MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND INJUNCTION

This case brings a challenge seeking a declaratory judgment that the mandatory local contribution required in AS 14.12.020(c) and AS 14.17.410(b): (1) constitutes an unconstitutional dedicated tax prohibited by Article IX, Section 7 of the Alaska Constitution; (2) violates the prohibition on expenditures without appropriations in Article IX, Section 13 of the Alaska Constitution; and (3) deprives the governor of the veto powers granted by Article II, Section 15 of the Alaska Constitution. The Plaintiffs ask the Court to enjoin the State from enforcing those and other statutes requiring the payment of a mandatory local contribution or imposing penalties on a municipality for failing to make the mandatory local contribution.

The Plaintiffs are requesting that the Court issue an order declaring the mandatory local contribution unconstitutional in violation of the prohibition on dedicated taxes and dedicated funds in Article IX, Section 7 of the Alaska Constitution, and granting an injunction prohibiting the State from:

1) deducting a required local contribution from the public school funding provided under AS 14.17.410(b)(1) to the Ketchikan Gateway Borough School District (KGBSD);

2) withholding State aid from the KGBSD under AS 14.17.410 for failure to make a mandatory local contribution;

3) withholding funding adjustments under AS 14.17.490(b) for failure to make a mandatory local contribution; and

4) enforcing a requirement for a mandatory local contribution under AS 14.12.020(c).

Because this case does not involve issues where there are disputes of material fact, the arguments on the merits of Plaintiff's Claim for Declaratory Judgment may be decided on a summary judgment basis.

I. Facts

A. EDUCATION IS EXCLUSIVELY A STATE FUNCTION AND RESPONSIBILITY

The State of Alaska has a constitutional duty to provide for public education. Article VII, Section 1 of the Alaska Constitution provides:

> **Public Education.**
>
> The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.

The Alaska Supreme Court has held that this Section constitutes mandate for pervasive State authority in field of education. The Court wrote**:**

> The legislature shall by general law establish and maintain a system of public schools open to all children of the State * * * *.This constitutional mandate for pervasive state authority in the field of education could not be more clear. First, the language is mandatory, not permissive. Second, the section not only requires that the legislature "establish" a school system, but also gives to that body the continuing obligation to "maintain" the system. Finally, the provision is unqualified; no other unit of government shares responsibility or authority. That the legislature has seen fit to delegate certain educational functions to local school boards in order that Alaska schools might be adapted to meet the varying conditions of different localities does not diminish this constitutionally mandated state control over education.

Macauley v. Hildebrand, 491 P.2d 120, 122 (Alaska 1971). (Footnote omitted.)[1]

B. THE LEGISLATURE FUNDS EDUCATION THROUGH APPROPRIATIONS TO THE PUBLIC EDUCATION FUND.

The State has used various methods over the years to discharge its responsibilities under Article VII, Section 1. The current State program 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, the State boarding school, centralized correspondence study, and pupil transportation. See AS 14.17.300. Each school district is eligible for 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, for centralized correspondence study, and the State boarding school is reduced on a pro-rata basis. See AS 14.17.400.

The current method to determine a school district's eligible share of State funds, as set out in AS 14.17.410 et seq, in essence determines an amount for each district identified as the "basic need" using a weighting formula which takes into account the relative costs of providing services in various communities, the number of students requiring special needs, the size of school facilities and associated economies of scale, the costs of vocational and technical instruction, and the number of correspondence students. The formula multiplies these adjustment factors by the number of students in average daily attendance during a student count period to arrive at an adjusted average daily membership. This number is then multiplied by the basic

[1] The omitted footnote provided that "[t]he State supplies a minimum of 90% of school operating funds. AS 14.17.021(c)(5)." This Statute has been amended, and the current version of the State funding for school operating funds is found in AS 14.17.410.

student allocation to arrive at a basic need figure. There are some minor variants, but by and large the process for determining the "basic need" has been substantially the same since 1987.

The State will provide each school district with funds in the amount of the basic need, but for all 53 districts will first subtract from that 90% of the "Eligible Federal Impact Aid."[2] For the 34 municipal school districts only, the State will also subtract an amount calculated to be the mandatory local contribution.

As it relates to the issues in this case, the current formula used by the State of Alaska is substantially the same as it has been since adoption by Chapter 75 SLA 1987. The ratios have been adjusted, and the total amount of funding per student has increased, but the inclusion of a deduction for 90% of "Eligible Federal Impact Aid" and the reduction of State aid to municipal school districts based upon a mandatory local contribution component have continued to be elements of the formula.

In the 1987 legislation, this mandatory local contribution was established as:

> 14.17.025(a) Local contributions to a city or borough school district shall include at least the lesser of
>
> (1) 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 Community and Regional Affairs under AS 14.17.140 and AS 29.45.110; or
>
> (2) 35 percent of the district's basic need for the preceding fiscal year, as determined under AS 14.17.021(b)….

[2] This is a specific term which is calculated by taking the total amount of Federal Impact Aid and multiplying it by a ratio of the mandatory local contributions divided by the actual total local contributions. In 2012, the "Eligible Federal Impact Aid" number averaged about 55% of total Federal Impact Aid in municipal school districts, and 100% of Federal Impact Aid in Regional Educational Attendance Areas (REAAs). The State would then deduct 90% of this amount from each district's State provided basic need funding.

The current Statute is found in AS 14.17.410. This Statute provides in the part relevant to this case:

> **Sec. 14.17.410. Public school funding.**
>
> (a) A district is eligible for public school funding in an amount equal to the sum calculated under (b) and (c) of this section.
> (b) Public school funding consists of state aid, a required local contribution, and eligible federal impact aid determined as follows:
> (1) State aid equals basic need minus a required local contribution and 90 percent of eligible federal impact aid for that fiscal year….
> (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."

Additionally, AS 14.12.020(c) provides in part that:

> "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 city council for a city school district, shall provide the money from local sources to maintain and operate the district."

The State mandated local contribution is enforced in two ways. First, if a municipality does not make its required local contribution payment, then all of the State aid for education to the municipal district is withheld. See AS 14.17.410(d), which provides: "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." Second, the eligibility for supplemental funding under AS 14.17.490 is conditioned on the same mandatory local contribution. See AS 14.17.490(b).

The level of State control over school funding is consistent with the exclusive responsibility in this area recognized by the Alaska Supreme Court in **Macauley v. Hildebrand.**

The role of public school education as a core State responsibility and function is illustrated in various other statutes relating to school funding as well.[3]

C. THE CURRENT SCHOOL FUNDING FORMULA REQUIRES AN ENFORCED CONTRIBUTION FROM MUNICIPALITIES WITH MUNICIPAL SCHOOL DISTRICTS TO SUPPORT THE STATE FUNCTION OF PUBLIC EDUCATION.

The 1987 legislature studied the issue extensively, and selected a funding formula which both requires a mandatory local contribution from municipal school districts, and limits additional optional contributions from local governments, in an effort to satisfy Federal regulatory limitations on the ability of the State to retain portions of the Federal Impact Aid provided to those school districts which are entitled to receive such aid.[4] The options posed were discussed at length in the House Research Agency as Report 87-A in February 1987 entitled "Public School Financing In Alaska." The report notes that in order to take the Federal Impact Aid into account, Alaska would need to have either an equalization program, a wealth neutrality program, or get an exceptional circumstances waiver. That report identifies the five basic models for equalization of education financing that have been developed: 1) flat grants; 2) foundation program; 3) percent equalizing; 4) power equalizing; or 5) full state funding. The report

[3] See, for example, AS 14.07.030(14) authorizing the State Department of Education to intervene and take over direction of a school district to improve instructional practices, including directing employees and using school appropriations; and see AS 14.07.030(15) authorizing the State Department of Education to redirect public school funding under AS 14.17 appropriated for distribution to a school district to address such instructional practices.

[4] The history of the Educational funding system, and an explanation of the role of Federal Impact Aid is set out thoroughly in the publication prepared by the House Research Agency as Report 87-A in February 1987 entitled "**Public School Financing in Alaska**." A copy is attached as Exhibit A. Pages 21-26 of the report summarize the Federal program limitations, and pages 27-30 identify the common methods to meet these requirements. The choice to select the disparity test was a method to satisfy the requirements of 34 CFR 222.61-163. Alaska obviously chose the foundation formula method.

advocates for a foundation program with a mandatory local contribution element as being the most acceptable. That is the method that was then adopted by the legislature.

The legislature chose a foundation formula option to meet the equalization test so that the State could maximize the portion of Federal Impact Aid it could receive for the State general fund, rather than those funds going directly to districts. Dr. Huxel testified before the House HESS Committee on February 3-4, 1987 as follows (tape at log 035; Emphasis added):

> "Dr. Huxel answers that the legislation will have the four mills required so disparities will not occur on the low end of the basic scale. The legislation will also prohibit any district for going above six mills so that disparities will not occur on the high end of the basic need scale. With a two mill range, the state should keep within a 25% disparity and be able to maintain the PL 874 funds and meet the equalization test. **This is the whole purpose of the legislation."**

The Committee report in the House Journal for March 20, 1987 noted:

> Upon adoption of several minor amendments, which are incorporated into the HESS committee substitute, the Committee recommends the bill as a fundamentally equitable means of distributing state money to the state's elementary and secondary schools. CSHB 126 (HESS) will pass the disparity test which is required to continue the annual receipt of approximately $60 million of federal PL 81-874 funds."

Accordingly, an underlying motivation for the foundation formula is to meet the Federal disparity test, and thus, entitle the State to take into account the Federal Impact Aid when funding education. Were the State to not meet this disparity test, it could not deduct or withhold any of the Federal Impact Aid, resulting in a loss to millions of dollars of revenue to the State. In 1987 this was estimated to be $ 67 million. In 2012 it was approximately $ 100 million.

The directive in AS 14.12.020(c) names cities and boroughs with school districts as the nominal entities required to provide money from local sources. The amount is calculated based upon the taxable value of property, and calculated based upon a property tax levy. Local sources, as indicated in annual reports of the State Assessor (*Alaska Taxable*), are overwhelmingly simply a combination of property taxes and sales taxes paid by individual residents to the municipality. See *Alaska Taxable 2012*, Table 1, pages 15- 21, Department of Commerce, Community, and Economic Development (January 2013). Only 4 of the 34 municipal districts do not have either sales or property tax. The 3 of the other 4 rely on fish taxes or mineral severance taxes. The State then, through operation of the statute, funnels the money to supplant State funds for education at the rates prescribed by the State for payments to be made.

The operation of the mandatory local contribution using a fixed mill rate (capped at 45 percent of basic need) as the determinant of the amount produces a wide variation in the amount of the mandatory local contribution both in terms of the effective mill rate, after locally exempt property has been removed from the tax base, and on a per student basis. Accordingly, the reduction in State aid offset by the required payment of a mandatory local contribution is greater in districts with high per student property values, and lesser in districts with lower per student property values. In this manner the extraction of funds from those municipalities which maintain a municipal school district, and from their residents, is graduated. The municipalities and residents in more wealthy municipal districts pay higher amounts per student, thus allowing the State to retain a greater fund balance in the Public Education Fund. Municipalities and residents in the 19 Regional Educational Attendance Areas pay no mandatory local contribution, regardless of the wealth of the school district.

Thus, the reduction in State aid as a result of supplanting that aid with a mandatory local contribution is not a pro-rata reduction in State aid, but rather is a graduated rate of reduction based upon the wealth of the municipal district at issue. In contrast, if the State appropriation to fund the balance in the State Public Echool Fund is inadequate to meet the basic need, that shortfall is allocated on a pro-rata basis across all districts.

In the case of the Ketchikan Gateway Borough and the Ketchikan Gateway Borough School District, the calculation of the FY 2013 mandatory local contribution was $4,220,699. This is based upon a property tax of 2.65 mills on the full and true value of $1,592,716,600 (January 1, 2011 value)[5] as determined by the Department of Commerce, Community, and Economic Development (DCCED). Because of certain optional property tax exemptions, the actual taxable value in the Ketchikan Gateway Borough in FY 2013 was $1,314,675,800. Therefore, the mandatory local contribution equates to an actual mill levy of 3.21 on the FY 2013 taxable property within the Ketchikan Gateway Borough.

The per student amount for mandatory local contributions in FY 2013 (mandatory local contribution divided by the actual number of students in average daily membership) for the Ketchikan Gateway Borough was $2,008.28 per student. Using the adjusted ADM (after vocational, correspondence, special needs, school size, area cost adjustments etc. have been factored in), the Ketchikan Gateway Borough mandatory contributions per adjusted ADM was $ 961.91. By comparison, the City of Hydaburg the mandatory local contribution was $744.21 per student, or $194.24 per adjusted ADM; and the Bristol Bay Borough amount was $5,061.20 per student or $1,579.86 per adjusted ADM. Thus, the more wealthy Bristol Bay Borough and its residents supplanted more State funds per student than did the City of Hydaburg.

[5] The formula in AS 14.17.410 calls for the DCCED full value from the second preceding fiscal year to be used in calculating the mandatory local contribution, but the current taxable value is used to levy and collect the taxes.

Correspondingly, if there were a shortfall in the Public Education Fund of 10%, there would be pro-rata reduction of 10% in State basic need funding statewide. This would amount to a reduction of $ 568 per adjusted ADM in each of the Ketchikan Gateway Borough, Bristol Bay Borough and Hydaburg City school districts.

In FY 2013, the Ketchikan Gateway Borough and its residents provided $4,220,699 in these compulsory payments, and an additional $4,018,819 in optional local contributions and in-kind contributions, for a total property tax mill equivalent of 6.27 mills in community resources allocated to public school education. [6]

The Ketchikan Gateway Borough raises revenues to meet these and other areawide Borough expenditures for FY 2013 through an areawide mill levy of 5 mills and an areawide sales tax of 2.5%. There are additional taxes levied for Borough service area and non-areawide functions, and additional sales and property taxes are levied by cities within the borough for city services.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See **Zeman v. Lufthansa German Airlines**, 699 P.2d 1274, 1281 (Alaska 1985). All reasonable inferences of fact from proffered materials must be drawn against the moving party and in favor or the non-moving party. **Id.** See also **Howarth v. First National Bank**, 540 P.2d 486, 490 (Alaska 1975), affirmed 551 P.2d 934 (Alaska 1976).

[6] This, of course, only addresses local support for operation of the School District. Significant additional funding was provided for the local shares for debt service and capital projects for school facilities.

III. Argument

Looking at the Standards for a Summary Judgment, this case is primarily a case of statutory interpretation. There is no dispute as to material facts. The operable facts regarding the amounts of mandatory local contributions, voluntary local contributions, tax rates, tax assessments, State funds for education and Federal Impact Aid are matters of public record, and are not subject to legitimate dispute.

The heart of this case is Article IX, Section 7 of the Alaska Constitution, Dedicated Funds. This section provides:

> "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."[7]

The Plaintiffs argue that the mandatory local contribution is a dedicated tax in violation of this section of the Alaska Constitution. Plaintiffs also argue that it is an unconstitutional expenditure without an appropriation. The central issues in this case are: 1) whether the proceeds are dedicated to a particular government purpose; and 2) whether the mandatory local contribution is a tax or license.

A. The Mandatory Local Contribution is Dedicated for a Specific Purpose

[7] At Statehood Alaska had a school tax. To the extent this former school tax was a permissible pre-existing dedicated fund, that "grandfathered" status was eliminated when the school tax was repealed in 1980. See 1959 A.G. Opinion No.8, March 12, 1959 discussing the constitutional convention minutes and concluding that a grandfathered dedicated tax cannot be reinstated once repealed. The opinion quoted the minutes: "At foot 125, of tape 4, Delegate Nerland stated that he spoke for the Committee on Finance and Taxation, and that it was their intent that present dedications be allowed until repealed; but that once it was repealed, it could not be later re-enacted."

The Louisiana Supreme Court has defined a dedicated tax as "quite simply, a tax that is dedicated for a specific purpose."[8] Through AS 14.17.410 and 14.17.490, the State mandates that a calculated amount of money be paid to fund a State obligation. It is analytically indistinguishable from a special State School Tax of which 100% of the proceeds is dedicated to offset State payments on a dollar-for-dollar basis. Further, these transfer payments are made without any legislative appropriation.

There is little question that the proceeds of the mandatory local contribution are dedicated to the special purpose of paying part of the basic need that the State is required to pay for public education. AS 14.17.410 calls for the State to pay the basic need, after subtracting the mandatory local contribution from that amount. This is a core governmental purpose for the benefit of the public in discharge of the State's constitutional responsibility to provide for public education. The government of the State of Alaska has an exclusive constitutionally mandated duty to provide for an educational system in Alaska. The mandatory local contribution is certainly enforced, and it provides support for the government in the form of funding education, thus alleviating the State from a very significant part of its burden – $216,537,020 in FY 2013.

The State might argue that there is no impermissible dedication of State funds because the funds never enter the State's hands. This is a semantics argument which cannot be entertained as legitimate reasoning. The State legislature mandates that organized boroughs, and home-rule and first class cities in the unorganized borough, operate school districts. The will of the legislature in enacting the mandatory local contribution is to force local municipalities that are compelled by the State to operate municipal school districts to pay a significant part of the costs of public education. The amount is measured as an ad valorem tax equivalent based upon

[8] **City of New Orleans v. La. Assessors' Rec. & Relief Fund,** 986 So.2d 1, 16 (La. 2007).

taxable property values, capped at a maximum of 45 percent of basic need. The operative impact is functionally an annual payment of a State tax by each municipality that has a municipal school district into the public education fund created under AS 14.17.300. The mandatory payments are just as irrevocably dedicated to payment of public education costs as if they were collected by the State Department of Revenue and deposited in the public education fund for expenditure without requiring an appropriation.

This process is indistinguishable from the assessments rejected by the Court in **State v. Alex**, 646 P.2d 203 (Alaska 1982). There the Court, held that a statute which required payment of mandatory assessments to third party private aquaculture associations violated Article IX, Section 7. Like the direct transfer of funds from 34 municipalities to their respective municipal school districts without passing through a State account, the assessments were collected by buyers of salmon and forwarded directly to the particular regional aquaculture association trust account without even entering a State account. **State v. Alex** at 207.

B. The Mandatory Local Contribution is a Tax

The merits of the issue turn on the determination of whether the mandatory local contribution is a tax. It cannot be seriously disputed that the State statutory scheme regarding the educational foundation funding program: 1) mandates payments by a party other than the State, and 2) dedicates those funds to paying for public education.

There are two broad classifications into which a payment to the government can be categorized: fees and taxes. Fees are further broken down into the subcategories of regulatory and user fees. A regulatory fee is designed to raise money to help defray an agency's regulatory

expenses. A user fee is a payment given in return for a government-provided benefit, and is tied in some fashion to the payer's use of the service.

The United States Supreme Court has defined a tax as "an enforced contribution to provide for the support of the government."[9] A tax sustains the essential flow of revenue to the government, is usually imposed by Congress or a state or municipal legislature, and is designed to provide a benefit for the entire jurisdiction in which the tax is levied. A tax may also be imposed for regulatory purposes to influence certain desired behavior. [10]

A review of authorities addressing the tax/fee distinction shows that the mandatory charge here is a tax, not a fee. The mandatory local contribution falls squarely within the definition of a tax as "an enforced contribution to provide for the support of the government."[11] Further it is clearly within the scope of a source of "any public revenue" as that term was used in **State v. Alex, 646 P.2d 203, 210 (Alaska 1982).**

a. The Mandatory Local Contribution is not a Regulatory Fee.

Many of the precedents addressing what is a tax and what is a fee are in the context of the federal Tax Injunction Act (TIA) which prohibits courts from enjoining collection of a tax, but allows fees to be enjoined. The TIA calls for a procedure under which taxpayers pay under protest and seek a refund rather than pursue an injunction. **San Juan Cellular**[12] established an oft-cited, three-part test to determine whether a charge is a regulatory fee:

1. Does a regulatory agency assess the fee?

[9] **U.S. v. Tax Comm'n of Miss.**, 421 U.S. 599, 606 (1975) citing **U.S. v. LaFranca**, 282 U. S. 568, 572 (1931).
[10] See **Nat'l Fed'n of Indep. Bus. V. Sebelius**, 132 S. Ct. 2566 (2012).
[11] See **U.S. v. Tax Comm'n of Miss.**, 421 U.S. 599, 606 (1975). See also **Menz v. Coyle**, 117 N.W. 2d 290, 297 (N.D. 1962).
[12] **San Juan Cellular v. Public Service Commission of Puerto Rico**, 967 F.2d 683 (1st Cir. 1992).

2. Does the agency place the money in a special fund?

3. Is the money used for a general purpose or to defray the expenses generated during the exercise of the agency's regulatory powers?

If all three factors are present, that would weigh heavily in finding a charge to be a regulatory fee. However, even when the first two factors are present, courts examining whether an assessment is a tax have tended to emphasize the revenue's ultimate use. The heart of the inquiry centers on function, requiring an analysis of the purpose and ultimate use of the fee. That is, if the revenues go to a general fund, the charge will typically be labeled a tax. [13]

Under the **San Juan Cellular** test, the mandatory local contribution required by Alaska Statutes is not a fee, it is a tax. The first factor is not met, as there is no regulatory agency imposing the charge. It is imposed by the legislature.

As to the second factor, in FY 2013, the State transferred $86,811,000 in Unrestricted General Funds to the Public Education Fund (Chapter 15, SLA 2012, page 49). Once in the Public Education Fund, the money is dedicated to a particular purpose. The required local contributions are used to reduce withdrawals from the Public Education Fund even though the proceeds of the mandatory local contribution are not placed directly in the Public Education Fund maintained by the State.

As to the third factor, the funds are clearly not used to defray an agency's regulatory expenses of overseeing the activity. Rather, they are used for the sole purpose of avoiding greater transfers of Undesignated General Fund State monies to the Public Education Fund.

Going to "the heart of the inquiry", the use of the funds is to supplant a portion of the State's required payments of the basic need for public education in every municipal school

[13] **San Juan Cellular** at 685.

district in Alaska. If a municipal school district had no taxable property, and thus paid no mandatory local contribution, the State would pay the full basic need amount for that district. Each dollar of mandatory local contribution does not provide additional money for public education. Rather, it displaces State money on a dollar-for-dollar basis.

Analytically, this is indistinguishable from a situation where the funds are paid to the State and placed in a dedicated fund used only for payment for public school education. The "purpose and ultimate use" of the money is to reduce the Undesignated General Fund monies which must be expended to fund public education. It is not used to influence specific behavior by municipalities.

b. It is not a user fee.

Diginet [14] provides a "functional" test to examine if a charge is a user fee: If the fee is a reasonable estimate of the cost imposed by the person required to pay the fee, then it is a user fee and is within the municipality's regulatory power. If it is calculated not just to recover a cost imposed on the municipality or its residents but to generate revenues that the municipality can use to offset unrelated costs or confer unrelated benefits, it is a tax, whatever its nominal designation.

In **Diginet,** the Lessee of circuits in fiber optic network brought diversity action against the owner of the network and a city, seeking declaration of its rights. The city filed a cross claim against owner and sought a preliminary injunction against owner's expansion of its network in the city without obtaining a municipal franchise. The Court of Appeals held that the franchise fee

[14] **Diginet, Inc. v. Western Union ATS, Inc**., 958 F.2d 1388, 1399 (7th Cir. 1992).

that city desired to levy on the owner constituted a tax, not a user fee, and thus franchise fee could not be imposed in absence of State authority.

Here, the amount of the mandatory local contribution has no relationship to the actual costs of providing public education. It is calculated based upon the property tax revenue potential of a mill levy of 2.65 mills on the full and true value of all property in each municipal school district which is not entitled to a mandatory tax exemption (up to a maximum of 45 percent of basic need). It is paid from funds collected in part from parties who have no children receiving educational services.[15] It displaces Undesignated State General Fund monies which are then made available for expenditure on unrelated State purposes in a manner which may confer no benefit on the parties providing the mandatory local contribution funds.

Another court defined a user fee as: a payment given in return for a government-provided benefit and that is tied in some fashion to the payer's use of the service. An example may be seen in **Emerson College v. City of Boston**, 462 N.E.2d 1098 (Mass. 1984). The College filed suit against the city, challenging the imposition of a charge for augmented fire services. The Court held that it was neither a fee nor a valid excise tax, and was constitutionally impermissible. There, the court wrote:

> "Fees share common traits that distinguish them from taxes: they are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society; they are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge; and the charges are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses." (Citations omitted.)

[15] See **Folio v. City of Clarksburg, W.Va**., 134 F.3d 1211, 1217 (4th Cir. 1998) where the court held that a fire service protection fee constituted a tax within the meaning of the Tax Injunction Act (TIA), because liability for the fee was based upon a resident's property owner status instead of his use of the city service. Generally speaking, a special assessment imposed by a municipality qualifies as a tax within the meaning of the TIA.

Emerson College at 1105.

Looking at this tax versus fee analysis, it is clear that the mandatory local contribution is not a fee. There is no linkage between the amount of the charge and the services received. The amount of the charge is calculated based upon ad valorem taxable value. This is inconsistent with a charge being related to services received. It is clearly indexed by wealth, not benefits. There is no direct relationship between the amount of mandatory local contributions paid by any community and the funds provided under the Education Foundation Formula to the district in that community. While the amount of State funding received from the Public Education Fund may be reduced based upon the amount of the mandatory local contribution, the total amount of a district's basic need entiltement (the core funding for education provided through operation of the State Educational Foundation Formula) is determined by factors which bear no relationship to the amount of the mandatory local contribution.

The entitlement of basic need is the base student allocation[16] multiplied by the adjusted average daily membership.[17] Under AS 14.17.410 the State provides public school funding in the amount of the basic need through a combination of the funds from the public education fund, the mandatory local contribution and a portion of Federal Impact Aid.[18] Each district is provided this minimum even if they have no mandatory local contribution or no Eligible Federal Impact Aid. Municipal districts may provide additional funds beyond the basic need through optional local contributions under 14.17.410(c).

A district which is not required to make a mandatory local contribution, or makes a mandatory local contribution which is a tiny fraction of the mandatory local contribution per

[16] AS 14.17.470.
[17] See AS 14.17.410(b)(1) for the procedure to calculate average daily membership.
[18] The State provides the amount represented by the equasion (basic need amount – mandatory local contribution – 90% of eligible Federal Impact Aid).

student made by another district, is not entitled to a single dollar more or less in public school basic need funding based upon the amount of its mandatory local contribution. The amont of the basic need funding for public education in any district is not varied by the amount of a municipality's mandatory local contribution. Any public education funding beyond the basic need comes from sources which are independent of the amount of the mandatory contribution as well, whether they be optional local contributions, Federal Impact Aid, quality schools funding from the State under AS 14.17.480, or other grants. Accordingly, the amount of the mandatory local contributions are independent of any educational services or benefits received. The amount of mandatory local contributions for any district is independent of the total amount of funds that district will receive for providing public educational services. They are not a fee. They serve only to provide the State with general revenues thorugh a reduction in expenditures from the Public Education Fund, and the State general fund, by the amount of funds supplanted by the mandatory contribution funds.

Morever, the mandatory local contribution is imposed only on residents of 34 of the 53 school districts in the State. This is also inconsistent with a fee in that not all those benefiting from public educational services are charged. It is not even a rational wealth based charge in that some of the municipalities which are required to pay a mandatory local contribution are much less wealthy than some of the districts which are not required to pay any mandatory local contribution. Clearly the mandatory local contribution is a compelled payment imposed by the State legislature for the support of the State government, and sustains the flow of revenue to the State government. Authorities from numerous jurisdictions support this conclusion that the mandatory local contribution is a tax, and not a fee.

In **Marcus v. Kansas Dept. of Revenue**, 170 F.3d 1305 (10th Cir. 1999) the court said:

> [T]he classic tax sustains the essential flow of revenue to the government, while the classic fee is linked to some regulatory scheme. The classic tax is imposed by a state or municipal legislature, while the classic fee is imposed by an agency upon those it regulates. The classic tax is designed to provide a benefit for the entire community, while the classic fee is designed to raise money to help defray an agency's regulatory expenses.

Marcus at 1311, quoting **Home Builder's Ass'n of Miss., Inc v. City of Madison, Miss.**, 143 F.3d 1006, 1011 (5th Cir. 1998).

See also: **Kleher v. New England Tel. & Tel. Co.**, 947 F.2d 547, 549 (2d Cir.1991) (finding city-assessed public utility "franchise fee" to be a "tax" since revenues derived thereby were treated as part of city's general revenue); **American Trucking Assoc., Inc. v. Conway**, 514 F.Supp. 1341 (D.Vt.1981) (permit fees on interstate vehicles registered out-of-state were a "tax" where fees exceeded administrative costs of registration program, were earmarked for general fund, and intent of legislature was to raise revenue); see also **Indiana Waste Systems, Inc. v. County of Porter**, 787 F.Supp. 859, 865 (N.D.Ind.1992) (special assessment by municipality is "tax," as is property tax, gross receipts tax, city license tax, and state permit fees); **Butler v. State of ME. Supreme Judicial Court**, 767 F.Supp. 17, 19 (D.ME.1991) (finding jury fee promulgated by Maine Supreme Court and imposed on out-of-state litigants to be a tax).

In **U.S. v. City of Huntington, W.Va.**, 999 F.2d 71, 73 (4th Cir. 1993) the court wrote:

> "The general rule that what must be considered is the real nature of the tax and its effect upon the federal right asserted. The proper analysis to arrive at the real nature of the assessment is to examine all the facts and circumstances and assess them on the basis of economic realities." (Internal citations omitted).

The 4th Circuit Court went on to note:

> "User fees are payments given in return for a government provided benefit. Taxes, on the other hand, are enforced contributions for the support of government. " **U.S. v. City of Huntington, W.Va.** at 74.

The user fee that was being charged by the City of Huntington in this case was a tax in the classic sense. The City of Huntington was imposing a "municipal service fee" against owners of buildings, which was assessed on the basis on square footage of the buildings. The Court held this was the equivalent to an ad valorem tax which makes an allocation of costs of governmental services among the beneficiaries according to their respective wealth, and as a tax, the federal government was exempt.

The mandatory local contribution, like a square footage assessment, is a classic ad valorem tax. It incorporates the exemptions which an ad valoren tax incorporates. It is graduated based upon the value of property, allocating costs of the governmental services based upon the respective wealth, not the level of benefit or service received. It is a classic revenue transfer mechanism. The only twist is that the revenue transfer occurs bypassing the treasury and making the payment directly to the expenditure.

Such a bypass does not change the essential nature of the payment as a tax; it only makes the dedication more clear. See **State v. Alex**, supra, rejecting a statute under Article IX, Section 7 which required payment of mandatory assessments to third party private aquaculture associations. The assessments were collected by buyers of salmon and forwarded directly to the particular regional aquaculture association trust account. **State v. Alex** at 207. The fact that the mandatory local contributions are paid directly by municipalities to the relevant school district, similar to the assessments in **State v. Alex**, does not change the character of the payment, or make it any less a dedicated tax. In fact, as noted below, this, in effect, violates Article IX, Section 13, of the Alaska Constitution which prohibits money being withdrawn from the treasury without an appropriation.

c. The Mandatory Local Contribution is a Dedicated Tax.

In 1987 when it established the mandatory local contribution in its effort to satisfy the prerequisites to be able to take control of Federal Impact Aid directed to municipal school districts, what the legislature apparently did not know, did not take into account, or proceeded to implement regardless of the limits of Alaska's Constitution, was that Alaska is the only state with a constitutional provision prohibiting State legislation creating dedicated taxes or dedicated funds. According to the National Conference of State Legislatures, Alaska is the only state that has a constitutional provision banning the dedication of taxes.[19] Accordingly, the foundation approach to meet the requirements to take Federal Impact Aid into account under 34 CFR 222.161-163[20], which requires a dedicated local tax, may be used in the other 49 states, but will not work in Alaska because the mandatory contribution is precluded by the Alaska Constitution.

The Constitutional Convention framers specifically acted to avoid dedicated funds in order to preserve flexibility in budgeting, financial control, and the lack of relationship between the tax and the purpose. See AG Opinion no. 7, March 11, 1959. The delegates recognized that the widespread existence of dedicated revenues lodged in special funds deprives both the governor and the legislature of "any real control over the finances of the state." [21]

[19] http://www.ncsl.org/documents/transportation/FULL-REPORT.pdf at page 29.
[20] The Appendix to Subpart K of 34 CFR part 222 provides specific examples of the methods for compliance with the disparity standard in 34 CFR 222.162(b)(1). These methods require mandatory local contributions of tax revenues dedicated to education in order to allow the State to meet the disparity test and become entitled to intercept Federal Impact Aid funds.
[21] 1975 Atty General Op. No. 9, May 2, 1975 citing 6 MINUTES, CONSTITUTIONAL CONVENTION, App. V, 111 (1956).

The Alaska Supreme Court has held that Art. IX, sec. 7 "prohibits the dedication of *any source of revenue*, including both taxes and special assessments."[22] In one case, the Court cited an opinion by the Alaska Attorney General which stated that Art. IX, Sec. 7 can "be given its intended effect and serve its repeatedly expressed purpose only if the words 'proceeds of any tax or license' are interpreted to mean what their framers clearly intended, i.e., the sources of any public revenues."[23]

"The prohibition is meant to apply broadly."[24] As an example, in one case the State was not allowed to direct the net proceeds from 250,000 acres of land into the University of Alaska's endowment. The prohibition has also been applied to settlements from civil lawsuits.[25]

The language of Art. IX, sec. 7 prohibiting the dedication of proceeds of any State tax or license "must be read as embodying certain implied exceptions, specifically … contributions from local government units for state-local cooperative programs, and tax receipts which the state might collect on behalf of local government."[26] The Supreme Court for the State of Alaska has interpreted an amendment that took place during the constitutional convention to the proposed provision that inserted "proceeds of any state tax or license" in the place of "all revenues" as an effort to "allow for the setting up of certain special funds, such as sinking funds for the repayment of bonds," rather than "to exempt some sources of revenue from the prohibition."[27]

The Court referred to a "well-researched" attorney general opinion from 1975, which "carefully and minutely detail[ed] the debate of the constitutional convention on the point" and

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[22] ***State v. Alex***, 646 P.2d 203, 210 (Alaska 1982)(emphasis added).
[23] *Id.* (quoting 1975 Alaska Op. Atty. Gen. No. 9 at 24).
[24] ***Southeast Alaska Conservation Council v. State***, 202 P.3d 1162, 1170 (Alaska 2009).
[25] See ***Myers v. Alaska Hous. Fin. Corp.,*** 68 P.3d 386 (Alaska 2003).
[26] November 30, 1982 Op. Att'y Gen. (Emphasis added).
[27] ***Southeast Alaska Conservation Council v. State***, 202 P.3d 1162, 1170 (Alaska 2009)

concluded that the clause applied to "any source of public revenue: tax, license, rental, sale, bonus-royalty, [or] royalty."[28] That opinion 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 behalf of local government units."[29] Clearly the mandatory local contribution payments are not contributions to a pension fund. They are not payments into a sinking fund or bond fund. They are not for a revolving fund. They are not payments required to match federal grant funds. They are not taxes the state is collecting on behalf of municipalities and remitting to municipalities (like personal property taxes on motor vehicles under AS 28.10.431). Finally, the exception for state-local cooperative programs does not apply here.

The clause which the 1975 Attorney General Opinion identifies as allowing dedicated funds or taxes which are "contributions from local governments for state-local cooperative programs" refers to voluntary joint activities. Keep in mind that the State has an exclusive constitutional duty to establish and maintain a system of education. It ostensibly carries out that duty by mandating that the 34 organized boroughs and home-rule and first-class cities in the unorganized operate schools. Those 34 muncipal governments have no choice in the matter, they must operate the school districts. Moreover, if those 34 municipal governments do not pay very significant amounts of money – $216,537,020 in FY 2013 – which do not provide any local benefit and only serve to displace State funds to wich these districts are entitled as their basic

[28] **State v. Alex**. at 210 (citing 1975 Formal Op. Att'y Gen. 9, 24 (May 2, 1975)).
[29] ***Southeast Alaska Conservation Council v. State***, 202 P.3d 1162, 1170 n. 29 (Alaska 2009)(quoting 1975 Formal Op. Att'y Gen. 9, 6-7 (May 2, 1975) (quoting Mem. from Pub. Admin. Serv., Jan. 4, 1956).

need, they will suffer penalities imposed by the State. Such an arrangement can hardly be characterized as "cooperative."

Moreover, a "contribution", unmodified by the descriptor "mandatory", is generally regarded as a voluntary act; the word essentially means "to give." Here AS 14.12.020(c) makes clear that this is not voluntary. Further, the huge penalty imposed by the State under AS 14.17.410(d) if the mandatory local contribution is not paid means that it is not a "contribution," – even if the State law refers to it as such – but is an involuntary compelled payment. It is compelled under the threat of withholding any State educational funding. AS 14.17.410(d) provides that the State aid for schools will not be provided if the required local contributions have not been made. If that were to occur, the local municipality would be forced to fund all of its school district operation, a cost which would create a crushing tax burden.[30] In fact, the fiscal burden would be so massive that in all but perhaps a few cases, municipalities would be unable to raise sufficient funds through ad valorem taxes given statutory limits on such.[31]

The State may argue that this kind of local contribution was implicitly excluded by changing the language from "all revenue" to "tax or license," which means the mandatory local contribution is constitutionally acceptable. The State might argue that the mandatory local contribution might meet the United States Supreme Court's definition of a tax, but it is not public revenue, because it derives from local government, not from the public at large (i.e., all residents of the state) and is spent on local education. The State might also assert that the mandatory local

[30] Under last year's decision in **Nat'l Fed'n of Indep. Bus. V. Sebelius**, 132 S. Ct. 2566 (2012), this penalty would itself be considered an additional tax. The U.S. Supreme Court's decision in **Sebelius** last year, upheld the penalty for not buying health insurance as a valid exercise of Congress' power to tax. The Court in **Sebelius** discussed the same functionality focus as to determination of whether an exaction of funds is a tax. Just as the Federal government now makes the state of not owning health insurance taxable (by imposing a small penalty), the State of Alaska is making not contributing money to local education a taxable condition (by imposing a huge penalty).

[31] See AS 29.45.090 placing a maximum limit on both tax rates (30 mills) and tax revenues from all sources for municipal taxes (combined revenues for all municipalities levying taxes cannot exceed $1,500 per person residing within municipal boundaries); and AS 29.45.100 allowing exceptions to these limits only for taxes to pay bonds.

contribution is not revenue because it is never in the hands of the public (state) at large. Such arguments do not stand.

The State will also likely argue that the mandatory local contribution is not a tax because it is not paid by individuals. The statute outlines how to calculate the amount of the mandatory local contribution in terms of taxes on local property, while it does not require that it derive from property tax, or any other specific local tax. Municipalities with municipal school districts are required to pay the money, but how they procure it is up to them. However, it is common knowledge that the actual funds for the local contributions come from property tax and sales tax in nearly every municipal district in the state. To pretend that the required payments are not derived from tax revenues is disingenuous.

Even if they were not direct taxes paid by residents, the payments here are an extraction of funds belonging to the citizens of each municipality which has a municipal school district. The payment of those funds is a dedication of funds to pay for education.

Perhaps the most compelling is analysis is by analogy. If the Court were to find that the State is permitted, consistent with Article IX, Section 7, to require payment of funds from local government or their residents, in an amount based upon some measure of ad valorem or sales taxation, and further require that those funds be expended on a specific purpose which is a State responsibility, then the Court would be creating a loophole which would deprive the prohibition on dedicated taxes of any meaning. For example, what if, instead of the mandatory local contribution for education, the State were to enact a statute saying that any organized borough which houses a State courthouse must contribute the equivalent of a 1-mill levy to offset the costs of that courthouse, including staff salary, utilities, building upkeep and maintenance, etc.[32]

[32] Under Article IV, Section 1 of the Alaska Constitution, the judicial power of the State is a State responsibility,

This loophole would allow legislation which required each municipality to pay an amount equivalent to the revenues from a 0.5% sales tax on all sales of alcohol in the jurisdiction to pay election workers and ballot preparation costs for running State elections[33] for those State polling places which are in that municipality.

How about if the State adopted a statutory scheme which required each city to contribute a one-mill levy to support its local elected representatives to the State 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. What if the State required boroughs to contribute 2 mills to defray the costs of a State district attorney, troopers, and jails? Would it be any different if it was a requirement that any retail business had to pay an equivalent of 1% of its sales to pay the costs for heat and food for the State jails?

In each case, the fact that the funds are paid directly to a recipient rather than passing through a State account does not change the nature of the transaction. See **State v. Alex**. If the State is mandating payments to fund what are State services, and the State's responsibility, then such payments are clearly "an enforced contribution to provide for the support of the government"[34], and therefore a tax. Moreover, when the payments are required to go directly to payment of a specific expense which is a State responsibility, that tax is dedicated. Further, these examples illustrate that it is immaterial whether the State is imposing the charge on municipal residents individually or collectively through the municipal government.

The State may argue that the mandatory local contribution is required to be paid by municipalities, not individuals, and thus cannot be seen as a tax on the residents. This argument in semantics is a mere misdirection. Initially, the fact that the nominal payer of the mandatory

[33] State elections are a State responsibility under Article V of the Alaska Constitution.
[34] **U.S. v. Tax Comm'n of Miss.**, 421 U.S. 599, 606 (1975).

local contribution is a municipality does not make it any less a tax. Municipalities are required to pay certain taxes (e.g., Federal Social Security Tax, and Unemployment Tax). A State tax compelling payments for education is analytically no different.

In reality, the amount of the tax here is determined based upon the full and true value of all property which is not mandatorily exempt from property tax under State law. Whether the money required to be paid is generated from property tax, sales tax, fish tax or elsewhere, it is local funds which collectively belong to the citizens in the municipality. Further, everyone, including the legislature which adopted the statute, knew then, and knows now, that those contributions from local sources are taxes, calculated on the basis of relative wealth of certain areas of the State, are paid by businesses and residents to generate the funds. The State cannot be allowed to do indirectly, through a requirement placed on municipalities, something which they cannot do directly. If the court were to allow this practice, as illustrated in the example above, the exception would swallow the rule against dedicated taxes.

It is not difficult to see how, if the mandatory local contribution were held to be permissible under Article IX, Section 7, the State legislature could manipulate the any number of State responsibilities to create dedicated revenue streams by imposing taxes on municipalities, and by extension their residents, to fund what is under pervasive State authority and responsibility under the Alaska Constitution, and for which "no other unit of government shares responsibility or authority." **Macauley v. Hildebrand**, 491 P.2d 120, 122 (Alaska 1971). And further, to fund those State responsibilities directly with a dedicated revenue stream which is not subject to the constitutional requirement of appropriation.

C. The use of mandatory local contributions to fund public education violates Article IX, Section 13 of the Alaska Constitution which requires appropriations.

Article IX, Section 13, of the Alaska Constitution prohibits money being withdrawn from the treasury without an appropriation. A dedication which expends funds generated from a State mandated tax revenue stream without requiring an appropriation effectively circumvents this requirement. Article IX, Section 13 of the Alaska Constitution provides:

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

In a February 28, 1977, Attorney General's opinion,[35] the Alaska Attorney General recognized that this provision gives the legislature total and absolute power over the expenditure of State funds. This retention of legislative power over the expenditure of State funds through the requirement that funds may be expended only in accordance with appropriations made by law is a companion to the prohibition on dedicated taxes. Significantly, the power of veto held by the governor under Article II, Section 15, of the constitution, to strike or reduce items in appropriation bills, is an inherent part of this legislative appropriation authority.

As discussed above, the constitutional convention drafters prohibited dedication of taxes because they sought to retain and preserve flexibility in budgeting, financial control, and the lack of relationship between the tax and the purpose. See 1959 AG Opinion No. 7, March 11, 1959. Where there is a dedication of a revenue stream it allows one legislature and governor to deprive subsequent legislatures and governors of their authority to annually make appropriations to allocate the resources of the State. For funds coming from the State general fund the legislature recognizes this by setting up the Public Education Fund in AS 14.17.300 into which

[35] 1977 Op. Atty. Gen. Alaska No. 9, February 28, 1977.

appropriations are placed. The allocation of mandatory local contributions in a way to reduce withdrawals from this fund is functionally the same as depositing an identical amount of revenues into this fund, and allowing them to be expended without an appropriation. The ongoing process of functionally levying a tax, but diverting the revenues before they hit the general fund not only deprives successive legislative bodies the opportunity to weigh that appropriation against other demands on public funds, but it effectively allows the withdrawal of money from the public treasury without an appropriation, and without allowing the governor to exercise the veto power in Article II, Section 15 of the Alaska Constitution.

In **Thomas v. Rosen**, 569 P.2d 793 (Alaska 1977) the court wrote that an appropriation was: "[t]he setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other." **Id.** at 796, quoting **State ex rel Finnegan v. Dammann**, 220 Wis. 143, 264 N.W. 622, 624 (1936). In **Thomas v. Bailey**, 595 P.2d 1, 5 (Alaska 1979) the Court recognized that the term appropriation extended to selection of land and designating its use as a State asset, in addition to money.

The 1995, Alaska Supreme Court decision in **Carr-Gottstein Properties v. State**, 899 P.2d 136 (Alaska 1995) addressed a situation where funds were expended for State purposes without passing through the State treasury. In that case the State had entered into a lease purchase agreement for the former Anchorage Times building. The arrangements included the landlord/seller escrowing $2.8 million for renovations with a trustee.[36] The Alaska Court System was authorized to spend these escrowed funds for improvements to the property, but the funds

[36] These funds deposited were voluntarily deposited pursuant to a negotiated agreement. They were clearly not an "enforced contribution to the support of the government." Thus they were not a tax, and the issue of whether it was an impermissible dedicated tax did not arise.

never entered the State treasury, and were not appropriated by the legislature. The court noted that commercial leases commonly require a landlord to make improvements. The court concluded that 1) the "renovation fund did not provide the court system with unbridled authority to spend funds renovating the building, 2) the funds were limited to the amount held in trust and were subject to disbursement by the trustee; and 3) the 1994 legislature had approved spending of the $2.8 million as part of the agreement to lease purchase the building.[37] Therefore the court concluded that Article IX, Section 13, had not been violated. **Carr-Gottstein** at 145-146.

This case is instructive for several reasons. First, the fact that the legislature had approved a specific agreement which identified the $2.8 million as authorized to be expended gave a clear link to the legislature's retention of power over the expenditure of State funds. Second, the Court had to identify both the specificity of the amount and the legislative approval of this amount to find compliance with Article IX, Section 13's limitation on expenditures in accordance with appropriations. Third, the escrowed funds never entered the State coffers, but were nonetheless treated by the court as funds subject to the appropriation requirement in Article IX, Section 13.

Like the escrowed funds in **Carr-Gottstein**, the mandatory local contributions never enter the State treasury before being expended on public education. As in **Carr-Gottstein**, even though the mandatory contribution funds do not enter the State treasury, they are nonetheless State funds subject to the requirement that the legislature approve the expenditure of those funds in the identified amount.

[37] The Court noted the legislature had notice that the property required $2.8 million in renovations, and wrote "The Legislature specifically approved the cost of the lease-purchase and renovations to the building by enacting SB 247 into law. **Carr-Gottstein** at 145.

In contrast to the funds which the Court found met the restrictions of Article IX, Section 13 in **Carr-Gottstein**, the mandatory local contribution funds are not in a set amount, but vary year to year. Second, mandatory local contributions are an ongoing annual expenditure. Third, the legislature has no notice of the amount, nor does the legislature approve the amount of the expenditure on an annual basis. Similarly, while the lease purchase and escrow arrangement in SB 247 was subject to the governor's veto power, the governor is deprived of the constitutional right to veto, strike or reduce portions of the mandatory local contributions dedicated to education funding on an annual basis without appropriation. These mandatory local contributions are also different from the escrowed funds in that they are compelled payments for the support of the government (i.e., taxes) rather than voluntary payments pursuant to a negotiated contract funding tenant improvements in a lease purchase arrangement. The discussion by the Court in **Carr-Gottstein** makes clear that the mandatory local contribution is not only a dedicated tax, but it is an expenditure without legislative appropriation.

D. The Doctrine of Constitutional Avoidance will not save AS 14.17.410(b) and AS 14.12.020(c) from Constitutional Infirmities.

The Court, when faced with a challenge to the constitutionality of a statute, is called upon to interpret the Statute as constitutional if possible. The Statute is entitled to a presumption of constitutionality, and the burden is on the party challenging the Statute to establish that it is unconstitutional. See **Harrod v. State**, 255 P.3d 991, 1000-1001 (Alaska 2011). The doctrine of constitutional avoidance, "is a tool for choosing between competing plausible interpretations of a statutory text. Under this tool, as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [this court's] plain duty is to adopt that

which will save the Act." **Estate of Kim v. Coxe**, 295 P.3d 380, 388 (Alaska 2013) (Footnotes omitted.)

Here, as was the case in **Estate of Kim**, the statutes at issue are not ambiguous. The directive in AS 14.12.020(c) that municipalities with municipal school districts shall make a mandatory local contribution is unambiguous. The provisions in AS 14.17.410 requiring that contribution, calculating the amount based upon the value of taxable property, and deducting it from the State-provided education funding are not ambiguous. The fact that it is not labeled a tax is not ambiguous, nor does it inject such ambiguity as to alter the analysis that the mandatory local contribution is an enforced contribution to provide for the support of the government. See **U.S. v. Tax Comm'n of Miss.**, 421 U.S. 599, 606 (1975). There is no alternate interpretation that would make this tax pass constitutional muster. As the Court wrote in **Caddo-Shreveport Sales v. Office of Motor Vehicles**, 710 So. 2d 776, 780 (La. 1998):

> "The constitution is the supreme law, to which all legislative acts and all ordinances, rules, and regulations of creatures of the legislature must yield. **Macon v. Costa**, 437 So. 2d 806 (La. 1983). The state cannot effect a de facto nullification of a constitutional provision that it is powerless to repeal save by constitutional amendment. **Williams v. State, Through Office of Motor Vehicles,** 538 So. 2d 193 (La. 1989). When a statute conflicts with a constitutional provision, the statute must fall. **City of Baton Rouge v. Short**, 345 So. 2d 37 (La. 1977)."

III. Conclusion

The mandatory local contribution violates the prohibition on dedicated taxes in Article IX, Section 7 of the Alaska Constitution. It also violates the prohibition on expenditures without appropriations in Article IX, Section 13 of the Alaska Constitution, and deprives the governor of the veto powers granted by Article II, Section 15 of the Alaska Constitution. The Court should declare the mandatory contribution required by AS 14.12.020(c) and AS 14.17.410(b)

unconstitutional; enjoin the State from deducting the mandatory local contribution from the amount of public school funding provided by the State; prohibit the State from withholding education funding under AS 14.17.410(d) and AS 14.17.490 for non-payment of the mandatory local contribution; and order the State to pay the full amount of State public school funding, without a deduction for mandatory local contributions, to the Ketchikan Gateway Borough School District for FY 2014 and in the future.