

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

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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

REPLY BRIEF OF CROSS-APPELLANTS (KGB ET AL)

Dated: July 28, 2015

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for the State of Alaska,
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In contrast to the assertions of Cross-Appellees, the RLC payments (1) fit the relevant definitions of appropriations set forth in this Court's case law; (2) will not create chaos in the legislative budgeting process if declared unconstitutional; and (3) cannot be transformed into constitutional payments by an order from this Court that they be collected and deposited in the State Treasury instead of in school district accounts. RLC payments are therefore unconstitutional under the Appropriations and Veto Clauses.

Cross-Appellants are entitled to a refund because all three unjust enrichment elements are satisfied. The State receives a tangible benefit because Municipalities are forced to make the RLC payments for educational services to assist the State in fulfilling its constitutional duty to maintain and operate a public education system. The fact that the State receives a benefit from RLC payments is underscored by Cross-Appellees' argument that the State would have been irreparably harmed from the lack of RLC payments during the pendency of this appeal. The State appreciated the benefit because it created the RLC payment scheme, was made aware that the Borough made the RLC payment under protest on constitutional grounds, and continues to assess the RLC payment after the superior court's ruling below. Section 19 of the *Restatement* demonstrates that the RLC payment is an illegal "tax" that has unjustly enriched the State. If this Court finds that RLC payments are unconstitutional, it would be unjust for the State to retain the benefit it received from them, and therefore a refund is appropriate.

ARGUMENT

I. RLC Payments Fit the Definitions of “Appropriation” Set Forth in this Court’s Precedent to Interpret the Appropriations Clause.

A. RLC Payments Are Appropriations Under *Thomas v. Rosen and Knowles III*.

Cross-Appellees erroneously conclude that Cross-Appellants should not rely upon *McAlpine v. University of Alaska*, 762 P.2d 81 (Alaska 1988), because it discusses the constitutional prohibition on initiatives which make appropriations instead of the Appropriations or Veto Clauses.¹ Cross-Appellants rely upon *McAlpine* because in that case, this Court looked to the definition of “appropriation” in the Black’s Law Dictionary contemporaneous with the drafting of the Constitution instead of the 2014 version of the definition relied upon by the superior court to conclude that an RLC payment is not an appropriation.² Cross-Appellants demonstrated that the RLC payments do qualify as appropriations under the contemporaneous definition.³

Further, the suggestion in Cross-Appellees’ brief that Cross-Appellants ignored the definition of appropriations provided for in *Alaska Legislative Council ex rel. Alaska State Legislature v. Knowles*, 86 P.3d 891, 895-06 (2004) (“*Knowles III*”),⁴ does not square with the statement in Cross-Appellants’ brief that “[t]he RLC payment is also unconstitutional under the definition of appropriation adopted by the Court in. . . *Knowles III*” because the RLC is a “payment[] of money under existing statutes.”⁵ Unlike the

¹ Answering Brief of Appellants/Cross-Appellees State of Alaska and Michael Hanley (“Cross-Appellees’ Brief”) at 15.

² Cross-Appellants’ Opening Brief (“Cross-Appellants’ Brief”) at 11-12.

³ *Id.* at 10.

⁴ Cross-Appellees’ Brief at 15.

⁵ Cross-Appellants’ Brief at 12-13.

“non-monetary asset” transfer of land to the University in *Knowles III*,⁶ AS 14.12.020(c) (emphasis added) provides that a Municipality “shall provide *the money* that must be raised from local sources to maintain and operate the school district.” Similarly, AS 14.17.410(b) (emphasis added) provides that “public school *funding* consists of state aid, a required local contribution, and eligible federal impact aid...” Since these statutes mandate payment of money (the RLC), the RLC is a “payment of money under existing statutes.”

Moreover, the RLC payment meets the *Knowles III* criteria because the amount of money that must be paid to the school districts each year is “certain,” for a “specified object,” and “dedicated to a particular purpose.”⁷ AS 14.17.410(b)(2), establishing that the annual RLC payments shall be “equivalent [to] a 2.65 mill tax levy on the full and true value of taxable real and personal property,” satisfies the “sum certain” requirement because it requires “the expenditure of an ascertainable sum of money in order to qualify as an appropriation.”⁸ Additionally, the RLC payment is for the “specified object” of operation and maintenance of schools and it cannot be spent on anything else, therefore it is “dedicated to a particular purpose.”⁹

Thus, the RLC payments constitute “public revenue of the State” subject to the Appropriations and Veto Clauses, despite Cross-Appellees’ statement to the contrary,¹⁰ because they fit within the criteria established for appropriations in *Thomas* and *Knowles*

⁶ *Knowles III*, 86 P.3d at 893.

⁷ *Id.* at 898 (quoting *Thomas v. Rosen*, 569 P.2d 793, 796 (Alaska 1977) (quoting *State ex rel. Finnegan v. Dammann*, 220 Wis. 143, 264 N.W. 622, 624 (1936)).

⁸ *Id.* at 898.

⁹ *Id.*

¹⁰ Cross-Appellees’ Brief at 1.

III as well as *McApline*. Cross-Appellees contend that the RLC payment “is consistent with the appropriations and veto clauses ... for the same reason that [it] does not violate the dedicated funds clause: [it] is not state public revenue and therefore is not subject to the constitutional restrictions that apply to the spending of state public revenue.”¹¹

However, the RLC payment is indeed “state public revenue” for the numerous reasons asserted in Appellees’ Brief on the Anti-Dedication Clause.¹² Instead of the State writing a check to the districts from funds deposited in the State Treasury, the State forces the Municipalities to write the check directly to the districts, thus evading the State’s constitutional duties under the Appropriations and Veto Clauses.

Finally, the point is not that the Appropriations and Veto Clauses extend to “money [the State] does not itself possess.”¹³ Rather, because the statutes at issue here require that a certain amount of revenue must be raised and spent for a particular purpose in perpetuity, they prevent the State from possessing the money, and correspondingly, prevent the Governor and the Legislature from fulfilling their respective constitutional duties to determine annual spending priorities for these public revenues.¹⁴

B. *Carr-Gottstein Properties* Is Distinguishable Because Cross-Appellants do not argue that the RLC Payments are Program Receipts and the Local Sources of RLC Payments Are Not “Private Funds.”

Cross-Appellees erroneously argue that classification of revenues as “unrestricted program receipts” is necessary to determine whether they should be deposited in the State Treasury and subject to the Appropriations Clause based upon the *per curiam* decision in

¹¹ *Id.* at 2.

¹² Appellees’ Brief at 10-18.

¹³ Cross-Appellees’ Brief at 14.

¹⁴ *Simpson v. Murkowski*, 129 P.3d 435, 447 (Alaska 2006) (determining annual spending priorities for public revenues are duties of the Legislature and Governor under the Appropriations and Veto Clauses).

Carr-Gottstein Properties v. State, 899 P.2d 136 (Alaska 1995).¹⁵ The fact that program receipts are subject to appropriation does not mean that other sources of revenues are exempt from appropriation. Rather, this Court analyzed whether the renovation funds in *Carr-Gottstein Properties* constituted program receipts because Carr-Gottstein argued that they were program receipts,¹⁶ not because revenues have to be characterized as program receipts to be subject to the Appropriations Clause. Cross-Appellants respectfully suggest that this Court will never issue such a holding, since public revenues consist of taxes and other sources of revenue as well as program receipts.

Moreover, this Court characterized the money set aside for renovations by a private sector landlord in *Carr-Gottstein Properties* as private funds not subject to the Appropriations Clause.¹⁷ Money voluntarily provided by a private party landlord for renovations in a typical lease-purchase agreement is distinguishable from the mandatory RLC payment and corresponding withholding of all State aid to school districts if the RLC payment is not made. Additionally, the RLC is not a payment made from private funds, but rather, from taxes that the Borough obtains from taxpayers (including some of the Cross-Appellants) to make the RLC payments to the school district mandated by State statutes. As such, it is “state public revenues” required to be levied by State statutes.

C. Cross-Appellees’ Plain Meaning Argument Ignores the Framers’ Intent Embraced by this Court to Interpret the Appropriations Clause.

Cross-Appellees emphasize that the literal language of the Appropriations Clause refers to money “from the treasury,” to support their argument that RLC payments do not violate the Appropriations Clause because they are paid directly to the school districts

¹⁵ Cross-Appellees’ Brief at 17-18.

¹⁶ 899 P.2d at 145.

¹⁷ *Id.* at 145-46.

instead of into the Treasury.¹⁸ However, the plain meaning of a constitutional provision is not always controlling. Instead, it is axiomatic that this Court determines the meaning of the Constitution by examining “the minutes of the Constitutional Convention” as well as the language of the Constitution itself.¹⁹ Indeed, this Court relied on the Framers’ intent as expressed in the Convention minutes to reach its holding in *Knowles III* on what constitutes an appropriation subject to the Appropriations and Veto Clauses.²⁰ As discussed above in Section I.A, the RLC payments constitute appropriations under *Knowles III*.

D. The Enabling Statutes Which Provide for RLC Payments Do Not Alter the Conclusion that the RLC Payments Violate the Appropriations and Veto Clauses.

Cross-Appellees state the obvious when they point out that AS 14.12.030(c) and AS 14.17.410(b) are enabling statutes, not appropriation bills.²¹ Cross-Appellants do not argue that these statutes constitute appropriations. Rather, Cross-Appellants’ position is that because these statutes require Municipalities to provide hundreds of millions of dollars directly to school districts annually in the form of RLC payments, the Legislature and Governor are prevented from exercising their constitutional duty to determine the

¹⁸ Cross-Appellees’ Brief at 11-12.

¹⁹ *Knowles III*, 86 P.3d at 895 (holding that both the Convention minutes and the language of the Constitution are considered to determine the meaning of “appropriations” in Article II); *Thomas*, 569 P.2d at 795 (holding that to decide whether bond authorization legislation constitutes an appropriation, “we must first look to the intent of the framers of the constitution”) (quoting *Warren v. Boucher*, 543 P.2d 731, 735 (Alaska 1975)).

²⁰ 86 P.3d at 896 (citing Delegate Sundborg’s statement that “any bill affecting payments of money under existing statutes” would be considered an appropriation as well as other statements of Delegate Sundborg, Delegate McCutcheon and Delegate Rivers regarding their interpretation of what would constitute an appropriation).

²¹ Cross-Appellees’ Brief at 17. Cross-Appellees make a similar statement about all of AS 14.17.410. *See id.* at 5.

amount of, and purpose for, these public revenues on an annual basis regardless of authorization provided for RLC payments in enabling statutes. If the RLC payments were the only source of funding for education, it would be more obvious that they thwart the purposes of the Appropriations and Veto Clauses. But the fact that they are not the only source of funding for education does not change the fact that the current funding scheme circumvents the constitutional prerogative of the Legislature and Governor to appropriate these amounts to education or another purpose each year.

This Court has previously held that the Governor could veto an appropriation for the Longevity Bonus program, despite the fact that the enabling statute providing for longevity bonuses had not been repealed, because the Appropriations and Veto Clauses demonstrate that “it is the joint responsibility of the governor and the legislature to determine the State’s spending priorities on an annual basis.”²² The statutes that force Municipalities to pay the RLC interfere even more with this joint responsibility than the Longevity Bonus authorization statute because they force Municipalities to raise hundreds of millions of dollars every year and provide the funds to a single purpose year after year, even though the Legislature and the Governor might or might not choose to provide this same amount of funds to that single purpose every year if they were faced with making the funding decisions themselves annually in light of other competing needs for public revenues.

Cross-Appellees argue that AS 14.12.030(c) and AS 14.17.410(b) “would violate the confinement clause if they were deemed to be appropriations.”²³ As noted above,

²² *Simpson*, 129 P.3d at 447 (quoting superior court decision in the case below). *See also Alaska Legislative Council v. Knowles*, 21 P.3d 367, 378 (Alaska 2001) (“*Knowles II*”) (holding that legislatures “do not have to fund or fully fund any program ...”).

²³ Cross Appellees’ Brief at 17 n. 40.

Cross-Appellants are not arguing that the enabling statutes are appropriation bills but rather, that the effect of the statutes violates the Appropriations and Veto Clauses because the Legislature and Governor have no opportunity to consider whether to use those funds, in that specific amount, for education or another purpose on an annual basis. That said, if this Court is inclined to view these statutes as appropriations, they are not “confined to appropriations,” providing yet another basis for concluding that the RLC payments required by these statutes violate the Appropriations Clause. The enabling statutes violate at least three of the five “non-exclusive” criteria for determining a violation of the Confinement Clause in this Court’s precedent: the statutes “administer the program of expenditures,” “enact law,” and “extend beyond the life” of an annual appropriation.²⁴

In sum, the RLC payment fits within this Court’s precedent establishing what constitutes an appropriation for purposes of the Appropriations and Veto Clauses. The statutes that provide for RLC payments are therefore unconstitutional because they prevent the Legislature and the Governor from exercising their joint responsibility to determine annually what amount of funds will be provided to fulfill State responsibilities.

II. Budget Process Pandemonium will not Result From a Ruling of this Court that the RLC Payments Violate the Appropriations and/or Veto Clauses.

Cross-Appellees misstate Cross-Appellants’ position and demonstrate a misunderstanding of the legislative budgeting process when they raise the specter of appropriation chaos if this Court holds that RLC payments violate the Appropriations and/or Veto Clauses.²⁵ First, Cross-Appellants have never stated that the federal government should send Federal Impact Aid to the State for appropriation nor have we

²⁴ *Knowles II*, 21 P.3d at 377.

²⁵ Cross-Appellees’ Brief at 11; 18-21.

argued that the Legislature and Governor have to appropriate all the money that local governments spend each year.²⁶ Rather, Cross-Appellants argue that the RLC payments are unconstitutional because they thwart the purposes of the Appropriation and Veto Clauses by forcing Municipalities to make the payments directly to their school districts, instead of raising funds to be deposited in the Treasury.²⁷ How and if the Legislature seeks to replace that unconstitutional source of public revenue with a constitutional source of public revenue is entirely up to the Legislature, as Cross-Appellees admit elsewhere in their brief.²⁸

Second, before the beginning of each upcoming fiscal year, the Governor proposes and the Legislature passes a budget that appropriates what the State expects to receive in public revenues throughout the course of the upcoming fiscal year.²⁹ In other words, all public revenues are appropriated before they are received and before their actual totals are known.³⁰ These public revenues include taxes, program receipts, federal funds, bond proceeds and all other sources of public revenue.³¹ If necessary, the budget for a

²⁶ *Id.* at 19-20.

²⁷ *See* Cross-Appellants' Brief at 7-17.

²⁸ Cross-Appellees' Brief at 27.

²⁹ Article IX, Section 12 of the Alaska Constitution (Governor's budget shall set forth proposed expenditures and all anticipated income); AS 37.07.020(a) (Governor's proposed budget shall include all estimated receipts); AS 37.07.070 (Legislature shall consider Governor's proposed budget and determine the level of funding required to support authorized state services subject to available revenues).

³⁰ AS 37.07.020(c) (proposed expenditures in Governor's budget may not exceed "estimated revenue for the succeeding fiscal year").

³¹ Article IX, Section 12 of the Alaska Constitution (Governor's budget shall set forth all anticipated income from all sources); AS 37.07.020(a) (Governor's proposed budget shall include all estimated receipts including federal funds); AS 37.05.144.145 (general fund and non-general fund program receipts which must be appropriated); AS 37.05.500 - AS 37.05.610 (a variety of special funds to which appropriations are made).

particular fiscal year is adjusted during successive legislative sessions through special appropriations and supplemental appropriations.³² It is therefore incorrect to assert that the sources of public revenue (if any) that might replace the unconstitutional RLC payments cannot be appropriated along with all other sources of public revenue in accordance with these routine budgeting procedures or that “meaningless delay and confusion”³³ in the budgeting process will result.

III. This Court may not Redraft the RLC Payment Statutes in order to Avoid Holding that the RLC Payments are Unconstitutional.

An equally unconvincing claim is that if this Court “agrees” that the statutes at issue are unconstitutional, instead of holding that they are unconstitutional, this Court should conclude that the RLC payments should be “routed through the state treasury” in accordance with the doctrine of constitutional avoidance.³⁴ This Court has long held that it would be a violation of the separation of powers doctrine to “redraft legislation” in order to avoid holding that an unconstitutional statute is in fact unconstitutional.³⁵ Moreover, this alleged solution without even more redrafting of the statutes would not change the fact that the RLC payments would still violate the Anti-Dedication Clause because they are mandatory and dedicated to a single recipient for a single purpose.³⁶ Instead, this Court should declare that the RLC payment scheme is unconstitutional and leave it to the Legislature to exercise its “pervasive state authority”³⁷ to provide for a statewide education system and provide services through local governments by any

³² AS 37.07.100 (special and supplemental appropriations).

³³ Cross-Appellees’ Brief at 19.

³⁴ Cross-Appellees’ Brief at 21.

³⁵ See Appellees’ Brief at 8-9.

³⁶ See *id.* at 10-21.

³⁷ *McCauley v. Hildebrand*, 491 P.2d 120, 122 (Alaska 1971).

means it chooses that does not interfere with the appropriations and veto powers, unconstitutionally dedicate revenues, or otherwise violate the Constitution.

IV. A Refund is Required Because All of the Elements of Unjust Enrichment are Met.

The parties agree that unjust enrichment requires three elements: (1) a benefit conferred on the defendant by the plaintiff; (2) appreciation of the benefit; and (3) acceptance and retention of the benefit under circumstances that would be inequitable without paying the value thereof.³⁸ Cross-Appellees argue for the first time on appeal that none of the three elements necessary for Cross-Appellants to prevail on their refund claim are met.³⁹ However, Cross-Appellees do not clearly articulate why each element is not satisfied, but rather argue more generally that the State was not unjustly enriched by payment of the RLC directly to school districts.⁴⁰ All three elements are met for the reasons explained in Cross-Appellants' Brief at 17-24 and below.

A. Municipal School Districts Are Created and Controlled by the State, and therefore, the State Receives and Appreciates a Tangible Benefit from the RLC Payments It Forces Municipalities to Provide Directly to School Districts.

Cross-Appellees would have this Court believe that the State is so far removed from management and control of school districts that the State has not been unjustly enriched by payment of unconstitutional RLCs directly to school districts because school districts are not separate entities from Municipalities.⁴¹ Of course, the reason that school districts are not separate entities from Municipalities is that the State has exercised its

³⁸ Cross-Appellants' Brief at 18; Cross-Appellees' Brief at 24.

³⁹ Cross-Appellees' Brief at 24; Exc. 114-115.

⁴⁰ Cross-Appellees' Brief at 23-24.

⁴¹ Cross-Appellees' Brief at 24-25.

“pervasive state authority”⁴² over education by enacting a statutory scheme that provides that school districts are not separate entities from Municipalities.⁴³

School districts are State created and State controlled, cradle to grave. As noted above, they are established and joined at the hip with the Municipalities not by ordinance as Cross-Appellees claim,⁴⁴ but by AS 14.12.010(2). The Borough ordinance merely reiterates what State law requires. Further, the State mandates that each Municipal School District is managed and controlled by school boards, not by the Municipalities.⁴⁵ State statutes prescribe the length of the school year (AS 14.03.030), the holidays (AS 14.03.050), require a preference for recycled products (AS 14.03.085), require a flag and pledge of allegiance (AS 14.03.130), exercise general supervision over elementary and secondary programs (AS 14.07.020(9)), and extensively control the labor relations of districts prescribing terms for employment, transfer, tenure, and retirement of teachers (AS 14.20; AS 14.25).

A Municipality’s control over the money and spending of a school district is limited by AS 14.14.060 to only approving the total amount of the district’s budget. Even then, the Municipality’s discretionary authority is limited to the amount of the voluntary local contribution but only up to the State-prescribed cap for voluntary contributions. After approval of the total amount, the Municipality is then required (without discretion – and can be compelled by mandamus) to appropriate the amount to be provided from local sources as indicated in that budget. The State, on the other hand, can step in and direct the use of district funds if the State deems it necessary to improve

⁴² *McCauley*, 491 P.2d at 122.

⁴³ AS 14.12.010(2).

⁴⁴ Cross-Appellees’ Brief at 25-26.

⁴⁵ AS 14.12.020(b).

the instructional practices of a district or school performance standards.⁴⁶ Once the Municipality exercises its approval of the budget as to total amount (or allows the budget as submitted to take effect for failure to act within 30 days), the entirety of municipal discretion in school funding matters has been exercised. All that remains is to appropriate the funds, and perhaps manage and invest the funds. The fiduciary duty to manage this account is not one which would allow the Municipality discretion to expend school district funds, particularly not the discretion the State has should the State exercise its powers in AS 14.07.030(14) and (15).

Cross-Appellees incorrectly claim that State officials are never authorized to use the money that constitutes RLC payments.⁴⁷ AS 14.17.410(b) provides: “Public school funding consists of state aid, a required local contribution, and eligible federal impact aid ...” AS 14.07.030(14) and (15) provide that “notwithstanding any other provision of this title,” the Department of Education and Early Development (“DEED”) may “direct” and “redirect public school funding under AS 14.17 appropriated for distribution to a school district” to improve instructional practices in a district. These statutes are implemented through regulations which reiterate that DEED may “redirect money from the district’s funding under AS 14.17” to improve instructional practices and “may redirect funding” if performance standards are not met.⁴⁸ Thus, DEED is in fact authorized to use public school funding provided under AS 14.17, including RLC payments, to improve instructional practices in a district.

⁴⁶ AS 14.07.030(14); AS 14.07.030(15); 4 AAC 06.872 (f)-(h).

⁴⁷ Cross-Appellees’ Brief at 16.

⁴⁸ 4 AAC 06.872(f)-(g).

The fact that Municipalities have discretion to determine how much of a local contribution to make “within the floor and cap” set by statute⁴⁹ is inconsequential because this appeal only concerns “the floor” (*i.e.*, RLC payments) forced on Municipalities in accordance with the State’s “pervasive authority” over education. That “pervasive” control also explains why it is misleading to suggest that RLC payments are nothing more than an imposition of a financial obligation on “non-state entities.”⁵⁰ Municipalities are established by the State Constitution⁵¹ and their powers derive from state law.⁵² They are not accurately described as “non-state entities” in this context where the State forces them to make RLC payments in accordance with its “pervasive authority” over education.

B. The State Receives A Tangible Benefit from the RLC Payments Because They Assist the State in Fulfilling Its Constitutional Duty to Provide for a Public School System.

Equally misleading is the assertion that the RLC payments merely “trigger[] the State’s obligation to *spend* the state aid portion of the funding formula and therefore cost the State money, rather than the other way around,”⁵³ since the State has no “obligation” to spend a particular amount of money on education or any other state responsibility, regardless of what the enabling statutes provide.⁵⁴ It is for this reason that Cross-Appellants do not assume as Cross-Appellees claim, that Basic Need “represents a

⁴⁹ Cross-Appellees’ Brief at 7.

⁵⁰ *Id.* at 15.

⁵¹ Article X of the Alaska Constitution.

⁵² AS 29.

⁵³ Cross-Appellees’ Brief at 4 (emphasis in the original), *see also id.* at 26.

⁵⁴ *Knowles II*, 21 P.3d at 378 (“legislatures do not have to fund or fully fund any program ...”).

constitutional minimum.”⁵⁵ Rather, it is simply an indisputable fact that under the current school funding scheme, the State receives a tangible benefit from RLC payments because they assist the State in fulfilling its “constitutional mandate for pervasive state authority in the field of education ...” for which “no other unit of government shares responsibility or authority.”⁵⁶ In other words, as explained more fully in Cross-Appellants’ Brief,⁵⁷ even though the State does not have to fully fund education, it still receives a tangible benefit from the RLC payment.

Additionally, Cross-Appellants’ statement that we would not address the precise amount that the State must provide for school funding does not waive Cross-Appellants’ ability to argue that payment of the RLC nonetheless provides a tangible benefit to the State,⁵⁸ as Cross-Appellees claim.⁵⁹ The real disagreement is whether the superior court erred by concluding that unjust enrichment cannot be found absent a constitutional obligation on the State’s part to fund the full statutory Basic Need amount.⁶⁰

As noted above, the State receives a tangible benefit regardless of whether there is a State obligation to provide any particular amount of funding because this Court held in *McCauley* that the State’s duty to maintain the public education system is not shared with any other unit of government and that the State’s authority over education is “pervasive” and “unqualified.”⁶¹ The State’s cost of maintaining schools has undeniably been

⁵⁵ Cross-Appellees’ Brief at 24.

⁵⁶ *McCauley*, 491 P.2d at 121.

⁵⁷ Cross-Appellants’ Brief at 19-21.

⁵⁸ See Cross-Appellants’ Brief at 21-22 (further explanation of this position).

⁵⁹ Cross-Appellees’ Brief at 22-23.

⁶⁰ *Id.*

⁶¹ 491 P.2d at 121; see also Cross-Appellants’ Brief at 18-24.

reduced by the contributions the Municipalities are required to make annually through the RLC payments, benefiting the State by “leaving more money in state coffers”⁶² for education or other purposes. As DEED noted in a 2001 report to the Legislature on the foundation funding program, the RLC payments have resulted in “shifting the financial burden [of education funding] to municipalities.”⁶³

Cross-Appellees incorrectly assert that Cross-Appellants have waived their right to argue that the State has been enriched by the RLC payment in the absence of a full funding obligation, because this argument was expressly raised in Cross-Appellants’ summary judgment briefing and addressed in both the superior court’s order and order on reconsideration.⁶⁴ Thus, Cross-Appellants did not waive this argument by raising it for the first time on reconsideration, since the legal issue of whether the State received a tangible benefit in the absence of a responsibility to fully fund education was raised

⁶² Defendants’ Cross Motion for Summary Judgment at 15 (Exc. 108).

⁶³ Appendix C to CEAAC Brief at 56 (*Alaska’s Public School Funding Formula: A Report to the Alaska State Legislature*, January 15, 2001 at 8).

⁶⁴ Cross-Appellees argued that Cross-Appellants were making an “implicit” argument that the State had the sole responsibility for fully funding education in Alaska. Exc.114-15. Cross-Appellants responded that they were arguing instead that the State’s obligations had been lessened as a result of the unconstitutional RLC payments, and pointed out that the State had admitted that it was enriched when it conceded that the RLC “leaves more money in state coffers because schools received part of their funding from local sources.” Exc. 144. On reconsideration, Cross-Appellees expanded upon this argument, Exc. 271-73, in response to the superior court’s conclusion in its summary judgment order that no RLC payment could enrich the State unless the State had a binding legal obligation to fully fund education to the Basic Need amount. Exc. 266-68. The superior court denied Cross-Appellants’ Motion for Partial Reconsideration, noting that in the court’s view, a finding that the State had a constitutional obligation to fund Alaska’s public schools to the full statutory Basic Need amount “was necessary in order to find unjust enrichment.” Exc. 280.

before the superior court.⁶⁵ Even if this Court determines that the issue was not properly raised below, this Court should still consider the issue on appeal because it does not depend on new or disputed facts and it is closely related to the refund arguments that Cross-Appellants raised below.⁶⁶

C. If the State is Irreparably Harmed by the Lack of RLC Payments, It Receives a Tangible Benefit from Such Payments.

Cross-Appellants did not state that Cross-Appellees “concede[d] enrichment in [their] motion for stay.”⁶⁷ Rather, we pointed to the statements in their stay motion pleadings that demonstrate that the State receives a tangible benefit from the RLC payment.⁶⁸

In response to Cross-Appellants’ arguments regarding Cross-Appellees’ claim of irreparable harm, Cross-Appellees claim that the Legislature could decide to replace the RLC payments with a funding source that might be of “benefit” to “the borough,” and therefore, the State has not been “unjustly enriched” as a result of the current RLC payments.⁶⁹ This argument is not persuasive because the elements of unjust enrichment concern events that have occurred in the past: defendant must have already received a benefit, appreciated it, accepted and retained it, and it must be inequitable to retain the benefit without paying for it. In other words, what the Legislature may do in the future is not determinative of whether these elements are met.

⁶⁵ *Clemensen v. Providence Alaska Medical Center*, 203 P.3d 1148, 1155 (Alaska 2009) (citations omitted) (holding that this Court will not consider an argument on appeal that was raised for the first time in reconsideration).

⁶⁶ *See Id.*

⁶⁷ Cross-Appellees’ Brief at 27.

⁶⁸ Cross-Appellants’ Brief at 18-19.

⁶⁹ Cross-Appellees’ Brief at 27.

Cross-Appellees also claim that the irreparable harm arguments made in the stay motion were “not a concession that the borough is harmed by the current system in which its schools receive funding from both state and local sources.”⁷⁰ Presumably, this position goes to the third element regarding whether it would be inequitable for Cross-Appellees to retain the benefit of RLC payments if they are held unconstitutional. Cross-Appellants assert that if the payments are unconstitutional, this third element is met, particularly since the RLC payments prevent Cross-Appellants from exercising the discretion the Framers intended them to have over education funding.⁷¹ Additionally, the RLC payment consumes just under two-thirds of the Borough’s areawide property tax levy.⁷² It would therefore be inequitable for the State to retain the benefit of this significant expenditure if this Court holds that the RLC payments are unconstitutional.

D. Section 19 of the *Restatement* Applies Because Local Taxpayers Such as Some of Cross Appellants Provide the Taxes that Finance the RLC Payment.

Nor can Cross-Appellees avoid the application of Section 19 of the *Restatement* to the RLC payment by asserting that it only “impose[s] a financial obligation on the borough to pay a certain amount to itself for its schools.”⁷³ AS 14.12.020(c) requires the Borough to raise the funds for the RLC payment from “local sources.” Those “local sources” are taxpayers, some of whom are Cross-Appellants in this proceeding. The financial obligation is therefore on the local taxpayers as well as on the Borough. The

⁷⁰ *Id.*

⁷¹ Appellants’ Brief at 14 (citing Delegate Fischer stating: “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.”).

⁷² Affidavit of Scott Brandt-Erichsen, ¶ 9 (Exc. 043-44).

⁷³ Cross-Appellees’ Brief at 25-26.

Borough is not just “spend[ing] its money,” as Cross-Appellees claim,⁷⁴ it is spending local taxpayers’ money, which AS 14.12.020(c) requires it to do. In this sense, the RLC payments “transfer[] money away from the taxpayer,” despite Cross-Appellees contrary claim.⁷⁵ Additionally, even if the money used to fund RLC payments comes from a local source other than taxpayers, *Restatement* § 19 explicitly states that “[t]ax’ within the meaning of this section includes every form of imposition or assessment collected under color of public authority.”⁷⁶ Notably, Cross-Appellees provide no response to Cross-Appellants’ other *Restatement* § 19 arguments.

In sum, Cross-Appellants are entitled to a refund because all three unjust enrichment elements are satisfied. The State closely monitors and controls provision of educational services by the school districts including funds that are spent by districts, and therefore, payments that Municipalities are forced to make to the districts for educational services provide a tangible benefit to the State that assists it in fulfilling its constitutional duty to maintain and operate a public education system. Cross-Appellants raised these arguments below, and therefore, have not waived the ability to make these arguments in this appeal. Moreover, Cross-Appellees’ irreparable harm position in the stay motion practice underscores the benefit that the State receives from the RLC payments.

The State appreciated the benefit because it created the RLC payment scheme, was made aware that the Borough made the RLC payment under protest on constitutional grounds, and has never declined to assess the RLC payment even after the superior court concluded it was unconstitutional.⁷⁷ Section 19 of the *Restatement* demonstrates that the

⁷⁴ *Id.* at 26.

⁷⁵ *Id.* at 25.

⁷⁶ *Restatement (Third) of Restitution and Unjust Enrichment* § 19(1) (2011).

⁷⁷ Cross-Appellants’ Brief at 23-24.

RLC payment is an illegal “tax” that has unjustly enriched the State. If this Court finds that RLC payments are unconstitutional, it would be unjust for the State to retain the benefit it received from them, and therefore a refund is appropriate.

CONCLUSION AND RELIEF REQUESTED

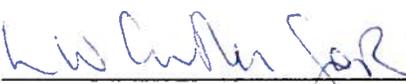
Cross-Appellants respectfully request that this Court (1) hold that the statutorily required RLC payment is a violation of the Appropriations Clause and/or the Veto Clause, (2) grant the refund claim and (3) remand the case to the superior court for issuance of an amended judgment consistent with this Court’s opinion.

DATED this 28th day of July, 2015.

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IN THE SUPREME COURT FOR THE STATE OF ALASKA

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

Appellants/Cross-Appellees,

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

CERTIFICATE OF SERVICE

Dated: July 28, 2015

Filed in the Supreme Court
for the State of Alaska,
this 28th day of July, 2015

Marilyn May
Clerk of Appellate Courts

By: _____
Deputy Clerk

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I hereby certify that on July 28, 2015, I caused true and correct copies of the Reply

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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.

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