


CHANDLER, FALCONER, MUNSON & CACCIOLA, LLP

ATTORNEYS AT LAW
SUITE 302
911 WESTEIGHTH AVENUE
ANCHORAGE, ALASKA 99501
TELEPHONE: (907) 272-8401
FACSIMILE: (907) 274-3698
bcf@bcfaklaw.com

MEMORANDUM

TO: Annette Kreitzer
FROM: Charles A. Cacciola 
RE: Prohibiting Transportation of Ore Across Lutak Dock
DATE: March 21, 2024

Haines Borough is considering a charter amendment that would prohibit the use of Lutak Dock for transportation of mineral ores. You asked if such a restriction on the use of the dock presents an unconstitutional restriction on trade or may suffer from similar Constitutional infirmity.

We have concluded that the Commerce Clause does not prohibit the proposed limitation on the use of the Lutak Dock.

State and municipal¹ economic regulations restricting trade or commerce can run afoul of the U.S. Constitution, even on issues where federal law is silent. Federal courts sometimes hold that these local restrictions violate the Commerce Clause in Article I § 8 of the U.S. Constitution, under a doctrine known as the “Dormant Commerce Clause.” As the U.S. Supreme Court recently explained, “state laws offend the Commerce Clause when they seek to build up domestic commerce through burdens upon the industry and business of other States regardless of whether Congress has spoken. At the same time, though, [...] absent discrimination, a State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to the interests of its citizens.”²

¹ Either state laws or municipal ordinances can be unconstitutional under the Commerce Clause. *See, e.g., Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (“The party challenging the validity of a state statute or *municipal ordinance* bears the burden of showing that it discriminates against, or places some burden on, interstate commerce.”) (emphasis added).

² *National Pork Producers Council v. Ross*, 598 U.S. ___, at p. 7 (May 11, 2023) (internal citations, brackets, and quotation marks omitted).

The Supreme Court has reiterated that for state or local economic restrictions to run afoul of the Commerce Clause, discrimination against commerce to or from another state is ordinarily required:

“Today, this antidiscrimination principle lies at the very core of our dormant Commerce Clause jurisprudence. In its modern cases, this Court has said that the Commerce Clause prohibits the enforcement of state laws driven by economic protectionism that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.”³

The Supreme Court rejected arguments that a state or local law is unconstitutional merely because it places an “excessive ... burdens” on out-of-state economic activity or has “extraterritorial” effects on commerce outside of that state’s borders.⁴ The Supreme Court has noted that its decisions should not be read to suggest that “regulating the sale of an ordinary consumer good within its own borders on nondiscriminatory terms” is unconstitutional.⁵

Applying this guidance to the present issue—a charter amendment restricting the Lutak dock—there is no plausible claim that these restrictions violate the U.S. Constitution. First, there is no discrimination in intent or effect. The proposed charter amendment does not treat ore coming from or to one state differently than ore coming from or to Alaska. It does not apply different rules or handling requirements depending on the ore’s origin nor require Alaska businesses to be involved in ore transport before it can be handled at the Lutak dock.⁶ Moreover, the ore is coming from outside the country,⁷ rather than from a different state. Nor does transportation to or from Canada alter this analysis. While closing Lutak dock to ore may make it more costly for this ore to make it from Canada to its final destination (assuming somewhere in the Lower 48), the mere side-effect that policies in one state place an economic burden on the economy of another state does not violate the Dormant Commerce Clause, as explained above.

Moreover, with the borough restricting activity on its own dock is not a widespread economic regulation, but rather the borough’s decision on the use of its own property. We were able to find any published judicial decision in which a municipality’s actions or restrictions *as a property owner* were challenged as unconstitutional for burdening or interfering with interstate

³ *National Pork*, 598 U.S. ___ at p.7 (internal citations and quotation marks omitted).

⁴ *National Pork*, 598 U.S. ___ at pp. 15-16.

⁵ *National Pork*, 598 U.S. ___ at p.29.

⁶ Compare *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984) (striking down an Alaska regulation that required all timber harvested on state lands to be processed within the State prior to export).

⁷ A state’s ability to restrict foreign commerce is severely limited, however, where the state (or local government) imposes a tax or import-export restriction “burdening foreign commerce.” See *South-Central Timber Development, Inc. v. Wunnicke*, 467 US 82, 101 (1984) (citations omitted). Restrictions on Lutak dock, however, are not taxes or restrictions on imports or exports to or from the Canadian border.

commerce.⁸ This is unsurprising given the broader principle that “...when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause.”⁹ If a local government is not restricted by the Commerce Clause when acting as a market participant, it follows that it is not restricted when acting as an property owner regulating the business that it wants to occur on its own property.

One final consideration is that even if the Lutak dock charter amendment were viewed as an economic regulation, under broader requirements of the Alaska and U.S. Constitutions, it is valid, like other economic or business regulations, unless opponents can “show[] that there is no rational basis for the challenged legislation.”¹⁰ Any reasonable and documented justification – such as concerns over environmental or safety liability, noise, or other disruption to the borough’s property – satisfies this requirement.

Please let us know if you have any further questions regarding this matter.

⁸ The closest case to this argument is *South-Central Timber Development*, where a State of Alaska regulation required that all lumber harvested from state lands be processed by in-state lumber mills before shipment. The Court found Alaska was not merely regulating use of its property, or attaching conditions to its contracts to harvest lumber, but rather discriminating in favor of private in-state lumber mills around the state by restricting when lumber could be exported out of state. *See South-Central Timber*, 467 U.S. at 94-95. No such concerns are present in the Lutak dock restriction.

⁹ *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 208 (1983) (internal citations omitted).

¹⁰ *Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough*, 527 P. 2d 447, 452 (Alaska 1974).