

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,

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/Cross-Appellants.

Supreme Court No. S-15811/15841

FILED

JUN 30 2015

APPELLATE COURTS
OF THE
STATE OF ALASKA

Trial Court No. 1KE-14-00016 CI

APPEAL FROM THE SUPERIOR COURT
FIRST JUDICIAL DISTRICT AT KETCHIKAN
HONORABLE WILLIAM B. CAREY

BRIEF OF APPELLEES (KGB ET AL)

Dated: June 30, 2015

Filed in the Supreme Court
for the State of Alaska,
this 30th day of June, 2015

Marilyn May
Clerk of Appellate Courts

By: _____
Deputy Clerk

K&L Gates LLP
Louisiana W. Cutler, Alaska Bar No. 9106028
Jennifer M. Coughlin, Alaska Bar No. 9306015
420 L Street, Suite 400
Anchorage, AK 99501
(907) 276-1969

Attorneys for all Appellees/Cross-Appellants

Scott Brandt-Erichsen, Alaska Bar No. 8811175
1900 1st Ave., Suite 215
Ketchikan, AK 99801
Attorney for Appellee/Cross-Appellant Ketchikan
Gateway Borough

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
AUTHORITIES PRINCIPALLY RELIED UPON	v
I. ISSUE PRESENTED	1
II. STATEMENT OF THE CASE	1
A. Introduction And Summary Of Appellees’ Argument.....	1
B. The Statutory Scheme For School District Funding	3
C. The Impact Of The RLC On Provision Of Services In The Borough.....	6
D. Procedural History.....	8
III. STANDARD OF REVIEW.....	8
IV. ARGUMENT	8
A. The RLC Violates The Anti-Dedication Clause Because It Is A Source Of Public Revenue Earmarked For School Districts For The Special Purpose Of Funding Schools.	10
1. This Court’s Holding in <i>Alex</i> that Royalty Assessments Violated the Anti-Dedication Clause Controls.	10
2. This Court’s More Recent Anti-Dedication Clause Holdings Reaffirm <i>Alex</i> and Confirm that the RLC Violates the Anti-Dedication Clause.	15
B. The RLC Is Unconstitutional Because It Is Mandatory.	19
1. <i>City of Fairbanks v. Fairbanks Convention and Visitors Bureau</i> Also Supports the Conclusion that the RLC Violates the Anti-Dedication Clause.	19
2. The Superior Court Appropriately Relied Upon <i>FCVB</i> To Support The Conclusion That The RLC Violates The Anti-Dedication Clause.	21
C. The Additional Requirements For A Violation Of The Anti-Dedication Clause Put Forward By Appellants And Amici Are Not Found In This Court’s Precedent.	24
1. The RLC Violates the Anti-Dedication Clause Regardless of Whether it is Considered a Tax, or if it is Paid with Taxes Or Another Source of Revenue....	24
2. The Imagined CEAAC Test for Violation of the Anti-Dedication Clause Is Not Found in this Court’s Anti-Dedication Clause Precedent.	28
D. The RLC Is Not A Matching Grant That If Found Unconstitutional Will Jeopardize Other Matching Grant Programs.....	30
E. Mandatory Automobile Insurance, Minimum Wage, or Other Similar Statutory Obligations Will Not Be Impacted if the RLC Is Declared Unconstitutional by This Court.....	31
F. This Case Does Not Represent A “Clash” Between Constitutional Values And Even if it Did, This Court’s Precedent Does Not Require Upholding the RLC Because of Allegedly Competing Constitutional Values.....	33

G. The RLC is Not Exempt From the Broad Reach of the Anti-Dedication Clause.	37
1. This Court Has Never Held that there is an Implied State-Local Cooperative Program Exemption or an Implied Exemption For A Local Tax Collected by the State; Nor Would Either Alleged Exemption Apply to the RLC.	37
2. RLC Payments are not Required for Participation in a Federal Program.	41
3. The RLC is not a Pre-existing Dedication Exempt from the Anti-Dedication Clause, nor is It Exempt Because an RLC was First Enacted in 1962.	45
V. CONCLUSION	50

TABLE OF AUTHORITIES

CASES

<i>Alaska Civil Liberties Union v. State</i> , 122 P.3d 781 (Alaska 2005)	35
<i>Alaska Legislative Council v. Knowles</i> , 21 P.3d 367 (Alaska 2001)	32
<i>Anchorage Chrysler Ctr., Inc. v. DaimlerChrysler Motors Corp.</i> , 221 P.3d 977 (Alaska 2009)	41
<i>Bradner v. Hammond</i> , 553 P.2d 1 (Alaska 1976)	9, 48, 49
<i>City of Fairbanks v. Fairbanks Convention and Visitors Bureau</i> , 818 P.2d 1153 (Alaska 1991)	19, 20, 21, 22, 23, 24, 29, 30
<i>Denish v. Johnson</i> , 121 N.M. 280 P.2d 914 (N.M. 1996)	35
<i>Gilmore v. Alaska Workers' Comp. Bd.</i> , 885 P.2d 922 (Alaska 1994)	9
<i>Gottschalk v. State</i> , 575 P.2d 289 (Alaska 1978)	9
<i>Hootch v. Alaska State Operated School System</i> , 536 P.2d 793 (Alaska 1975)	36
<i>Kasayulie v. State</i> , 3AN-97-03782 CI (Super Ct. 1999)	36
<i>Liberati v. Bristol Bay Borough</i> , 584 P.2d 1115 (Alaska 1978)	32, 33
<i>Matanuska-Susitna Borough Sch. Dist. v. State</i> , 931 P.2d 391 (Alaska 1997)	25, 36, 47
<i>McCauley v. Hildebrand</i> , 491 P.2d 120 (Alaska 1971)	36, 37
<i>Moore v. State</i> , 3 AN-04-09756 CI (Super. Ct. 2004)	36, 37
<i>Municipality of Anchorage v. Repasky</i> , 34 P.3d 302 (Alaska 2001)	32, 36
<i>Myers v. Alaska Housing Finance Corp.</i> , 68 P.3d 386 (Alaska 2003)	11, 14, 16, 22, 28, 33, 34
<i>Okanogan Indians v. United States</i> , 279 U.S. 655, 49 S.Ct. 463, 73 L.Ed. 894 (U.S. 1929)	48
<i>Park v. State</i> , 528 P.2d 785 (Alaska 1974)	35
<i>Sonneman v. Hickel</i> , 836 P.2d 936 (Alaska 1992)	11, 17, 27, 28
<i>Southeast Alaska Conservation Council v. State</i> , 202 P.3d 1162 (Alaska 2009)	10, 11, 15, 16, 17, 22, 27, 28, 29, 34, 35, 38
<i>State v. Alex</i> , 646 P.2d 203 (Alaska 1982)	2, 8, 9, 10, 11, 12, 13, 14, 15, 17, 19, 20, 21, 23, 24, 26, 27, 28, 29, 30, 34, 35, 38
<i>State v. Campbell</i> , 536 P.2d 105 (Alaska 1975)	49
<i>State v. Fairbanks N. Star Borough</i> , 736 P.2d 1140 (Alaska 1987)	9
<i>State v. Ostrosky</i> , 667 P.2d 1184 (Alaska 1983)	35
<i>State v. Schmidt</i> , 323 P.3d 647 (Alaska 2014)	8
<i>Yi v. Yang</i> , 282 P.3d 340 (Alaska 2012)	41
<i>Zeman v. Lufthansa German Airlines</i> , 699 P.2d 1274 (Alaska 1985)	41

STATUTES

AS 11.15.310-330	9
AS 14.08.031(a)	4
AS 14.12.010(1) - (3)	6
AS 14.12.020(c)	1, 5, 12, 20, 26, 29
AS 14.17.300	4

AS 14.17.300(a)(1).....	5
AS 14.17.400.....	5
AS 14.17.410.....	5
AS 14.17.410(b).....	1, 4, 5, 6, 12, 20, 25, 27, 31
AS 14.17.410(c).....	7, 31
AS 14.17.410(d).....	5, 12, 30
AS 14.17.470.....	4
AS 14.17.490(b).....	5, 12
AS 16.10.530.....	10
AS 37.06.030.....	30
AS 37.07.080(g)(2).....	9

OTHER AUTHORITIES

20 USC §§ 7701-7714.....	41
3 AAC 88.020(b)(1)(H).....	10
3 AAC 88.040(b).....	10
3 AAC 88.040(c).....	10
3 AAC 88.900(2).....	10
34 CFR 222.161.....	42
34 CFR 222.162(a).....	42
34 CFR 222.163(b).....	43
34 CFR 222.163(b)(2).....	41
4 AAC 09.990(b)(2).....	26
4 Alaska Conv. Proceed. 2362-63.....	39
Article II of the Alaska Constitution.....	36
Article VII, Section 1 of the Alaska Constitution.....	1
Article VII, Section 2 of the Alaska Constitution.....	34
Article X.....	36
Article X of the Constitution.....	36
Article X, Section 6 of the Alaska Constitution.....	18
Article XI, Section 7 of the Alaska Constitution.....	1, 10, 19, 21, 36
N.M. Stat. Ann. Section 22-8-25.....	43
N.M. Stat. Ann. section 7-37-7.....	43

RULES

Appellate Rule 204(e).....	1
----------------------------	---

ATTORNEY GENERAL OPINIONS

1959 Op. Att’y Gen. Alas. No. 7.....	41, 46
1975 Attorney General’s Opinion at 19-20.....	24, 39, 40
1985-2 Opp. Atty. Gen. Alas. No. 425, Nov. 5, 1985.....	41
1988 Inf. Op. Att’y Gen., 1988 WL 249509.....	23
1989-1 Op. (Inf.) Att’y. Gen. Alas. No. 77, January 19, 1989.....	41
1991 Inf. Op. Att’y Gen., 1991 WL 913843.....	14
1991 Op. Att’y Gen Alas. No. 443 Oct. 7, 1991.....	41
1992 Alaska Op. Att’y Gen. (Inf.) No. 33 (Jan. 12, 1990, re-dated Jan. 1, 1992).....	46
1992 Alaska Op. Att’y. Gen. (Inf.) No. 31 (Sept. 11, 1989, re-dated Jan. 1, 1992).....	46

FORMER ALASKA STATUTES

§ 37-3-62 of the 1949 Compiled Laws of Alaska.....	46
Ch. 127, SLA 1983.....	43
Ch. 127, SLA 1984.....	43
Ch. 75, SLA 1985.....	43
Laws of Alaska 1962, ch. 164, § 1.07(a)-(c).....	25
Sec. 1, ch. 173, SLA 1976.....	48
Sec. 12, ch. 95, SLA 1969.....	43, 47
Sec. 2, ch. 173, SLA 1976.....	48
Sec. 2, Ch. 75, SLA 1986.....	43
Sec. 2, ch. 90, SLA 1977.....	48

Sec. 21, ch. 26 SLA 1980.....	43
Sec. 4, ch. 238 SLA 1970.....	43, 48
Sec. 4, ch. 26, SLA 1980.....	48
Sec. 4, ch. 91 SLA 1987.....	43, 48

AUTHORITIES PRINCIPALLY RELIED UPON

Alaska Constitution, 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.

AS 14.12.020. Support, Management, and Control in General; Military Reservation Schools.

. . . (c) The legislature shall provide the state money necessary to maintain and operate the regional educational attendance areas. 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.

AS 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. . .

I. ISSUE PRESENTED

Appellants' January 28, 2015 Statement of Point On Appeal presented the sole issue as follows: "Did the superior court err by holding that the required local contribution to public school districts, imposed pursuant to AS 14.17.410(b) and AS 14.12.020(c), violates the prohibition on dedicated funds in Article XI, Section 7 of the Alaska Constitution?" To the extent that any additional issues are presented for resolution in Appellants' or Amici's briefs, they should not be considered by this Court.¹

II. STATEMENT OF THE CASE

A. Introduction and Summary Of Appellees' Argument

The State of Alaska ("State") has a constitutional duty to "establish and maintain a system of public schools open to all children of the State . . ." ² Appellants and Amici who have appeared on Appellants' behalf ("Amici") argue that the State partially fulfills this constitutional duty by requiring the Ketchikan Gateway Borough ("Borough") to make a local contribution to the Ketchikan Gateway Borough School District ("KGB School District") pursuant to AS 14.12.020(c) and AS 14.17.410(b). However, by forcing the Borough to make the required local contribution ("RLC"), the State violates Article IX, Section 7 of the Alaska Constitution (the "Anti-Dedication Clause") because the RLC is a source of public revenue that the State compels the Borough to provide to the KGB School District, thus earmarking and dedicating the RLC payment to a particular source (the KGB School District) for a particular purpose (operation and maintenance of schools within the Borough).

¹ Appellate Rule 204(e) ("The appellate court will consider points included in the statement, and points that the court can address effectively without reviewing untranscribed portions of the electronic record.")

² Article VII, Section 1 of the Alaska Constitution.

A classic Anti-Dedication Clause violation would occur where the Alaska State Legislature (“Legislature”) enacted a tax or other revenue raising statute and provided that the revenues were automatically earmarked to support a particular government function, without being subject to annual appropriation by the Legislature for that purpose. Yet merely because the State compels the Borough to raise funds and make the RLC payment directly to its school district instead of to the State Treasury for annual appropriation by the Legislature, Appellants and Amici urge this Court to ignore past precedent and find that the RLC is not an unconstitutional dedication.

NEA-Alaska acknowledges that this Court’s seminal Anti-Dedication Clause case, *State v. Alex*,³ “stands for the generic principle that the Legislature cannot do indirectly what it is prohibited from doing directly.”⁴ This is exactly what the State achieves with the RLC. It forces the Borough to take an action that the State is prohibited from taking. An unconstitutional dedication occurs any time funds are earmarked for a single purpose and the recipient of those funds has an exclusive right to them. The fundamental purpose of the Anti-Dedication Clause is to ensure that all sources of public revenue are available for the Legislature to appropriate so that it can make an annual decision about which competing State needs it will fund. The Legislature does not have that opportunity with respect to the public revenues that are raised to fund RLC payments each year.

Appellants and Amici emphasize that the RLC never enters the State Treasury and never will if this Court upholds the superior court’s finding that the RLC violates the Anti-Dedication Clause, even though that is exactly what happened in *Alex*. The RLC remains a dedication that takes away the Legislature’s ability to make annual decisions about how to spend revenue required to be raised by a State statute, thus violating the fundamental purpose of the Anti-Dedication Clause.

³ 646 P.2d 203 (Alaska 1982).

⁴ Brief of Amicus Curiae NEA-Alaska (“NEA-Alaska Brief”) at 6.

Appellants and Amici also ignore longstanding case law which (1) adopts an extremely broad interpretation of “proceeds of any state tax or license” within which the RLC readily fits; (2) states that the mandatory nature of a dedication determines whether the Anti-Dedication Clause is violated; and (3) holds that other constitutional provisions do not trump compliance with the Anti-Dedication Clause. Further, the matching grants and other analogies presented by Appellants and Amici are inapposite, and the extrajudicial requirements they claim must be met to violate the Anti-Dedication Clause are not supported by this Court’s precedent.

Finally, try as they might, Appellants and Amici cannot fit the RLC within any exception to the Anti-Dedication Clause. Instead, the RLC fits squarely within the kind of dedication and earmarking that does not withstand scrutiny under the Anti-Dedication Clause as interpreted by this Court.

B. The Statutory Scheme for School District Funding

Alaska currently has fifty-three school districts.⁵ Each of Alaska’s nineteen organized boroughs constitutes a borough school district (“Borough District”).⁶ Each of Alaska’s fifteen home-rule and first-class cities within the unorganized borough constitutes a city school district (“City District”).⁷ Borough and City Districts are referred to collectively herein as “Municipal Districts.” Boroughs and Cities who are required to make RLC payments to their school districts are referred to collectively herein as “Municipalities.” Other than Mount Edgecumbe, the remaining nineteen school districts are within the portion of the unorganized borough exclusive of City Districts.⁸

⁵ Appellants’ Brief at 15.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

These school districts are divided into State-created regional educational attendance areas (“REAAAs”).⁹

The current State scheme for providing operating funds for education uses a specified education fund which consists of those funds appropriated by the Legislature for distribution to school districts, Mount Edgecumbe, centralized correspondence study, and pupil transportation.¹⁰ Whether a Municipal District or an REAA, each school district is funded according to its “Basic Need.”¹¹ Basic Need is the level of educational funding at which “all districts are considered equal” and that “provides all districts with needed resources.”¹² Basic Need is determined using a weighting formula which takes into account the relative costs of providing services in various school districts, the number of students with special needs, enrollment in each school and associated economies of scale, the costs of vocational and technical instruction, and the number of correspondence students.¹³ The formula multiplies some of these adjustment factors by the number of students in average daily attendance during a student count period and adds weighted amounts to arrive at an adjusted average daily membership.¹⁴ This number is then multiplied by the base student allocation in AS 14.17.470 to arrive at an amount identified as the Basic Need.¹⁵

⁹ *See id.*; *see also* AS 14.08.031(a) (providing for creation of REAAs by the Department of Commerce, Community, and Economic Development (“DCCED”) in consultation with the Department of Education and Early Development (“DEED”) and local communities).

¹⁰ AS 14.17.300.

¹¹ *See* AS 14.17.410(b).

¹² *Alaska’s Public School Funding Formula: A Report to the Alaska State Legislature*, Tab 2 -- Comparison of Old to New Funding Formula, DEED, p. 8, January 15, 2001, attached to Affidavit of Scott Brandt-Erichsen (“Brandt-Erichsen Aff.”), ¶ 2 & Ex. A (Exc. 042, 059).

¹³ AS 14.17.410(b).

¹⁴ *Id.*

¹⁵ AS 14.17.410(b); AS 14.17.470.

The three sources of public revenue that fulfill Basic Need are “state aid, a required local contribution, and eligible federal impact aid.”¹⁶ However, the State requires different combinations of this funding depending on whether the district is a Municipal District or an REAA.¹⁷

Each school district is eligible for state aid under AS 14.17.410 (“State Aid”) in an amount determined by a formula, but if the appropriations in a given year are insufficient to pay the amounts authorized, then the amount provided by the State to each district is reduced on a pro-rata basis.¹⁸ State Aid is provided from the funds appropriated to the Public Education Fund by the Legislature.¹⁹

The RLC payments reduce (by a 1:1 ratio) – or offset – the amount of State Aid provided from the Public Education Fund to school districts.²⁰ RLC payments are made directly from each Municipality to its Municipal District.²¹ Not only is the RLC “required,”²² the penalty for a Municipality and its residents if an RLC is not provided to a Municipal District is that the State will not provide *any* State Aid to the Municipal District²³ and the Municipal District will be disqualified from receiving supplemental funding.²⁴

The RLC is statutorily set at 2.65 mills of the full and true value of the taxable real

¹⁶ AS 14.17.410(b). The KGB School District does not currently receive eligible federal impact aid because it does not meet the eligibility requirements. Brandt-Erichsen Aff., ¶ 12 & Ex. I (Exc. 044, 092-093).

¹⁷ AS 14.17.410(b)(2) (RLC required only for City Districts and Borough Districts).

¹⁸ AS 14.17.400.

¹⁹ See AS 14.17.300(a)(1).

²⁰ See AS 14.17.410(b).

²¹ See AS 14.17.410(b) and AS 14.12.020(c).

²² AS 14.17.410(b); AS 14.12.020(c).

²³ AS 14.17.410(d).

²⁴ AS 14.17.490(b).

and personal property in the Municipal District in a specified year.²⁵ Taxable real and personal property in the “district” means taxable real and personal property within the Municipality because the municipal and school district boundaries are the same.²⁶ The RLC is capped at 45% of a Municipal District’s Basic Need in the preceding fiscal year.²⁷

C. The Impact of The RLC on Provision of Services in the Borough

Based upon the October 2013 student count period as reported by the KGB School District to DEED, FY 2014 Basic Need for the KGB School District was \$25,947,546.²⁸ DCCED reported the population estimate of the Borough at 13,856 as of January 15, 2014.²⁹ This represents a Basic Need amount of approximately \$1,873 per person residing in the Borough.³⁰

The Borough’s FY 2014 RLC was \$4,198,727.³¹ This is based upon a property tax equivalent to 2.65 mills on the 2012 full and true value of \$1,584,425,200 as determined by DCCED.³² Because of certain optional property tax exemptions, the actual taxable value in the Borough in FY 2014 was \$1,314,675,800.³³ Therefore, the RLC equates to an actual mill levy of 3.19 on the FY 2014 taxable property within the Borough.³⁴

²⁵ AS 14.17.410(b)(2).

²⁶ AS 14.17.410(b); *see also* AS 14.12.010(1) - (3).

²⁷ AS 14.17.410(b)(2).

²⁸ Brandt-Erichsen Aff., ¶ 3 & Ex. B (Exc. 042, 062).

²⁹ Brandt-Erichsen Aff., ¶ 4 & Ex. C (Exc. 042, 063).

³⁰ Brandt-Erichsen Aff., ¶ 4 (Exc. 042).

³¹ Brandt-Erichsen Aff., ¶ 5 (Exc. 042-43).

³² Brandt-Erichsen Aff., ¶ 5 & Ex. D (Exc. 042-43, 064).

³³ Brandt-Erichsen Aff., ¶ 5 & Ex. E at 10 (Exc. 042-43, 074).

³⁴ Brandt-Erichsen Aff., ¶ 5 (Exc. 042-43).

The per student amount for the Borough RLC payment in FY 2014 was approximately \$1,900.³⁵ This number equals the FY 2014 RLC divided by the actual number of students in average daily membership reflected in the October 2013 student count period as reported by the KGB School District to DEED.³⁶ In FY 2014, the Borough and its residents provided \$4,198,727 in these compulsory payments, and an additional \$3,851,273 in optional local contributions allowed by AS 14.17.410(c), for a total property tax mill equivalent of 6.12 mills, based on the FY 2014 assessed value, in Borough resources allocated to operation of KGB School District schools.³⁷

The Borough raised revenues to meet these and other areawide Borough expenditures for FY 2014 through an areawide property tax levy of 5 mills and an areawide sales tax levy of 2.5%.³⁸ There are additional taxes levied and fees charged for Borough service area and nonareawide functions, and additional sales and property taxes are levied by cities within the Borough for city services.³⁹

Contrary to the assertion of the Association of Alaska School Boards, Alaska Council of School Administrators & Alaska Superintendents Association (“AASB”) that the RLC is “so low ... that it does not operate as a real constraint on city and borough assemblies,”⁴⁰ the RLC consumes just under two-thirds of the Borough’s areawide property tax levy, and the remainder of the levy (as well as additional sales tax revenue) is devoted to other education-related funding by the Borough.⁴¹

³⁵ Brandt-Erichsen Aff., ¶ 6 (Exc. 043).

³⁶ *Id.*

³⁷ Brandt-Erichsen Aff., ¶ 7 & Ex. F (Exc. 043, 085-88).

³⁸ Brandt-Erichsen Aff., ¶ 8 (Exc. 043).

³⁹ *Id.*

⁴⁰ AASB Brief at 32.

⁴¹ Brandt-Erichsen Aff., ¶ 9 (Exc. 043-44).

D. Procedural History

The parties filed cross motions for summary judgment. With respect to the Anti-Dedication Clause, the superior court concluded that the RLC is a “‘proceed[] of any state tax or license’ because it is a source of public revenue.”⁴² In reaching this conclusion, the superior court relied upon this Court’s Anti-Dedication Clause precedent defining this phrase.⁴³ Relying upon this precedent, the superior court then concluded that the RLC is dedicated to a specific recipient and a specific purpose because the “statute explicitly requires that municipal districts pay the RLC directly to their respective school districts annually.”⁴⁴ Finally, the superior court concluded that the RLC was not a pre-existing dedication exempt from the reach of the Anti-Dedication Clause because it was not enacted until after Statehood, adopting the analysis in Attorney General Opinions on this subject.⁴⁵

III. STANDARD OF REVIEW

This Court will review interpretations of the Alaska Constitution and statutes *de novo* and apply its independent judgment to questions of law.⁴⁶

IV. ARGUMENT

This Court does not hesitate to strike statutes as unconstitutional when necessary. In *Alex*, this Court found the royalty assessment statutes unconstitutional under the Anti-Dedication Clause notwithstanding the State’s claim that they should be interpreted as

⁴² SJ Order at 7 (Exc. 250).

⁴³ SJ Order at 8-15 (Exc. 251-58).

⁴⁴ SJ Order at 15-16 (Exc. 258-59).

⁴⁵ SJ Order at 16-18 (Exc. 259-261).

⁴⁶ *State v. Schmidt*, 323 P.3d 647, 654-55 (Alaska 2014).

directory instead of mandatory in order to avoid a holding that the statutes were unconstitutional.⁴⁷ *Alex* states:

This court has previously noted its intention to narrowly construe statutes to avoid constitutional infirmity where that can be done without doing violence to the legislature's intent. However, only a reasonable construction may be placed on a statute in this manner, because giving the statute an unintended meaning "would be stepping over the line of interpretation and engaging in legislation."⁴⁸

Thus, despite the presumption of constitutional validity, this Court held that the Legislature had dedicated revenues in violation of the Anti-Dedication Clause.⁴⁹

Similarly, in *Bradner v. Hammond*, a case that Appellants rely upon, this Court held a statute providing for legislative confirmation of sub-Cabinet officials unconstitutional because it could not be reconciled with the constitutional provision providing only for legislative confirmation of Cabinet officials.⁵⁰ In *Gilmore v. Alaska Workers' Comp. Bd.*, this Court held that the gross weekly wage determination method in a workers' compensation statute violated the lowest level of equal protection scrutiny even though "[i]f reasonably possible, we will construe statutes so as to avoid the conclusion that they are unconstitutional. We cannot, however, 'go so far as to redraft defective legislation.'"⁵¹

⁴⁷ 646 P.2d at 207-208.

⁴⁸ *Id.* (citations omitted).

⁴⁹ *Id.*

⁵⁰ 553 P.2d 1, 7 n. 22 (Alaska 1976) (citation omitted), relied upon in Appellants' Brief at 40.

⁵¹ 882 P.2d 922, 926 n.10 & 929 (Alaska 1994) (internal citations omitted). *See also State v. Fairbanks N. Star Borough*, 736 P.2d 1140, 1142 & 1144 (Alaska 1987) ("hold[ing] that the legislature unconstitutionally delegated legislative authority when it enacted AS 37.07.080(g)(2) [permitting withholding or reduction of appropriations when estimated receipts and surpluses will be insufficient to provide for appropriations] without providing any meaningful guidance," stating "[t]his court is under a duty to construe a statute to avoid constitutional infirmity where possible. However, it cannot go so far as to

A. The RLC Violates The Anti-Dedication Clause Because It Is A Source Of Public Revenue Earmarked For School Districts For The Special Purpose Of Funding Schools.

1. This Court's Holding in *Alex* that Royalty Assessments Violated the Anti-Dedication Clause Controls.

The Anti-Dedication Clause found in Article IX, Section 7 of the Alaska Constitution “prohibits the earmarking of state funds for predetermined purposes,”⁵² and prohibits “any and all dedications.”⁵³ In *Alex*, this Court defined the phrase “the proceeds of any state tax or license” to include “the sources of any *public* revenues,” including a “tax, license, rental, sale, bonus-royalty, royalty, or *whatever . . .*”⁵⁴

Alex applied this definition of “the proceeds of any state tax or license” to a statute requiring an assessment on commercial salmon fishing that was collected by commercial fish buyers and provided directly to private aquaculture associations.⁵⁵ The statute at issue⁵⁶ required that commercial fishermen pay a “royalty assessment” on certain species of salmon “for the purpose of providing revenue” to the private aquaculture association⁵⁷ to which the royalty assessment was made.⁵⁸ The assessments were collected by the commercial buyers to whom the salmon were sold, and the funds forwarded directly to the aquaculture association’s trust account instead of being deposited in the State

(“holding AS 11.15.310-330 [Alaska’s criminal defamation statute] to be unconstitutionally vague [and overbroad],” and rejecting a narrower interpretation that would make the criminal defamation law constitutional.)

⁵² *Southeast Alaska Conservation Council v. State*, 202 P.3d 1162, 1167 (Alaska 2009).

⁵³ 646 P.2d at 210.

⁵⁴ *Id.* at 210 (quoting 1975 Alaska Op. Att’y Gen. No. 9 (May 2)) (“1975 AG’s Opinion”) at 24 (emphasis added).

⁵⁵ *Id.* at 204.

⁵⁶ AS 16.10.530 (1982).

⁵⁷ The aquaculture associations were formed for the purpose of enhancing salmon production, at least in part by constructing salmon hatcheries. *Alex*, 646 P.2d at 205-06 (citations omitted).

⁵⁸ *Id.* at 205.

Treasury.⁵⁹ A group of commercial fishermen brought a class action claim against two of the aquaculture associations and the State, seeking a declaratory judgment holding the statute unconstitutional, as well as a refund of all assessments that had been paid by the fishermen and a permanent injunction to restrain future collection of the assessments.⁶⁰

This Court affirmed the superior court's order granting partial summary judgment to the plaintiffs, holding the assessment statute unconstitutional because it created a dedicated tax.⁶¹ After examining the history of the Anti-Dedication Clause and concluding that it prohibited the dedication of any source of public revenue, this Court concluded that the assessments imposed upon the salmon fishermen were "'proceeds of a state tax or license,' within the meaning of article IX, section 7 . . ."⁶² In the thirty three years since it was decided, *Alex* has been reaffirmed numerous times and applied to dedications of revenues derived from the sale, lease, or management of public lands,⁶³ income from tobacco companies as a result of litigation settlements,⁶⁴ and restrictions on an agency's ability to access funds for capital projects dedicated to operational support of the Marine Highway System.⁶⁵

⁵⁹ *Id.* (citing 3 AAC 88.020(b)(1)(H), 88.040(b), (c), 88.900(2) (1982)).

⁶⁰ *Id.* at 204.

⁶¹ *Id.* at 205, 215.

⁶² *Id.* at 210.

⁶³ *Southeast Alaska Conservation Council*, 202 P.3d at 1165-66.

⁶⁴ *Myers v. Alaska Housing Finance Corp.*, 68 P.3d 386, 391 (Alaska 2003). In a split decision, this Court held that the one-time sale of the right to future payments from the master tobacco settlement agreement did not violate the Anti-Dedication Clause, in the same way that the one-time sale of any state asset such as a building would not violate the Anti-Dedication Clause. The Court recognized, however, that the Anti-Dedication Clause "would prohibit the legislature from appropriating the tobacco settlement revenue stream for more than the immediately forthcoming fiscal year" for a specific purpose. *Id.*

⁶⁵ *Sonneman v. Hickel*, 836 P.2d 936, 939 (Alaska 1992) (limitation on ability of DOTPF to request appropriations from the Marine Highway Transportation System Fund for capital projects violates the Anti-Dedication Clause).

The RLC contains the same constitutional infirmities present in *Alex* and its progeny. Like the salmon assessments in *Alex*, the RLC is (1) required to be paid by a State statute; (2) paid directly to the intended recipient of the funds; and (3) dedicated to a State identified purpose in violation of the Anti-Dedication Clause. Like the special assessments imposed on the commercial fishermen in *Alex*, the RLC imposed on the Borough is a “source[] of any public revenue[],”⁶⁶ namely a payment compelled by the State to be collected by the Borough from “local sources” and paid to the KGB School District.⁶⁷ Public revenue in the form of the RLC is then dedicated for a particular purpose (operation of schools) to a particular source (the KGB School District) in a manner that is materially indistinguishable from the compelled payment from the commercial buyers in *Alex* to the regional aquaculture associations for operation of salmon hatcheries. Like the compelled special assessments on the sale of salmon in *Alex*, the compelled RLC creates an impermissible dedication of public revenue, thereby violating the Anti-Dedication Clause.

AS 14.12.020(c) (emphasis added) provides that the Municipalities “*shall* provide the money that *must* be raised from *local sources* to maintain and operate the district.” Additionally, if an RLC payment is not made, AS 14.17.410(d) provides that the State will not provide any State Aid to a Municipal District and AS 14.17.490(b) provides that the Municipal District will be disqualified from receiving supplemental funding. In *Alex*, the Court explained that the statutory provisions that the State claimed did not amount to a dedication would be “nonsensical” if they were not interpreted as being earmarked for support of aquaculture associations and as not creating a right to those revenues for the aquaculture associations.⁶⁸ Likewise, it would be nonsensical to interpret AS

⁶⁶ 646 P.2d at 210.

⁶⁷ See AS 14.17.410(b), AS 14.12.020(c).

⁶⁸ 646 P.2d at 208.

14.12.020(c), AS 14.17.410(b), and AS 14.17.490(b) as providing that the RLC was not earmarked for support of schools and as if the school districts alone did not have a right to such revenues. In fact, it is readily apparent that Appellants and Amici treat the RLC as if the school districts have a right to it.⁶⁹

Alex and its progeny eviscerate the argument that “proceeds of any *state*” as a modifier of “tax or license” does not mean revenues (including taxes) raised from “local sources” to make compulsory RLC payments.⁷⁰ Raising the funds to make RLC payments through taxes or otherwise is not a local decision made by the local government to fund its schools.⁷¹ The RLC is funded and paid for in this manner because of State statutes that require collection of revenues from local sources to make payments to school districts that if not made will result in a loss of State Aid and any supplemental funding. This is why Appellees refer to the RLC as “an unfunded State mandate imposed on the Borough and the Taxpayer Plaintiffs” that is a “mandatory State tax or other State revenue source, or a dedicated fund, that is dedicated to a special purpose ...”⁷²

This State imposed statutory dedication of RLC payments to school districts for operation of schools is unconstitutional under *Alex* and subsequent cases. *Alex* is not distinguishable, as Appellants argue, merely because the State did not make the same arguments in *Alex* that it is making here.⁷³ This Court’s conclusion in *Alex* was that *all*

⁶⁹ See January 27, 2015 Affidavit of Hanley (“Hanley Aff.”) at ¶¶ 4, 8 (Exc. 291, 292); CEAAC Brief at 6 (“CEAAC estimates that removal of the Required Local Contribution would take in excess of \$220,000,000.00 per year out of the State’s foundation funding program.”); AASB Brief at 3 (a decision holding the RLC unconstitutional “will substantially disrupt the state’s long-standing system of public school financing, and create significant uncertainty for the interests represented by AASB, ACSA and ASA.”)

⁷⁰ Appellants’ Brief at 25-36; NEA-Alaska’s Brief at 6.

⁷¹ See Appellants’ Brief at 28 (if the Framers had wanted to, they could have expressly stated that political subdivisions could not dedicate revenues).

⁷² Complaint at 8, ¶ 26 (Exc. 008).

⁷³ Appellants Brief at 32.

public revenues from *whatever source* are covered by the Anti-Dedication Clause. Moreover, as in *Alex*, only the school district can claim a right to the money, and therefore, the RLC is earmarked for a specific purpose. In other words, any argument that the State did not make in *Alex* does not distinguish the RLC payments from the salmon assessments held unconstitutional in *Alex*.

Collection of RLC payments directly by the State is not relevant in assessing a violation of the Anti-Dedication Clause as Appellants claim.⁷⁴ The *Alex* assessments were not collected by the State.⁷⁵ Instead, as is true of the RLC, the compelled payment in *Alex* was dedicated by a State statute. The dedication itself, and not who collects it, is the relevant factor.

Appellants inappropriately rely upon a 1991 AG's Opinion for the proposition that the RLC consists of "money that is outside of State revenue."⁷⁶ In 1991, the Attorney General determined that *Exxon Valdez* settlement monies placed in a Trust Fund for use by the federal and state governments were not "revenues" of the State and therefore, not subject to the Anti-Dedication Clause.⁷⁷ Nonetheless in 2003, this Court held in *Myers* that earmarking settlement proceeds that have not been reduced to present value violates the Anti-Dedication Clause. The *Myers* Court did not accept the 1991 AG's Opinion and instead relied on an earlier 1986 AG's Opinion which reached the opposite conclusion.⁷⁸ Furthermore, the 1991 AG's Opinion is distinguishable because the settlement monies were subject to federal requirements. As the 1991 AG's Opinion points out, "even if the Trust Fund monies *were* State revenues," the limitations placed on the use of the monies

⁷⁴ Appellants' Brief at 30.

⁷⁵ See *Alex*, 646 P.2d at 205-06.

⁷⁶ Appellants' Brief at 12-13.

⁷⁷ WL 916843 at 5.

⁷⁸ 68 P.3d at 391, n. 24.

were required by the federal government, rendering them exempt from the reach of the Anti-Dedication Clause.⁷⁹ This is not the case with the RLC.⁸⁰

Finally, Appellants erroneously attempt to distinguish the instant case from *Alex* because the funds generated to make RLC payments “will not be available to the legislature for expenditure” if the RLC is invalidated by this Court.⁸¹ Appellants provide no authority for this position or for its extrajudicial statement of the Anti-Dedication Clause’s supposed requirement. In *Alex*, this Court noted that the royalty assessments unconstitutionally collected from commercial fisherman would be refunded to them,⁸² just as Appellees propose here. Moreover, rather than compel the Legislature to place the royalty assessments in the general fund, in *Alex*, this Court issued a permanent injunction to restrain future collection of the assessments, as Appellees request here, and provided guidance to the Legislature to remedy the unconstitutional dedication.⁸³

2. This Court’s More Recent Anti-Dedication Clause Holdings Reaffirm *Alex* and Confirm that the RLC Violates the Anti-Dedication Clause.

In 2009, this Court held in *Southeast Alaska Conservation Council* that it was “reaffirm[ing] the reasoning and language of *Alex*...”⁸⁴ Thus, just six years ago, this Court again broadly interpreted “proceeds of any state tax or license” to mean all sources of public revenues when it held that money earned from the sale of State lands conveyed

⁷⁹ WL 916843 at 5.

⁸⁰ See Section IV.G.2 *supra*.

⁸¹ Appellants’ Brief at 30-31.

⁸² See 646 P.2d at 204, 215 (noting that complaint in the court below sought a refund of all assessments that had been paid by fishermen, and discussing assumpsit cause of action).

⁸³ See *id.* at 205.

⁸⁴ 202 P.3d at 1169 (land and net proceeds of sales of land conveyed to the University could not be dedicated to the University).

to the University could not be directly deposited into a University trust fund. This Court viewed the arrangement as classic earmarking for a special purpose and then went on to reiterate *Alex's* reliance upon the 1975 AG's Opinion as well as its broad definition of public revenues that cannot be earmarked.⁸⁵

Dedication of revenue to a particular purpose is unconstitutional under the Anti-Dedication Clause, regardless of whether the generated revenue would flow to the State Treasury in the absence of the statutory requirement that it flow elsewhere and be dedicated to a particular purpose, as Appellants claim.⁸⁶ Proceeds of land sales dedicated and paid directly to the University for its support in *Southeast Alaska Conservation Council* are no different from the RLC payments which are dedicated and paid directly to the school districts here. Similarly, the compelled transfers of money to aquaculture associations in *Alex* for support of salmon hatcheries are indistinguishable from the compelled transfer of funds from the Municipalities to their respective school districts for support of schools.

The Anti-Dedication Clause is purposefully broad. In *Southeast Alaska Conservation Council*, this Court pointed out that the reach of the Anti-Dedication Clause is so broad that a constitutional amendment was required to dedicate revenue to the Permanent Fund.⁸⁷ This Court also noted in *Southeast Alaska Conservation Council* that although it had held that the transaction at issue in *Myers* was constitutional, the Court was nonetheless concerned that the transaction actually "might be contrary to the spirit of" the Anti-Dedication Clause and that "*Myers* suggests that the reach of the dedicated funds clause might be extended to statutes that, while not directly violating the clause by dedicating revenues, in some other way undercut the policies underlying the clause."⁸⁸

⁸⁵ *Id.*

⁸⁶ Appellants' Brief at 30-31.

⁸⁷ 202 P.2d at 1169.

⁸⁸ *Id.* at 1170 (citations omitted).

Thus, in addition to the fact that the RLC statutes directly violate the Anti-Dedication Clause because they mandate dedication of public revenues for a particular purpose to a particular recipient, they also violate the spirit of the clause by mandating that revenues will be generated and dedicated to a particular purpose and recipient.

Southeast Alaska Conservation Council was not the first time that this Court expressed such concerns. In *Sonneman*, this Court concluded that a statute restricting the ability of the Department of Transportation and Public Facilities to seek funding of capital projects from the Marine Highway Fund violated the Anti-Dedication Clause even though it was “a less direct method” than a classic dedication because all departments are supposed to be able to compete equally for all funds on an annual basis.⁸⁹ Similarly, the RLC statutes preclude the executive branch from asking that the money raised by the RLC be considered each year in light of competing needs, not just the operation and maintenance needs of municipal school districts.

Indeed, if RLC payments are allowed to stand as currently configured, the State could require payments from local governments or their residents, in an amount based on some measure of ad valorem or sales taxation, and further require that those funds be expended *for any* specific purpose which is a State responsibility. For example, if the RLC is held not to violate the Anti-Dedication Clause, what if the Legislature were then to enact a mandatory contribution from any borough which houses a State courthouse in order to offset the cost of maintaining the court within that borough? What if the Legislature required boroughs to contribute two mills to defray the costs of the State district attorney, troopers and jails? How about if the Legislature then required each city to contribute a one-mill levy to support its local elected representatives to the Legislature, and required each borough to pay the equivalent of an additional one-mill levy to pay for fuel to heat State facilities located within their boundaries? Especially in lean times like

⁸⁹ 836 P.2d at 940.

those now faced by the State, these kinds of dedications are exactly what the Framers of Alaska's Constitution sought to avoid. Their thinking has been embraced by this Court in *Alex* and its progeny.

Appellants have claimed that these analogies are inapt because local communities need to have a financial stake in their schools to ensure that state and federal dollars are spent prudently.⁹⁰ However, this case is not about whether the State can share the burden of funding education with the Municipalities but rather, whether a particular mechanism chosen to do so (the RLC payment) violates the Anti-Dedication Clause. Furthermore, if Appellants' claim were true, those who live within REAAs would also have a financial stake in their local schools but they do not. The "consideration" in the foundation formula of a portion of eligible Federal Impact Aid ("FIA") that would otherwise be paid directly to school districts by the federal government is not accurately viewed as akin to the RLC for two reasons. First, FIA is federal money, not local "skin-in-the game."⁹¹ Second, all federally impacted communities have a portion of their FIA "considered" in this manner, regardless of whether they are located in REAAs or Municipal Districts.⁹²

Additionally, the Legislature, which has the authority to exercise any power or function in the unorganized borough which the assembly may exercise in an organized borough, could levy taxes in order for residents within REAAs to have a financial stake in their schools, or for any other purpose.⁹³ Similarly, the State could levy and collect a statewide property tax and appropriate the proceeds annually to education or another purpose. Instead, the State compels the raising of revenue only through the RLC, earmarks it for schools, and bypasses the annual appropriation process. This mechanism cannot be reconciled with the clear requirements of the Anti-Dedication Clause.

⁹⁰ State's Reply at 16 (Exc. 237); *see also* AASB Brief at 18.

⁹¹ AASB Brief at 18.

⁹² *See* Section IV.G.2 *supra*.

⁹³ Article X, Section 6 of the Alaska Constitution.

B. The RLC Is Unconstitutional Because It Is Mandatory.

1. *City of Fairbanks v. Fairbanks Convention and Visitors Bureau* Also Supports the Conclusion that the RLC Violates the Anti-Dedication Clause.

In *City of Fairbanks v. Fairbanks Convention and Visitors Bureau*, 818 P.2d 1153 (Alaska 1991) (“*FCVB*”), this Court held that a local initiative that broadened the use of bed tax funds to uses other than tourism did not make or repeal an appropriation or dedicate revenues in violation of Article IX, Section 7 of the Alaska Constitution (initiatives cannot appropriate money or dedicate revenues). The initiative allowed any organization to apply for funds from a discretionary fund containing bed tax receipts, instead of a more limited list of organizations provided for in the ordinance that the initiative had amended. This Court first held that the initiative did not make or repeal appropriations and that it gave the City Council more discretion rather than less with respect to which organizations could receive funds.⁹⁴

This Court then adopted the *Alex* analysis for whether the initiative dedicated funds.⁹⁵ It stated that the salmon assessment in *Alex* was problematic because “the allocation of revenues to the regional associations was mandatory, leaving no discretion to the Legislature to spend the money in any other way.”⁹⁶ In contrast, “the questioned initiative would not create any similar ‘right’ for any person or group. It would not earmark any funds for any particular organizations. Nor does it create any *mandatory*

⁹⁴ *FCVB*, 818 P.2d at 1157.

⁹⁵ *Id.* at 1158.

⁹⁶ *Id.*

expenditures.”⁹⁷ “The initiative might be better described as an ‘undedication’ [rather] than a dedication.”⁹⁸

In contrast to the initiative at issue in *FCVB*, the payment of the RLC to school districts is *mandatory*, leaving the Legislature without discretion to collect these revenues and use them in some other way. Instead, the RLC is earmarked for use by school districts for operation of schools. Municipalities are required to provide RLC payments under AS 14.17.410(b) and they “must” raise the money “from local sources” for the RLC under AS 14.12.020(c). In *FCVB*, this Court pointed out that “... the two main motivations behind the ban on dedicated revenues were to maintain the potential of flexibility in budgeting and to ensure that the legislature did not abdicate responsibility for the budget.”⁹⁹ The holding in *FCVB* further compels the conclusion that the RLC violates the Anti-Dedication Clause.

By adopting the *Alex* impermissible dedication analysis, *FCVB* highlights that a key purpose behind the prohibition on dedicated revenues was to avoid earmarking.¹⁰⁰ Yet that is exactly what AS 14.12.020(c) and AS 14.17.410(b) do; they *require* or *mandate* the *earmarking* of RLC payments for a single purpose: support of schools. This aspect of the RLC is why Citizens for the Educational Advancement of Alaska’s Children (“CEAAC”) erroneously claim that the Framers would be surprised by Appellee’s argument that the State cannot require an RLC without violating the Anti-Dedication Clause.¹⁰¹ As Appellants point out, Delegate Victor Fischer stated in a debate on the Local Government Powers Article of the Constitution that “we feel that education when it

⁹⁷ *Id.* (emphasis added).

⁹⁸ *Id.* at 1159.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1158.

¹⁰¹ CEAAC Brief at 39.

comes to the tax dollar, must compete with all other necessary services that are required by the people of the area. It was felt that the borough assembly would best be able to say that so much ... can be afforded of this tax dollar for education, so much for health, so much for police enforcement, etc.”¹⁰² The RLC does not comport with the Framers’ intent that there be no mandatory expenditures for education or for any other purpose.

2. The Superior Court Appropriately Relied Upon *FCVB* To Support The Conclusion That The RLC Violates The Anti-Dedication Clause.

Appellants and NEA-Alaska take issue with the superior court’s reliance on *FCVB* for its statement that “...the fact that the RLC is, essentially a solely local matter and local source of funds, does not weigh in the court’s consideration of whether the RLC consists of funds subjected to the dedicated funds clause.”¹⁰³ Appellants and NEA-Alaska seize on the fact that the superior court incorrectly asserted that *FCVB* held that the change to the bed tax at issue in the case was “constitutional under the dedicated funds clause”¹⁰⁴ in reaching this conclusion. As noted, in *FCVB*, this Court held that the bed tax initiative was not an impermissible subject of an initiative in accordance with Article XI, section 7 of the Constitution, because it did not dedicate funds, but in doing so, this Court adopted its *Alex* analysis of the Anti-Dedication Clause.¹⁰⁵

This Court explained:

We have not had occasion to review the clause in article XI, section 7 of the Alaska Constitution prohibiting initiatives which dedicate revenues. However, we have reviewed a similar provision in article IX, section 7, which prohibits the dedication of the proceeds of any state tax or license to any special purpose. *Because the language of these two provisions is*

¹⁰² Appellants’ Brief at 14 (citation omitted).

¹⁰³ SJ Order at 14 (Exc. 257). *See generally* Appellants’ Brief at 25-28; NEA-Alaska’s Brief at 8.

¹⁰⁴ SJ Order at 14 (Exc. 257).

¹⁰⁵ *FCVB*, 818 P.2d at 1158-59.

*similar, we adopt a similar analysis of the meaning of each provision and the purposes behind them.*¹⁰⁶

The fact that *FCVB* was not technically decided under the Anti-Dedication Clause does not render the superior court's conclusion about the dedication at issue in *FCVB* any less persuasive especially since this Court expressly found in *FCVB*: "[T]he initiative neither makes an appropriation nor dedicates funds."¹⁰⁷

Similarly, Appellants erroneously claim that the superior court's statements that "the RLC funds are not available for use throughout the Borough but instead are earmarked for specific use at the Borough's schools" and that this arrangement "infringes greatly on the Borough's flexibility in budgeting and further illustrates the dedicated nature of these funds" demonstrate that the superior court improperly viewed the RLC as an impermissible dedication by the local government of local sources of revenue.¹⁰⁸

However, when read in context with the rest of this portion of the superior court's opinion, it is clear that the superior court made these statements in order to explain why the *State statute compelling these payments* constitutes a dedication:

Yes, the RLC is dedicated to a specific purpose. This is evident even from a cursory reading of the statute. The statute explicitly requires that municipal districts pay the RLC directly to their respective school districts. ... [T]he RLC is committed by statute to a specific fund -- the school district's budget.¹⁰⁹

Moreover, in addition to *FCVB*, the superior court analyzed other precedent of this Court to bolster its conclusion that a statutory requirement that funds be raised locally and directed to a particular source violates the Anti-Dedication Clause:

Finally, the nuanced questions analyzed by the Alaska Supreme Court in past dedicated funds clause cases further illustrate the clarity of the issue here. Past cases dealing with this provision presented more complex issues

¹⁰⁶ *Id.* at 1158 (emphasis added).

¹⁰⁷ 818 P.2d at 1156.

¹⁰⁸ Appellants' Brief at 22.

¹⁰⁹ SJ Order at 15 (Exc. 258).

such as whether the sale of future settlement income or whether the proceeds of land use or sales transferred from the state to a state university qualified as ‘proceeds of any state tax or license.’ Here, the court is focused on local revenue raised to fulfill a municipal district’s required contribution to that district’s education facilities. This is a much clearer issue than *Myers* or *Southeast Alaska Conservation Council*, for example. In contrast to those cases where there was a multilayered statute involving items that were later transformed into money (settlement revenue or land sales), *here there is a clear direction from the state statute requiring municipal districts to contribute money to their school districts.* There is no need to parse the statute as was required by *Myers* or *Southeast Alaska Conservation Council*, for example, because the scheme here much more clearly and directly involves local money. As stated, this local money qualifies as “proceeds of any state tax or license” and is thus subject to the restrictions of the dedicated funds clause.¹¹⁰

Appellants and NEA-Alaska find significant the fact that this Court stated in *FCVB* that it was not deciding whether the ordinance that the initiative sought to change was unconstitutional under the Anti-Dedication Clause because neither party had raised that issue.¹¹¹ Since neither party had raised it, it is unremarkable that this Court clarified that it was not addressing whether the predecessor ordinance violated the Anti-Dedication Clause especially since “[t]he city [of Fairbanks] concede[d] that [the ordinance] as currently written *is a dedicated fund.*”¹¹²

Finally, Appellants and NEA-Alaska further criticize the superior court’s reliance on *FCVB* because an informal 1988 AG’s Opinion opined that the Anti-Dedication Clause “does not apply to local communities.”¹¹³ First, unlike the analysis of the 1975 AG’s Opinion at issue in *Alex*,¹¹⁴ this Court has not adopted the analysis of the 1988 AG’s Opinion. Second, the 1988 AG’s Opinion dealt with an ordinance that would have dedicated revenues,¹¹⁵ not a State statute that mandates that a Municipality make

¹¹⁰ SJ Order at 14-15 (emphasis added) (Exc. 257-58).

¹¹¹ Appellants’ Brief at 26 (citing 818 P.2d at 1158 n. 7); NEA-Alaska Brief at 8.

¹¹² 818 P.2d at 1158 (emphasis added).

¹¹³ Appellants’ Brief at 29, NEA-Alaska Brief at 6-7.

¹¹⁴ *Alex*, 646 P.2d at 210.

¹¹⁵ 1988 Inf. Op. Att’y Gen., 1988 WL 249509 at 1.

payments to a particular organization for a particular purpose. Third, the 1988 AG's Opinion expressly recognized that the Anti-Dedication Clause applies to statutes enacted by the Legislature.¹¹⁶

In sum, *FCVB* demonstrates that the RLC is unconstitutional under the Anti-Dedication Clause and the superior court appropriately relied upon it in its SJ Order.

C. The Additional Requirements For A Violation Of The Anti-Dedication Clause Put Forward By Appellants And Amici Are Not Found In This Court's Precedent.

Appellants and Amici do not contest the essential nature of the RLC, namely that it is a payment compelled by the State to be collected by the Borough and paid directly to the KGB School District. As explained above, the compelled or mandatory nature of the payment directed to a particular source for a particular purpose is unconstitutional under this Court's Anti-Dedication Clause case law. Appellants and Amici attempt to impose additional requirements for a statute to run afoul of the Anti-Dedication Clause that are not found in this Court's case law, and therefore, do not have to be met.

1. The RLC Violates the Anti-Dedication Clause Regardless of Whether it is Considered a Tax, or if it is Paid with Taxes Or Another Source of Revenue.

The theoretical possibility that the RLC could be funded through a local source other than taxes¹¹⁷ does not mean it complies with the Anti-Dedication Clause. This proposed interpretation is a narrowed, hyper-textual reading of the Anti-Dedication Clause that was expressly rejected in *Alex* and the 1975 AG's Opinion which held that "the *dedication* of any source of public revenue: tax, license, rental, sale, bonus-royalty, royalty, or whatever . . ." violates the Anti-Dedication Clause.¹¹⁸ The 1975 AG's Opinion concluded that "the Convention intended to prohibit any new dedicated funds of

¹¹⁶ *Id.* at 2, 4.

¹¹⁷ Appellants' Brief at 34-35.

¹¹⁸ *Alex*, 646 P.2d at 210 (emphasis added).

whatever description,” despite recognizing that the plain language of the Anti-Dedication Clause suggested a more narrow reading:

Either the Convention prohibited the dedication of any and all additional funds or it did not. The plain language of section 7 says that it did not. The plain language of the Convention’s debates compels the conclusion that it did.¹¹⁹

Thus, it is the RLC’s status as a State-compelled exaction dedicated to a particular source and purpose that creates the infirmity, not whether the statutes require the Borough to impose taxes to fund it, or whether it meets Appellants’ cramped definition of a “specific tax or license.”

Furthermore, although the label is not required by Anti-Dedication Clause precedent, the required RLC payment can be viewed as “the proceeds of any specific tax” on both the Borough and its citizens. The RLC statutes “tax” the Borough directly by requiring a payment to be made to the school district, which is no different than a State-compelled tax payment required of any corporation. Moreover, the RLC has historically been considered, and is intended to operate as, a “tax” on the Borough’s citizens with the Borough as the designated tax collector. For example, the 1962 “required local effort” statute described the local contribution as a “required local *tax* effort,” which was based on a one mill levy on all taxable property within the district.¹²⁰ Both the Legislature and the Attorney General’s Office have referred to a proposed decrease in the RLC as “*tax relief* for ‘all of organized Alaska . . .’”¹²¹

Appellants admit that the RLC is calculated with reference to taxable property in the Municipality under AS 14.17.410(b)(2),¹²² and that the RLC is limited to those

¹¹⁹1975 Attorney General’s Opinion at 19-20 (Exc. 164-65).

¹²⁰ Laws of Alaska 1962, ch. 164, § 1.07(a)-(c) (emphasis added) (Exc. 172).

¹²¹ See Dep’t of Law Memorandum, April 25, 2005 at 3 (emphasis added) (quoting Sen. Finance Committee, Hearing on SB 174, remarks of Sen. Wilken (April 20, 2001)) (Exc. 179).

¹²² Opposition to Plaintiffs’ Motion for Summary Judgment (“Opp.”) at 12 n.30 (Exc.

governments which have taxing authority under Article X, Section II.¹²³ If the RLC was not intended to come from the tax contributions of the Borough's taxpayers, Appellants provide no suggestion of another source of these funds.

The reality is that the "local sources" required to be used for RLCs under AS 14.12.020(c) are local taxpayers. Thus, the fact that Municipalities have the power to tax¹²⁴ does not render the statute any less of a dedication since the statute expressly requires municipalities to use "local sources" to fund RLC payments. And if, as NEA-Alaska argues,¹²⁵ the RLC statutes are characterized as a delegation of the State's taxing powers to Municipalities, it is all the more apparent that it is a State-compelled tax that cannot be dedicated to operation and maintenance of schools under this Court's Anti-Dedication Clause precedent. The RLC is earmarked for schools, unlike a true delegation of taxing power where the Municipality can determine how best to spend the taxes.

AASB's point that the value of in-kind services can count towards RLC payments¹²⁶ does not change the fact that the vast majority of RLC payments are funded with local tax dollars as Appellants admit.¹²⁷ Such tax dollars are indeed a "traditional source of public revenue" like the royalty assessments in *Alex*. Furthermore, "the value" of in-kind services generally consists of payment of such necessities as utilities,

105).

¹²³ Opp. at 6 (Exc. 099). See also *Matanuska-Susitna Borough Sch. Dist. v. State*, 931 P.2d 391, 399 (Alaska 1997) (accepting State's argument that the RLC drew a permissible distinction between REAAs and municipal districts "based on the constitutional differences between these two entities," namely the municipalities' ability to collect taxes).

¹²⁴ Appellants' Brief at 31.

¹²⁵ NEA-Alaska Brief at 12, 14.

¹²⁶ AASB Brief at 29.

¹²⁷ State of Alaska's Reply Brief in Further Support of Its Cross Motion For Summary Judgment ("State's Reply") at 14 ("Nor does the fact that municipalities must use their taxing power to raise the money to make the contribution transform this contribution into a 'state tax'.") (Exc. 235).

maintenance of school facilities, and insurance by Municipalities and is assigned a “documented fair market value.”¹²⁸ The money to pay for such services must come from somewhere and is likely to come from taxes.

The lack of specificity regarding what “local sources” Municipalities may use to pay the RLC¹²⁹ does not make it any less of a “tax.” No tax specifies the source of the payment, because money is fungible. For example, the IRS bases federal income taxes on a taxpayer’s income but there is no requirement that the tax payment is sourced exclusively from income or any other source. Similarly, the statutorily required RLC payment amount is based on taxable property in the Borough,¹³⁰ but it contains no technical requirement that the RLC actually be paid by property tax revenues.

Equally unconvincing is AASB’s assertion that because payments for in-kind services are not “locked up in a ‘fund,’”¹³¹ the RLC does not violate the Anti-Dedication Clause. The determining factor is that any payments for in-kind services are dedicated to a particular recipient for a particular purpose, as in *Alex* and its progeny. The “good relationship” between the RLC and its purpose of funding schools¹³² parallels the good relationship between: (1) the salmon assessments and aquaculture associations in *Alex*, (2) the ferry fees and the Marine Highway Fund in *Sonneman*, and (3) the land sales and University financial support in *Southeast Alaska Conservation Council*. Despite such

¹²⁸ AASB Brief, Attachment 2 at 1 (column for value of in-kind services). *See also* 4 AAC 09.990(b)(2) (“value of in-kind services means the documented fair market value of insurance, utilities, energy, audits, and maintenance of facilities provided at no charge to a district by the city or borough as reported in the district's school operating fund.”)

¹²⁹ Appellants’ Brief at 34.

¹³⁰ AS 14.17.410(b).

¹³¹ AASB Brief at 29.

¹³² AASB Brief at 29-30.

good relationships, the dedication of revenues in each case violated the Anti-Dedication Clause, as it does here.

2. The Imagined CEAAC Test for Violation of the Anti-Dedication Clause Is Not Found in this Court’s Anti-Dedication Clause Precedent.

This Court’s holdings explain what constitutes a dedicated revenue stream that violates the Anti-Dedication Clause and they do not align with CEAAC’s imagined test.¹³³ The first prong of the supposed test fails because this Court has never held that a violation of the Anti-Dedication Clause must arise from the State’s taxing power. If CEAAC’s position were correct, this Court would not have held in *Alex* that “the proceeds of any state tax or license” includes “the sources of any *public* revenues,” such as a “tax, license, rental, sale, bonus-royalty, royalty, or *whatever . . .*”¹³⁴ Nor would this Court have held in *Sonneman* that ferry fees placed in a fund that could only be used for construction projects if certain conditions were met violated the Anti-Dedication Clause.¹³⁵ Nor would this Court have explained in *Southeast Alaska Conservation Council* that the Alaska Permanent Fund had to be constitutionally established so as to ensure that non-tax revenues such as royalties and lease bonuses could be dedicated to support the Permanent Fund.¹³⁶ CEACC’s claim contradicts these holdings. Furthermore, even if this prong were part of the actual test, the RLC can be construed as an exercise of the State’s taxing power for the reasons described in Section IV.C.1 *supra*.

The second invented prong, that a dedication occurs when the Legislature uses its appropriation power to dedicate a State asset or property,¹³⁷ contradicts this Court’s holding that the Anti-Dedication Clause is not violated as long as the Legislature

¹³³ CEAAC Brief at 18-27.

¹³⁴ 646 P.2d at 210 (citation omitted) (emphasis added).

¹³⁵ 836 P.2d at 940-41.

¹³⁶ 202 P.3d at 1169.

¹³⁷ CEAAC Brief at 18.

appropriates a future stream of revenue from a State asset for a single purpose all in one year.¹³⁸ Finally, CEAAC's conclusion that the RLC is not dedicated to a particular purpose because: (1) the statute does not "dictate how funds are to be spent" and (2) the school districts have some flexibility to decide how to spend the funds¹³⁹ also conflicts with this Court's precedent. *Alex's* Anti-Dedication Clause holding did not turn on how the hatcheries would spend the salmon assessments but rather on the fact that the funds were directed to the aquaculture associations eliminating spending for any other purpose because only the aquaculture associations had a right to the funds.¹⁴⁰ The RLC suffers from the same fatal flaws.

The unconstitutional statute in *Alex* stated that the royalty assessments "shall be for the purpose of providing revenue for" the aquaculture associations.¹⁴¹ The unconstitutional statute in *Southeast Alaska Conservation Council* would have placed the income derived from the sale of University land in the University's endowment fund, requiring the income to be "used exclusively for the benefit of the University of Alaska."¹⁴² Likewise, the RLC is unconstitutional because it must be provided "to maintain and operate the [school] district."¹⁴³ The case law does not require that the statute dictate precisely how the funds have to be spent to constitute a dedication. Additionally, as discussed in Section IV.A. 2 *supra*, this Court's precedent establishes that a statute can be found unconstitutional under the Anti-Dedication Clause even if it only violates the spirit of, or undercuts the policies underlying, the Anti-Dedication Clause.

¹³⁸ *Myers*, 68 P.3d at 393-394.

¹³⁹ CEAAC Brief at 22, 27.

¹⁴⁰ 646 P.2d at 208.

¹⁴¹ *Id.* at 205.

¹⁴² 202 P.3d at 1166.

¹⁴³ AS 14.12.020(c).

Equally unpersuasive is CEAAC's argument that this Court should adopt the *FCVB* test of what constitutes an appropriation to determine what constitutes a dedication.¹⁴⁴ In *FCVB*, this Court specifically reiterated the test in *Alex* for what constitutes a dedication.¹⁴⁵

In sum, the extrajudicial requirements concocted by CEAAC, the other Amici, and Appellants are not found in this Court's precedent and therefore, do not distinguish the RLC payment from other dedications found unconstitutional by this Court.

D. The RLC Is Not A Matching Grant That If Found Unconstitutional Will Jeopardize Other Matching Grant Programs.

Appellants' argument that the RLC is more comparable to the Municipal Capital Project Matching Grant Program ("Matching Grant Program") than to the salmon assessments in *Alex*¹⁴⁶ ignores the compulsory nature of the RLC. Unlike the discretionary Matching Grant Program, the RLC is unconstitutional because "allocation of revenues to the [KGB School District] [i]s mandatory, leaving no discretion to the legislature to spend the money in any other way."¹⁴⁷ Only if a Municipality elects to participate in the Matching Grant Program does it incur the local share requirement under AS 37.06.030. But a Municipality cannot elect to forego providing the RLC to a school district, making this comparison of little value. Additionally, AS 14.17.410(d) provides that the State will not pay any State Aid to Municipal School Districts if they do not receive the RLC payment from their Municipality. The RLC is not an optional expenditure incentivized by the promise of State funds like municipal funds used to obtain a State matching grant; it is a requirement with severe financial consequences. As this Court pointed out in *Alex*, the salmon assessments were not a mere "policy

¹⁴⁴ CEAAC Brief at 24-25.

¹⁴⁵ 818 P.2d at 1158.

¹⁴⁶ Appellants' Brief at 33.

¹⁴⁷ *FCVB*, 818 P.2d at 1158.

commitment to appropriate matching monies from the general fund” but rather, a mandatory method for funding aquaculture associations.¹⁴⁸ The same analysis applies to the RLC.

E. Mandatory Automobile Insurance, Minimum Wage, or Other Similar Statutory Obligations Will Not Be Impacted if the RLC Is Declared Unconstitutional by This Court.

Appellants erroneously argue that the RLC is akin to minimum wage and mandatory insurance requirements that do not “create state revenue” and therefore, do not violate the Anti-Dedication Clause.¹⁴⁹ Minimum wage and mandatory insurance requirements are not examples of the State invoking its power to raise and expend funds for a public purpose, but rather, examples of the State utilizing its police power to promote public welfare and regulate public health and safety. No one is required to hire employees or to drive cars, but a Municipality is required to have a school district. Furthermore, if one chooses to hire employees or drive cars, one has to incur certain minimum expenses but is not penalized for paying employees more than the minimum wage or obtaining more insurance than is statutorily required. In contrast, the amount of the RLC is dictated by statute; nor can Municipalities provide more in voluntary local contributions than allowed by statute.¹⁵⁰

Appellants also erroneously argue that the RLC does not violate the Anti-Dedication Clause because voluntary local contributions, paid for by local tax dollars, constitute local decisions about how to raise and spend local money.¹⁵¹ The fact that voluntary local contributions are allowed in addition to the RLC does not render the RLC voluntary or constitutional. Moreover, as noted, the amount of voluntary local contributions that Municipalities may provide their school districts cannot exceed the

¹⁴⁸ 646 P.2d at 207.

¹⁴⁹ Appellants’ Brief at 33.

¹⁵⁰ AS 14.17.410(b) and (c).

¹⁵¹ Appellants’ Brief at 30, 35; *see also* NEA-Alaska Brief at 14.

statutory cap provided for in AS 14.17.410(c), regardless of the Municipality's own determination of educational funding needs within its school district.

Appellants also take solace in statutes providing that the State “shall” fund public assistance, per diem and other similar programs claiming that they do not create “a dedicated funds problem because money is not pre-pledged from a particular source of revenue to a particular purpose.”¹⁵² Agreed: all such statutes are subject to the Legislature’s constitutional power to appropriate.¹⁵³ Yet the RLC is not because it forces Municipalities to earmark hundreds of millions of dollars directly for school districts without the Legislature having the chance to exercise the power provided to it in the Appropriations Clause.

In fact, *Municipality of Anchorage v. Repasky*, a case relied upon by CEACC,¹⁵⁴ expressly states that even a “home rule municipality cannot enact an ordinance which conflicts with a state education statute.”¹⁵⁵ Since the RLC is mandatory, Municipalities are pre-empted from doing anything other than providing it, absent a declaration from this Court that the statute is unconstitutional. Unlike those who choose not to own cars to avoid mandatory insurance requirements and unlike the Legislature who has the constitutional power not to fund a statutory “shall,” Municipalities must comply with the RLC statutes or be vulnerable to a preemption doctrine lawsuit brought by the State or organizations like Amici.

¹⁵² Appellants’ Brief at 35-36.

¹⁵³ *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 378 (Alaska 2001) (holding that legislatures “do not have to fund or fully fund any program”).

¹⁵⁴ CEAAC Brief at 27.

¹⁵⁵ 34 P.3d 302, 311 (Alaska 2001) (citation omitted). *See also Liberati v. Bristol Bay Borough*, 584 P.2d 1115, 1122 (Alaska 1978) (municipalities are preempted from passing an ordinance that would substantially interfere with the effective functioning of a state law or its underlying purpose).

The preemption doctrine and potential lawsuits arising from the doctrine also explain why NEA-Alaska is wrong when it claims that the compulsory nature of the RLC is “an assumption, not an undisputed fact.”¹⁵⁶ Moreover, the mandatory nature of the RLC statutes is not questioned by Appellants. The parties to this case agreed that there were no facts in dispute and made cross motions for summary judgment.

Further, the preemption doctrine demonstrates the illogic of AASB’s claim that if Municipalities fail to comply with the RLC, nothing bad will happen because the State will step in and take over schools.¹⁵⁷ That said, the argument that the State will take over schools underscores that maintenance and operation of schools are State responsibilities that the State currently meets in part by compelling RLC payments and dedicating them to operation of schools in violation of the Anti-Dedication Clause.

Equally inapt is the analogy made by AASB to statutes that require municipalities to hold elections and provide for planning, platting, and land-use regulation.¹⁵⁸ These statutes do not require municipalities to raise a specific amount of funds from “local sources” and dedicate them to a particular recipient for a particular purpose. The fact that the RLC violates the Anti-Dedication Clause does not place every statute that imposes an obligation on a Municipality in the same position unless that statute also violates the Anti-Dedication Clause.

F. This Case Does Not Represent A “Clash” Between Constitutional Values And Even if it Did, This Court’s Precedent Does Not Require Upholding the RLC Because of Allegedly Competing Constitutional Values.

Amici argue incorrectly that the State can violate the Anti-Dedication Clause through the RLC because of its obligation to maintain an education system imposed by Article VII, Section 1 of the Constitution and to “define the ‘powers and functions’ of

¹⁵⁶ NEA-Alaska Brief at 15.

¹⁵⁷ AASB Brief at 33-34. AASB recognizes the preemption doctrine articulated in *Liberati* elsewhere in its Brief at 21 n. 68, 23.

¹⁵⁸ AASB Brief at 24.

cities and boroughs.”¹⁵⁹ Amici rely primarily on the *Myers* holding that “competing constitutional values” limited the reach of the Anti-Dedication Clause when considered in conjunction with the Legislature’s appropriations power.¹⁶⁰ Amici misread *Myers* and ignore other precedent which expressly holds that the Anti-Dedication Clause cannot be violated in order to fulfill another constitutional duty.

The competing constitutional values at issue in *Myers* were: “the prohibition on dedicated funds and the legislative power to manage and appropriate the State’s assets” because the Legislature sold future proceeds from the tobacco litigation settlement and appropriated those proceeds all in one year.¹⁶¹ The RLC does not present a clash between the Anti-Dedication Clause and the Appropriations Clause; both provisions are violated because the money is earmarked for a particular recipient for a particular purpose and the Legislature does not have the opportunity to consider competing needs and then decide which recipients and purposes to fund in a particular year. *Myers* expressly held that the Legislature was prohibited from “appropriating the tobacco settlement revenue stream for more than the immediately forthcoming fiscal year.”¹⁶²

Moreover, in both *Alex* and *Southeast Alaska Conservation Council*, this Court held that the State *could not* violate the Anti-Dedication Clause because of other constitutional obligations or rights. In *Alex*, the State argued that the natural resources article allowed it to dedicate funds. This Court held:

Nothing contained in article VIII can be construed to grant the legislature the power to ignore other express constitutional limitations on its taxing

¹⁵⁹ AASB Brief at 13-25; CEAAC Brief at 2-3, 21 and 28. NEA-Alaska also argues that it is acceptable to violate the Anti-Dedication Clause through the RLC so as to “encourag[e] use of the delegated tax power” provided under Article X, Section 2 of the Constitution. NEA-Alaska Brief at 12, 14.

¹⁶⁰ AASB Brief at 14; *see also* CEAAC Brief at 28.

¹⁶¹ *Myers*, 68 P.3d at 391.

¹⁶² *Id.*

power just because it is legislating in an area that concerns natural resources, such as fisheries or aquaculture.¹⁶³

In *Southeast Alaska Conservation Council*, this Court held that the State could not dedicate proceeds of University lands merely because Article VII, Section 2 establishes the University and provides that the University has title to real or personal property conveyed to it.¹⁶⁴ Amici's argument is the same as the unpersuasive argument in both *Alex* and in *Southeast Alaska Conservation Council*. One section of the Constitution is not an excuse to violate another section of the Constitution.

Instead, constitutional provisions should be construed in harmony with each other whenever reasonably possible.¹⁶⁵ Courts ordinarily try to find a reading that will construe the various constitutional provisions "as a harmonious whole,"¹⁶⁶ and then apply other canons afterward. There are only a few cases where this Court was faced with truly conflicting or competing constitutional provisions.

For example in *State v. Ostrosky*, 667 P.2d 1184 (Alaska 1983), this Court recognized the primacy of the harmonizing principle, but implicitly recognized that it could not harmonize the provisions at issue, and would need to apply different aids in interpretation.¹⁶⁷ This Court then held the later constitutional provision governed when two provisions conflicted.¹⁶⁸ This canon does not apply here since the constitutional provisions at issue were adopted at the same time.

¹⁶³ 646 P.2d at 211.

¹⁶⁴ 202 P.3d at 1171-72.

¹⁶⁵ See, e.g., *Park v. State*, 528 P.2d 785, 786-87 (Alaska 1974) (Alaska Constitution's citizenship requirement for voting in Art. 5, Sec. 1 did not conflict with the equal protection clause of the Alaska Constitution contained in Article 1, Sec. 1 because the Court has to assume that the framers meant there to be no conflict because they were adopted at the same time).

¹⁶⁶ *Denish v. Johnson*, 121 N.M. 280, 288, 910 P.2d 914, 922 (N.M. 1996).

¹⁶⁷ *Id.* at 1191 (citing *Park*).

¹⁶⁸ *Id.* at 1190.

However, this Court has also recognized that a specific constitutional provision will prevail over more general constitutional provisions. In *Alaska Civil Liberties Union v. State*, this Court held that the more general state equal protection clause does not override the more specific marriage amendment to Constitution.¹⁶⁹ Similarly, the Anti-Dedication Clause (as well as the Appropriations and Veto Clauses) are specific requirements that cannot be overridden by the more general provision providing for a statewide education system or for local government powers. Indeed, AASB admits that Article X of the Constitution regarding local governments is a “general power.”¹⁷⁰

Finally, it is unnecessary for this Court to view the constitutional mandates to provide for a statewide education system (Article VII) or to provide for local governments (Article X) as “competing” with the constitutional mandates not to dedicate revenues or to contravene the Legislature’s power to appropriate and the governor’s power to veto. Instead, they can all be read in concert with one another, and the specific powers enumerated in Article IX and Article II would in any event prevail over the more general powers enumerated in Article VII and Article X. In other words, the Legislature can exercise its “pervasive state authority”¹⁷¹ to provide for a statewide education system and provide services through local governments by any means that do not dedicate revenues or interfere with the appropriations and veto powers.

The Education Clause cases cited by Amici do not suggest otherwise since neither the RLC or the Anti-Dedication Clause are at issue in these cases.¹⁷² If anything, the

¹⁶⁹ 122 P.3d 781, 787 (Alaska 2005).

¹⁷⁰ AASB Brief at 18.

¹⁷¹ *McCauley v. Hildebrand*, 491 P.2d 120, 122 (Alaska 1971).

¹⁷² See, e.g., *Hootch v. Alaska State Operated School System*, 536 P.2d 793 (Alaska 1975) (constitutional right to an education does not include the right to attend secondary school in one’s own community); *Municipality of Anchorage v. Repasky*, 34 P.3d 302 (Alaska 2001) (under Charter, Anchorage Mayor had veto power over school district budget which was not in conflict with Education Clause); *Kasayulie v. State*, 3AN-97-03782 CI (Super Ct. 1999) (failure to provide adequate funding for school facilities in rural areas

superior court’s statement in *Moore v. State* that “all sources of funding, including private foundations, individual philanthropists, the federal government, or any number of combined sources” are available to the Legislature to meet its duty to adequately fund education¹⁷³ contradicts CEAAC’s claim that *Moore* stands for the proposition that the RLC “is an appropriate exercise of the State’s constitutional authority under Article VII” to fund education.¹⁷⁴ The fact that the State has a myriad of education funding choices from which to chose is all the more reason why it should not be able to violate the Anti-Dedication Clause, or any other constitutional provision, in fulfilling its duty to adequately fund education.

In sum, the State may not establish a method of school funding that is unconstitutional in any manner.

G. The RLC is Not Exempt From the Broad Reach of the Anti-Dedication Clause.

None of the exemptions to the Anti-Dedication Clause raised by Appellants and Amici apply to the RLC for the reasons explained herein.

1. This Court Has Never Held that there is an Implied State-Local Cooperative Program Exemption or an Implied Exemption For A Local Tax Collected by the State; Nor Would Either Alleged Exemption Apply to the RLC.

Appellants erroneously argue that even if the statutes requiring an RLC payment constitute a dedication, the RLC qualifies for the alleged state-local cooperative program exception to the Anti-Dedication Clause or the alleged exception for collection by the State of tax receipts on behalf of local governments.¹⁷⁵ First, the State implements its

violates the Education Clause); *Moore v. State*, 3 AN-04-09756 CI (Super. Ct. 2004) (rejecting Plaintiffs’ contention that rural schools were inadequately funded). Additionally, since *Matanuska-Susitna Borough School District*, 931 P.2d at 399, only addresses whether the RLC survives the lowest level of equal protection scrutiny, its holding does not foreclose the challenge to the RLC presented by Appellees in this case as NEA-Alaska suggests. NEA-Alaska Brief at 11.

¹⁷³ Appendix B to CEAAC Brief at 179-180, ¶ 21.

¹⁷⁴ CEAAC Brief at 32-33.

¹⁷⁵ Appellants’ Brief at 37-38.

exclusive constitutional duty to establish and maintain the local education system¹⁷⁶ in part by forcing Municipalities to make RLC payments in a specified amount to their school districts or face the loss of all State Aid for schools. There is nothing about this arrangement that is accurately characterized as “cooperative.”

Second, the RLC is not collected by the State on behalf of the local government as Appellants actually concede elsewhere in their Brief.¹⁷⁷ Rather, the State forces Municipalities to impose taxes or use other “local sources” to make RLC payments to Municipal School Districts or face the loss of all State Aid for their districts if they fail to comply with the statutory requirement. Putting aside the fact that Appellants and Amici argue inconsistently that the RLC payment does not have to be funded with taxes but only from “local sources,”¹⁷⁸ the fact that the RLC is largely paid for with local taxes does not transform it into a local tax collected by the State on behalf of the Municipality.

Third and perhaps most importantly, this Court has never held that these exceptions exist and therefore has also not determined the parameters of either alleged exception. The only case that mentions them is *Southeast Alaska Conservation Council*.¹⁷⁹ This Court noted that the 1975 AG’s Opinion relied upon in *Alex* “quoted a document on which the convention delegates had relied, noting that the amendment removing the words ‘all revenues’ avoided having to make explicit necessary exceptions to the clause for ‘certain moneys, e.g., pension contributions, proceeds from bond issues, sinking fund receipts, revolving fund receipts, contributions from local government units for state-local cooperative programs, and tax receipts which the state might collect on

¹⁷⁶ *Macaully*, 491 P.2d at 122.

¹⁷⁷ Appellants’ Brief at 30 (“The determination of what should be taxed and by how much is not made by the State; *the money is not collected by the State*; ...) (emphasis added).

¹⁷⁸ *See, e.g.*, AASB Brief at 29.

¹⁷⁹ *Southeast Alaska Conservation Council*, 202 P.3d at 1169, n.29.

behalf of local government units.”¹⁸⁰ In other words, this Court reiterated the holding in *Alex* that the change to “proceeds of any state tax or license” was not an attempt to exempt other sources of revenue from the Anti-Dedication Clause, but was designed to avoid earmarking certain revenues to special purposes in advance.¹⁸¹ This intent was expressed clearly by Delegate White in response to a question from Delegate Davis:

DAVIS: I read the memorandum that was distributed yesterday and one of the suggestions was that this be broadened to allow setting aside special funds for sinking funds for paying bonds and that sort of thing. Now I wonder if you have taken care of that with the language you have used here. Supposing the state should bond. It appears to me on the language that you have used, you have prevented setting up a sinking fund to pay the bonds. Am I wrong on that?

WHITE: Mr. President. In answer to your question, Mr. Davis, this suggested committee change came about because under the old language where it said, "All revenues shall be deposited without allocation..." we ran into a situation where we had listed seven exceptions that we were afraid we were going to have to make. By going to the tax itself and saying that the tax shall not be earmarked, we eliminated all seven of those exceptions. *Now in this case the sinking funds for bonds, all this prohibits is the earmarking of any special tax to that sinking fund. You could still set up a sinking fund from the general fund or the state treasury.*¹⁸²

Thus, even if either exception were to be recognized by this Court, the RLC payment would not qualify as an exception because it is perpetually earmarked for schools and paid directly to the school districts. It is not collected and then subsequently appropriated by the Legislature to schools or another purpose depending on annual consideration of competing needs for State revenues, as the Framers intended. “The important thing to note is that no intent was shown to limit the class of revenues which could not be dedicated.”¹⁸³ Further:

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 1169.

¹⁸² 4 Alaska Conv. Proceed. 2362-63. *See also* 1975 AG’s Opinion at 6-7 (Exc. 151-52).

¹⁸³ 1975 AG’s Opinion at 8-9 (Exc. 153-54).

In response to a typical argument that “ ... unless you have a fair share of earmarked funds for special certain purposes, particularly public works ... you often times do not get them,” the answer was: “they have to sell their viewpoint [to the legislature] along with everybody else.”¹⁸⁴

The only place in all of the Convention history that either of these alleged exceptions is addressed is in the 1956 PAS memo relied upon by Appellants.¹⁸⁵ Significantly, the actual amendment PAS proposed in the memo did not cover either exception:

This section might be revised by the deletion of the words in brackets and by the addition of the underlined words, as follows:

Section 8: All public revenues shall be deposited in the State treasury without allocation for special purposes. [; except where state participation in Federal programs will thereby be denied.] This provision shall not prohibit the continuance of any allocation existing upon the date of ratification of this Constitution by the people of Alaska, nor the earmarking of tax revenues and other receipts where necessary to enable the State to participate in Federal programs, to repay public debt, to maintain any individual or corporate or other Local government equity therein, or to maintain duly established revolving funds.¹⁸⁶

Finally, neither of these alleged exceptions applies to the RLC because the RLC did not exist at the time of Statehood as explained in Section IV.G.3 *infra*. “The Convention answered th[e] question[: ‘Do we want earmarking or do we not?’] with a resounding vote against earmarking and *against any exceptions other than those existing and those required by federal law.*”¹⁸⁷ In the 1975 AG’s Opinion, the Attorney General also bolstered this conclusion with the Convention record to prove the point that “the

¹⁸⁴ *Id.* at 11 (Exc. 156).

¹⁸⁵ Appellants’ Brief at 5-7; 9-11; Exc. 240-243.

¹⁸⁶ *Id.* at 8 (Exc. 153).

¹⁸⁷ 1975 A.G. Op. at 20-21 (emphasis added) (Exc. 165-66).

Convention intended to prohibit any new dedicated funds of whatever description” after the date of ratification of the Constitution.¹⁸⁸

2. RLC Payments are not Required for Participation in a Federal Program.¹⁸⁹

In order to qualify for the federal program exception to the Anti-Dedication Clause, the Attorney General has consistently opined that the federal program must *require* the dedication.¹⁹⁰ The RLC is not required by the federal government for school districts to receive Federal Impact Aid (“FIA”).¹⁹¹ Nor is an RLC required for the State to utilize FIA in its school funding program, as AASB asserts.¹⁹² In fact, states are generally prohibited from utilizing FIA to supplant state funds for schools, but they can choose to do so if they meet the FIA requirement that funding between school districts be “equalized.” Importantly however, even if a state chooses to meet the equalization requirements in order to supplant state funds with FIA, a local contribution is not

¹⁸⁸ See *id.* at 20-21, 24 (Exc. 165-66, 169).

¹⁸⁹ This is a new argument that was not raised before the superior court. Accordingly, this Court should not consider this argument on appeal. *Yi v. Yang*, 282 P.3d 340, 348 n.31 (Alaska 2012); *Anchorage Chrysler Ctr., Inc. v. DaimlerChrysler Motors Corp.*, 221 P.3d 977, 985 (Alaska 2009) (“We have held that, in general, ‘a party may not present new issues or advance new theories to secure a reversal of a lower court decision.’” (quoting *Zeman v. Lufthansa German Airlines*, 699 P.2d 1274, 1280 (Alaska 1985))).

¹⁹⁰ See, e.g., 1991 Op. Att’y Gen Alas. No. 443 Oct. 7, 1991 (regarding airport revenue dedication in compliance with Federal Aviation Administration grant assurances); 1989-1 Op. (Inf.) Att’y. Gen. Alas. No. 77, January 19, 1989 (explaining that “if the federal government as a condition of state participation in a federal program requires a dedication of income, the State may comply”); 1985-2 Opp. Atty. Gen. Alas. No. 425, Nov. 5, 1985 (holding that walrus ivory sales proceeds can be dedicated only if the federal permit includes a condition that proceeds be dedicated to a special wildlife fund); 1959 Op. Att’y Gen. Alas. No. 7 (stating that “[a]ny attempted dedication of funds after April 26, 1956, which is not absolutely required for participation in Federal programs must be covered into the general fund, any statute notwithstanding”). This Court has not yet addressed the federal program exception to the Anti-Dedication Clause.

¹⁹¹ 20 USC §§ 7701-7714.

¹⁹² AASB Brief at 35-41.

required.¹⁹³ Therefore, AASB’s claim that the RLC is required by the federal government is incorrect and does not excuse the RLC payment scheme from compliance with the Anti-Dedication Clause.

FIA is available to school districts which have federal (nontaxable) land within their boundaries and/or children living on federal or Indian land such that their “ability to finance public schools is negatively affected by federal presence.”¹⁹⁴ Although states are generally prohibited from supplanting state funding for education with FIA funds, in limited situations, states can “consider” eligible FIA that would otherwise go directly to school districts and count that FIA towards state education funding for all school districts if a state meets the FIA equalization requirements.¹⁹⁵ As a publication relied upon by Appellants¹⁹⁶ states:

In almost every case, states cannot reduce the amount of state aid a school district receives as a result of their Impact Aid payment. *Impact Aid is considered “outside” of a state’s school finance formula and a state must pretend that the school district does not receive Impact Aid funds.*

In a few circumstances, however, a state is allowed to reduce the amount of state aid sent to a school district simply because the district receives Impact Aid. In order for a state to be allowed to do this, the state must be certified as “Equalized” by the US Department of Education.¹⁹⁷

“[A] State aid program equalizes expenditures if the disparity in the amount of current expenditures or revenues per pupil for the free public education among [all local

¹⁹³ See 34 CFR 222.163(b)(2) (“In cases where there are no local tax revenues for current expenditures and the State provides all of those revenues on behalf of the LEA [Local Education Agency], the State may consider up to 100% of the funds received under the Act by the LEA in allocating State aid”).

¹⁹⁴ Appellants’ Brief at 17 n. 61; AASB Brief at 8.

¹⁹⁵ AASB Brief at 8-9; 34 CFR 222.161.

¹⁹⁶ Appellants’ Brief at 17 n. 61.

¹⁹⁷ “Getting a Grip on the Basics of Impact Aid,” National Association of Federally Impacted Schools, March 2013, at 15 (emphasis in the original), available at http://www.ruraledu.org/user_uploads/file/ImpactAidTheBasics.pdf.

school districts except those ranked in the top 5% and bottom 5%] in the state is no more than 25 percent.”¹⁹⁸ A state does not have to require local contributions in order to meet the disparity test and demonstrate equalization of expenditures among all school districts.¹⁹⁹

Proof that the RLC is not required for states to “consider” FIA is underscored by the fact that only Alaska and two other states “are currently equalized.”²⁰⁰ New Mexico, one of the two other equalized states, does not have a required local contribution. New Mexico counties, in conjunction with school districts, have the discretion to determine how much property tax to levy for schools up to a cap of .5 mills.²⁰¹ The New Mexico equalization system applies 75% of the proceeds of such taxes, if any, to the equalization program.²⁰²

Moreover, the history of the State’s “consideration” of FIA in Alaska includes the period from 1981 to 1987 in which there was no RLC.²⁰³ During this period, State Aid was provided at the Basic Need level with a deduction for 80% of a district’s FIA, and allowed supplemental aid based upon the rate of voluntary local contributions and the relative wealth of the district.²⁰⁴

¹⁹⁸ 34 CFR 222.162(a).

¹⁹⁹ *See* 34 CFR 222.163(b).

²⁰⁰ AASB Brief at 9, footnote 29; Appellants’ Brief at 17, n. 61.

²⁰¹ N.M. Stat. Ann. section 7-37-7.

²⁰² N.M. Stat. Ann. Section 22-8-25.

²⁰³ *See* Sec. 12, ch. 95, SLA 1969; Sec. 4, ch. 238 SLA 1970; Sec. 21, ch. 26 SLA 1980; Sec. 4, ch. 91 SLA 1987).

²⁰⁴ *See* Ch. 127, SLA 1983 (an act relating to state support for education; and providing an effective date); Ch. 127, SLA 1984 (an act relating to state support for education; and providing for an effective date); Ch. 75, SLA 1985 (an act relating to state support for education; and providing for an effective date); Sec. 2, Ch. 75, SLA 1986 (an act relating

Finally, in addition to arguing erroneously that the RLC is required by FIA, AASB exaggerates the potential negative FIA-related consequences of a ruling from this Court that the RLC is unconstitutional. First, districts which qualify would get FIA funds directly. Some REAAs would actually be better off if the State did not take their FIA into consideration in the school funding formula, even if the RLC is declared unconstitutional and the State does not provide any additional funding for support of schools. For example, utilizing the information included in Appendix D to the CEAAC Brief (DEED FY2015 Foundation Closeout spreadsheet prepared 3/16/15), Annette Island School District (“AISD”) funding would increase by \$649,540.07, from \$5,266,475 to \$5,916,015.07.²⁰⁵

Utilizing the same Appendix D information, similar results occur for other REAAs. Such results are summarized in the following chart:

<i>School District</i>	<i>Increase in Funding</i>
Bering Strait	\$3,199,075.77
Kashunamiut	\$ 896,108.87
Lower Kuskokwim	\$1,992,583.53
Lower Yukon	\$2,412,997.32
Southwest Region	\$1,102,416.65

to state aid to education; and providing for an effective date).

²⁰⁵ AISD currently has a Basic Need of \$5,076,531 (column 1). This consists of State Aid of \$3,367,032 (column 6) and Eligible Federal Impact Aid “considered” by the state of \$1,709,499 (column 5). AISD also receives directly the remaining 10% of FIA, or \$ 189,944. Thus, the total amount of funds available to AISD as a result of the current formula is the Basic Need plus the 10% of FIA, or \$5,266,475. If the State no longer “considered” FIA, the RLC is declared unconstitutional and the State chooses not to provide additional state funding as a result of this Court’s ruling, the Basic Need entitlement would effectively be reduced by proration under AS 14.17.400 at the rate of \$1,217 per adjusted ADM. Because the FIA for AISD is \$2,181.36 per adjusted ADM, and AISD would receive 100% of that amount, the total funds available to AISD would increase by \$649,540.07 to \$5,916,015.07.

Yupiit	\$ 973,096.21
--------	---------------

Second, AASB exaggerates the potential FIA-related consequences from a ruling that the RLC is unconstitutional because decertification did not result from 1981 to 1987 when the RLC was not required to meet the equalization test necessary for the State to “consider” FIA in its foundation funding. Lastly, meeting the disparity test involves a host of factors none of which require an RLC. The foundation formula would only be decertified if one or more of several elements which make up audited total revenues were to vary sufficiently for the total per Adjusted Average Daily Membership (“Adjusted ADM”) funding to exceed the 25% limit,²⁰⁶ *and* the Legislature fails to address that circumstance by adopting another method to meet the disparity test.

Even AASB admits: (1) decertification is only a possibility; (2) there are various constitutional methods the Legislature could substitute for the compelled RLC payment to continue the certification it currently enjoys as a result of local contributions; and (3) “[f]or certain, the State could devise a new public-school funding formula that, in the years following a judicial invalidation of the RLC, *likely would be certifiable by the Department of Education.*”²⁰⁷

In sum, an RLC is not a federal government requirement for school districts to receive FIA, or for the State to supplant a portion of FIA funds in its school funding program, and therefore is not exempt from the Anti-Dedication Clause on this basis.

3. The RLC is not a Pre-existing Dedication Exempt from the Anti-Dedication Clause, nor is It Exempt Because an RLC was First Enacted in 1962.

It is unclear whether Appellants have dropped the argument they made below that the RLC is exempt from the Anti-Dedication Clause because it existed on the date of

²⁰⁶ The audited total revenues used to calculate the spending per Adjusted ADM is the sum of various revenue elements. Local funds are considered as a portion of one of the revenue elements but local funds are not required to be appropriated. AASB Attachment 5 at 7 (explanation of Column J).

²⁰⁷ AASB Brief at 38-41 (emphasis added).

ratification of the Alaska Constitution.²⁰⁸ However, as explained in detail in Plaintiffs' Reply below,²⁰⁹ (1) the RLC was established *after* Statehood, and (2) the pre-existing school funding statute was repealed. The Attorney General has opined numerous times that a dedication is only grandfathered from the reach of the Anti-Dedication Clause if it existed before April 1956 and has not thereafter been repealed.²¹⁰ No RLC was enacted by the Legislature until 1962, long after the Constitution was ratified. Moreover, even if the pre-Statehood statutory funding scheme is considered a dedication – a position the Appellees reject for the reasons set forth in Plaintiffs' Reply – it was expressly repealed when the RLC and the other elements of the post-Statehood education funding statutes were enacted and thus, the RLC is not a grandfathered pre-existing dedication.

Appellants erroneously claim that a Territorial Law “included mandatory local funds going directly to local schools.”²¹¹ Under that law, municipalities exercised independent judgment and discretion as to what they could afford to pay for schools, and were reimbursed by the Territory for a portion of the support provided “from the moneys of the Territory appropriated for such purposes.”²¹² Each year, the city councils determined “the amount of money to be made available for school purposes, [furnished] the school board of the city a statement of such sum, and [required] the treasurer to pay

²⁰⁸ Appellant's Brief at 40 (“Here, the requirement for local funding for public schools, in addition to being a pre-statehood practice, was codified into State law shortly following statehood.”)

²⁰⁹ Plaintiffs' Reply at 12-15 (Exc. 139-142).

²¹⁰ See 1959 Alaska Op. Att'y Gen. No. 7 at 1-2 (March 11, 1959) (Exc. 212-217); 1992 Alaska Op. Att'y Gen. (Inf.) No. 33 (Jan. 12, 1990, re-dated Jan. 1, 1992) (Exc. 218-219); 1992 Alaska Op. Att'y Gen. (Inf.) No. 31 (Sept. 11, 1989, re-dated Jan. 1, 1992) (Exc. 220-221).

²¹¹ Appellants' Brief at 39.

²¹² § 37-3-62 of the 1949 Compiled Laws of Alaska (Exc. 204). Appellants did not provide the superior court with a complete copy of the Territorial Law it claimed created the pre-existing dedication. Therefore, Appellees provided a complete copy which can be found at Exc. 193-209.

the sum available for school purposes to the treasurer of the school board.”²¹³ Thus, no dedication was created because, unlike the current mandatory RLC, the cities were not required to provide any particular amount to the school districts. Additionally, no dedication was created because the amount of State reimbursement depended on how much was appropriated by the Legislature for such purpose.

Because no dedication was created, there would have been no reason to include these arrangements in the “27 percent of territorial taxes [that] were dedicated” as Appellants claim.²¹⁴ Similarly, because this statute did not dedicate funds to schools, there would have been no reason to discuss its status as a dedication at the Convention. As Appellants point out, dedication of tobacco tax revenues for schools was discussed.²¹⁵ If this proves anything, it demonstrates only that the Territorial statute Appellant claims constituted a dedication in fact did not do so.

Similarly, the RLC should not be considered exempt from the Anti-Dedication Clause because it was first enacted in a different form in 1962.²¹⁶ Appellants provide no support for their argument that this Court must ignore the unconstitutionality of a statute merely because it was enacted many years ago.²¹⁷

Furthermore, the RLC is not the “long settled and established practice” that Appellants claim, and therefore, does not represent a long settled and established interpretation that the RLC does not violate the Anti-Dedication Clause.²¹⁸ The 1962

²¹³ *Id.* at § 37-3-35 (Exc. 196-97).

²¹⁴ Appellants’ Brief at 8.

²¹⁵ Appellants’ Brief at 39.

²¹⁶ Appellants’ Brief at 40. This is another new argument that was not raised below and therefore, should not be considered by this Court on appeal.

²¹⁷ Indeed, if Appellants were correct, this court would not have considered whether the RLC violated the equal protection clause in 1997 in *Mat-Su Borough School District*, 931 P.2d at 397.

²¹⁸ Appellants’ Brief at 40.

enactment of the RLC was repealed in 1969.²¹⁹ Moreover, although the foundation formula was amended several times, no local contribution from Municipalities was required in 1969-1970 and from 1981 until 1987.²²⁰

These facts are quite different from the facts at issue in the case relied upon by Appellants, *Okanogan Indians v. United States (The Pocket Veto Case)*, where the U.S. Supreme Court held that federal legislation does not become law when the President does not act on it in the manner required by Article I of the United States Constitution. The Court explained that its conclusion was confirmed by the settled practice of past presidents (in which Congress acquiesced) and therefore such a practice “is a consideration of great weight in a proper interpretation of constitutional provisions of this character.”²²¹ In contrast, the constitutional provision at issue here is not of the same character as Article I of the United States Constitution, nor has the RLC been consistently applied and acquiesced in by the Legislature from 1962 to the present. Moreover, in *The Pocket Veto Case*, the Court pointed out that such a practice was “not absolutely binding on the judicial department.”²²²

Finally, *Bradner v. Hammond*²²³ supports Appellees’ position instead of Appellants’ position. First, it was in the context of explaining appellants’ view of the constitutional convention history at issue in the case that this Court pointed out that “[c]ontemporaneous interpretation of fundamental law by those participating in its drafting has traditionally been viewed as especially weighty evidence of the framers’

²¹⁹ Sec. 12, Chapter 95, SLA 1969.

²²⁰ Sec. 4, ch. 238, SLA 1970; Sec. 1, ch. 173, SLA 1976; Sec. 2, ch. 173, SLA 1976; Sec. 2, ch. 90, SLA 1977; Sec. 4, ch. 26, SLA 1980; Sec. 4, ch. 91, SLA 1987.

²²¹ 279 U.S. 655, 689, 49 S.Ct. 463, 73 L.Ed. 894 (U.S. 1929), relied upon in Appellants’ Brief at 40.

²²² *Id.* at 690 (citation omitted).

²²³ 553 P.2d 1 (Alaska 1976), relied upon in Appellants’ Brief at 40.

intent.”²²⁴ Yet the Court rejected appellants’ view of the Framers’ intent, adopted the view of the Framers’ intent espoused by the appellee, and upheld the lower court’s ruling in favor of the appellee that a statute requiring legislative confirmation of sub-cabinet officials was unconstitutional because it exceeded the Legislature’s constitutional authority to confirm only cabinet level appointments.²²⁵ This Court reached its decision despite the fact that the executive branch had in the past “acquiesced to legislative confirmation of certain subcabinet officials.”²²⁶ This Court explained that the constitutional provisions in question (sections 25 and 26 of Article II) were not ambiguous and “delineated the full extent of the constitution’s express grant to the legislative branch of checks on the governor’s power to appoint subordinate executive officers.”²²⁷ In doing so, this Court quoted the following passage from an earlier case:

This court is admittedly under a duty to reconcile, whenever possible, challenged legislation with the constitution by rendering a construction that would harmonize the statutory language with specific constitutional provisions. However, in fulfilling that duty, the extent to which the express language of the provision can be altered and departed from and the extent to which the infirmities can be rectified by the use of implied terms is limited by the constitutionally decreed separation of powers which prohibits this court from enacting legislation or redrafting defective statutes.²²⁸

Similarly, the Anti-Dedication Clause expressly provides that unless required by a federal program or existing before 1956, all dedications of public revenue are prohibited. Under such circumstances, this Court should not imply that the RLC is somehow exempted from the reach of the Anti-Dedication Clause because a form of RLC was first enacted in 1962 especially since no required contributions were imposed from 1969-1970

²²⁴ *Id.* at 4, n. 4 (citations omitted).

²²⁵ *Id.* at 5-8.

²²⁶ *Id.* at 4 n. 5.

²²⁷ *Id.* at 7.

²²⁸ *Id.* at 7 n. 22 (quoting *State v. Campbell*, 536 P.2d 105, 110-11 (Alaska 1975)).

and 1981-1987. As noted, this Court held unconstitutional legislative confirmation of sub-cabinet officials in *Bradner* despite a past practice of legislative confirmations of sub-cabinet officials because Sections 25 and 26 of Article II prohibited such legislation.

V. CONCLUSION

For all of the reasons set forth above and in Amicus Fairbanks North Star Borough's Brief, this Court should affirm the superior court's award of partial summary judgment to Appellees that the RLC payment scheme violates the Anti-Dedication Clause.

DATED this 30th day of June, 2015.

K&L GATES LLP

By: LW Cutler
Louisiana W. Cutler, ABA #9106028
Jennifer Coughlin, ABA#9306015
Attorneys for Appellees Ketchikan
Gateway Borough, Agnes Moran, John
Coss, John Harrington and David
Spokely

KETCHIKAN GATEWAY BOROUGH

By: LW Cutler for
Scott Brandt-Erichsen, ABA #8811175
Attorney for Appellee Ketchikan
Gateway Borough

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,

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/Cross-Appellants.

Supreme Court No. S-15811/15841

Trial Court No. 1KE-14-00016 CI

APPEAL FROM THE SUPERIOR COURT
FIRST JUDICIAL DISTRICT AT KETCHIKAN
HONORABLE WILLIAM B. CAREY

**APPELLEES' (KGB ET AL) SUPPLEMENTAL EXCERPT OF RECORD
VOLUME 1 OF 1**

Dated: June 30, 2015

Filed in the Supreme Court
for the State of Alaska,
this 30th day of June, 2015

Marilyn May
Clerk of Appellate Courts

By: _____
Deputy Clerk

K&L Gates LLP
Louisiana W. Cutler, Alaska Bar No. 9106028
Jennifer M. Coughlin, Alaska Bar No. 9306015
420 L Street, Suite 400, Anchorage, AK 99501
(907) 276-1969
Attorneys for all Appellees/Cross-Appellants

Scott Brandt-Erichsen, Alaska Bar No. 8811175
1900 1st Ave., Suite 215, Ketchikan, AK 99801
Attorney for Appellee/Cross-Appellant Ketchikan
Gateway Borough

TABLE OF CONTENTS

Affidavit of A. Rene Broker in Support of the Unopposed Motion by the Fairbanks North Star Borough for Leave to Participate as Amicus Curiae
February 26, 2014.....294

Amicus Curiae Fairbanks North Star Borough’s Reply in Support of Plaintiffs’ Motion for Summary Judgment and Opposition to Defendants’ Cross Motion for Summary Judgment
April 28, 2014299

district") as the statutorily required local contribution. The required local contribution in FY2014 equates to a mill rate of 3.29 on the taxable property within the FNSB.

3. The FNSB also contributed \$23,354,165 in optional local contributions and in-kind contributions.

4. The FNSB levied local property taxes upon the taxable real property owned by the residents and businesses in the FNSB in the amount totaling 6.15 mills to pay for the operation of the local school district in FY2014.

5. The calculated "Basic Need" for the local school district in FY2014 is estimated to be \$150,674,894. My understanding is this is an estimation and the final figures will be finalized at the end of March, 2014. After deducting the minimum required local contribution and federal impact aid, the State foundation aid paid to the local school district will be approximately \$117,445,340. Dividing the amount to be paid by the amount calculated for Basic Need means that the local school district only receives 78% of Basic Need from the State of Alaska.

6. On February 13, 2014, the FNSB Borough Assembly passed a resolution authorizing the FNSB to participate as *amicus curiae* in this proceeding. Attached is a true and correct copy of Resolution 2014-08 directing the Borough Attorney to take appropriate steps to accomplish such participation.

7. On or about February 19, 2014, I spoke to Scott Brandt-Erichsen and Louisiana W. Cutler, attorneys for the plaintiff. They indicated to me that they would not oppose a motion by the FNSB to participate as *amicus curiae*.

8. On or about February 24, 2014, I spoke to Assistant Attorney General Kate Vogel of the Attorney General's office. She indicated to me that she was filling in

for Margaret Paton-Wash representing the defendants, the State of Alaska and the Commissioner. She told me that that the defendants would not oppose a motion by the FNSB to participate as *amicus curiae* as long as the FNSB agrees to abide by all established schedules and limits its participation only to significant motions which contain questions of law.

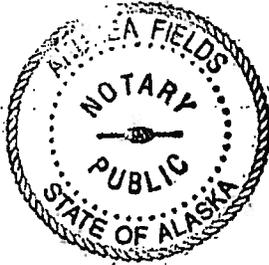
FURTHER AFFIANT SAYETH NAUGHT.

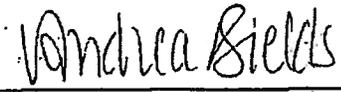
DATED at Fairbanks, Alaska this 26th day of February, 2014.


A. RENÉ BRÖKER

SUBSCRIBED AND SWORN TO BEFORE ME on this 26th day of February,

2014.




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

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

1 By: Diane Hutchison
2 Karl Kassel
3 Luke Hopkins, Mayor
4 Introduced: 02/13/2014
5 Adopted: 02/13/2014

6 FAIRBANKS NORTH STAR BOROUGH

7
8
9 RESOLUTION NO. 2014 - 08

10
11 A RESOLUTION AUTHORIZING THE PARTICIPATION OF THE FAIRBANKS NORTH
12 STAR BOROUGH AS AMICUS CURIAE IN *THE KETCHIKAN GATEWAY BOROUGH*
13 *V. STATE OF ALASKA* LITIGATION CHALLENGING THE CONSTITUTIONALITY OF
14 THE STATE OF ALASKA'S EDUCATION FUNDING STATUTORY SCHEME

15
16 WHEREAS, the Ketchikan Gateway Borough and other individual plaintiffs
17 recently filed suit against the State of Alaska in a complaint in the Superior Court in
18 Case Number 1 KE 14-16 CiV challenging the constitutionality of the State of Alaska's
19 education funding statutory scheme; and

20
21 WHEREAS, the Fairbanks North Star Borough, like the Ketchikan
22 Gateway Borough, is a second class borough, and was involuntarily established by the
23 Mandatory Borough Act; and

24
25 WHEREAS, because the Fairbanks North Star Borough was incorporated
26 through the Mandatory Borough Act, state law requires the Fairbanks North Star
27 Borough taxpayers to make a required local contribution to fund the "basic need" of our
28 local school district thereby reducing the state's legally required contribution to the
29 district's "basic need"; and

30
31 WHEREAS, the required local contribution is an unconstitutional dedicated
32 State tax imposed on the Fairbanks North Star Borough and its residents; and

33
34 WHEREAS, under this statutory scheme the State is permitted to
35 substantially underfund the Fairbanks North Star Borough school district with the
36 Fairbanks North Star Borough and its taxpayers forced to make up the difference; and

37
38 WHEREAS, this statutory scheme is an unconstitutional unfunded state
39 mandate illegally imposed on Borough taxpayers.

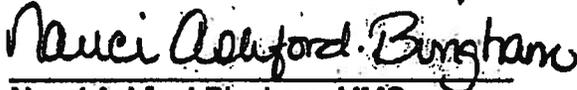
40
41 NOW, THEREFORE, BE IT RESOLVED that the Assembly of the
42 Fairbanks North Star Borough authorizes the participation of the Fairbanks North Star
43 Borough as an amicus curiae in any proceedings before the superior court and if
44 necessary, the Alaska Supreme Court and directs the Borough Attorney to take
45 appropriate steps to accomplish such participation.
46

47

PASSED AND APPROVED THIS 13TH DAY OF FEBRUARY, 2014.


Karl Kassel
Presiding Officer

ATTEST:


Nanci Ashford-Bingham, MMC
Borough Clerk

48
49 Ayes: Hutchison, Golub, Roberts, Lawrence, Dodge, Davies, Kassel
50 Noes: None
51 Excused: Sattley, Dukes

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

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

Plaintiffs,

vs.

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

Defendants.

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

APR 28 2014

Clerk of the Trial Courts

By _____ Deputy

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

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

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

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

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

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

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

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

² AS 14.17.410(b)(2).

³ State's Opposition to Ketchikan Gateway Borough's MSJ and Cross MSJ at 11.

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

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

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

(2) The State exacts payment only from municipal districts -- the only legal entities to which the State has constitutionally delegated taxing powers⁸ in obvious recognition that the taxing power is a necessary predicate to payment of the required “contribution.”

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

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

⁶ McQuillin's 344 at 17.

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

⁸ Alaska Const. art. X, § 2.

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

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

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

⁹ AS 14.17.410(b)(2).

¹⁰ AS 14.17.510.

¹¹ 646 P.2d 203, 209 (Alaska 1982).

¹² AS 14.07.030(14)-(15) and AS 14.07.020(a)(16).

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

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

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

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

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

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

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

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

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

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

Therefore, not only does the plain language of the required contribution clearly contemplate payment obtained through the levying of the taxing power delegated to the municipality by the state,¹⁹ one could not logically expect that the Fairbanks North Star Borough could make a legally required payment of over 26 million dollars²⁰ necessary to pay the state-mandated local contribution other than through utilization of the taxing power delegated to it by the state. State law implicitly recognizes this financial fact by limiting the required "contribution" to entities to which it has delegated the power of taxation.²¹

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

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

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

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

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

²¹ AS 29.35.010(6).

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

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

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

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

²³ 646 P.2d 203 (1982).

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

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

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

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

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

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

²⁵ WILLIAM SHAKESPEARE, HAMLET, act 3, scene 2 (1602).

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

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

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

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

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

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

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

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

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

²⁹ AS 37.06.

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

³¹ "The borough assembly for a borough school district . . . shall provide the money that must be raised from local sources to maintain and operate the district."

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

In addition to the use of mandatory language directing its local political subdivisions to make the required "contribution," state law adds a coercive element in which the state eradicates all "state aid" to a city or borough school district if the local contribution is not made.³³ In other words, the state adds (through its threatened withholding of all state aid) the whip of overwhelming economic pressure³⁴ to ensure the local governing body's exercise of its already titular appropriating power. No case law that the Borough is aware of, however, authorizes a grant or incentive program which conditions a constitutionally imposed duty.³⁵ While admittedly the constitution does not quantify the financial amount necessary to meet the State's duty to "establish and maintain a system of public schools open to all children of the State,"³⁶ it logically must

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

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

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

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

³⁶ Alaska Const. art. VII, §1.

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

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

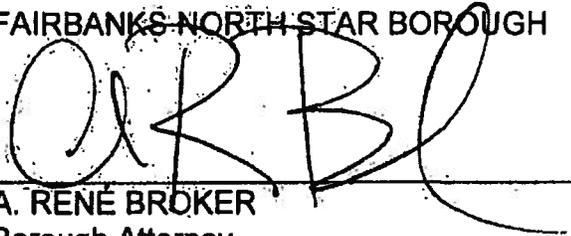
Thus, unlike the capital matching grant program where both the State's and the municipalities' payments are voluntarily, in the challenged funding scheme both sides are acting pursuant to legally imposed duties and obligations. State law requires the municipalities to contribute and Alaska's constitution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

III. CONCLUSION

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

DATED at Fairbanks, Alaska this 28th day of April, 2014.

FAIRBANKS NORTH STAR BOROUGH



A. RENÉ BROKER
Borough Attorney
ABA No. 9111076

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

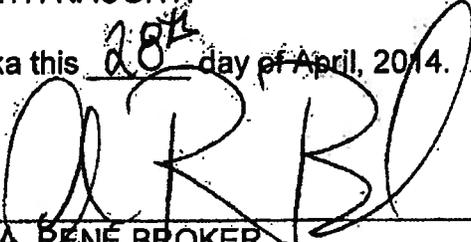
3. The amount of revenue for local taxes for the Fairbanks North Star Borough totals \$107,221,524. Most of those taxes are generated by property taxes which amount to \$102,890,424

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

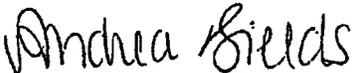
5. Attached hereto as Exhibit 2, is a Memorandum of Legislative Counsel dated February 25, 2013 received by the Fairbanks North Star Borough Department of Law during last year's legislative session.

FURTHER AFFIANT SAYETH NAUGHT.

DATED at Fairbanks, Alaska this 20th day of April, 2014.


A. RENÉ BROKER

SUBSCRIBED AND SWORN TO BEFORE ME on this 20th day of April, 2014.


Notary Public in and for Alaska
Commission Expires: with office



Affidavit of A. René Broker In Support of Amicus Curiae Fairbanks North Star Borough's Reply in Support of Plaintiffs' Motion for Summary Judgment and Opposition to Defendants' Cross Motion for Summary Judgment

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

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

Revenue Detail

REVENUE SOURCE	2010/11 Actual	2011/12 Actual	2012/13 Actual	2013/14 Approved	2013/14 Revised	2014/15 Recommended
LOCAL REVENUE						
LOCAL TAXES & ASSESSMENTS						
Total Taxable Levy				91,678,090	91,678,090	91,678,090
Less: Estimated Delinquent Taxes				(1,833,570)	(1,833,570)	(1,833,570)
Current Taxes	85,643,722	86,666,871	87,427,560	89,844,520	89,844,520	89,844,520
Delinquent Taxes	6,643,023	7,675,746	778,931	850,000	850,000	800,000
Interest & Penalties	3,199,723	3,404,738	793,499	723,000	723,000	780,000
Payment in lieu of taxes for privatized military housing	742,500	742,500	742,500	792,800	792,800	1,392,800
SUB-TOTAL	96,228,968	98,489,855	89,742,490	92,210,320	92,210,320	92,817,320
PROPERTY TAX - NON-AREAWIDE						
Total Taxable Levy				2,826,330	2,826,330	2,755,144
Less: Estimated Delinquent Taxes				(56,500)	(56,500)	(55,080)
Current Taxes	1,973,051	2,548,611	2,663,526	2,769,830	2,769,830	2,700,064
Delinquent Taxes	207,829	252,178	26,600	20,000	20,000	25,000
SUB-TOTAL	2,180,880	2,800,789	2,690,126	2,789,830	2,789,830	2,725,064
PROPERTY TAX - SOLID WASTE COLLECTION						
Total Taxable Levy				7,019,990	7,019,990	7,431,660
Less: Estimated Delinquent Taxes				(140,390)	(140,390)	(148,620)
Current Taxes	5,972,351	6,332,244	6,621,297	6,879,600	6,879,600	7,283,040
Delinquent Taxes	576,320	700,138	68,742	55,000	55,000	65,000
SUB-TOTAL	6,548,671	7,032,382	6,690,039	6,934,600	6,934,600	7,348,040
TOTAL PROPERTY TAXES:	104,958,519	108,323,026	99,122,655	101,934,750	101,934,750	102,890,424
ALCOHOLIC BEVERAGE SALES TAX						
Alcoholic Beverage Tax - Pen. & Int.	994,626	1,044,069	1,088,021	1,040,000	1,040,000	1,075,000
	6,575	3,129	21,086	4,000	4,000	4,000
SUB-TOTAL	1,001,201	1,047,198	1,109,107	1,044,000	1,044,000	1,079,000
TOBACCO DISTRIBUTION EXCISE TAX						
Penalties & Interest	1,799,328	1,503,285	1,464,733	1,450,000	1,450,000	1,450,000
			50	100	100	100
SUB-TOTAL	1,799,328	1,503,285	1,464,783	1,450,100	1,450,100	1,450,100
HOTEL/MOTEL TAX						
Hotel/Motel Tax - Pen & Int	1,692,522	1,921,094	2,028,262	1,750,000	1,750,000	1,800,000
	2,743	2,391	2,987	2,000	2,000	2,000
SUBTOTAL	1,695,265	1,923,485	2,031,249	1,752,000	1,752,000	1,802,000
TOTAL LOCAL TAXES:	109,454,313	112,786,874	103,727,794	106,180,850	106,180,850	107,221,524

LEGAL SERVICES

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

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

February 25, 2013

SUBJECT: Borough Assembly appropriation power
HB 47 (Work Order No. 28-LS0171A)

TO: Representative Steve Thompson
Attn: Jane Pierson

FROM: Jean M. Mischel
Legislative Counsel 

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

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

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

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

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

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

Representative Steve Thompson
February 25, 2013
Page 2

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

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

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

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

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

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

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

If I may be of further assistance, please advise.

JMM:ljw
13-116.ljw

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

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,

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/Cross-Appellants.

Supreme Court No. S-15811/15841

FILED

JUN 30 2015

APPELLATE COURTS
OF THE
STATE OF ALASKA

Trial Court No. 1KE-14-00016 CI

APPEAL FROM THE SUPERIOR COURT
FIRST JUDICIAL DISTRICT AT KETCHIKAN
HONORABLE WILLIAM B. CAREY

CERTIFICATE OF SERVICE

Dated: June 30, 2015

Filed in the Supreme Court
for the State of Alaska,
this 30th day of May, 2015

Marilyn May
Clerk of Appellate Courts

By: _____
Deputy Clerk

K&L Gates LLP
Louisiana W. Cutler, Alaska Bar No. 9106028
Jennifer M. Coughlin, Alaska Bar No. 9306015
420 L Street, Suite 400
Anchorage, AK 99501
(907) 276-1969

Attorneys for all Appellees/Cross-Appellants

Scott Brandt-Erichsen, Alaska Bar No. 8811175
1900 1st Ave., Suite 215
Ketchikan, AK 99801
Attorney for Appellee/Cross-Appellant Ketchikan
Gateway Borough

I hereby certify that on June 30, 2015, I caused true and correct copies of the Appellants' (KGB ET AL) Opening Brief and the Appellees' (KGB ET AL Supplemental Excerpt of Record to be served by first class mail on:

Kathryn R. Vogel
Department of Law
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501

Rene Broker
Fairbanks North Star Borough
809 Pioneer Road
Box 71267
Fairbanks, AK 99707

William D. Falsey
John M. Sedor
Sedor, Wendlandt, Evans & Filippi, LLC
500 L Street, Suite 500
Anchorage, AK 99501

Saul R. Friedman
Jermain Dunnagan & Owens, P.C.
3000 A Street, Suite 300
Anchorage, AK 99503

Kim Dunn
Landye Bennett Blumstein LLP
701 West Eighth Avenue, Suite 1200
Anchorage, AK 99501

Howard S. Trickey
Matthew Singer
Robert J. Misulich
Holland & Knight LLP
601 W. Fifth Avenue, Suite 700
Anchorage, AK 99501

Scott Brandt-Erichsen
Ketchikan Gateway Borough
1900 1st Ave., Suite 215
Ketchikan, AK 99801

I further certify that pursuant to Alaska R. App. P. 513.5(c)(2), the typeface and point size used in the above-referenced documents is Times New Roman 13 point.

By: 
Tara L. Moore