June 27, 1996

The Honorable Tony Knowles
Governor
State of Alaska
P.O. Box 110001
Juneau, AK 99811-0001

Re: HCS 2d CSSB 136 (FIN) am H (brf sup maj fld H) (efd fld S) -- making, amending and repealing appropriations
A.G. file no: 883-96-0145

Dear Governor Knowles:

At your legislative office's request on your behalf, we have reviewed HCS 2d CSSB 136 (FIN) am H (brf sup maj fld H) (efd fld S), a bill combining the capital budget for FY 1997, appropriations intended to supplement the FY 1996 operating budget, and reappropriations of money previously appropriated for other purposes. Traditionally, each one of these functions would be a separate bill.

At the outset we must note a peculiarity of this bill, although we not do believe that the peculiarity gives rise to legal problems. As noted in the bill's designation, it did not receive the supermajority vote in the Senate necessary for an effective date different from that specified in the Alaska Constitution,[1] or the supermajority vote in the House necessary to spend money from the constitutional budget reserve fund.[2] However, CSSB 1005(FIN) am, passed by the legislature during the special session, contains a section (sec. 20 of that bill) establishing effective dates for the various sections of this bill and a subsection (sec. I (b)) authorizing the expenditure, if necessary, of budget reserve fund money for all 1997 general fund appropriations. Both of these provisions were approved by the necessary supermajorities in each house.

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[1] Under art. II, sec. 18, of the Alaska Constitution, laws passed by the legislature become effective 90 days after enactment, unless two-thirds of the membership of each house provides for another effective date.

[2] Because the conditions specified in art. IX, sec. 17, subsec. (b) of the Alaska Constitution for appropriation from the fund by a simple majority vote are not met, subsec. (c)'s requirement of a three-quarters vote in each house in order to appropriate money from the fund is applicable.

Most of the reappropriation sections of the bill contain a common feature on which we have previously commented. See 1994 Inf. Op. Att•y Gen. (883-94-0120; June 17). Before 1994, when the legislature wanted to reappropriate money, it always repealed the prior appropriation and then reappropriated it. However, in 1993 the state prevailed in a lawsuit, brought by the legislature, challenging numerous vetoes by Governor Cowper in 1990, when he vetoed the reappropriation language but let stand the repeals of the prior appropriations. Alaska State Legislature v. Cowper, 3AN-91-551 CI (3rd. Jud. Dist.). Apparently to try to prevent such vetoes, the 1994 legislature, like this one, did not include language repealing the prior appropriations, but only ostensibly "reappropriated" the money.

We said then, and we say now, that the legislature cannot circumvent the veto power in this way. In our opinion, money cannot be "reappropriated" unless the prior appropriation is repealed. Thus, notwithstanding the lack of any repeal language, we construe all the reappropriation sections lacking an explicit repealer[3] to include implicit repeaters of the prior appropriation. If you should wish to veto a section of this bill reappropriating prior appropriated funds, and to make clear that you are not vetoing the implicit repeal of the prior appropriation, please contact us.

There is a question about that portion of sec. 11(a)(1) of the bill that appears at page 5, lines 19 and 20. This portion reappropriates $1,030,000 of a prior appropriation (for Ship Creek redevelopment) to the Department of Administration for payment as a grant to the Municipality of Anchorage under AS 37.05.315 for "Ship Creek weir and trailing crossing for northern extension of coastal trail - design and construction." We understand that these are two separate projects. The question then is whether language specifying one project can be vetoed and still provide for the grant for the other one. We believe that the answer to this question is no. In our opinion, this would constitute a rewriting of the bill, rather than vetoing a line item.

Next, there is a question about section 11 (a) (2) (B) of the bill. That paragraph reappropriates $269,100 of the Ship Creek redevelopment appropriation to the Department of Health and Social Services as a grant under AS 37.05.316 to the Food Bank of Alaska, for debt retirement. Here the question is whether this appropriation is consistent with the "public purpose" clause of art. IX, sec. 6, of the Alaska Constitution.[4]

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[3] For some reason, a few of the sections of the bill do contain repealer sections. See sections 58 and 59.

[4] That section provides, •No tax shall be levied, or appropriation of public money

We addressed a debt retirement question in an unpublished 1995 review letter of a budget bill:

> This provision appropriates $100,000 to Hope Cottage for debt retirement. This may violate the public purpose doctrine set out in art. IX, sec. 6, of the Constitution of Alaska. The retirement of a preexisting debt confers no benefit on the public. Hope Cottage is a private entity. It appears that this appropriation is for a private purpose with, at best, an indirect benefit to the public. The legislature has a history of funding nonprofit corporations that conduct social programs in the state. This appropriation could be considered a method of freeing up other resources of the grantee to perform social programs. For that reason, the purpose of the grant may state a public purpose.

That discussion is equally applicable here.

A likely legal infirmity appears in sec. 13 (a) of the bill, which provides, "The unexpended and unobligated balance of the appropriation made in sec. 59, ch. 8, FSSLA 1994 (small business assistance and development program, procurement technical assistance program - $100,000) lapses June 30, 1997." The earlier appropriation was not a capital appropriation; hence it lapsed on June 30, 1995, and was closed out on the books on August 31 of that year. We believe that the legislature cannot revive a lapsed and closed-out appropriation in the manner that they are attempting to do here. Accordingly we recommend a veto of this subsection.

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transferred, nor shall the public credit be used, except for a public purpose.•

Section 28(f) of the bill presents another public purpose question. This subsection amends a capital appropriation from 1993, to broaden the purpose clause. As enacted by sec. 21, ch. 79, SLA 1993, at page 112, lines 21-22, $70,000 was appropriated to Nightmute for •facility improvements/boardwalks.• This subsection would amend that appropriation to read "facility improvements/boardwalks and settlement of outstanding community debts to the federal government." The materials relating to this subsection indicate that the debt to the federal government (specifically to the Internal Revenue Service) arose primarily from work on the boardwalks, although they give no greater detail.[5]

Because the appropriation here is to a municipality, we believe that there is a presumption of a public purpose. The presumption might be rebutted if there were some indication that the debt to the federal government arose as a result of some egregious wrongdoing by municipal officials, and the city were attempting to shield those officials by paying their debt. Here, however, there is no indication that the debt arose for any reason other than an honest mistake. Hence we believe that this subsection does not violate the public purpose section of the Alaska Constitution.

Another legal question arises with respect to sec. 34 of the bill. Subsection (a) would reappropriate $250,000 from the unexpended and unobligated balance of a 1995 appropriation for a grant to Arctic Power, Inc. Subsection (g) provides that the unexpended and unobligated balance of this 1995 appropriation "not reappropriated by (a), (b), and (f) of this section" lapses into the general fund on June 30, 1997. The question is, what would be the effect of a veto of subsec. (a)? We believe, given the language of subsec. (g), that such a veto would increase by $250,000 the amount of the 1995 appropriation available for spending in FY 1997. In other words, a veto of subsec. (a) would not cause the $250,000 to become unavailable for any purpose.

Section 68 of the bill is rather unusual - it is a stand-alone statement of legislative intent, and such statements are usually attached to specific appropriations. As with all such statements, you are free to follow it, ignore it, or veto it. The same is true for the more traditional statements of legislative intent that appear in sec. 100 of the bill.

Section 71(b) of the bill makes an appropriation to the Department of Health and Social Services for payments as seven grants under AS 37.05.316 "in equal amounts" to seven named entities for upgrading search and rescue and emergency medical equipment. There is a question here as to whether you may veto the "equal amount" language and then make the grants based on the relative need of the entities. Again, we believe that this would be going beyond an item veto and would constitute rewriting the bill, so that you may not legally do this.

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[5] Possibly the city failed to withhold federal taxes from the wages it paid on the project.

Several entities have inquired about two related appropriations in sec. 100 of the bill (which is essentially the capital budget). On page 46, at the top, $300, 000 is appropriated to the Department of Community and Regional Affairs (DC&RA) for a grant, under AS 37.05.316, to the Alaska Craftsman Home Program, and $300,000 is appropriated to DC&RA for a grant to Energy Rated Homes of Alaska. The source of this appropriation is given as "federal Stripper Well Oil Overcharge funds appropriated to the Alaska Housing Finance Corporation Projects in the Department of Revenue." On page 58, at lines 13-14, under "Alaska Housing Finance Corporation Projects," $600,000 is appropriated to "Stripper Well Oil Overcharge."[6]

[6] As written, this appropriation makes no sense. However, AHFC has prepared a plan for the expenditure of these overcharge funds, and that plan has been approved by the U.S. Department of Energy. Hence the appropriation should be read as referring to the Stripper Well Oil Overcharge Plan.

We understand that Alaska Housing Finance Corporation (AHFC) is the designated state agency for the receipt of this overcharge funds, so that the appropriation had to be made to it. We further understand that the two named grantees did not want to be under AHFC supervision. Hence the appropriation to DC&RA.[7]

There is a question as to whether DC&RA has the statutory authority to handle this sort of energy program. Because of this uncertainty, we understand that DC&RA, if the appropriation at the top of page 46 is allowed to stand, is planning to RSA the funds back to AHFC. AHFC would then make a request for proposals, as allowed by AS 37.05.316(a), and either give the grants to the named recipients or to some other entity or entities.

In light of this planned RSA, it would make sense for you to veto page 46, lines 4-12. This would return the appropriation to AHFC, and that agency could expend it in conformance with its approved plan, without having to enter into an RSA with DC&RA and without having to consider a specific named grantee.

Comment is also appropriate on another aspect of the AHFC Projects appropriation. On page 57, at lines 17-21, the following language appears:

> Alaska Housing Finance Corporation should not fund any designated grants but design a competitive bid process for all capital budget expenditures. The appropriations made in Stripper Well Overcharge and Low Income Weatherization [a $7,000,000 appropriation] are contingent on Alaska Housing Finance Corporation's adoption of a competitive bid process for all components.

Because we understand that AHFC is planning on adopting a competitive bid process, there is likely no problem created by this language. If, however, AHFC should for some reason wish to change its plans, we believe that it may.

The "should" language is of course not binding; it is an expression of legislative intent, even though the usual intent words are missing. As to the alleged contingency, we believe that it is not binding. We have previously noted that the Alaska Superior Court has ruled that because appropriation bills must be constitutionally limited to appropriations, any conditions that the

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[7] As the AHFC has noted, there is an inconsistency between an expression of intent (discussed below) saying that AHFC should •design a competitive bid process for all capital budget expenditures• (which includes the overcharge plan) and two grants to named recipients.

legislature places on appropriations "must be the minimum necessary to explain the Legislature's intent regarding how the money appropriated is to be spent. It must not administer the program of expenditures." Alaska State Legislature v. Hammond, 1JU-80-1163 CI (1st Jud. Dist., May 25, 1983), quoted in 1994 Inf. Op. Att•y Gen. (883-94-0120; June 17). We believe that a court would find that the purported contingency here is in fact an attempt to administer the program of expenditures.

We find no constitutional or other legal problems with the bill, other than those we have discussed above. If legal questions arise in connection with the administration of these appropriations, we will be happy to consult with the appropriate entities or officials on those questions.

Sincerely,

Bruce M. Botelho
Attorney General

BMB:JG:jn