

IN THE SUPREME COURT FOR THE STATE OF ALASKA

State of Alaska, et al.,)
)
 Appellants/Cross-Appellees,)
)
 vs.)
)
 Ketchikan Gateway Borough, et al.,)
)
 Appellees/Cross-Appellants.)
)
)

Supreme Court No. S-15811/15841
Trial Court Case No. 1KE-14-00016 CI

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MAY 13 2015

K & L GATES LLP

**MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF
BY NEA-ALASKA IN SUPPORT OF
APPELLANT/CROSS APPELLEE, STATE OF ALASKA**

Pursuant to Alaska R. App. P. 212 (c)(9), NEA-Alaska seeks leave to file an amicus curiae brief in support of the State of Alaska’s appeal. The appeal challenges the Trial Court’s conclusion that the State’s consideration of local tax revenues in its funding formula for education assistance imposes an unconstitutional dedication of municipal taxes. Proposed amicus will provide the perspective of the statewide labor organization that represents 13,000 teachers and support professionals working in Alaska’s public schools.

LEGAL STANDARD

Alaska Rule of Appellate Procedure 212(c)(9) permits *amicus curiae* to file a brief “by leave of court.”

DISCUSSION

NEA-Alaska is the largest statewide labor organization representing teachers, certificated staff and education support professionals across the state. NEA-Alaska believes that its members will be financially and professionally impacted if the trial court’s decision is affirmed. Although the decision does not purport to direct how the State will fund local

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school districts if the current system of funding is struck down, it is evident that implementing the trial court's decision would require drastic alteration of the current funding system. Presently, the State considers the municipal tax base in apportioning funding to organized municipalities. The Ketchikan Gateway Borough seeks a determination that the State may no longer consider local tax capacity in determining the amount of state funding allocated to schools within municipalities. This effort, if successful, will create the potential for municipalities to displace in whole or in part the current stream of local tax revenue paid to support local schools, with limited state dollars. The decision would potentially change the State's stable needs-based system into a flat allocation for all districts, regardless of local ability to tax.

Because personnel expenses constitute a substantial component of the funding needed to finance public schools, any reduction in school funding will necessarily damage the interests of NEA-Alaska's membership. Additionally, even if school funding is not reduced overall, re-distribution under the Appellee's proposal would likely generate inequities attributable to the limited tax base in rural districts. School districts with little or no tax base would have reduced ability to attract and retain highly qualified personnel, a difficulty with which rural school districts already struggle. Reduced funding limits the professional stability and rapport needed to facilitate and enhance excellence in education.

Currently, the State and two boroughs will participate in the appeal. In addition, the associations for school administrators, superintendents and school boards have been granted leave to submit *amici* briefing. As the statewide advocate for Alaska's education professionals, NEA-Alaska has a deep interest in ensuring that maximum state and local

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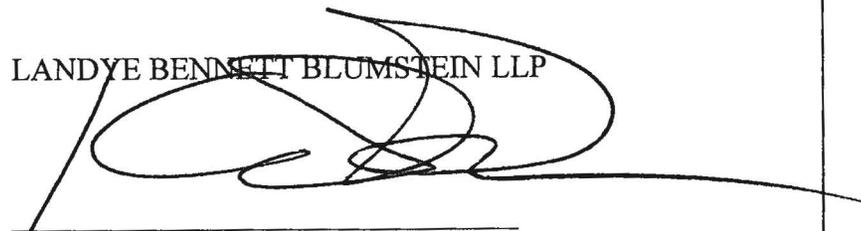
funding is available to provide a quality education, and to provide appropriate legal analysis to the Court.

CONCLUSION

NEA-Alaska believes that its perspective and legal analysis will assist the Court's determination of the varied interests impacted by this important appeal.

Dated this 12th day of May, 2015 at Anchorage, Alaska.

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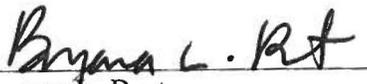
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IN THE SUPREME COURT FOR THE STATE OF ALASKA

State of Alaska, et al.,)	
)	Supreme Court No. S-15811/15841
Appellants/Cross-Appellees,)	
)	Trial Court Case No. 1KE-14-00016 CI
vs.)	
)	
Ketchikan Gateway Borough, et al.,)	
)	
Appellees/Cross-Appellants.)	
)	
)	

**ORDER ALLOWING AMICI CURIAE TO FILE THEIR BRIEF
[PROPOSED]**

Amicus Curiae NEA-Alaska moved this court for permission to file an Amicus Curiae Brief in support of Appellant/Cross Appellees, State of Alaska. This Court grants that motion.

It is therefore ordered that the brief is due May 12, 2015.

Dated: _____, 2015

Marilyn May
Clerk of the Appellate Courts

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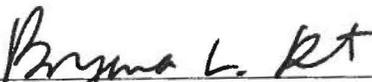
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IN THE SUPREME COURT FOR THE STATE OF ALASKA

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

Appellants/Cross-Appellees,)

vs.)

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/Cross-Appellants.)

) Supreme Court No. S-15811/15841

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

BRIEF OF AMICUS CURIAE NEA-ALASKA

Filed in the Alaska Supreme Court
of the State of Alaska, this ___ day
of May, 2015

Marilyn May, Clerk

By: _____
Deputy Clerk

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AUTHORITIES PRINCIPALLY RELIED UPON

Alaska Statutes

Sec. 14.12.010. Districts of State Public School System

The districts of the state public school system are as follows:

- (1) each home rule and first class city in the unorganized borough is a city school district;
- (2) each organized borough is a borough school district;
- (3) the area outside organized boroughs and outside home rule and first class cities is divided into regional educational attendance areas.

Sec. 14.14.060. Relationship Between Borough School District and Borough; Finances and Buildings

(c) Except as otherwise provided by municipal ordinance, the borough school board shall submit the school budget for the following school year to the borough assembly by May 1 for approval of the total amount. Within 30 days after receipt of the budget the assembly shall determine the total amount of money to be made available from local sources for school purposes and shall furnish the school board with a statement of the sum to be made available. If the assembly does not, within 30 days, furnish the school board with a statement of the sum to be made available, the amount requested in the budget is automatically approved. Except as otherwise provided by municipal ordinance, by June 30, the assembly shall appropriate the amount to be made available from local sources from money available for the purpose.

Sec. 14.14.065. Relationship Between City School District and City

The relationships between the school board of a city school district and the city council and executive or administrator are governed in the same manner as provided in AS 14.14.060 for the school board of a borough school district and the borough assembly and executive or administrator.

Sec. 14.14.090. Duties of School Boards.

In addition to other duties, a school board shall:

- (1) determine and disburse the total amount to be made available for compensation of all school employees and administrative officers;
- (2) provide for, during the school term of each year, an educational program for each school age child who is enrolled in or a resident of the district;

(3) withhold the salary for the last month of service of a teacher or administrator until the teacher or administrator has submitted all summaries, statistics, and reports that the school board may require by bylaws;

(4) transmit, when required by the assembly or council but not more often than once a month, a summary report and statement of money expended;

(5) keep the minutes of meetings and a record of all proceedings of the school board in a pertinent form;

(6) keep the records and files of the school board open to inspection by the public at the principal administrative office of the district during reasonable business hours;

(7) establish procedures for the review and selection of all textbooks and instructional materials, including textbooks and curriculum materials for statewide correspondence programs, before they are introduced into the school curriculum; the review includes a review for violations of AS 14.18.060; nothing in this paragraph precludes a correspondence study student, or the parent or guardian of a correspondence study student, from privately obtaining or using textbooks or curriculum material not provided by the school district;

(8) provide prospective employees with information relating to the availability and cost of housing in rural areas to which they might be assigned, and, when possible, assist them in locating housing; however, nothing in this paragraph requires a school district to provide teacher housing, whether district owned, leased, rented, or through other means, nor does it require a school board to engage in a subsidy program of any kind regarding teacher housing;

(9) train persons required to report under AS 47.17.020, in the recognition and reporting of child abuse, neglect, and sexual abuse of a minor;

(10) provide for the development and implementation of a preventative maintenance program for school facilities; in this paragraph, "preventative maintenance" means scheduled maintenance actions that prevent the premature failure or extend the useful life of a facility, or a facility's systems and components, and that are cost-effective on a life-cycle basis.

Sec. 14.17.410. Public School Funding.

(a) A district is eligible for public school funding in an amount equal to the sum calculated under (b) and (c) of this section.

(b) Public school funding consists of state aid, a required local contribution, and eligible federal impact aid determined as follows:

(1) state aid equals basic need minus a required local contribution and 90 percent of eligible federal impact aid for that fiscal year; basic need equals the sum obtained under (D) of this paragraph, multiplied by the base student allocation set out in AS 14.17.470 ; district adjusted ADM is calculated as follows:

(A) the ADM of each school in the district is calculated by applying the school size factor to the student count as set out in AS 14.17.450 ;

(B) the number obtained under (A) of this paragraph is multiplied by the district cost factor described in AS 14.17.460 ;

(C) the ADMs of each school in a district, as adjusted according to (A) and (B) of this paragraph, are added; the sum is then multiplied by the special needs factor set out in AS 14.17.420 (a)(1);

(D) the number obtained for intensive services under AS 14.17.420(a)(2) and the number obtained for correspondence study under AS 14.17.430 are added to the number obtained under (C) of this paragraph;

(2) the required local contribution of a city or borough school district is the equivalent of a four mill tax levy on the full and true value of the taxable real and personal property in the district as of January 1 of the second preceding fiscal year, as determined by the Department of Commerce, Community, and Economic Development under AS 14.17.510 and AS 29.45.110 , not to exceed 45 percent of a district's basic need for the preceding fiscal year as determined under (1) of this subsection.

(c) In addition to the local contribution required under (b)(2) of this section, a city or borough school district in a fiscal year may make a local contribution of not more than the greater of

(1) the equivalent of a two mill tax levy on the full and true value of the taxable real and personal property in the district as of January 1 of the second preceding fiscal year, as determined by the Department of Commerce, Community, and Economic Development under AS 14.17.510 and AS 29.45.110 ; or

(2) 23 percent of the district's basic need for the fiscal year under (b)(1) of this section.

(d) State aid may not be provided to a city or borough school district if the local contributions required under (b)(2) of this section have not been made.

(e) If a city or borough school district is established after July 1, 1998, for the first three fiscal years in which the city or borough school district operates schools, local contributions may be less than the amount that would otherwise be required under (b)(2) of this section, except that

(1) in the second fiscal year of operations, local contributions must be at least the greater of

(A) the local contributions, excluding federal impact aid, for the previous fiscal year; or

(B) the sum of 10 percent of the district's eligible federal impact aid for that year and the equivalent of a two mill tax levy on the full and true value of the taxable real and personal property in the city or borough school district as of January 1 of the second preceding fiscal year, as determined by the Department of Commerce, Community, and Economic Development under AS 14.17.510 and AS 29.45.110 ; and

(2) in the third year of operation, local contributions must be at least the greater of

(A) the local contributions, excluding federal impact aid, for the previous fiscal year; or

(B) the sum of 10 percent of the district's eligible federal impact aid for that year and the equivalent of a three mill tax levy on the full and true value of the taxable real and personal property in the district as of January 1 of the second preceding fiscal year, as determined by the Department of Commerce, Community, and Economic Development under AS 14.17.510 and AS 29.45.110.

(f) A school district is eligible for additional state aid in the amount by which the local contributions that would otherwise have been required under (b)(2) of this section exceed the district's actual local contributions under (e) of this section.

Sec. 29.05.011. Incorporation of a City

(a) A community that meets the following standards may incorporate as a first class or home rule city:

(1) the community has 400 or more permanent residents;

(2) the boundaries of the proposed city include all areas necessary to provide municipal services on an efficient scale;

(3) the economy of the community includes the human and financial resources necessary to provide municipal services; in considering the economy of the community, the Local Boundary Commission shall consider property values, economic base, personal income, resource and commercial development, anticipated functions, and the expenses and income of the proposed city, including the ability of the community to generate local revenue;

(4) the population of the community is stable enough to support city government;

(5) there is a demonstrated need for city government.

(b) A community that meets all the standards under (a) of this section except (a)(1) may incorporate as a second class city.

Sec. 29.10.030. Initiative and Referendum

(a) A home rule charter shall provide procedures for initiative and referendum.

(b) A charter may not require an initiative or referendum petition to have a number of signatures greater than 25 percent of the total votes cast in the municipality at the last regular election.

(c) A charter may not permit the initiative and referendum to be used for a purpose prohibited by art. XI, Sec. 7 of the state constitution.

AS 29.35.160. Education.

(a) Each borough constitutes a borough school district and establishes, maintains, and operates a system of public schools on an areawide basis as provided in AS 14.14.060. A military reservation in a borough is not part of the borough school district until the military mission is terminated or until inclusion in the borough school district is approved by the Department of Education and Early Development. However, operation of the military reservation schools by the borough school district may be required by the Department of Education and Early Development under AS 14.14.110. If the military mission of a military reservation terminates or continued management and control by a regional educational attendance area is disapproved by the Department of Education and Early Development, operation, management, and control of schools on the military reservation transfers to the borough school district in which the military reservation is located.

(b) This section applies to home rule and general law municipalities.

AS 29.45.210. Hearing

(c) The board of equalization shall certify its actions to the assessor within seven days. Except as to supplementary assessments, the assessor shall enter the changes and certify the final assessment roll by June 1.

AS 29.45.020. Taxpayer Notice.

(a) If a municipality levies and collects property taxes, the governing body shall provide the following notice: [graphic content omitted: requires state education assistance to be listed in dollars and millage rate]

Notice shall be provided by

(1) furnishing a copy of the notice with tax statements mailed for the fiscal year for which aid is received; or

(2) publishing in a newspaper of general circulation in the municipality a copy of the notice once each week for a period of three successive weeks, with publication to occur not later than 45 days after the final adoption of the municipality's budget.

(b) Compliance with the provisions of this section is a prerequisite to receipt of municipal tax resource equalization under AS 29.60.010 - 29.60.080 and priority revenue sharing for municipal services under AS 29.60.100 - 29.60.180. The department shall withhold annual allocations under those sections until municipal officials demonstrate that the requirements of this section have been met.

Alaska Constitution

Article VII Section 1 – Public Education

The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational

institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.

Article IX Section 7 - Dedicated Funds

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

Article X Section 2 – Local Government Powers

All local government powers shall be vested in boroughs and cities. The State may delegate taxing powers to organized boroughs and cities only.

Article XI Section 7 – Restrictions

The initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation. The referendum shall not be applied to dedications of revenue, to appropriations, to local or special legislation, or to laws necessary for the immediate preservation of the public peace, health, or safety.

INTEREST OF AMICUS CURIAE

This *amicus curiae* brief is submitted by NEA-Alaska, in support of Appellant State of Alaska and with the consent of the State. NEA-Alaska is a statewide labor organization of 13,000 certificated educators and education support professionals serving in Alaska's public schools. The NEA-Alaska membership is committed to ensuring that public school students and education professionals have the resources needed to provide the highest quality public education Alaska can afford. In recent years the state and local obligation to provide such resources has been under fire on a variety of fronts. Due to the large percentage of school funding devoted to personnel expense, educators face increasingly intense pressure to perform in quantifiable ways, both individually and as a class, and to justify the expenditure of state and local education dollars. Currently, NEA-Alaska's membership faces potential wage freezes, rollbacks, and loss of bargained-for monetary benefits that nonetheless remain subject to local appropriation. These unpleasant fiscal realities are inherent in Alaska's education structure. Despite these tensions, Alaska's funding system workably balances essential local control and support of education and the State's constitutional obligations, through the combined appropriation powers of the State, municipal governments, and local school boards.

If successful, Appellee Ketchikan Gateway Borough's unprecedented challenge to this working balance will destabilize the State's ability to provide a free, quality public education to students wherever they live in Alaska. Although the trial court

decision does not directly reduce the funding available to fund school personnel costs, there can be little doubt that implementing the trial court's decision will harm the ability of many districts to attract and retain highly-qualified education professionals to work in non-urban districts. Appellee asks the State to provide a flat amount to all districts, regardless of the local tax base, a result which would reduce the resources available to students in less affluent regions of the state. Without financial resources and quality educators, students will not readily achieve the educational objectives articulated by the Legislature and executive branch. Such results will harm NEA-Alaska's membership: attracting and retaining quality educators is essential to creating the stability, teamwork and rapport necessary for attaining excellence in education. And only high student achievement equips educators to defeat the ongoing attacks on public education and education professionals.

Appellee's claim that the State has imposed an improper tax dedication on municipalities ignores the delegated powers of municipal governments and their fundamental interest in controlling and providing educational resources. Alaska's current system equitably coordinates available local resources, federal funding, and the State's obligation to provide adequate education for all Alaska children. Organized municipalities are responsible for providing local sources of revenue to fund their schools. AS 14.17.410 presents no constitutional infirmity, because the funds at issue are municipal funds and not "state" revenues, and municipal revenues are not subject to the restrictions of Article IX Section 7 of the Alaska Constitution. Unlike the state,

municipalities are permitted to dedicate funding for schools. The trial court's decision would unwittingly invalidate all dedications of funds by municipalities, by placing municipal revenues in a newly defined category of "public revenues" that cannot be dedicated. This consequence of the trial court's ruling would have significant and undetermined consequences. Accordingly, the Court should hold that AS 14.17.410 does not violate Alaska Constitution Article IX Section 7, and lawfully allocates statewide education resources among local communities.

ARGUMENT

The trial court erred in concluding that the anti-dedication clause applies to revenues generated by municipalities. Both municipal formation and tax delegation by the State are based on the expectation that local government will exercise its tax power to fund local schools. Municipalities are authorized to dedicate taxes to particular local functions. Because the State has no power to levy, collect, or appropriate municipal taxes, and municipalities may dedicate revenue to schools, the State commits no "dedication" in requiring a local contribution as a condition of receiving state education assistance. Organized municipalities have a joint obligation with the State to fund schools, and consequently the State has established a balanced approach to allocating additional state resources to those areas of the state with fewer resources. The fact that municipalities have strong financial inducements to raise taxes for schools does not convert municipal revenue into "state" funds. Appellee Ketchikan

Gateway Borough (the “Borough”) failed to establish that the Borough was improperly compelled by AS 14.17.410 to pay local tax revenues to its school district.

1. The Anti-Dedication Clause Does not Apply to Municipal Revenue

The trial court accepted the Borough’s argument that AS 14.17.410 compels municipalities to collect and “dedicate” taxes as directed by the State, without considering the responsibility of municipal governments to appropriate education funds, or local government’s power to dedicate local revenue to education. Instead, the Borough and the trial court relied almost exclusively on *State v. Alex*¹ to conclude that Borough revenue paid to its school district created a “public” fund subject to the Constitution’s prohibition against dedication of “state” taxes. [Joint Excerpt of Record (“Exc.”) at 28-29, 25-26] Although the Borough recognized that *Alex* was not on point [Exc. at 133], the Borough nonetheless persuaded the trial court to cite *Alex* as support for extending the anti-dedication clause to “all” revenues that might be considered “public” in nature, including municipal revenues. [Exc. at 256]

It is certainly true that municipal taxation generates “public” funds, just as any assets and resources held by a municipality are essentially “public” in character. At the same time, the anti-dedication clause has never been broadly interpreted to cover funds received or held by local government. To the contrary, since shortly after statehood, and up until the trial court’s announced ruling, it was clear that municipal revenue was not subject to the anti-dedication clause, its “public” character

¹ 646 P.2d 203 (Alaska 1982)

notwithstanding.² Based on long-established law, the Constitution's prohibition against dedication of "state" taxes should continue to be interpreted in accordance with its ordinary meaning: that is, a "state" tax means revenue received by the State, not revenues collected by political subdivisions through exercise of local government authority.

In *Alex*, the Court held that when the State uses its tax power to charge a tax, the proceeds of that exercise are subject to the anti-dedication clause, even if a private third party has collected or spent the fund.³ In *Alex*, the parties did not dispute the "state" character of the revenues collected by the aquaculture associations.⁴ The State conceded that the funds were "state" revenues, choosing instead to characterize the payments as excepted "special assessments" rather than taxes.⁵ The Court concluded that even if the payments were a "special assessment," the term "taxes" covered such assessments.⁶ The Court also held that the State had improperly delegated its taxing authority to private entities.⁷ By authorizing aquaculture associations to collect taxes that only the State could properly exact, the resulting "public funds" were deemed state revenues that had escaped deposit into the general fund. Because *Alex* focused on what constitutes a "tax" rather than what constitutes a "state" tax, it sheds no light on what revenue qualify as "state" taxes or revenues.

² 1988 Informal Op. Atty Gen. (July 29, 1988) (1988 WL 249509)

³ 646 P.2d 210

⁴ *Id.* at 208

⁵ *Id.*

⁶ *Id.* at 210

⁷ *Id.* at 211-213

In *Alex*, the Court interpreted the term “tax” by reference to the “discussions at the constitutional convention which adopted the wording.”⁸ That purpose was to avoid earmarking of funds and the abdication of the legislature’s obligation to exercise budgetary controls over all revenues, funds, and taxes, once they were “received and placed in the general fund.”⁹ As the State explained below, *Alex* demonstrates that the revenues subject to the anti-dedication clause are funds collected by the State or that *should have been* deposited in the State’s general fund, but for legislative mistake. [Exc. 226, 229] The decision stands for the generic principle that the Legislature cannot do indirectly what it is prohibited from doing directly. To reach its result, the Court read the term “tax” broadly, based on the convention record.¹⁰ But *Alex* never suggests that the term “state” tax should also be read broadly, or that it should include *municipal taxes*.

In significant contrast to the private associations in *Alex* that received “state” taxes through improper State delegation of authority, organized municipalities have the power to levy and collect taxes within their boundaries, as delegated by the State in accordance with Article X Section 2 of the Alaska Constitution. Equally important, and unlike the State, municipalities possess the power to *dedicate* local revenues and taxes. As the Attorney General concluded in 1988:

⁸ *Id.* at 209.

⁹ *Id.* at 208-209.

¹⁰ *Id.* at 219 (concluding that *both* “special assessments” and taxes were covered by Article IX, Section 7 of the Alaska Constitution)

While article XI, section 7 prohibits use of the initiative to dedicate public revenues, article IX, section 7 of the Alaska Constitution prohibits the state legislature from dedicating state money to a special purpose. ... We do not believe that this provision, which only references “state” revenues, was drafted with the intention to restrict local governments in the management of their fiscal matters. After substantial research, we find no discussion in the constitutional convention minutes nor pertinent case or statutory law that evidences any intent for this provision of the constitution to automatically apply to the governing bodies of political subdivisions. *See* 1960 Inf. Op. Att’y Gen. (Dec.5; Havelock). In contrast, the constitutional prohibitions on use of the initiative have been specifically made applicable to municipalities under AS 29.10.030(c) (home rule charters) and AS 29.26.100.

In conclusion, we find no restriction in the constitution or statutes prohibiting the governing body of a political subdivision from dedicating revenues. Of course, this does not preclude local municipalities from adopting such a restriction and we, therefore, must defer to local law and interpretations by municipal attorneys on this matter. ¹¹

The authority of Alaska municipalities to dedicate revenues is commonly understood by practitioners.¹² It is much less clear that the trial court was aware of this authority, because the court never referred to the distinction between state and local powers in its decision. As a result of this missing link, the trial court conflated municipal revenue with “state” revenue on the ground that both constitute “public” revenue. [Exc. at 256]¹³

Consistent with this primary misunderstanding, the trial court cited precedent addressing limitations on the local *initiative* power, as justification for interpreting Article IX Section 7 to cover *all* forms of public revenue, regardless of source. [Exc.

¹¹ 1988 Informal Op. Atty Gen. (July 29, 1988)

¹² *See, e.g.*, Alaska Dispatch News article, January 17, 2015, *attached hereto* (In article reporting controversy over a proposed Anchorage alcohol tax, Anchorage attorney Dan Coffey “acknowledged that the municipality, unlike the state, is allowed to dedicate revenues”).

¹³ The trial court concluded that municipal taxes are a “source of public revenue ... as broadly defined by the Alaska Supreme Court [in *Alex*]” and described the Borough’s local contribution as “local money and ... public revenue.”

at 257]¹⁴ In the trial court's authority, *City of Fairbanks*, this Court analyzed a local initiative petition that modified how the city's bed tax proceeds could be used, in order to determine if the initiative dedicated city taxes in violation of AS 29.10.030.¹⁵ The Court applied *Alex* as the only available precedent on dedication of revenues, relying on its interpretation of Article IX Section 7 in order to interpret Article XI Section 7 on limitations of the initiative power. The Court in *City of Fairbanks* explicitly declined to rule on whether "the ordinance itself violates Article XI, Section 7[sic] of the Alaska Constitution, prohibiting dedicated revenues," and cautioned against reading its decision as expressing *any* opinion on that question.¹⁶

Despite this warning, the trial court concluded that *City of Fairbanks* supported its ruling that all "public" revenues are subject to the anti-dedication clause. As stated by the trial court, "the fact that the funds in *City of Fairbanks* were the product of a local bed tax did not matter in the court's determination that the tax proceeds were 'proceeds of any state tax or license.'" [Exc. at 257] In other words, because the Court applied Article IX Section 7 to determine if a local petition violated the statutory prohibition against dedicating taxes by initiative, municipal revenues must also be subject to the anti-dedication clause. What the court misunderstood was that there is

¹⁴ Citing *City of Fairbanks v. Fairbanks Convention & Visitor's Bureau*, 818 P.2d 1153 (Alaska 1991)

¹⁵ 818 P.2d at 1155, 1158-1159.

¹⁶ 818 P.2d at 1158, n. 7.

no legal support for reaching this conclusion, as the Attorney General determined in 1988.¹⁷ Most clearly, *City of Fairbanks* does not supply such authority.

Whereas the legislative body of a municipality must appropriate funds, the electorate is prohibited from making appropriations by initiative. Municipalities may dedicate revenues, but the electorate may not. AS 29.10.030 limits only the electorate's initiative power, not the municipality's legislative authority. This distinction between the initiative restriction and municipal legislative power is stated explicitly in *City of Fairbanks*, but appears to have been overlooked by the trial court.¹⁸

In taking the enormous step of concluding that limitations on voter initiatives justify applying the anti-dedication clause to municipal government, the trial court misunderstood the relevant law. [Exc. at 257] The trial court's use of general concepts from *Alex* and *City of Fairbanks* to re-define what constitutes "state" taxes must be rejected for lack of legal or policy support.

As previously discussed, when the Attorney General concluded in 1988 that the term "state" taxes in Article IX Section 7 meant "state" taxes alone, and excluded municipal revenue, the opinion relied on the complete absence of any authority to the

¹⁷ AS 29.10.030.

¹⁸ "The parties do not dispute that the Fairbanks City Council has the power to enact a municipal ordinance identical to the proposed initiative. This appeal is not about whether the city council could do what the initiative petition seeks; rather the issue is whether this goal can be attained through an initiative." 818 P.2d at 1155. Similarly, the 1988 Attorney General opinion specifically concluded that a local initiative seeking to dedicate funds was unconstitutional, but the municipality's ability to enact the same legislation would not have been limited by Article IX Section 7. 1988 Informal Op. Att'y Gen. (July 29, 1988). Again, the statutory restriction on municipal voter initiatives does not limit a local government's ability to dedicate revenue.

contrary, in the convention record or elsewhere.¹⁹ It is thus not surprising that neither the Borough nor the trial court cited any constitutional convention history to support the expanded definition of “state” taxes. The linguistic gymnastics required to interpret “state” taxes as inclusive of both “state *and municipal*” taxes, or to cover “all public revenues,” achieves no identifiable public policy. Such interpretation would jettison a half century of municipal legislation. Fifty-five years have elapsed since this question of municipal power was first answered, and as a result the trial court’s holding would invalidate an untold number of municipal ordinances, including the lawful bed tax at issue in *City of Fairbanks*.

Although the Borough might be willing to cede away its power to dedicate revenue in exchange for pursuing expanded *Alex* theories, no rationale has been offered for subjecting nonparticipating municipalities to the same abridgment of their fiscal authority. Alaska municipalities should not be disempowered by an inadvertent ruling, based on a truncated record and an incomplete analysis of state precedent.

2. School Funding is a Municipal Responsibility, not just a State Obligation

To the degree that the Borough has offered any policy support for its position, it contends that the State is required to supply the first tier of dollars necessary to meet education needs in organized municipalities, with municipalities required only to provide locally-sourced revenues after the State has supplied initial funding. This implicit policy contention is the only support for the Borough’s claim that the State

¹⁹ Page 5, *supra*.

must completely disregard the capacity of local governments to fund their schools. Although the Borough argued below that it was not seeking to relitigate earlier precedent, this “first dollar” approach suggests that instead of reducing the State’s assistance dollar for dollar by the Borough’s local contribution, the Borough’s assistance should be reduced first, by the amount of State assistance. In other words, state assistance should displace the municipality’s obligation to fund education. The Borough’s attack on AS 14.17.410 is contrary to decisions interpreting the requirements of the Education Clause.²⁰ This Court has already determined that the State may lawfully delegate the power to provide education – and to fund education – to local government.²¹ And there can be no dispute that local governments have been granted the power to tax in order to meet this obligation.

Article X Section 2 of the Alaska Constitution authorizes the State to delegate its tax powers only to organized municipalities. A primary purpose behind the tax delegation was to authorize collection of local taxes to fund school districts.²² Under state law, formation of a borough, home rule or first class city requires the municipality to fund its local public schools.²³

²⁰ *Matanuska –Susitna Borough School District v. State*, 931 P.2d 391, 399 (Alaska 1977) (State met its constitutional mandate to fund schools by requiring local contribution from organized municipalities, and differences in funding for REAA’s and organized municipalities did not violate Equal Protection).

²¹ *Matanuska*, 931 P.2d at 399 (the fact that the legislature has lawfully delegated “certain educational functions to local school boards in order that Alaska schools might be adapted to meet the varying conditions of different localities does not diminish this constitutionally mandated state control over education.”)

²² Exc. at 112-113 State’s Opp. brief at 19-20, citing convention discussion of borough taxes for schools, and *Alex* 646 P.2d at 212 n. 9

²³ AS 29.05.011, AS 29.35.160 and AS 14.12.010, (“the borough assembly for a borough school district, and the city council for a city school district, shall provide the money that must be raised from local sources to maintain and operate the district.”)

Thus, both the State and its organized municipalities share the obligation to fund schools. There is no structural basis for concluding that the obligation of municipalities takes *second* place to the State's obligation under the Education Clause. Because the power to tax and to administer schools stems from the State's delegation of authority, the State may deem the Borough's obligation to be primary in nature.

It is also clear that the local taxation and appropriation process permits local districts to tailor school funding to meet local needs, a task that the State cannot perform as effectively. In order to carry out their financial responsibility to fund local education,²⁴ each school board must submit its annual budget to the assembly or city council for approval of the "total amount."²⁵ The assembly or city council must then determine the total amount of money to be made available from local sources for school purposes.²⁶ The school board completes the appropriation process by disbursing funds for personnel, educational programs, and administration.²⁷ Any veto power over municipal school funding is relegated to the executive branch of municipal government.²⁸ The timing of school budget approval coincides with the municipal requirements for certifying the final tax roll,²⁹ and state law requires that notice of

²⁴ AS 29.35.160, AS 14.14.060, AS 14.14.065.

²⁵ AS 14.14.060(c).

²⁶ AS 14.14.060(b).

²⁷ AS 14.14.090

²⁸ *Municipality of Anchorage v. Repasky*, 34 P.3d 302 (Alaska 2001)

²⁹ AS 29.45.210(c) (final assessment roll to be certified by June 1).

school funding from the state be identified (in dollar value and millage equivalent) in notice to taxpayers.³⁰

This local appropriation process can be extremely political and complex, as communities and their elected representatives weigh difficult funding decisions within the context of state laws and locally-crafted checks and balances.³¹ Sensibly, AS 14.17.410 does not attempt to dictate the outcome of these procedures, and expects that school budgets will vary from municipality to municipality due to a variety of factors.³² A state formula that attempts to predictably allocate state assistance – and avoids incentivizing municipalities to *reduce* their locally-sourced revenues -- is a constitutionally appropriate method for encouraging use of the delegated tax power and achieving the fundamental objectives of Article X Section 2 and Article VII Section 1 of the Alaska Constitution. The Borough’s approach would achieve the opposite: it could potentially deter municipalities from fully using the delegated tax power to meet their school funding obligations, and effectively require the State to play a greater role in local school funding determinations.

Balanced incentives are important in crafting a formula for meeting shared obligations. The Borough has contended -- as a matter of undisputed fact – that the State’s formula provides too much incentive, and is so compelling that it forces

³⁰ AS 29.45.020

³¹ *Id.*

³² *Matanuska* 931 P.2d at 398 (“AS 14.17.025(a) requires boroughs like the one in which the plaintiffs reside to contribute to operating costs at the four mill rate; it does not required them to actually meet their contribution through property taxes”), and *Hootch v. Alaska State-Operated School System* 536 P.2d 793, 803 (Alaska 1975) (the concept of “uniformity” was not included in the Education Clause, because diversity in educational choices was expected).

municipalities to do what they otherwise would not do. The Borough repeatedly argued that it only provided its local contribution because the State, through AS 14.17.410, forced or “compelled” the Borough to spend funds on local schools. [Exc. at 25-26] This argument was essential to the Borough’s effort to overcome the ordinary meaning of “state” tax under Article IX Section 7, and was apparently accepted by the trial court.³³ Contrary to the Borough’s claim that it was compelled to fund schools as a matter of undisputed fact, the motivation for the Borough’s funding of its schools has yet to be explained. [Exc. at 25-26, 29-30, 132-133].

The Borough conceded that it has funded its schools at a substantially higher level than mandated by AS 14.17.410. [Exc. at 22, citing \$4,198,727 in “compulsory” payments and \$3,851,273 in “optional” payments in FY 2014] The Borough’s failure to explain the additional contribution confirms that the voluntary contribution is factually incompatible with the claim of being “compelled” to pay the minimum contribution. The voluntary contribution indicates that the Borough would have levied taxes in at least the amount of the minimum local contribution, regardless of inducements presented by AS 14.17.410. Perhaps the community expected its Assembly to approve a certain amount of local revenue for schools, or to augment *whatever* amount the State might provide through appropriation. Ultimately, the Borough’s “compelled” argument is an assumption, not an undisputed fact.

³³ The court concluded that it was addressing “local revenue raised to fulfill a municipal district’s required contribution to that District’s education facilities.” [Exc. at 257]

The community goal of maximizing education resources for local schools aligns precisely with the State's larger goal of providing funding for all Alaska students. The two interests are parallel and inseparable. The Borough's voluntary funding of its schools confirms the correctness of legislature's determination that the more capacity a municipality has to tax, the more funding it will provide to education. Community goals for excellence in education explain why the equitable apportionment of state funding requires a specific mechanism to accommodate the power of local governments to levy taxes. Otherwise, urban schools would receive more funding than rural schools, to the detriment of rural schools and the state as a whole. As this Court has previously ruled, by enacting education funding laws that ensure *equitable* educational opportunities across the state, the legislature fulfills its constitutional mandate.³⁴

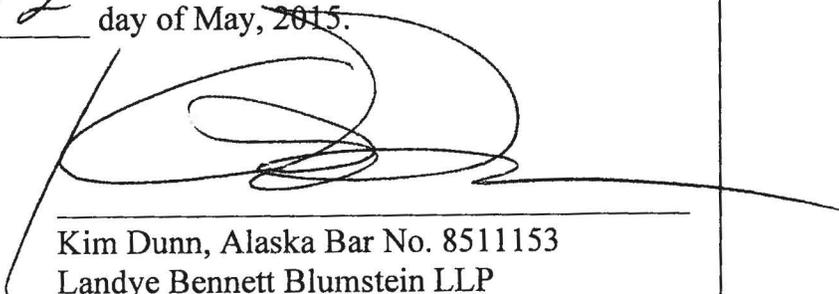
The trial court's agreement that the Borough was forced by AS 14.17.401 to secure revenue for schools, rather than by other compelling local interests, should be rejected. This "fact" was not established. It is just as likely that the Borough was motivated by its general and moral obligation to fund education and to promote quality education for its students.

CONCLUSION

For the above-stated reasons, the judgment below should be reversed.

³⁴ *Matanuska*, 932 P.2d at 399.

SUBMITTED this 12th day of May, 2015.



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[Home](#) > Battle shaping up over Anchorage alcohol tax

Devin Kelly ⁽¹⁾
January 17, 2015

The grainy video flashed onto a screen in a small conference room at Loussac Library.

It showed footage that Anchorage Assembly member Paul Honeman captured from a car window. On a dimly lit sidewalk, a tent appeared, and Honeman's voice was audible: "Look at all these clothes and sleeping bags."

"Could you imagine if this was your child or my child?" came the voice of Assembly member Dick Traini, referring to people who were sleeping on the sidewalk along Third Avenue in Anchorage.

The video, taken after an Assembly meeting one night last month, was part of a broader discussion in the Assembly's Public Safety Committee meeting that day, centered on problems associated with homelessness, alcohol use and a lack of facilities.

As he listened to people talk, West Anchorage Assembly member Ernie Hall felt a familiar frustration.

"Where are we going to find the money to do this?" he thought.

Then Hall remembered. For some time, Traini had been working on a proposal for an alcohol tax that could pay for problems associated with drinking. After the meeting, Hall approached Traini and offered to help.

Their joint effort coalesced Tuesday, when Traini introduced a ballot measure to tax retail sales of alcohol ⁽²⁾ in Anchorage, with the new funds dedicated to combating health and safety problems associated with alcohol. If it gains Assembly approval after public hearings on Jan. 27 and Feb. 3, voters will decide the fate of the proposal in the April city election.

Traini came up with the idea. But Hall said it was after seeing Honeman's footage at the mid-December meeting that he decided to help fight to see the tax measure through.

He called himself "an avid supporter."

A battle brewing

While some details remain to be decided about Traini's proposal, including the exact tax rate, the local alcohol industry appears to be gearing up for a fight. Fairbanks and Juneau both tax alcohol at the local level but similar proposals have been successfully defeated in Seward, Nome and the Mat-Su Borough.

Darwin Biwer, owner of the downtown Anchorage bar Darwin's Theory, said the tax would deter customers from buying alcohol at bars or restaurants. He warned that the unintended consequences of the measure could be "severe" and said it would face resistance.

"We're going to fight, and we'll win," said Biwer, who also chairs the board of directors for the Alaska Cabaret, Hotel, Restaurant and Retailers Association. "We beat an alcohol tax in Seward (and) up in the Valley. We're going to beat an alcohol tax here. It's not

going to happen. But it cost us a lot of money, a lot of hassle."

In an email, Dale Fox, the director of Alaska CHARR, said Traini gave industry representatives no notice before introducing the measure. Fox said the question should be asked whether the proposal would comply with state law for taxing alcoholic beverages, and whether it was legal to specifically dedicate tax revenues in Alaska.

In the city of Fairbanks, for example, money generated from the alcohol tax returns to the general fund and supplements property taxes, said chief financial officer Jim Soileau.

Anchorage municipal attorney Dennis Wheeler said the measure meets legal requirements. He said the wording of the measure is based on Anchorage's existing hotel and motel tax in the city charter, which also dedicates money to specific purposes.

When he signed on to Traini's proposal, Hall said he wanted to ensure that it amounted to revenue outside the city's tax cap, not just property tax relief.

"That's not going to do anything to deal with the problem," Hall said of property tax relief. "And this is identified as ... the No. 1 (community) problem we've got here."

Anchorage mayoral candidate Dan Coffey, a lawyer whose legal firm has represented clients that included members of the liquor industry, said he needs to see more details on Traini's proposal first but agreed that the topic is "certainly worthy of discussion." He acknowledged that the municipality, unlike the state, is allowed to dedicate tax revenues.

He also said he agreed with Hall and Traini that something should be done to address issues tied to alcohol abuse in Anchorage.

"Now, if this is a tool that can be used to address it, then, when I hear the details, then this might be something where I would say, 'OK,'" Coffey said. "But ... it's a concept right now; it's an idea."

Paul Fuhs of the Fairview Business Association recalled what happened when the state increased the state alcohol tax to 10 cents a drink in 2002 on a pledge that at least half the money would be directed to rehabilitation programs. Instead, state spending on such programs dropped [3], he said.

In 2014, Fuhs was part of a group that successfully lobbied the state Legislature for a \$4 million grant to go toward substance abuse treatment. The money came from the state alcohol tax fund but has not yet been spent, with questions remaining about how it will be used, Fuhs said.

Source URL: <http://www.adn.com/article/20150117/battle-shaping-over-anchorage-alcohol-tax>

Links:

[1] <http://www.adn.com/author/devin-kelly>

[2] <http://www.adn.com/article/20150113/assembly-hears-proposal-alcohol-tax-ballot-measure>

[3] <http://www.adn.com/article/20130915/alaskans-drunk-more-despite-higher-alcohol-tax-drink-prices>

IN THE SUPREME COURT FOR THE STATE OF ALASKA

State of Alaska, et al.,)	
)	Supreme Court No. S-15811/15841
Appellants/Cross-Appellees,)	
)	Trial Court Case No. 1KE-14-00016 CI
vs.)	
)	
Ketchikan Gateway Borough, et al.,)	
)	
Appellees/Cross-Appellants.)	
)	
)	

CERTIFICATE OF SERVICE

I certify that on May 12, 2015, I caused a copy of the foregoing Brief of Amici Curiae NEA-Alaska and Certificate of Typeface to be delivered by mail, postage prepaid to:

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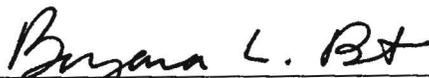
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