

Fairbanks North Star Borough  
Department of Law  
P.O. Box 71267  
Fairbanks, Alaska 99707  
Phone: (907) 459-1318

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
FIRST JUDICIAL DISTRICT AT KETCHIKAN

KETCHIKAN GATEWAY BOROUGH,  
And Alaska municipal corporation and  
political subdivision; AGNES MORAN, an  
individual, on her own behalf and on behalf  
of her minor son; JOHN COSS, a minor;  
JOHN HARRINGTON, and individual; and  
DAVID SPOKELY, an individual;

Plaintiffs,

vs.

STATE OF ALASKA; MICHAEL HANLEY,  
COMMISSIONER OF ALASKA  
DEPARTMENT OF EDUCATION AND  
EARLY DEVELOPMENT, in his official  
capacity;

Defendants.

Superior Court Case No. 1KE-14-16 CI

**AMICUS CURIAE FAIRBANKS NORTH STAR BOROUGH'S REPLY IN SUPPORT  
OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO  
DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT**

The State of Alaska's Opposition/Cross Motion essentially relies on two arguments.<sup>1</sup> First, the State claims that the required local contribution cannot possibly be a source of public revenue because the state does not ever actually sully its hands with the extracted funds or statutorily demand that its political subdivisions, which rely

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<sup>1</sup> In addressing these arguments, the Fairbanks North Star Borough attempts to avoid the wholesale remaking or repeating the arguments made in the *Plaintiffs' Reply In Support of Motion For Summary Judgment and Opposition to Defendants' Cross Motion for Summary Judgment* except where those arguments are necessary for logical thought and flow. The omitted arguments, however, are intended to be adopted and incorporated by the Fairbanks North Star Borough.

on taxation as their principal source of revenue, actually raise the funds by taxing its citizens. As more fully discussed below, this argument catapults form over substance.

Second, the State complains that Plaintiffs' arguments furtively rest on the unasserted belief that the State must fully fund education. An assertion that the State's chosen funding mechanism unconstitutionally relies on a dedicated tax does not depend, legally or factually, upon whether or not the State must **fully** fund education. As discussed below, however, the fact that the State undeniably bears **some** obligation to fund education (a penny or a pound) not only establishes the underlying state purpose of the challenged statutory funding scheme, it forecloses the State's effort to recast its chosen coercive funding system as a voluntary, legal matching grant or other incentive program.

**I. THE REQUIRED LOCAL CONTRIBUTION IS A SOURCE OF PUBLIC REVENUE AS CONTEMPLATED BY THE ANTI-DEDICATION CLAUSE.**

Essentially the State argues that since it has devised an educational funding structure that commandeers the municipal tax system for the state purpose of providing direct educational funding in a manner that bypasses the state legislature's annual appropriating power, it has somehow avoided classification of those funds as a state tax or revenue. This "taxation by proxy scheme" thus enables the State to re-brand a state law mandating that borough taxpayers contribute "the equivalent of a 2.65 mill tax levy on the full and true value of the taxable real and personal property in the district"<sup>2</sup> as "neither a tax nor a state asset of any kind."<sup>3</sup>

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<sup>2</sup> AS 14.17.410(b)(2).

<sup>3</sup> State's Opposition to Ketchikan Gateway Borough's MSJ and Cross MSJ at 11.

A. A Tax by Any Other Name is Still a Tax—Not a “Formula”.

Whether something constitutes a tax “is determined from its nature and not its name.”<sup>4</sup> Similarly, Alaska’s Supreme Court refused to narrowly constrain the definition of “tax” as used in the Alaska’s dedicated funds clause, holding that it applied to any public revenue in order to ensure that the framer’s use of the term would serve its intended purpose.<sup>5</sup> One of the hallmarks of a tax, as opposed to a grant, fee or a formula, is “that it is not a voluntary payment or donation, but an enforced contribution, exacted pursuant to legislative authority in the exercise of the taxing power.”<sup>6</sup> Notably, here:

(1) State law does not merely suggest, imply or encourage Municipalities to make this payment. State law mandates the payment.<sup>7</sup> Nothing about it is voluntary.

(2) The State exacts payment only from municipal districts -- the only legal entities to which the State has constitutionally delegated taxing powers<sup>8</sup> in obvious recognition that the taxing power is a necessary predicate to payment of the required “contribution.”

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<sup>4</sup> Eugene McQuillin, *The Law of Municipal Corporations* §44.2 at 16 (3d ed. 2013).

<sup>5</sup> *State v. Alex*, 656 P.2d 203 (Alaska 1982).

<sup>6</sup> McQuillin’s 344 at 17.

<sup>7</sup> See, AS 14.12.020(c) (“The borough assembly for a borough school district, and the city council for a city school district, shall provide the money that must be raised from local sources to maintain and operate the district.”) and AS 14.17.410(b)(2) which describes the local contribution as “required” and distinguishes it from the voluntary payments which a municipality “may make” in AS 14.17.410(c).

<sup>8</sup> Alaska Const. art. X, § 2.

(3) The State's statutory scheme mandates payment by the incorporated municipality that "is the equivalent of a 2.65 mill tax levy on the full and true value of the taxable real and personal property in the district."<sup>9</sup>

(4) The municipal payment is directly tied to and floats with the total value of the municipal property tax base, *i.e.* the amount of the payment is determined by municipal taxable values.<sup>10</sup> As the State previously argued in *State v. Alex*, one distinction of a general revenue tax is its direct tie to ability to pay.<sup>11</sup>

(5) Once the local funds are collected and paid by the Borough, state law asserts state authority over the funds and subjects the funds to the general supervision of the State, including the right to use the funds as it deems necessary to improve instructional practices in the district.<sup>12</sup> Moreover, according to the State, it, not the Borough Assembly, has ultimate control over the local taxpayer funds paid pursuant to the state-mandated local contribution.<sup>13</sup> State control over these funds, nominally appropriated by the Borough Assembly at the demand of the State, even apparently extends to the legal right to *prohibit* the Borough Assembly from reappropriating or reallocating any unused funds at the end of the budget year.<sup>14</sup> Thus, according to the State, their authority and power over these funds legally trumps even the local

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<sup>9</sup> AS 14.17.410(b)(2).

<sup>10</sup> AS 14.17.510.

<sup>11</sup> 646 P.2d 203, 209 (Alaska 1982).

<sup>12</sup> AS 14.07.030(14)-(15) and AS 14.07.020(a)(16).

<sup>13</sup> See, Memorandum of Legislative Counsel (Feb. 25, 2013) attached as Exhibit 2 to the *Affidavit of A. Rene Broker submitted in Support of FNSB's Reply and Opposition*.

<sup>14</sup> *Id.* at 2 (asserting state law can restrict and prohibit the Assembly from "the reallocation or reappropriation of local contributions for another purpose").

legislative body's constitutionally granted legislative powers.<sup>15</sup> In other words, once the local governing body collects and pays the state-demanded funds, local taxpayer money converts into state money subject to State departmental supervision, use and control.

Accordingly, this statutory funding scheme does not merely "provide a formula for the required amount of local contribution"<sup>16</sup> as argued by the State. It is, instead, an enforced contribution, exacted pursuant to the State's legislative authority which essentially utilizes and wields the taxing arm of the municipality on its citizens in order to raise education funds over which the State exercises predominant, supervisory legal control. By all generally accepted definitions, that is a tax resulting in public revenue dedicated to a specific state purpose, not a mere academic formula.

B. The State Disingenuously Asserts that the Legally Required Contribution is not a Tax Because a Municipality can Finance the Local Contribution Anyway it Wishes.

Although the Fairbanks North Star Borough derives minor revenue from other sources, including sales and excise taxes, by far the bulk of its total revenue results from property taxes.<sup>17</sup> The Fairbanks North Star Borough's near total reliance on taxes as a revenue source is not unique. It is almost axiomatic that taxes are a local government's principal source of revenue. As noted by McQuillin, "[o]f all the customary local powers, that of taxation is most effective and most valuable. Local government

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<sup>15</sup> Alaska Const art. X, § 4 (making the Assembly the governing body of the organized borough).

<sup>16</sup> *State of Alaska's Opp. to Ketchikan Gateway Borough MSJ and Cross MSJ* at 12.

<sup>17</sup> In the next budget year property taxes will provide \$102,890,424 of a total expected tax revenue of \$107,221,524. This tax revenue pays for the overwhelming bulk of the borough's total budget, with designated grants as the only other significant source of revenue. *Affidavit of A. Rene Broker In support of FNSB's Reply and Opposition.*

without this would be little better than a mockery. A municipal corporation without the power of taxation would be a body without life, incapable of acting and serving no useful purpose.”<sup>18</sup>

Therefore, not only does the plain language of the required contribution clearly contemplate payment obtained through the levying of the taxing power delegated to the municipality by the state,<sup>19</sup> one could not logically expect that the Fairbanks North Star Borough could make a legally required payment of over 26 million dollars<sup>20</sup> necessary to pay the state-mandated local contribution other than through utilization of the taxing power delegated to it by the state. State law implicitly recognizes this financial fact by limiting the required “contribution” to entities to which it has delegated the power of taxation.<sup>21</sup>

C. The Alaska Supreme Court Has Already Rejected the Notion that an Unconstitutional Dedication Requires a Deposit Into the State Treasury.

According to the State, its statutory edict to the Fairbanks North Star Borough to pay over 26 million in taxpayer money to the school district (that is then subject to the supervisory control and use by the State) sidesteps an unconstitutional dedication because it “does not create a pot of money that is available for the legislature to appropriate if it is not provided directly to school districts.”<sup>22</sup> Significantly, although the

<sup>18</sup> Eugene McQuillin, *The Law of Municipal Corporations* §44.3 at 22 (3d ed. 2013).

<sup>19</sup> Alaska Const. art. X, § 2 authorizes the State to “delegate taxing powers to organized boroughs and cities only.” The State, through adoption of AS 29.35.010(6), statutorily delegated this taxing power to 2<sup>nd</sup> class Boroughs like the Fairbanks North Star Borough.

<sup>20</sup> *Affidavit of A. Rene Broker in Support of the Unopposed Motion for Leave to Participate as Amicus Curiae* at 1 § 2.

<sup>21</sup> AS 29.35.010(6).

<sup>22</sup> *State of Alaska's Opposition to Ketchikan Gateway Borough's MSJ and Cross MSJ* at 11.

State repeats this naked assertion throughout its briefing, the assertion always appears bereft of any legal support. Instead, the State largely limits its case law discussion to its efforts to distinguish *State v. Alex*,<sup>23</sup> apparently in recognition that *Alex*'s holding directly contradicts the State's unsupported insistence that a necessary element of an unconstitutional dedicated fund is deposit into the state treasury.

In *Alex*, the Court examined a factually similar funding scheme wherein the State authorized "qualified regional associations" to levy a royalty assessment on salmon. These assessments were designed to directly provide revenue to the qualified regional associations so that they could fulfill an "integral part of the [State's] Fisheries Enhanced Loan Program Act."<sup>24</sup> Thus, neither the challenged funding system in *Alex* nor the one in this case actually results in a payment into the state treasury; but, both did and do create a pot of money that, if collected and paid to the State *rather than to the third party as directed by state law*, would be available for the legislature to appropriate.

The only real distinguishing fact between this case and *Alex* is that this education statutory taxing by proxy system utilizes a pre-existing, properly delegated taxing system. This obviated any requirement for the authorizing statute to legally levy the tax or authorize the collection agent to collect the levied tax (as it did in *Alex*). Thus, while the State argues that *Alex* is distinguished by its two-part structure with the first step consisting of the authorization to levy the tax, it fails to acknowledge that in the instant case, the alleged missing "first step" would have been superfluous. Given that the State had already delegated its taxing power to incorporated municipalities, accomplishment

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<sup>23</sup> 646 P.2d 203 (1982).

<sup>24</sup> *State v. Alex*, 646 P.2d 203, 205-06 (Alaska 1982).

of the State's funding goal here only required the "second step" of imposing the legal obligation to pay funds directly to the state-chosen recipient to serve a state purpose in a state-specified amount (e.g. the equivalent of a 2.65 levy on the full and true value of the taxable real and personal property in the district).

## II. THE EDUCATION CLAUSE MANDATES AT LEAST SOME STATE FUNDING OF MUNICIPAL SCHOOLS.

### A. Nothing in Plaintiffs' Arguments Rests on the Requirement of Full State Funding.

Plaintiffs primarily challenge the State's educational funding statutory scheme as amounting to an unconstitutional dedicated tax. Nothing in Plaintiffs' argument furtively or necessarily depends on whether a completely separate constitutional provision requires full state educational funding. Although the State claims that the assumption of a full funding obligation underlies the Plaintiffs' argument, it provides no explanation or argument that ties this alleged assumption to a necessary element of an unconstitutional dedicated tax. Rather, the State devotes its effort solely to discrediting the unmade assumption, thereby bringing to mind a modern day example of Shakespeare's comment that "[t]he lady doth protest too much, methinks."<sup>25</sup>

Setting aside the red herring of "full" state funding, however, does not render completely irrelevant the fact that the state undeniably bears some duty or obligation to provide education funding. The Alaska Supreme Court recognized long ago that the state adopted Title 14, which includes the challenged local contribution within its overall

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<sup>25</sup> WILLIAM SHAKESPEARE, *HAMLET*, act 3, scene 2 (1602).

statutory funding scheme, in an effort to meet its constitutionally imposed obligations.<sup>26</sup> Thus, just like the “special assessment” invalidated in *State v. Alex*, the required local contribution plays an integral part of a larger State statutory scheme designed to produce revenue for an underlying state public purpose.

Moreover, it is noteworthy that the State, in an effort to discredit an argument not made by Plaintiffs, relies upon a constitutional convention delegate comment demonstrating that while there was some delegate expectation that the organized boroughs would continue to tax in order to support their district’s school districts,<sup>27</sup> nothing in the delegate’s comments suggest that the expected support would occur in an amount dictated by the state. Instead, the proffered quote makes it clear that the amount of the contribution would remain vested in the discretion of the local officials who are “best able to say that so much . . . can be afforded out of this tax dollar for education, so much for health, etc.”<sup>28</sup> This historical contribution appropriated by the local governing body wholly vested to their legislative discretion in the exercise of their duties and responsibilities to their taxpayers does not, therefore, equate factually or legally to the current funding system. While the local Assembly nominally “appropriates”

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<sup>26</sup> *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793, 798 (Alaska 1975)(Pursuant to the constitutional mandate to establish and maintain a system of public schools “the legislature has enacted Title 14 of the Alaska Statutes.”).

<sup>27</sup> This, however, should be placed in proper historical context. As Delegate Rivers explained that same day: “The taxing power exercised by the school districts today is mainly limited to a taxing power for the development of the physical plant and for capital investments, as you all know. **The main operating expense of a school district comes from and would continue to come from the state level as would the refunds of all the taxes.**” 4A Proceedings of Alaska Constitutional Convention (Jan. 19, 1956). (emphasis added).

<sup>28</sup> 4A Proc. of Alaska Const. Convention 2630 (Jan. 19, 1956).

the money, the amount “appropriated” is no longer within their discretion but is predetermined and controlled by the state.

B. A Legally Mandated Payment Secured by Coercion is Nothing Akin to a Voluntary Grant or Incentive Program.

Finally, a realistic examination of the underlying facts fully dispels the State's effort to analogize its challenged mandatory, legally required payment to a state-local cooperative program like the capital matching grant program in which the state legislature voluntarily appropriates money for capital projects that can be spent by municipalities if they in turn voluntarily choose to contribute local money.<sup>29</sup> A legal grant or incentive program envisions, like the state's capital matching grant program, two voluntary payments (one by the offeror and one by the offeree) neither under legal compulsion to make its payment.

Although the state incentivizes and encourages municipalities to contribute local money to capital projects, nothing legally requires that payment. Those voluntary attributes are not, however, contained in the challenged “required contribution” edict of AS 14.17.410(b)(2)<sup>30</sup> and AS 14.12.020(c)<sup>31</sup> in which state law effectively supplants all discretion of the local governing body by not only ordering the payment but requiring payment in the amount set by state law. The State's education scheme itself draws a sharp distinction between this “required” payment and the separate voluntary borough

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<sup>29</sup> AS 37.06.

<sup>30</sup> “The required local contribution of a city or borough school district is the equivalent of a 2.65 mill tax levy on the full and true value of the taxable real and personal property of the district.”

<sup>31</sup> “The borough assembly for a borough school district . . . shall provide the money that must be raised from local sources to maintain and operate the district.”

borough contribution authorized in AS 14.17.410(c)<sup>32</sup> in which state law permits municipalities to provide additional educational funding, but no state funding is conditioned on these voluntary payments and the amount remains wholly vested within the local governing bodies' discretion.

In addition to the use of mandatory language directing its local political subdivisions to make the required "contribution," state law adds a coercive element in which the state eradicates all "state aid" to a city or borough school district if the local contribution is not made.<sup>33</sup> In other words, the state adds (through its threatened withholding of all state aid) the whip of overwhelming economic pressure<sup>34</sup> to ensure the local governing body's exercise of its already titular appropriating power. No case law that the Borough is aware of, however, authorizes a grant or incentive program which conditions a constitutionally imposed duty.<sup>35</sup> While admittedly the constitution does not quantify the financial amount necessary to meet the State's duty to "establish and maintain a system of public schools open to all children of the State,"<sup>36</sup> it logically must

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<sup>32</sup> "In addition to the local contribution required under (b)(2) of this section, a city or borough school district . . . **may make** a local contribution" the amount of which is capped by state law (emphasis added).

<sup>33</sup> See AS 14.17.410(d) ("State aid may not be provided to a city or borough school district if the local contributions required under (b)(2) of this section have not been made.") and AS 14.17.490(b) (A city or borough school district is not eligible for additional funding authorized under (a) of this section unless . . . the district received a local contribution equal to at least the equivalent of a 2.65 mill tax levy . . .").

<sup>34</sup> While the U.S. Supreme Court has generally approved of the use of financial inducements, it has drawn a distinction between "relatively mild encouragement" and "a gun to the head." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2604 (2012).

<sup>35</sup> The U.S. Supreme Court, in *South Dakota v. Dole* illustrates the classic example of a legal incentive in which the federal government conditioned five percent of its grant of a State's federal highway funds on whether the State raised its drinking age to 21, 483 U.S. at 208, 107 S.Ct. 2793, 97 L.Ed. 2d 171 (1987). The State remained free not to raise its drinking age and the Federal government had no constitutional or other legal obligation to pay the conditioned five percent.

<sup>36</sup> Alaska Const. art. VII, §1.

amount to something above zero. Zero, however, is what the State threatens to pay unless the incorporated municipality fails to make its required contribution.

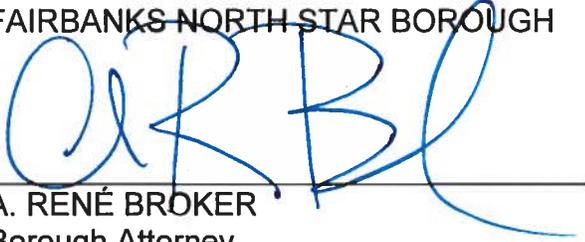
Thus, unlike the capital matching grant program where both the State's and the municipalities' payments are voluntarily, in the challenged funding scheme both sides are acting pursuant to legally imposed duties and obligations. State law requires the municipalities to contribute and Alaska's constitution provides more than enough legal compulsion to require some State funding of education independent of the municipalities contribution. This statutory scheme, therefore, cannot be explained or excused as a matching grant program or any other legal incentive program. Instead it amounts to nothing less than a state-enforced contribution extracting public revenue for a state purpose through employment of the state-delegated municipal tax power.

### III. CONCLUSION

For the reasons stated above, the Fairbanks North Star Borough respectfully urges this Court to enter summary judgment for the Plaintiffs and deny Defendants' cross motion.

DATED at Fairbanks, Alaska this 28<sup>th</sup> day of April, 2014.

FAIRBANKS NORTH STAR BOROUGH

  
A. RENÉ BROKER  
Borough Attorney  
ABA No. 9111076



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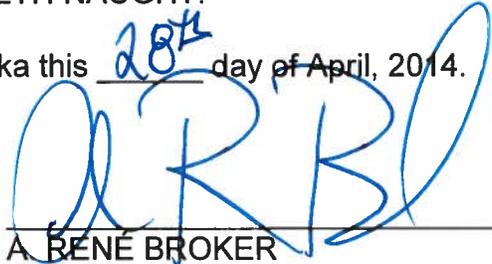
3. The amount of revenue for local taxes for the Fairbanks North Star Borough totals \$107,221,524. Most of those taxes are generated by property taxes which amount to \$102,890,424

4. There are no other significant sources of Fairbanks North Star Borough funds other than grants designated for a specific purpose.

5. Attached hereto as Exhibit 2, is a Memorandum of Legislative Counsel dated February 25, 2013 received by the Fairbanks North Star Borough Department of Law during last year's legislative session.

FURTHER AFFIANT SAYETH NAUGHT.

DATED at Fairbanks, Alaska this 28<sup>th</sup> day of April, 2014.

  
A. RENÉ BROKER

SUBSCRIBED AND SWORN TO BEFORE ME on this 28<sup>th</sup> day of April, 2014.

  
Notary Public in and for Alaska  
Commission Expires: with office



**FY 2014-2015 Budget  
Fairbanks North Star Borough**

**Revenue Detail**

REVENUE SOURCE	2010/11 Actual	2011/12 Actual	2012/13 Actual	2013/14 Approved	2013/14 Revised	2014/15 Recommended
<b>LOCAL REVENUE</b>						
<b>LOCAL TAXES &amp; ASSESSMENTS</b>						
Total Taxable Levy				91,678,090	91,678,090	91,678,090
Less: Estimated Delinquent Taxes				(1,833,570)	(1,833,570)	(1,833,570)
Current Taxes	85,643,722	86,666,871	87,427,560	89,844,520	89,844,520	89,844,520
Delinquent Taxes	6,643,023	7,675,746	778,931	850,000	850,000	800,000
Interest & Penalties	3,199,723	3,404,738	793,499	723,000	723,000	780,000
Payment in lieu of taxes for privatized military housing	742,500	742,500	742,500	792,800	792,800	1,392,800
<b>SUB-TOTAL</b>	<b>96,228,968</b>	<b>98,489,855</b>	<b>89,742,490</b>	<b>92,210,320</b>	<b>92,210,320</b>	<b>92,817,320</b>
<b>PROPERTY TAX - NON-AREAWIDE</b>						
Total Taxable Levy				2,826,330	2,826,330	2,755,144
Less: Estimated Delinquent Taxes				(56,500)	(56,500)	(55,080)
Current Taxes	1,973,051	2,548,611	2,663,526	2,769,830	2,769,830	2,700,064
Delinquent Taxes	207,829	252,178	26,600	20,000	20,000	25,000
<b>SUB-TOTAL</b>	<b>2,180,880</b>	<b>2,800,789</b>	<b>2,690,126</b>	<b>2,789,830</b>	<b>2,789,830</b>	<b>2,725,064</b>
<b>PROPERTY TAX - SOLID WASTE COLLECTION</b>						
Total Taxable Levy				7,019,990	7,019,990	7,431,660
Less: Estimated Delinquent Taxes				(140,390)	(140,390)	(148,620)
Current Taxes	5,972,351	6,332,244	6,621,297	6,879,600	6,879,600	7,283,040
Delinquent Taxes	576,320	700,138	68,742	55,000	55,000	65,000
<b>SUB-TOTAL</b>	<b>6,548,671</b>	<b>7,032,382</b>	<b>6,690,039</b>	<b>6,934,600</b>	<b>6,934,600</b>	<b>7,348,040</b>
<b>TOTAL PROPERTY TAXES:</b>	<b>104,958,519</b>	<b>108,323,026</b>	<b>99,122,655</b>	<b>101,934,750</b>	<b>101,934,750</b>	<b>102,890,424</b>
<b>ALCOHOLIC BEVERAGE SALES TAX</b>	<b>994,626</b>	<b>1,044,069</b>	<b>1,088,021</b>	<b>1,040,000</b>	<b>1,040,000</b>	<b>1,075,000</b>
Alcoholic Beverage Tax - Pen. & Int.	6,575	3,129	21,086	4,000	4,000	4,000
<b>SUB-TOTAL</b>	<b>1,001,201</b>	<b>1,047,198</b>	<b>1,109,107</b>	<b>1,044,000</b>	<b>1,044,000</b>	<b>1,079,000</b>
<b>TOBACCO DISTRIBUTION EXCISE TAX</b>	<b>1,799,328</b>	<b>1,503,265</b>	<b>1,464,733</b>	<b>1,450,000</b>	<b>1,450,000</b>	<b>1,450,000</b>
Penalties & Interest	-	-	50	100	100	100
<b>SUB-TOTAL</b>	<b>1,799,328</b>	<b>1,503,265</b>	<b>1,464,783</b>	<b>1,450,100</b>	<b>1,450,100</b>	<b>1,450,100</b>
<b>HOTEL/MOTEL TAX</b>	<b>1,692,522</b>	<b>1,921,094</b>	<b>2,028,262</b>	<b>1,750,000</b>	<b>1,750,000</b>	<b>1,800,000</b>
Hotel/Motel Tax - Pen & Int	2,743	2,391	2,987	2,000	2,000	2,000
<b>SUBTOTAL</b>	<b>1,695,265</b>	<b>1,923,485</b>	<b>2,031,249</b>	<b>1,752,000</b>	<b>1,752,000</b>	<b>1,802,000</b>
<b>TOTAL LOCAL TAXES:</b>	<b>109,454,313</b>	<b>112,796,974</b>	<b>103,727,794</b>	<b>106,180,850</b>	<b>106,180,850</b>	<b>107,221,524</b>

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES  
LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA

(907) 465-3887 or 465-2450  
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Juneau, Alaska 99801-1182  
Deliveries to: 129 6th St., Rm. 329

## MEMORANDUM

February 25, 2013

**SUBJECT:** Borough Assembly appropriation power  
HB 47 (Work Order No. 28-LS0171\A)

**TO:** Representative Steve Thompson  
Attn: Jane Pierson

**FROM:** Jean M. Mischel  
Legislative Counsel 

You have provided an opinion of the Fairbanks Northstar Borough attorney that sec. 4 of the above-referenced bill is an unconstitutional restraint on borough powers under art. X, secs. 1, 2, and 4 of the Constitution of the State of Alaska and ask my opinion of it. Section 4 of the bill adds a prohibition on a borough assembly (also applicable to municipalities under AS 14.14.065) as follows:

The assembly may not reallocate or reappropriate for another purpose the amount appropriated from local sources to the district for school purposes unless the unrestricted portion of the year-end balance in the district's school operating fund exceeds the amount set in AS 14.17.505(a).

Article X, secs. 1 - 4 of the Constitution of the State of Alaska provide as follows:

**SECTION 1. Purpose and Construction.** The purpose of this article is to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions. A liberal construction shall be given to the powers of local government units.

**SECTION 2. Local Government Powers.** All local government powers shall be vested in boroughs and cities. The State may delegate taxing powers to organized boroughs and cities only.

**SECTION 3. Boroughs.** The entire State shall be divided into boroughs, organized or unorganized. They shall be established in a manner and according to standards provided by law. The standards shall include population, geography, economy, transportation, and other factors. Each borough shall embrace an area and population with common interests to the maximum degree possible. *The legislature shall classify boroughs and*

Representative Steve Thompson  
February 25, 2013  
Page 2

*prescribe their powers and functions.* Methods by which boroughs may be organized, incorporated, merged, consolidated, reclassified, or dissolved shall be prescribed by law. [Emphasis added]

**SECTION 4. Assembly.** The governing body of the organized borough shall be the assembly, and its composition shall be established by law or charter.

The opinion does not cite to art. X, sec. 3. The power of the legislature to "prescribe their powers and functions" seems very clear despite the liberal construction in favor of local control in sec. 1 of art. X.

In addition to the express constitutional provision for state control, local contributions are included in the state funding formula as basic need for public education. AS 14.17.410(b) provides that:

Public school funding consists of state aid, *a required local contribution*, and eligible federal impact aid determined [according to the statutory formula]. [Emphasis added]

AS 14.17.410(b)(2) and (c) expressly provide for both mandatory and optional local contributions to the funding support for public schools. Just as the funding mandates and formulas, the reallocation or reappropriation of local contributions for another purpose may, in my opinion, be restricted by state law as provided in HB 47.

I can find many instances in which the legislature has restricted borough powers by statute,<sup>1</sup> including the existing requirements in AS 14.14.060 that are proposed for amendment by sec. 4 of HB 27. The borough attorney relies on this and other statutes to make her point for unfettered local control over local education funding. In my opinion, sec. 4 of the bill, restricting reappropriation or reallocations by the borough of local funds for another public purpose, is consistent with the statutes cited and with art. X, sec. 3 and art. IX, sec. 6. Section 4, by implication, is a legislative proclamation that the reserves allowed to be retained by school districts in AS 14.17.505 are included in the original purpose of the local appropriation and are not therefore available for reappropriation by a borough. In addition, the restriction on reappropriations in sec. 4 of the bill could be construed as a condition on the receipt of state funds by the borough school district.

If I may be of further assistance, please advise.

JMM:ljw  
13-116.ljw

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<sup>1</sup> Indeed AS 29.35 is replete with instances of the legislature granting municipalities powers and authority and conversely restricting their powers and authority.

Fairbanks North Star Borough  
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
FIRST JUDICIAL DISTRICT AT KETCHIKAN

KETCHIKAN GATEWAY BOROUGH,  
And Alaska municipal corporation and  
political subdivision; AGNES MORAN, an  
individual, on her own behalf and on behalf  
of her minor son; JOHN COSS, a minor;  
JOHN HARRINGTON, and individual; and  
DAVID SPOKELY, an individual;

Plaintiffs,

vs.

STATE OF ALASKA; MICHAEL HANLEY,  
COMMISSIONER OF ALASKA  
DEPARTMENT OF EDUCATION AND  
EARLY DEVELOPMENT, in his official  
capacity;

Defendants.

Superior Court Case No. 1KE-14-16 CI

CERTIFICATE OF SERVICE

I, Andrea Fields, hereby certify that on the 28th day of April, 2014, I served by first class United States mail, postage prepaid, and electronic mail, true and correct copies of the following documents on the person(s) identified below:

1. Amicus Curiae Fairbanks North Star Borough's Reply in Support of Plaintiffs' Motion for Summary Judgment and Opposition to Defendants' Cross Motion for Summary Judgment;
2. Affidavit of A. René Broker in Support of Amicus Curiae Fairbanks North Star Borough's Reply in Support of Plaintiffs' Motion for Summary Judgment and Opposition to Defendants' Cross Motion for Summary Judgment; and
3. Certificate of Service.

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DATED at Fairbanks, Alaska this 28<sup>th</sup> day of April, 2014.

FAIRBANKS NORTH STAR BOROUGH



Andrea Fields, Legal Assistant