APPENDIX A

THE SUPREME COURT OF
THE STATE OF ALASKA

Nos. S-12218/12223

CITY OF VALDEZ,
Appellant and Cross-Appellee,

v.

POLAR TANKERS, INC.,
Appellee and Cross-Appellant.

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Peter A. Michalski, Judge.

Appearances: Debra J. Fitzgerald and William M. Walker, Walker & Levesque, LLC, Anchorage, for Appellant and Cross-Appellee. Leon T. Vance, Faulkner Banfield, P.C., Juneau, and Susan Orlansky and Eric T. Sanders, Feldman Orlansky & Sanders, Anchorage, for Appellee and Cross-Appellant.

Before: Fabe, Chief Justice, Matthews, Eastaugh, and Carpeneti, Justices. [Bryner, Justice, not participating.]

EASTAUGH, Justice.

III. INTRODUCTION

The City of Valdez adopted an ad valorem property tax on large vessels docking at private facilities in Valdez, and the city council thereafter adopted an apportionment formula based on days spent in port for taxing large vessels engaged in interstate commerce. Several transporters of oil, including Polar Tankers, Inc., challenged the tax in superior court, alleging that it violated the Due Process, Commerce, and Tonnage Clauses of the Federal Constitution. We hold that the apportionment formula does not create a risk of duplicative taxation; it was therefore error to declare the ordinance unconstitutional as applied.

IV. FACTS AND PROCEEDINGS

A. Factual History

In 1999 the City of Valdez adopted Ordinance No. 99-17, an ad valorem property tax ("vessel tax") on certain large vessels docking at private facilities in the city. Part A of the ordinance describes the affected vessels:

> Boats and vessels of at least 95 feet in length for which certificates of documentation have been issued under the laws of the United States are subject to taxation at their full and true value unless the vessel is used primarily in some aspect of commercial fishing or docks exclusively at the Valdez Container

> Terminal where it is subject to municipal dockage charges.[1]

The city subsequently interpreted the exception for vessels docking exclusively at the Valdez Container Terminal to also apply to vessels docking exclusively at other city-owned docks. Part B of the ordinance provides for taxation on an "apportionment basis" and for adoption of assessment formulas:

> Vessels operated in intrastate, interstate or foreign commerce that have acquired a taxable situs elsewhere, shall be assessed on an apportionment basis. The assessor shall allocate to the City the portion of the total market value of the property that fairly reflects its use in the City. The assessor shall establish formulas for calculating the proportion of the total market value allocated to the City. The assessment formula shall be approved by the city council.[2]

The vessel tax was proposed to address what was described as a serious erosion of the city's tax base, much of which is oil- and gas-related property. For several years before passage of the ordinance, the portion of the city's tax base consisting of oil and gas property had been declining rapidly, and it would continue to decline under a depreciation formula negotiated between the State of Alaska and the owners of the Trans Alaska Pipeline System (TAPS).

In accordance with Part B of the 1999 vessel tax ordinance, in 2000 the city council adopted a resolu-

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[1] Valdez Ordinance 99-17 (codified as Valdez Municipal Code (VMC) 03.12.020(A) (1999)).

[2] *Id.*

tion containing an apportionment formula. Section 1 of Resolution No. 00-15 adopted a tax apportioned on the days spent in port:

> A vessel owner will pay the personal property tax based on 100 percent of the assessed value, times a ratio determined by the number of days spent in Valdez divided by the total number of days spent in all ports, including Valdez, where the vessel has acquired a situs for taxation.[3]

We refer to this as a "port-day" apportionment formula. The formula also exempts "periods when a vessel is tied up because of strikes or withheld from the Alaska service for repairs."[4] Section 2 of the 2000 resolution contingently provides for adoption of "another apportionment formula that will more fairly represent how value should be apportioned."[5] It provides:

> If a taxpayer claims that in a particular case the apportionment formula approved in this Resolution does not reasonably represent the portion of the total value of the vessel that should be apportioned to the taxing situs of Valdez, the taxpayer may petition, or the assessor may require, the use of another apportionment formula that will more fairly represent how the value should be apportioned among Valdez and other taxing jurisdictions.[6]

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[3] Valdez, Alaska, Resolution No. 00-15 (May 1, 2001).

[4] *Id.*

[5] *Id.*

[6] *Id.*

Polar Tankers, Inc. operates tanker vessels that transport crude oil from the TAPS terminal in Valdez to ports in Washington, California, and Hawaii. In Valdez, Polar loads crude oil at the Alyeska Marine Terminal, a private dock owned by a consortium of oil companies—the TAPS owners. Polar is a wholly owned subsidiary of ConocoPhillips Company. The city issued tax statements for each of the assessed vessels in early July of 2000, 2001, 2002, 2003, and 2004. Polar paid the assessed taxes under protest each year. The taxes it paid each year were: $440,221.24 in 2000; $398,157.62 in 2001; $1,037,530.12 in 2002; $1,433,072.20 in 2003; and $1,657,249.02 in 2004.

B. Procedural History

After the city enacted the apportionment resolution in 2000, Polar sued the city in superior court, claiming the vessel tax violated the Due Process, Commerce, and Tonnage Clauses of the Federal Constitution. Polar was initially joined by several other tankship companies. Over the next three years, the city settled with all of the plaintiffs except Polar and SeaRiver Maritime, Inc. In 2004 the superior court granted these plaintiffs' motion for summary judgment, holding that the vessel tax was an unconstitutional duty on tonnage. The city moved for reconsideration. The superior court granted the reconsideration motion, vacated its earlier ruling, and directed the parties to brief seven legal and factual questions. In January 2005 the superior court issued a decision and order ruling that the apportionment method violated the Due Process and Commerce Clauses. It declined to rule on the Tonnage Clause issue. The city moved for summary judgment on that issue, and the superior court granted the city's motion in July and

concluded that, assuming the vessel tax was fairly apportioned, the tax would not violate the Tonnage Clause.

In January 2006 the superior court issued its final judgment holding that the tax did not violate the Tonnage Clause, but that the port-day apportionment formula, as applied to the plaintiffs, violated the Due Process and Commerce Clauses. The judgment permitted the city to levy the vessel tax as soon as it adopted a constitutional apportionment formula, and required the city to repay all taxes overpaid by the plaintiffs, as calculated using the new apportionment formula. The city moved for clarification of the final judgment. The court denied the clarification motion but stayed the judgment and ordered that the city could not "levy against Plaintiffs any amount of tax beyond the amount that would be due using this apportionment formula: Days in Valdez/365." The court ordered that the amount be paid into a court-supervised account until the appeal was terminated by agreement of the parties or decision of this court. Finally, the superior court denied all parties' motions for attorney's fees.

Three parties appealed. SeaRiver eventually dismissed its appeal, and the city's and Polar's appeals were consolidated. On appeal, the city challenges the Due Process and Commerce Clause rulings and Polar challenges the Tonnage Clause ruling.

V. DISCUSSION

A. Standard of Review

We review summary judgment rulings on constitutional issues such as the Due Process, Commerce, and Tonnage Clauses de novo.[7]

B. The Vessel Tax Apportionment Formula Does Not Violate the Due Process Clause or the Commerce Clause.

Polar contends that the vessel tax violates the Due Process and Commerce Clauses of the Federal Constitution.[8] The superior court held that the tax, Valdez Ordinance 99-17, was constitutional, but that the port-day apportionment formula contained in Valdez Resolution 00-15 violated the Due Process and Commerce Clauses.[9]

Due process requires that: (1) the property taxed have a physical presence and minimal connections with the taxing sovereign (thus giving it a tax situs)[10]; and (2) the tax be fairly apportioned to "opportunities, benefits, or protection conferred or afforded by the taxing [authority]."[11]

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[7] *Lewis* v. *State, Dep't of Corr.*, 139 P.3d 1266, 1268-69 (Alaska 2006).

[8] U.S. CONST. amend. XIV § 1; U.S. CONST. art. I, § 8, cl. 3.

[9] In its final judgment, the superior court stated that the port-day apportionment formula is contained in Valdez Resolution 00-19. This appears to be a typographical error as the port-day apportionment formula is contained in Valdez Resolution 00-15. We therefore refer to Valdez Resolution 00-15 here.

[10] *Atlantic Richfield Co.* v. *State*, 705 P.2d 418, 430 (Alaska 1985).

[11] *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174 (1949) (holding that ad valorem property tax apportioned using

In *Complete Auto Transit, Inc.* v. *Brady* the United States Supreme Court laid out the test for determining whether a tax on mobile property used in interstate commerce satisfies the Commerce Clause.[12] *The Complete Auto* test requires that: (1) the property taxed have a "substantial nexus" with the taxing jurisdiction; (2) the tax be fairly apportioned; (3) the tax not discriminate against interstate commerce; and (4) the tax be fairly related to the services provided by the jurisdiction.[13]

The Supreme Court has noted that the "*Complete Auto* test, while responsive to Commerce Clause dictates, encompasses as well … due process requirement[s]."[14] We therefore consider minimal connection/substantial nexus and fair apportionment under both clauses simultaneously.

1. There is a substantial nexus between Valdez and the vessels, such that Valdez has become a tax situs.

The parties agree that Polar's presence and activities in Valdez are sufficient to permit the city to tax its vessels, and that Valdez is therefore a tax situs for Polar. Ample evidence supports this conclusion. There is a direct and significant economic connection between the city and Polar. Most of Polar's business involves the oil it loads at the Alyeska Marine Terminal in Valdez, and the parties seem to

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miles traveled in state divided by total miles traveled did not violate Commerce or Due Process Clauses).

[12] *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977) (upholding sales tax challenged by motor carrier transporting cars into Mississippi from out of state).

[13] *Id.* at 279.

[14] *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 313 n.7 (1992).

agree that Polar's tankers spend an average of about forty-two port days in Valdez per year. Furthermore, the city provides many services to Polar. The city assists the Coast Guard in regulating traffic on dedicated "tanker lanes." The significant presence of the Coast Guard in the city is primarily due to the operations of Polar and the other oil shippers. The city tells us the Alyeska Marine Terminal, which is privately owned by the TAPS owners, was "financed by $1.3 billion in tax-exempt revenue bonds issued by the City."

Polar has at least one employee permanently located in Valdez, and Polar's employees, including the vessel crews, have access to all the services provided by the city, such as police protection, airport, roads, and hospitals. The city is involved in oil spill contingency plans. As demonstrated by the EXXON VALDEZ oil spill in 1989, the city is heavily affected by oil spills; following the EXXON VALDEZ spill, cleanup efforts continued to consume city resources for more than three years. All of these factors create a substantial nexus between the city and Polar such that Valdez has acquired the status of a tax situs for purposes of the Due Process and Commerce Clauses.

Because we agree with the parties that a substantial nexus exists, we also agree that Valdez is a tax situs for Polar.[15]

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[15] *See Goldberg* v. *Sweet*, 488 U.S. 252, 260 (1989) (upholding excise tax under *Complete Auto* test and stating that because "all parties agree that Illinois has a substantial nexus with the interstate telecommunications reached by the Tax Act, we begin our inquiry with apportionment, the second prong of the *Complete Auto* test").

2. The vessel tax is fairly apportioned.

The superior court concluded that the city's port-day apportionment formula by which the tax is calculated violates the Due Process and Commerce Clauses because the formula creates a risk of multiple taxation and is therefore not fairly apportioned. We disagree.

The "central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction."[16] There is no single correct method of apportionment; rather, a tax is deemed fairly apportioned if it is both internally and externally consistent.[17] Because both parties agree that the vessel tax is internally consistent (i.e., if all taxing jurisdictions used the same formula, a vessel would be taxed for one hundred percent of its value), we address only external consistency.

External consistency is the principle that looks "to the economic justification for the state's claim upon the value taxed, to discover whether a state's tax reaches beyond that portion of value that is fairly attributable to activity within the taxing state."[18] According to Hellerstein & Hellerstein, "the external consistency test in substance is nothing more than another label for the fair apportionment requirement."[19]

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[16] *Id.* at 260-61.

[17] *Id.* at 261.

[18] I JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION ¶ 4.15[2], at 4-142 (3d ed. 1998) (citing *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995)).

[19] *Id.*

The superior court concluded that the vessel tax was not fairly apportioned because the apportionment formula created a risk of duplicative taxation. A tax may be invalid even if it creates only a risk of duplicative taxation. In *Central Railroad of Pennsylvania* v. *Commonwealth of Pennsylvania*, the Supreme Court stated that a "domiciliary State is precluded from imposing an ad valorem tax on any property to the extent that it could be taxed by another State, not merely on such property as is subjected to tax elsewhere."[20] We have similarly stated that "the Commerce Clause is triggered only upon an affirmative showing that property taxed by one jurisdiction has another taxable situs and could be taxed elsewhere."[21]

Polar admits that Valdez is a proper taxing situs. But Polar nonetheless argues that Valdez's taxing authority is subordinate to the taxing authority of Polar's domicile and that Valdez's apportionment scheme is unfair because it impinges on the domicile's taxing authority, creating the risk of multiple taxation. Polar asserts that California is its commercial domicile.

Under the home port doctrine, a vessel was subject to property taxation in full at the domicile of the owner and not elsewhere.[22] But the Supreme Court

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[20] *Cent. R.R. of Pa.* v. *Pennsylvania*, 370 U.S. 607, 614 (1962) (emphasis added).

[21] *Kenai Peninsula Borough* v. *Arndt*, 958 P.2d 1101, 1103 (Alaska 1998) (emphasis added) (holding that Commerce Clause was not violated because vessel's tax status became fixed for full tax year on date of its assessment and it therefore could not be taxed elsewhere, even after being sold).

[22] *S. Pac. Co.* v. *Kentucky*, 222 U.S. 63, 68-69 (1911); *see also* HELLERSTEIN & HELLERSTEIN, supra note 18, at ¶ 4.12[2][c].

in *Japan Line, Ltd.* v. *County of Los Angeles* recognized that the home port doctrine has yielded to a rule of fair apportionment among situs states.[23] The Court there noted that if the containers at issue in *Japan Line* were instrumentalities of purely interstate commerce, a rule of fair apportionment would have been applied.[24]

Therefore, a rule of fair apportionment must be applied to the taxation of Polar's ships. As we discuss below, an apportionment formula is fair if it apportions the full value of a ship between the taxing jurisdictions in which it is regularly present in proportion to the number of days during the tax year that the ship is present in each jurisdiction. Our determination that Valdez has adopted one of the many potential fair apportionment schemes it could choose from renders Polar's assertion of home port superiority irrelevant.[25]

Valdez' s apportionment formula apportions the full value of a ship between the taxing jurisdictions

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[23] *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 442 (1979).

[24] *Id.* at 445-46. Although it appears that some of Polar's vessels, for some of the years at issue, might have acquired a taxing situs in a foreign nation, Polar does not argue that the international aspect of its commerce affects the Valdez tax. We recognize that *Japan Line* imposes an additional test for taxation of the instrumentalities of foreign commerce, *id.* at 446-49, but we do not reach that test because the parties did not raise this issue on appeal.

[25] Polar's claim of home port superiority is not compelled by the cases that Polar cites. For example, the holding in *Central Railroad*, 370 U.S. at 611-12, 614, that a domiciliary situs cannot tax property to the extent that it could be taxed by another situs, does not define the limits of a non-domiciliary's right to tax.

in which it is regularly present in proportion to the number of days during the tax year that the ship is present in each jurisdiction. Thus if we assume that a tanker is in port in Valdez for fifty days a year and in port in all jurisdictions including Valdez for 150 days per year, the Valdez apportionment ratio would be 50/150. There is no reason why the days at sea outside the jurisdiction of any taxing authority should be included in the denominator of the fraction. This result is different, however, from Polar's contention that any jurisdiction is taxing for days spent at sea.[26]

The port-day formula resembles the formula that was involved in *Braniff Airways* v. *Nebraska State Board of Equalization & Assessment*, and whose reasonableness was not challenged.[27] The *Braniff* for-

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[26] Polar's apportionment argument rests on this characterization of the Valdez tax. There is no risk of multiple taxation if Valdez uses a port-day formula and other jurisdictions use a port-day formula, voyage-day formula (number of days in jurisdiction divided by total days in a year), or voyage-distance formula (distance traveled in a jurisdiction divided by total distance). A risk of multiple taxation only exists if we accept Polar's assertion that its domicile can extraterritorially tax its vessels for all time spent on the open seas.

Polar provides no compelling reason for us to accept this assertion. Modern precedent and the repudiation of the home port doctrine in *Japan Line*, 441 U.S. at 443, suggest that a domicile possesses no such expansive powers. The *Japan Li*ne Court announced that the special status traditionally accorded a domicile "can claim no unequivocal constitutional source." *Id.* Polar's view of a domicile's ability to assert an extraterritorial tax conflicts with the tenor of *Japan Line*.

[27] *Braniff Airways* v. *Nebraska State Bd. of Equalization & Assessment*, 347 U.S. 590, 593 & n.4, 597-98 (1954). While Polar argues that the *Braniff* Court's reasoning should not be extended to ocean-going vessels, the Court's later decision in *Ja-*

mula involved the ratio of aircraft landings in the taxing jurisdiction as compared to all landings in all potential taxing jurisdictions.[28] There is not too much difference between landings and dockings, nor between dockings and days in port. Each of these measures assesses the extent of activity in the taxing jurisdiction relative to the activity in all taxing jurisdictions. This satisfies the goal of apportionment, which is "to ensure that each State taxes only its fair share of an interstate transaction."[29] Most importantly the *Braniff* formula taxed the whole aircraft in accordance with the ratio indicated by the formula without carving out some separate quantum of value for the aircraft's "home port." The home port received no special consideration even though the planes likely spent time flying over non-situs states.[30]

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pan Line largely eliminated the distinction between ocean-going vessels and other instrumentalities of interstate commerce. *Japan Line*, 441 U.S. at 442. It is notable that the *Japan Line* Court specifically cited *Braniff* in its discussion of prior opinions whose language distinguishing ocean-going vessels based on the home port doctrine the Court rejected. *Id.* (citing *Braniff*, 347 U.S. at 600).

[28] *Braniff*, 347 U.S. at 593 n.4.

[29] *Goldberg*, 488 U.S. at 260-61.

[30] A variation on *Braniff* more dramatically illustrates the point: if an airline domiciled in New York only has flights between New York City and Los Angeles, the airline would not be subject to taxation by any jurisdiction other than New York and California. The *Braniff* apportionment formula of number of landings would accord California and New York even powers of taxation. Under the home port superiority method urged by Polar, New York, the state of domicile, would have the ability to tax a plane for all times the plane was not in California.

The formula in *Ott* v. *Mississippi Valley Barge Line Co.*[31] also supplies an analogy. In that case the apportionment ratio compared the number of barge miles in Louisiana to the total number of barge miles in all state waters concerning the routes in question.[32] No special status, or even mention, was given to the vessels' home ports. In *Ott* the vessels' routes were from port to port on navigable rivers.[33] But if instead a vessel's regular route was from St. Louis, Missouri through New Orleans, Louisiana to Tampa Bay, Florida, it is hard to imagine that the denominator would have to include miles traveled on the high seas outside the taxing authority of any state.

There are of course many conceivable apportionment formulaé that might be fair.[34] The port-days formula is but one such example. Because the formula is fair, and accordingly a valid formula for Valdez to use, and because Valdez's permissible tax necessarily limits the taxing authority of Polar's domicile, there is no concern about the risk of duplicative taxation.[35] Because the tax is fairly apportioned, the tax is also externally consistent.

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[31] *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949).

[32] *Id.* at 171.

[33] *Id.* at 170.

[34] *See Goldberg*, 488 U.S. at 261 (" '[W]e have long held that the Constitution imposes no single [apportionment] formula on the States,' and therefore have declined to undertake the essentially legislative task of establishing a 'single constitutionally mandated method of taxation.' " (quoting *Container Corp. of Am.* v. *Franchise Tax Bd.*, 463 U.S. 159, 164, 171 (1983))).

[35] *See Cent. R.R.*, 370 U.S. at 614.

3. Polar waived claims of discrimination against interstate commerce and fair relation between the tax and services provided.

On appeal, Polar only devotes a single sentence to the third element of the *Complete Auto* test—whether the tax discriminates against interstate commerce—stating in its brief, "unfair apportionment itself is a form of discrimination against interstate commerce." Given the cursory nature of Polar's failure to argue this issue separately, we consider it waived.[36]

Even if we were to consider the issue on its merits, it does not appear that the vessel tax discriminates against interstate commerce. In *Moorman Manufacturing Co.* v. *Bair*, the United States Supreme Court held that a tax did not violate the Commerce Clause even if it resulted in an out-of-state company paying a greater portion of its income in taxes because the tax apportionment method "treat[ed] both local and foreign concerns with an even hand."[37] According to the Court, any "alleged disparity" was "the consequence of the combined effect" of multiple state statutes, and a single state was not responsible for that combined effect.[38] Like

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[36] *Petersen* v. *Mut. Life Ins. Co.*, 803 P.2d 406, 410 (Alaska 1990) ("Where a point is not given more than a cursory statement in the argument portion of a brief, the point will not be considered on appeal."); *Lewis* v. *State,* 469 P.2d 689, 691-92 (Alaska 1970).

[37] *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 274, 278 n.12 (1978) (upholding Iowa apportionment formula for income tax on interstate business against Due Process and Commerce Clause challenges).

[38] *Id.*

the tax in *Moorman*, the city's vessel tax applies equally to in-state and out-of-state vessels. Any effect on interstate commerce is incidental.

Polar also waived any argument regarding the fourth element of *Complete Auto*—whether the tax is fairly related to the services provided. Polar asserts that the tax is not fairly related to the services provided because the city's apportionment method "effectively treats a portion of [out-of-Valdez] time as if the tankers were present in Valdez." But because Polar has not briefed the issue we decline to address it.

Because Polar has attained a taxable situs in Valdez, and because the vessel tax is fairly apportioned, we hold that neither the tax nor the apportionment formula violates the Due Process Clause or the Commerce Clause.

C. The Vessel Tax Does Not Violate the Tonnage Clause.

In its cross-appeal Polar asserts that the tax violates the United States Constitution's Tonnage Clause,[39] which prohibits taxes that "operate to impose a charge for the privilege of entering, trading in, or lying in a port."[40] The superior court initially found that the tax violates the Tonnage Clause, but after vacating that judgment the superior court concluded that the tax does not violate the Tonnage Clause. In so ruling, the superior court noted that it had originally "misunderstood the taxpayer's argument on this matter." Because the parties agreed

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[39] U.S. CONST. art. I, § 10, cl. 3.

[40] *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 265-66 (1935) (holding fee exacted to fund regulation of harbor not unconstitutional duty of tonnage).

that no trial concerning the Tonnage Clause claim was necessary, and because (as the superior court noted) "counsel for the taxpayers … clarified taxpayers' agreement that had the tax been properly apportioned, the City has jurisdiction to tax the tankers," the superior court dismissed Polar's Tonnage Clause challenge.

The United States Constitution forbids the states from, "without the Consent of Congress, lay[ing] any Duty of Tonnage."[41] A duty of tonnage is any tax or duty that "operate[s] to impose a charge for the privilege of entering, trading in, or lying in a port," regardless of whether it is measured by the tonnage of the vessel.[42] A fairly apportioned property tax is not a tonnage duty.[43]

Having concluded above that the disputed vessel tax is a fairly apportioned ad valorem tax on personal property, we necessarily also hold that it does not violate the Tonnage Clause. The vessels are taxed based on their value, and only those vessels that have acquired a taxable situs in Valdez are taxed.[44] Polar concedes that it has acquired a taxable situs in Valdez.

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[41] U.S. CONST. art. I, § 10, cl. 3.

[42] *Clyde Mallory Lines*, 296 U.S. at 265-66.

[43] *In re State Tonnage Tax Cases*, 79 U.S. 204, 212-14 (1870) (stating that vessels owned by individuals and used for commercial purposes are considered property and are allowed to be taxed by states and do not fall under Tonnage Clause); *Bigelow* v. *Dep't of Taxes,* 652 A.2d 985, 987-88 (Vt. 1994) (holding that Vermont's tax was not tonnage tax because it taxed property used, not privilege of using Vermont's ports).

[44] VMC 03.12.020(A).

In *Japan Line, Ltd.* v. *County of Los Angeles*, the California Supreme Court sustained an ad valorem property tax on cargo containers against a Tonnage Clause challenge.[45] The California Supreme Court reasoned that the cargo containers were "not being taxed while in transit [but r]ather they [were] being taxed on an apportioned basis for their continuous presence in the state."[46] Like the containers in *Japan Line*, no single vessel is in the taxing situs of Valdez year-round, but as a group the tankers form a continuous presence in the city. As the California Supreme Court noted, the presence of these vessels "involves the constant use of many services provided by the (state and, here, the county); e.g., harbor facilities, roads, bridges, water supply, as well as fire and police protection."[47] Similarly, the Vermont Supreme Court upheld a personal property tax on vessels in Vermont, noting that "[t]he tax relates to police, fire, and environmental protection afforded to those who use vessels in this state."[48] Polar does not deny that municipal services are available to it in Valdez, including police, airport, civic center, and medical services. The vessel tax is therefore a le-

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[45] *Japan Line, Ltd.* v. *County of Los Angeles*, 571 P.2d 254 (Cal. 1977), *rev'd on other grounds*, 441 U.S. 434 (1979). The United States Supreme Court held that the tax, as applied to Japanese shipping companies' cargo containers that were based, registered, and subjected to property tax in Japan, and were used exclusively in foreign commerce, violated the Commerce Clause. *Japan Line*, 441 U.S. at 453-54. The Court therefore did not reach the Tonnage Clause question. *Id.* at 439 n.3.

[46] *Japan Line*, 571 P.2d at 258.

[47] *Id.*

[48] *Bigelow*, 652 A.2d at 988.

gitimate property tax levied to support the services available to all taxpayers in the city, including Polar.

Polar argues that the vessel tax is invalid because it is a general revenue tax imposed only on specific vessels. But the legitimacy of the vessel tax does not depend on whether the city chooses to tax other personal property. Alaska Statute 29.45.050(b)(2) provides that "[a] municipality may by ordinance … classify as to type and exempt or partially exempt some or all types of personal property from ad valorem taxes."

Citing *Transportation Co.* v. *Wheeling*,[49] Polar argues that in order to be valid, the tax must be applied to the vessels "in the same manner" as it is applied to other property. It reasons that because the vessel tax is the only personal property tax in effect in Valdez, the vessels are not being taxed in the same manner as other property. We disagree. *Wheeling* stands for the proposition that a charge based on the value of property is not a duty of tonnage.[50] Valdez taxes the vessels' value using the same mill rate it uses for all other property, including real property.[51] It thus taxes the vessels in the same manner as other property, because the tax is based on value.

Polar contends that the vessel tax is no more than a charge for entering the Valdez port to access

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[49] *Transp. Co.* v. *Wheeling*, 99 U.S. 273, 283-84 (1878) (noting that tax is only impermissible duty of tonnage when it is taxed as instrument of commerce without reference to value of property).

[50] *Id.*

[51] VMC 03.12.022(A), .010, .060, .170.

private facilities. Polar argues that the tax "applies only to vessels that call at the three private docking facilities in Valdez," and that it is "therefore … a charge for being in port and not using the City's docking facilities." (Emphasis in original.) It compares the tax to one struck down by the California Supreme Court in *City of Oakland* v. *E.K. Wood Lumber Co.*[52] But *E.K. Wood Lumber* is inapt. The fee there was a flat fee, not a tax based on the value of the property.[53] The fee was imposed on all vessels landing at Oakland, regardless of whether they had obtained a taxable situs there.[54] *E.K. Wood Lumber* therefore does not persuade us that the city's ad valorem property tax is an unconstitutional duty of tonnage.

D. Other Issues

The city asserts that the final judgment is defective because it violates separation of powers and "fails to sustain Valdez's vessel tax in accordance with the law." The city also contends that the ruling should have been modified to clarify that it applies only to Polar. Because we are reversing the judgment below and remanding for entry of judgment for the City of Valdez, we do not need to address these arguments.

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[52] *City of Oakland* v. *E.K. Wood Lumber Co.*, 292 P. 1076, 1080 (Cal. 1930) (holding that "ordinance requiring every vessel to land at the city's wharves, or, upon paying the same charge, be entitled to a permit to land at some other wharf in the city, is not a charge, as to vessels so landing elsewhere, for facilities or services furnished by the city" and thus was unconstitutional duty of tonnage).

[53] *Id.* at 1077-78.

[54] *Id.*

Reversal also makes it unnecessary to consider Polar's argument concerning attorney's fees. On remand the city will be the prevailing party for purposes of Alaska Civil Rule 82.

VI. CONCLUSION

We therefore REVERSE the judgment below and REMAND for entry of judgment for the City of Valdez.

APPENDIX B

SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

No. 3AN-00-9665CI

POLAR TANKERS, INC., AND SEARIVER MARITIME, INC.,
Plaintiffs,

v.

CITY OF VALDEZ
Defendant.

FINAL JUDGMENT

January 10, 2006

IT IS ORDERED that judgment is entered as follows:

1. The port-day apportionment formula contained in Valdez Resolution 00-19 violates the Due Process and Commerce Clauses and therefore is unconstitutional as applied to Polar Tankers, Inc., and SeaRiver Maritime, Inc.

2. Valdez Ordinance 99-17, codified as Valdez Municipal Code §3.12.020, does not violate the Tonnage Clause and therefore can remain in full force and effect; however, until the City adopts a constitu-

tional apportionment formula, it can not collect any further tax under Ordinance 99-17 from Polar Tankers, Inc., or SeaRiver Maritime, Inc.

3. The City is permitted to levy the vessel tax under Ordinance 99-17 against Polar Tankers, Inc., and SeaRiver Maritime, Inc., once a constitutional apportionment formula is adopted.

4. The City shall adopt a constitutional apportionment formula and use that constitutional apportionment formula to recalculate all taxes paid by Polar Tankers, Inc., and SeaRiver Maritime, Inc., respectively, under the unconstitutional apportionment formula contained in Resolution 00-15. For each tax year, the difference between the amount of tax previously paid by Polar Tankers, Inc., and the recalculated amount will constitute the refund the City shall pay to Polar Tankers, Inc., and the difference between the amount of tax previously paid by SeaRiver Maritime, Inc., and the recalculated amount will constitute the refund the City shall pay to SeaRiver Maritime, Inc.

5. Interest shall accrue on the refund amounts at the rate of 8% per annum from the date of each individual tax payment as provided in AS 29.45.500(a). The total of all refunds and interest due Polar Tankers, Inc., as of the date of this judgment will be known as the "Polar Base Refund", and the total of all refunds and interest due SeaRiver Maritime, Inc., as of the date of this judgment will be known as the "SeaRiver Base Refund".

6. Attorneys' fees and costs may be sought by any party believing they have a right to them pursuant to the Civil Rules.

7. The total of the Polar Base Refund plus the attorneys' fees and costs awarded to Polar Tankers, Inc., if any, will be known as the "Polar Total Judgment", and the total of the SeaRiver Base Refund plus the attorneys' fees and costs awarded to SeaRiver Maritime, Inc., if any, will be known as the "SeaRiver Total Judgment". Post-judgment interest at the rate of 8% per annum as provided in AS 29.45.500(a) shall accrue on the Polar Total Judgment and on the SeaRiver Total Judgment from the date of this judgment.

DATED at Anchorage, Alaska this 10th day of January, 2006.

/s/ Peter A. Michalski
PETER A. MICHALSKI
Superior Court Judge

APPENDIX C

SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

No. 3AN-00-9665CI

ALASKA TANKER COMPANY, LLC, ET AL.,
Plaintiff,

v.

CITY OF VALDEZ
Defendant.

ORDER

July 28, 2005

The constitutionality of an *Ad valorem* property tax is contingent upon the taxed property being physically within the taxing jurisdiction. Earlier in our history, courts took the position that only the home port could tax vessels. Though other jurisdictions could charge vessels for services rendered, general taxes could not be obtained from vessels passing through a jurisdiction just to do business.

As the world has changed, so has the law. Our courts now recognize that the economic value of a vessel is in the business that it does, and that those jurisdictions within which it does business should be

allowed to tax the vessel—at rates commensurate with rates paid by locals—for the proportionate period that the vessel is within the taxing jurisdiction.

The first of these notions—the home port doctrine—goes to the power to tax. One would not expect Wisconsin to try to impose real estate taxes on properties in South Dakota. But for property in Wisconsin the power to tax is a given. With real estate the question is pretty simple.

Movable property is more complicated. The United States Constitution prohibits taxing vessels for merely being in a State. The "tonnage clause" only allows fees to be charged to a vessel for particular services rendered to it. This provision protects an important means of interstate and international commerce. While this taxing power was reserved to the Congress, Congress could allow states to impose a tonnage tax.

As the means of commerce became railroads, trucking, and airplanes, as well as vessels, the meaning and application of the tonnage clause to these new means of carriage was tentatively applied. The economic need for States to tax the instrumentalities of wealth-gathering led courts to ultimately reject the home port doctrine for vessels. The law now allows a fairly-imposed and apportioned *ad valorem*, or "property tax," on vessels as well as other personal property.

Thus, the vessels here are lawfully subject to *ad valorem* tax for the period of time during which they do business in Alaska. But they are not subject to tax, for example, for merely passing through the inland passage of Alaska. The limit on such taxes is that they be fairly imposed and apportioned.

The tonnage clause under modern taxation law really only arises if a tax fails to conform to the requirements of Commerce and Due Process Clauses of the U.S. Constitution.

This court made a ruling on January 31, 2005 granting, in effect, partial summary judgment to the taxpayer plaintiffs on the tax at issue. The ruling held that the Valdez tanker tax ordinance failed to conform to constitutional requirements because it apportions the Valdez tax in such a way that Valdez improperly taxes for periods the tankers are not within its jurisdiction.

This court found the ordinance to run afoul of the due process and commerce clause because of its apportionment scheme. But, as noted by the City in its objection to the taxpayers' proposed judgment, the Municipal Code's severability clause saves the tax itself. The court's April 19, 2005 order interlineating the City's draft recognized the viability of the tax once a proper apportionment was established.

The parties sought a status hearing, the plaintiffs asking for a ruling that the tax violates the tonnage clause. The City argued that the tonnage tax doctrine is inapplicable, because the court has already analyzed the tax using the due process clause.

The City reaches this point by observing that if there is sufficient nexus between the taxed property and the taxing jurisdiction then the property is simply subject to taxation like any other property in the jurisdiction. Though the City gently chides the taxpayers with trying to restore the now defunct "home port doctrine," in some respects the concept is reinvigorated and relied on by the City itself with an added twist: a vessel is "at home" wherever it is.

When thinking about "home port" that way, of course, it is no longer the home port doctrine as understood in the law, but it may help taxpayers and taxing jurisdictions to understand the justification and extent allowable for the taxation of objects which may be here one day and there the next.

A remnant of the "old" home port doctrine survives to the extent that it is the home port that has taxing authority when the vessel is not in any other taxing authority.

The parties agree that a trial related to the tonnage tax is unnecessary. The court had apparently misunderstood the taxpayer's argument on this matter. The court understands and has found that the tax is not one for specific services to the vessels, such as docking fees or "wharfage." The court misunderstood the taxpayers to be arguing that no public services of the City which are paid for by the tax were available to the vessels. Perhaps the court should have rejected the argument as a matter of law, since, necessarily, a general revenue tax goes to fund all municipal services. In any case, the court took the vessels' argument to be that the various benefits or municipal services elsewhere listed by the City were not available to the vessel At argument on May 26, 2005 counsel for the taxpayers further clarified taxpayers' agreement that had the tax been properly apportioned, the City has jurisdiction to tax the tankers and that general City services were provided to the taxpayers.

North Slope Borough v. *Puget Sound T & Barge*, 598 P.2d 924, 926 (Alaska 1979), stands for proposition that even involuntary presence may result in being subject to taxation. There, a vessel caught in arctic ice in the borough could be taxed though some

things in the borough were not taxed. Use of services of the borough was irrelevant as long as they were "available." 598 P.2d at 928.

The City agrees there are no material facts at issue and for that reason the court vacates its conclusion that a trial is necessary. No material facts are in dispute on this issue of the complaint.

Under recent modern law the tonnage clause has rarely arisen, due primarily to the predominance of due process and commerce clause justification for taxes on vessels.

The heart of the taxpayers' objections to the tax is the narrow tailoring of it so that it is primarily paid by oil tankers in interstate commerce. The tax is certainly designed to insure it captures a part of the wealth created by the vessels. It is clearly not as generally applicable as the City argues.

Nevertheless, the tax does apply to all vessels over a certain length that don't utilize the City's dock and are not engaged in a fishery. The failure of the City to tax more property does not make its taxation of all property of this class an unconstitutional tonnage tax.

Summary judgment is granted to the City on the tonnage tax issue.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 28th day of July, 2005.

/s/ Peter A. Michalski
PETER A. MICHALSKI
Superior Court Judge

APPENDIX D

SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

No. 3AN-00-9665 Civil

POLAR TANKERS, INC. AND SEARIVER MARITIME, INC.,
Plaintiffs,

v.

CITY OF VALDEZ
Defendant.

SUMMARY JUDGMENT RULING

April 19, 2005

IT IS ORDERED that judgment is entered as follows:

1. The port-day apportionment formula contained in Valdez Resolution 00-15 is unconstitutional as applied to Polar Tankers, Inc. and SeaRiver Maritime, Inc.;

2. Valdez Ordinance 99-17, codified as Valdez Municipal Code § 3.12.020, remains in full force and effect unless and until a court of competent jurisdiction invalidates it; until a constitutional apportionment formula is adopted no further tax may be col-

lected under it until a constitutional apportionment funds is adopted no for other tax may be collected under it.

3. Valdez is permitted to levy the vessel tax under Ordinance 99-17 once a constitutional apportionment formula is adopted; and

4. The court has not heard argument on the amount of tax that may lawfully be retained and cannot determine the question in a vacuum.

5. The parties are to hold a teleconference with the court at their convenience to discuss the status of the case need for trial of issues related to tonnage, settlement prospects, etc.

DATED this 19th day of April, 2005.

/s/ Peter Michalski
Peter Michalski
Superior Court Judge

APPENDIX E

SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

No. 3AN-00-9665 Civil

POLAR TANKERS, INC., AND SEARIVER MARITIME, INC.,
Plaintiffs,

v.

CITY OF VALDEZ
Defendant.

DECISION AND ORDER

January 31, 2005

Parties agree that the tax at issue is an ad valorem property tax raising general revenue funds for the City of Valdez, which is a tax situs, but not a domicile, of the Plaintiffs' ships. On reconsideration, the Court has considered parties' original and supplemental briefings and oral arguments.

In order to pass Constitutional muster, the tax must conform to the Tonnage, Due Process, and Commerce Clauses. To avoid a finding that the tax violates the Tonnage Clause, the tax must not "impose a charge for the privilege of entering, trading in,

or lying in a port." *Clyde Mallory Lines* v. *State of Alabama ex. rel. State Docks Commission*, 296 US 261, 266 (1935). A tax will not violate the Tonnage Clause if it is imposed "for services rendered to and enjoyed by the vessel, such as pilotage, wharfage, or charges for the use of locks on a navigable river, or fees for medical inspection." *Id.* (citations omitted). Also, the Tonnage Clause will not invalidate charges to compensate a local jurisdiction for the cost of providing emergency support services to ships, even if those ships do not actually call upon such services. *New Orleans Steamship Association* v. *Plaquemines Port, Harbor & Terminal Dist.*, 690 F.Supp. 1515 (E.D. La., 1988).

To survive scrutiny under the Due Process and Commerce Clauses, the tax must be fairly apportioned by not creating even the risk of taxation by both a domiciliary state and a non-domiciliary state. *See Central Railroad Company of Pennsylvania* v. *Commonwealth of Pennsylvania*, 370 US 607 (1962). The burden rests on the taxpayer to show the risk of multiple taxation. *Id.* at 613.

Parties dispute, as a factual matter, whether the City provides services to the ships so as to escape a finding that the tax is an unconstitutional tonnage duty.

However, there is no need for the Court to rule on this factual matter because the tax creates a risk of multiple taxation by both domiciliary and non-domiciliary states, and is therefore unconstitutional under the Due Process and Commerce Clauses.

The problem with the tax is its method of calculating apportionment. Valdez' apportionment formula is: (time a ship spends in Valdez) / (all time

minus time spent in international waters). This denominator is problematic because it ignores the possibility that a domiciliary state may tax a ship while it is in international waters. *See Central Railroad*, 370 US 611 (1962) ("This Court has consistently held that the State of domicile retains jurisdiction to tax tangible personal property which has 'not acquired an actual situs elsewhere") (citations omitted).

For example, SeaRiver's ships are domiciled in Texas; thus, Texas may enact a property tax on SeaRiver's ships while they are in international waters. Since Valdez is already taxing those ships for part of the time they actually spend in international waters, there is risk of multiple taxation.

Plaintiffs' Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 31st day of January 2005.

/s/ Peter A. Michalski
PETER A. MICHALSKI
Superior Court Judge

APPENDIX F

SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

No. 3AN-00-9665CI

POLAR TANKERS, INC. AND SEARIVER MARITIME, INC.,
Plaintiffs,

v.

CITY OF VALDEZ
Defendant.

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

July 26, 2004

Plaintiffs Polar Tankers, Inc., and SeaRiver Maritime, Inc. ("Plaintiffs") have moved for summary judgment on the issues in this case. The basis for the motion is that the City of Valdez's Ordinance 99-17, codified at Valdez Municipal Code Section 3.12.020 (the "Tanker Tax"), violates the Tonnage, Due Process, and Commerce Clauses of the United States Constitution. Defendant City of Valdez ("the City") opposes plaintiffs' motion and cross-moves for summary judgment. The City argues that it is entitled to judgment as a matter of law that the Tanker Tax does not violate the Tonnage, Due Process, and

Commerce Clauses of the U.S. Constitution. The plaintiffs' motion is **GRANTED**, and the City's cross-motion is **DENIED**. This court finds that the City's Tanker Tax violates the Tonnage Clause of the Constitution because it effectively charges only oil tankers, docking at private docks, for the privilege of entering municipal waters. Because the Tanker Tax violates the Tonnage Clause, this order does not consider whether the tax also violates the Due Process and Commerce Clauses.

DISCUSSION:

VII. Factual Background

A. The Tanker Tax

The City of Valdez imposes a property tax on property not exempted from taxation by city, state, or federal law. Prior to the 2000 tax year, the City exempted personal property from the property tax. In November 1999, effective in the 2000 tax year, the City adopted an ordinance that repealed the personal property tax exemption for a limited class of property:

> 3.12.020 **Taxation of Personal Property**
>
> A. Property subject to taxation. Except as otherwise provided in this chapter, the following personal property which has a tax situs within the city is subject to taxation:
>
> 1. Boats and vessels of at least 95 feet in length for which certificates of documentation have been issued under the laws of the United States are subject to taxation at their full and fair value unless the vessel is used primarily in some aspect of commercial fishing or docks exclusively at the Valdez Con-

> tainer Terminal where is subject to municipal dockage charges.[1]

All other personal property remained exempt from taxation.

The City thus targeted a specific class of personal property for taxation: federally documented vessels of at least 95 feet in length. From the limited class the City then exempted from taxation vessels engaged in some aspect of commercial fishing and those that dock exclusively at the Valdez Container Terminal, where they pay the City municipal docking charges. The City subsequently interpreted the second exemption to also apply to vessels that dock exclusively at other City-owned docks.

This enactment climaxed a long-term effort by the City to address a serious financial dilemma. A significant portion of the available tax base located in the City is oil and gas property including a section of the Trans Alaska Pipeline System ("TAPS") and the Valdez Marine Terminal of the Pipeline (the "TAPS Terminal"). This property is assessed by the State of Alaska under AS 43.56 and then taxes are shared with the City. For several years, this portion of the City's tax base had been declining rapidly and was scheduled to continue to do so pursuant to a depreciation formula negotiated between the State of Alaska and the TAPS Owners (a consortium of oil pipeline companies that own the TAPS Terminal) in the mid-1980s. During the five years before the enactment of the Tanker Tax, municipal budgets had decreased by approximately 25%. In fact, in 1997, an

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[1] Valdez Ordinance 99-17 (codified at Valdez Municipal Code 3.12.020 A).

earlier version of the tax had been enacted to address this revenue decline but was withdrawn in an effort to work out a compromise with the effected shippers. But at the end of 1999, the City Council decided that the Tanker Tax needed to be reinstated.

B. Application of the Tanker Tax to Plaintiffs

In closed tax years 2000, 2001, 2002, and 2003 (and the current tax year), the plaintiffs owned or operated vessels subject to the Tanker Tax. Specifically, the plaintiffs own or operate tankers that take on cargoes of crude oil at the Valdez Marine Terminal of the Trans Alaska Pipeline System (the "TAPS Terminal").

The TAPS terminal is located within the territorial boundaries of the City of Valdez on the south shore of Port Valdez. The TAPS Owners own the terminal, including tanks, tanker berths and related facilities. The TAPS Owners' acquisition of the TAPS terminal site and the construction of the terminal facilities were financed in large part by tax-exempt revenue bonds issued by the City of Valdez.

Plaintiff Polar Tankers, Inc. ("Polar") is a corporation organized under the laws of Delaware with its principal place of business in Long Beach, California. Its primary business is the operation of tankers that transport cargoes of crude oil taken on at the TAPS Terminal. Polar is a wholly owned subsidiary of ConocoPhillips Company. Polar makes one of the tankers it operates available at the TAPS Terminal within a specified time frame and then delivers the cargo of crude oil to locations identified by the customer in the mainland United States or Hawaii.

Plaintiff SeaRiver Maritime, Inc. ("SeaRiver") is a corporation organized under the laws of Delaware

with its principal place of business in Houston, Texas. SeaRiver has engaged in various aspects of tanker and barge transportation of crude oil and refined oil products, primarily for ExxonMobil Corporation. SeaRiver is a wholly owned subsidiary of ExxonMobil Corporation. SeaRiver is subject to the Tanker Tax because it makes one of its vessels available at the TAPS Terminal to take on crude at a time specified by ExxonMobil. It then delivers the cargo of crude to a location specified by ExxonMobil in the mainland U.S., Hawaii, or a foreign country.

The tankers operated by the plaintiffs on which they have paid the Tanker Tax have varied somewhat over time, but all have been documented vessels over 95 feet in length. The homeports of the tankers for purposes of documentation vary, but no vessel has had Valdez as her homeport.

Consistent with the requirements the City imposed, the plaintiffs reported to the City the information it used to apportion the assessed values to the City. The City levied taxes based on the apportionment factors for tax years 2000 through 2003.[2] The plaintiffs paid these taxes under protest.[3] Plaintiffs bring this action on the grounds that the Tanker Tax violates the Tonnage, Due Process, and Commerce Clauses of the U.S. Constitution.

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[2] In 2000, the Tanker Tax was assessed on 28 vessels. Of the 28 vessels, 24 were oil tankers. The total tax paid for the year 2000 was $1,833,709.39, which constituted about 10.1% of the total tax revenues received by the City for that year.

[3] In 2000, Polar paid $440,221.24, and SeaRiver paid $529,670.60.

VIII. Standard of Review

Under Alaska Rule of Civil Procedure 56(c), summary judgment is proper when there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law. Issues concerning the constitutionality of a law are questions of law.[4]

IX. The Tonnage Clause

The Tonnage Clause provides in part: "No state shall, without the consent of Congress, lay any duty of tonnage … "[5] The purpose of this prohibition is to supplement the prohibitions against duties on imports and exports, also contained in Article I, Section 10:

> If the states had been left free to tax the privilege of access by vessels to their harbors the prohibition against duties on imports and exports could have been nullified by taxing the vessels transporting the merchandise.[6]

The prohibition extends to all ships and vessels employed in the coasting trade, whether employed in commercial intercourse between ports in different states, or between ports in the same state, and it makes no difference whether the ships or vessels taxed belong to the citizens of the state which levies the tax or to the citizens of another state.[7]

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

[5] United States Constitute, Article I, Section 10.

[6] *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Commission*, 296 U.S. 261, 265 (1935).

[7] 70 Am. Jur. 2d. Shipping § 82 (citations omitted).

The term "tonnage" refers to the internal cubic capacity of the vessel, but the prohibition is not limited to exactions imposed on the basis of capacity.[8] The United States Supreme Court has ruled that the Tonnage Clause prohibits:

> all taxes and duties, regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in or lying in a port.[9]

The prohibition, however, does not extend to charges made by a state or local authority, even if graduated by tonnage, for services rendered to and enjoyed by vessels, for the use of facilities locally provided, or for the purpose of meeting the expense incident to the general supervision of the port and the execution of rules and regulations for the proper accommodation and safety of vessels at the port.[10] But if the charge attempted to be imposed is one which, by the terms of the statute or ordinance imposing it, may become due from the vessel, without any services being rendered to it, or without the enjoyment of any special benefits, and from the mere fact that it has arrived in a port of the state, it is a charge of tonnage, and therefore not collectible.[11]

The City's Tanker Tax violates the Tonnage Clause. The City admits that the tax was instituted as a means to generate general revenue, not to collect compensation for specific services. The United

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[8] *Id.* (citations omitted).

[9] *Id.* at 265-66.

[10] 70 Am. Jur. 2d. Shipping § 82 (citations omitted).

[11] *Id.* (citations omitted).

States Supreme Court has held that the Tonnage Clause prohibits reliance on tonnage duties to raise general revenues.[12]

The City argues that the Tanker Tax is not a tonnage duty. Instead, the City asserts that it is a fairly apportioned, nondiscriminatory *ad valorem* personal property tax, based on the value of the property. However, while the term "tonnage" refers to the internal cubic capacity of the vessel, the prohibition is not limited to exactions imposed on the basis of capacity.[13] Regardless of the form of tax the City instituted, the reality of the tax is that it almost exclusively burdens large oil tankers that dock at private facilities merely for coming within the City's territorial boundaries. In fact, large vessels, and only large vessels, are the only personal property taxed by the City. In little sense then can it be considered a property tax of general application falling upon oil tankers along with other types of property. This is a tonnage duty.

But even tonnage duties are constitutionally permissible in some circumstances. As described above, charges made by state or local authorities are allowed, even if graduated by tonnage, for services made available to vessels. While the City cites the many services it offers the tankers, admittedly the

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[12] *Clyde Mallory*, 296 U.S. at 265-66.

[13] *See supra* fn. 12. *See also Scandinavian Airlines System, Inc.* v. *Los Angeles County*, 363 P.2d 25, 40 (Cal. 1961)(fact that case involved an *ad valorem* tax rather than tax based upon tonnage did not alter underlying principle that duty imposed upon instrumentalities of commerce, which is not a charge for a specific services rendered, amounts to an impermissible tonnage duty levied as condition to being allowed to enter or leave port).

purpose of the Tanker Tax was not to charge the oil tankers for the use or potential use of these services, but instead was to raise general revenue. Thus, the tax operates to charge the tankers for the mere fact that they have arrived in the City's port. Therefore, the tax is an impermissible charge of tonnage and not collectible.

The court rules that Ordinance 99-17 is unconstitutional and invalid due to its violation of the Tonnage Clause of the United States Constitution. The City of Valdez is ordered to refund the plaintiffs all sums plaintiffs have paid to the City of Valdez under Ordinance 99-17. The City is ordered to cease from imposing or collecting from plaintiffs taxes based upon Ordinance 99-17.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 26th day of July, 2004.

/s/ Peter A. Michalski
PETER A. MICHALSKI
Superior Court Judge

APPENDIX G

CITY OF VALDEZ, ALASKA
Ordinance No. 99-17

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF VALDEZ, ALASKA, AMENDING CHAPTER 3.12 OF THE VALDEZ CITY CODE TO ENACT A PERSONAL PROPERTY TAX ON VEHICLES

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF VALDEZ, ALASKA, that:

Section 1: Section 3.12.020 of the Valdez City Code is hereby repealed and reenacted to read as follows:

3.12.020 Taxation of Personal Property

A. Property subject to taxation. Except as otherwise provided in this chapter, the following personal property which has a tax situs within the city is subject to taxation:

1. Boats and vessels of at least 95 feet in length for which certificates of documentation have been issued under the laws of the United States are subject to taxation at their full and true value unless the vessel is used primarily in some aspect of commercial fishing or docks exclusively at the Valdez Container Terminal where it is subject to municipal dockage charges.

B. Pro ration of personal property taxes. Personal property shall be assessed once a year as of January 1 of the assessment year. Assessments on personal property shall not be pro rated for the assessment year except as follows:

1. Vessels operated in intrastate, interstate or foreign commerce that have acquired a taxable situs elsewhere, shall be assessed on an apportionment basis. The assessor shall allocate to the City the portion of the total market value of the property that fairly reflects its use in the City. The assessor shall establish formulas for calculating the proportion of the total market value allocated to the City. The assessment formula shall be approved by the city council.

C. Tax situs of personal property.

1. All personal property which has a tax situs within the city on January 1 of the tax year is subject to taxation. Tax situs means the principal place where an item of personal property is located or used, having due regard to the residence and domicile of its owner, the place where it is registered or licensed, whether it is taxed by other jurisdictions, and any other factors which may indicate the principal location of the property.

2. Tax situs shall be conclusively presumed to be within the city when the property, although not within the city on January 1 of the assessment year, either;

a. Has been or is usually, kept or used within the city, whether regularly or irregularly; or

b. Travels to or within the City along fixed and regular routes; or

c. Has been or is kept or used within the city for any ninety (90) days or more, whether consecutive or otherwise, in the twelve (12) months preceding the January 1 assessment;

d. Has been or is regularly kept or used within the city for any length of time preceding January 1 of the assessment year if such presence or use is intended to be permanent. The term "permanent", as used in this subsection means for ninety (90) days or more, whether consecutive or otherwise, within the assessment year.

e. Is necessary for business transactions or takes on cargo within the City of Valdez if such transactions or cargo have a cumulative value in excess of One Million Dollars ($1,000,000) during the tax year.

Section 2: Section 3.12.022 of the Valdez City Code is hereby enacted to read as follows:

3.12.022 Taxation of Real Property.

A. Property subject to taxation. For the purposes of this chapter, real property subject to taxation includes, among other things, trailers and mobile homes, and lean-to and similar structures attached or contiguous thereto.

B. Trailers and mobile homes. The words "trailers and mobile homes" include all forms of housing adaptable to being moved by a power con-

nected thereto, and which are or can be used for residential, business, commercial or office purpose; provided, however, that those trailers which are:

1. Used for camping or recreational purposes only; or

2. Not affixed to the site and not connected with utilities, shall be considered to be personal property and exempt from taxation.

C. Conclusive presumption. A trailer or mobile home is conclusively presumed to be affixed to the land and real property for the purposes of taxation when it has remained at a fixed site for more than ninety (90) days.

D. Ownership. When the ownership of a trailer or mobile home and attachments and appurtenances is different from the land upon which it rests, the city may, in its discretion assess and tax the ownership separately.

Section 3: Section 3.12.030 of the Valdez City Code is hereby repealed and reenacted to read as follows:

3.12.030 Property Exempt from Taxation.

A. The following property is exempt from general taxation:

1. Property exempted by state or federal law including all properties listed in A.S. 29.45.030;

2. All other personal property not subject to taxation under Section 3.12.020(A)(1);

3. The real property owned and occupied as the primary residence and permanent place

of abode by a resident sixty-five(65) years of age or older is wholly exempt from taxation. Only one exemption may be granted for the same property and, if two or more persons are eligible for an exemption for the same property, the parties shall decide between or among themselves who is to receive the benefit of the exemption. Real property may not be exempted under this subsection if the assessor determines, after notice and hearing to the parties, that the property was conveyed to the applicant primarily for the purpose of obtaining the exemption. The determination of the assessor may be appealed under A.S. 44.62.560-44.62.570.

a. An exemption may not be granted under subsection (A)(3) of the this section except upon written application for the exemption on a form approved by the state assessor for use by local assessors. The claimant must file the application no later than January 15 of the assessment year for which the exemption is sought. The city council for good cause shown may waive during a year the claimant's failure to make timely application for exemption for that year and authorize the assessor to accept the application as if timely filed. The claimant must file a separate application for each assessment year in which the exemption is sought. If an application is filed within the required time and is approved by the assessor, the assessor shall allow an exemption in accordance with the provisions of this section. If a

> failure to file by January 15 of the assessment year has been waived as provided in this subsection and the application for exemption is approved, the amount of tax that the claimant has already paid for the assessment year for the property exempted shall be refunded to the claimant. The assessor shall require proof in the form the assessor considers necessary of the right and amount of an exemption claimed under subsection(A)(3) of this section. The assessor may require proof under this section at any time.

Section 4: Section 3.12.070(E) of the Valdez City Code is hereby repealed and reenacted to read as follows:

> The assessor may require each person having ownership or control of or an interest in property to submit a return in the form prescribed by the assessor, based on property values existing on January 1, except as otherwise provided in this chapter. By written notice, the assessor may require a person to provide additional information within 30 days.

Section 5: Section 3.12.070(F) of the Valdez City Code is hereby enacted to read as follows:

> The assessor is not bound to accept a return as correct. The assessor may make an independent investigation of property returns or of taxable property on which no return has been filed. In either case, the assessor may make the assessor's own valuation of the

taxable property and this valuation is prima facie evidence of the value of the property.

1. For investigation, the assessor or the assessor's agent may enter a premise during reasonable hours and may examine property on the premise. The assessor or the assessor's agent may examine all property records involved. A person shall, on request, furnish to the assessor or the assessor's agent every facility and assistance for the investigation. The assessor may seek a court order to compel entry and production of records needed for assessment purposes.

2. An assessor may examine a person on oath. On request, the person shall submit to examination at a reasonable time and place selected by the assessor.

Section 6: Section 3.12.072 of the Valdez City Code is hereby enacted to read as follows:

Violations: Penalties.

For knowingly failing to file a tax statement required by the assessor, or knowingly making a false statement required by this chapter relative to the amount, location, kind, or value of property subject to taxation with intent to evade the taxation, a person having ownership or control of or an interest in the property subject to taxation shall be subject to a fine up to $1,000 or imprisonment for 90 days.

Section 7: This ordinance takes effect January 1, 2000.

PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF VALDEZ, ALASKA, this 15th day of November, 1999.

CITY OF VALDEZ, ALASKA
By: /s/ David S. Cobb
David S. Cobb, Mayor

APPENDIX H

CITY OF VALDEZ, ALASKA
Resolution No. 00-15

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF VALDEZ, ALASKA ESTABLISHING A METHODOLOGY FOR APPORTIONING THE PERSONAL PROPERTY TAX ON VESSELS OVER 95 FEET IN LENGTH

WHEREAS, each year since 1985, the oil property (as defined in A.S. 43.56 et seq.) in Valdez, as assessed by the State of Alaska, has declined in value based upon a methodology agreed to between the State and the Trans Alaska Pipeline System (TAPS) owners; and

WHEREAS, the impact of this annual devaluation has caused the City of Valdez continued fiscal uncertainty and required the City to reduce its budget by approximately 25% over the past 5 years; and

WHEREAS, other similar terminal facilities are not devalued each year, as is the case with the Alyeska marine terminal in Valdez; and

WHEREAS, efforts by the City over the past 10-plus years to establish a floor in the value of the TAPS property in Valdez has been unsuccessful; and

WHEREAS, the City has taken substantial steps to bring stability to its tax base. Such efforts include financial support and participation in the creation of the Alaska Gasline Port Authority to build or cause

to be built a gasline from Alaska's North Slope to an LNG plant located in Valdez; and

WHEREAS, with the closing of the State of Alaska Harborview Developmental facility in Valdez, the City is faced with having to build its own stand-alone hospital; and

WHEREAS, the City is faced with having to replace the existing Junior High School; and

WHEREAS, on this November's statewide election is a proposition to create a statewide tax cap of 10 mills which would decrease the property tax-generated revenues received by the City by 50%; and

WHEREAS, funds received from an ad valorem tax on vessels over 95 feet in length is intended to offset the fiscal instability resulting from the continued decline in the Valdez tax base and to be able to obtain fiscal stability to allow for the funding of the building of a hospital, school, and the needed repairs of city infrastructure and facilities; and

WHEREAS, on November 15, 1999, the City Council adopted Ordinance No. 99-17, which provided that a documented vessel over 95 feet in length shall be taxed at its full and true value unless it is used primarily in commercial fishing or docked exclusively at the Valdez Container Terminal; and

WHEREAS, the ordinance provides that the value of a vessel that has acquired a tax situs elsewhere in addition to its tax situs in Valdez, shall be assessed on an apportioned basis; and .

WHEREAS, the Ordinance directs the Assessor to establish formulas for calculating the proportion of the total value of a vessel that fairly reflects its use

in the City, and further requires that the formula be approved by the City Council; and

WHEREAS, the Assessor has developed an apportionment formula that determines value on the basis of a ratio that compares the time a vessel spends in port in Valdez with the total time spent by the vessel in all ports; and

WHEREAS, the City Council desires to approve the formula.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF VALDEZ, ALASKA, that

Section 1: Personal property tax on a vessel over 95 feet that has established a tax situs in places outside of Valdez shall be apportioned as follows:

A. A vessel owner will pay the personal property tax based on 100 percent of the assessed value, times a ratio determined by the number of days spent in Valdez divided by the total number of days spent in all ports, including Valdez, where the vessel has acquired a situs for taxation;

B. The number of days in Valdez and other ports shall be determined by using the number of days spent in each port during the year prior to the tax;

C. Days in port do not include periods when a vessel is tied up because of strikes or withheld from the Alaska service for repairs;

D. The term "days in port" shall mean the time the vessel is within the city limits of the taxing jurisdiction until the vessel is outside that taxing jurisdiction's boundaries. Any

portion of a day a vessel is within the taxing jurisdiction's boundaries, that vessel will be considered to be in the city limits for that entire day.

Section 2: If a taxpayer claims that in a particular case the apportionment formula approved in this Resolution does not reasonably represent the portion of the total value of the vessel that should be apportioned to the taxing situs of Valdez, the taxpayer may petition, or the assessor may require, the use of another apportionment formula that will more fairly represent how the value should be apportioned among Valdez and other taxing jurisdictions.

PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF VALDEZ, ALASKA, THIS 1st DAY OF May, 2000.

CITY OF VALDEZ, ALASKA
/s/ David C. Cobb
David C. Cobb, Mayor