

IN THE SUPREME COURT OF 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 Case No: 1KE-14-00016 CI

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

REPLY BRIEF OF APPELLANTS/CROSS-APPELLEES STATE OF ALASKA and MICHAEL HANLEY

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CONSTITUTIONAL PROVISIONS

Alaska Const. art. IX, § 7. Dedicated Funds.

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

Article Const. art, XI, § 7. Restrictions.

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

STATUTES

AS 14.14.060. Relationship between borough school district and borough; finances and buildings.

- (a) The borough assembly may by ordinance require that all school money be deposited in a centralized treasury with all other borough money. The borough administrator shall have the custody of, invest, and manage all money in the centralized treasury. However, the borough assembly, with the consent of the borough school board, may by ordinance delegate to the borough school board the responsibility of a centralized treasury.
- (b) When the borough school board by resolution consents, the borough assembly may by ordinance provide a centralized accounting system for school and all other borough operations. The system shall be operated in accordance with accepted principles of governmental accounting. However, the assembly, with the consent of the borough school board, may by ordinance delegate to the borough school board the responsibilities of the accounting system.
- (c) Except as otherwise provided by municipal ordinance, the borough school board shall submit the school budget for the following school year to the borough assembly by May 1 for approval of the total amount. Within 30 days after receipt of the budget the assembly shall determine the total amount of money to be made available from local sources for school purposes and shall furnish the school board with a statement of the sum to be made available. If the assembly does not, within 30 days, furnish the school board with a statement of the sum to be made available, the amount requested in the budget is automatically approved. Except as otherwise provided by municipal ordinance, by June 30, the assembly shall appropriate the amount to be made available from local sources from money available for the purpose.

- (d) The borough assembly shall determine the location of school buildings with due consideration to the recommendations of the borough school board.
- (e) The borough school board is responsible for the design criteria of school buildings. To the maximum extent consistent with education needs, a design of a school building shall provide for multiple use of the building for community purposes. Subject to the approval of the assembly, the school board shall select the appropriate professional personnel to develop the designs. The school board shall submit preliminary and subsequent designs for a school building to the assembly for approval or disapproval; if the design is disapproved, a revised design shall be prepared and presented to the assembly. A design or revised design approved by the assembly shall be submitted by the board to the department in accordance with AS 14.07.020(a)(11).
- (f) The borough school board shall provide custodial services and routine maintenance for school buildings and shall appoint, compensate, and otherwise control personnel for these purposes. The borough assembly through the borough administrator, shall provide for all major rehabilitation, all construction and major repair of school buildings. The recommendations of the school board shall be considered in carrying out the provisions of this section.
- (g) State law relating to teacher salaries and tenure, to financial support, to supervision by the department and other general laws relating to schools, governs the exercise of the functions by the borough. The school board shall appoint, compensate, and otherwise control all school employees and administration officers in accordance with this title.
- (h) School boards within the borough may determine their own policy separate from the borough for the purchase of supplies and equipment.
- (i) Notwithstanding (e) and (f) of this section, a borough assembly and a borough school board may divide the duties imposed under (e) and (f) of this section by agreement between the borough assembly and borough school board.

AS 14.17.410(b)-(c). Public school funding.

...

(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) and the secondary school vocational and technical instruction funding factor set out in AS 14.17.420(a)(3);

(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;

(E) notwithstanding (A)--(C) of this paragraph, if a school district's ADM adjusted for school size under (A) of this paragraph decreases by five percent or more from one fiscal year to the next fiscal year, the school district may use the last fiscal year before the decrease as a base fiscal year to offset the decrease, according to the following method:

(i) for the first fiscal year after the base fiscal year determined under this subparagraph, the school district's ADM adjusted for school size determined under (A) of this paragraph is calculated as the district's ADM adjusted for school size, plus 75 percent of the difference in the district's ADM adjusted for school size between the base fiscal year and the first fiscal year after the base fiscal year;

(ii) for the second fiscal year after the base fiscal year determined under this subparagraph, the school district's ADM adjusted for school size determined under (A) of this paragraph is calculated as the district's ADM adjusted for school size, plus 50 percent of the difference in the district's ADM adjusted for school size between the base fiscal year and the second fiscal year after the base fiscal year;

(iii) for the third fiscal year after the base fiscal year determined under this subparagraph, the school district's ADM adjusted for school size determined under (A) of this paragraph is calculated as the district's ADM adjusted for school size, plus 25 percent of the difference in the district's ADM adjusted for school size between the base fiscal year and the third fiscal year after the base fiscal year;

(F) the method established in (E) of this paragraph is available to a school district for the three fiscal years following the base fiscal year determined under (E) of this paragraph only if the district's ADM adjusted for school size determined under (A) of this paragraph for each fiscal year is less than the district's ADM adjusted for school size in the base fiscal year;

(G) the method established in (E) of this paragraph does not apply to a decrease in the district's ADM adjusted for school size resulting from a loss of enrollment that occurs as a result of a boundary change under AS 29;

(2) 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 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 total of the district's basic need for the fiscal year under (b)(1) of this section and any additional funding distributed to the district in a fiscal year according to (b) of this section.

...

AS 29.10.030(c). Initiative and referendum.

....

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

AS 43.76.025. Collection of tax and disposition of proceeds.

(a) Except as otherwise provided under (d) of this section, a buyer who acquires fishery resources that are subject to a salmon enhancement tax imposed under AS 43.76.001 - 43.76.013 shall collect the salmon enhancement tax at the time of purchase, and shall remit the total salmon enhancement tax collected during each month to the Department of Revenue by the last day of the next month.

(b) A buyer who collects the salmon enhancement tax shall

(1) maintain records reflecting the region designated under AS 16.10.375 in which the fishery resource was caught; and

(2) report to the Department of Revenue by March 1 of each year the total value, as defined in AS 43.75.290, of the salmon caught in each region designated under AS 16.10.375 which the buyer has acquired during the preceding year.

(c) The salmon enhancement tax collected under AS 43.76.001 - 43.76.028 shall be deposited in the general fund. The legislature may make appropriations based on this revenue to the Department of Commerce, Community, and Economic Development for the purpose of providing financing for qualified regional associations. The legislature may base an appropriation for a qualified regional association operating within a region designated under AS 16.10.375 on the value of the fisheries resources caught in that region rather than the value of the fisheries resources sold in that region if those values differ.

(d) A direct marketing fisheries business licensed under AS 43.75.020(c) or a commercial fisherman who transfers possession of salmon to a buyer who is not a fisheries business licensed under AS 43.75 is liable for the payment of a salmon enhancement tax imposed by AS 43.76.001, 43.76.002, 43.76.003, 43.76.004, 43.76.005, 43.76.006, 43.76.007, 43.76.008, 43.76.009, 43.76.010, 43.76.011, 43.76.012, or 43.76.013 if, at the time possession of the salmon is transferred to a buyer, the salmon enhancement tax payable on the salmon has not been collected. If a direct marketing fisheries business or commercial fisherman is liable for payment of the salmon enhancement tax under this subsection, the direct marketing fisheries business or commercial fisherman shall comply with the requirements of (b) of this section to maintain records and to report the liability for payment of the tax. Notwithstanding (a) of this section, a person subject to this subsection shall remit the total salmon enhancement tax payable during the calendar year to the Department of Revenue before April 1 after close of the calendar year.

ARGUMENT

Ketchikan Gateway Borough (the borough) and amicus Fairbanks North Star Borough (Fairbanks) challenge Alaska’s statutory requirement that municipalities, in partnering with the State to educate their children, pay a fraction of the cost of that education. At the same time, the borough concedes that the required local contribution lacks hallmarks of a “classic” dedicated funds violation, urges the Court to expand the scope of the dedicated funds clause, and acknowledges that the superior court misinterpreted a key case in declaring the local contribution unconstitutional. [Borough Ans. Br. 2, 21]

To support its position that the local contribution violates the dedicated funds clause despite lacking characteristics of state money, the borough focuses on the imprecise use of the term “public revenue” in caselaw that exclusively considered *state* revenue. The borough also asserts that the clause prohibits dedication of any and all “*revenue required to be raised by a State statute,*” rather than just state revenue. [Borough Ans. Br. 2 (emphasis added)] This novel interpretation is unsupported by the clause’s text or history. The clause’s connection to state revenue is what ties it to its purpose of ensuring annual legislative control over state spending. This connection to state revenue also explains why the constitutional delegates never discussed local education funding—a pre-statehood mandatory financial obligation imposed on local governments—within the context of the dedicated funds debate. And it explains why the dedicated funds clause is not implicated by minimum wage laws or other financial burdens that the State fairly places on non-state entities.

The gravamen of the borough's complaint concerns the State's exercise of its pervasive educational authority to require local contributions, not the Legislature's flexibility to spend state money from the state treasury. But a financial obligation is not the same as a dedicated fund. The dedicated funds clause does not prohibit the longstanding practice of state-mandated local contributions to local schools because the local contributions are not state revenue and because invalidating the local contribution would not serve the clause's purpose of increasing the money available for legislative appropriation. The local contribution simply does not present a dedicated funds issue.

I. The state-mandated local contribution to local schools is not subject to the dedicated funds clause because it is not state revenue.

The history of the dedicated funds clause demonstrates the drafters viewed the clause's purpose and application exclusively in terms of state revenue. [See Op. Br. 4-12] Beginning with the Public Administration Service (PAS) staff paper that prompted the adoption of the clause in order to enhance "controls of each branch of government over the finances of the state," the official committee commentary that described the clause's purpose in terms of state funds, and culminating in debates about state funds on the convention floor, the dedicated funds clause concerned state revenue.¹ The borough never contests that history, nor does it make the case that the local contribution is state revenue. [See Borough Ans. Br.] This issue is dispositive.

The borough instead argues without any supporting constitutional language,

¹ 3 Alaska Statehood Commission, *Constitutional Studies* pt. IX "State Finance" at 27-30 (November 1955), available at State Op. Br. App. 1; 6 Proceedings of the Alaska Constitutional Convention App. V at 106-07 (Dec. 16, 1955); see, e.g., 4A Proceedings 2364, 2368 (Jan. 17, 1956).

constitutional history, or precedent that the dedicated funds clause applies to all “revenue required to be raised by state statute.” [Borough Ans. Br. 2, 17] But where, as here, the State does not raise the money, possess the money, or spend the money, the money is not state revenue. And money required to be raised by statute is not the “proceeds of any state tax or license” when a local government imposes local taxes of its own design, locally collects the money, locally spends the money on itself, reaps a local benefit, and qualifies for state funds as a result.

The borough’s proposed expansion of the clause is also inconsistent with the purpose of the clause. The delegates were concerned with strengthening the Legislature’s ability to appropriate state revenue by maximizing the unencumbered money in the general fund.² During the debate over the controversial clause, multiple proponents pointed out that any harm to a worthy cause from the lack of dedicated money would be mitigated by the ability of future legislatures to “see it the same way” and annually appropriate the funds to carry out the programs.³ But invalidating the local contribution would not give the legislature the ability to annually appropriate the local money—for schools or any other purpose—because the money is not in state coffers. A blanket

² 4A Proceedings 2408 (Jan. 17, 1956) (Delegate Barr: “If we leave this up to the legislature, to succeeding legislatures over a period of years . . . [w]e won’t have anything in the general fund for appropriations.”); *id.* at 2409 (Delegate Hermann: “I think the real evil inherent in earmarking is that it so often leaves the general fund short of funds on which to operate.”)

³ 4A Proceedings 2415 (Jan 17, 1956) (Delegate White); *id.* at 2366 (Delegate Gray: “There is nothing in this article to preclude the legislature from appropriating to the particular body that amount of money that they have collected through the license. In their appropriation they could use those figures to appropriate that amount of money to the respective bodies.”).

prohibition on statutes requiring revenue to be raised would also bar the State from statutorily defining the financial obligations of others or requiring any local stake in jointly funded projects; a result not contemplated in the dedicated funds debate.

In practice, the local contribution is not a requirement that the borough give revenue to the State, let alone that it give *state* revenue to the State. It is a requirement that the borough use some of its resources to support itself in the vital area of education funding. As the borough's own complaint demonstrates with phrases like "unfunded state mandate" and "underfunded by the State," the local contribution does not look like state money, feel like state money, or act like state money. [Exc. 8] It is correspondingly not subject to constitutional restrictions that apply to the spending of state money.

II. The Court's prior dedicated funds caselaw does not support holding that the required local contribution violates the dedicated funds clause.

Neither the borough nor Fairbanks refute the State's arguments that prior dedicated funds cases concerned only state revenue, did not examine the word "state" in the phrase "state tax or license" of article IX, § 7, and thus do not stand for the proposition that the word "state" can be read out of the provision. [See State Op. Br. 11-12, 25-26] This is the first case in which the dedicated funds clause has been brought to challenge the "dedication" of non-state money. And the local contribution is different from all revenue streams previously evaluated by the Court in numerous ways:

- The money being "dedicated" is raised by a local government.
- The method of raising the money is left to the discretion of the local government.
- Local appropriation of the local money qualifies the local government for state money.

- “Dedication” of the money does not deprive the Legislature of flexibility to spend state money because if the local money were not spent on public schools, the Legislature would not be free to appropriate it some other way.
- Application of the dedicated funds prohibition to the local contribution hinders rather than supports sound financial planning by barring a mandatory local financial stake in a program that receives state money.
- Application of the dedicated funds prohibition to the local contribution hinders rather than supports intergovernmental financial cooperation.

Despite these distinguishing features, the borough urges that *State v. Alex* controls.⁴ [Borough Ans. Br. 10-15] But *Alex* considered the dedication of money that even the State classified as state money, subject to deposit in the general fund and legislative appropriation.⁵ In *Alex* the State was using its own taxing authority to collect the salmon assessment because the regional aquaculture association had none.⁶ The salmon assessment had both parts of dedicated fund problem: it was an assessment on the value of salmon to fund aquaculture associations and, therefore, included both a specific incoming source of tax-like state revenue along with the mandatory dedication.⁷ Additionally, the assessment was not tied to matching state funding for the aquaculture association—the assessment *was* the state funding—and the assessment did not fall within any dedicated funds clause exceptions. These differences from the local contribution matter because they made application of the dedicated funds clause to the salmon assessments consistent with the clause’s language, history, and purpose.

Alex hinged on how strictly the constitutional delegates intended the words “tax or

⁴ 646 P.2d 203 (Alaska 1982).

⁵ *Id.* at 207 (“[T]he state argues that the current administration and future legislatures would be free to do as they please with the assessment funds.”)

⁶ *Id.* at 213.

⁷ *Id.* at 205.

license” to be interpreted. In keeping with the constitutional debate, the implied exceptions identified in the PAS Memorandum, and the conclusions in a 1975 Attorney General Opinion, the Court held a broad interpretation was required.⁸ In considering whether licenses as well as taxes should be subject to the prohibition on dedication, the delegates were concerned with getting too technical about sources of state revenue such that a future legislature could evade the clause by changing the name of a tax.⁹ But because local contributions are not state money, consideration of the same constitutional history undermines application of the clause to the local contribution.

The borough relies on *Alex*’s citation to the 1975 Attorney General Opinion’s listing of types of state revenue subject to the clause, which ended with “*or whatever*.”¹⁰ [Borough Ans. Br. 10] But the doctrine of *ejusdem generis* bars reading “or whatever” to include local contributions because “when a general word follows a list of specific persons or things, the general word will be construed to apply only to persons or things of the same type as those specifically listed.”¹¹ A requirement that the borough pay money to itself for its schools to qualify for additional state funds is not “of the same type” as a state tax, state license, state sale of an asset, or state assessment on anything.

The borough also argues that the decision in *Alex* to issue a permanent injunction to restrain future collection of assessments, rather than compel the Legislature to place the assessments in the general fund, demonstrates the similarity between the cases.

⁸ *Id.* at 210.

⁹ 4A Proceedings 2368 (Jan. 17, 1956).

¹⁰ 646 P.2d at 210 (citing 1975 Op. Att’y Gen. No. 9 at 24 (May 2, 1975)).

¹¹ *Northern Alaska Environmental Center v. State, Dep’t of Natural Resources*, 2 P.3d 629, 636 (Alaska 2000).

[Borough Ans. Br. 15] But the borough's reliance is unavailing because a new tax was passed even before *Alex* was decided, imposing a comparable salmon assessment and depositing the revenue in the general fund for expenditure by the Legislature.¹² *Alex* is therefore distinguishable both because it involved state funds and because the dedication of those funds decreased the money available to the Legislature for unrestricted appropriation. In contrast, if the local contribution does not go to the borough's schools, the money remains in borough coffers beyond the Legislature's reach.

In response to the factual and legal differences between the cases, the borough argues that "Any argument that the State did not make in *Alex* does not distinguish the [local contribution] payments from the salmon assessments held unconstitutional in *Alex*." [Borough Ans. Br. 14] This ignores factual differences that exist regardless of the arguments the Court was addressing. And the Borough appears to be inadvisably suggesting the Court should decide a legal question based on its decision in a case in which the same legal question was not present.¹³

The remaining caselaw is even less helpful to the borough. The borough agrees

¹² *Alex*, 646 P.2d at 205; see, e.g., AS 43.76.025 (salmon enhancement tax deposited into the general fund and may be appropriated by the legislature to qualified regional associations).

¹³ That is the equivalent of the State urging the Court uphold the local contribution as constitutional because the Court upheld a nearly identical local contribution in *Matanuska-Susitna Borough School District v. State* when the local contribution was being challenged on entirely different legal grounds. 931 P.3d 391, 399-400 (Alaska 1997). The Court noted favorably in *Mat-Su* that "By enacting a [local contribution] law to ensure equitable educational opportunities, the legislature acted in furtherance of this constitutional mandate [for pervasive state authority in the field of education]." *Id.* Given the different factual and legal questions involved, the *Alex* decision is no more dispositive of whether the dedicated funds clause applies to state-mandated local contributions than the *Mat-Su* decision is.

that the superior court misread the constitutional provision underlying *City of Fairbanks v. Fairbanks Convention Visitors Bureau*,¹⁴ mistakenly treating the case as though it was a holding under the dedicated funds clause rather than the article XI, § 7 clause prohibiting dedicated revenues in initiatives. [Borough Ans. Br. 21] The borough argues that the mistake did not render the superior court’s analysis any less persuasive. [Borough Ans. Br. 22] But the superior court used *City of Fairbanks* to determine the import of the local nature of the local contribution, a key issue in this case and an area where the two clauses sharply vary. Unlike the dedicated funds clause, the initiatives dedication clause does not include the term “proceeds of any state tax or license,”¹⁵ and, unlike the dedicated funds clause, the initiatives clause has been extended by statute to local governments.¹⁶

The borough further attempts to buttress the superior court’s analysis by arguing that the court recognized that the local contribution was the product of a “state statute compelling the payments.” [Borough Ans. Br. 22] But the superior court’s decision never adopted this rationale for applying the dedicated funds clause. [*Compare id.*, with Exc. 255-258] The superior court’s explanation of its reasoning is inconsistent with the borough’s: “the fact that the [local contribution] is, essentially a solely local matter and local source of funds, does not weigh in the court’s consideration of whether [it] consists of funds subjected to the dedicated funds clause.” [Exc. 257] The court rejected the need

¹⁴ 818 P.2d 1153, 1155 (Alaska 1991).

¹⁵ Alaska Constitution, article XI, § 7 reads: “The initiative shall not be used to dedicate revenues. . . .”

¹⁶ *City of Fairbanks*, 818 P.2d at 1155 (citing AS 29.10.030(c)).

to consider the “state” nature of the funds or the impact on the Legislature’s spending abilities, looking instead to whether the funds were local public revenue and the impact on the borough assembly’s flexibility. [Exc. 255, 258]

Because the borough’s position on appeal is that the dedicated funds clause applies to state statutes mandating the raising of revenue, it is unclear whether the borough agrees with the superior court’s conclusion that the prohibition applies directly to local revenue. [See Borough Ans. Br. 23-26] The Court has never addressed the application of the dedicated funds clause to non-state money. Nor, contrary to the borough’s suggestion, did the Court reject the 1991 Attorney General opinion concluding that Exxon Valdez settlement proceeds held in trust by the State could be dedicated because the settlement money was not a state asset.¹⁷ In contrast to *City of Fairbanks*, where the local applicability of the dedicated funds was not decided,¹⁸ Attorney General opinions have concluded that non-state money is not subject to the clause.¹⁹

¹⁷ The borough stated that the Court “did not accept the 1991 AG’s Opinion” in *Myers v. Alaska Housing Finance Corp.*, 68 P.3d 386 (Alaska 2003), but the *Myers* decision did not cite or mention that opinion. [Borough Ans. Br. 14] *Myers* and the 1986 opinion it cites stand for the uncontroversial proposition that lawsuit settlement revenue that accrues to the State is subject to the dedicated funds clause. *Id.* at 391 n.24 (citing 1986 Inf. Op. Att’y Gen. vol. 1 at 429). The 1991 Opinion discussed the applicability of the dedicated funds clause to non-state money. 1991 Inf. Op. Att’y Gen., 1991 WL 916843 at *4-5 (April 2, 1991).

¹⁸ 818 P.2d at 1158 n.7.

¹⁹ 1991 Inf. Op. Att’y Gen., 1991 WL 916843 at *4-5 (where trust fund monies to settle the Exxon Valdez lawsuit were, as part of the agreement, not monies belonging to the state there was no dedicated funds conflict); 1988 Inf. Op. Att’y Gen., 1988 WL 249509, at *3 (July 29, 1988) (local communities not restricted by dedicated funds clause).

III. Even if it was state revenue, the local contribution would not be subject to the dedicated funds clause because of the implied exceptions for state-local cooperative programs and local tax receipts.

The borough seeks to avoid the implied exceptions that motivated revision of the phrase “all public revenues” to the “proceeds of any state tax or license” in the dedicated funds clause by arguing that the Court has never applied the relevant exceptions.²⁰

[Borough Ans. Br. 37-39] While the parties agree that the Court has not yet had occasion to apply the exceptions for “contributions from local government units for state-local cooperative programs” and “tax receipts which the state might collect on behalf of the local government units,” that is not a reason for the Court to ignore the exceptions now.²¹

The borough offers no reason for the Court to ignore the acknowledged constitutional history of the clause.²² Because the Court has recognized that the list of implied exceptions impacted the language and meaning of the clause, the Court should consider the relevant exceptions here.

The borough’s argument that public schools would not fall within an exception for funding for a state-local cooperative program is likewise unpersuasive given the jointly funded and jointly controlled nature of public schools in Alaska. The borough offers no definition of state-local cooperative program that would exclude public schools, and the definition of the term “cooperate” easily encompasses the public education partnership between local governments and the State. Webster’s New Riverside University

²⁰ See *Southeast Alaska Conservation Council v. State*, 202 P.3d 1162, 1169 n.29 (Alaska 2009) (listing exceptions).

²¹ See Public Administration Service, Memorandum (Jan. 4, 1955 [sic]) [Exc. 240].

²² *Southeast Alaska Conservation Council*, 202 P.3d at 1169 n.29.

Dictionary defines cooperate as: “(1) To work or act together toward a common end or purpose. (2) To practice economic cooperation.”²³ Public schools meet the definition of a state-local cooperative program because state and local governments (1) share the common purpose of educating Alaska’s children and (2) both contribute financially to public schools.

The borough also argues that the implied exception for “tax receipts which the states might collect on behalf of local government units” is irrelevant because the state concedes that it does not collect (or assess) taxes to satisfy the local contribution. [Borough Ans. Br. 28] But this misses the point: the implied exception demonstrates that *even if* the state’s action in statutorily mandating the local contribution is sufficient to transform local taxes into state revenue, the clause still exempts the local money from the prohibition on dedication.

The borough erroneously posits that the amendment proposed by the PAS memorandum to address the implied exceptions (which is not the amendment adopted by the delegates) did not “cover” an exception for state-local cooperative programs or local taxes created on behalf of local governments. [Borough Br. 40] But PAS did propose language stating “This provision shall not prohibit . . . the earmarking of tax revenues and other receipts where necessary . . . to maintain any individual or corporate or other Local government equity therein.”²⁴ And any insufficiency in that language is irrelevant because the delegates were of the opinion that changing the language from “All public

²³ Webster’s II, New Riverside University Dictionary at 309 (1994).

²⁴ Public Administration Service, Memorandum (Jan. 4, 1955 [sic]) [Exc. 240-41].

revenue” to “The proceeds of any state tax or license” would suffice to eliminate any potential dedication restrictions on the local money.²⁵ The use of the word *state* in this context was apparently designed to eliminate any dedication restriction on any state-received local funds for state-local cooperative programs or local tax revenue intended for local purposes.

The borough then tries to draw meaning from the constitutional convention discussion of the implied exception for sinking funds, whereby money can be set aside for repayment of bonds in future years. [Borough Br. 39] The sinking fund implied exception, involving the setting aside of a fund of *state* money for a specific purpose, naturally operates differently than exceptions for local money. Delegate White remarked, “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.” The borough argues that the language change “was not an attempt to exempt other sources of revenue from the Anti-Dedication clause,” but that analysis does not give meaning to the implied exceptions for local money. [Borough Ans. Br. 39] In order to allow a dedication exception for local contributions for state-local cooperative programs the State must be allowed to allocate local money it receives to the local program that it was raised to fund.

IV. The defined nature of the local contribution does not make it a dedicated fund.

The borough concedes that the framers intended for borough assemblies to fund

²⁵ 4A Proceedings 2363 (Jan. 17, 1956); 1975 Op. Att’y Gen. No. 9 at 7-8 (May 2, 1975) [Exc. 152-53].

public schools from their own tax dollars—a concession inconsistent with its claim that the State should be fully funding education. [Borough Br. 19-20] The borough also concedes the delegates did not consider pre-statehood local school contributions to be dedicated funds. [See State Op. Br. 8, 11, 38-40; Borough Ans. Br. 46-47] Yet both the borough and Fairbanks allege that the dedicated funds problem is triggered here because the current local contribution expenditure is “mandatory.” [Borough Ans. Br. 30, 33, 47; Fairbanks Br. 17] But while the borough’s current obligation may be more defined, it is no more mandatory than the pre-statehood system of local school funding.

At the time of the constitutional convention, territorial law provided that “Every city shall constitute a school district, and it *shall* be the duty of the council to provide the same with suitable school houses and *to provide the necessary funds* to maintain public schools therein.”²⁶ Although “[t]he city council shall then determine the amount of money to be made available for school purposes”²⁷ the mandatory duty imposed on the city included a duty to fund a school board that had the power “to hire and employ the necessary teachers, to provide for heating and lighting the schoolhouse and in general do and perform everything necessary for the due maintenance of a proper school.”²⁸ Territorial law provided that the territory would refund a fixed percentage of school expenditures, subject to oversight by the Commissioner of Education.²⁹

²⁶ Alaska Compiled Laws Ch. 3, art. 3 § 37-3-32 (1949) [Exc. 195] (emphasis added).

²⁷ *Id.* § 37-3-36 [Exc. 197].

²⁸ *Id.* § 37-3-33 [Exc. 196].

²⁹ Alaska Compiled Laws Ch. 3, art. 5 § 37-3-61 to 63 (1949) [Exc. 203] (defining school maintenance refund as percentage of total amount expended for maintenance).

Under this system, the municipality did not have the option to refuse to maintain public schools; it had to pay for teachers, heating, lighting and any other necessary expense. The municipality could not spend zero dollars and be in compliance with the territorial law—cities lacked the flexibility to spend nothing on schools. Yet in the dedicated funds debate *not a single dollar* of this local money was treated as a dedicated fund. When viewed in light of the borough’s current challenge, this dispositive historical context shows that a mandatory local financial obligation is not enough to trigger the dedicated funds clause.

The current school funding formula likewise is not a dedicated fund. Today’s statutes give significant discretion to local governments regarding how much to spend on education, merely establishing a minimum and maximum contribution level for local funding.³⁰ While the local contribution formula makes the mandate clearer, it does not make it any more or less of a legal obligation. If anything, the defined contribution is even less like a dedicated funds problem because it does not pledge an unknown amount of money. One of the evils of earmarking future revenue streams is that the legislature pledging future funds may misapprehend the amount of future money being dedicated relative to the future needs.³¹ This concern does not exist here. In the local contribution context, the Legislature decides the minimum amount to be expended for education—basic need—and then uses its pervasive authority over education to assign partial funding

³⁰ AS 14.17.410(b)-(c).

³¹ See, e.g., Proceedings 2382 (“If they were earmarking [oil royalties], for instance for schools even, it might be that the revenue from those lands would amount to millions and millions a year, far beyond even our requirements for schools.”).

responsibility to local governments.

Indeed, because the local contribution floor is so low (a fraction of legislatively determined “basic need”), local communities are not forced to spend more on their schools than the schools require to operate. The borough argues that the restraint of the local contribution on the flexibility of local government is demonstrated by the percentage of local taxes that goes to schools. [Borough Ans. Br. 7] To the contrary, absent the waived argument that the State should be fully funding schools, the flexibility of the local government is impacted, if at all, only when the local contribution generates more revenue than schools need. But the arguments from the borough and Fairbanks about the importance of the state aid portion of school funding reflect local sentiment that schools need far more than the required local contribution—they also need state funds. [Borough Ans. Br. 30 (calling statutory penalty of no state aid for schools a “severe financial consequence”); Fairbanks Br. 17 (describing possibility of no state aid as “the whip of overwhelming economic pressure”)] The willingness of the borough and Fairbanks to contribute additional voluntary local funds on top of both state aid and the required local contribution further underscores the unobtrusive low bar set by the local contribution. In other words, the borough complaining that definition of the local contribution limits the exercise of local discretion over how much to spend on schools is akin to a company paying above minimum wage while challenging the mandatory nature of minimum wage laws. Indeed, the only difference between the local contribution and minimum wage laws or matching grant programs is the state’s exercise of its “pervasive state authority in the field of education” to mandate the that boroughs and other

municipalities form school districts.³² And regardless of where the bar is set, because defining the local contribution does not create the obligation, it does not create a dedicated funds problem.

Because it provides more legislative control over state finances, today's school funding formula is also less troublesome than the permissible local funding at statehood—particularly when viewed in light of the purpose of the clause. The dedicated funds clause was intended to protect each legislature's annual ability to spend state revenue according to the needs of the state in that year. Pre-statehood, territorial law allowed local communities to set the dollar amount necessary to fund schools, subject to territorial law providing for a fixed percentage back in refund.³³ Relative to that reimbursement structure, the local contribution gives the legislature far greater control over state finances because under the current program the legislature—not local governments—determines basic need and defines state aid.

In sum, the local contribution is as constitutional today as the accepted pre-statehood practice of mandatory local school contributions.

V. The remaining arguments from the borough and Fairbanks North Star Borough about the local contribution are unmoored from any litigated constitutional violation, and are thus not properly before the Court.

The borough and Fairbanks make several arguments against the local contribution system that are divorced from any alleged dedicated funds problem and are not properly before the Court. Indeed, Fairbanks's brief lists a total of four constitutional provisions

³² See *Macauley v. Hildebrand*, 491 P.2d 120, 122 (Alaska 1971).

³³ Alaska Compiled Laws of Alaska § 37-3-62 [Exc. 204] (listing percentages from 75 to 85 percent of local expenditures).

within its “authorities principally relied upon” section—none of which were a legal basis for challenging the local contribution below. [Fairbanks Br. iv] These new arguments are waived.

For example, the borough argues that a better way for the State to encourage a policy of local participation in school funding would be to impose a tax on the REAAs. [Borough Ans. Br. 18] But the existence of other political solutions to school financing does not make the current solution, which was chosen by the elected representatives of Alaskans, an unconstitutional one. Nor does the borough explain how the local contribution can be unconstitutional if a state-imposed-and-collected tax could be permissibly dedicated to schools.

The borough also presents a slippery slope argument, premised on the proposition that school funding is solely a “state responsibility,” to suggest that upholding the local contributions in this case will result in a flurry of new statutes mandating local contributions to fund exclusively state functions. [Borough Ans. Br. 17] The argument appears to be empirically false, given the length of time that a local contribution has existed. Because the dedicated funds clause is about dedication of state revenue and not limitation of obligations that the State may pass on to its political subdivisions, this argument is also unrelated to the dedicated funds clause challenge before the Court.

Fairbanks’s brief included inquiries into what limits may be placed on local governments for “fiscal affairs of purely municipal concern.” [Fairbanks Br. 2 n.8] The description of public schools and public school funding as an issue of “purely municipal concern” contradicts other arguments Fairbanks makes about state responsibility for

schools and misapprehends the joint state-local nature of schools, which are the subject of pervasive state authority and significant local control. [Fairbanks Br. 17]

Fairbanks also argues that the *Mat-Su* challenge to school funding is an indication that others have long recognized the unconstitutionality of the local contribution.³⁴

[Fairbanks Br. 6] But the fact that a community litigated the local contribution for almost ten years and did not argue a dedicated funds violation is a good indication of what a poor fit the challenge is here.³⁵

Fairbanks also argues that once the local contribution is made to the school board the fact that it cannot be reappropriated away from the school district at the end of the year means the money is effectively state money. [Fairbanks Br. 12] This argument overlooks the role of elected local school boards, who retain control and discretion over the money once it comes in from various sources.³⁶ Fairbanks's characterization of school money as a "revenue stream protected from any (local or state) annual legislative control or discretion" ignores that discretion and the budgeting process at the state and borough level. [Fairbanks Br. 12]

Fairbanks also takes out of context a convention debate over whether school boards should have overlapping ability to impose local taxes or whether the borough should be given that exclusive ability on the local level. [Fairbanks Br. 14] Fairbanks

³⁴ See *Matanuska-Susitna School Borough School District v. State*, 931 P.3d 391 (Alaska 1997).

³⁵ *Id.*

³⁶ See AS 14.14.060. Fairbanks's argument also overlooks the supervision of local school boards that existed in territorial days. Alaska Compiled Laws, Ch. 3, art. 5 § 37-3-63 (1949) [Exc. 204].

cites this debate as if it was discussing the State’s taxing authority or oversight: “[t]he constitutional delegates, however, made the deliberate choice to vest local education funding decisions solely in the discretion of local governing bodies.” [*Id.*] But this piece of the debate simply indicates that the delegates intended there to be locally raised money for schools—a proposition wholly consistent with a state-mandated local financial obligation to schools.³⁷ And nothing in the debate on local taxing authority analyzes the dedicated funds clause at all, let alone reads into the clause a bar on state oversight over education funding.

Finally, Fairbanks’s argument that limitations on the federal government’s ability to mandate State actions should control the meaning of the Alaska Constitution with respect to state political subdivisions is unavailing. The issue is both not before the Court and also an inapt analogy. The federal government’s relationship to the State, a sovereign entity, is different from the relationship of the State to municipalities, which are its political subdivisions.³⁸ And the clauses that limit the U.S. government (including the Spending and Commerce Clause) are not found in the Alaska Constitution.³⁹

CONCLUSION

Based on the foregoing and the reasons articulated in the amicus briefs of Citizens for the Educational Advancement of Alaska’s Children, NEA-Alaska, and Association of

³⁷ 4A Proceedings 2611-17 (Jan. 19, 1956).

³⁸ See *National Federation of Indep. Bus. v. Sebelius*, 567 U.S. ___, 132 S.Ct. 2566, 2602 (2012) (“Respecting [spending clause limitations] is critical to ensuring that Spending Clause legislation does not undermine the status of States as independent sovereigns in our federal system.”); *Kenai Peninsula Bor. v. State*, 532 P.2d 1019, 1020 (Alaska 1975) (identifying municipalities and school districts as political subdivisions).

³⁹ See U.S. Const. Art. I, § 8, cl. 1, 3.

Alaska School Boards, et al., the Court should reverse the superior court's determination that the local contribution violates the dedicated funds clause.

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