

IN THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, et. al,)
)
 Appellants,)
)
 v.)
)
 KETCHIKAN GATEWAY)
 BOROUGH, et. al,)
)
 Appellee.)
)

Supreme Court No.: S-15811

Trial Court Case No.: 1KE-14-00016 CI

APPENDIX

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2 Court's determination of the constitutional issue.² **A decision on this emergency**
3 **motion is needed as soon as possible, and no later than February 17, 2015.**

4 The superior court's decision puts in jeopardy approximately \$300 million
5 dollars³ of education funding annually relied upon by Alaska school districts at a
6 moment when the governor's budget anticipating the presence of that funding has
7 already been submitted, the date for a revised budget is rapidly approaching, the
8 legislature's ninety-day session has already begun, and the legislature is already
9 weighing options for the next education budget.⁴ The superior court's decision
10 invalidated a longstanding requirement that has existed in some form since pre-
11 statehood: the requirement that local communities with taxing authority pay directly to
12 their own local school districts a small portion of the cost of educating their children as
13 a necessary prerequisite for receiving state (or territory) funding.⁵ The court's ruling
14 relied on an expansion of the dedicated funds clause, Article IX, section 7 of the Alaska
15 Constitution, and warrants appellate review before going into effect.
16
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19
20 ² The State moves pursuant to Alaska Rules of Appellate Procedure 205 and 504.

21 ³ Affidavit of Michael Hanley, dated January 27, 2015, at ¶¶ 2, 8, *attached* as
22 Ex. 3. This affidavit was initially submitted in support of a motion for emergency stay
23 before the superior court.

24 ⁴ The governor's preliminary budget was statutorily due by December 15, 2014
25 and his amended budget is due by February 18, 2015. AS 37.07.020(a);
26 AS 37.07.070(2). This year's legislature is scheduled to adjourn April 19, 2015.

⁵ See Alaska Compiled Laws, ch. 3, art. 3 §§ 37-3-32, art. 4 § 37-3-53, art. 5 § 37-
3-62 (1949); Sec. 1.03, ch. 164, SLA 1962.

1
2 The State filed an emergency motion for stay pending appeal and motion for
3 expedited consideration with the superior court on January 28, 2015, requesting a
4 decision no later than February 12, 2014 in order to allow time for an emergency motion
5 in this court prior to the administration's amended budget deadline.⁶ The superior court
6 provided notice the next day that Judge Carey, who presided below, would be out of the
7 country for much of the next three weeks.⁷ At a status hearing on the case held on
8 Friday, January 30th, the superior court effectively denied the State's request for an
9 emergency stay by setting a briefing and argument schedule that will not allow for a
10 decision before February 23rd.

11
12 Specifically, the court issued the attached "Order Setting Schedule," giving
13 plaintiffs (collectively, "the borough" or "Ketchikan Gateway Borough") a full twelve
14 days to file an opposition and indicating that oral argument, which the plaintiffs said
15 they would request, would be scheduled for February 23, 2015.⁸ During Friday's
16 superior court hearing, counsel for plaintiffs informed the court that they might also
17 seek an evidentiary hearing on the stay, and the superior court indicated that if a request
18 for evidentiary hearing were granted, the court would be unable to schedule it for more
19 than a month.⁹

20
21
22 ⁶ These are attached as Ex. 4 and Ex. 5, respectively.

23 ⁷ See Notice to Parties attached as Ex. 6.

24 ⁸ The superior court's Order Setting Schedule is attached as Ex. 7.

25 ⁹ The borough also stated their position on an evidentiary hearing request in an
26 email before the hearing. See Email from Louisiana Cutler, January 30, 2015, attached
as Ex. 8.

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2 Every day that passes without a stay is a day of legislative session in which the
3 enforceability of the education funding formula reflected in the proposed education
4 budget is in limbo. The State requests that the stay be ruled upon in advance of the
5 February 18, 2015 statutory deadline for the administration to propose a revised
6 budget.¹⁰ Lawmakers should not be put in the position of being compelled to
7 preemptively and precipitously reimagine public school funding out of concern that a
8 funding gap will affect students before this Court has had a chance to rule.
9

10 **STANDARD FOR A STAY PENDING A PETITION FOR REVIEW**

11 “Whether a stay of an injunction pending appeal will be granted is a question
12 directed to the sound discretion of the court.”¹¹ In considering whether to grant a stay
13 pending appeal, a court “must consider criteria much the same as it would in
14 determining whether to grant a preliminary injunction.”¹²
15

16 Alaska courts employ a “balance of hardships” test when considering a motion
17 for a preliminary injunction.¹³ In order for an injunction to issue, the party requesting
18 the injunction “must be faced with irreparable harm; ... the opposing party must be
19

20 ¹⁰ AS 37.07.070 (“Requests by the governor for budget amendments to state agency
21 budgets for the budget fiscal year may be received by the finance committees only
22 through the 30th legislative day.”). February 18, 2015 is the 30th legislative day of the
23 2015 session, which began on January 20, 2015.

24 ¹¹ *Powell v. City of Anchorage*, 536 P.2d 1228, 1229 (Alaska 1975) (internal
25 citations omitted).

26 ¹² *Id.*

¹³ *N. Kenai Peninsula Rd. Maint. Serv. Area v. Kenai Peninsula Borough*, 850 P.2d
636, 639 (Alaska 1993).

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2 adequately protected; and ... [the party requesting the injunction] must raise serious and
3 substantial questions going to the merits of the case; that is, the issues raised cannot be
4 'frivolous or obviously without merit.'"¹⁴

5 LEGAL AND FACTUAL BACKGROUND

6 I. Education funding

7
8 Public education in Alaska is funded through multiple sources that include
9 predominantly state funding and—from municipalities with taxing authority—a
10 required local contribution that goes directly from a local municipality to its local
11 school district.¹⁵ The lawsuit brought by Ketchikan Gateway Borough concerns the
12 constitutionality of the required local contribution described in statute at
13 AS 14.12.020(c) and AS 14.17.410(b)(2), but its outcome impacts the entire school
14 funding formula statewide. In recent years the required local contribution has totaled
15 more than \$220 million per year, statewide.¹⁶ Payment of the local contribution is an
16 important part of Alaska's equalized school funding across all districts, which enables
17 the State to deduct \$70 million of eligible federal impact aid from its funding
18 allocations.¹⁷

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21
22 ¹⁴ *Id.* (quoting *State v. Kluti Kaah Native Village*, 831 P.2d 1270, 1273 (Alaska
23 1992)).

24 ¹⁵ AS 14.12.020(c).

25 ¹⁶ Ex. 3, affidavit of Commissioner Hanley at ¶ 4.

26 ¹⁷ Ex. 3, affidavit of Commissioner Hanley at ¶ 8.

1
2 Both the local contribution and any voluntary contribution (the legality of which
3 is not being challenged here) are paid by a city or borough directly to its local school
4 district, and the funds are incorporated into the city or borough's school budget.¹⁸

5 Although statute specifies the amount of the local contribution, the statute does not
6 dictate the method that a city or borough must use to obtain the funds.¹⁹

7
8 The State dispenses its own legislatively-apportioned share of education funding
9 only after the local community has paid its required local share. Alaska
10 Statute 14.17.410(d) provides that: "State aid may not be provided to a city or borough
11 school district if the local contributions required under (b)(2) of this section have not
12 been made." The requirement of a local financial stake to access state funds seeks to
13 ensure prudent expenditure of state and federal education dollars. The requirement is
14 also not new. Pre-statehood, Alaska cities and independent school districts had taxing
15 power and were required to fund local public schools.²⁰ The territory then "refunded" a
16 percentage of the school expenses to the local entities.²¹ Constitutional delegates
17 envisioned that the process of local expenditure followed by state support would
18

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20
21 ¹⁸ See Ex. 2, Order on Motion and Cross Motion for Summary Judgment at 5.

22 ¹⁹ AS 14.17.410(b)(2) states that the amount of required local contribution is "*the*
23 *equivalent of a 2.65 mill tax levy on the full and true value of the taxable real and*
24 *personal property in the district . . . not to exceed 45 percent of a district's basic need*
25 *for the preceding fiscal year . . .*" (emphasis added).

26 ²⁰ Alaska Compiled Laws, ch. 3, art. 4 § 37-3-32, 37-3-35, 37-3-53 (1949).

²¹ Alaska Compiled Laws, ch. 3, art. 5 § 37-3-61 (1949).

1
2 continue.²² And following statehood the statutory expectation of local contributions did
3 continue in school districts with taxing authority, including the newly formed
4 boroughs.²³

5 **II. Dedicated fund prohibition**

6 Ketchikan Gateway Borough sued the State arguing in relevant part that the
7 required local contribution violates the Alaska Constitution's prohibition on dedicated
8 funds. The Dedicated Fund provision, Article 9, section 7 of the Constitution states:
9 "The proceeds of any state tax or license shall not be dedicated to any special
10 purpose" The provision was inserted into the constitution as a way to combat
11 earmarking of specific sources of state revenue to particular projects on the theory that
12 such earmarking tied the hands of future legislatures and prevented them from
13 exercising budgetary controls.²⁴ Additionally, during the constitutional convention, the
14 language of the provision was changed from referencing "all public revenue" to "the
15 proceeds of any state tax or license" in direct response to a memorandum stating the
16 need to create exceptions to the dedicated fund prohibition for seven categories of
17 moneys including "contributions from local government units for state-local cooperative
18 programs."²⁵

22 ²² 4A Proceedings of Alaska Constitutional Convention 2640 (Jan. 19, 1956).

23 ²³ See Sec. 1.03, ch. 164, SLA 1962.

24 ²⁴ *State v. Alex*, 646 P.2d 203, 209 (Alaska 1982).

25 ²⁵ 1975 Op. Att'y Gen. No. 9 at 4, 7 (May 2) (quoting 6 Proceedings of Alaska
26 Constitutional Convention, App. V, 106-07 (Dec. 19, 1955)).

1
2 The State argued that the dedicated fund provision does not apply to required
3 local contributions to local schools because the money is not “the proceeds of any state
4 tax or license” and is not state revenue.²⁶ The State also argued that even if the money
5 were state public revenue, it falls within the category of local money for a state-local
6 cooperative program that is an exception to the prohibition on dedication.²⁷
7

8 **III. Superior court decision**

9 Following cross-motions for summary judgment, the superior court held that the
10 required local contribution violated the dedicated funds prohibition, but rejected
11 Ketchikan Gateway Borough’s other arguments that the local contribution violated the
12 appropriation or gubernatorial veto provisions of the Alaska Constitution.²⁸ The court
13 agreed with the State that the borough was not entitled to a refund of the money it spent
14 on the local contribution in 2013 or 2014 because the State had not been unjustly
15 enriched by the borough’s payments.²⁹ The superior court denied a motion for partial
16 reconsideration on the issue of the refund, stating that “the KGB School District is the
17 only party enriched by a [local contribution] payment.”³⁰
18

19 The lawsuit did not re-litigate the already settled law that it is constitutional to
20 require municipal school districts to pay required local contributions when residents
21

22 ²⁶ See Ex. 2, Order on Motion and Cross Motion for Summary Judgment at 7.

23 ²⁷ See State’s opposition and cross motion at 15; reply brief 9-10.

24 ²⁸ See Ex. 2, Order on Motion and Cross Motion for Summary Judgment at 18-23.

25 ²⁹ *Id.* at 23-25.

26 ³⁰ Order on Motion to Reconsider at 2, attached as Ex. 9.

1
2 living in unorganized Alaska do not.³¹ Similarly, the borough explicitly disclaimed the
3 argument that the State has the obligation to fully fund education in Alaska.³²

4 **ARGUMENT**

5 The court should stay the superior court's Final Judgment pending appeal
6 because the State faces irreparable harm if a stay is not granted, the borough is
7 adequately protected because it faces no cognizable legal harm from a stay, and the
8 State's arguments raise serious and substantial questions going to the merits of this case.
9 Under the balance of interests analysis, the balance clearly favors a stay pending appeal
10 because the stay would allow the legislature to overhaul the education funding system
11 only if necessary—or otherwise desirable—and then with the guidance of the Alaska
12 Supreme Court.

14 **I. The State and public face irreparable harm if the order is not stayed.**

15 The State has a strong interest in ensuring the solvency of local school districts.
16 Because required local contributions constituted over \$222 million dollars of public
17 education funding in the last school year,³³ the invalidation of the required local
18 contribution creates an enormous gap in education funding starting with the 2015-2016
19 school year. Indeed, school districts already submitted budget proposals for the
20 school year.

21
22 ³¹ See *Matanuska-Susitna Borough School District v. State*, 931 P.2d 391, 398-99
(Alaska 1997).

23 ³² Ex. 2, Order on Motion and Cross Motion for Summary Judgment at 24 (citing
24 borough's opposition and reply brief at 10); see also, *Matanuska Susitna Borough
25 School Dist.*, 931 P.2d at 399 (legislature acting in "furtherance of [its] constitutional
26 mandate" by enacting law requiring local contributions).

³³ Ex. 3, affidavit of Commissioner Michael Hanley ¶ 4.

1
2 2015-2016 school year under the expectation that they would be using funds from
3 required local contributions.³⁴ As the superior court rightly held, the State is not legally
4 responsible for fully funding education or covering that shortfall, and the borough
5 conceded that it was not arguing for full funding.³⁵ Nonetheless, by declaring
6 unconstitutional the method by which schools receive their equalized funding, the
7 court's decision puts in limbo school budgets statewide, including the budgets of non-
8 parties to this suit.
9

10 Even if funding is eventually found from another source, financial limbo has
11 immediate and irreparable effects on schools, as a budget crisis and budget uncertainty
12 make schools less able to retain staff, embark on multi-year projects, or plan for the
13 future.³⁶ This problem is exacerbated by Alaska's unrelated revenue shortfall that is
14 already demanding tough decisions.
15

16 Moreover, the State would suffer irreparable harm from immediate enforcement
17 of the Final Judgment because resulting legislative amendments to ameliorate the
18 effects of the loss of funding may render the appeal subject to attack under the mootness
19 doctrine. The mootness of an appeal is an irreparable injury.³⁷ Because some form of
20 local contribution to schools has existed since before statehood, invalidation of the
21 practice through an expansion of the dedicated funds clause is an issue of constitutional
22

23 ³⁴ *Id.* at ¶ 3.

24 ³⁵ Ex. 9, Order on Motion to Reconsider at 3 (citing borough reply br. at 10).

25 ³⁶ Ex. 3, affidavit of Commissioner Michael Hanley ¶ 9.

26 ³⁷ *Artukovic v. Rison*, 784 F.2d 1354, 1356 (9th Cir. 1986).

1
2 and practical significance that the Alaska Supreme Court should have the opportunity to
3 review.

4 Even if a subsequent appeal were allowed to proceed, the State also has an
5 interest in not overhauling a system before a final appellate judgment is issued. If the
6 legislature believes it is legally unable to require local contributions pending appeal, it
7 may urgently and imprudently overhaul education funding without the benefit of
8 appellate judgment on the permissibility of the status quo. Even should plaintiffs prevail
9 on some points on appeal, the exact contours of an Alaska Supreme Court decision may
10 not align with the superior court's judgment, causing a chaotic and disruptive funding
11 climate for schools in multiple years and creating repeated unnecessary legislative
12 crises.
13

14 Accordingly, the State and public face irreparable harm should the superior
15 court's judgment take immediate effect.³⁸
16

17 **II. The borough is adequately protected because they do not face cognizable**
18 **harm if the order is stayed.**

19 The borough is adequately protected by a stay because if they ultimately prevail
20 before the Supreme Court, the political discussion about how education should be
21 funded in Alaska will be able to occur in an atmosphere of legal finality and an agreed
22 understanding of the meaning of the dedicated funds prohibition. The only impact of the
23 stay would be that any judicially-mandated education overhaul would happen slightly
24

25
26 ³⁸ *N. Kenai Peninsula*, 850 P.2d at 639.

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2 later in time—an insignificant factor given that the borough collected a required local
3 contribution for half a century prior to filing suit.³⁹

4 Where, as here, the borough has not, and cannot, establish that they would pay
5 less to educate their children in the absence of the “dedication” of their local
6 contribution to their local school district, a stay imposes no cognizable financial harm
7 on the borough. It is a political question whether an alternative to the current system of
8 local contributions would prove more or less costly for plaintiffs. For example, should
9 the legislature instead institute a state property or sales tax, it is far from certain that the
10 legislature’s formula would improve the financial position of the taxpayer plaintiffs
11 although it would deprive them of local control over how the money is raised. Should
12 the legislature respond to the lack of local contributions by drastically slashing
13 education funding, such precipitous action might well harm rather than benefit plaintiff
14 parents, students, or the borough as a whole.
15
16

17 Indeed, the only injury caused by an ongoing dedicated fund violation is a
18 limitation on the budgetary discretion of the *legislature* in future years, which is not a
19 harm to plaintiffs at all.⁴⁰ Moreover, this injury does not exist here. Allowing the State
20 to require local contributions of local money to joint state-local cooperative programs
21 such as public schools benefits rather than impedes legislative appropriation freedom.
22 Even if having local contributions did somehow impede future legislatures’ budgetary
23

24 ³⁹ See Sec. 1.07, ch. 164, SLA 1962 (requiring local contributions to education).

25 ⁴⁰ See *State v. Alex*, 646 P.2d 203, 209 (Alaska 1982) (provision motivated by
26 concerns about hampering scope and flexibility of budgeting in legislature).

1
2 discretion, because local contributions to education have been required since before
3 statehood, any impact caused to legislative discretion by allowing the legislature the
4 option of maintaining the status quo during the brief additional time required for an
5 Alaska Supreme Court appeal is negligible if not non-existent.

6 Accordingly, the borough will be “adequately protected” from harm should this
7 Court stay its order pending appeal.⁴¹

8
9 **III. The State’s arguments raise serious and substantial questions going to the
10 merits of the case.**

11 Alaska’s longstanding local contribution requirement is constitutional because
12 the local contribution is not state revenue and therefore is not subject to the dedicated
13 funds prohibition. The superior court’s decision to the contrary relied on what the State
14 believes is a misreading of key precedent resulting in the determination that local taxes
15 are equally subject to the dedicated funds provision—which is significantly outside of
16 the boundaries of this Court’s prior rulings on the dedicated fund provision.

17 The superior court read *City of Fairbanks v. Fairbanks Convention and Visitors*
18 *Borough*⁴² as including the holding that Fairbanks’s local bed tax proceeds were
19 “proceeds of any state tax or license” and thus subject to the dedicated funds
20 prohibition.⁴³ From this the superior court concluded that no weight should be given to
21 the fact that the required local contribution at issue “is, essentially, a solely local matter
22

23
24 ⁴¹ *N. Kenai Peninsula*, 850 P.2d at 639.

25 ⁴² 818 P.2d 1153 (Alaska 1991).

26 ⁴³ Ex. 2, Order on Motion and Cross Motion for Summary Judgment at 14.

1
2 and local source of funds.”⁴⁴ But *City of Fairbanks* contains no such holding, and never
3 refers to the local tax as state revenue. Instead, *City of Fairbanks* explicitly reserved
4 judgment on whether the previous iteration of Fairbanks’s bed tax, which dedicated its
5 revenue to a specific source, would have violated the dedicated funds provision of the
6 Constitution—presumably that issue would involve analysis of whether local
7 governments are allowed to have dedicated funds.⁴⁵
8

9 The court also relied on *State v. Alex*,⁴⁶ a dedicated funds case which struck
10 down a statute allowing regional aquaculture associations to levy an assessment on the
11 sale of salmon by commercial fisherman and funnel the revenue to the local aquaculture
12 associations.⁴⁷ The superior court did not address several of the State’s arguments for
13 why *Alex* is distinguishable: including that in *Alex* the court did not decide whether the
14 dedicated funds provision applies to money that is not state public revenue because the
15 State did not make that argument and argued to the contrary that the *Alex* money was
16 subject to appropriation by the legislature.
17

18 Moreover, even if the dedicated funds prohibition were interpreted broadly as
19 applying to local revenue, the Constitutional Convention Delegates drafted the
20 provision to exempt “contributions from local government units for state–local
21

22
23 ⁴⁴ *Id.*

24 ⁴⁵ 818 P.2d at 1158 n.7.

25 ⁴⁶ 646 P.2d 203, 210 (Alaska 1982).

26 ⁴⁷ Ex. 2, Order on Motion and Cross Motion for Summary Judgment at 13.

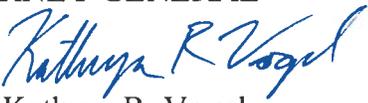
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2 cooperative programs”⁴⁸ such as the local portion of public education funding. The
3 superior court never addressed this argument. For these reasons among others that the
4 state will fully brief on appeal, the State has met its burden of raising serious and
5 substantial questions going to the merits of its case.

6
7 **CONCLUSION**

8 Because the State faces irreparable harm if a stay is not granted, the plaintiffs are
9 adequately protected because they face no cognizable legal harm, and the State’s
10 arguments raise serious and substantial questions going to the merits of the case, this
11 Court should grant a stay of the superior court judgment pending appeal.

12 DATED February 3, 2015

13 CRAIG W. RICHARDS
14 ATTORNEY GENERAL

15 By: 
16 Kathryn R. Vogel
17 Alaska Bar No. 1403013
18 Rebecca Hattan
19 Alaska Bar No.0811096
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21 Alaska Bar No. 0411074
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23 Phone: (907) 269-5275
24 *Attorneys for Defendants*

25 ⁴⁸ 1975 Op. Att’y Gen. No. 9 at 8 (May 2) (quoting 6 Proceedings of Alaska
26 Constitutional Convention, App. V, 106-07 (Dec. 19, 1955).

1
2 **IN THE SUPREME COURT OF THE STATE OF ALASKA**

3 STATE OF ALASKA; MICHAEL)
4 HANLEY, COMMISSIONER OF)
5 ALASKA DEPARTMENT OF)
6 EDUCATION AND EARLY)
7 DEVELOPMENT, in his official)
8 capacity)

Supreme Court No.: S-15811

9 Appellants,)

10 v.)

11 KETCHIKAN GATEWAY)
12 BOROUGH, an Alaska municipal)
13 corporation and political subdivision;)
14 AGNES MORAN, an individual, on)
15 her own behalf and on behalf of her)
16 son; JOHN COSS, a minor; JOHN)
17 HARRINGTON, an individual; and)
18 DAVID SPOKELY, and individual)

19 Appellees.)

20 **Trial Court Case #: 1KE-14-00016 CI**

21 **RULE 504 AFFIDAVIT OF KATHRYN R. VOGEL**

22 STATE OF ALASKA)
23) ss.
24 FIRST JUDICIAL DISTRICT)

25 Kathryn R. Vogel, being duly sworn, states as follows:

26 1. I am the Assistant Attorney General assigned to the above-captioned matter and I have personal knowledge of the matters stated in this affidavit. I represent the defendants in this matter.

2. On February 3, 2015 I spoke to Louisiana Cutler, counsel for plaintiffs, and informed her that the State was filing a motion for emergency stay with this Court.

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Kathryn R. Vogel

SUBSCRIBED AND SWORN TO before me this 3rd day of February, 2015.




Notary Public in and for Alaska
My Commission Expires: with office

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

1
2 **IN THE SUPREME COURT OF THE STATE OF ALASKA**

3 STATE OF ALASKA; MICHAEL)
4 HANLEY, COMMISSIONER OF)
5 ALASKA DEPARTMENT OF)
6 EDUCATION AND EARLY)
7 DEVELOPMENT, in his official)
8 capacity,)

Supreme Court No.: S-15811

9 Appellants,)

10 v.)

11 KETCHIKAN GATEWAY)
12 BOROUGH; AGNES MORAN, an)
13 individual, on her own behalf and on)
14 behalf of her son; JOHN COSS, a)
15 minor; JOHN HARRINGTON, an)
16 individual; and DAVID SPOKELY, an)
17 individual;)

18 Appellees.)

Trial Court Case No.: 1KE-14-00016 CI

19 **ORDER**

20 Upon consideration of the defendant State of Alaska's emergency motion for
21 stay and any opposition to the motion,

22 IT IS HEREBY ORDERED that the motion is GRANTED. The superior court's
23 Final Judgment is stayed pending appeal.

24 DATED this ___ day of February, 2015.

25 _____
Justice of the Alaska Supreme Court

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I further certify, pursuant to App. R. 513.5, that the aforementioned documents were prepared in 13 point proportionately spaced Times New Roman typeface.



Katelyn M. Disney
Law Office Assistant

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT KETCHIKAN

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

Plaintiffs,)

v.)

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

Case No. 1KE-14-00016 CI

Defendants.)

FINAL JUDGMENT

IT IS ORDERED that judgment is entered as follows:

1. Plaintiffs Ketchikan Gateway Borough, Agnes Morgan, John Coss, John
Harrington and David Spokely collectively shall recover from and have judgment against
Defendant State of Alaska, as follows:

- a. Attorney's fees \$ _____
Date awarded: _____
Judge William B. Carey: _____
- b. Costs \$ _____

Ketchikan Gateway Borough v. SOA, et.al.
FINAL JUDGMENT

Case No. 1KE-14-00016 CI
Page 1 of 2

JAN 22 2015

K&L GATES LLP
420 L STREET, SUITE 400
ANCHORAGE, ALASKA 99501-1971
TELEPHONE: (907) 276-1969

Date awarded: _____

Clerk: _____

c. **TOTAL JUDGMENT** \$ _____

d. Post Judgment Interest Rate: 3.75%

2. As set out in the Order on Motion and Cross Motion for Summary Judgment dated November 21, 2014 ("Order"), the court rules that the required local contribution ("RLC") imposed on the Ketchikan Gateway Borough pursuant to AS 14.17.410(b) and AS 14.12.020(c) qualifies as "proceeds of any state tax or license" and is thus subject to the restrictions of the dedicated funds clause (art. IX, §7) of the Alaska Constitution. The court further finds that the RLC is a "dedicated fund" within the meaning of the Constitutional prohibition. It is therefore unconstitutional for the State of Alaska to require the payment of the RLC, or to penalize the Ketchikan Gateway Borough ("Borough") (including but not limited to reducing State funding for the Ketchikan Gateway Borough School District ("District") under AS 14.17 *et seq.* or AS 14.12 *et seq.*) based on the Borough's non-payment of an RLC in the future.

3. As of the date of the Order, the State of Alaska shall not require any further payment of the RLC by the Borough, and shall not penalize the Borough or the District for the non-payment of the RLC.

4. As set out in the Order, all other claims in Plaintiffs' Complaint are dismissed.

Dated this 23 day of January, 2015.

CERTIFICATION

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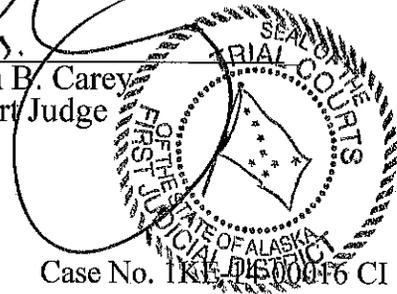
To S. Brandt-Erichsen / L. Cutler

M. Paton Walsh

A. Broker

R. Hattan

Hon. William B. Carey
Superior Court Judge



Case No. 1KE-04500016 CI

Page 2 of 2

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Ketchikan Gateway Borough v. SOA, et al.
FINAL JUDGMENT

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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.)

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

NOV 21 2014

Clerk of the Trial Courts

Deputy

Case No. 1KE-14-16CI

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.

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Ketchikan Gateway Borough v. State of Alaska, 1KE-14-16 CI

Appendix 0023
Page 1 of 26

Alaska Court System

1 **ISSUES**

- 2 1) Is the RLC a dedicated fund in violation of the dedicated funds clause of the Alaska
3 Constitution¹ when it requires some localities to make payments to their local school
4 districts for the purpose of meeting that district's Basic Need for education funding?
- 5 2) If the RLC is in violation of the dedicated funds clause, does it qualify for the
6 exemption that clause allows for pre-Statehood dedicated funds?
- 7 3) Does the RLC violate the appropriations clause² and governor's veto clause³ of the
8 Alaska Constitution because the RLC payments flow directly from a locality to its
9 school district and thus takes place outside of the legislative appropriation process?
- 10 4) If the RLC is unconstitutional, should the court order a refund of the Borough's 2014
11 RLC payment under theories of assumpsit or restitution?
12

13 **STATEMENT OF FACTS**

14 The State of Alaska is constitutionally mandated to "establish and maintain a system of
15 public schools."⁴ Title 14 of the Alaska Statutes governs school administration.⁵ Alaska
16 manages its public schools through a system of school districts.⁶ Alaska has 53 school districts.
17 Each of Alaska's 19 organized boroughs constitutes a borough school district. Likewise, each
18 of Alaska's 15 home-rule and first-class cities within an unorganized borough constitutes a city
19 school district. The court will use the term "municipal district" to refer to a school district
20 located in one of the previous two areas, i.e., a school district located within an organized
21 borough or a home-rule or first-class city. Finally, the remaining 19 school districts are within
22

23 ¹ Alaska Const. art. XI, § 7.

24 ² Alaska Const. art. IX, § 13.

25 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.

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Ketchikan Gateway Borough v. State of Alaska, 1KE-14-16 CI

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

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

12 The Basic Need formula is set by statute.¹¹ To calculate a district's Basic Need, the
13 district starts by calculating the adjusted daily membership (ADM) of each school in the
14 district.¹² The ADM is then multiplied by the district cost factor, a factor set by statute.¹³ Then
15 the ADMs of each school in the district, as adjusted based on the prior calculations, are then
16 added together. The sum is then multiplied by several factors, which look at the special needs
17 funding the district as a whole requires. These factors take into account things that make the
18 cost of education more or less expensive in a district. Among the factors are: the cost of any
19 vocational or technical instruction provided by the district, the number of correspondence
20

21 ⁷ REAAs are established under AS 14.08.031(a).

22 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.

23 ⁹ AS 14.17.410(b).

24 ¹⁰ *Id.*

25 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.

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

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

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

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

17 The amount of a municipal district's RLC payment is 2.65 mills of the full and true
18 value of taxable real and personal property²¹ in the municipal district in the second prior fiscal
19

20 ¹⁴ AS 14.17.410(C) and AS 14.17.420.

21 ¹⁵ AS 14.17.410(b).

¹⁶ AS 14.17.410.

¹⁷ AS 14.17.300.

22 ¹⁸ AS 14.17.400(b).

23 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."

24 ²⁰ See Brandt-Erichsen Aff. ¶ 10 (Feb. 6, 2014).

25 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).

1 year of the fiscal year at issue.²² The RLC is capped at 45% of a municipal district's Basic
2 Need in the preceding fiscal year.²³ If a municipal district fails to make its RLC payment, State
3 aid for education funding "may not be provided" to a municipal district.²⁴ In addition, the
4 municipal district will be disqualified from receiving supplemental funding under AS
5 14.17.490.

6 The expected fiscal year (FY) 2014 Basic Need for the KGB School District is
7 \$25,947,546.²⁵ Using the statutory formula set forth above, the Borough's FY 2014 RLC is
8 \$4,198,727.²⁶ The Borough paid its RLC to the KGB School District on October 9, 2013.²⁷ On
9 that same date, the Borough sent a letter to Commissioner Hanley and attached a copy of the
10 check it sent to the KGB School District.²⁸ The letter noted that the Borough was making its
11 RLC payment "under protest" and recited the Borough's belief that the RLC was
12 unconstitutional.²⁹

13 On January 13, 2014, the Borough filed suit against the State alleging that the RLC
14 violates the Alaska constitutional prohibition against dedicated funds³⁰ and arguing that the
15 RLC unconstitutionally circumvents the constitutional provisions setting forth the legislature's
16 appropriation power³¹ and the governor's veto power.³² The Borough filed a Motion and
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18

19 ²² AS 14.17.410(b)(2).

²³ AS 14.17.410(b)(2).

20 ²⁴ AS 14.17.410(d).

²⁵ See Brandt-Erichsen Aff. ¶ 3 (Feb. 6, 2014).

21 ²⁶ *Id.* Because of certain optional property tax exemptions, the actual taxable value of real and personal property in
22 the Borough was lower than the full and true value of that property. Therefore, the RLC equates to an actual mill
23 levy of 3.19 on the FY 2014 taxable property within the Borough. The Borough paid an additional \$3,851,273 to the
24 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
25 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.

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Ketchikan Gateway Borough v. State of Alaska, 1KE-14-16 CI

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Alaska Court System

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

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

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

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

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

11 **DISCUSSION**

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

22
23
24 ³³ *Reeves v. Alyeska Pipeline Serv. Co.*, 926 P.2d 1130, 1134 (Alaska 1996) (citations and internal quotations
omitted).

25 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)).

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

3 **a) The RLC is a “proceed[] of any state tax or license” because it a source of**
4 **public revenue.**

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

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

15
16 Article IX, section 7 of the Alaska Constitution states,

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

22 This section “prohibits the earmarking of state funds for predetermined purposes.”³⁵

23 The Alaska Supreme Court has held that “there is no doubt that [the clause] was intended to
24 prohibit any and all dedications.”³⁶

25 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).

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

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

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

13
14 In *Alex*, the Alaska Supreme Court held that royalty assessments on the sale of salmon
15 which were collected by private aquaculture associations under power granted to the
16 associations by a state statute were “proceeds of any state tax or license.”⁴⁰ The statute at issue
17 in *Alex* provided for an assessment on the sale of salmon by commercial fishermen to
18 processors.⁴¹ The assessments were levied for the purpose of providing revenue for the
19 associations.⁴² The associations were private entities set up to enhance the efficiency of salmon
20

21
22 ³⁷ *Id.* at 209.

³⁸ *Id.*

23 ³⁹ *Id.* at 210. The Attorney General’s Opinion also stated, after studying the debate of the constitutional convention
24 on the section, that the section “can be given its intended effect and serve its repeatedly expressed purpose only if
25 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.*

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

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

19 The Alaska Supreme Court has had several opportunities to reexamine the dedicated
20 funds clause over the years, and has consistently held that the explicit exceptions contained in
21 the clause and in the amendment to the clause indicate "that the prohibition [against dedicating
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23 ⁴³ *Id.* at 206.

24 ⁴⁴ *Id.*

25 ⁴⁵ *Id.*

⁴⁶ *Id.* at 210.

⁴⁷ *Id.*

⁴⁸ *Id.*

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

4 In addition to the clause at issue in *Alex*, the Alaska Supreme Court has held that
5 revenues from the Alaska Marine Highway System,⁵¹ the sale of future income from a
6 settlement claim,⁵² revenue from assessments on the sale of salmon,⁵³ proceeds from the sale of
7 state land,⁵⁴ and funds generated by a local bed tax⁵⁵ are all “proceeds of a state tax or license.”

8 The Borough relies heavily on *Alex* and argues that the RLC is “materially
9 indistinguishable” from the assessments in that case. In both cases, the Borough argues, a state
10 statute required payments to fund a particular source. In *Alex* it was to the private aquaculture
11 associations and in this case it is to the Borough School District. Furthermore, the Borough
12 points out that in *Alex* the funds were never deposited into the State treasury but rather flowed
13 directly from the fishermen to the associations. The court in *Alex*, the Borough argues, was not
14 concerned with the fact that the funds never entered the State’s coffers and this court should not
15 be concerned over the direct payment of the RLC to the School District here either.
16

17 The State argues that the RLC does not run afoul of the dedicated funds clause because
18 the RLC does not qualify as a “proceed[] of any state tax or license.” Although the State
19 acknowledges the broad meaning prescribed to the phrase under case law, the State argues that
20 the RLC is not a source of public revenue. The State contends that this is the case because of
21 what would happen if the RLC were no longer required. The State points out that the statutory
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23 ⁴⁹ *Southeast Alaska Conservation Council v. State*, 202 P.3d 1162 (2009).

24 ⁵⁰ *Id.*

25 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).

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

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

18 Finally, the State contends that the purpose of the dedicated funds clause would not be
19 served by its application to the RLC. The State cites comments made by delegates at the Alaska
20
21

22 ⁵⁶ State’s Opp. and Cross Motion for Summary Judgment at 11.

23 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
24 paid to the aquaculture associations. *Alex*, 646 P.2d at 207.

25 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).

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

7 The State's attempts to characterize a statute that requires certain municipal districts to
8 raise a substantial amount of funds and contribute those funds to a state program as a statute
9 that does not concern "proceeds of any state tax or license" as defined by the Alaska Supreme
10 Court are unpersuasive. As noted, the Alaska Supreme Court has consistently given that key
11 phrase a broad definition, even citing with approval an Attorney General's Opinion that
12 concluded the dedicated funds clause was intended to cover "the sources of any public
13 revenues" including a "tax, license, rental, sale, bonus-royalty, royalty, or *whatever...*"⁵⁹
14 (emphasis added).
15

16 The RLC plainly consists of public revenue. The State's assertion that the RLC is not a
17 source of public revenue because the statutory scheme only requires that the funds be raised,
18 but does not tell the municipal districts how to raise those funds, ignores reality. Notably, the
19 RLC is only applicable to municipal districts. As stated, municipal districts consist of organized
20 boroughs and home-rule or first-class cities.⁶⁰ Organized boroughs and cities have local taxing
21 power.⁶¹ It is hard to conceive of a way, and the State does not propose any, whereby a
22 municipal district could raise the funds necessary to fulfill its RLC obligation without resorting
23

24 ⁵⁹ *Alex*, 646 P.2d at 210.

25 ⁶⁰ AS 14.12.010.

⁶¹ Alaska Const. art. 10, § 2.

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

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

12 The Alaska Supreme Court's analysis in *State v. Alex* is especially useful here. As in
13 that case, here we are concerned with a state statute that directs that a certain amount of funds
14 be paid from one state organization to another. In *Alex*, the payee was a private organization set
15 up by state statute and the method of raising revenue was explicitly defined, but that only
16 makes the case for finding the statutory scheme here as dealing with "proceeds of any state tax
17 or license" all the more compelling. Here, rather than a private organization receiving funds
18 raised by individuals, we have one unit of government (the municipal district) raising funds at
19 the direction of another unit of government (the State) and paying those funds to a public
20 institution (the municipal district's schools). These facts only further illustrate the public nature
21 of the funds at issue. The State's attempt to distinguish *Alex* on the grounds that unlike in that
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25 ⁶² See Brandt-Erichsen Aff. ¶10 (Feb. 6, 2014).

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

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

14
15 Finally, the nuanced questions analyzed by the Alaska Supreme Court in past dedicated
16 funds clause cases further illustrates the clarity of the issue here. Past cases dealing with this
17 provision presented more complex issues such as whether the sale of future settlement income⁶⁶
18 or whether the proceeds of land use or sales transferred from the state to a state university⁶⁷
19 qualified as “proceeds of any state tax or license.” Here, the court is focused on local revenue
20 raised to fulfill a municipal district’s required contribution to that district’s education facilities.
21 This is a much clearer issue than *Myers* or *Southeast Alaska Conservation Council*, for
22 example. In contrast to those cases where there was a multilayered statute involving items that

23 ⁶³ 818 P.2d 1153 (Alaska 1991).

24 ⁶⁴ *Id.* at 1158.

25 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).

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

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

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

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

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25 ⁶⁸ AS 14.17.410.

⁶⁹ 836 P.2d 936 (Alaska 1992).

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

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

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

22 ⁷⁰ 818 P.2d 1153, 1158-59 (Alaska 1991).

23 ⁷¹ *Id.*

24 ⁷² Alaska Const. art. IX, § 7.

25 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).

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

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

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

17 Even if the Territorial laws were dedications, the Borough argues that their grandfather
18 status was extinguished when they were repealed and replaced by the education funding
19 scheme (including the RLC) enacted in 1962. The Borough cites to the aforementioned Alaska
20 Attorney General opinion for support and asks the court to reject the State's argument that the
21 RLC is protected by the clause's exemption for pre-ratification dedicated funds.
22

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25 ⁷⁴ Both parties attached copies of the Territorial laws discussed.

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

8 Second, and more importantly, those laws were repealed and replaced by the RLC and
9 other education funding law in 1962. Alaska Attorney General Opinions conclude that pre-
10 Statehood exemptions under the dedicated funds clause are extinguished when the law is
11 repealed, even if it is later re-enacted.⁷⁵ There are no cases that address this exemption portion
12 of the dedicated funds clause, and therefore the Attorney General Opinions are the most
13 persuasive authority available to this court on this issue. The logic employed in those opinions
14 makes sense when applied to this situation as well. Merely because localities have always been
15 statutorily mandated to contribute to the funding of their schools should not mean that the RLC,
16 which was enacted after Statehood, should be exempted from the dedicated funds clause. In
17 sum, because the RLC was not in existence before Alaska's constitution was ratified and
18 because the pre-Territorial education funding law was repealed and replaced in 1962 (which
19 included the statute enacting the RLC), the RLC does not qualify for the exemption found in the
20 dedicated funds clause.
21

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

25 ⁷⁵ 1959 Op. Atty. Gen. No. 7, at 1-2 (March 11, 1959).

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

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

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

11 The notes of decisions concerning this clause have to do with items such as special
12 funds⁷⁶ and the scope and manner of municipal appropriations.⁷⁷ There are no cases analogous to
13 the situation at hand. Black’s Law Dictionary gives the following meanings to the term
14 appropriation: “A legislative body’s act of setting aside a sum of money for a public
15 purpose... The sum of money so voted.”⁷⁸ Similarly, Black’s includes the following definition of
16 appropriations bill: “A bill that authorizes governmental expenditures.”⁷⁹ The Alaska Supreme
17 Court has defined an item in an appropriations bill as “a sum of money dedicated to a particular
18 purpose.”⁸⁰

19
20 The only mention of the appropriations clause in the context of a dedicated fund that the
21 court could find was a citation to a comment made by a state official in the dissent of *Myers*. The

22 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
23 receipts” that must be deposited in the state treasury and subject to the legislature’s power of appropriation).

24 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).

25 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).

1 dissent briefly mentioned the concern an official had raised prior to the finalizing of the
2 settlement scheme that the payment of the revenues from the tobacco settlement directly to a
3 private entity upon receipt by the State was potentially in violation of the appropriations clause.⁸¹

4 Other than that brief mention, the Alaska Supreme Court has not addressed appropriation clause
5 (or governor's veto clause) claims in the context of a dedicated funds challenge.

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

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

10 The Alaska Supreme Court has interpreted this clause as a safeguard against "corrupt or
11 hasty and ill-considered legislation," and as a power granted "to preserve the integrity of the
12 executive branch of government and thus maintain an equilibrium of governmental powers."⁸²

13 The governor's veto power applies only to monetary appropriations, as defined above.⁸³

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

20 ⁸¹ *Myers v. Alaska Hous. Fin. Corp.*, 68 P.3d 386, 399-400 (Alaska 2003) (Justice Bryner and Justice Fabe
21 dissenting).

22 ⁸² *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 772 (Alaska 1980) (internal citations omitted).

23 ⁸³ *Alaska Legislative Council ex rel. Alaska State Legislature v. Knowles*, 86 P.3d 891, 895 (Alaska 2004) (holding
24 that a bill which transferred land and the income derived from that land to the University of Alaska was not an
25 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).

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

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

13 The State argues that the appropriations clause and the governor's veto clause do not
14 apply for the same reason the dedicated funds clause does not apply – the RLC is not a source of
15 public revenue. The State argues that the RLC is local money, over which the legislature has no
16 authority to appropriate and thus the governor has no authority to exercise his veto over. The
17 State contends that the legislature may only appropriate funds from the State treasury and
18 because the RLC is comprised of Borough funds, the legislature has no power over it and
19 therefore the appropriations clause is not violated. The State points out that the governor's
20 authority to strike out or reduce an item in an appropriation bill is limited to appropriations that
21 are authorized by the legislature. Because the RLC is not an appropriation from the legislature,
22 the governor has no authority over the funds and the governor's veto clause does not apply. The
23 State does not address the case law referenced by the Borough.
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25

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

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

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

19 Lastly, the RLC does not run afoul of the purposes of either of these provisions. Both
20 strive to ensure that public funds are not spent without legislative approval or without a final
21 check on an errant legislature. Here, while although there is a statute that directs municipal
22 districts to spend funds, the statute was enacted through the legislative process and protected by
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25 ⁸⁶ BLACK'S LAW DICTIONARY 123 (10th ed. 2014).

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

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

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

12 “Assumpsit will lie whenever the defendant has received money which is the property of
13 the plaintiff, and which the defendant is obliged by natural justice and equity to refund.”⁸⁹

14 Assumpsit is a quasi-contract cause of action to enforce a duty to repay.⁹⁰ Alaska recognizes
15 actions in assumpsit and its common counts.⁹¹ In order to later bring an action in assumpsit, the
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20 ⁸⁷ Pl.’s Reply in Support of Mot. for Summary Judgment and Opp. to State’s Cross Mot. for Summary Judgment at
21 16.

⁸⁸ State’s Opp. and Cross Motion for Summary Judgment at 11 at 21-22.

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).

23 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).

24 ⁹¹ *State v. Wakefield Fisheries, Inc.*, 495 P.2d 166, 172 (1972), “The common law has long recognized a cause of
25 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.”

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

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

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

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

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

21 ⁹² *Principal Mutual*, 780 P.2d at 1030. See also *Era Aviation, Inc. v. Campbell*, 915 P.2d 606, 612 (1996) ("To later
22 bring an action in assumpsit, a payer must specifically notify the State, whether by the words 'paid under protest' or
23 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
24 unconstitutional assessment, the Borough is entitled to a refund." Pl.'s Reply in Support of Mot. for Summary
25 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.

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

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

11
12 **CONCLUSION**

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

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

20 Further, the State of Alaska's cross motion for summary judgment is GRANTED, in
21 part, because the RLC does not violate the governor's veto clause or the legislative
22 appropriations clause of the Alaska Constitution. The State's cross motion for summary
23 judgment insofar as it relates to the dedicated funds clause is DENIED.
24

25 **IT IS SO ORDERED.**

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Ketchikan Gateway Borough v. State of Alaska, 1KE-14-16 CI

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Appendix 20047

Alaska Court System

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

William B. Carey

William B. Carey
Superior Court Judge



CERTIFICATION

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT KETCHIKAN

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

Plaintiffs,

v.

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

Case No. 1KE-14-00016 CI

Defendants.

AFFIDAVIT OF MICHAEL HANLEY

STATE OF ALASKA)
) ss.
FIRST JUDICIAL DISTRICT)

I, Michael Hanley, state the following under oath:

1. I am the Commissioner of the Alaska Department of Education and Early Development, and have held this position since February, 2011. The Department of Education and Early Development is responsible for the distribution of funding from the Public Education Fund to school districts in Alaska.

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

1
2 2. Prior to serving as Commissioner of Education and Early Development I
3 was employed as a public school teacher at Gladys Wood Elementary School in the
4 Anchorage School District for 15 years, from 1991-2006. From 2006-2010 I was an
5 elementary school principal, first at Kasuun Elementary School and then at Kincaid
6 Elementary School in Anchorage.
7

8 3. School districts are required to submit their annual budgets both to the
9 state and to their municipal governments well in advance of each school year. Typically,
10 school districts project basic need in the November prior to the beginning of the
11 subsequent school year, thereby allowing at least 10 months to begin budgeting in order
12 to provide for students entering the classroom the following September.
13

14 4. It is of paramount importance to our students that districts are able to plan
15 for the upcoming school year, and in municipal school districts, the required local
16 contribution is a significant part of the plan. The required local contribution pays for
17 teachers, heating fuel, and other required elements for Alaska's education system.
18

19 Required local contributions constituted over \$222 million of public education funding
20 in the last school year, and for individual municipal school districts, an average of 16
21 percent of basic student need funding.

22 5. For example, in Ketchikan, the required local contribution for FY2015 is
23 approximately \$4.4 million of approximately \$31.6 million in operating expenditures,
24 exclusive of pension funding. The Ketchikan budget plan, including the required local
25 contribution funding, directs \$25 million to the instructional budget component and \$4.4
26

1
2 million for fuel, custodians and other annual operations of buildings. The remaining
3 \$2.2 million is allocated for such things as district administration and student activities.
4 In short, our school districts need the required local contribution to operate as expected.

5 6. This ruling comes at a time when our school districts are already
6 pressured by budgetary constraints. State revenue projections have fallen and the high
7 cost of health care and other challenges have significantly stressed our schools.
8

9 7. Each year, the Alaska Department of Education & Early Development
10 reviews the 53 school district budgets and communicates with individual districts and
11 schools. This year, districts reported budget challenges related to fluctuations in their
12 local economies, costs of goods such as fuel and transportation, and other factors.
13 During these times of economic uncertainty, the current year school budgets represent a
14 careful balance of revenues and expenditures and the required local contribution is a
15 critical source of the current year's plan.
16

17 8. Not only are required local contribution dollars a vital source of funding
18 to our municipal schools, the required local contribution is also an essential element of
19 the state's proven, equalized funding mechanism that maximizes Alaska's ability to
20 include federal dollars in its funding formula. The required local contribution impacts
21 not only municipal school districts, but schools throughout Alaska. Maintaining an
22 equalized education funding mechanism allows Alaska to include \$130 million of
23 annual federal Impact Aid receipts in the state's funding formula. Of that amount,
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2 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

3 FIRST JUDICIAL DISTRICT AT KETCHIKAN

4 KETCHIKAN GATEWAY BOROUGH,)
5 an Alaska municipal corporation and)
6 political subdivision; AGNES MORAN,)
7 an individual, on her own behalf and on)
8 behalf of her son; JOHN COSS, a minor;)
9 JOHN HARRINGTON, an individual;)
10 and DAVID SPOKELY, and individual,)

11 Plaintiffs,)

12 v.)

13 STATE OF ALASKA; MICHAEL)
14 HANLEY, COMMISSIONER OF)
15 ALASKA DEPARTMENT OF)
16 EDUCATION AND EARLY)
17 DEVELOPMENT, in his official)
18 capacity,)

19 Case No. 1KE-14-00016 CI

20 Defendants.)

21 **EMERGENCY MOTION FOR STAY PENDING APPEAL**

22 Defendants State of Alaska and Michael Hanley (“the State”), move the court,
23 pursuant to Alaska Rule of Civil Procedure 62(c), for a stay of the court’s Final
24 Judgment, dated January 23, 2015, pending appeal to the Alaska Supreme Court. *A*
25 *decision on this emergency motion is needed immediately.* The State requests this stay
26 because the court’s Final Judgment invalidates the statutory provisions that govern
education funding at a point in time when the governor’s budget has already been
submitted, the legislature is already in session, and major budgetary decisions will be

1
2 finalized within the next few weeks.¹ An atmosphere of uncertainty currently prevails
3 regarding the legal ramifications of this Court’s judgment, particularly because it is
4 unlikely that the Alaska Supreme Court will have the opportunity to fully review the
5 issue before this year’s legislature passes the next education budget.²

6 **STANDARD FOR A STAY PENDING A PETITION FOR REVIEW**

7
8 “Whether a stay of an injunction pending appeal will be granted is a question
9 directed to the sound discretion of the court.”³ In considering whether to grant a stay
10 pending appeal, “the lower court must consider criteria much the same as it would in
11 determining whether to grant a preliminary injunction.”⁴

12 Alaska courts employ a “balance of hardships” test when considering a motion
13 for a preliminary injunction.⁵ In order for an injunction to issue, the party requesting the
14 injunction “must be faced with irreparable harm; ... the opposing party must be
15 adequately protected; and ... [the party requesting the injunction] must raise serious and
16

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18
19
20 ¹ The governor’s preliminary budget was statutorily due by December 15, 2014
and his amended budget is due by February 18, 2015. AS 37.07.020(a); AS 37.07.070.

21
22 ² This year’s legislature is scheduled to adjourn April 19, 2015.

23 ³ *Powell v. City of Anchorage*, 536 P.2d 1228, 1229 (Alaska 1975) (internal
citations omitted).

24 ⁴ *Id.*

25 ⁵ *N. Kenai Peninsula Rd. Maint. Serv. Area v. Kenai Peninsula Borough*, 850 P.2d
26 636, 639 (Alaska 1993).

1
2 substantial questions going to the merits of the case; that is, the issues raised cannot be
3 ‘frivolous or obviously without merit.’”⁶

4 **LEGAL AND FACTUAL BACKGROUND**

5 The State incorporates by reference the facts stated in its cross-motion and
6 opposition to summary judgment.

7 **ARGUMENT**

8
9 This Court should stay its final judgment pending appeal to the Alaska Supreme
10 Court because the State faces irreparable harm if a stay is not granted, plaintiffs
11 (collectively, “the borough”) are adequately protected because they face no cognizable
12 legal harm from a stay, and the State’s arguments raise serious and substantial questions
13 going to the merits of this case. Under the balance of interests analysis, the balance
14 clearly favors granting a stay pending appeal.

15
16 **I. The State and public face irreparable harm if the order is not stayed.**

17 The State has a strong interest in ensuring the solvency of local school districts.
18 Because required local contributions constituted over \$222 million dollars of public
19 education funding in the last school year, [affidavit of Commissioner Michael Hanley
20 ¶ 4]⁷ the invalidation of the required local contribution creates an enormous gap in
21 education funding. Indeed, school districts already submitted budget proposals for fiscal
22

23
24 ⁶ *Id.* (quoting *State v. Kluti Kaah Native Village*, 831 P.2d 1270, 1273 (Alaska
1992)).

25 ⁷ The affidavit of Commissioner Michael Hanley, dated January 27, 2015, is
26 attached as Ex. 1 to this motion.

1
2 year 2016 under the expectation that they would be using funds from required local
3 contributions. [Hanley affidavit ¶ 3] As this Court rightly held, the State is not legally
4 responsible for fully funding basic need or covering that shortfall, and the borough
5 conceded that it was not arguing for full funding. [Order on Motion to Reconsider at 3;
6 Borough Reply Br. at 10] Nonetheless, by declaring unconstitutional the method by
7 which schools receive their full basic need funding, the court's decision puts in limbo
8 school budgets statewide, including the budgets of non-parties to this suit. Immediate
9 implementation of the order risks seriously impairing educational opportunities in
10 Alaska because it places in jeopardy a key source of school funding that has been relied
11 upon since before statehood.
12

13
14 Even if funding is eventually found from another source, financial limbo has
15 immediate and irreparable effects on schools, as a budget crisis and budget uncertainty
16 make schools less able to retain staff, embark on multi-year projects, or plan for the
17 future. [Hanley affidavit ¶ 9] This problem is exacerbated by Alaska's unprecedented
18 and unrelated revenue shortfall that is already demanding tough decisions. Because of
19 the harm and disruption that will result given the budget deadlines and legislative
20 decision-making timeframe, the State requests that the court grant an immediate stay of
21 the January 23, 2015 Final Judgment.
22

23 Moreover, the State would suffer irreparable harm from immediate enforcement
24 of the Final Judgment because resulting legislative amendments to ameliorate the
25 effects of the loss of funding may render the appeal subject to attack under the mootness
26

1
2 doctrine. The mooted of an appeal is an irreparable injury.⁸ Because some form of local
3 contribution to schools has existed since before statehood, invalidation of the practice
4 through an expansion of the dedicated funds clause is an issue of constitutional and
5 practical significance that the Alaska Supreme Court should have the opportunity to
6 review.

7
8 Even if a subsequent appeal were allowed to proceed, the State also has an
9 interest in not overhauling a system before a final appellate judgment is issued. If the
10 legislature believes it is legally unable to require local contributions pending appeal, it
11 may urgently and imprudently overhaul education funding without the benefit of
12 appellate judgment on the permissibility of the status quo. Even should plaintiffs prevail
13 on some points on appeal, the exact contours of an Alaska Supreme Court decision may
14 not align with this Court's judgment, causing a chaotic and disruptive funding climate
15 for schools in multiple years and creating repeated unnecessary legislative crises.

16
17 Accordingly, the State and public face irreparable harm should this Court's
18 judgment take immediate effect.⁹

19 **II. The borough is adequately protected because they do not face cognizable**
20 **harm if the order is stayed.**

21 The borough is adequately protected by a stay because if they ultimately prevail
22 before the Supreme Court, the political discussion about how education should be
23 funded in Alaska will be able to occur in an atmosphere of legal finality and an agreed

24
25 ⁸ *Artukovic v. Rison*, 784 F.2d 1354, 1356 (9th Cir. 1986).

26 ⁹ *N. Kenai Peninsula*, 850 P.2d at 639.

1
2 understanding of the meaning of the dedicated funds prohibition. The only impact of the
3 stay would be that any court-required education overhaul would happen slightly later in
4 time—an insignificant factor given that the borough collected a required local
5 contribution for half a century prior to filing suit.¹⁰

6
7 Where, as here, the borough has not, and cannot, establish that they would pay
8 less to educate their children in the absence of the “dedication” of their local
9 contribution to their local school district, a stay imposes no cognizable financial harm
10 on the borough. It is a political question whether an alternative to the current system of
11 local contributions would prove more or less costly for plaintiffs. For example, should
12 the legislature amend the statute to redirect the borough’s current required local
13 contribution into the state’s general fund, plaintiff’s financial outlay would not change
14 at all, although its schools might receive a different amount of funding because their
15 money would not be pledged to their school district. Should the legislature instead
16 institute a state property or sales tax, it is far from certain that the legislature’s formula
17 would improve the financial position of the taxpayer plaintiffs although it would deprive
18 them of local control over how the money is raised. Should the legislature respond to
19 the lack of local contributions by drastically slashing education funding, such
20 precipitous action might well harm rather than benefit plaintiff parents, students, or the
21 borough as a whole.
22
23

24
25
26 ¹⁰ See Sec. 1.07, ch. 164, SLA 1962 (requiring local contributions to education).

1
2 Indeed, the only injury caused by an ongoing dedicated fund violation is a
3 limitation on the budgetary discretion of the *legislature* in future years. But this injury
4 does not exist here. Allowing the State to require local contributions of local money to
5 joint state-local cooperative programs such as public schools benefits rather than
6 impedes legislative appropriation freedom. Even if having local contributions did
7 somehow impede future legislatures' budgetary discretion, because local contributions
8 to education have been required since before statehood, any impact caused to legislative
9 discretion by allowing the legislature the option of maintaining the status quo during the
10 brief additional time required for an Alaska Supreme Court appeal is negligible if not
11 non-existent.
12

13 Accordingly, the borough will be "adequately protected" from harm should this
14 Court stay its order pending appeal.¹¹
15

16 **III. The State's arguments raise serious and substantial questions going to the**
17 **merits of the case.**

18 The State incorporates by reference the merits arguments it made to this Court in
19 its opposition and cross-motion for summary judgment and reply. In sum, the State
20 maintains that the local contribution is not state revenue and therefore is not subject to
21 the dedicated funds prohibition. Moreover, even if the dedicated funds prohibition were
22 interpreted broadly as applying to local revenue, the Constitutional Convention
23 Delegates drafted the provision to exempt "contributions from local government units
24
25

26 ¹¹ *N. Kenai Peninsula*, 850 P.2d at 639.

1
2 for state–local cooperative programs”¹² such as the local portion of public education
3 funding. For these reasons and the others articulated in its brief, the State has met its
4 burden of raising serious and substantial questions going to the merits of its case.

5
6 **CONCLUSION**

7 Because the State faces irreparable harm if a stay is not granted, the plaintiffs are
8 adequately protected because they face no cognizable legal harm, and the State’s
9 arguments raise serious and substantial questions going to the merits of the case, this
10 Court should grant a stay of its order pending appeal.¹³

11 DATED January 28, 2015

12 CRAIG W. RICHARDS
13 ATTORNEY GENERAL

14 By:



Kathryn R. Vogel
Alaska Bar No. 1403013
Rebecca Hattan
Alaska Bar No.0811096
Margaret Paton-Walsh
Alaska Bar No. 0411074
Assistant Attorneys General

Attorneys for Defendants

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23
24 ¹² 1975 Op. Att’y Gen. No. 9 at 8 (May 2) (quoting 6 Proceedings of Alaska
25 Constitutional Convention, App. V, 106-07 (Dec. 19, 1955).

26 ¹³ *N. Kenai Peninsula*, 850 P.2d at 639.

1
2 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

3 FIRST JUDICIAL DISTRICT AT KETCHIKAN

4 KETCHIKAN GATEWAY BOROUGH,)
5 an Alaska municipal corporation and)
6 political subdivision; AGNES MORAN,)
7 an individual, on her own behalf and on)
8 behalf of her son; JOHN COSS, a minor;)
9 JOHN HARRINGTON, an individual;)
10 and DAVID SPOKELY, and individual,)

11 Plaintiffs,)

12 v.)

13 STATE OF ALASKA; MICHAEL)
14 HANLEY, COMMISSIONER OF)
15 ALASKA DEPARTMENT OF)
16 EDUCATION AND EARLY)
17 DEVELOPMENT, in his official)
18 capacity,)

19 Defendants.)

Case No. 1KE-14-00016 CI

20 **ORDER**

21 Upon consideration of the defendant State of Alaska's emergency motion for
22 stay and any opposition to the motion,

23 IT IS HEREBY ORDERED that the motion is GRANTED. The court's order
24 Final Judgment of January 23, 2015 is stayed pending appeal.

25 DATED this ___ day of January, 2015.

26

Honorable William B. Carey
Superior Court Judge

1
2 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

3 FIRST JUDICIAL DISTRICT AT KETCHIKAN

4 KETCHIKAN GATEWAY BOROUGH,)
5 an Alaska municipal corporation and)
6 political subdivision; AGNES MORAN,)
7 an individual, on her own behalf and on)
8 behalf of her son; JOHN COSS, a minor;)
9 JOHN HARRINGTON, an individual;)
10 and DAVID SPOKELY, and individual,)

11 Plaintiffs,)

12 v.)

13 STATE OF ALASKA; MICHAEL)
14 HANLEY, COMMISSIONER OF)
15 ALASKA DEPARTMENT OF)
16 EDUCATION AND EARLY)
17 DEVELOPMENT, in his official)
18 capacity,)

19 Defendants.)

Case No. 1KE-14-00016 CI

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26
MOTION FOR EXPEDITED CONSIDERATION

Defendants State of Alaska and Michael Hanley (“the State”), move the court, pursuant to Alaska Rule of Civil Procedure 77(g), for expedited consideration of the concurrently filed Emergency Motion for Stay Pending Appeal. The emergency nature of the request for stay due to the final judgment’s immediate fiscal and educational ramifications is explained in the motion for stay and attached supporting affidavit from Commissioner Hanley. And expedited consideration should be granted for the additional reason that the governor and legislature need to know whether the court’s final judgment is to take immediate effect so that, if necessary, they can take responsive

1
2 action within the legislative session that has already begun. Every day without a ruling
3 is a day of uncertainty for Alaska’s policymakers. Additionally, should this Court deny
4 the stay, the State wishes to promptly learn of that ruling in order to exercise its ability
5 to seek a stay from the Alaska Supreme Court.

6 Counsel for the State spoke about this motion and the motion for stay with
7 Louisiana Cutler, counsel for plaintiffs, on January 27, 2015 and again on
8 January 28, 2015 but did not yet receive a response on whether plaintiffs oppose the
9 motion for expedited consideration.¹ Based on Ms. Cutler’s representation that she is
10 unable to receive direction from her clients before next Monday,² the State proposes the
11 following schedule for the motion for stay:
12

13 Any opposition should be filed by close of business on Tuesday, February 3rd.

14 The State would file any reply no later than two business days later, by close of
15 business Thursday, February 5th.
16

17 The State requests that this Court issue its decision as soon as possible thereafter
18 or no later than Thursday, February 12, 2015.

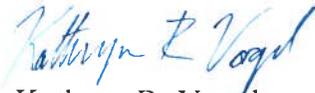
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25 ¹ Affidavit of Kathryn R. Vogel, dated January 28, 2015, ¶ 2, *attached as Ex. 1*.

26 ² *Id.*

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DATED January 28, 2015

CRAIG W. RICHARDS
ATTORNEY GENERAL

By: 
Kathryn R. Vogel
Alaska Bar No. 1403013
Rebecca Hattan
Alaska Bar No.0811096
Margaret Paton-Walsh
Alaska Bar No. 0411074
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DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
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ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

1
2 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
3 FIRST JUDICIAL DISTRICT AT KETCHIKAN

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

) Case No.: 1KE-14-00016 CI

9 Plaintiffs,)

10 v.)

11 STATE OF ALASKA; MICHAEL)
12 HANLEY, COMMISSIONER OF)
ALASKA DEPARTMENT OF)
13 EDUCATION AND EARLY)
14 DEVELOPMENT, in his official)
capacity,)

15 Defendants.)
16

17 **AFFIDAVIT OF KATHRYN R. VOGEL**

18 STATE OF ALASKA)
19 FIRST JUDICIAL DISTRICT) ss.

20 Kathryn R. Vogel, being duly sworn, states as follows:

21 1. I am the Assistant Attorney General assigned to the above-captioned
22 matter and I have personal knowledge of the matters stated in this affidavit. I represent
23 the Defendants in this matter.

24 2. I spoke telephonically with Louisiana Cutler, counsel for plaintiffs, on
25 January 27, 2015, and again on January 28, 2015, regarding the State's intention to file
26

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
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ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

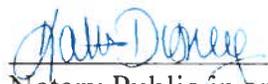
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a motion for stay and a motion for expedited consideration. Ms. Cutler informed me that she would be unable to state her clients' position on the motion for stay or motion for expedited consideration until on or after Monday, February 2, 2015 because that is the date she is meeting with her clients.


Kathryn R. Vogel

SUBSCRIBED AND SWORN TO before me this 28th day of January, 2015.




Notary Public in and for Alaska
My Commission Expires: with office

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

Ketchikan Gateway Borough v. SOA
Affidavit of Kathryn R. Vogel

Case No. 1KE-14-00016 CI
Page 2 of 2

~~Exhibit~~ 1
2 of 2

1
2 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

3 FIRST JUDICIAL DISTRICT AT KETCHIKAN

4 KETCHIKAN GATEWAY BOROUGH,)
5 an Alaska municipal corporation and)
6 political subdivision; AGNES MORAN,)
7 an individual, on her own behalf and on)
8 behalf of her son; JOHN COSS, a minor;)
9 JOHN HARRINGTON, an individual;)
10 and DAVID SPOKELY, and individual,)

11 Plaintiffs,)

12 v.)

13 STATE OF ALASKA; MICHAEL)
14 HANLEY, COMMISSIONER OF)
15 ALASKA DEPARTMENT OF)
16 EDUCATION AND EARLY)
17 DEVELOPMENT, in his official)
18 capacity,)

19 Defendants.)

Case No. 1KE-14-00016 CI

20 **ORDER**

21 Upon consideration of the defendant State of Alaska's Motion for Expedited
22 Consideration and any opposition to the motion,

23 IT IS HEREBY ORDERED that the motion is GRANTED.

24 DATED this ___ day of January, 2015.

25 _____
26 Honorable William B. Carey
Superior Court Judge

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

**KETCHIKAN GATEWAY BOROUGH, an 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, an)
individual; and DAVID SPOKELY, an)
individual,)**

Plaintiffs,

v.

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

Defendants.

**FILED in the Trial Courts
State of Alaska First District
at Ketchikan
JAN 29 2015
Clerk of the Trial Courts
Deput-**

Case No. 1KE-14-16CI

NOTICE TO PARTIES

The undersigned has just returned to Ketchikan from my very busy monthly court calendar in Petersburg, and is reviewing the State's recently filed motions demanding immediate action regarding its request for a stay pending appeal for the first time on the morning of January 29.

This court is in trial today, January 29 and has a very full calendar tomorrow, January 30. The undersigned has long scheduled leave out of the country beginning February 2 through February 17. I have unchangeable reservations to depart Ketchikan at 5:30 p.m. on Friday, January 30.

Notice to Parties
KGB v. State of AK No. 1KE-14-16CI
Page 1 of 2 **Alaska Court System**

1 The court is going to be completely unable to address these matters within the time frame
2 requested. The parties should take this into consideration and discuss how they might wish to
3 proceed.

4 Dated at Ketchikan, Alaska this 29th day of January, 2015.

5
6 
7 William B. Carey
8 Superior Court Judge
9 

12 CERTIFICATION

Copies Distributed

13 Date 1-29-15

To S. Brandt-Erichsen

L. Cutler

M. Anton-walsh

A. Broker

By CF

K. Vogel) Fax

R. Hattan

14 *Notice to Parties*

15 KGB v. State of AK No. 1KE-14-16CI

16 Page 2 of 2

17 *Alaska Court System*

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

KETCHIKAN GATEWAY BOROUGH, an 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, an)
individual; and DAVID SPOKELY, an)
individual,)

Plaintiffs,)

v.)

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

Defendants.)

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

JAN 30 2015

Clerk of the Trial Courts

By _____

Case No. 1KE-14-16CI

ORDER SETTING SCHEDULE

Defendant State of Alaska moved for expedited consideration of its motion for a stay of the court's judgment in this matter on January 28, 2015. The court set a hearing to discuss the issue on January 30. The court issued its order from the bench at the end of the hearing.

The plaintiff shall file its response to the motion for stay on or before February 9, 2015. The Stat shall file any reply by February 12. If either party requests oral argument, it will be scheduled for February 23. Otherwise the court will render its decision on or before that date.

IT IS SO ORDERED.

CERTIFICATION

Copies Distributed

Dated January 30, 2015

Date 1-30-15

To L. Cutler

S. Brandt-Erichsen

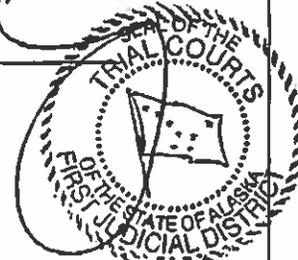
M. Patton-Walsh

R. Hattan

By CK

William B. Carey
Superior Court Judge

A. Broker) Fax
K. Vogel)



Order Setting Schedule

KGB v. State of AK No. 1KE-14-16CI

Page 1 of 1

Alaska Court System

Disney, Katelyn M (LAW)

From: Cutler, Louisiana W. <louisiana.cutler@klgates.com>
Sent: Friday, January 30, 2015 9:06 AM
To: Vogel, Kathryn R (LAW)
Cc: Paton-Walsh, Margaret A (LAW); Hattan, Rebecca E (LAW); Scott Brandt- Erichsen
Subject: Proposed schedule for State's stay motion in education funding lawsuit

Good morning Kate. As you know, we have a status conference this afternoon and in his earlier order the Court asked us to take his schedule into consideration and see if we can agree on how to proceed. Plaintiffs' proposal is below. The context for our proposal is as follows: the State first approached Plaintiffs about a stay motion in early December. Plaintiffs therefore disagree that the State's decision to wait until now to file its stay motion renders the situation an emergency that demands immediate attention. We also think it is highly unlikely that the Supreme Court will provide the State with a stay if it continues to seek to rush Plaintiffs' ability to adequately respond to its motion to Superior Court, and/or to get the Court to rush too quickly to decision. Therefore, we propose as follows:

1. Our opposition and the State's reply would be due on the normal schedule since the court is unavailable anyways. Given weekends, this means that our opposition would be due 2/9 and your reply would be due 2/16.
2. Plaintiffs will request oral argument which would take place after the State submits its reply brief. Plaintiffs may also request (and/or the Court may decide that it wants) an evidentiary hearing because Plaintiffs will dispute many of the facts about the impact on the State and Plaintiffs that has been set forth in the State's opening brief and Commissioner Hanley's affidavit. Plaintiffs propose that, if the Court is available, oral argument be set sometime the week of February 23, assuming no evidentiary hearing is necessary. If an evidentiary hearing is necessary, that would logically take place before oral argument and perhaps as early as the week of Feb 23, again depending on the court's schedule and the nature of the hearing. Plaintiffs are willing to be flexible about scheduling such a hearing if it is necessary, and work with the State and the Court to come up with a schedule that works for all parties.
3. Plaintiffs are willing to agree that we jointly request that the Court rule more quickly than he normally would but we are reluctant to suggest any time frame for this at the status conference, other than to say we'd like him to rule sooner rather than later. We do not want to presume we know his schedule and we also want him to have the time he needs to think through his order. We are willing to discuss a date by which the Court thinks he can rule (given the above possibilities) today at the status conference.

Please let us know if this is acceptable to the State.

Thanks.

Louann

K&L GATES

Louisiana W. Cutler
K&L Gates LLP
420 L St. Suite 400
Anchorage, AK 99501
Phone: 907-777-7630

Cell: 907-360-7445
Fax: 907-865-2443
louisiana.cutler@kkgates.com
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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
JAN 21 2015
Clerk of the Trial Courts
By _____ Deputy

ORDER ON MOTION TO RECONSIDER

INTRODUCTION

In its November 21st Order, the court found that plaintiff Ketchikan Gateway Borough's (the Borough) assumpsit and restitution claims against the State failed because it was not established, nor argued by either party, that the State has a constitutional obligation to fund Alaska's public schools to the full statutory Basic Need amount. In the court's view, such a finding was necessary in order to find unjust enrichment such as would justify claims on these theories. The Borough moves this court to reconsider whether or not the State received a tangible benefit from the Ketchikan Gateway Borough's (the Borough) 2013 Required Local Contribution (RLC) payment. For the following reasons this motion is **DENIED**.

DISCUSSION

ORDER ON MOTION TO RECONSIDER

Ketchikan Gateway Borough v. State of Alaska, 1KE-14-16 CI

1 The Borough argues the RLC payment gave the State a tangible benefit by: (1) reducing
2 the State's educational funding obligation, (2) helping the State "establish and maintain" the
3 Alaskan public school system, and (3) relieving the State of additional direct payments to the
4 KGB School District. The Borough further argues that the State conceded in its briefing that the
5 RLC leaves more money in State coffers. The State counters that the Borough failed to argue in
6 underlying briefs both that the RLC reduced the State's funding obligation and that the RLC
7 helps fulfill a State constitutional function. The State argues the RLC payment benefits only the
8 Borough and Borough residents and that it never conceded the RLC leaves more money in State
9 coffers.

10 1. The State is Not Enriched by the Borough's RLC Payment

11 The Borough argues that for every dollar contained in a RLC payment, the State retained
12 one corresponding dollar in its coffers.¹ This argument fails for four reasons. First, AS 14.17.410
13 does not obligate the State to fully fund schools to the statutory Basic Need amount. Second, the
14 legislature created a statutory back-up plan in the event insufficient monies are appropriated for
15 education. Third, the statutory scheme contemplates a variety of school funding sources. Fourth
16 and finally, the KGB School District is the only party enriched by an RLC payment. For all these
17 reasons, the State does not receive a tangible benefit from an RLC payment.

18 Nothing in AS 14.17.410(b) directs the State to make up the difference left by an unpaid
19 RLC. The statute sets out a mathematical equation used to determine the amount of State aid
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24 ¹ Pl.'s Mot. for Partial Reconsideration at 2, 3 ("[A]s a result of the RLC,
25 the State paid a diminished amount to fund education at the level required by
State law").

ORDER ON MOTION TO RECONSIDER

Ketchikan Gateway Borough v. State of Alaska, 1KE-14-16 CI

Page 2 of 8

Alaska Court System

Appendix 0074

1 available to school districts in Alaska.² It does not direct the State to fully fund a district's Basic
2 Need calculation in the full amount in the event of an absent RLC payment.³

3 Alaska's educational funding scheme contemplates a statutory back-up plan in the event
4 the legislature does not appropriate enough money to satisfy its calculated educational aid.⁴
5 Under this statutory back-up plan, if the legislature fails to appropriate enough money to fulfill
6 the State's obligations under AS 14.17.410, the Department of Education may reduce the Basic
7 Need amount of each district on a pro-rata basis. To analogize the case at bar: If the State of
8 Alaska found that it's 2015 budget did not account for a dearth of RLC payments, the State
9 would be able to reduce the final Basic Need calculations of all districts to account for this
10 deficit and would give schools less funding as a result. As a practical matter, the State would not
11 need to fill the gap left by unpaid RLCs, but would be able to adjust its amount of school funding
12 to fit its current appropriations, as it is allowed to do under state statute.

13 AS 14.17.410 explicitly names three sources of school funding: Local, State, and Federal
14 monies. Although the State is solely "responsible" to "maintain education," in reality a variety of
15 sources are necessary from different governmental levels.⁵ These sources include State aid, local
16 aid, federal impact aid, federal grants, private grants, and even parental support. The drafters of
17 Alaska's school funding scheme recognized that a variety of funding sources are required to fund
18 schools, and that the onus should not fall solely with the State.

19 The KGB School District was the only party enriched by the Borough's RLC payment,
20 and therefore, the KGB School District is the sole party liable in a claim in restitution. The
21 Borough cites Restatement (third) of Restitution and Unjust Enrichment § 19 to argue the RLC
22

23 ² See AS 14.17.410.

24 ³ See *id.*

25 ⁴ AS 14.17.400(b).

⁵ See *Matanuska-Susitna Borough School Dist. v. State*, 931 P.2d 391 (Alaska 1997).

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1 payments were a state tax, and the Borough therefore paid in excess of the proper amount.⁶

2 However, this same authority indicates that the RLC provides the State no tangible benefit. If the
3 RLC payments were an illegal state tax, even in the broadest sense of the word "tax," there
4 would be a claim in restitution for the amount of the RLC payment.⁷ A tax, in its broadest sense,
5 is "a monetary charge imposed by the government on persons, entities, or property, to yield
6 public revenue. Most broadly, the term embraces all governmental impositions on the person,
7 property, privileges, occupations, and enjoyment of the people."⁸ The State demanded the RLC
8 from the Borough under the color of public authority. In this way, the State is taking something
9 from the municipality, despite never receiving the RLC themselves. In this broad sense, the RLC
10 payment is a "tax" for purposes of a Restatement analysis.

11 This court's November 21 Order discusses the compulsory, tax-like nature of the RLC
12 under this extremely broad definition. This court held the RLC is a proceed of a state tax or
13 license in violation of the dedicated funds clause under an equally broad definitional framework.⁹
14 The court found the RLC to be a "payment"; that it "consists of public revenue"; that it is an
15 "obligation"; that it "is a source of public revenue"; that it consists of "public funds"; and, that it
16 "compels a set amount and does not let municipalities use their independent judgment as to how
17 much to contribute to local schools."¹⁰ As the court wrote:

18 Here, rather than a private organization receiving funds raised by individuals, we have
19 one unity of government (the municipal district) raising funds at the direction of another
20 unit of government (the state) and paying those funds to a public institution (the

21 ⁶ Pl.'s Mot. for Partial Reconsideration at 4.

22 ⁷ Restatement (third) of Restitution and Unjust Enrichment § 19 (2010) ("[T]he
23 payment of a tax by mistake, or the payment of a tax that is erroneously or
24 illegally assessed or collected, gives the taxpayer a claim in restitution
25 against the taxing authority as necessary to avoid unjust enrichment. 'Tax'
within the meaning of this section includes every form of imposition or
assessment collected under color of public authority." (emphasis added)).

⁸ BLACK'S LAW DICTIONARY 1469 (7th ed.1999).

⁹ Order at 25.

¹⁰ See *id.* at 4, 12, 13, 17.

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1 municipal district's schools). These facts only further illustrate the public nature of the
2 funds at issue.¹¹

3 The holding of the court and the language used throughout the order implies that the RLC
4 is a "tax" under the broad definitional framework of the Restatement.

5 If the RLC is a tax for purpose of this analysis, the party who is enriched from the RLC
6 payment is clear. The "tax" was paid to a third party—the KGB School District. The
7 Restatement addresses illegal tax payments to third parties in the following illustration:

8 16. A municipal zoning board has the statutory duty to approve new residential
9 subdivisions on such terms as will serve the best interests of the community. The board
10 adopts the practice of requiring developers to make a cash contribution to the local school
11 district as a condition of obtaining development approval. Upon a judicial determination
12 that the board has no statutory authority to require such contributions, the developers who
13 have made them have a claim in restitution to recover their payments from the school
14 district.¹²

15 When the method of taxation is illegal and the tax is paid to a third party the restitution
16 claim lies against the body that actually received the funds. The KGB School District is the party
17 that received the RLC and was thereby the only party enriched. Under the Restatement analysis,
18 the KGB School District is the sole party against whom the Borough may bring a claim in
19 restitution. The restitution claim against the State fails for this reason.

20 2. The Borough's Constitutional Obligation Argument is Not Timely and was Explicitly 21 Waived in Briefs

22 The Borough argues that because the RLC lessens the State's role in fulfilling its
23 constitutional duty to "maintain" public schools, the Borough assisted the State in fulfilling a
24 State constitutional obligation.¹³ The Borough argues for the first time, without citation aside
25 from the text of the statute itself, that the State's statutory basic student allocation and Basic

¹¹ *Id.* at 13.

¹² Restatement (third) at cmt. illus. 16.

¹³ Pl.'s Mot. for Partial Reconsideration at 3.

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1 Need calculation is an expression of the State's constitutional obligation under the Alaska
2 Constitution, article VII, section 1.¹⁴

3 However, the Borough specifically waived this argument in its briefing.¹⁵ In the
4 Borough's April 28th Reply, it stated explicitly that: "The Borough will not address the extent to
5 which the State must provide school funding, and it will not speculate in a case in which it has
6 not presented that issue." In its November 21st Order, this court stated: "[N]either party has
7 argued that the Alaska Constitution's education clause compels the state to fully fund all public
8 schools in Alaska."¹⁶ Therefore, this contention cannot be considered on this motion to
9 reconsider because the Borough both explicitly waived the issue and failed to raise this issue in
10 briefing previous to their motion for reconsideration.¹⁷

11 3. The RLC Payments Do Not Spare the State an "Otherwise Necessary Expense"

12 Because the State need not fill the gap left by an unpaid RLC in the State's statutory aid
13 calculation, *supra*, there can be no claim in restitution on the basis the RLC payment spared the
14 State an "otherwise necessary expense." In its November 21st Order, the court considered that
15 there could be no unjust enrichment because RLC payments never passed through State coffers,
16 stating: "[T]here was no unjust enrichment because there was no type of enrichment at all."¹⁸
17 The Borough argues, "[t]he State cannot be allowed to avoid an unjust enrichment claim by
18 simply orchestrating payment from a surrogate (the Borough) to the School District for the
19

20 ¹⁴ *Id.* at 4.

21 ¹⁵ Pl.'s Reply in Support of Motion for Summary Judgment at 10.

22 ¹⁶ Order at 24. See also Amicus Curiae Fairbank's North Star Borough's Reply
23 at 8 (the Fairbanks North Star Borough argues that the State bears some duty
24 or obligation to provide an amount of school funding, but states any argument
25 regarding full funding is a red herring); Pl.'s Reply in Support of Motion
for Summary Judgment at 10.

¹⁷ *Clemensen v. Providence Alaska Medical Center*, 203 P.3d 1148, 1155 (Alaska
2009); *Stadnicky v. Southpark Terrace Homeowner's Ass'n, Inc.*, 939 P.2d 403,
405 (Alaska 1997) ("An issue raised for the first time in a motion for
reconsideration is not timely.").

¹⁸ Order at 24.

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1 State's benefit."¹⁹ The Borough cites Restatement (third) of Restitution and Unjust Enrichment §
2 9 in support, which stands for the proposition a party who mistakenly confers a non-monetary
3 benefit on another party has a claim in restitution to the extent "the recipient has been spared an
4 otherwise necessary expense."

5 A claim in restitution for a benefit other than money is measured in to the extent "the
6 recipient has been spared an otherwise necessary expense." It has not been shown that the gap left
7 by an unpaid RLC payment leaves an "otherwise necessary expense" to the State because the
8 State need not fill the gap left by an RLC payment, thereby leaving no measure by which this
9 claim in restitution can be calculated. Therefore, this claim fails.

10
11
12 **4. The State Did Not Concede that an RLC Payment Leaves More Money in State
Coffers**

13 The State explicitly argued in briefs that the State was never meant to be the sole source
14 of educational funding in the State of Alaska.²⁰ The Borough argues the State conceded that the
15 RLC leaves more money in State coffers.²¹ The relevant language contained in State's briefing
16 and cited by the Borough as a concession reads: "Local contribution likewise does not curtail
17 budgetary control; on the contrary it leaves more money in state coffers because schools receive
18 part of their funding from local sources."²² This language is contained in a section of the State's
19 Opposition that discusses dedicated funds in a historical context.²³ Here, the State compares a
20 discussion about earmarking in the Alaska Constitutional Convention record to the RLC in order
21 to further differentiate the RLC from dedicated funds. The court does not view this as a
22

23
24 ¹⁹ Pl.'s Mot. for Partial Reconsideration at 3.

²⁰ State's Opp. to Pl.'s Mot. for Summary Judgment at 17.

²¹ Pl.'s Mot. for Partial Reconsideration at 3.

²² Id. (citing State's Opp. to Pl.'s Mot. for Summary Judgment at 15).

²³ See State's Opp. to Pl.'s Mot. for Summary Judgment at 14-15.

25
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concession as to the Borough's assumpsit or restitution claims, but is rather as an illustration used to distinguish a separate point of law unrelated to the assumpsit and restitution claims.

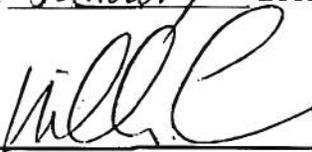
CONCLUSION

For the foregoing reasons and because it has not been established that the State has an obligation to fill the gap left by an unpaid RLC payment, and because the Borough did not argue the RLC helped fulfill a constitutional mandate in briefs; and because the RLC payments do not spare the State an "otherwise necessary expense" and the State made no concession that they do, the Borough's motion to partially reconsider is **DENIED**.

Otherwise this order, together with the court's Order on Motion and Cross Motion for Summary Judgment shall comprise the court's decision in this matter. Counsel for plaintiff Ketchikan Gateway Borough shall prepare and file an appropriate judgment for the court's signature.

IT IS SO ORDERED

Dated at Ketchikan, Alaska this 21 day of January 2015.



William B. Carey
Superior Court Judge



CERTIFICATION

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ORDER ON MOTION TO RECONSIDER

Ketchikan Gateway Borough v. State of Alaska, 1KE-14-16 CI

IN THE SUPREME COURT FOR THE STATE OF ALASKA

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

Appellants,

v.

KETCHIKAN GATEWAY BOROUGH;
AGNES MORAN, an individual, on her own
behalf and on behalf of her son; JOHN COSS,
a minor; JOHN HARRINGTON, an
individual; and DAVID SPOKELY, an
individual,

Appellees.

Supreme Ct. No. S-15811

Superior Court No. 1KE-14-00016 CI

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FEB 09 2015

APPELLATE COURTS
OF THE
STATE OF ALASKA

OPPOSITION TO EMERGENCY MOTION FOR STAY PENDING APPEAL

Plaintiffs oppose the State's Emergency Motion for Stay Pending Appeal ("Emergency Motion") because no emergency exists that would require the Supreme Court to rush to a decision and because the State has not and cannot establish that it is entitled to a stay.

I. There Is No Emergency.

First and foremost, there is no "emergency" that necessitates the Supreme Court ruling on whether a stay is appropriate. The State has made the very same request of the

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Superior Court, and he has agreed to do so, on an expedited basis.¹ Furthermore, the State claims that the February 18 deadline for the Governor to submit his amended budget in accordance with AS 37.07.070 is the reason that it requires emergency relief. Yet the Governor already submitted his amended budget to the legislature last Thursday (February 5, 2015).² It is therefore apparent that the Governor is not waiting for a ruling on the State's request for a stay in this case before meeting the deadline provided for in AS 37.07.070.

Additionally, the Attorney General long ago concluded that the deadlines provided for throughout AS 37.07 (Executive Budget Act) are directory instead of mandatory because of the Governor's constitutional authority for initial budget preparation.³ The Attorney General stated that "*any statutory restriction*" on the Governor's power to recommend appropriations would be a violation of the separation of powers doctrine since the source of the Governor's power to recommend a budget and appropriations is provided

¹ January 30, 2015 Order Setting Schedule (Exhibit 7 to Emergency Motion) ("Scheduling Order"). The State's Claim that the schedule set for the Superior Court to make a decision could be stretched out for another month if Plaintiffs request an evidentiary hearing is curious since the Scheduling Order makes no provision for an evidentiary hearing. Moreover, after preparing its Opposition to both motions, Plaintiffs have concluded that they will not request an evidentiary hearing.

² "Governor Releases Amended Endorsed Budget," Office of the Governor February 5, 2016 Press Release attached as Exhibit A to the February 6, 2015 Affidavit of Louisiana W. Cutler in Support of Plaintiffs' Superior Court Opposition attached as Exhibit A to this Opposition ("Cutler Aff.") .

³ Attorney General's Opinion, File No. 366-464-83, February 28, 1983 ("1983 Attorney General's Opinion"), attached as Exhibit C to the Cutler Aff. included in Exhibit A to this Opposition.

in Article IX, section 12 of the Constitution.⁴ Further, “[a]pplying AS 37.07.070(1) strictly, rather than just as a guide, could prevent the governor from introducing an essential appropriation bill; that would produce a result that is both unconstitutional and unreasonable.”⁵ Here, there is no reason for the Court to conclude otherwise just because the statute has been amended to add additional deadlines such as the one that the State claims is critical here.⁶

Furthermore, it is inevitable that final budget decisions will not be made until the end of the legislative session in April, as is the case every year. Moreover, if the State is correct that an “emergency” exists, the Governor has the statutory power to propose additional appropriations to the legislature in order to address an emergency “at any time” in accordance with AS 37.07.100 and the 1983 Attorney General’s Opinion.⁷

In sum, the so-called “emergency” created by the February 18 dead line is

⁴ *Id.* at 2 (emphasis added).

⁵ *Id.*

⁶ See *S. Anchorage Concerned Coal., Inc. v. Municipality of Anchorage Bd. of Adjustment*, 172 P.3d 768, 771-72 (Alaska 2007) (“If a statute is mandatory, strict compliance is required; if it is directory, substantial compliance is acceptable absent significant prejudice to the other party.” In determining if a statute is considered directory three factors can be examined: “if (1) its wording is affirmative rather than prohibitive; (2) the legislative intent was to create ‘guidelines for the orderly conduct of public business’; and (3) ‘serious, practical consequences’ would result if it were considered mandatory.”); *West v. State, Bd. of Game*, 248 P.3d 689, 698 (Alaska 2010) (citing *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 192 (Alaska 2007)) (“[C]ourts should if possible construe statutes so as to avoid the danger of unconstitutionality.”); *State v. Blank*, 90 P.3d 156, 162 (Alaska 2004) (“[Courts should] narrowly construe statutes in order to avoid constitutional infirmity where that can be done without doing violence to the legislature’s intent.”).

⁷ 1983 Attorney General’s Opinion at 2 (if the statute is not viewed as directory, it would prevent the Governor from “dealing with emergencies and other situations in which the best interests of the state require an appropriation to be submitted after the statutorily specified time.”)

nonexistent.

II. In Accordance with Longstanding Precedent, The Court Should Let The Superior Court Determine Whether Or Not A Stay Is Appropriate In This Case.

In *Powell v. City of Anchorage*, 536 P.2d 1228, 1230 (Alaska 1973) (citation omitted), the Court held that the Superior Court should first consider an application for stay of a judgment because “the stay or suspension of such judgments often involves a delicate balancing of the equities that only the court thoroughly familiar with the case is able to make.” That guidance is especially helpful here since the State has requested that this Court rush to a decision before an unenforceable deadline eight days from now. The Superior Court weighed the arguments made by Plaintiffs and the State and issued a lengthy decision examining the education funding scheme at issue here in light of this Court’s longstanding Anti-Dedication Clause case law.⁸ The Superior Court is the tribunal that is familiar with the record, including the complicated education funding statute.⁹ The Superior Court is the one who has most recently applied the Anti-Dedication Clause case law to the statute.¹⁰ Therefore, Plaintiffs respectfully suggest that the Superior Court is the tribunal that is currently in the best position to apply the balancing of harms test for a stay to the facts presented here, particularly when that balancing is going to be done on an expedited basis.

⁸ Order on Cross Motion for Summary Judgment (“Superior Court Decision”) (Exhibit 2 to Emergency Motion).

⁹ An overview of the education funding statute can be found at 2-5 of the Superior Court Decision.

¹⁰ Superior Court Decision at 7-18.

III. The State Has Not and Cannot Establish That It Is Entitled to A Stay.

The vast majority of the arguments made by the State to this Court are in the process of being made to the Superior Court. Therefore, Plaintiffs incorporate their Opposition to the Emergency Motion for Stay Pending Appeal that the State is filing today in the Superior Court (“Plaintiffs’ Superior Court Opposition”) into this Opposition. Plaintiffs’ Superior Court Opposition is attached as Exhibit A to this Opposition. A summary of the arguments follows.

To obtain a stay of a non-monetary judgment, the moving party needs to show that it will be irreparably harmed if a stay is not granted, and that the non-moving party can be adequately protected from harm, or, in the absence of adequate protection, that the moving party has a clear likelihood of success on the merits. The State has not made the required showing. Instead, the State mischaracterizes the balance of hardships, ignores the fact that Plaintiffs cannot be adequately protected from harm if the stay is granted, and does not demonstrate a clear likelihood of prevailing on the merits before this Court.

The State will not be irreparably harmed for a host of reasons. First, AS 14.17.610(b) provides that any overpayments of State aid to school districts can be adjusted in future fiscal years, there is no requirement that the legislature make up for the lack of RLC payments because it does not have to fully fund education or any other program, and AS 14.17.300 expressly provides that the State can fund education at less than 100% of basic need. Second, the State argued and the Superior Court concluded that the State receives no benefit from the RLC payments. The State is not irreparably harmed by the

absence of a payment from which it receives no benefit. Third, the State's irreparable harm arguments rely on rank speculation about what might happen this legislative session in the absence of a stay and/or how nonparties to the case might be impacted by the Superior Court's Final Judgment. Such speculation does not establish irreparable harm. Fourth, the Superior Court's Final Judgment continues to have preclusive effect even if it is stayed. Fifth, despite its present budget woes, the State has adequate resources to address the absence of the required local contribution provided for in AS 14.17.410(b) and AS 14.12.020(c) ("RLC") if the Governor and the legislature choose to do so. Sixth, the State's mootness argument is not supported by the case upon which it relies and does not comport with Alaska law holding that a legislative change in a statute does not moot a challenge to the previous version of the law. Finally, the uncertainty in school funding that the State claims is created by the Superior Court's Final Judgment for school districts is greatly exaggerated and in any event is not harm to the State.

In contrast, Plaintiffs are harmed and cannot be adequately protected from harm because the Superior Court has ruled that once the RLC is paid, Plaintiff Ketchikan Gateway Borough ("Borough") is not entitled to a refund. Furthermore, even if a refund were to be available, the private party plaintiffs would still be harmed without adequate protection because the Borough has no mechanism to refund them their taxes paid towards the RLC. Therefore, the Court must find that Plaintiffs cannot be adequately protected if the Final Judgment is stayed pending appeal.

Given that the Superior Court has concluded that the RLC funding scheme is an unconstitutional violation of the Anti-Dedication Clause, the State cannot make a showing of clear likelihood of success on the merits because the Superior Court's decision follows longstanding Alaska Supreme Court precedent interpreting the Anti-Dedication Clause. This is not a case of first impression but instead applies settled law which has broadly construed the Anti-Dedication clause over many years. Accordingly, the State has not met its burden of proving its entitlement to a stay, and its Motion must be denied.

IV. The State Has Not Established "Clear Likelihood of Success on the Merits" Simply By Asserting that the Superior Court Decision Is Wrong.

The State claims that the Superior Court Decision "invalidated a longstanding requirement that has existed in some form since pre-statehood."¹¹ The Superior Court expressly held that the RLC was not longstanding and did not qualify as a pre-Statehood exception to the Anti-Dedication Clause.¹² The Superior Court again relied upon Attorney General Opinions for this conclusion which the State apparently seeks to disavow here.¹³

The State also claims that the Superior Court expanded the scope of the Anti-Dedication Clause beyond this Court's precedents with respect to same.¹⁴ The Superior Court carefully considered all of this Court's previous precedents¹⁵ and concluded that this Court has had numerous opportunities to re-examine the Anti-Dedication Clause over the

¹¹ Emergency Motion at 2.

¹² Superior Court Decision at 16-18.

¹³ *Id.* at 18.

¹⁴ Emergency Motion at 2.

¹⁵ Superior Court Decision at 7-16.

years, but has consistently held that a broad interpretation of this constitutional provision is appropriate.¹⁶

The State also argues that the Court misread this Court's precedent and did not discuss each and every one of the State's arguments in the Superior Court Decision.¹⁷ A stay motion is not the proper forum to fully brief the arguments on the underlying merits, particularly in a case like the one presented here where the stay motion is being considered on an "emergency" basis. However, in the instant appeal, where there is no factual dispute, the parties fully briefed all the issues, and the Superior Court applied longstanding precedent in reaching his conclusion, the State has not demonstrated a clear likelihood of success on the merits merely by asserting that the decision was wrongly decided for the same reasons it argued below. The State does not point to any legal conclusion that is so far beyond the parameters of this Court's previous decisions that it might justify a finding of a clear likelihood of success on the merits. Although clearly the State has the right to make all of its arguments in its appeal, finding fault with the Superior Court Decision does not establish the "clear likelihood of success on the merits" prong of the stay test. If it is indeed so clear that they will succeed with this Court, they would already have done so at the Superior Court.

Here, the State essentially asks this Court to overrule *State v. Alex*, 646 P.2d 203 (Alaska 1982) and its progeny, cases in which this Court several times reiterated its

¹⁶ *Id.* at 9-10.

¹⁷ Emergency Motion at 13-15.