June 16, 1997

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

Re: HCS CSSB 107(FIN) am H -- Making, Amending and Repealing Capital and Other Appropriations, and Making Appropriations to Capitalize Funds
A.G. file no: 883-97-0111

Dear Governor Knowles:

At your legislative office's request on your behalf, we have reviewed HCS CSSB 107(FIN) am H, a bill combining the capital budget for FY 1998 and reappropriation of money previously appropriated for other purposes. Traditionally, each of these functions would be a separate bill. This bill also contains a few operating-type appropriations, including the appropriations for the cost-of-living adjustments in state employee salaries.

Many of the reappropriation sections of the bill contain a common feature on which we have previously commented. See 1994 Inf. Op. Atty. 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 Before 1994, when the legislature wanted to reappropriate money, it always repealed the prior appropriation and then reappropriated it.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 (3d. 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 In our opinion, money cannot be "reappropriated" unless the prior appropriation is repealed.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 to include implicit repealers of the prior appropriations. If you

should wish to veto a section of this bill reappropriating prior appropriated money, and to make clear that you are not vetoing the implicit repeal of the prior appropriation, please contact us.[1]

There appears to be duplication in the reappropriation made in secs. 9(d) and 17(b). Both items reappropriate the same prior year appropriation for purposes related to Bartlett High School. The reappropriation made in sec. 9(d) also includes library materials, while the reappropriation made in sec. 17(b) does not. If you favor the broader purpose, you should strike sec. 17(b).

A peculiarity appears in sec. 27(a) of the bill, which provides, "Notwithstanding the repeal of general fund balances of appropriation in ch. 130, SLA 1986, by sec. 101 (a) (10), ch. 103, SLA 1995, the unexpended and unobligated balance of the appropriation made in sec. 541, ch. 130, SLA 1986 (Dillingham water and sewer - $863,550) is reappropriated to the Department of Administration for payment as a grant under AS 37.05.315 to the City of Dillingham for new landfill development." We read this subsection as implicitly repealing the prior 1995 repeal of this appropriation. The legislature is not presumed to have performed a useless act, and if this subsection is not read as we propose to read it the subsection would be useless. Because this subsection contains a recipient, an amount, and a purpose, it is in our opinion a valid appropriation.

Subsections (b)-(f) of sec. 27 of the bill amend prior appropriations to broaden the purpose clauses, so as to allow the City of Napakiak to use the appropriations to settle federal debt. Subsections (b)-(d) of sec. 33 of the bill similarly amend prior appropriations to allow the City of Scammon Bay to use them to settle "outstanding community debts." The reapportionment bill last year contained a similar provision with regard to another municipality. We addressed then the question of whether the appropriation was for a public purpose, as required by the constitution. What we said there is equally applicable to these subsections:

> 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 constitution.

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[1] We note that sec. 46 of the bill still contains an explicit repeal of the prior appropriations, probably because of the complexity of the section.

Several of these subsections, though, present an additional wrinkle not presented by last year's bill. The wrinkle is that the reappropriation attempt's to convert matching grants under AS 37.06 into straight grants under AS 37.05.315. The Department of Administration has explained that this change was made because it was determined that debt settlement did not meet the definition of "capital project" in AS 37.06.090. The department has also noted that these reappropriations do not explicitly make transfers from the matching grant fund to the general fund, and has suggested that we render an opinion as to whether such a transfer is implied in the reappropriation language.

We believe that the answer to this question is yes. The intent of the legislature to make a transfer is clear. We believe that it would be elevating form above substance to hold that that intent should be thwarted because of the failure to follow formalities.

Section 42(a) of the bill contains a condition that is likely unconstitutional "micro-managing" by the legislature, in violation of the principle of separation of powers. It makes the appropriation in the subsection -- for the purchase of the "Overland Park parcel" -- conditional upon the execution of an agreement between the Department of Natural Resources and the Kachemak Bay Conservation Society under which the society agrees to assume responsibility for monitoring Overlook Park and keeping it clean. The condition is a rider in that it would require the Department of Natural Resources (DNR) to take action that should be separately authorized in a general law bill. The condition probably violates article II, section 13 of the Alaska Constitution, which requires that appropriations bills be "confined" to appropriations. This condition is probably not a problem, as DNR intends to enter into this agreement. If, however, something were to change before execution of the agreement -- if, for instance, the society were to dissolve, or decide not to enter into the agreement -- it is our opinion that this appropriation would still be valid.

Section 42(b) of the bill is an expression of "legislative intent." As with all such expressions, as a matter of law you may choose to follow it, veto it, or simply ignore it.

Section 44(c) of the bill is another expression of legislative intent. This one is unusually detailed, and asks the executive branch to refrain from using its authority under AS 37.07.080(h), except in emergency situations. If you do not agree with this request, we would recommend a veto.

Section 47(a) of the bill contains another condition that is likely unconstitutional "micro-managing" by the legislature. The subsection extends the lapse date for an FY 97 appropriation to the Alaska Seafood Marketing Institute (ASMI) to June 30, 2000, but conditions that extension on ASMI having no high-level employees located outside Alaska. No date is set as the effective date of this alleged requirement, so it would seem to be the effective date of the bill. We would recommend a veto of this "condition." The other conditions in sec. 47 of the bill, relating to the amount of the extended appropriation that ASMI may spend in fiscal years 1998, 1999, and 2000, all are, in our opinion, legitimate conditions, involving the legislature's proper exercise of its appropriation power, and not involving attempted intrusion into executive branch prerogatives.

The condition in sec. 49(a) of the bill we believe is a legitimate one. It makes the appropriation in this section conditional upon the Department of Transportation and Public Facilities' exhausting other appropriations made for the same project.

Section 50 (c) of the bill presents a problem. It conditions various matching grants to municipalities and unincorporated communities on the grantees complying before July 1, 1998, with the requirements, other than deadlines, set out in AS 37.06. The problem is that AS 37.06.010(d) and 37.06.020(e) both require that certain requirements be met by October 1 of the fiscal year for which a grant is made. Thus, sec. 50 (c) of the bill may have the effect -- and, according to the Department of Administration, the intent -- of amending substantive law. This would violate that portion of article II, section 13 of the Alaska Constitution, which provides, "Bills for appropriations shall be confined to appropriations."

According to the Department of Administration, this is not the first year in which the legislature has included this provision. We believe that the problem can be circumvented by reading the subsection not as an attempt to amend substantive law, but as a legislative declaration that the deadlines found in AS 37.06.010(d) and 37.06.020(e) are directory, rather than mandatory.[2] We note, though, that if this subsection is read in this manner, it might not negate appropriations made under sec. 50 of the bill even to grantees who do not meet the June 30, 1998, deadline.

Section 59 of the bill appropriates a sum of money to finance pay increases for state employees covered by certain collective bargaining agreements, state employees whose salaries are governed by AS 39.27.011, and certain other state, legislative, judicial, and university employees. The section appropriates money to the various departments, but, in contrast to sec. 60 of the bill, does not identify the amount of money associated with each affected collective bargaining unit. To determine whether this section actually finances the pay increases of the contracts for the affected units as required by AS 23.40.215(a), the office of management and budget will have to compare the amounts appropriated with the amounts requested. We understand that other monetary terms, specifically certain health insurance cost increases, were reported to the legislature and financed through the personal services appropriations in this year's operating budget bill, CCS HB 75.

Section 60 of the bill finances the terms of four specific collective bargaining agreements. Again, the amount requested must be checked against the amount appropriated, but it appears that sec. 60 of the bill is in compliance with AS 23.40.215 as well.

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[2] Generally speaking, failure to follow a mandatory statute entails adverse consequences, while failure to follow a directory statute does not. See City of Yakutat v. Ryman, 654 P.2d 785 (Alaska 1982).

Three sections of this bill, secs. 69, 70, and 75, amend appropriations made in CCS HB 75. Even though that bill has not yet become law, there is no problem here, because sec. 81 (d) - (f) of this bill makes those three sections effective as of the effective date of the sections in CCS HB 75 being amended.

Section 74 of the bill also presents legal problems. Subsection (a) again contains a "micro-managing" intent item that is in our opinion invalid, namely the purported requirement that the cost per inmate day not exceed the statewide average cost for the Department of Corrections. We would recommend a veto of this item.[3] Subsection (b) is purely intent language.

One appropriation in sec. 82 of the bill, the section making the bulk of the capital appropriations, warrants comment. On page 57, line 12, $300,000 is appropriated to Energy Rated Homes of Alaska, Inc., for home energy ratings, training, and the development and marketing of financing methods for residential energy efficiency. We commented on this entity and its problems in our review of HCS CSSB 55 (FIN) , which you signed into law as ch. 59, SLA 1997. You may wish to veto this designated grant while the Alaska Housing Finance Corporation (AHFC) and the proposed grantee are in litigation over whether the grantee has violated the public trust through its handling of a prior grant from AHFC.

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:JBG:pao

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[3] The item also seems to us to impose an impossible task for the Department of Corrections. How can it tell that the cost per inmate day in Valdez will not exceed the statewide average cost before the program in Valdez becomes operative?