IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT KETCHIKAN

KETCHIKAN GATEWAY BOROUGH, AGNES MORAN, JOHN CROSS, JOHN HARRINGTON, AND DAVID SPOKELY	)	
Plaintiffs,	)	
v.	)	
STATE OF ALASKA AND MICHAEL HANLEY, COMMISSIONER OF ALASKA DEPARTMENT OF EDUCATION AND EARLY DEVELOPMENT	)	
Defendants.	)	**Case No. 1KE-14-16CI**

FILED in the Trial Courts
State of Alaska First District
at Ketchikan

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By _____ Deputy

ORDER ON MOTION AND CROSS MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The Ketchikan Gateway Borough, et. al. (the Borough) challenges one facet of Alaska's education funding law – the required local contribution (RLC). The Borough argues that the RLC is unconstitutional because it violates three provisions of the Alaska Constitution: Article XI, Section 7, the dedicated funds clause; Article IX, Section 13, the appropriations clause; and Article II, Section 15, the governor's veto clause. The Borough moves for summary judgment on these claims. The State of Alaska and Michael Hanley (the State) oppose the Borough's motion and has filed its own motion for summary judgment on the claims. For the following reasons, the Borough's motion is partially granted and the State's motion is partially granted.

ISSUES

1) Is the RLC a dedicated fund in violation of the dedicated funds clause of the Alaska Constitution[1] when it requires some localities to make payments to their local school districts for the purpose of meeting that district's Basic Need for education funding?
2) If the RLC is in violation of the dedicated funds clause, does it qualify for the exemption that clause allows for pre-Statehood dedicated funds?
3) Does the RLC violate the appropriations clause[2] and governor's veto clause[3] of the Alaska Constitution because the RLC payments flow directly from a locality to its school district and thus takes place outside of the legislative appropriation process?
4) If the RLC is unconstitutional, should the court order a refund of the Borough's 2014 RLC payment under theories of assumpsit or restitution?

STATEMENT OF FACTS

The State of Alaska is constitutionally mandated to "establish and maintain a system of public schools."[4] Title 14 of the Alaska Statutes governs school administration.[5] Alaska manages its public schools through a system of school districts.[6] Alaska has 53 school districts. Each of Alaska's 19 organized boroughs constitutes a borough school district. Likewise, each of Alaska's 15 home-rule and first-class cities within an unorganized borough constitutes a city school district. The court will use the term "municipal district" to refer to a school district located in one of the previous two areas, i.e., a school district located within an organized borough or a home-rule or first-class city. Finally, the remaining 19 school districts are within

[1] Alaska Const. art. XI, § 7.
[2] Alaska Const. art. IX, § 13.
[3] Alaska Const. art. II, § 15.
[4] Alaska Const. art. VII, § 1.
[5] *See* AS 14.03.010 (establishing a system of public schools within the state).
[6] *See* AS 14.12.010.

the areas of unorganized boroughs that are exclusive of home-rule or first-class city districts. Those final school districts are divided into State created regional educational attendance areas (REAA).[7] The Ketchikan Gateway Borough School District (KGB School District) is located within a municipal district.

Alaska Statute Title 14, Chapter 17 outlines the State aid for which a public school is eligible.[8] Each public school district is funded through three primary sources: state aid, a required local contribution, and eligible federal impact aid.[9] The composition of this funding depends on whether the schools within the district are located within a municipal district or a REAA.[10] The calculation of necessary education funding for a given fiscal year always starts with a computation of a school district's "Basic Need." This occurs regardless of where the school district is located (whether it is in a municipal district or REAA).

The Basic Need formula is set by statute.[11] To calculate a district's Basic Need, the district starts by calculating the adjusted daily membership (ADM) of each school in the district.[12] The ADM is then multiplied by the district cost factor, a factor set by statute.[13] Then the ADMs of each school in the district, as adjusted based on the prior calculations, are then added together. The sum is then multiplied by several factors, which look at the special needs funding the district as a whole requires. These factors take into account things that make the cost of education more or less expensive in a district. Among the factors are: the cost of any vocational or technical instruction provided by the district, the number of correspondence

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[7] REAAs are established under AS 14.08.031(a).

[8] The court recognizes that although the State is constitutionally mandated to "establish and maintain a system of public schools," it is not mandated to fully fund public schools. *See* AS 14.17, noting several times that public school districts are "eligible" for, not entitled to, State aid.

[9] AS 14.17.410(b).

[10] *Id.*

[11] *See* AS 14.17.410.

[12] *See* AS 14.17.450 for the calculation used to reach a district's ADM. The calculation is based on the number of students in average daily attendance during a student count, plus other weighted factors.

[13] AS 14.17.460.

students, and other associated economies of scale.[14] Those calculations yield a school district's Basic Need.

As stated previously, there are three sources of funding that may be used to fulfill a school district's Basic Need: State aid, eligible federal impact aid, and a required local contribution.[15]

Every school district is eligible for State aid for the operation of its district.[16] State aid is paid from the Public Education Fund. This fund consists of funds appropriated for education by the Alaska State Legislature.[17] If the Public Education Fund contains insufficient funds to make full payments of the calculated State aid requirement, the Alaska Department of Education and Early Development is required to reduce each district's Basic Need on a pro-rata basis.[18]

The RLC is at the heart of this lawsuit. Municipal districts must fund a portion of their school districts' Basic Need.[19] This is accomplished through an annual RLC payment from the municipal district directly to its school district.[20] RLC payments do not change the amount of Basic Need required to fund a district's schools. Therefore, when a municipal district pays the RLC, the district's Basic Need is partially fulfilled, which in turn reduces the State's Basic Need obligation.

The amount of a municipal district's RLC payment is 2.65 mills of the full and true value of taxable real and personal property[21] in the municipal district in the second prior fiscal

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[14] AS 14.17.410(C) and AS 14.17.420.
[15] AS 14.17.410(b).
[16] AS 14.17.410.
[17] AS 14.17.300.
[18] AS 14.17.400(b).
[19] AS 14.17.410(b) and 14.12.020(c). AS 14.12.020(c) in particular highlights the mandatory nature of the RLC. It provides: "[a municipal district] shall provide the money that must be raised from local sources to maintain and operate the district."
[20] *See* Brandt-Erichsen Aff. ¶ 10 (Feb. 6, 2014).
[21] Taxable real and personal property in the district means such property within the city of Ketchikan and the Borough because the city and the Borough constitute the district. Taxable real and personal property "means all real and personal property taxable under the laws of the state." AS 14.17.990(7).

year of the fiscal year at issue.[22] The RLC is capped at 45% of a municipal district's Basic Need in the preceding fiscal year.[23] If a municipal district fails to make its RLC payment, State aid for education funding "may not be provided" to a municipal district.[24] In addition, the municipal district will be disqualified from receiving supplemental funding under AS 14.17.490.

The expected fiscal year (FY) 2014 Basic Need for the KGB School District is $25,947,546.[25] Using the statutory formula set forth above, the Borough's FY 2014 RLC is $4,198,727.[26] The Borough paid its RLC to the KGB School District on October 9, 2013.[27] On that same date, the Borough sent a letter to Commissioner Hanley and attached a copy of the check it sent to the KGB School District.[28] The letter noted that the Borough was making its RLC payment "under protest" and recited the Borough's belief that the RLC was unconstitutional.[29]

On January 13, 2014, the Borough filed suit against the State alleging that the RLC violates the Alaska constitutional prohibition against dedicated funds[30] and arguing that the RLC unconstitutionally circumvents the constitutional provisions setting forth the legislature's appropriation power[31] and the governor's veto power.[32] The Borough filed a Motion and

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[22] AS 14.17.410(b)(2).
[23] AS 14.17.410(b)(2).
[24] AS 14.17.410(d).
[25] *See* Brandt-Erichsen Aff. ¶ 3(Feb. 6, 2014).
[26] *Id.* Because of certain optional property tax exemptions, the actual taxable value of real and personal property in the Borough was lower than the full and true value of that property. Therefore, the RLC equates to an actual mill levy of 3.19 on the FY 2014 taxable property within the Borough. The Borough paid an additional $3,851,273 to the KGB School District in optional local contributions and in kind contributions allowed by AS 14.17.410(c).
[27] The Borough paid the RLC, and other expenditures, through an area wide property tax levy of 5 mills and an area wide sales tax levy of 2.5%. *Id.*
[28] *Id.*
[29] *Id.*
[30] Alaska Const. art. XI, § 7.
[31] Alaska Const. art. IX, § 13.
[32] Alaska Const. art. II, § 15.

Memorandum in Support of Motion for Summary Judgment on February 6, 2014 seeking the relief outlined in the introduction section.

The State filed an Opposition to Ketchikan Gateway Borough's Motion for Summary Judgment and Cross Motion for Summary Judgment on March 28, 2014.

The Borough filed its Reply on April 28, 2014. On that same date, the Fairbanks North Star Borough filed a Reply in Support of Plaintiffs' Motion for Summary Judgment and Opposition to Defendants' Cross Motion for Summary Judgment.

The State filed its Reply Brief in Further Support of Cross Motion for Summary Judgment on May 23, 2014.

Oral argument on the dueling motions for summary judgment was held on June 2, 2014.

DISCUSSION

Alaska Civil Rule 56(c) provides that summary judgment should be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." The moving party "must show that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. In determining whether there is a genuine issue of material fact, all reasonable inferences of fact from proffered materials must be drawn against the moving party and in favor of the non- moving party."[33] Once a moving party has met its burden, the party seeking to avoid summary judgment must "set forth specific facts showing that [it] could produce admissible evidence reasonably tending to dispute or contradict the movant's evidence, and thus demonstrate that a material issue of fact exists."[34]

[33] *Reeves v. Alyeska Pipeline Serv. Co.*, 926 P.2d 1130, 1134 (Alaska 1996) (citations and internal quotations omitted).

[34] *Still v. Cunningham*, 94 P.3d 1104, 1108 (Alaska 2004) (quoting *Philbin v. Matanuska-Susitna Borough*, 991 P.2d 1263, 1265-66 (Alaska 1999)).

In this case, the material facts are not in dispute. In their cross motions for summary judgment each party presents multiple legal arguments.

a) The RLC is a "proceed[] of any state tax or license" because it a source of public revenue.

There are two steps the court must engage in determining whether the RLC violates the dedicated funds clause. The first requires the court to determine whether the funds at issue are "proceeds of any state tax or license" so as to be subject to the dedicated funds clause. If the answer is yes, the court must then determine whether those funds are dedicated to a particular purpose.

The Borough argues that the RLC is a "proceed[] of any state tax or license" because it is a source of public revenue. The State disagrees, arguing that the RLC is not a source of revenue subject to the dedicated funds clause because the RLC consists of local, not state, money. The court finds that the RLC is a "proceed[] of any state tax or license" and is therefore subject to the constraints of the dedicated funds clause.

Article IX, section 7 of the Alaska Constitution states,

> The proceeds of any state tax or license shall not be dedicated to any special purpose, except as provided in section 15 of this article or when required by the federal government for state participation in federal programs. This provision shall not prohibit the continuance of any dedication for special purposes existing upon the date of ratification of this section by the people of Alaska.

This section "prohibits the earmarking of state funds for predetermined purposes."[35] The Alaska Supreme Court has held that "there is no doubt that [the clause] was intended to prohibit any and all dedications."[36]

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[35] *See Southeast Alaska Conservation Council v. State*, 202 P.3d 1162, 1167 (Alaska 2009).
[36] *State v. Alex*, 646 P.2d 203, 210 (Alaska 1982).

The two primary motivations for enacting the clause were 1) to promote the "scope and flexibility" afforded by having a general fund instead of specifically earmarked funds, and 2) to prevent the abdication of legislative responsibility that earmarking creates"[37]

Most of the litigation surrounding the dedicated funds clause has focused on the meaning of the phrase "the proceeds of any state tax or license."

The section as originally drafted by the framers stated that "all revenues shall be deposited in the state treasury without allocation for special purposes."[38] This language was later changed to the current "proceeds of a state tax or license" language. But, the Alaska Supreme Court in *State v. Alex* found that "the change did not seek to exempt some sources of revenue from the prohibition" and that the consistent use of the words revenue, funds, and taxes interchangeably during the drafting process indicated that the section was intended to prohibit the dedication of any source of revenue.[39]

In *Alex*, the Alaska Supreme Court held that royalty assessments on the sale of salmon which were collected by private aquaculture associations under power granted to the associations by a state statute were "proceeds of any state tax or license."[40] The statute at issue in *Alex* provided for an assessment on the sale of salmon by commercial fishermen to processors.[41] The assessments were levied for the purpose of providing revenue for the associations.[42] The associations were private entities set up to enhance the efficiency of salmon

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[37] *Id.* at 209.
[38] *Id.*
[39] *Id.* at 210. The Attorney General's Opinion also stated, after studying the debate of the constitutional convention on the section, that the section "can be given its intended effect and serve its repeatedly expressed purpose only if the words 'proceeds of any tax or license' are interpreted to mean what their framers clearly intended, i.e., the sources of any public revenues." 1975 Formal Op. Atty. Gen. No. 9, at 24 (May 2, 1975).
[40] *Alex*, 646 P.2d at 210.
[41] *Id.* at 205.
[42] *Id.*

production and processing in a given region.[43] Commercial fishermen brought suit against two of the private aquaculture associations and the state arguing that the assessments were unconstitutional because, among other reasons, the statute violated the dedicated funds clause.[44]

In siding with the fishermen, the Alaska Supreme Court rejected the state's contention that the assessments were not "proceeds of a state tax or license."[45] In reaching that conclusion, the court examined the history of the dedicated funds clause. As stated, the court noted that the language of the clause changed from its original draft to the current "proceeds of a state tax or license" language, but the court in *Alex* found that "the change did not seek to exempt some sources of revenue from the prohibition" and that the consistent use of the words revenue, funds, and taxes interchangeably during the drafting process indicated that the section was intended to prohibit the dedication of any source of revenue.[46] The court cited the definition an Attorney General's Opinion gave to the phrase which "the proceeds of any state tax or license" to include "the sources of any public revenues" including a "tax, license, rental, sale, bonus-royalty, royalty, or whatever..."[47] Accordingly, given the court's broad interpretation of the phrase, the court held that the salmon assessments required under the statute constituted "proceeds of a state tax or license" within the meaning of article IX, section 7, and were therefore an unconstitutional dedication.[48]

The Alaska Supreme Court has had several opportunities to reexamine the dedicated funds clause over the years, and has consistently held that the explicit exceptions contained in the clause and in the amendment to the clause indicate "that the prohibition [against dedicating

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[43] *Id.* at 206.
[44] *Id.*
[45] *Id.*
[46] *Id.* at 210.
[47] *Id.*
[48] *Id.*

funds] is meant to apply broadly."[49] The court has even gone so far as to note that "the reach of the dedicated funds clause might be extended to statutes that, while not directly violating the clause by dedicating revenues, in some other way undercut the polices underlying the clause."[50]

In addition to the clause at issue in *Alex*, the Alaska Supreme Court has held that revenues from the Alaska Marine Highway System,[51] the sale of future income from a settlement claim,[52] revenue from assessments on the sale of salmon,[53] proceeds from the sale of state land,[54] and funds generated by a local bed tax[55] are all "proceeds of a state tax or license."

The Borough relies heavily on *Alex* and argues that the RLC is "materially indistinguishable" from the assessments in that case. In both cases, the Borough argues, a state statute required payments to fund a particular source. In *Alex* it was to the private aquaculture associations and in this case it is to the Borough School District. Furthermore, the Borough points out that in *Alex* the funds were never deposited into the State treasury but rather flowed directly from the fishermen to the associations. The court in *Alex*, the Borough argues, was not concerned with the fact that the funds never entered the State's coffers and this court should not be concerned over the direct payment of the RLC to the School District here either.

The State argues that the RLC does not run afoul of the dedicated funds clause because the RLC does not qualify as a "proceed[] of any state tax or license." Although the State acknowledges the broad meaning prescribed to the phrase under case law, the State argues that the RLC is not a source of public revenue. The State contends that this is the case because of what would happen if the RLC were no longer required. The State points out that the statutory

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[49] *Southeast Alaska Conservation Council v. State*, 202 P.3d 1162 (2009).
[50] *Id.*
[51] *Sonneman v. Hickel*, 836 P.2d 936 (Alaska 1992).
[52] *Myers v. Alaska Hous. Fin. Corp.*, 68 P.3d 386 (Alaska 2003).
[53] *Alex*, 646 P.2d at 210.
[54] *Southeast Alaska Conservation Council*, 202 P.3d at 1177.
[55] *City of Fairbanks v. Fairbanks Convention & Visitors Bureau*, 818 P.2d 1153 (Alaska 1991).

scheme setting up the RLC "does not create a pot of money that is available for the legislature to appropriate if it is not provided directly to school districts."[56] Because the funds never go to the legislature and because the funds would not otherwise be available to the legislature if the statute did not order the funds to be paid directly to the school district, the funds are not, in the State's eyes, a source of public revenue that is subject to the dedicated funds clause. The State also points to the Borough's concern and objections regarding the RLC and argues that if the RLC were a "proceed[] of any state tax or license," and not local revenue as the State contends, then the Borough would not characterize the RLC as taking local money and the Borough would not feel as though the State is wronging the Borough by requiring this contribution.

The State distinguishes the RLC from the assessments at issue in *Alex* by arguing that unlike in that case, where a set tax was established,[57] the statute here merely provides a formula for the calculation of the RLC and leaves municipalities subject to the requirement free to raise the funds as they see fit, whether through taxes or other means. The State points out that the statutes at issue in previous dedicated funds clause cases all involved a two part scheme – both the requirement of funds and the method of how to raise those funds.[58] Such a system is not present here because there is only the requirement that the Borough pay the RLC, but no constraints on how the Borough must raise the funds to fulfill that obligation.

Finally, the State contends that the purpose of the dedicated funds clause would not be served by its application to the RLC. The State cites comments made by delegates at the Alaska

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[56] State's Opp. and Cross Motion for Summary Judgment at 11.

[57] The statute in *Alex* established a set tax at "two or three per cent of the fair market value of the fish" that had to be paid to the aquaculture associations. *Alex*, 646 P.2d at 207.

[58] *See Southeast Alaska Conservation Council*, 202 P.3d at 1177 (grant of state lands to the University of Alaska and directing where those funds would go); *Sonneman v. Hickel*, 836 P.2d 936 (Alaska 1992) (establishing a specific fund for revenue raised by the Alaska Marine Highway System); *Myers v. Alaska Hous. Fin. Corp.*, 68 P.3d 386 (Alaska 2003) (requiring the sale of future settlement revenue and the dedication of that revenue to a specific source).

Constitutional Convention reflecting delegates' concern that without the dedicated funds clause, earmarking would occur and would curtail the legislature's exercise of budgetary controls. The State argues that such a danger does not exist with the RLC. The RLC actually gives the legislature more control over its budget by leaving more money in the State's budget because without the RLC, the State would have to contribute more to the funding of State education programs.

The State's attempts to characterize a statute that requires certain municipal districts to raise a substantial amount of funds and contribute those funds to a state program as a statute that does not concern "proceeds of any state tax or license" as defined by the Alaska Supreme Court are unpersuasive. As noted, the Alaska Supreme Court has consistently given that key phrase a broad definition, even citing with approval an Attorney General's Opinion that concluded the dedicated funds clause was intended to cover "the sources of any public revenues" including a "tax, license, rental, sale, bonus-royalty, royalty, *or whatever*..."[59] (emphasis added).

The RLC plainly consists of public revenue. The State's assertion that the RLC is not a source of public revenue because the statutory scheme only requires that the funds be raised, but does not tell the municipal districts how to raise those funds, ignores reality. Notably, the RLC is only applicable to municipal districts. As stated, municipal districts consist of organized boroughs and home-rule or first-class cities.[60] Organized boroughs and cities have local taxing power.[61] It is hard to conceive of a way, and the State does not propose any, whereby a municipal district could raise the funds necessary to fulfill its RLC obligation without resorting

[59] *Alex*, 646 P.2d at 210.
[60] AS 14.12.010.
[61] Alaska Const. art. 10, § 2.

to taxes. Indeed, that is what the Borough has done in this instance.[62] Funds raised through the exercise of a municipal district's taxing power are clearly a source of public revenue as broadly defined by the Alaska Supreme Court.

Even absent the fact that most, if not all, municipal districts resort to local taxes to raise the fund necessary to meet their RLC obligation, the RLC is a source of public revenue. If one supposes that a municipal district's RLC funds come directly from the district's coffers, and are not raised by taxes, those funds are still "proceeds of any state tax or license" because the funds consist of money raised, in some way or another, by municipal districts. That is local money and that is public revenue. Under the Alaska Supreme Court's expansive definition of the phrase "proceeds of any state tax or license," this is sufficient to implicate the constraints of the dedicated funds clause.

The Alaska Supreme Court's analysis in *State v. Alex* is especially useful here. As in that case, here we are concerned with a state statute that directs that a certain amount of funds be paid from one state organization to another. In *Alex*, the payee was a private organization set up by state statute and the method of raising revenue was explicitly defined, but that only makes the case for finding the statutory scheme here as dealing with "proceeds of any state tax or license" all the more compelling. Here, rather than a private organization receiving funds raised by individuals, we have one unit of government (the municipal district) raising funds at the direction of another unit of government (the State) and paying those funds to a public institution (the municipal district's schools). These facts only further illustrate the public nature of the funds at issue. The State's attempt to distinguish *Alex* on the grounds that unlike in that

[62] *See* Brandt-Erichsen Aff. ¶10 (Feb. 6, 2014).

case, municipal districts have the choice of how to raise the funds necessary to meet the RLC is unpersuasive for the reasons discussed above.

City of Fairbanks[63] is also helpful in resolving this question. In that case, the Alaska Supreme Court held that a local initiative that expanded the permissible uses of funds derived from a bed tax to uses other than tourism was constitutional under the dedicated funds clause.[64] The bed tax funds were clearly "proceeds of any state tax or license" and thus the question before the court was whether the initiative set aside specific amounts of the funds for a specific purpose in a way that was mandatory.[65] As in that case, here we are presented with an entirely local source of money. The fact that the funds in *City of Fairbanks* were the product of a local bed tax did not matter in the court's determination that the tax proceeds were "proceeds of any state tax or license." Thus, the fact that the RLC is, essentially, a solely local matter and local source of funds, does not weigh in the court's consideration of whether the RLC consists of funds subjected to the dedicated funds clause.

Finally, the nuanced questions analyzed by the Alaska Supreme Court in past dedicated funds clause cases further illustrates the clarity of the issue here. Past cases dealing with this provision presented more complex issues such as whether the sale of future settlement income[66] or whether the proceeds of land use or sales transferred from the state to a state university[67] qualified as "proceeds of any state tax or license." Here, the court is focused on local revenue raised to fulfill a municipal district's required contribution to that district's education facilities. This is a much clearer issue than *Myers* or *Southeast Alaska Conservation Council*, for example. In contrast to those cases where there was a multilayered statute involving items that

[63] 818 P.2d 1153 (Alaska 1991).
[64] *Id.* at 1158.
[65] *Id.*
[66] *Myers v. Alaska Hous. Fin. Corp.*, 68 P.3d 386 (Alaska 2003).
[67] *Southeast Alaska Conservation Council v. State*, 202 P.3d 1162 (2009).

were later transformed into money (settlement revenue or land sales), here there is clear direction from a state statute requiring municipal districts to contribute money to their school districts. There is no need to parse the statute as was required by *Myers* or *Southeast Alaska Conservation Council*, for example, because the scheme here much more clearly and directly involves local money. As stated, this local money qualifies as "proceeds of any state tax or license" and is thus subject to the restrictions of the dedicated funds clause.

b) The RLC is a dedicated fund because the funds are earmarked for a specific purpose and cannot be used in any other way.

As stated, after the court determines that the RLC is a "proceed[] of any state tax or license," the court must then determine whether the RLC is dedicated to a specific purpose. This question is easier to answer than the first issue. Yes, the RLC is dedicated to a specific purpose. This is evident even from a cursory reading of the statute. The statute explicitly requires that municipal districts pay the RLC directly to their respective school districts annually.[68]

The statute clearly dedicates the RLC to municipal school districts. Like the bill in *Southeast Alaska Conservation Council* that explicitly committed land and proceeds to a specific fund, the *Myers* case which did the same but with settlement revenue, and *Sonneman v. Hickel* which established a special fund for Alaska Marine Highway Revenue,[69] the RLC is committed by statute to a specific fund – the municipal school district's budget. Neither side substantially addresses this point at all, likely in recognition that most of the debate in this case involves the definition of "proceed[] of any state tax or license."

[68] AS 14.17.410.
[69] 836 P.2d 936 (Alaska 1992).

The fact that the RLC never passes through the State treasury is inconsequential. It actually provides further support for the dedicated nature of the RLC. For example, in *City of Fairbanks*, the Alaska Supreme Court noted that the initiative that removed restrictions for the use of the proceeds of the bed tax was best thought of as "an 'undedication' than a dedication."[70] Also relevant to the court's analysis was its finding that the initiative at issue "did not infringe on flexibility in the [city's] budget process."[71] Here, unlike in *City of Fairbanks*, the RLC funds are not available for use throughout the Borough but rather are earmarked for specific use at the Borough's schools. This setting aside of funds infringes greatly on the Borough's flexibility in budgeting and further illustrates the dedicated nature of these funds.

c) The RLC is a dedicated fund but it is not exempted from the dedicated funds clause because it was not in existence at the time the Alaska Constitution was ratified.

The dedicated funds clause provides an exemption for pre-Statehood dedications. The clause states: "This provision shall not prohibit the continuance of any dedication for special purposes existing upon the date of ratification of this section by the people of Alaska."[72] One Alaska Attorney General Opinion concluded, after analyzing the minutes from the Alaska Constitutional Convention, that any repeal or repeal and re-enactment of a dedication after ratification "takes the dedication from under the protection of the grandfather clause..."[73]

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[70] 818 P.2d 1153, 1158-59 (Alaska 1991).
[71] *Id.*
[72] Alaska Const. art. IX, § 7.
[73] 1959 Op. Atty. Gen. No. 7, at 1-2 (March 11, 1959). The Borough cites to several more recent Attorney General Opinions that likewise hold that a grandfathered dedicated fund must have existed before Statehood and that such pre-existing dedications lose their grandfather status once repealed (even if repealed and re-enacted). *See* 1992 Informal Op. Atty. Gen. vol. 1 at 33 (Jan. 12, 1990, re-dated Jan. 1, 1992); 1992 Informal Op. Atty. Gen. vol. 1 at 31 (Sept. 11, 1989, re-dated Jan. 1. 1992).

The State argues that even if the court found that the RLC were a dedicated fund, it would be exempted from the dedicated funds clause under the exemption for dedicated funds existing at the time of ratification. The State argues that similar statutory provisions requiring a local contribution to a locality's school district have been in existence since the Territorial days. Therefore, if the court found the RLC were a dedicated fund, it would qualify for the exemption from the dedicated funds clause.

The Borough argues that the RLC cannot be grandfathered in as a pre-existing dedication because 1) the RLC was enacted after Statehood (enacted in 1962) and 2) even if pre-Statehood laws were dedications (which the Borough rejects) all previous similar Territorial laws were repealed when the RLC was enacted.

The Borough then discusses the Territorial laws proposed by the State as being similar to the RLC.[74] The Borough argues that under the law analyzed by the State, municipalities were free to contribute as much as they deemed fiscally responsible and then the Territory would reimburse the municipalities. This is in contrast to the RLC, in the Borough's view, because the RLC compels a set amount and does not let municipalities use their independent judgment as to how much to contribute to local schools.

Even if the Territorial laws were dedications, the Borough argues that their grandfather status was extinguished when they were repealed and replaced by the education funding scheme (including the RLC) enacted in 1962. The Borough cites to the aforementioned Alaska Attorney General opinion for support and asks the court to reject the State's argument that the RLC is protected by the clause's exemption for pre-ratification dedicated funds.

[74] Both parties attached copies of the Territorial laws discussed.

The court agrees with the Borough on this issue and finds that the RLC does not qualify for the exemption for dedications in existence before the Alaska Constitution was ratified. For one, the Territorial laws were more permissive with regards to local contribution requirements than the RLC here. For example, the Territorial laws allowed the localities to determine how much to contribute to education and then the Territory would reimburse a percentage of those expenditures. That is contrasted here with the set, mandatory amount of the RLC. Thus, the RLC has not been in existence since Territorial days.

Second, and more importantly, those laws were repealed and replaced by the RLC and other education funding law in 1962. Alaska Attorney General Opinions conclude that pre-Statehood exemptions under the dedicated funds clause are extinguished when the law is repealed, even if it is later re-enacted.[75] There are no cases that address this exemption portion of the dedicated funds clause, and therefore the Attorney General Opinions are the most persuasive authority available to this court on this issue. The logic employed in those opinions makes sense when applied to this situation as well. Merely because localities have always been statutorily mandated to contribute to the funding of their schools should not mean that the RLC, which was enacted after Statehood, should be exempted from the dedicated funds clause. In sum, because the RLC was not in existence before Alaska's constitution was ratified and because the pre-Territorial education funding law was repealed and replaced in 1962 (which included the statue enacting the RLC), the RLC does not qualify for the exemption found in the dedicated funds clause.

d) The RLC does not violate the legislative appropriations clause or the governor's veto clause because the funds are not involved in the appropriations process

[75] 1959 Op. Atty. Gen. No. 7, at 1-2 (March 11, 1959).

The court will address the remaining two claims – that the RLC violates the appropriations clause and the governor's veto clause – together because the parties present virtually identical arguments with respect to both claims. The court finds that the RLC does not violate either of these constitutional provisions because the RLC does not enter the state treasury (and its failure to do so likewise does not violate these clauses) and because the RLC is not an appropriation.

Article IX, section 13 of the Alaska Constitution, the appropriations clause, states:

> No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law. Unobligated appropriations outstanding at the end of the period of time specified by law shall be void.

The notes of decisions concerning this clause have to do with items such as special funds[76] and the scope and manner of municipal appropriations.[77] There are no cases analogous to the situation at hand. Black's Law Dictionary gives the following meanings to the term appropriation: "A legislative body's act of setting aside a sum of money for a public purpose...The sum of money so voted."[78] Similarly, Black's includes the following definition of appropriations bill: "A bill that authorizes governmental expenditures."[79] The Alaska Supreme Court has defined an item in an appropriations bill as "a sum of money dedicated to a particular purpose."[80]

The only mention of the appropriations clause in the context of a dedicated fund that the court could find was a citation to a comment made by a state official in the dissent of *Myers*. The

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[76] *Carr-Gottstein Prop. v. State*, 899 P.2d 136 (Alaska 1995) (holding that private funds, deposited into an administrative agency's account and subject to the agency's instructions, do not constitute unrestricted "program receipts" that must be deposited in the state treasury and subject to the legislature's power of appropriation).
[77] *Municipality of Anchorage v. Frohne*, 568 P.2d 3 (Alaska 1977) (interpreting the charter of the municipality of Anchorage as allowing the municipality to make appropriations outside of the ordinance process).
[78] BLACK'S LAW DICTIONARY 123 (10th ed. 2014).
[79] BLACK'S LAW DICTIONARY 196 (10th ed. 2014).
[80] *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 373 (Alaska 2001).

dissent briefly mentioned the concern an official had raised prior to the finalizing of the settlement scheme that the payment of the revenues from the tobacco settlement directly to a private entity upon receipt by the State was potentially in violation of the appropriations clause.[81] Other than that brief mention, the Alaska Supreme Court has not addressed appropriation clause (or governor's veto clause) claims in the context of a dedicated funds challenge.

Article II, section 15 of the Alaska Constitution, the governor's veto clause, provides:

> The governor may veto bills passed by the legislature. He may, by veto, strike or reduce items in appropriation bills. He shall return any vetoed bill, with a statement of his objections, to the house of origin.

The Alaska Supreme Court has interpreted this clause as a safeguard against "corrupt or hasty and ill-considered legislation," and as a power granted "to preserve the integrity of the executive branch of government and thus maintain an equilibrium of governmental powers."[82] The governor's veto power applies only to monetary appropriations, as defined above.[83]

The case law interpreting this clause has focused on the different meaning ascribed to the term appropriation when dealing with a citizen's initiative versus a bill originating in the legislature,[84] and whether a governor properly exercised the veto.[85] As stated, there are no analogous cases in which the Alaska Supreme Court has discussed a challenge to a funding scheme on the grounds that it violates the governor's veto clause in the context of a suit also challenging the statute or action on the grounds that it violates the dedicated funds class too. All

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[81] *Myers v. Alaska Hous. Fin. Corp.*, 68 P.3d 386, 399-400 (Alaska 2003) (Justice Bryner and Justice Fabe dissenting).
[82] *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 772 (Alaska 1980) (internal citations omitted).
[83] *Alaska Legislative Council ex rel. Alaska State Legislature v. Knowles*, 86 P.3d 891, 895 (Alaska 2004) (holding that a bill which transferred land and the income derived from that land to the University of Alaska was not an appropriation subject to the governor's enhanced veto power (requiring a three-fourths vote of the legislature to override the veto under article II, section 16) because the bill presented a non-monetary asset transfer which is not an appropriation as defined by the court).
[84] *Alaska Legislative Council ex rel. Alaska State Legislature*, 86 P.3d at 894-95 (Alaska 2004).
[85] *Simpson v. Murkowski*, 129 P.3d 435 (Alaska 2006) (holding that the governor's line item veto of a budget appropriation was authorized by the constitution); *Alaska Legislative Council*, 21 P.3d 367 (Alaska 2001) (holding that the governor sufficiently stated his objections to vetoed items in appropriations bill).

of the cases interpreting this clause concerned more direct cases of bills coming from the legislature or ballot initiatives that directly required the outlay of state funds. None of them dealt with the negative appropriation argument we have here, where the Borough argues that the fact that the RLC is never subject to the appropriations clause or governor's veto clause thereby violates those provisions.

Unlike the arguments advanced related to the dedicated funds clause, both parties present virtually no case law to support their arguments related to the appropriations clause or the governor's veto clause. The Borough argues that the RLC violates the appropriations clause and the governor's veto clause because when it compels a direct transfer of public funds from the Borough to the Borough School District, it effectively circumvents the legislature and the legislature's ability to appropriate the funds to the school district or to other means and the governor's ability to veto items in appropriations bills.

The State argues that the appropriations clause and the governor's veto clause do not apply for the same reason the dedicated funds clause does not apply – the RLC is not a source of public revenue. The State argues that the RLC is local money, over which the legislature has no authority to appropriate and thus the governor has no authority to exercise his veto over. The State contends that the legislature may only appropriate funds from the State treasury and because the RLC is comprised of Borough funds, the legislature has no power over it and therefore the appropriations clause is not violated. The State points out that the governor's authority to strike out or reduce an item in an appropriation bill is limited to appropriations that are authorized by the legislature. Because the RLC is not an appropriation from the legislature, the governor has no authority over the funds and the governor's veto clause does not apply. The State does not address the case law referenced by the Borough.

The RLC is clearly not an appropriation as defined by the Alaska Supreme Court or by Black's Law Dictionary. It is plainly not a "sum of money so voted."[86] Simply because the legislature enacted the RLC statute does not mean that the RLC is an appropriation as the term is commonly used. As stated, the appropriations clause and governor's veto clause only apply to appropriations. Because the RLC is not an appropriation, those clauses do not apply.

The Borough's argument that the RLC violates these constitutional provisions because of the lack of opportunities for the legislature to appropriate the funds another way, or for the governor to veto an appropriation of the funds, is unpersuasive. The appropriations clause and governor's veto clause clearly require an appropriation before they apply and the argument that the lack of an appropriation violates those provisions is too tenuous for the court.

The court does not adopt all of the State's arguments on these clauses, though. The RLC can still be a source of public revenue for purposes of the dedicated funds clause while also being considered a source of funds that is not an appropriation for purposes of the appropriations clause and governor's veto clause. To hold otherwise would mean that any outlay of local funds at the direction of a state statute violates these two clauses. Thus, the court's holding that the RLC is a source of public revenue for purposes of the dedicated funds clause is not incongruous with its holding here, that the RLC is not a source of funds subject to the appropriations clause or governor's veto clause.

Lastly, the RLC does not run afoul of the purposes of either of these provisions. Both strive to ensure that public funds are not spent without legislative approval or without a final check on an errant legislature. Here, while although there is a statute that directs municipal districts to spend funds, the statute was enacted through the legislative process and protected by

[86] BLACK'S LAW DICTIONARY 123 (10th ed. 2014).

all of the safeguards that provides. Thus, the RLC was not enacted without legislative oversight and the purposes of the appropriations clause or governor's veto clause have been met. To impose additional burdens on the funding scheme here by virtue of its absence from the appropriations process would be unnecessarily duplicative.

e) The Borough is not entitled to a refund under either a theory of assumpsit or restitution

This court has explained, *supra*, that the RLC is a dedicated fund. The Borough argues the RLC reduced the amount the state must pay to support the Borough schools and therefore was enriched by the RLC payment.[87] The state responds that it received no enrichment because the RLC never passed through state coffers and in fact triggered a statutory obligation of the state to additionally fund Ketchikan Gateway Borough School District.[88]

"Assumpsit will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund."[89] Assumpsit is a quasi-contract cause of action to enforce a duty to repay.[90] Alaska recognizes actions in assumpsit and its common counts.[91] In order to later bring an action in assumpsit, the

[87] Pl.'s Reply in Support of Mot. for Summary Judgment and Opp. to State's Cross Mot. for Summary Judgment at 16.
[88] State's Opp. and Cross Motion for Summary Judgment at 11.at 21-22.
[89] *Bayne v. U.S.*, 93 U.S. 642, 643 (1876) (Assumpsit is underpinned by principles of quasi-contract and unjust enrichment); *State of Alaska Commercial Fisheries Entry Comm'n v. Carlson*, 270 P.3d 755, 765 (2012).
[90] *See American Surety Co. of New York v. Multnomah Co.*, 171 Or. 287, 325 (Or. 1943); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 70 (2011).
[91] *State v. Wakefield Fisheries, Inc.*, 495 P.2d 166, 172 (1972). "The common law has long recognized a cause of action in assumpsit to recover overpayment of taxes" (*overruled on other grounds by Principal Mut. Life Ins. v. State Div. of Ins.*, 780 P.2d 1023, 1030 (Alaska 1989)). *See also Stone v. White*, 301 U.S. 532, 534 (1937), "[I]t has been gradually expanded as a medium for recovery upon every form of quasi-contractual obligation in which the duty to pay money is imposed by law, independent of contract, express or implied in fact."

paying party must formally protest at the time of payment.[92] Similarly, restitution is a remedy that corrects unjust enrichment.[93]

Both pled theories of assumpsit and restitution rest on the doctrine of unjust enrichment. Unjust enrichment occurs when one side is benefitted at a loss to the other. Alaska case law recognizes three elements of unjust enrichment:

1. A benefit conferred upon the defendant by the plaintiff;
2. Appreciation of such benefit; and
3. Acceptance and retention by the defendant of such benefit under such circumstances that it would be inequitable for him to retain it without paying the value thereof.[94]

Classifying the RLC payment as an unjust enrichment to the state turns on the first prong. Factually, one must determine whether the state received a benefit from the Borough's RLC payment. On one hand, the Borough made the RLC payment directly to the Borough School District. The money never passed through state coffers. This would support the state's argument that there was no unjust enrichment because there was no type of enrichment at all. Further, the payment of the RLC caused the state to release the remaining funding to the school district. The Borough impliedly argues that without the RLC payment, the State of Alaska would have been forced to contribute money in the place of the RLC payment to fully fund schools, and the Borough's RLC payment lessened the state's obligations.[95]

This argument fails for two reasons. First, neither party has argued that the Alaska Constitution's education clause compels the state to fully fund all public schools in Alaska.[96]

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[92] *Principal Mutual*, 780 P.2d at 1030. *See also Era Aviation, Inc. v. Campbell*, 915 P.2d 606, 612 (1996) ("To later bring an action in assumpsit, a payer must specifically notify the State, whether by the words 'paid under protest' or otherwise, that it intends to seek reimbursement").

[93] RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. a (2011).

[94] *Alaska Sales and Service, Inc. v. Millet*, 735 P.2d 743, 746 (Alaska 1987).

[95] "Because the state's obligations have been lessened by the Borough's payment under protest of an unconstitutional assessment, the Borough is entitled to a refund." Pl.'s Reply in Support of Mot. for Summary Judgment and Opp. to State's Cross Mot. for Summary Judgment at 16.

[96] *See* State's Opp. and Cross Motion for Summary Judgment at 18-21; Pl.'s Reply in Support of Mot. for Summary Judgment and Opp. to State's Cross Mot. for Summary Judgment at 10.

Second, without this showing one cannot conclude the state received any benefit from KGB's payment. If on one hand the state has a duty to fully fund public schools, then perhaps the payment of the RLC to the Borough School District would indeed give the state an indirect benefit. However, if the state has no duty to fully fund public schools and requiring a local contribution violates no constitutional provision beyond the dedicated funds clause, then payment of the RLC does not provide the state a tangible benefit.

Because the Borough has failed to offer argument that the state has a duty to fully fund public schools and because the RLC payment was paid to the school district and not the state, a claim of unjust enrichment fails and the state need not pay the borough the amount of the RLC payment under an action in assumpsit or restitution.

CONCLUSION

For the reasons stated above, the Ketchikan Gateway Borough's motion for summary judgment is GRANTED in part because the court finds that the RLC is a dedicated fund in violation of the dedicated funds clause of the Alaska Constitution. The Borough is entitled to a declaratory judgment to this effect.

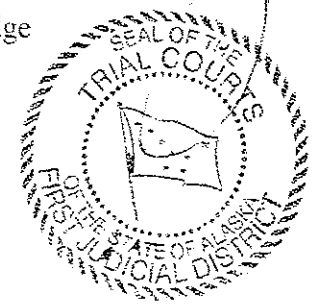
The Borough's motion for summary judgment is DENIED, in part, because the court finds that the Borough is not entitled to funds equivalent to the 2013 RLC payment under theories of assumpsit and restitution.

Further, the State of Alaska's cross motion for summary judgment is GRANTED, in part, because the RLC does not violate the governor's veto clause or the legislative appropriations clause of the Alaska Constitution. The State's cross motion for summary judgment insofar as it relates to the dedicated funds clause is DENIED.

IT IS SO ORDERED.

Dated at Ketchikan, Alaska this 21 day of November 2014.

William B. Carey
Superior Court Judge



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