent as subdivisions made by other landowners.” AS 40.15.200.

³⁹ “A department shall comply with local planning and zoning ordinances and other regulations in the same manner and to the same extent as other landowners.” AS 35.30.020.

⁴⁰ “[I]n the exercise of its authority [to construct court facilities], the supreme court shall cooperate and coordinate with the Department of Transportation and Public Facilities so that court facility construction projects are carried out in accordance with the statutes and regulations applicable to state public works projects.” AS 22.05.025(a)(2).

sovereign immunity: “liability is the rule, immunity the exception.”⁴¹ Although liability for negligence is not at issue here, the principle behind our presumption of liability retains its force: The state is responsible for its actions to the same degree as a private party, and those, like the Railroad, who propose a rule weakening its responsibility have a heavy burden to carry. And by abolishing the state’s common law immunity to suits sounding in contract, quasi-contract, or tort, the legislature has shown complementary disfavor for sovereign immunity.⁴²

That said, there is no doubt that the Railroad and the dissent are correct that under the “traditional” rule, the state and its instrumentalities would be presumed immune from local regulation. But this rule is contrary to our general precept of state liability. There are exceptions to our principle — for example, as discussed below, the state is presumed immune from punitive damages awards⁴³ — but neither the Railroad nor the dissent has made the strong showing necessary to demonstrate that Alaska operates under a rule presuming immunity. The history of enactments dealing with the relationship between state and local authorities, as ably recounted in the dissenting opinion, does make a plausible argument that the legislature at one time operated from that presumption. There is another plausible reading, however.

⁴¹ *Adams v. State*, 555 P.2d 235, 244 (Alaska 1976); see also *Johnson v. Alaska State Dept. of Fish & Game*, 836 P.2d 896, 905 (Alaska 1991); *Freeman v. State*, 705 P.2d 918, 920 (Alaska 1985).

⁴² AS 09.50.250; see also *Estate of Arrowwood By and Through Loeb v. State*, 894 P.2d 642, 644 (Alaska 1995). Immunity is retained for certain types of suits, including those arising from “a discretionary function or duty” of the state. AS 09.50.250(1-5); see also, e.g., *Estate of Himsel v. State*, 36 P.3d 35, 40 (Alaska 2001).

⁴³ *Alaska Housing Finance Corp. v. Salvucci*, 950 P.2d 1116, 1123 (Alaska 1997).

The legislature has in the past enacted legislation that restates an underlying presumption. We recognized as much in *Alaska Housing Finance Corp. v. Salvucci*, where we noted that the legislature had “specifically exclude[d] awards of punitive damages against the State” from AS 09.50.280, part of Alaska’s Tort Claims Act,⁴⁴ but we were not dissuaded from finding that “a presumption exists . . . which disfavors punitive damage awards against the State.”⁴⁵ The presumption means that the state was not subject to punitive damages awards even before the law was passed. The law did not change anything; yet the legislature passed it anyway. But the dissent argues that here we must find that the legislature’s enactments changed the situation — we must read from the enactments that the legal landscape was different before they were passed. By the dissent’s reasoning in this case, the Tort Claims Act should have been evidence against the presumption of state immunity that we affirmed in *Salvucci*. We did not employ that logic then, and we will not employ it now. The legislature may well have passed laws subjecting state entities to local regulation even though those entities were already obliged to follow local authority.

But more fundamentally, the dissent misapprehends the point of our inquiry. We are seeking to interpret the effect of a gap in ARCA in order to determine whether the Railroad must comply with local zoning ordinances. Our task, therefore, is to pinpoint the intent of the legislature that enacted ARCA in 1984, not to map the understanding of the Alaska Legislature as a historical body, especially in light of the changing complexion of the law of state-local relations. Only one legislature enacted ARCA; only that legislature’s intent is of concern today.

⁴⁴ 950 P.2d at 1123.

⁴⁵ *Id.*

Although it is not determinative, the Alaska Constitution provides some guidance. Article X, section 11 assigns to the state's home rule municipalities "all legislative powers not prohibited by law or by charter." This provision is not a bar to the presumption of immunity sought by the Railroad — leaving state instrumentalities immune to local regulation does not strip them of a constitutionally guaranteed power. But we should recall what motivated the framers to include this provision: "It was hoped that the constitutional delegation of authority under the terms of Art. X, § 11 would lead the courts of this jurisdiction to take a new and independent approach when conflicts inevitably arose between the municipalities and the state."⁴⁶ "[T]his constitutional provision was adopted in order to abrogate traditional restrictions on the exercise of local legislative authority."⁴⁷ This court is certainly not bound by some other jurisdictions' rule that state instrumentalities are always immune absent explicit waiver by the legislature. And in light of our constitutional commitment to questioning long-held ideas about the interacting powers of state and local governments, we should hesitate to assign to the legislature the failure to rethink the role of municipalities.

With that constitutional directive in mind, we note that by 1984, when the legislature created the Railroad as an arm of the state, support for the traditional presumption of immunity was starting to erode. In 1972 the Supreme Court of New Jersey, in *Rutgers, the State University v. Piluso*,⁴⁸ held that the particular intent of the legislature in passing the law in question was paramount. The court therefore discarded

⁴⁶ *Jefferson v. State*, 527 P.2d 37, 42-43 (Alaska 1974); see also *Area Dispatch, Inc. v. City of Anchorage*, 544 P.2d 1024, 1025-27 (Alaska 1976).

⁴⁷ *Simpson v. Municipality of Anchorage*, 635 P.2d 1197, 1200 (Alaska App. 1981).

⁴⁸ 286 A.2d 697 (N.J. 1972).

the traditional presumption. Under its new rule, when the legislature is silent or unclear, instead of presuming that it intended immunity, courts are to balance the interests at stake in order to determine the legislature's intent.⁴⁹ By 1982, the number of states adopting the test was approaching ten.⁵⁰ The high court in at least one other state had hinted it might do so,⁵¹ and the American Law Institute had adopted it for its Model Land Development Code.⁵² A few years later one state court described the traditional presumption as "both simplistic and archaic."⁵³ The traditional approach changed because government had changed:

The old tests were adopted at a time when state government was much smaller. The myriad of agencies now conducting the functions of the state have necessarily resulted in a diminution of centralized control. The decision of a person administering an outlying function of a state agency with respect to the site where this function should be performed is

⁴⁹ *Id.* at 702-03. The specific factors to be considered are discussed below in Part III.B.3.

⁵⁰ In *Blackstone Park Improvement Ass'n v. State Bd. of Standards & Appeals*, 448 A.2d 1233, 1239 (R.I. 1982), the Rhode Island Supreme Court counted nine states adopting the test, and added itself as the tenth. Our review of the cases, however, indicates that several had only adopted part of the test or had only indicated in dicta that the test might be the right one.

⁵¹ *Kunimoto v. Kawakami*, 545 P.2d 684, 687 (Haw. 1976).

⁵² See MODEL LAND DEV. CODE §§ 7-301 to 304 and 12-201 (1975).

⁵³ *Hayward v. Gaston*, 542 A.2d 760, 766 (Del. 1988) ("We find that the [superior sovereign] hierarchical approach to land use disputes between competing governmental entities, as urged by the Department, is both simplistic and archaic.").

not necessarily any better than the decision of the local authorities on the subject of land use.^{54]}

As shown by ARCA's creation of a state-owned Railroad, governed by a board some distance from the center of state government,⁵⁵ Alaska was as much a part of this trend as any other state.

There is no particular evidence that the legislature was aware of this development in other states' law, and we do not claim that it enacted ARCA with the new test in mind. However, an examination of enactments and other legislative statements provides evidence that like the courts adopting the balancing test, the legislature at the time of ARCA was taking notice of the need for a new balance between state and local governments and loosening its adherence to the traditional rule. First, there is a section of ARCA itself, AS 42.40.935(b), discussed in Part III.B.1.c above, which indicates that the legislature that enacted ARCA may not have been operating from a presumption of immunity. This provision requires the Railroad to consult with local authorities and gives it five years to develop a plan for compliance with safety and building codes. These apply to other state instrumentalities through AS 35.10.025, but the Railroad is exempt from AS 35. Because AS 42.40.935(b) itself does not contain any language applying the codes to the Railroad, the provision appears to start from the assumption that they do apply. Reading the statutes this way admittedly might have the effect of rendering AS 35.10.025 superfluous — if the 1984 legislature assumed that local codes apply to state instrumentalities, the provision requiring such compliance is

⁵⁴ *Blackstone Park Improvement Ass'n*, 448 A.2d at 1237-38 (quoting *City of Temple Terrace v. Hillsborough Association for Retarded Citizens, Inc.*, 322 So. 2d 571, 578-79 (Fla. Dist. App. 1975), *aff'd*, 332 So. 2d 610 (Fla. 1976)).

⁵⁵ See AS 42.40.020 (setting out makeup of Railroad's Board of Directors).

unnecessary. It is, however, not surprising that if the legislature's views change over time, some older provisions like AS 35.10.025, enacted in 1969,⁵⁶ might be overtaken by changes in its perspective.

The dissent's own reading of the ARCA legislative history further illustrates that the 1984 legislature may have abandoned any older presumption about immunity. As the dissent recounts the March 15, 1984 Senate Transportation Standing Committee meeting, Senator Halford sought to preserve AS 42.40.390 in order to "protect the railroad's operations from local zoning restrictions."⁵⁷ While we differ with the dissent on the meaning of the committee's response to Senator Halford's remark, the nature of his concern is unmistakable: he thought that the Railroad should be shielded from local zoning, and he thought that the statutory provision was necessary to give it that protection. If he thought that the Railroad was presumptively immune from zoning, he would not have argued for the inclusion of AS 42.40.390 on those grounds.

Finally, the most recent piece of legislation that the dissent cites as "central to [its] main premise"⁵⁸ is the 1976 amendment to AS 35.10.020, including the University of Alaska in its coverage. The dissent says this change "illustrates legislative acceptance of the rule of general immunity"⁵⁹ because the amendment shows that "[t]he legislature implicitly accepted the University's view that it was not subject to zoning."⁶⁰

⁵⁶ Ch. 89, § 1, SLA 1968.

⁵⁷ *Hearing on SB 352 Before the Senate Transp. Standing Comm.* (Alaska, March 15, 1984) (statement of Senator Halford).

⁵⁸ See dissent at 46.

⁵⁹ Dissent at 49.

⁶⁰ Dissent at 44.

But all the amendment shows is that the legislature wanted the University to comply with local rules, and the University was not doing so. The legislative history cited in the dissent⁶¹ suggests that the legislature believed that the University was always subject to local zoning. The amendment's sponsor, Senator Croft, noted that the legislature, upon passing the original bill, had realized that "the University considers itself something other than a portion of the state."⁶² He went to say that he thought that the University should abide by the bill, and had he known "that they wouldn't, [the Senate] would have included it last year."⁶³ The real purpose of the 1976 amendment may well not have been to strip any preexisting immunity from the University, but to clarify that it did not have immunity and ensure that the University abandon its position that it did. This is not to argue that the legislature actually did believe that the University was never immune, but merely to point out that the evidence of the legislature's adherence to a presumption of immunity grows weaker as the date moves closer to 1984. By the time of the enactment of ARCA, the picture is quite murky — too murky to convince us to throw over the legislature's disfavor for immunity and say that the legislature acted against the background of the traditional presumption.

3. The trial court must apply the balancing of interests test if the Railroad's efforts to comply with local zoning laws fail.

⁶¹ Dissent at 42 n.5.

⁶² Track 1, 16:00-19:20 - 1976 Senate Committee: Community & Regional Affairs.

⁶³ *Id.*; see also Track 2, 0:27-4:00 - House Committee: Community & Regional Affairs (statement of Senator Croft) ("[W]e thought we were picking up the University but there was a drafting mistake.").

Because the legislature did not state explicitly whether it intended the Railroad to be immune and because we do not find sufficient evidence to impute to it the intent to rely on a presumption of immunity, we must adopt a test to discern the legislature's intent. We have never addressed the issue and there is no consensus among other jurisdictions regarding what test should be applied to determine whether the legislature intended a state agency to be immune from local zoning ordinances.⁶⁴ In the absence of a clear expression by the legislature of its intent, there are four tests generally used by courts to resolve intergovernmental land use disputes: the "superior sovereign test," the "eminent domain test," the "governmental function test," and the "balancing of interests test."⁶⁵

The superior sovereign test, the source of the traditional presumption of immunity, focuses on the relationship between the competing political entities. If the agency whose activities might be regulated is "superior" to the regulating authority, it is presumed that the legislature intended the superior agency to be immune from

⁶⁴ See generally Elaine Marie Tomko-DeLuca, Annotation, *Applicability of Zoning Regulations to Governmental Projects or Activities*, 53 A.L.R. 5TH 1 (1997) (surveying tests in various jurisdictions for determining legislative intent to immunize state agencies from local zoning laws).

⁶⁵ See Laurie Reynolds, *The Judicial Role in Intergovernmental Disputes: The Case Against Balancing*, 71 MINN. L. REV. 611, 612-13 (1987). The Pennsylvania Supreme Court has adopted a fifth test, the "legislative intent" test, which provides that "legislative intent may be determined by a consideration, inter alia, of the consequences of a particular interpretation." *Commonwealth v. Ogontz Area Neighbors Ass'n*, 483 A.2d 448, 454 (Pa. 1984). The parties have not addressed the merits of this test. We decline to adopt the legislative intent test because it appears to be a modified balancing of interests test but with less guidance as to the factors to be considered.

regulation.⁶⁶ Where two governmental entities are of equal rank, the court will resort to rules of statutory construction to determine whether one's regulations should govern the other.⁶⁷ In a case like this one, where a local authority seeks to regulate a state instrumentality, the superior sovereign test presumes that the legislature intended the state instrumentality to be immune.

Under the eminent domain test, if a state agency has the power of eminent domain, it is immune from local zoning regulations.⁶⁸ The theory behind this test is that the power of eminent domain is inherently superior to the exercise of the zoning power⁶⁹ and thus there is a presumption that the legislature intended the state or its agency to be immune from local zoning laws if it granted that entity the power of eminent domain.⁷⁰

Whether the legislature is deemed to have intended a governmental entity to be immune from local laws under the governmental function test depends on the purpose of the intended land use: If a use furthers a private purpose, as opposed to a governmental function, there is no immunity.⁷¹ A proprietary land use is said to be one

⁶⁶ J. Scott MacBeth, *Zoning and Planning: The Economics of State Land Use and the Balancing of Interests Test*, 30 WASHBURN L.J. 148, 151 (1990).

⁶⁷ *City of Richmond v. Bd. of Supervisors*, 101 S.E.2d 641, 646 (Va. 1958).

⁶⁸ MacBeth, *supra* note 66, at 152. For a survey of cases in which the courts have applied the eminent domain test, see Tomko-DeLuca, *supra* note 64, at § 22.

⁶⁹ Note, *Governmental Immunity from Local Zoning Ordinances*, 84 HARV. L. REV. 869, 874 (1971).

⁷⁰ MacBeth, *supra* note 66, at 152.

⁷¹ *City of Albuquerque v. Jackson Bros., Inc.*, 823 P.2d 949, 951 (N.M. App. 1991) (citing 6 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 40.03[2] (a) (1978)).

“conferring private advantage pursuant to permissive legislation”⁷² or a function “undertaken by a governmental entity in a business, private, or corporate capacity.”⁷³ In contrast, a governmental function has been characterized as a “political function or as a function mandated by statute and performed by the governmental entity in furtherance of its duty to discharge its obligation for the health, safety and general welfare of the public.”⁷⁴ Under this test, “[a] municipal corporation in the exercise of a governmental function is not subject to zoning laws or ordinances either within or outside the municipal boundaries.”⁷⁵ This test was developed as a judicial response to the breadth of the superior sovereign and eminent domain tests by limiting immunity to governmental functions,⁷⁶ and it evolved in the context of governmental immunity from tort claims.⁷⁷ Although many courts have abandoned the governmental function test, a few continue to apply it.⁷⁸

All three of these older tests have been heavily criticized because they have led courts to “frequently resolve[] such [intergovernmental] conflicts in perhaps too

⁷² Note, *Municipal Power to Regulate Building Construction and Land Use by Other State Agencies*, 49 MINN. L. REV. 284, 295-96 (1964).

⁷³ Tomko-DeLuca, *supra* note 64, at § 2[a].

⁷⁴ *Id.*

⁷⁵ 8 EUGENE MCQUILLIN, MUNICIPAL CORPORATIONS § 25.15, at 55-56 (West Group ed., 3d ed. 2002) (citations omitted).

⁷⁶ Reynolds, *supra* note 65, at 621.

⁷⁷ MacBeth, *supra* note 66, at 153.

⁷⁸ Tomko-DeLuca, *supra* note 64, at §§ 10-1; *see also, e.g., Town of Bourne v. Plante*, 708 N.E.2d 103, 105 (Mass. 1999); *Lane v. Zoning Bd. of Adjustment*, 669 So. 2d 958, 959 (Ala. Civ. App. 1995).

simplistic terms and by the use of labels rather than through reasoned adjudication of the critical question of which governmental interest should prevail in the particular relationship or factual situation.”⁷⁹ In particular, critics of the superior sovereign test urged upon us by the Railroad and relied upon by the dissent cite defects such as “the test’s lack of safeguards against irresponsibility, the practical difficulties inherent in developing a system of sovereign ranking, the inconsistencies in the test’s application, the inability of the test to deal with conflicts between governmental units of equal rank, and the test’s failure to recognize that all units of local government are ‘equally’ agents of the state.”⁸⁰ Courts and commentators also have criticized the governmental function test as being difficult to apply and as requiring an often-tenuous distinction between governmental and proprietary functions.⁸¹ We agree that these three traditional tests are unduly rigid and we join the growing ranks of jurisdictions who have rejected these tests in favor of the balancing of interests test.

In *Rutgers, the State University v. Piluso*, the New Jersey Supreme Court recognized that the scope of immunity may be limited, and that its scope is best

⁷⁹ *Rutgers, the State University v. Piluso*, 286 A.2d 697, 701 (N.J. 1972); see also 4 SANDRA M. STEVENSON, *ANTI-EAU’S LOCAL GOV’T LAW* § 57.08[3], at p. 57-107 (2d ed. 2002) (calling balancing of interests “more realistic than other tests” such as the governmental function test); Note, *supra* note 69, at 872 (“Inconsistent results proliferate due largely to state court reliance upon artificial labels to rationalize ‘governmental immunity’ from local zoning ordinances . . .”).

⁸⁰ Reynolds, *supra* note 65, at 619-20 (citations omitted); see also *Blackstone Park Improvement Ass’n*, 448 A.2d at 1238; MacBeth, *supra* note 66, at 152.

⁸¹ See, e.g., *Township of Washington v. Village of Ridgewood*, 141 A.2d 308, 311 (N.J. 1958); 2 KENNETH H. YOUNG, *ANDERSON’S AMERICAN LAW OF ZONING* § 12.05, at 507-11 (4th ed. 1996).

determined by applying a "balancing of the interests" test.⁸² The burden is on the governmental entity that seeks exemption from local zoning laws to prove that a balancing of the following factors weigh in favor of immunity:⁸³ "the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulation would have upon the enterprise concerned and the impact upon legitimate local interests."⁸⁴ The court noted the importance of the flexibility of this test,⁸⁵ and emphasized that even where the balance tips in favor of immunity, "it must not . . . be exercised in an unreasonable fashion so as to arbitrarily override all important legitimate local interests."⁸⁶

Some form of a balancing of interests test has been embraced in at least fourteen jurisdictions: Delaware, Florida, Indiana, Iowa, Kansas, Minnesota, Missouri,

⁸² 286 A.2d 697, 702-03 (N.J. 1972).

⁸³ *City of Crown Point v. Lake County*, 510 N.E.2d 684, 690 (Ind. 1987) ("We conclude that an intruding entity must be allowed to seek relief under some circumstances. It must, however, bear the burden to show that immunity is necessary to advance the governmental ends it seeks."); *City of Fargo v. Harwood Township*, 256 N.W.2d 694, 698 (N.D. 1977); *Temple Terrace*, 322 So. 2d at 579.

⁸⁴ *Piluso*, 286 A.2d at 702.

⁸⁵ *Id.* at 703 ("[T]here is no precise formula or set of criteria which will determine every case mechanically and automatically.").

⁸⁶ *Id.*

New Jersey, New York, North Dakota, Ohio, Oklahoma, Rhode Island, and South Dakota.⁸⁷ Others have approved it in dicta.⁸⁸ A few other states, while not explicitly adopting balancing tests, resolve such conflicts by assessing the necessity for the state's action,⁸⁹ or the reasonableness of the state's exercise of immunity,⁹⁰ or of the zoning ordinance,⁹¹ tasks that may easily turn into a balancing of interests. A similar balancing

⁸⁷ See *City of Washington v. Warren County*, 899 S.W.2d 863, 865-66 (Mo. 1995); *Herrmann v. Bd. of County Comm'rs*, 785 P.2d 1003, 1008 (Kan. 1990); *In re County of Monroe*, 530 N.E.2d 202, 203 (N.Y. 1988); *Hayward v. Gaston*, 542 A.2d 760, 766 (Del. 1988); *City of Crown Point v. Lake County*, 510 N.E.2d 684, 690 (Ind. 1987); *City of Ames v. Story County*, 392 N.W.2d 145, 149 (Iowa 1986); *Indep. Sch. Dist. No. 89 v. City of Oklahoma City*, 722 P.2d 1212, 1215 (Okla. 1986); *Brownfield v. State*, 407 N.E.2d 1365, 1368 (Ohio 1980), *overruled on other grounds by Racing Guild of Ohio v. Ohio State Racing Comm'n*, 503 N.E.2d 1025 (Ohio 1986); *Blackstone Park Improvement Ass'n v. State Bd. of Standards & Appeals*, 448 A.2d 1233, 1239 (R.I. 1982); *City of Fargo v. Harwood Township*, 256 N.W.2d 694, 698 (N.D. 1977); *Lincoln County v. Johnson*, 257 N.W.2d 453, 458 (S.D. 1977); *Hillsborough Ass'n for Retarded Citizens, Inc. v. City of Temple Terrace*, 332 So. 2d 610, 612 (Fla. 1976), *aff'g Temple Terrace*, 322 So. 2d at 578-79; *Town of Oronoco v. City of Rochester*, 197 N.W.2d 426, 429 (Minn. 1972); *Rutgers, the State University v. Piluso*, 286 A.2d 697, 701 (N.J. 1972); see also *Dearden v. City of Detroit*, 296 N.W.2d 139, 142 & n.4 (Mich. 1978) (adopting "legislative intent" test, citing *Piluso* favorably).

⁸⁸ *Hagfeldt v. City of Bozen, an*, 757 P.2d 753, 757 (Mont. 1988); *Kunimoto v. Kawakami*, 545 P.2d 684, 687 (Haw. 1976).

⁸⁹ *City of New Orleans v. Bd. of Comm'rs*, 640 So. 2d 237, 252 (La. 1994).

⁹⁰ *Austin Indep. Sch. Dist. v. City of Sunset Valley*, 502 S.W.2d 670, 674 (Tex. 1973).

⁹¹ *City of Everett v. Snohomish County*, 772 P.2d 992, 997-98 (Wash. 1989).

methodology has been endorsed by the drafters of the American Law Institute Model Land Development Code.⁹²

We join those courts, adopting the factors as articulated by the New Jersey Supreme Court. Resort to the balancing of interests test is limited by two threshold requirements. First, because the test aims to discern legislative intent, direct statutory grants of immunity control when they exist.⁹³ Second, the court will not resolve conflicts under the balancing test unless the state has made a reasonable good faith attempt to comply with local zoning laws.⁹⁴ This second requirement is consistent with the premise that “the basic purpose of the doctrine of exhaustion of administrative remedies is ‘to allow an administrative agency to perform functions within its special competence — to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies.’ ”⁹⁵ Requiring the Railroad to first attempt to comply with Anchorage’s zoning procedures enhances the possibility that the parties will reach an accommodation that serves the public interest underlying both the zoning power and the Railroad’s quarrying activity without resorting to judicial remedies.⁹⁶ Because the

⁹² See MODEL LAND DEV. CODE §§ 7-301 to 304 and 12-201 (1975).

⁹³ See *Temple Terrace*, 322 So. 2d at 579; see also *Brownfield*, 407 N.E. 2d at 1368; *City of Fargo*, 256 N.W.2d at 698; Young, *supra* note 81, at § 12.05.

⁹⁴ See *Piluso*, 286 A.2d at 703; see also *City of Crown Point* 510 N.E.2d at 690-91; *Brownfield*, 407 N.E.2d at 1368; *Temple Terrace*, 322 So. 2d at 579.

⁹⁵ *Mount Juneau Enters., Inc. v. City & Borough of Juneau*, 923 P.2d 768, 776-77 (Alaska 1996) (quoting *Ben Lomond, Inc. v. Municipality of Anchorage*, 761 P.2d 119, 122 (Alaska 1988)).

⁹⁶ Cf. *Ben Lomond*, 761 P.2d at 122 (“[S]uccessful pursuit of a claim through the administrative process could obviate the need for judicial review of the constitutional
(continued...)”)

Railroad has not yet sought the conditional use permit required by the Anchorage zoning ordinance, neither this court nor the superior court should yet apply the balancing of interests test. If the Railroad continues to want to operate the quarry, it should apply for a conditional use permit from the Municipality. If the result of that application is unsatisfactory to it (or any other interested party), further proceedings may follow.

The balancing of interests test has been criticized by the Pennsylvania Supreme Court as amounting to "judicial legislation" because it yields uncertain results and requires courts to resolve intergovernmental land use disputes where the legislature is silent.⁹⁷ The eminent domain test, the superior sovereign test, and the governmental function test admittedly may provide a more clear-cut resolution to intergovernmental zoning disputes in some cases. But the very fact that the balancing of interests test does not yield highly predictable results, coupled with the requirement that the state first attempt to comply with local zoning laws, may promote good faith attempts at accommodation by the parties and minimize the need for judicial intervention.⁹⁸

We conclude that the balancing of interests test represents the most enlightened approach to determining the legislature's intent with regard to the applicability of local zoning laws to state agencies. We agree with the Minnesota

⁹⁶ (...continued)

issues."); Gregory W. Stype, Comment, *Government Immunity from Local Zoning Restrictions: The Balancing Test of Brownfield v. State*, 43 OHIO ST. L.J. 229, 241 (1982).

⁹⁷ *Ogontz Area Neighbors Ass'n*, 483 A.2d at 454-55.

⁹⁸ See *Brown v. Kansas Forestry, Fish & Game Comm'n*, 576 P.2d 230, 236 (Kan. App. 1978) ("[I]f the state were not required to seek local approval, the city would always be forced to litigate its disagreement . . .") (quoting *Temple Terrace*, 322 So. 2d at 612 n.3); Stype, *supra* note 96, at 264.

Supreme Court that “[t]he trend is to limit [the state’s] freedom from regulation, a trend which we believe is well within the dictates of the public interest, principally because the pungent realities of urban sprawl and overpopulation have accentuated the need for land-use planning and control.”⁹⁹ In adopting the balancing of interests test, we join the ranks of American jurisdictions that have rejected the formalistic approaches of the traditional tests.¹⁰⁰

C. The Interstate Commerce Commission Termination Act Does Not Preempt Local Zoning Regulation of the Railroad’s Operations at the Eklutna Quarry.

The Railroad argues that Anchorage may not force it to obtain a conditional use permit for the quarry because the federal Interstate Commerce Commission Termination Act (ICCTA)¹⁰¹ preempts Anchorage’s zoning ordinances with respect to Railroad property. “ICCTA abolished the Interstate Commerce Commission, created the [Surface Transportation Board], and granted the board jurisdiction over certain interstate rail functions and proceedings.”¹⁰² Section 10501 of ICCTA provides, in pertinent part:

⁹⁹ *Town of Oronoco*, 197 N.W.2d at 429.

¹⁰⁰ Our decision today is also consistent with an opinion letter of the Alaska Attorney General, advocating for the adoption of the balancing of interests test in 1981. *See Rabbit Creek Shooting Range Improvement*, 1981 Informal Op. Att’y Gen. 867, 869; WL 38706, at *2 (Alaska, July 13, 1981).

¹⁰¹ 49 U.S.C. § 701 *et seq.* ICCTA applies to the Railroad via 45 U.S.C. § 1207(a)(1), which provides that “the [Alaska R]ailroad shall be a rail carrier engaged in interstate and foreign commerce subject to Part A of subtitle IV of Title 49 and all other Acts applicable to rail carriers subject to that chapter.”

¹⁰² *City of Auburn v. United States*, 154 F.3d 1025, 1028 n.3 (9th Cir. 1998) (quoting ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995)), *cert. denied*, 527 U.S. 1022 (1999).

(b) The jurisdiction of the [Surface Transportation] Board over —

....

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located . . . entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.^{103]}

Eklutna argues that case law in other jurisdictions and the legislative history of ICCTA indicate that the act preempts only state economic regulation, and does not disturb local zoning authority. In determining the scope of federal preemption, “we ‘start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’ ”¹⁰⁴ “ ‘[T]he purpose of Congress is the ultimate touchstone’ in every preemption case.”¹⁰⁵ Thus, we will evaluate the regulation the Municipality wishes to apply in order to determine whether it “st[ands] as an obstacle to the goals of ICCTA.”¹⁰⁶

¹⁰³ 49 U.S.C. § 10501 (emphasis added).

¹⁰⁴ *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

¹⁰⁵ *Id.* (quoting *Retail Clerks Int’l Ass’n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

¹⁰⁶ *In re Vermont Ry.*, 769 A.2d 648, 503 (Vt. 2001).

In passing ICCTA, Congress focused on “removing direct economic regulation by the States.”¹⁰⁷ One House Report, for example, noted that state criminal and antitrust law would not be preempted as applied to railroads, “because they do not generally collide with the scheme of economic regulation . . . of rail transportation.”¹⁰⁸ Similarly, another report contrasts the states’ retained “police powers” to the exclusive “[f]ederal scheme of economic regulation and deregulation.”¹⁰⁹ Congress’s focus on economic regulation makes clear that it had no intention of preempting all state or local regulation that touches railroads in any way. Instead, “there are areas with respect to railroad activity that are reasonably within the local authorities’ jurisdiction.”¹¹⁰ These areas are defined not by the subject matter of the regulation — we will not draw a line between “economic” and “environmental” or “land use” regulations.¹¹¹ Congress did not intend ICCTA to preempt state or local regulation with only “a remote or incidental effect on rail transportation.”¹¹² State or local regulation of “manufacturing activities

¹⁰⁷ *Florida East Coast Ry. Co. v. City of West Palm Beach*, 266 F.3d 1324, 1337 (11th Cir. 2001).

¹⁰⁸ H.R. Rep 104-422, at 167 (1995), *reprinted in* 1995 U.S.C.C.A.N. 850, 852.

¹⁰⁹ H.R. Rep. 104-311, at 96 (1995), *reprinted in* 1995 U.S.C.C.A.N. at 807-08.

¹¹⁰ *Cities of Auburn and Kent, WA*, STB Finance Docket No. 33200, at *6 (Surface Transp. Bd. July 1, 1997); 1997 WL 362017.

¹¹¹ *Cf. City of Auburn*, 154 F.3d at 1031 (noting that environmental regulations “will in fact amount to ‘economic regulation’ if the [rail] carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line”).

¹¹² *Florida East Coast Ry.*, 266 F.3d at 1331; *see also Borough of Riverdale*, STB Finance Docket No. 33466, at *5, (Surface. Transp. Bd. Sept. 9, 1999); 1999 WL (continued...)

and facilities not integrally related to the provision of interstate rail service are not subject . . . to federal preemption.”¹¹³ The Surface Transportation Board has provided examples of allowable regulations, including “a local law prohibiting the railroad from dumping excavated earth into local waterways,” or a law penalizing the railroad if “harmful substances were discharged during railroad construction.”¹¹⁴

If Anchorage’s zoning ordinance survives preemption, it will at least delay the operation of the quarry by the time needed for the Railroad to obtain a conditional use permit, and may bar the Railroad’s use of the land altogether, if the permit is denied. Whether this amounts to undue interference with the Railroad’s operation is a “fact-bound determination.”¹¹⁵ Although obtaining ballast for the Railroad’s tracks arguably is “integrally related” to its operations, the Railroad’s own operation of a gravel quarry is not. Thomas E. Brooks, Chief of Engineering Services for the Railroad, testified at the evidentiary hearing that the Railroad generally obtains ballast by “request[ing] material from commercial sources outside the railroad or ask[ing] contractors to come into the pit that we operate.” Brooks’s affidavit indicates that rock from the Eklutna Quarry is a superior quality granite and provides a particularly economical source for ballast. It does not, however, establish that the economic impact of obtaining ballast from other sources would be so significant that it would necessarily interfere with rail operations. Brooks

¹¹² (...continued)
715272 (“[S]tate or local regulation is permissible where it does not interfere with interstate rail operations . . .”).

¹¹³ *Borough of Riverdale*, 1999 WL 715272, at *7.

¹¹⁴ *Cities of Auburn and Kent*, 1997 WL 362017, at *6.

¹¹⁵ *In re Vermont Ry.*, 769 A.2d at 502.

testified that if the Railroad is enjoined from obtaining ballast from Eklutna, it could get ballast from another source, as it did for eighty-two years prior to the quarry's opening.

ICCTA's preemption is aimed at improving the "nationwide efficiency of the railroad industry," not at stopping all regulation that "prevents an individual firm from maximizing its profits."¹¹⁶ Local regulation may bring some hardship or inconvenience to a railroad without causing the sort of economic impact that would trigger preemption. Therefore, on the record before us, the Railroad has not shown that Anchorage's zoning ordinance will have a more than incidental impact on its operations; the ordinance is therefore not preempted by ICCTA.

IV. CONCLUSION

We REVERSE the order of the superior court entering judgment in favor of the Railroad. If the Railroad does not succeed in obtaining the necessary permit from the zoning commission, it may seek judicial review in the superior court. The superior court will then apply the balancing of interests test, consistent with this opinion, to determine whether the legislature intended the Railroad to be immune from local zoning laws.

¹¹⁶ *Florida East Coast Ry.*, 266 F.3d at 1338 n.11.

MATTHEWS, Justice, with whom BRYNER, Justice, joins, dissenting.

The question presented in this case is whether the state-owned Alaska Railroad is subject to municipal zoning ordinances. In my opinion the answer is no. In Alaska, state government activities are exempt from local regulation in the absence of a statute making them subject to local regulation. No statute makes the Railroad subject to local regulation. Therefore, the Railroad is exempt. Although this rationale is, in my opinion, conclusive and fully sufficient to decide this case, there is another reason why the Railroad is exempt: the legislature in passing the Alaska Railroad Corporation Act indicated its intention to exempt the Railroad from local zoning regulation. I address each of these reasons in this opinion.

I. Alaska State Government Activities Are Exempt from Local Regulation in the Absence of a Statute Subjecting Them to Local Regulation.

The traditional view is that state agencies are immune from municipal zoning in the absence of a statute making them subject to municipal zoning.¹ As the following discussion of the history of AS 35.30.020 and .030 will make clear, the Alaska Legislature has accepted this rule in enacting these statutory sections and their precursors. I start with these sections as they appear now. Alaska Statute 35.30.020 provides:

A department shall comply with local planning and zoning ordinances and other regulations in the same manner and to the same extent as other landowners.

Alaska Statute 35.30.030 provides:

If a department clearly demonstrates an overriding state interest, waiver of local planning authority approval and the compliance requirement may be granted by the governor.

¹ See 6 ROHAN, ZONING AND LAND USE CONTROLS § 40.03[1][b] at 40-122 (1993).

The governor shall issue specific findings giving reasons for granting any waiver under this section.

There are two other sections in AS 35.30. Both of them are helpful in understanding AS 35.30.020 and .030. Alaska Statute 35.30.010 provides:

(a) Except as provided in (b) of this section, before commencing construction of a public project,

(1) if the project is located in a municipality, the department shall submit the plans for the project to the planning commission of the municipality for review and approval;

(2) if the project is located within two miles of a village, the department shall submit the plans to the village council for review and comment;

(3) if the project is located within one-half mile of the boundary of an area represented by a community council established by municipal charter or ordinance, the department shall submit the plans to the community council for review and comment.

(b) Prior approval by a municipal planning commission may not be required before the commencement of construction of a highway or local service road if

(1) the department and the municipality have entered into agreement for the planning of the project under AS 19.20.060 or 19.20.070 and the plans for the project are completed in accordance with the terms of that agreement;

(2) the municipality has adopted a municipal master highway plan under AS 19.20.080 and the highway or local service road is consistent with the plan adopted; or

(3) the department has entered into agreement with the municipality for the planning of transportation corridors under AS 19.20.015 and the plans for the project are completed in accordance with the provisions of that agreement.

(c) If final disapproval by resolution of the governing body of the affected municipality or village is not received within 90 days from the date the project was submitted to the municipality or village, the department may proceed with the project.

The other section is AS 35.30.040. It provides:

In this chapter

(1) "public project" means a public building or other structure, public work, or other facility, highway, or local service road constructed or maintained by a department; the term includes the acquisition by purchase or agreement of land and rights in land for materials and the extraction or removal of materials necessary for completion of a highway under AS 19.05.080 - 19.05.120;

(2) "village" means an unincorporated community of the unorganized borough where at least 25 people reside as a social unit.

The definitions section of Title 35 is also important. Alaska Statute 35.95.100(3) provides:

In this title, unless the context requires otherwise,

...

(3) "department" means the Department of Transportation and Public Facilities[.]

The substance of present day AS 35.30.020 and 35.30.030 were first enacted in 1975. Chapter 96, section 1, SLA 1975. The features now found separately in sections .020 and .030, the duty of compliance and waiver of compliance, were both incorporated in a single section, AS 35.10.020. As it was enacted in 1975, this section read:

Before the construction of a public works in a municipality, the department shall confer with the planning

commission of the municipality to determine that the welfare of the public is properly protected and its agencies and instrumentalities shall comply with all local planning and zoning ordinances and the local regulations in the same manner and to the same extent as other landowners. However, if a state agency clearly demonstrates an overriding state interest, a waiver to the compliance requirements may be granted by the governor.

The history of the 1975 version of AS 35.10.020 began in 1957. Chapter 152 Laws of Alaska 1957, Title III, article 3, section 2, required the Department of Transportation and Public Facilities' territorial predecessor, the Alaska Highway and Public Works Board, to confer prior to the construction of any public work within a municipality "with the planning commission of such municipality to determine that the welfare of the public is properly protected." There was no requirement that the board also comply with local planning and zoning ordinances, only that it confer.

A change with respect to local building codes took place in 1968. Chapter 89, section 1, SLA 1968, was enacted requiring compliance with local building codes, but not local zoning ordinances. The 1968 enactment was codified as AS 35.10.025. As enacted it read, and still reads, as follows:

A public building shall be built in accordance with applicable local building codes including the obtaining of required permits. This section applies to all buildings of the state and corporate authorities of the state.^[2]

An important change was made to AS 35.10.020 in 1974.³ Previously, as noted, the highway board, and after statehood, the department, had to confer with local

² Note that although this section is in Title 35, which mainly relates to the Department of Transportation and Public Facilities, its application extends beyond the department to all state entities.

³ Ch. 63, § 1, SLA 1974.