

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

3 **ERIC FORRER,**)

4 **Plaintiff,**)

5 **v.**)

6)

7 **STATE OF ALASKA, and SHELDON**)
8 **FISHER, Commissioner of the Alaska**)
9 **Department of Revenue in his official**)
)

10 **Defendants.**)

Filed in the Trial Courts,
State of Alaska First District

JAN - 2 2019

Clerk of the Trial Courts
By MHA Deputy

Case No.: 1JU-18-00699 CI

11 **ORDER GRANTING MOTION TO DISMISS**

12 **I. Introduction**

13 Eric Forrer filed a lawsuit against the State of Alaska claiming that recently
14 enacted legislation, HB 331, violates several sections of article IX of the Alaska
15 Constitution. The State has moved to dismiss Mr. Forrer's complaint for failure to
16 state a claim upon which relief can be granted under Civil Rule 12(b)(6).
17

18 Although the Alaska legislature adopted HB 331 for the purpose of providing
19 stimulus to Alaska's economy, Mr. Forrer maintains the law will have the opposite
20 effect. He argues that HB 331 will push Alaska deeper into financial crisis.
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22 However, it is not the role of this court to make economic policy judgments or
23 second guess the wisdom of the legislature's fiscal decisions. The limited role of this
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1 court is to apply the law of the Alaska Constitution as interpreted by the Alaska
2 Supreme Court.

3 Resolution of the State's motion to dismiss primarily turns on interpretation of
4 article IX, section 8 of the Alaska Constitution and the Alaska Supreme Court's
5 decision in *Carr-Gottstein v. State*.¹ Within this context, the court holds HB 331 passes
6 constitutional muster and therefore grants the State's motion to dismiss Mr. Forrer's
7 lawsuit under Rule 12(b)(6).
8

9 II. Facts

10 A. Legislative History of HB 331

11 Beginning in 2006 the legislature enacted a series of amendments to the existing
12 tax credit program which were designed to create incentives for oil exploration.²
13 These laws expanded the available transferrable tax credits certificates that served as
14 incentives for exploration and also created additional transferrable tax credits for
15 other expenditures. The Department of Revenue (Department) was given the
16 authority to purchase certain transferable tax credit certificates when requested to do
17 so by the explorers.³ The Legislature also created an oil and gas tax credit fund for
18 the Department to use for the purchase of the tax credit certificates from the
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22 ¹ 899 P.2d 136 (Alaska 1995).

23 ² Secs. 13-18, ch. 2, TSSLA 2006, AS 43.55.023 and 43.55.025(a), (b); Sec. 46, ch. 1, SSSLA 2007,
24 AS 43.55.028; Sec. 21(u), ch. 12, SLA 2009; sec. 27(d), ch. 41, SLA 2010; sec. 27(h), ch. 03, FSSLA
25 2011; sec. 25(g), ch. 15, SLA 2012; sec. 27(g), ch. 14, SLA 2013; sec. 27(e), ch. 16, SLA 2014; Sec. 4,
ch. 55, 2013, AS 43.55.029(a).

³ Sec. 13, ch. 2, TSSLA 2006, AS 43.55.023(f).

1 explorers.⁴ The oil and tax credit fund was primarily supported through
2 appropriations by the Legislature.⁵

3 In 2015 it became apparent that appropriations to the oil and gas tax credit
4 fund were no longer sufficient to pay the full amount of outstanding tax credit
5 certificates.⁶ By early 2018, the Department estimated that explorers had made nearly
6 \$800 million in requests for purchases of tax credit certificates that were awaiting
7 payment.⁷ These developments prompted Governor Bill Walker to introduce HB 331
8 to the legislature on February 7, 2018. Governor Walker described HB 331 as a
9 necessary response to the fiscal issues the State was experiencing and capital
10 constraints facing explorers because of the reduced appropriations to the oil and gas
11 tax credit fund and the decline of oil prices.⁸

12 Governor Walker informed the Legislature that HB 331 would establish the
13 Alaska Tax Credit Certificate Bond Corporation which would be authorized to issue
14 up to \$1 billion in bonds to finance the purchase of outstanding oil and tax credit
15 certificates at a discount from face value.⁹ He explained that this discount would then
16 be used to pay the cost of financing the bonds.¹⁰

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22 ⁴ Sec. 46, ch. 1, SSSLA 2007, AS 43.55.028.

23 ⁵ AS 43.55.028(b)(1)-(2).

24 ⁶ HB 2001, Sec. 8(b)(partial veto and reductions), ch. 1, SSSLA 2015.

25 ⁷ Governor's transmittal letter for HB 331, House Journal 2341.

⁸ Governor's transmittal letter for HB 331, House Journal 2341-43.

⁹ Governor's transmittal letter for HB 331, House Journal 2342.

¹⁰ *Id.*

1 During the first legislative hearing on HB 331, the tax division director of the
2 Department provided an opening statement:

3 So before we get to the bill itself, just to lay the groundwork a little bit,
4 as, you know, this committee had a strong role in passing House Bill 111
5 last year. That ended Alaska's system of cashable tax credits. There are,
6 however, still a substantial amount of them still on the books at some
7 point needing either to be used by taxpayers to offset taxes sold to other
8 taxpayers or purchased by the state pending funding. That number,
9 which is discussed later in this presentation, is a little over \$800 million,
10 plus there's another roughly 150 million that we expect to come in or are
11 in the process before the final tax credits that are eligible for cash
12 repurchase are sunset. So – and in this environment we're looking at a
13 recession in Alaska. Private sector jobs are down. And part of the
14 reason we are here with this bill is to give a boost to Alaska's economy.¹¹

15 During legislative committee hearings on HB 331, explorers and finance
16 company representatives explained that they supported the bill because uncertainty
17 regarding the State's payment of oil and tax credit certificates had held up financing
18 for oil and gas exploration and development projects.¹² A number of private citizens
19 provided testimony both in support of and against HB 331 – those in favor suggested
20 the new law would provide much needed economic stimulus, those against argued it
21 would incur unnecessary debt and impair the State's credit.¹³ The Legislature also

22 ¹¹ House Resources Committee, March 30, 2018, testimony of Ken Alper at Trans. 6:3 – 6:23.

23 ¹² House Finance Committee, April 23, 2018, testimony of Pat Foley of Caelus Alaska at Trans.
24 64:21 – 65:10; Senate Finance Committee, May 8, 2018, testimony of Peter Clinton of iNG Capital
25 at Trans. 56:19 – 57:18; Senate Finance Committee, May 8, 2018, testimony of Kara Moriarty of the
Alaska Oil and Gas Association at Trans. 61:20 – 62:7.

¹³ House Finance Committee, April 24, 2018, at Trans. 4:3 -56:3.

1 heard testimony in support of HB 331 from representatives of a teamsters union and
2 an executive of an energy company employing over 2000 workers.¹⁴

3 During the floor debates, legislators explained their justification for HB 331:
4 under the proposed law, the State would realize greater oil and gas production,
5 resulting in revenues which would benefit Alaska's economy.¹⁵
6

7 During the legislative process, attorneys from the Legislative Affairs Agency
8 raised concerns that HB 331 might violate article IX, sections 8 and 11 of the Alaska
9 Constitution.¹⁶ On the other side, an attorney for the Department of Law, the State's
10 bond counsel, and a debt manager assured the legislature that HB 331 did not violate
11 Alaska's constitutional provisions concerning debt.¹⁷ In response to this debate,
12 Governor Walker requested an attorney general opinion.
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14 The Attorney General advised that "subject-to-appropriation financing tools"
15 like the tax credit bonds at issue in HB 331 are not "state debt" under article IX,
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20 ¹⁴ House Finance Committee, April 24, 2018, testimony of Barbara Huff Tuckness , Director of
21 Governmental Affairs for Teamsters Local 959 at Trans. 36:1 – 37:18; testimony of Doug Smith,
22 chief executive officer for ASOC Energy Services at Trans. 38:9 – 41:22.

23 ¹⁵ House Floor Debate on HB 331 (May 3, 2018)(Statement of Representative Grenn)(Trans. 56:10-
19; 60:15-20); (Statement of Representative Wool) (Trans. 100:19-101:6); Senate Floor Debate on
24 HB 331 (May 11, 2018)(Statement of Senator Micciche)(Trans. 38:6-21).

25 ¹⁶ House Finance Committee, April 21, 2018, testimony of Emily Nauman and Jerry Luckupt,
Trans. 132:23 – 162:2.

¹⁷ House Finance Committee, April 21, 2018, testimony of Assistant Attorney General Bill Milks,
the State's bond counsel Douglas Goe, and debt manager Deven Mitchell, Trans. 163:4 – 194:16.

1 section 8 of the Alaska Constitution because “the Legislature retains the authority to
2 decide whether or not to appropriate funds to pay the debt service on the bonds.”¹⁸

3 The Legislature enacted HB 331 on May 11, 2018. On June 20, 2018,
4 Governor Walker signed the bill into law.

6 **B. The Statutory Provisions of HB 331**

7 HB 331 establishes the Alaska Tax Credit Certificate Bond Corporation (the
8 “Corporation”).¹⁹ The statute declares the Corporation to be a public corporation and
9 government instrumentality managed by a board of directors.²⁰ The board of the
10 directors for the Corporation is comprised of the commissioner of commerce,
11 community, and economic development, the commissioner of administration, and the
12 commissioner of revenue.²¹ The stated purpose of the Corporation is to finance the
13 purchase of transferrable oil and gas tax credit certificates, production tax credits, and
14 the payment of refunds and payments claimed under related provisions of law.²²
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16
17 The Corporation is authorized to issue and sell up to \$1,000,000,000 in bonds
18 for the purposes of financing purchases, refunds and payments for oil and gas tax
19 credit certificates and the costs of issuance and maintenance of those bonds.²³ The
20 statute expressly provides that bonds of the Corporation “do not constitute a general
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22 ¹⁸ 2018 Op. Alaska Attorney General (May 2, 2018) 2018 WL 2092127 at *6.

23 ¹⁹ AS 37.18.010.

24 ²⁰ *Id.*

25 ²¹ AS 37.18.020.

²² AS 37.18.010.

²³ AS 37.18.030(a)-(b).

1 obligation of the state and are not state debt within the meaning of art. IX, sec. 8,
2 Constitution of the State of Alaska.”²⁴ The law also announces, “Authorization by the
3 legislature and ratification by qualified voters of the state is not required under art. IX,
4 sec. 8, Constitution of the State of Alaska.”²⁵

5
6 The Corporation may not issue bonds unless it first finds that the discount rate
7 that the Department would apply to the purchase of oil and tax credit certificates
8 from the bond proceeds²⁶ would exceed the true interest cost to be paid on the bonds
9 by at least 1.5 percent.²⁷

10
11 The Corporation is permitted to establish a reserve fund.²⁸ The reserve fund
12 consists of money appropriated by the Legislature, proceeds of the bonds, and other
13 money deposited by the Corporation.²⁹ Upon application by a holder of certain
14 transferrable oil and gas tax credit certificates,³⁰ the Department may use money from
15 the reserve fund to purchase the certificates.³¹

16
17 The statute provides that the legislature may make annual appropriations to the
18 reserve fund to ensure maintenance of the required debt service associated with the
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21 ²⁴ AS 37.18.030(c).

22 ²⁵ *Id.*

23 ²⁶ AS 43.55.028(m).

24 ²⁷ AS 37.18.080.

25 ²⁸ AS 37.18.040(a).

²⁹ AS 37.18.040(a)(1)-(4).

³⁰ AS 43.20.046(e), 43.20.047(e), and 43.20.053(e).

³¹ AS 43.55.028(e).

1 bonds.³² The same provision of the statute declares, “Nothing in this subsection
2 creates a debt or liability of the state.”³³ Bond holders may sue the Corporation to
3 compel payment of debt service funds that the Corporation has received through
4 legislative appropriation or to enforce other terms and conditions of the bond
5 issuance.³⁴
6

7 **C. Factual Allegations made by Mr. Forrer**

8 In his complaint, Mr. Forrer makes the following factual assertions:

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- 10 • The source of the funds to meet the appropriation for the debt servicing for
11 the Alaska Tax Credit Certificate Bond Corporation are likely to be general
12 funds;³⁵
 - 13 • None of the existing tax credits established according to Alaska law are in
14 default or subject to a judicial judgment;³⁶
 - 15 • The Alaska legislature has regularly made appropriations for the satisfaction of
16 the existing tax credits established according to Alaska law since the inception
17 of the tax credit program;³⁷
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22 ³² AS 37.18.040(g).

23 ³³ *Id.*

24 ³⁴ AS 37.18.070(a).

25 ³⁵ See page 6, ¶ 19 of the Amended Complaint filed July 19, 2018.

³⁶ *Id.* at page 7, ¶ 24.

³⁷ *Id.* at ¶ 25.

- 1 • The appropriations made by the Alaska legislature are at or exceed the
2 repayment schedule for the tax credits set out in statute;³⁸
- 3 • Fully enacted and implemented, HB 331 would accelerate payments in
4 satisfaction of the existing tax credits established according to Alaska law;³⁹
- 5 • The bonds issued under HB 331 will not be backed by any secured property or
6 interest in property;⁴⁰
- 7 • Issuance of the bonds will have an impact on the credit rating and the ability of
8 the State of Alaska to incur additional credit;⁴¹
- 9 • If future legislatures fail to make funds available to repay the bonds in HB 331,
10 the credit rating for the State will plummet and there will be a substantial
11 negative impact on the State of Alaska's finances.⁴²

15 III. Procedural Posture

16 Mr. Forrer filed a Complaint seeking declaratory relief that HB 331 violates
17 article IX, sections 6, 7, 8, 10, and 13 of the Alaska Constitution.⁴³ He also requested
18 a permanent injunction requiring the State to abstain from incurring the type of debt
19 at issue in this case, or what both parties refer to as “subject to appropriation” debt.
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22 ³⁸ *Id.* at ¶ 25.

23 ³⁹ *Id.* at ¶ 26.

24 ⁴⁰ *Id.* at page 9, ¶ 32.

25 ⁴¹ *Id.* at page 11, ¶ 42.

⁴² *Id.* at page 14, ¶ 54; pages 15-16, ¶ 61.

⁴³ The original complaint was filed May 14, 2018. Mr. Forrer subsequently filed his Amended Complaint July 19, 2018.

1 The State elected not to file an Answer and instead moved to dismiss Mr. Forrer's
2 complaint under Civil Rule 12(b)(6).⁴⁴

3 The State's motion to dismiss included an appendix – a thick volume of
4 legislative history for HB 331 consisting of a copy of the enrolled bill and transcripts
5 of the house and senate committee proceedings and floor debates. Mr. Forrer
6 responded with what he styled as a “preliminary opposition” with extensive
7 arguments on the merits and a request for additional time to respond.⁴⁵ Mr. Forrer
8 also used his Opposition to argue that the State's motion to dismiss included material
9 outside the pleadings, and therefore should be converted to a motion for summary
10 judgment.⁴⁶ Mr. Forrer argued the State should be required to file an Answer prior to
11 the court ruling on the motion to dismiss.⁴⁷

12 On July 13, 2018, the court held a hearing and directed both parties to submit
13 supplemental briefing on whether the State's motion to dismiss should be properly
14 treated as a motion under Rule 12(b)(6) or as a motion for summary judgment. After
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20 ⁴⁴ The motion was filed June 25, 2018. The motion to dismiss also included an argument under
21 12(b)(1) directed at Mr. Forrer's challenge to the provision of HB 331 limiting judicial action, AS
22 37.18.110. However, that particular claim has been rendered moot because AS 37.18.110 did not
23 hinder Mr. Forrer from bringing the instant action. See pages 2-3 of the order issued October 2,
2018. Also, at oral argument on October 1, 2018, Mr. Forrer conceded the issue was moot.

24 ⁴⁵ Opposition filed July 5, 2018.

25 ⁴⁶ *Id.* at pages 7, 22-23.

⁴⁷ *Id.* at page 32. Mr. Forrer made the same argument in his Memorandum in Support of Combined
Motion for Extension or for a Scheduling Hearing and Request for Oral Arguments filed July 5,
2018.

1 the parties provided briefing on the issue,⁴⁸ the court scheduled oral argument to
2 consider the State's motion to dismiss and several other motions filed by the parties.⁴⁹

3 On October 1, 2018, the court issued a series of rulings, narrowing the scope
4 of the issues in dispute.⁵⁰ In addition to other rulings, the court held that the State's
5 motion to dismiss had not been converted into a motion for summary judgment by
6 virtue of the inclusion of legislative history and, therefore, it would be treated as a
7 motion to dismiss under Rule 12(b)(6).⁵¹ The court found the plain language of Rule
8 12(b) permitted the State to file a motion to dismiss prior to filing an Answer, and
9 therefore rejected Mr. Forrer's argument on this point.⁵² The court also scheduled
10 additional briefing on the primary constitutional issues, which the parties then
11 provided.⁵³

12 Subsequently, Mr. Forrer requested an additional opportunity for oral
13 argument. The State opposed. The court denied Mr. Forrer's request for further oral
14 argument.⁵⁴

20 ⁴⁸ The State filed its argument July 19, 2018; Mr. Forrer responded August 3, 2018, and the State
21 replied August 7, 2018.

22 ⁴⁹ The State filed a motion to strike. Mr. Forrer filed motions to compel discovery and amend his
23 complaint as well as a demand for a jury trial.

24 ⁵⁰ The court's rulings are summarized in the order dated October 2, 2018.

25 ⁵¹ *Id.* at page 3.

⁵² Ruling on record, October 1, 2018.

⁵³ Mr. Forrer filed his Supplemental Briefing October 8, 2018. The State provided a Reply in
Further Support on October 12, 2018.

⁵⁴ Order denying request for oral argument dated January 2, 2019.

1 IV. Analysis

2 A. The Standard of Review on a Motion to Dismiss for Failure to
3 State a Claim under Civil Rule 12(b)(6)

4 When a trial court evaluates a motion to dismiss a complaint under Rule
5 12(b)(6), the court must liberally construe the complaint and treat all factual
6 allegations as true.⁵⁵ However, the court is not required to accept unwarranted factual
7 inferences or conclusions of law as true.⁵⁶

8
9 A motion to dismiss under Rule 12(b)(6) is viewed with disfavor and should
10 rarely be granted.⁵⁷ To survive a motion to dismiss, a complaint need only allege a set
11 of facts consistent with and appropriate to some enforceable cause of action.⁵⁸ A
12 complaint should not be dismissed unless it appears beyond doubt that the plaintiff
13 can prove no set of facts in support of his claims that would entitled him to some
14 form of relief, even if the plaintiff requests a type of relief he is not entitled to
15 obtain.⁵⁹

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18 In reviewing a motion to dismiss under Rule 12(b)(6), a court will generally not
19 consider matters outside the complaint.⁶⁰ When a party presents additional materials
20 outside of the pleadings in connection with a motion dismiss, the trial court must
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22 ⁵⁵ *Larson v. State, Dept. of Corrections*, 284 P.3d 1, 6 (Alaska 2012).

23 ⁵⁶ *Dworkin v. First National Bank of Fairbanks*, 444 P.2d 77, 779-780 (Alaska 1968).

24 ⁵⁷ *Larson*, 284 P.3d at 6.

25 ⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 7.

1 expressly exclude the materials or convert the motion into a motion for summary
2 judgment under Civil Rule 56 and allow all parties a reasonable opportunity to submit
3 materials pertinent to such a motion.⁶¹ However, statutory history is legal material to
4 be analyzed; it is not evidence of facts.⁶² Therefore, inclusion of statutory history in
5 support of a motion to dismiss under Rule 12(b)(6) does not convert the motion into
6 a motion for summary judgment.
7

8 In this case, Mr. Forrer has included materials outside of the pleadings,
9 specifically affidavits submitted by himself, Milton Barker, and Gordon S. Harrison.⁶³
10 This court expressly excludes consideration of these affidavits and factual allegations
11 in making its ruling on the instant motion to dismiss.
12

13 To the extent the parties may have made other factual allegations or included
14 other materials outside of the pleadings, this court expressly excludes consideration of
15 these factual allegations and/or materials in making its ruling on the instant motion to
16 dismiss. However, in reaching its decision, the court has considered and relied upon
17 substantial statutory history provided by the State and records of proceedings at the
18 Constitutional Convention.
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24 ⁶¹ *Id.*

25 ⁶² *Cox v. Estate of Cooper*, 426 P.3d 1032, 1042 (Alaska 2018).

⁶³ Filed as attachments to Mr. Forrer's preliminary opposition, July 5, 2018.

1 This court has liberally construed Mr. Forrer's complaint and treated all factual
2 allegations made in his complaint as true.⁶⁴ However, this court has not accepted
3 unwarranted factual inferences and conclusions of law offered by Mr. Forrer as true.
4 By way of clarification, the court rejects Mr. Forrer's claim that certain allegations
5 must be accepted as true.⁶⁵ Specifically, the court will not accept the following
6 allegations as true, simply because Mr. Forrer has decided to style them assertions of
7 fact:
8

- 9 • The bonds established by HB 331 are state debt under the Alaska
10 Constitution.⁶⁶
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- 12 • The bonds created by HB 331 establish an obligation involving borrowed
13 money where there is a promise to pay money to bond holders in the future.⁶⁷
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- 15 • HB 331 contains enforceable legal provisions requiring the State of Alaska to
16 repay bond holders in the future irrespective of whether funds are available or
17 appropriated by a future Alaska legislature.⁶⁸
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21 ⁶⁴ See above, Part II.C. "Factual Allegations made by Mr. Forrer."

22 ⁶⁵ See page 11-12 of the Supplemental Briefing filed October 8, 2018.

23 ⁶⁶ See page 10, ¶ 39 of the Amended Complaint filed July 19, 2018. The court is not required to
24 accept the implied legal conclusion and unwarranted factual assertion offered by Mr. Forrer that HB
25 331 creates debt prohibited by article IX, section 8, of the Constitution.

⁶⁷ *Id.* at page 11, ¶ 40. The court is not required to accept the conclusion of law and unwarranted
factual assertion that HB 331 includes a promise by the State (as opposed to a promise by the newly
formed Alaska Tax Credit Certificate Bond Corporation B) to pay money to bond holders in the
future.

1 Mr. Forrer argues that it is improper for this court to use Rule 12(b)(6) to
2 resolve a legal claim so complex and of such importance as the constitutionality of
3 HB 331. He argues that if his complaint is to be denied, it should be done only after a
4 fully adjudicated summary judgment process in which both parties have had the full
5 opportunity to inform this court of the merits of all the underlying law and facts.⁶⁹ He
6 argues resolution of his claim under Rule 12(b)(6) will result in a scrambled or
7 incomplete appellate review.⁷⁰

9 In making its decision, this court has carefully reviewed the law, legislative
10 history for HB 331, history of the Constitutional Convention, and relevant precedent
11 of the Alaska Supreme Court. This court is mindful of the need to develop a full and
12 proper record for appellate review, and that a lower court must ensure that the
13 evidence, both pro and con, is sufficient to provide the necessary background of
14 knowledge to make a proper ruling on the motion.⁷¹

17 Certainly, the web of financial issues underpinning HB 331 is exceedingly
18 complex. The fiscal implications of the legislature's decision to create a corporation
19 with the authority to issue \$1 billion in unsecured bonds are profound and far-
20 reaching.

22 ⁶⁸ *Id.* at ¶ 41. The court is not required to accept the implied legal conclusion and unwarranted
23 factual assertion that HB 331 contains enforceable legal provisions requiring the State of Alaska to
24 repay bond holders.

24 ⁶⁹ See Supplemental Briefing at page 3.

24 ⁷⁰ *Id.* at page 4.

25 ⁷¹ *Walker v. Alaska State Mortgage Association*, 416 P.2d 245, 247 (1966).

1 But, in the end, resolution of the State’s motion to dismiss comes down to
2 questions of law not questions of fact. The court has assumed the truth of all of Mr.
3 Forrer’s factual allegations. Specifically, the decision in this case turns on
4 interpretation of article IX, section 8 and the relevant precedent of the Alaska
5 Supreme Court.
6

7 **B. HB 331 does not Violate Article IX, Section 6**

8 In his complaint Mr. Forrer alleges HB 331 violates article IX, section 6 of the
9 Alaska Constitution.⁷² This provision states, “No tax shall be levied, or appropriation
10 of public money made, or public property transferred, nor shall public credit be used,
11 except for a public purpose.”
12

13 Mr. Forrer argues HB 331 violates section 6 because the statute does not
14 articulate an ascertainable purpose.⁷³ He maintains it is significant the legislature failed
15 to adopt specific findings or an express purpose when enacting the law.⁷⁴ Given the
16 lack of specific findings or any expressly stated purpose in the law, he argues it is
17 extremely difficult, if not impossible, to determine if HB 331 serves any public
18 purpose at all.⁷⁵
19

20 Mr. Forrer argues a trilogy of decisions by the Alaska Supreme Court stand for
21 the proposition that a statute is void under article IX, section 6 if the statute does not
22

23 ⁷² See page 17, ¶ 70 of the Amended Complaint.

24 ⁷³ *Id.*

25 ⁷⁴ See page 27 of opposition filed July 5, 2018.

⁷⁵ *Id.* at pages 28 and 31.

1 include specific findings in support of an expressly stated purpose for the public
2 good.⁷⁶ However, Mr. Forrer's reliance on the decisions in *DeArmond*, *Walker*, and
3 *Suber* is misplaced because the holdings in these three cases do not go as far as he
4 suggests. In fact, the Alaska Supreme Court rejected precisely the same argument in
5 *Weber v. Kenai Peninsula Borough*, holding that neither the public purpose clause of
6 section 6 or case law require legislative action to include an express determination of
7 the public good.⁷⁷

9 Moreover, HB 331 does include an expressly stated purpose. Specifically, the
10 purpose of HB 331 is to finance the purchase of transferrable oil and gas tax credit
11 certificates, production tax credits, and the payment of refunds and payments claimed
12 under related provisions of law.⁷⁸ HB 331's purpose may be ascertained more
13 precisely in the context of its relation to existing provisions of law at AS 43.20.046,
14 43.20.047, 43.20.053, 43.55.023, 43.55.025, 43.55.028.⁷⁹ Legislative history amply
15 illuminates HB 331's overall purpose of seeking to introduce economic stimulus to
16 support a vital industry in the State.⁸⁰

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22 ⁷⁶ *Id.* at pages 26-31 citing *DeArmond v. Alaska State Development Corp.*, 376 P.2d 717 (Alaska 1962);
23 *Walker v. Alaska State Mortgage Association*, 416 P.2d 245 (1966) *Suber v. Alaska State Bond Committee*,
414 P.2d 546 (Alaska 1966).

24 ⁷⁷ 990 P.2d 611, 615 (Alaska 1999).

25 ⁷⁸ AS 38.18.010.

⁷⁹ *Id.* citing to these provisions of law.

⁸⁰ See above, footnote 15, Section II, A.

1 Mr. Forrer says legislative deliberations of HB 331 provided vague and
2 conflicting reasons for the enactment of the law, and thus suggests HB 331 was
3 adopted in an arbitrary manner without a reasonable basis in fact.⁸¹

4 The legislative history supporting HB 331 is extensive. The House Resources
5 Committee and House Finance Committee conducted a combined total of a dozen
6 hearings on the bill.⁸² The Senate Finance Committee had four hearings.⁸³ Both the
7 House and Senate held floor debates.⁸⁴ Prior to adopting HB 331, the Legislature
8 considered testimony from all private citizens who appeared and from representatives
9 of the government, oil and gas industry, employers, and investment and bond
10 entities.⁸⁵ Therefore, Mr. Forrer's claim that HB 331 was adopted in an arbitrary
11 manner is without merit.

12 Mr. Forrer alleges, "Enactment of HB 331 has the hallmarks of a special
13 interest deal stampeded through the legislature in the hot-house environment of an
14 election year without regard to a legitimate public purpose according to the Alaska
15 Constitution."⁸⁶ He complains HB 331 violates the Constitution because the law
16 caters only to "special interests." This argument also fails.

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22 ⁸¹ Opposition at page 31.

23 ⁸² The House Resources Committee heard HB 331 on March 30, April 4, 6, 7, 9, and 10, 2018. The
24 House Finance Committee heard HB 331 on April 21, 23, 24 and 27, and May 2, 2018.

25 ⁸³ February 21, March 23, May 8, 10, 2018.

⁸⁴ The House debate was May 3, 2018; the Senate debate was May 11, 2018.

⁸⁵ See above, Legislative History of HB 331, Section II, B.

⁸⁶ Opposition at page 29.

1 In *Suber*, the Court said, “It is not essential that the entire community or any
2 particular number of persons should benefit from remedial legislation in order that a
3 public purpose be served. The purpose of the Program is no less public because its
4 benefits may be limited by circumstances to a comparatively small part of the
5 public.”⁸⁷ Thus, although HB 331 may benefit the private interests of those
6 individuals holding transferable tax credit certificates, the general purpose of
7 providing economic stimulus to the citizens of Alaska as a whole is sufficient to
8 satisfy the requirements of article IX, section 6.
9

10 In *Walker* the Court explained, “Whether a public purpose is being served must
11 be decided as each case arises and in the light of the particular facts and circumstances
12 of each case.”⁸⁸ And in *DeArmond*, the Court explained that within the context of
13 article IX, section 6, “public purpose” represents a concept which is not capable of
14 precise definition; it is a concept which will change as changing conditions create
15 public needs.⁸⁹
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18 Where the legislature has found that a public purpose will be served by the
19 expenditure or transfer of public funds or the use of the public credit, a court should
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24 ⁸⁷ 414 P.2d at 552.

25 ⁸⁸ 416 P.2d at 251.

⁸⁹ 376 P.2d at 721.

1 not set aside the finding of the legislature unless it clearly appears that such finding is
2 arbitrary and without any reasonable basis in fact.⁹⁰

3 Mr. Forrer argues that with the enactment of HB 331 the Legislature has
4 proceeded without any sense of fiscal responsibility. But Mr. Forrer is simply asking
5 this court to substitute its own economic policy judgments in place of the fiscal
6 decisions made by the legislature. Based on the reasons provided above, this court
7 finds the legislature's purpose in HB 331 of providing general economic stimulus
8 through financing the purchase of tax credit certificates is not clearly arbitrary or
9 without any reasonable basis in fact and, thus, does not violate article IX, section 6.
10
11

12 **C. HB 331 is Consistent with Article IX, Section 7**

13 In his complaint Mr. Forrer alleges HB 331 is inconsistent with article IX,
14 section 7 of the Alaska Constitution.⁹¹ This provision states, "The proceeds of any
15 state tax or license shall not be dedicated to any special purpose, except as provided in
16 section 15 of this article or when required by the federal government for state
17 participation in federal programs. This provision shall not prohibit the continuance of
18 any dedication for special purposes existing upon the date of ratification of this
19 section by the people of Alaska."
20
21
22
23

24 ⁹⁰ *Walker*, 416 P.2d at 251.

25 ⁹¹ See page 12, ¶ 47 and page 15, ¶ 59 of the Amended Complaint.

1 Mr. Forrer claims HB 331 is inconsistent with article IX, section 7 because it
2 authorizes a “double dedication” of funds, first by placing the bond proceeds in a
3 fund dedicated for a special purpose and, then, by dedicating future proceeds of the
4 State to pay for the debt.⁹² Mr. Forrer’s arguments on both these points fail.

5
6 Mr. Forrer’s first argument is answered by the discussion of the intent of the
7 constitutional framers in *Southeast Alaska Conservation Council v. State*.⁹³ The Court in
8 *Southeast Alaska Conservation Council* found the prohibition against dedicated funds in
9 article IX, section 7 is meant to apply broadly.⁹⁴ However, based on the drafting
10 history of section 7 during the Constitutional Convention, the Court recognized that
11 certain special funds fall outside the scope of this provision.⁹⁵ Specifically, the Court
12 found that the framers intended to recognize necessary exceptions to the prohibition
13 against dedicated funds, “such as sinking funds for the repayment of bonds” and
14 “proceeds from bond issues.”⁹⁶

15
16
17 The decision in *Southeast Alaska Conservation Council* did not address a challenge
18 under article IX, section 7 to the legislative creation of a sinking fund for the
19 repayment of bonds or proceeds from bond issues and, thus, discussion on this point
20 may be considered *dicta*. Further, it does not appear the Alaska Supreme Court has
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23 ⁹² See page 77 of Supplemental Briefing.

24 ⁹³ 202 P.3d 1162 (Alaska 2009).

25 ⁹⁴ *Id.* at 1170 (Alaska 2009).

⁹⁵ *Id.* at 1169 and footnote 29, citing *State v. Alex*, 646 P.2d 203, 210 (Alaska 1982).

⁹⁶ *Id.*

1 ever directly addressed this specific constitutional issue. However, the clarity of the
2 framer's intent, as documented in *Southeast Alaska Conservation Council*, provides
3 sufficient reason for this court to rule that a sinking fund for the repayment of bonds
4 and proceeds from bond issues is not prohibited by section 7.
5

6 Thus, when the Legislature exercises its discretion under the HB 331 to make
7 annual appropriations to cover the debt service on the bonds, the reserve fund will
8 operate as a sinking fund consistent with article IX, section 7. The operation of HB
9 331 is consistent with section 7 because the reserve fund and the Legislature's option
10 to make annual appropriations to that fund are properly characterized as necessary
11 exceptions to the constitutional prohibition against dedicated funds.
12

13 Mr. Forrer's second argument regarding article IX, section 7 is that HB 331
14 improperly dedicates future proceeds of the State to pay for the debt created by the
15 sale of the bonds. In *Southeast Alaska Conservation Council* the Court affirmed the
16 rationale for the constitutional prohibition on earmarks: the dedication of funds
17 curtails the exercise of budgetary controls and simply amounts to an abdication of
18 legislative responsibility.⁹⁷
19

20 But HB 331 does not dedicate future proceeds of the State in violation of
21 article IX, section 7 because the law does not earmark any particular state revenues for
22 the specific purpose of paying debt service on the tax credit bonds. Under HB 331,
23
24

25 ⁹⁷ *Id.* citing *Alex*, 646 P.2d at 209.

1 the legislature “may” make annual appropriations to the newly created corporation,
2 but is not legally required to do so.⁹⁸

3 Mr. Forrer argues that because the premise of the bond indebtedness
4 repayment is founded on a future appropriation by the legislature, HB 331 amounts to
5 a de facto dedication of funds.⁹⁹ But the logic of Mr. Forrer’s argument was rejected
6 in *Sonneman v. Hickel*, where the Court addressed a challenge that the statute creating
7 the Alaska Marine Highway System Fund violated article IX, section 7.¹⁰⁰ Although
8 the statute at issue in *Sonneman* created an expectation an appropriation would be
9 made, the statute did not create a legal restraint on the appropriation power of the
10 legislature and, therefore, did not violate section 7.¹⁰¹

13 Similar to the statute at issue in *Sonneman*, the provisions of HB 331 create an
14 expectation that future appropriations will be made by the legislature. Also similar to
15 the statute in *Sonneman*, HB 331 does not create a legal obligation on the part of the
16 legislature to make an appropriation to the reserve fund. Thus, HB 331 is consistent
17 with article IX, section 7 because the statute provides that the legislature “may” make
18 an annual appropriation to the reserve fund and therefore does not create a legal
19 restraint on the appropriation power of the legislature.¹⁰²

23 ⁹⁸ AS 37.18.040(g).

24 ⁹⁹ See pages 20-21 of Opposition.

24 ¹⁰⁰ 836 P.2d 936 (Alaska 1982).

24 ¹⁰¹ *Id.* at 939-940.

25 ¹⁰² AS 37.18.040(g).

1 **D. HB 331 does not Create Debt in Violation of Article IX, Section 8**

2 In his complaint Mr. Forrer alleges HB 331 creates debt in violation of article
3 IX, section 8 of the Alaska Constitution.¹⁰³ This provision states, “No state debt shall
4 be contracted unless authorized by law for capital improvements or unless authorized
5 by law for housing loans for veterans, and ratified by a majority of the qualified voters
6 of the State who vote on the question. The State may, as provided by law and without
7 ratification by a vote of the people, contract debt for the purpose of repelling
8 invasion, suppressing insurrection, defending the State in war, meeting natural
9 disasters, or redeeming indebtedness outstanding at the time this constitution
10 becomes effective.”
11
12

13 Mr. Forrer argues the debt created by HB 331 is illegal because it violates the
14 plain meaning of article IX, section 8.¹⁰⁴ He cites to the Alaska Supreme Court
15 decision in *Village of Chefnak v. Hooper Bay Construction*¹⁰⁵ as providing a clear, sensible
16 definition of “debt” within the context of section 8:
17

18 The court has many times said what Article 8 means by the word “debt.”
19 We think that it means borrowed money; it denotes an obligation created
20 by the loan of money; it denotes an obligation created by the loan of
21 money, usually evidenced by bonds but possibly created by the issuance
22 of paper bearing a different label.¹⁰⁶

23

¹⁰³ See page 12, ¶ 48 of the Amended Complaint.

24 ¹⁰⁴ Supplemental Briefing, page 15.

25 ¹⁰⁵ 758 P.2d 1266 (Alaska 1988).

¹⁰⁶ *Id.* at 1270, emphasis supplied

1 Mr. Forrer points to history at the Constitutional Convention demonstrating
2 that article IX, section 8 was designed by the framers to serve as a “necessary
3 safeguard against excessive bonding.”¹⁰⁷ He argues that HB 331 incurs excessive
4 bonding without a vote by Alaska citizens by creating a corporation and then
5 authorizing that corporation to sell \$1 billion in unsecured bonds. Thus, Mr. Forrer
6 argues HB 331 is unconstitutional because it creates state debt that is not approved by
7 a citizen vote and does not fall within any of the express exceptions to the general
8 prohibition against debt under section 8.
9

10 Mr. Forrer interprets the safeguards contained in article IX, section 8 strictly, as
11 prohibiting all types of debt unless expressly and specifically permitted under the
12 Constitution. He argues that the Court’s decision in *Cheformak* provides ample
13 guidance for this court to find that debt, “usually evidenced by bonds,” is
14 constitutionally prohibited.¹⁰⁸
15
16

17 But the Alaska Supreme Court has not been so strict in its interpretation of
18 “debt” within the meaning of article IX, section 8. Specifically, in *Carr-Gottstein*
19 *Properties v. State*, the Court adopted a more nuanced approach requiring an
20 examination of the transaction or agreement to determine whether prohibited debt
21 had been created.¹⁰⁹
22

23
24 ¹⁰⁷ Proceedings of the Alaska Constitutional Convention, 2337, Day 55, (January 15, 1956).

25 ¹⁰⁸ Supplement Briefing, page 30.

¹⁰⁹ 899 P.2d at 144.

1 As an initial matter, in *Cheformak*, the court held that “debt,” as commonly
2 understood, includes every obligation to pay money, but that term “is much less
3 comprehensive when used in the constitutional sense.”¹¹⁰ The *Carr-Gottstein* court,
4 referencing the definition of “debt” it had previously provided in *Cheformak*, further
5 emphasized that “debt” under article IX, section 8 is a “term of art.”¹¹¹
6

7 At issue in *Carr-Gottstein* was the question of whether the Alaska Court System’s
8 lease-purchase agreement with the VECO Corporation could be considered the type
9 of debt prohibited under article IX, section 8. In *Carr-Gottstein* the State argued that
10 the majority of jurisdictions that have considered constitutional debt limitations have
11 upheld lease purchase agreements which contained non-appropriation clauses.¹¹² The
12 plaintiff responded that the courts in those jurisdictions cited by the State approved
13 lease-purchase agreements based on the inclusion of a non-appropriation clause and
14 because the agreements were between a third party and an independent state
15 corporation.¹¹³ The *Carr-Gottstein* court rejected the plaintiff’s argument:
16
17

18 The court finds that the independent nature of the state corporation or
19 authority is some evidence that the State is not contracting debt in a
20 lease-purchase agreement. However, the nature or relationship of the
21 contracting parties alone is not the dispositive issue in determining
22 whether an agreement violates the debt restriction in article IX, section
23 8. The court finds that the reasoning in the cases cited by the State is in
24 accordance with Alaska law. In *DeArmond*, *Walker*, and *Norene*, the Alaska

23 ¹¹⁰ 758 P.2d at 1269, citing *Rochlin v. State*, 545 P.2d 643, 647, (Arizona 1975).

24 ¹¹¹ 899 P.2d at 142.

25 ¹¹² *Id.* at 143.

¹¹³ *Id.*

1 Supreme Court examined the terms of the lease or transaction to
2 determine whether a debt obligation had been created within the
constitutional definition of “debt.”¹¹⁴

3 Examining the terms of the lease, the *Carr-Gottstein* court found the agreement
4 did not create debt prohibited by article IX, section 8 because the agreement (1)
5 contained a non-appropriation clause; (2) limited recourse to the leased property; and
6 (3) did not create a long-term obligation binding future generations or legislatures.¹¹⁵
7 Thus, despite the absence of an independent state corporation to shield the State
8 against creditor claims, the court in *Carr-Gottstein* found the lease-purchase agreement
9 did not create debt in the constitutional sense.
10
11

12 As explained in *Carr-Gottstein*, the existence of an independent state corporation
13 to handle the transaction was “some evidence” that the State is not contracting debt
14 in violation of article IX, section 8.¹¹⁶ Specifically, the *Carr-Gottstein* court relied upon
15 Alaska Supreme Court precedent in *DeArmond* and *Walker* to explain the significance
16 of the corporate form in determining whether a transaction has created state debt
17 prohibited by the constitution.¹¹⁷
18

19 In *DeArmond*, the legislature created the Alaska State Development Corporation
20 and gave it the authority to issue bonds to raise money for investment capital for
21

23 ¹¹⁴ *Id.* at 144, citing *State ex rel. Thomson v. Giessel*, N.W.2d 577, 590 (Wisconsin 1955).

24 ¹¹⁵ *Id.*

25 ¹¹⁶ *Id.*

¹¹⁷ *Id.* at 141.

1 Alaska businesses.¹¹⁸ The court noted that the legislation specifically provided that
2 bonds sold by the corporation did not constitute a pledge of the State's credit.¹¹⁹

3 Although the court in *DeArmond* was faced with a "public purpose" challenge under
4 article IX, section 6 (as opposed to a challenge under section 8) it held that where the
5 sales of bonds was backed only by the credit of the corporation, the debt incurred was
6 not the State's.¹²⁰

8 In *Walker*, the legislature created the Alaska State Mortgage Association as a
9 corporation, having a legal existence independent from and separate from the State.¹²¹

11 The corporation at issue in *Walker* was authorized by statute to issue bonds sufficient
12 to carry out its purposes.¹²² The statute creating the corporation provided that the
13 State was not liable for the bonds and that the bonds were not a debt of the State.¹²³

14 The plaintiff in *Walker* claimed that the bonds issued by the corporation created a
15 debt in violation of article IX, section 8.¹²⁴ In rejecting this challenge, the *Walker*
16 court stated:
17

18 In *DeArmond*, we concluded that the funds realized through the sale of
19 bonds which were backed only by the resources and credit of the
20 corporation and which did not constitute debts of the state were not
21 public funds. We are of the opinion that our holding in *DeArmond* is

22 ¹¹⁸ 376 P.2d at 722.

23 ¹¹⁹ *Id.*

24 ¹²⁰ *Id.*

25 ¹²¹ 416 P.2d at 248.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

1 controlling here and conclude that the bonds, notes and debentures of
2 the Association are not debts of the State of Alaska within the scope of
the article IX, section 8 of our constitution.¹²⁵

3 Like the agreement in *Carr-Gottstein*, the bond transaction authorized under HB
4 331 contains a non-appropriation clause. The non-appropriation clause in HB 331
5 provides that the legislature “may” make annual appropriations to the corporation.¹²⁶
6 Thus, as in *Carr-Gottstein*, the non-appropriation clause helps ensure HB 331 does not
7 create a long-term obligation binding future generations or legislatures.
8

9 However, unlike the agreement in *Carr-Gottstein*, HB 331 does not involve a
10 lease-purchase agreement. Mr. Forrer argues this distinction is critical, and renders
11 *Carr-Gottstein* inapplicable as guiding precedent in the instant case.¹²⁷ In *Carr-Gottstein*,
12 the lease-purchase agreement was secured by real property. As pointed out by Mr.
13 Forrer, the bonds issued under HB 331 will not be backed by any secured property or
14 interest in property.¹²⁸
15

16 But the fact that the bonds issued under HB 331 will not be secured by
17 property is not determinative of the constitutional question. The other distinguishing
18 feature of HB 331, the existence of an independent state corporation, provides a
19 protective shield and leaves bond holders without recourse against the State.
20
21
22

23 ¹²⁵ *Id.* at 253.

24 ¹²⁶ AS 37.18.040(g).

25 ¹²⁷ Opposition, page 15.

¹²⁸ See page 9, ¶ 32 of the Amended Complaint.

1 Just as was the case with the corporations in *DeArmond* and *Walker*, the
2 corporation form created by HB 331 is an entity having a legal existence independent
3 from and separate from the State.¹²⁹ Similar to the provisions of the statutes at issue
4 in *DeArmond* and *Walker*, the provisions of HB 331 provide that the State is not liable
5 for the bonds issued by the corporation and that the bonds are not a debt of the
6 State.¹³⁰ As was the case with the sale of bonds by the corporations in *DeArmond* and
7 *Walker*, the sale of the bonds authorized by HB 331 is backed only the resources and
8 credit of the Alaska Tax Credit Certificate Bond Corporation.
9

10
11 Mr. Forrer alleges HB 331 contains enforceable legal provisions requiring the
12 State of Alaska to repay bond holders in the future irrespective of whether funds are
13 available or appropriated by a future Alaska legislature.¹³¹ Mr. Forrer is mistaken as to
14 this claim. HB 331 does not contain any enforceable legal provision requiring the
15 State to repay bond holders. However, HB 331 does contain a provision that permits
16 bond holders to sue the Alaska Tax Credit Certificate Bond Corporation for payment
17 of the bonds.¹³²
18
19
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21

22 ¹²⁹ AS 37.18.010.

23 ¹³⁰ See AS 37.18.030(c), the bonds of the corporation do not constitute a general obligation of the
24 state and are not state debt within the meaning of article IX, section 8. See AS 37.18.040(g), with
regard to the legislature's discretion to make appropriations, "Nothing in this subsection creates a
debt or liability of the state."

25 ¹³¹ See page 11, ¶ 41 of the Amended Complaint.

¹³² AS 37.18.070.

1 An examination of the bond transaction in HB 331 demonstrates the presence
2 of both an effective non-appropriations clause and the shield of an independent state
3 corporation. These two features sufficiently ensure that HB 331 does not create any
4 debt that is legally enforceable against the State. Thus, under the precedent of
5 *DeArmond* and *Walker*, as interpreted by *Carr-Gottstein*, the bonds and debts of the
6 Alaska Tax Credit Certificate Bond Corporation authorized by HB 331 are not debts
7 of the State of Alaska within the scope of the article IX, section 8 of the Alaska
8 Constitution.
9

10 Mr. Forrer argues *Carr-Gottstein* does not control the instant case. He argues
11 that *Carr-Gottstein* is essentially a one-off decision and provides virtually no guidance
12 for a trial court to interpret article IX, section 8, outside disputes involving lease-
13 purchase agreements.¹³³
14

15 But Mr. Forrer's argument on this point is without merit. In *Carr-Gottstein*, the
16 Court's opinion that debt is a "term of art" under article IX, section 8 was broadly
17 expressed. Further, the logic and reasoning underlying this aspect of the *Carr-Gottstein*
18 decision was not limited to lease-purchase agreements. Specifically, the definition of
19 debt provided in *Carr-Gottstein* was premised on a substantial discussion of *DeArmond*
20 and *Walker*, both disputes that did not involve lease-purchase agreements.
21
22
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25 ¹³³ See Supplemental Briefing, page 24.

1 Mr. Forrer alleges, and this court accepts as true, the following: that payment
2 for the debt service on the bonds issued under HB 331 is likely to come from the
3 State's general funds through appropriations made by the legislature,¹³⁴ that issuance
4 of the bonds will have an impact on the credit rating and the ability of the State to
5 incur additional credit,¹³⁵ and, that if future legislatures fail to make funds available to
6 repay the bonds, the credit rating for the State will plummet and there will be a
7 substantial negative impact on the State's finances.¹³⁶

9 The thrust of Mr. Forrer's argument is that, as a practical matter, the substantial
10 negative impact that would follow from the legislature's refusal to pay for debt service
11 on the bonds under HB 331 will make it virtually impossible for future legislatures to
12 refuse to make appropriations.¹³⁷ Therefore, Mr. Forrer concludes, the "subject to
13 appropriation" language of HB 331 and the corporate form that shield the State from
14 legally enforceable debt are "legal fiction" and in violation of article IX, section 8.¹³⁸

17 Mr. Forrer's concerns that HB 331 may saddle future generations of Alaskans
18 with a crushing economic burden are genuine and deserve serious consideration.
19 However, the Court's decision in *Carr-Gottstein* indicates that when a transaction or
20 agreement does not create a legally enforceable debt against the State, the court
21

23 ¹³⁴ See page 6, ¶ 19 of the Amended Complaint.

24 ¹³⁵ *Id.* at page 11, ¶ 42.

24 ¹³⁶ *Id.* at page 14, ¶ 54; pages 15-16, ¶ 61.

25 ¹³⁷ *Id.* at pages 15-16, ¶ 61-64.

25 ¹³⁸ *Id.* at pages 16-17, ¶ 65-66.

1 should not engage in second guessing the wisdom of the legislature's fiscal policy
2 decisions, even when those decisions may have a negative impact on the State's credit
3 rating.

4 Specifically, in its explanation of why the lease-purchase agreement did not
5 create a legally enforceable debt against the State, the Court in *Carr-Gottstein* held that
6 while economic incentives may make lease-purchase of the property attractive,
7 economic incentives alone do not restrict the legislature's free exercise of discretion.¹³⁹

8
9 In support of this holding, the *Carr-Gottstein* court cited to the New York decision in
10 *Schulz v. State*.¹⁴⁰

11
12 In *Schulz*, the New York Court of Appeals rejected a challenge to a
13 transportation bond act as both imprudent fiscal policy and a violation of the debt
14 limiting provisions of the New York Constitution.¹⁴¹ The Court in *Schulz* held that a
15 moral obligation does not create "debt," since it creates no enforceable right on the
16 part of the one to whom the obligation is owed.¹⁴²

17
18 The *Schulz* court also addressed the claim that, in reality, the New York bonds
19 were backed by the State's full faith and credit because the consequence of default
20 would be ruinous, assuring that future legislative appropriations would, in fact, be
21

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24 ¹³⁹ 899 P.2d at 143, note 5.

25 ¹⁴⁰ 639 N.E.2d 1140, 1149 (N.Y. 1994).

¹⁴¹ *Id.* at 1142.

¹⁴² *Id.*

1 made. The *Schulz* court responded that concerns regarding the state's credit rating do
2 not create legally binding debt.¹⁴³

3 In sum, neutral principles of law and consistent precedents of this Court,
4 upon which decades of commercial transactions have been premised,
5 lead us to uphold the validity of the particular legislation before us. If (as
6 plaintiffs urge) modern ingenuity, even gimmickry, have in fact stretched
7 the words of the Constitution beyond the point of prudence, that plea
8 for reform in State borrowing practices and policy is appropriately
9 directed to the public arena[.]¹⁴⁴

10 A majority of states have concluded that constitutional prohibitions against
11 debt are not violated if appropriations-backed debt does not pledge a state's full faith
12 and credit.¹⁴⁵ Cases adopting this line of reasoning reject arguments that prohibited
13 debt is created by moral obligations or pressures on future legislatures to make
14 appropriations and/or concerns for the negative impact on a state's credit rating.¹⁴⁶
15 In contrast, there are states that treat appropriations-backed debt as legislative
16 decisions to circumvent debt limitation restrictions.¹⁴⁷

17 The Alaska Supreme Court's decision in *Carr-Gottstein* established Alaska as a
18 jurisdiction in league with a majority of its sister states holding that the relevant
19
20

21 ¹⁴³ *Id.* at 1149.

22 ¹⁴⁴ *Id.* at 1150.

23 ¹⁴⁵ See *Lonegan v. State*, 819 A.2d 395, 404, note 2 (N.J. 2003)(noting that 32 states uphold some form
24 appropriations backed debt and citing those decisions); See also *Fults v. City of Coralville*, 666 N.W.2d
25 548, 558 (Iowa 2003); *Schowalter v. State*, 822 N.W.2d 292, 301 (Minn. 2012).

¹⁴⁶ See e.g. *State ex. Rel. Kane v. Goldschmidt*, 783 P.2d 988, 993-996 (Oregon 1990); *Glennon Heights, Inc.*
v. Central Bank & Trust, 658 P.2d 872, 878-879 (Colorado 1983); *Schulz*, 639 N.E.2d at 1148-1150;

¹⁴⁷ *Montano v. Gabaldon*, 766 P.2d 1328, 1330 (New Mexico, 1989); *State ex rel. Ohio Funds Mgt. Bd. V.*
Walker, 561 N.E.2d 927, 932 (Ohio 1990).

1 constitutional inquiry is whether the statute in question creates a legally enforceable
2 debt against the state. HB 331 does not create a legally enforceable debt against the
3 State. Although of grave importance, derivative concerns regarding negative impact
4 on credit rating and the larger economic impacts of HB 331 are appropriately left to
5 the other branches of the government.
6

7 In anticipation that this court's ruling that *Carr-Gottstein* controls the outcome
8 of his case, Mr. Forrer has argued that either *Carr-Gottstein* does not mean what it says
9 or that it was wrongly decided by the Alaska Supreme Court.
10

11 Mr. Forrer notes that the opinion in *Carr-Gottstein* was adopted wholly from the
12 superior court, with the superior court acting as the intermediate appellate court in
13 reviewing an agency decision. For this reason, he suggests *Carr-Gottstein* should not be
14 relied upon for "sweeping propositions concerning constitutional interpretation."¹⁴⁸
15 He uses the same point to suggest the decision in *Carr-Gottstein* may not have been
16 subject to a rigorous system of thoughtful checks and editing as would be typical for
17 the Alaska Supreme Court.¹⁴⁹ In addition to other alleged flaws, he asserts the *Carr-*
18 *Gottstein* court's interpretation of article IX, section 8 was based on an incomplete
19 review of the proceedings at the Constitutional Convention.¹⁵⁰
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24 ¹⁴⁸ See Supplemental Briefing at page 26.

25 ¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at pages 26-27.

1 In essence, Mr. Forrer argues that the Alaska Supreme Court treated *Carr-*
2 *Gottstein* as a throw-away opinion, issuing the decision without careful reasoning,
3 review or consideration. If that is the case, then the Alaska Supreme Court will
4 surely correct the error of this court in relying on *Carr-Gottstein* as precedent. But for
5 now, this court will follow *Carr-Gottstein* as guiding precedent. For these reasons, the
6 court holds HB 331 does not violate article IX, section 8.
7

8 **D. Exceptions Created by Article IX, Section 11 do not Apply to**
9 **HB 331**

10 The State has argued in the alternative that HB 331 is constitutional because it
11 falls within the exceptions created by article IX, section 11. This provision states,
12 “The restrictions on contracting debt do not apply to debt incurred through the
13 issuance of revenue bonds by a public enterprise or public corporation of the State or
14 a political subdivision, when the only security is the revenues of the enterprise or
15 corporation. The restrictions do not apply to the indebtedness to be paid from
16 special assessments on the benefited property, nor do they apply to refunding
17 indebtedness of the State or its political subdivisions.”
18
19

20 The State first argues that HB 331 falls within the exception of article IX,
21 section 11 because it simply authorizes the issuance of tax credit bonds for the
22 purpose of refinancing obligations arising out of the discontinued tax credit
23
24
25

1 program.¹⁵¹ Mr. Forrer disputes this assertion, stating, “[I]n no manner can this
2 scheme to incur debt to pay off discretionary oil tax credits be considered a refinance
3 of existing debt.”¹⁵²

4 Moreover, Mr. Forrer makes the following factual allegations this court accepts
5 as true in assessing the State’s motion to dismiss under Rule 12(b)(6): that none of the
6 existing tax credits established according to Alaska law are in default or subject to a
7 judicial judgment;¹⁵³ that the Alaska legislature has regularly made appropriations for
8 the satisfaction of the existing tax credits established according to Alaska law since the
9 inception of the tax credit program;¹⁵⁴ and that appropriations made by the Alaska
10 legislature are at or exceed the repayment schedule for the tax credits set out in
11 statute.¹⁵⁵

14 Based on these facts, this court cannot conclude beyond a doubt that HB 331
15 serves to refinance an existing debt within the meaning of article IX, section 11. For
16 example, it is not clear that the oil tax credit certificates actually constitute a “debt,”
17 especially if the State is under no legally enforceable obligation to purchase the tax
18 credit certificates.
19
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21
22

23 ¹⁵¹ See Motion to Dismiss, pages 29-32.

24 ¹⁵² See Opposition, page 5.

25 ¹⁵³ See page 7, ¶ 24 of Amended Complaint.

¹⁵⁴ *Id.* at ¶ 25.

¹⁵⁵ *Id.*

1 The State next argues that the bonds issued under HB 331 are “revenue bonds”
2 within the meaning of article IX, section 11 because the only security pledged is that
3 of the corporation and not the State.¹⁵⁶ The State argues that nothing in the
4 constitutional text indicates that appropriations by the legislature cannot be
5 considered “revenue” of a public corporation for purposes of article IX, section 11.¹⁵⁷
6

7 Mr. Forrer responds that the State’s invocation of article IX, section 11 is faulty
8 because the corporation created under HB 331 has no revenue stream. Further, he
9 argues that appropriations made in the future by the Legislature cannot be considered
10 “revenue” for purposes of repaying bonded indebtedness under the Alaska
11 Constitution.¹⁵⁸
12

13 Discussions by the framers of article IX, section 11 during the Constitutional
14 Convention strongly suggest they intended the “revenues” to be those collected by
15 public utilities¹⁵⁹ or self-sustaining enterprises,¹⁶⁰ as opposed to appropriations
16 provided by the legislature.
17

18 The funding mechanism for repayment of the bonds issued under HB 331 is
19 discretionary appropriation by the legislature from the general fund. HB 331 is not
20 “self-sustaining” and does not have the benefit of an independent revenue stream
21

22
23 ¹⁵⁶ See Motion to Dismiss, pages 32-34.

24 ¹⁵⁷ *Id.* at page 32.

25 ¹⁵⁸ See Opposition, pages 14-15.

¹⁵⁹ Proceedings of the Alaska Constitutional Convention, 2303, Day 55, (January 15, 1956).

¹⁶⁰ Proceedings of the Alaska Constitutional Convention, 1112, Day 42, (December 19, 1955).

1 provided by the revenues of a public utility. Therefore, this court finds HB 331 does
2 not fall within the exceptions described by article IX, section 11 for “revenue bonds.”

3 However, a determination that HB 331 does not fall within the exceptions of
4 article IX, section 11 does not change the conclusion of this court that HB 331 passes
5 constitutional muster. This is because article IX, section 11, does not provide the
6 only exception to the prohibition of debt under article IX, section 8.
7

8 As outlined above, the precedent of *DeArmond* and *Walker*, as interpreted by
9 *Carr-Gottstein*, established that a transaction or agreement does not create prohibited
10 debt under article IX, section 8, if that debt is not legally enforceable against the State.
11 Moreover, the decisions in *DeArmond* or *Walker* did not rely upon the exceptions in
12 article IX, section 11, in holding that the bonds issued by the corporations were not
13 constitutionally prohibited debt. Thus, the decisions in *Carr-Gottstein*, *DeArmond*, and
14 *Walker* stand for the proposition that article IX, section 11 does not provide the
15 exclusive list of exceptions to debt prohibited under article IX, section 8.
16
17

18 For these reasons, the court finds that the exceptions created by article IX,
19 section 11 do not apply to HB 331.
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1 **E. HB 331 is Consistent with Article IX, Section 10**

2 In his complaint Mr. Forrer alleges that HB 331 is inconsistent with article IX,
3 section 10 of the Alaska Constitution.¹⁶¹ This provision states, “The State and its
4 political subdivisions may borrow money to meet appropriations for any fiscal year in
5 anticipation of the collection of revenues for that year, but all debt so contracted shall
6 be paid before the end of the next fiscal year.”
7

8 There are no decisions by the Alaska Supreme Court providing significant
9 discussion of article IX, section 10. The court in *Chefornak* did observe that the
10 minutes of the Constitutional Convention show that after the reading of proposed
11 article IX, one delegate stated that section 9 and 10... seem[] to be a limitation on the
12 right of the state of borrow money.”¹⁶² But beyond this brief observation, case law
13 does not provide additional guidance.
14

15 However, it is apparent from the language of section 10 that it is meant as an
16 exception to the prohibition against debt contained in article IX, section 8. Section 10
17 authorizes the State to incur short-term debt that might otherwise offend section 8, so
18 as to deal with cash-flow problems within the yearly budget cycle. In other words, the
19 restrictions imposed by section 10 only apply to debt that would otherwise be
20 prohibited by section 8.
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22

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24 ¹⁶¹ See page 12, ¶ 48 of the Amended Complaint.

25 ¹⁶² 758 P.2d at 1269, citing Proceedings of the Alaska Constitutional Convention, 1112, Day 42
(December 19, 1955).

1 This court has ruled above that HB 331 does not create debt within the
2 meaning of article IX, section 8. Because HB 331 does not create debt prohibited by
3 section 8, the exception provided by section 10 does not apply to HB 331. For this
4 reason, Mr. Forrer's claim that HB 331 violates article IX, section 10 necessarily fails.
5

6 **F. HB 331 does not Violate Article IX, Section 13**

7 In his complaint Mr. Forrer alleges HB 331 violates article IX, section 13 of the
8 Alaska Constitution.¹⁶³ This provision states, "No money shall be withdrawn from
9 the treasury except in accordance with appropriations made by law. No obligation for
10 the payment of money shall be incurred except as authorized by law. Unobligated
11 appropriations outstanding at the end of the period of time specified by law shall be
12 void."
13

14 Article IX, section 13 is implemented by AS 37.05.170.¹⁶⁴ This statute
15 provides: "Payment may not be made and obligations may not be incurred against a
16 fund unless the Department of Administration certifies that its records disclose that
17 there is a sufficient unencumbered balance available in the fund and that an
18 appropriation or expenditure authorization has been made for the purpose for which
19 it is intended to incur the obligation." Case law applying either article IX, section 13
20 or AS 37.05.170 is scant.
21
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24 ¹⁶³ See page 13, ¶ 51 of the Amended Complaint.

25 ¹⁶⁴ See *Zerbetz v. Alaska Energy Center*, 708 P.2d 1270, 1277 (Alaska 1985).

1 However, the Court in *Carr-Gottstein* did at least obliquely discuss an application
2 of article IX, section 13.¹⁶⁵ At issue were funds placed in escrow by VECO for
3 renovation of the property subject to the lease-purchase agreement. The plaintiff
4 argued that the escrow funds constituted “program receipts” under AS 37.05.146 and,
5 therefore, the funds were required to be placed in the state treasury and subject to the
6 legislature’s powers of appropriation under section 13.¹⁶⁶

8 The court in *Carr-Gottstein* rejected the plaintiff’s argument that the escrow
9 funds constituted unrestricted “program receipts” under AS 37.05.146.¹⁶⁷ Because the
10 escrow funds were not subject to deposit in the state treasury and the legislature’s
11 power of appropriation, the court found the arrangement did not violate section 13.¹⁶⁸

13 The holding in *Carr-Gottstein* appears to provide more of an analysis of AS
14 37.05.146 than it does of article IX, section 13. Mr. Forrer’s case does not involve the
15 application of AS 37.05.146. Therefore, this portion of the *Carr-Gottstein* opinion does
16 not provide much guidance for applying section 13 in Mr. Forrer’s case.

18 The first clause of article IX, section 13 generally demands that expenditures
19 can only be made from legislative appropriations, while the second clause proscribes
20 state employees from incurring future liabilities without statutory authorization.

22 _____
23 ¹⁶⁵ 899 P.2d at 145-146.

24 ¹⁶⁶ *Id.* at 145.

25 ¹⁶⁷ *Id.* The Court found the escrow funds were private funds, placed in trust for the renovation of the building subject to the lessee’s instructions, and not held in the name of the State. *Id.* at 145.

¹⁶⁸ *Id.* at 145-146.

1 During debate at the Constitutional Convention, section 13 was described as “a
2 standard section providing that money shall not be withdrawn from the treasury
3 except in accordance with appropriations made by law.”¹⁶⁹ In a subsequent discussion
4 of article IX, section 8, another delegate provided an explanation shedding light on
5 the purpose of section 13, “You contract administratively after the legislature has
6 authorized such a contract.”¹⁷⁰ These statements support the conclusion that section
7 13 requires that legislative authorization must precede any action by the executive to
8 obligate monies from the state treasury.
9

10
11 HB 331 establishes the legal mechanism by which bond revenues and
12 discretionary appropriations from the legislature are placed into the revenue fund
13 controlled by the Alaska Tax Credit Certificate Bond Corporation.¹⁷¹ Further the
14 provisions of HB 331 specify the manner in which money in the reserve funds may be
15 spent.¹⁷² Thus, any legislative appropriations and payments made by the corporation
16 under HB 331 would be done in accordance with the statutory provisions. Because
17 any appropriations made by the legislature and payments made by the Corporation
18 would be made in accordance with the law, HB 331 does not violate article IX,
19 section 13.
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24 ¹⁶⁹ Proceedings of the Alaska Constitutional Convention, 1111, Day 42, (December 19, 1955).

¹⁷⁰ *Id.* at 3406, Day 67, (January 28, 1956).

¹⁷¹ AS 37.18.040.

¹⁷² AS 37.18.040(b)-(d).


1 The last clause of section 13 permits the legislature to determine when the
2 unspent portion of an appropriation lapses back to the fund from which it was
3 appropriated. HB 331 does not impair or impede the legislature's power to
4 appropriate or limit appropriations. Therefore, HB 331 does not run afoul of the last
5 clause of section 13.
6

7 For these reasons, HB 331 does not violate article IX, section 13 of the Alaska
8 Constitution.

9 **V. Conclusion**

10 For the reasons given above, the court grants the State's motion to dismiss Mr.
11 Forrer's complaint for failure to state a claim upon which relief can be granted under
12 Civil Rule 12(b)(6).
13

14
15 **SO ORDERED** this 2nd day of January, 2019.
16

17
18 
19 _____
20 M. Jude Pace
21 Superior Court Judge



22 **CERTIFICATION**
23 I certify that on 2nd day of Jan 2019
24 a true copy of this do was placed
25 in attorney's box/mailed to the following:
J. Geldhof - email
m. grappling / m. paton-watsh
By [Signature] W. MILLS