

STATE OF ALASKA

DEPARTMENT OF LAW

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March 28, 2008

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

Re: HCS CSSB 256(FIN) am H -- making supplemental appropriations, capital appropriations, and other appropriations; making an appropriation to the senior benefits payment program; amending certain appropriations; ratifying certain expenditures; and making appropriations to capitalize funds
Our file: 883-08-0016

Dear Governor Palin:

At the request of your legislative office, we have reviewed HCS CSSB 256(FIN) am H, making supplemental, capital, and other appropriations. The bill was introduced at your request at the beginning of the 2008 regular session.¹ The legislature substantially amended portions of, and added a number of appropriations to, the bill. This letter will describe the various appropriations and identify legal issues raised by appropriations in the bill.

Section 1 of the bill provides funding for salary and benefit adjustments for the fiscal year ending June 30, 2008, under collective bargaining agreements, with the appropriations subject to reduction if a collective bargaining agreement is not ratified. Both of the collective bargaining agreements listed in sec. 1 have been ratified. Following introduction of HB 417 and SB 297, funding was added to the bill to provide for salary and benefit adjustments for certain non-union public officials, officers, and employees, for the fiscal year ending June 30, 2008, contingent upon passage and enactment into law in 2008 of a version of one of those bills.

Sections 2 - 3 of the bill set out the finding by agency and the statewide funding for the appropriations in sec. 1.

¹ Throughout this bill review, the bill that was introduced at your request is referred to as "the original bill."

Section 4 of the bill makes supplemental changes to appropriations for agency operating expenditures for fiscal year 2008. No substantive changes were made by the legislature to the provisions of sec. 4 in the original bill.

Sections 5 - 6 set out the funding by agency and the statewide funding for the appropriations in sec. 4.

Section 7 of the bill also makes supplemental changes to appropriations for agencies' fiscal year 2008 operating expenses. The legislature made substantial amendments to this section, in some instances appropriating less than the amounts requested for supplemental appropriations, and in other instances reducing fiscal year 2008 appropriations to various agencies by many millions of dollars. We have not identified legal issues with regard to the legislature's changes to sec. 7.

Sections 8 - 9 set out the funding by agency and the statewide funding for the appropriations in sec. 7.

Section 10 of the bill sets out appropriations for capital projects and grants. The legislature substantially changed this section. In addition to deleting two proposed appropriations, the legislature added provisions changing the funding source for \$68,000,000 of Department of Administration telecommunications projects and systems from the master lease line of credit fund source to the general fund. The legislature also set out intent language that agencies using the master lease line of credit make debt service payments from regular operating appropriations. As we have advised in previous letters reviewing legislative intent language in appropriation bills, although intent language is not subject to your line item veto,² you may choose to follow an expression of legislative intent accompanying an appropriation item, or ignore it.

Sections 11 - 12 set out the funding by agency and the statewide funding for the appropriations in sec. 10.

Section 13 of the bill was added by the legislature, and includes a number of appropriations for capital projects and grants that were vetoed last year. The bulk of appropriations in this section are made to Department of Commerce, Community, and Economic Development (DCCED) for grants.

² *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 371-75 (Alaska 2001) (expressions of legislative intent do not constitute "items" subject to governor's veto power under art. II, sec. 15, of the Alaska Constitution).

Appropriations to DCCED on pages 61 - 69 are for grants to named recipients under AS 37.05.316. Under AS 37.05.316, the named recipient of a grant must first submit a proposal that will then be subject to administrative review before the grant is finalized. A grant agreement must be executed before issuance of the grant. Grants not in the public interest may be rejected.

The grants to named recipients include a single grant to a religious entity that provides social services. On page 63, \$20,000 is appropriated for a grant to Catholic Community Services for the Angoon Senior Center stove, refrigerator, and freezer. As we noted in our review of HCS CSSB 53(FIN) am H, in which this appropriation first appeared and was subject to your veto, this grant is to assist an organization in its delivery of social services that are made available to those in need on a non-sectarian basis.³ Accordingly, we do not believe that this grant presents legal issues based on provisions of the Alaska and United States Constitutions that prohibit establishment of religion.⁴

The grants to named recipients also include several grants to schools and one grant to a community foundation for school projects.⁵ Because these grants would be made through DCCED, it is our understanding that they have not been reviewed by the Department of Education and Early Development (DEED) for priority in funding for construction and major repair under the priority list maintained under AS 14.11.014(a) and (b) and 14.11.102. This method of funding may impair DEED's ability to effectively monitor school projects, and may undermine the purpose of the statutory priority list. However, we understand that DEED's priorities may be reflected in appropriations in other appropriation bills. We do not think the appropriations for grants to named recipients present a legal problem.

³ Our file 883-07-0071 (June 12, 2007).

⁴ Article I, sec. 4, Alaska Constitution; First Amendment, U.S. Constitution. In evaluating statutes under the establishment clause, the United States Supreme Court applies three tests:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster "an excessive government entanglement with religion."

Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111 (1971). The Court continues to use these tests. See *McCreary County, Ky v. American Civil Liberties Union*, 73 U.S.L.W. 4639, 125 S.Ct. 2722 (2005)

⁵ See p. 61, lines 23 - 26; p. 63, lines 26 - 28; p. 64, lines 17 - 19; p. 67, lines 25 - 26; p. 69, lines 25 - 31.

Pages 70 - 83 include appropriations to DCCED for grants to municipalities under AS 37.05.315. Over 40 of these grants are for supplies or projects for municipal schools. As mentioned with regard to grants to named recipients for school projects, these projects have not necessarily been identified as priority projects by DEED.

We note that some of the projects for which grants are made in this section may have changed or already be underway or completed since the funding for the grant was originally vetoed last year. For example back up materials for a grant to the Anchorage School District for a student nutrition program emergency backup fuel system (p. 74, lines 25-28) indicate that the school district intended to use other funds to proceed with the project after it was vetoed, but could redirect those funds to other projects if the grant received funding in the fiscal year 2008 supplemental budget. If this project, or other projects for which funding was vetoed last year, has already been completed, then DCCED may not be able to execute a grant agreement with the municipality under AS 37.05.315 that provides that the municipality will spend the grant for the purposes set out in the appropriation. If a municipality seeks to apply a grant to debt the municipality has incurred for a project, validity of the expenditure will have to be determined.⁶

Although we have not identified other specific legal problems with appropriations for grants under this section, DCCED should contact this office if the current status of any project funded under sec. 13 raises legal questions.

Sections 14 - 15 set out the funding by agency and the statewide funding for the appropriations in sec. 13.

Section 16(a) of the bill appropriates money from the fees collected under AS 46.03.480(d), estimated to be \$2,800,000, from the commercial vessel environmental compliance fund to Department of Environmental Conservation (DEC) for the costs of the ocean ranger program. Subsections 16(b) - (nn) make a number of amendments to past appropriations for various water and sewer projects, reallocating money to village safe water study, design, and construction projects. The provisions of sec. 16 closely follow the provisions of sec. 13 of the bill as originally introduced, except that subsection (oo) was added by the legislature to limit use of reallocated funds to completion of the original scope of work listed for projects with projected funding shortfalls that are eligible for federal funding and that were approved through the annual priority list process, and to provide that projects receiving funds under (b) - (n) shall be funded in the order in which the projects were approved.

⁶ It is a general rule that the retirement of a pre-existing debt confers no benefit on the public. *See* 1995 Inf. Op. Att'y Gen. (June 15; 883-95-0113). Failure to confer a public benefit violates the public purpose doctrine set out in art. IX, sec. 6, of the Alaska Constitution.

Section 17(a) is the same as the proposed appropriation in sec. 14 of the original bill for the senior benefits payment program. The Legislature added a subsection (b) appropriating money to Department of Health and Social Services (DHSS) for a telephone system for front line social workers.

Section 18 was added by the legislature to appropriate money from the commercial vessel passenger tax account to Department of Revenue (DOR) for payment under AS 43.52.230(b) to the first five ports of call of the required share for fiscal year 2008 of the tax collected in calendar year 2007.

Section 19 includes appropriations and amendments to past appropriations that were proposed in sec. 15 of the original bill. The legislature reordered the appropriation subsections, and added a new subsection (f), reallocating to the Petersburg airport runway safety area an allocation that was made in 2007 for Nome airport rehabilitation, and increasing the amount of the allocation. The legislature also increased the earlier appropriations for airport improvement programs (subsecs. (e) and (k)).

Section 20 is an appropriation to the Office of the Governor, division of elections, for increased fiscal year 2008 operating costs for elections, which was included in sec. 16 of the original bill.

Section 21(a) and (b) of the bill include provisions for fund transfers that were included in sec. 17 of the original bill. The legislature added two large appropriations to this section. First, in subsection (c), the legislature appropriates a billion dollars from the general fund to the statutory budget reserve fund established by AS 37.05.540. This appropriation constitutes a transfer of money between different funds in the state treasury, and we do not believe the transfer will count toward the constitutional appropriation limit in art. IX, sec. 16 of the Alaska Constitution. We also believe that the provisions of AS 37.05.540(c) and (e), which purport to restrict the legislature's ability to appropriate money out of the statutory budget reserve fund, do not constitutionally limit the legislature's appropriation authority.⁷ Please let us know if you need us to elaborate on this advice.

Second, the legislature added an appropriation of \$180,000,000 from the general fund to the community revenue sharing fund, citing AS 29.60.850. Under section 35(a) of the bill, this appropriation is contingent on passage by the Twenty-Fifth Legislature and enactment into law of a measure creating the community revenue sharing fund. Although AS 29.60.850 does not yet exist, HCS CSSB 72(FIN) am H has been passed by the legislature, and transmitted to the governor. If enacted into law, sec. 6 of that bill would enact AS 29.60.850 and establish a community revenue sharing program.

⁷ See 1986 Inf. Op. Att'y Gen. (May 29; 883-86-0149).

Section 22(a) of the bill includes an amendment to a 2007 appropriation to the Alaska Housing Finance Corporation (AHFC) that was included in sec. 19 of the original bill. The legislature added two new appropriations to this section: a \$200,000,000 appropriation to AHFC for the home energy conservation and weatherization program, and a \$100,000,000 appropriation to the Alaska energy efficient home grant fund for the energy efficient home grant program.

Section 23(a) - (c) include provisions that were included in sec. 20 (a) - (c) of the original bill. Subsection (c) amends a 2006 appropriation to the Alaska Energy Authority (AEA) for the Alaska - British Columbia Intertie. The legislature removed a provision in subsection (d) related to a Qualified Trade Association Contract, and added a new subsection (d) to reappropriate up to \$2,000,000 of the unexpended balance of the appropriation amended by subsection (c) to the AEA for the Kake-Petersburg intertie. The legislature also added subsections (e) and (f), which include appropriations for the Kodiak Community Jail and Point Makenzie prison that were included in sec. 18 (a) and (c) of the original bill.

Section 24 of the bill includes appropriation, and an amendment to a 2007 appropriation, to the Department of Corrections that were included in sec. 21 of the original bill.

Section 25 of the bill includes an amendment to a 2007 appropriation to the DEED for fiscal year 2008 school performance incentive program payments that was included in sec. 22 of the original bill. The legislature changed the language of the amendment to include a specific amount of \$1,400,000.

Section 26(a) of the bill includes an amendment to language of a 2007 appropriation to Alaska Department of Fish and Game (ADF&G) that was included in sec. 23 of the original bill. The legislature added new subsections (b) and (c) to reappropriate the unexpended balance of a 2005 appropriation to ADF&G for design and construction of the Ruth Burnett Sport Fish Hatchery in Fairbanks, and for facilities upgrades, improvements and construction for Anchorage sport fish hatcheries.

Section 27 of the bill makes appropriations to the Department of Law for fiscal year 2008 judgments and settlements, fiscal year 2006 unpaid bills, implementation of a federal grant to stop violence against women, and fiscal year 2008 and fiscal year 2009 costs associated with a lawsuit. These appropriations were included in sec. 25 of the original bill.

Section 28 of the bill makes amendments to earlier appropriations to the Department of Transportation and Public Facilities (DOTPF), and a new appropriation for fiscal year 2008 and fiscal year 2009 costs related to federal Environmental Protection Agency enforcement actions and settlement costs, that were included in sec. 26 of the original bill.

Section 29 of the bill includes an amendment to a 2007 appropriation to the power cost equalization and rural electric capitalization fund that was included in sec. 27 of the original bill. The legislature increased the amount of the amended appropriation proposed by the original bill.

Section 30 of the bill includes an amendment to a 2007 appropriation and a new appropriation for state debt and other obligations that were included in sec. 28 of the original bill.

Section 31 of the bill includes ratifications of certain expenditures made in fiscal years 2005 - 2007, and increases in the appropriations from which the expenditures were paid, that were included in sec. 29 of the original bill.

Section 32 of the bill includes appropriations to the DCCED for grants to specified municipalities, political organizations, and school districts that are participating employers in the public employees' retirement system. This section implements the intent of the legislature expressed in sec. 1 of FCCS SB 125 (SB 125), that the legislature intends to adopt separate legislation making one-time grants to employers that the Alaska Retirement Management Board has determined have rates of less than 22 percent for fiscal year 2009, and to employers that made excess contributions to the public employees' retirement system during fiscal years 2005, 2006, and 2007. An earlier version of SB 125 included specific one-year and multiple-year rate relief for employers that made excess contributions or that had lower employer rates than the fixed rates established by SB 125. The fiscal note to FCCS SB 125 sets out the amounts that each entity was to receive as grants, and those amounts are reflected in the grants set out in sec. 32 of this bill.

Section 33(a) of the bill makes a \$2,600,000,000 appropriation from the general fund to the constitutional budget reserve fund for repayment of amounts owed the constitutional budget reserve fund. Subsection (b) sets out intent regarding the manner in which the Department of Revenue should invest the assets of the constitutional budget reserve fund. As with other such expressions of intent accompanying appropriation items, you may choose to follow this expression of legislative intent, or ignore it.

Section 34 of the bill provides that appropriations in secs. 10, 13, 19(h), 22(b), 22(c), 26(b), and 26(c) are for capital projects and lapse under AS 37.25.020.

Section 35(a) of the bill makes the appropriation to the community revenue sharing fund in sec. 21(d) contingent on passage by the Twenty-Fifth Legislature and enactment into law of a measure creating the community revenue sharing fund. HCS CSSB 72(FIN) am H has been passed by the legislature, and transmitted to the governor. Section 6 of that bill would establish a community revenue sharing program, if enacted into law. Subsection (b) makes the appropriations for grants in sec. 32 contingent on passage by the Twenty-Fifth Legislature and enactment into law of a version of SB 125. FCCS SB 125 has been passed by the legislature, and transmitted to the governor.

Section 36 of the bill provides a March 10, 2008, effective date for secs. 1, 16 - 20, 21(a), 21(b), 21(d), and 34 of the bill.

Section 37 of the bill provides a June 30, 2008, effective date for sec. 21(c).

Section 38 of the bill provides that, except as provided in secs. 36 and 37, the Act takes effect April 13, 2008.

This provisions for effective dates passed with the requisite two-thirds vote in both bodies and are therefore effective.

As we have stated in the past, please be advised it is not always possible to identify or comment on all legal issues in a large appropriation bill. However, we will assist the agencies throughout the year in interpreting and applying the provisions of this bill, as well as related legislation, to make sure that appropriations are implemented consistent with enabling statues and valid legislative intent.

Sincerely,

Talis J. Colberg
Attorney General

TJC:VBR:ajh