August 4, 1993

The Honorable John B. "Jack" Coghill
Lieutenant Governor
State of Alaska

Re: Review of Initiative on "Legislative Session Re-location"
Our File No: 663-93-0173

Dear Lieutenant Governor Coghill:

I. INTRODUCTION AND SUMMARY

You have asked us to review the application for an initiative petition requiring the Alaska Legislature to hold its regular legislative sessions at locations on the road system within the confines of a designated geographic area in central Alaska. The application and the proposed bill comply with the constitutional and statutory provisions governing the use of the initiative.

II. REVIEW OF APPLICATION

An application for an initiative petition must include the proposed bill, a statement that the sponsors are qualified voters who signed the application with the proposed bill attached, and designation of a three-member initiative committee. AS 15.45.030(1)-(3). The application meets these requirements. Additionally, AS 15.45.030(4) requires that the application contain the signatures and addresses of not less than 100 qualified voters. Your office must determine that this requirement has been fulfilled before a petition is issued.

III. REVIEW OF PROPOSED BILL

A. Introduction

A bill proposed by initiative must meet the four requirements set forth in AS 15.45.040: (1) the proposed bill must be confined to one subject; (2) the subject of the bill must be expressed in the title; (3) the enacting clause of the bill must be: "Be it enacted by the People of the State of

Alaska;" and (4) the bill may not include subjects restricted by AS 15.45.010.

The proposed bill reads:

> AN ACT RELATING TO
> LEGISLATIVE SESSION RE-LOCATION
> BE IT ENACTED BY THE PEOPLE OF THE STATE OF ALASKA:
>
> Section 1: PURPOSE AND POLICY: In order to make its sessions accessible by road to most residents the Alaska Legislature shall hold its regular sessions at locations on the road system within the confines of one hundred forty-four degrees (144•) and one hundred fifty-two degrees (152•) West Longitude, and fifty-nine degrees (59•) and sixty-six (66•) North Latitude.
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> By June 10th of each year the Legislative Council shall formulate and transmit to the governor a list of locations on the road system, within the above area, having facilities adequate for a legislative session.
>
> From this list the governor shall, by the following 30th of June, designate a particular location for the convening of the next regular session.
>
> Section 2: IMPLEMENTATION. The State of Alaska shall make the arrangements necessary to implement this Act.
>
> Section 3: EFFECTIVE DATE. This Act shall be effective immediately as authorized by law.

The proposed bill, as submitted by the sponsors, showing

the described geographical area is attached.

The proposed bill meets the first three requirements of AS 15.45.040: it is confined to one subject; the subject is expressed in the title; and the enacting clause is in the proper form.[1] See Yute Air Alaska, Inc. v. McAlpine, 698 P.2d 1173,

[1] Section 3 of the proposed bill provides that the bill would become "effective immediately as authorized by law." The effective date of an initiated law is governed by the Alaska Constitution. Article XI, section 6, provides that "[a]n

1180-82 (Alaska 1985).

The fourth requirement of AS 15.45.040 is that the proposed bill may not include any of the subjects restricted by AS 15.45.010. AS 15.45.010, which restates the restrictions on the initiative power in article XI, section 7, of the Alaska Constitution, provides:

> The law-making powers assigned to the legislature may be exercised by the people through the initiative. However, an initiative may not be proposed to dedicate revenue, to make or repeal appropriations, to create courts, to define the jurisdiction of courts or prescribe their rules, or to enact local or special legislation.

AS 15.45.010 raises three issues with regard to the proposed initiative: (1) whether the initiative would make an appropriation; (2) whether the initiative would enact local or special legislation; and (3) whether the initiative would enact a law (therefore subject to the initiative power), or whether it would enact a legislative rule, and if the latter, would the initiative be outside the scope of the initiative power.

B. Would the Proposed Initiative Make an Appropriation?

The proposed initiative would not make an appropriation. An appropriation "involves setting aside funds for a particular purpose." McAlpine v. University of Alaska, 762 P.2d 81, 88 (Alaska 1988) (emphasis in original); see also Thomas v. Bailey, 595 P.2d 1, 7-9 (Alaska 1979); Alaska Conservative Political Action Comm. v. Municipality of Anchorage, 745 P.2d 936, 938 (Alaska 1987) (initiative requiring conveyance of government assets is an appropriation whether the assets are money or other property). That state money would have to be expended in order for an initiative to be implemented never has caused the Alaska Supreme Court to invalidate an initiative. Rather, "[t]he reason for prohibiting appropriations by initiative is to ensure that the legislature, and only the legislature, retains control over the allocation of state assets among competing needs." McAlpine, 762 P.2d at 88 (footnote omitted) (emphasis in original).

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initiated law becomes effective ninety days after certification" of the election, provided a majority of the votes cast on the proposition favor its adoption. See also AS 15.45.220. Given the inconsistency between Section 3 and the constitutional and statutory provisions governing the effective date of an initiated law, Section 3 should be severed from the proposed bill. McAlpine v. University of Alaska, 762 P.2d 81, 94 (Alaska 1988).

The proposed initiative "leaves the legislature with all the discretion it needs with respect to appropriations" to conduct regular legislative sessions. McAlpine, 762 P.2d at 91. Nothing in the proposed bill usurps the legislature's appropriation powers. For these reasons, the proposed bill does not violate the constitutional and statutory prohibitions against using the initiative to make appropriations.

C. Would the Proposed Initiative Enact "Local or Special" Legislation?

Nor can the proposed initiative be characterized as "local or special legislation" prohibited by AS 15.45.010 and article XI, section 7, of the Alaska Constitution. In Boucher v. Engstrom, 528 P.2d 456 (Alaska 1974), the Alaska Supreme Court reviewed a proposed initiative to relocate the capital of Alaska from Juneau to a location to be determined by a commission. In deciding whether the bill proposed by the initiative would constitute local or special legislation, the court observed that "a law does not cease to be general, and become local or special, because it operates only in certain subdivisions of the state." Boucher, 528 P.2d at 461-62. The court concluded that the initiative should not be classified as local or special legislation, remarking that, "the question of the location of Alaska's capital has obvious statewide interest and impact." Id. at 461.

The initiative addressed in Boucher delineated criteria for a capital site, eliminating the Anchorage and Fairbanks areas from consideration. Id. at 462-463. The court held that the critical element in determining whether legislation was classified as "local" or "special" is whether there is a rational basis for the differentiation among areas of the state; the classification must bear a reasonable and proper relationship to the purposes of the act and the problem sought to be remedied. Id. at 463.

The court determined that if any conceivable factual basis would render an initiative's classification constitutional, the state's courts are obligated to uphold the statute. Applying this test, the court upheld the initiative at issue, finding a rational basis for eliminating Anchorage and Fairbanks from consideration on the premise that the new capital should be a planned capital not located in a relatively heavily urbanized area. Id. at 464.

A factual basis exists to support the proposed initiative. A requirement that the legislature hold its regular sessions at a place on the road system in central Alaska is rationally related to the purpose of the proposed bill, i.e., to make the legislature's regular sessions accessible by road to

"most residents" of Alaska.

Given the court's abandonment of the rigid two-tier formulation of the equal protection doctrine, the local or special legislation issue might now be analyzed by the court under a slightly different standard than was applied in Boucher. However, the same result would probably be reached under the current "sliding scale" analysis.

In Boucher, the court based its approach on the two-tiered standard applied to equal protection challenges to legislative classifications:

> The test to be employed [when considering whether an initiative violates the prohibition against local or special legislation] is substantially the same as that which would be applied to legislative classifications challenged as being contrary to the equal protection clause.

Id. at 463 n.25 (citations omitted).

Three years after it decided Boucher, the court considered a challenge to a law on grounds that it was local or special legislation because it affected only a limited geographical region of the state. Applying the Boucher test, the court said:

> The test to be employed in determining whether legislation contravenes [the local or special legislation prohibition] is substantially the same as that applicable to nonsuspect classifications challenged as violative of equal protection. Examining both the legislative goals and the means used to advance them, we must determine whether the legislation bears a "fair and substantial relationship" to legitimate purposes. If this standard is satisfied, the bill will not be invalid because of incidental local or private advantages. Legislation need not operate evenly in all parts of the state to avoid being classified as local or special.

State v. Lewis, 559 P.2d 630, 634 (Alaska 1977) (footnote omitted).

When Lewis was decided, the test applied to "nonsuspect classifications" in challenged enactments was a low level of scrutiny. Following Lewis, however, the court adopted a sliding scale approach for resolving equal protection challenges. See Isakson v. Rickey, 550 P.2d 359, 362 (Alaska 1976); State v. Erickson, 574 P.2d 1 (Alaska 1978); Alaska Pacific Assurance Co.

v. Brown, 687 P.2d 264, 269 (Alaska 1984).

The means-to-end inquiry the court has adopted in equal protection cases for its analysis of the issue of local or special legislation might be extended to the analysis of pre-election initiative challenges. This seems unlikely, however, in light of the court's reluctance to invalidate an initiative if any conceivable factual basis would render it constitutional. See Boucher, 528 P.2d at 463.

The court has held that in the absence of a clearly fatal constitutional flaw, an initiative should be allowed to proceed in order to facilitate the citizens' right to utilize the initiative, "an act of direct democracy guaranteed by our constitution." Yute Air Alaska, Inc. v. McAlpine, 698 P.2d at 1181. In using the initiative, the court has repeatedly recognized that the "people are exercising a power reserved to them by the constitution and the laws of the state, and that the constitutional and statutory provisions under which they proceed should be liberally construed." Id. (quoting Boucher v. Engstrom, 528 P.2d at 462, and Municipality of Anchorage v. Frohne, 568 P.2d 3, 8 (Alaska 1977)). Even when the local or special legislation issue is evaluated under a heightened scrutiny test, the proposed measure passes muster. The proposed initiative has a legitimate purpose and the means used to implement the stated purpose do not impair a constitutionally protected right.

E. Would the Initiative Enact a Law?

The initiative process may be used by the people to propose and enact laws. Alaska Constitution, art. XI, • 1. It is the "law-making powers assigned to the legislature" that may be exercised by the people through the initiative. AS 15.45.010. In addressing "law-making powers," article XII, section 11, of the Alaska Constitution provides that "[u]nless clearly inapplicable, the law-making powers assigned to the legislature may be exercised by the people through the initiative, subject to the limitations of Article XI." Thus, another threshold question is whether the initiative proposes to enact a law, or does it propose to enact a legislative rule, and if the latter, is the proposed initiative outside the scope of the initiative power.

The legislature clearly has the power to adopt rules of procedure for the conduct of its internal affairs. Article II, section 12 of the Alaska Constitution states in relevant part that "[t]he houses of each legislature shall adopt uniform rules of procedure." AS 24.05.120 provides that "[a]t the beginning of the first regular session of each legislature, both houses shall adopt uniform rules of procedure for enacting bills into laws and adopting resolutions." We conclude that the proposed initiative to relocate the regular sessions of the Alaska Legislature would

enact a "law," and not a legislative rule of procedure.[2]

Constitutional and statutory principles governing the use of the initiative are to be liberally construed to further the goal of allowing the people to vote and express their will by initiative. Boucher v. Engstrom, 528 P.2d at 462; Thomas v. Bailey, 595 P.2d 1, 3 and n.13 (Alaska 1979); Citizens Coalition v. McAlpine, 810 P.2d 162, 168 (Alaska 1991). Consideration should be given to interpretations that would render an initiative constitutional. Boucher, 528 P.2d at 462. But, if a proposed initiative cannot be reconciled with state constitutional provisions, the right of the people to legislate by initiative must give way to constitutional restrictions. Citizens Coalition, 810 P.2d at 168. And, although liberal construction of the people's initiative power is the general rule, constitutional limitations on the initiative power must also be interpreted as broadly as the people intended when they ratified the constitution. Id.

The Alaska Constitution does not prescribe the location for regular or special legislative sessions. Article II, sections 8 and 9, provide when, but not where, the legislature must convene. However, AS 24.05.090 provides that regular sessions of the legislature "shall convene at the capital each year" and AS 24.05. 100(b) provides that a "special session may be held at any location in the state." AS 24.05.100(b) also establishes the procedure for designating the location for a special session if it is to be convened at a location other than at the capital. Also relevant is AS 44.06.010, which provides that the capital of the state is at Juneau.[3] In addition,

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[2] In an opinion dated May 25, 1993, the Legislative Affairs Agency, Division of Legal Services, concluded that article II, section 12 of the Alaska Constitution does not provide authority for the legislature to designate by rule the place for holding its sessions. The opinion also states that the law is not entirely clear on this point. A copy of the opinion is attached.

[3] Legislative counsel, in the attached opinion, concludes that the legislature must convene its sessions at the "capital," and that the location of legislative sessions (at the capital) cannot be changed except by law changing the location of the capital itself. In short, the "capital" is the state's "seat of government" (Webster's Third New World Dictionary 332 (19--)), and "seat of government" is the place in which governmental authority, including legislative authority, is exercised. The location of the "capital" of Alaska is at Juneau. AS 44.06.010. The location of the "capital" may be changed by law enacted either by the legislature or by the people through the initiative; a constitutional amendment is not required. Starr v. Hagglund, 374 P.2d 316, 322 (Alaska 1962). However, the location of the "capital" cannot be changed by legislative rule; rather, a

article XV, section 20, of the Alaska Constitution provides that "[t]he capital of the State of Alaska shall be at Juneau." Article XV, section 20, is a transitional provision. Starr v. Hagglund, 374 P.2d 316, 322 (Alaska 1962).

There are several factors which mandate the conclusion that the proposed initiative would enact a "law," not a legislative rule of procedure. First, the location of legislative sessions is currently addressed in the Alaska Statutes. AS 24.05.090; AS 24.05.100(b). The initiative parallels statutes that the legislature has itself enacted. In addition, the legislature has not adopted a uniform rule designating the location of legislative sessions. And, most importantly, the location of regular legislative sessions is not a matter that governs the internal organization or workings of the legislature.

Because a legislative enactment takes the form of a statute does not necessarily mean that the subject matter of the statute is a "law" and not a "legislative rule." In fact, the Alaska Legislature has adopted statutes which purport to regulate its internal proceedings. In Malone v. Meekins, 650 P.2d 351 (Alaska 1982), the court concluded that AS 24.10.020, which prohibited a person other than the Speaker of the House from convening a session of the House, was a matter committed by the Alaska Constitution to the House, and therefore the question of whether the statute was violated was nonjusticiable.

> [A] statute such as AS 24.10.020 relates solely to the internal organization of the legislature, a subject which has been committed by our constitution [article II, section 12] to each house.

650 P.2d at 356 (footnote omitted). The court also determined that the "reasonable public notice" requirement of the Open Meetings Act, AS 44.62.310(e), as it related to the "internal organization" of one of the houses of the legislature, was nonjusticiable. Id. at 359.

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law is required to make such a change.

The logical extension of this argument is that a bill (such as the one proposed) purporting to designate just the location of legislative sessions, as opposed to the location of the capital, would be invalid even if enacted by the voters. However, even assuming this argument is correct, this is not a reason to deny certification of the initiative application under AS 15.45.010. As stated by the court in Yute Air, laws may be enacted on any subject; that they may or may not be effective is of no moment. 698 P.2d at 1176.

The distinction between a "law" and a "legislative rule" was also considered in Abood v. League of Women Voters, 743 P.2d 333 (Alaska 1987). In League of Women Voters, the court held that the Open Meetings Act (AS 44.62.310), as it applies to the legislature, is a procedural rule governing the internal workings of the legislature. In reaching this conclusion the court stated that "whether legislative business should be conducted in open or closed sessions is a procedural question which has traditionally been the subject of legislative rules." 743 P.2d at 337. In addition, pursuant to the constitutional grant of authority in article II, section 12, to adopt legislative rules, the legislature had adopted a uniform rule on this subject: Uniform Rule 22 which provides that all meetings of a legislative body are open to the public. Id.

The issue of whether an enactment constitutes a "law" or a "legislative rule" in the context of an initiative has not been considered by the Alaska Supreme Court. It has, however, been addressed by the courts in other states. In People's Advocate, Inc. v. Superior Court, 226 Cal. Rptr. 640 (Cal. App. 1986), the court held that an initiative which sought to regulate the appointment and powers of legislative committees and the method of adoption of rules for the conduct of the legislature would not have enacted a "law." Instead, the court held that the initiative sought to regulate the internal proceedings of both houses of the legislature, matters exclusively within the province of the houses affected by them under the California Constitution.[4] Therefore, the court concluded that the initiative was outside the scope of the initiative power. Id.

The question was also considered in Watson v. California Fair Political Practices Comm'n, 266 Cal. Rptr. 408 (Cal. App. 1990). The issue in Watson was whether an initiative measure prohibiting the sending of newsletters or other mass mailings by elected officials at public expense usurped the legislature's constitutional and statutory authority to govern its internal affairs. The court held that the initiative did not constitute an attempt at legislative rule making by the electorate. It did "not attempt to regulate the manner in which the legislature drafts it rules, appropriates its funds, or chooses its officers." 266 Cal. Rptr. at 413. The court went on to state:

[4] Article IV, section 7, subdivision (a), of the California Constitution provided that "[e]ach house shall choose its officers and adopt rules for its proceedings."

> While there can be no question that both the Senate and the Assembly possess the power to create and administer their own internal affairs, it does not strike us that the newsletter program in either house falls within the exclusive sway of the rule making process. These programs extend far beyond the halls of the Legislature and impact virtually every citizen of this state.
>
> The rule making authority is limited to the internal workings of the Senate and Assembly and does not encompass matters which are addressed to the world outside the Legislature.

Id. The court pointed out that unlike the initiative at issue in People's Advocate, the newsletter mailing initiative did not attempt to regulate any of the internal proceedings of either house of the legislature. Id. at 414.

The Massachusetts courts have also confronted the issue of the power of initiatives to govern legislative procedure. In Paisner v. Attorney General, 458 N.E. 2d 734 (Mass. 1983), the Massachusetts Supreme Judicial Court held that an initiative petition which sought to regulate the internal proceedings of both houses of the legislature did not propose a "law" and therefore was not a proper subject of the initiative. The initiative related to the organization and operation of the legislature and would have, for example, prescribed procedures for the nomination of presiding officers, the appointment of floor leadership positions, the selection of committee chairs, the reporting of matters by committees, the printing of bills, and notice of public hearings.

In deciding whether the initiative proposed to enact legislative rules or a law, the court considered the distinction between laws and rules. "First, laws govern conduct external to the legislative body, while rules govern internal procedures." 458 N.E. 2d at 739 (citing Immigration & Naturalization Service v. Chadha, 462 U.S. 919, 955-956 (1983). An initiative "aimed at the internal procedures" of the legislature would establish rules rather than laws because "its principal purpose is to order the internal operations" of the legislature "rather than to alter the legal duties of persons outside the Legislature." 458 N.E. 2d at 739.[5]

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[5] The second distinction between a law and a rule discussed by the court was that "a law is binding; a rule is not." Paisner, 458 N.E. 2d at 739. Legislative rule making authority is beyond the challenge of any other tribunal. Id. Again, the court concluded that the initiative at issue in Paisner sought to enact legislative rules, not a law, because even if the initiative were enacted the legislature could ignore its provisions and continue to determine its own procedures. Id.

Application of these principles to the initiative to relocate the regular sessions of the Alaska Legislature results in the conclusion that the initiative proposes to enact a law, not a legislative rule. The initiative, if enacted, would address where the legislature conducts its business, not how it conducts its business. It would not regulate the internal workings of the legislature, nor would it regulate the legislature's law-making procedures. Rather, the initiative would designate where the legislature is to convene its regular sessions, a matter external to the workings of the legislature. The impact of the enactment would be primarily on persons who are not members of the legislature, i.e., the public.[6] Also, if enacted, the initiative would have a binding effect on the governor and the Legislative Council, and would require substantive action by the governor and the legislature.[7] Additionally, the legislature has not adopted a uniform rule addressing the location of its regular sessions. Thus, the proposed initiative would enact a law, not a legislative rule, and is within the law-making powers appropriate for the initiative process.[8]

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This distinction is not particularly helpful in determining whether an enactment is a law or a rule because it addresses a result of the distinction once it is made, not how the distinction is made in the first instance.

[6] The stated purpose of the initiative is to make regular legislative sessions "accessible by road to most residents."

[7] The proposed bill conceivably violates the doctrine of separation of powers, a doctrine "implicit in the Alaska Constitution." State v. Fairbanks North Star Borough, 736 P.2d 1140, 1142 (Alaska 1987). The proposed initiative provides that the "Legislative Council shall formulate and transmit to the governor a list of [potential legislative session] locations" and "[f]rom this list the governor. . . shall designate where to convene the next regular legislative session." This may run afoul of the separation of powers doctrine because the governor would be required to interfere with a legislative function. Even assuming that it does, however, this problem is not a basis for denying certification of the initiative application.

[8] If a court found that the proposed initiative would enact a legislative rule, not a law, the question of whether the proposal could be enacted through the initiative process would have to be decided. As discussed above, the courts in other jurisdictions have held that legislative rules are the exclusive province of the legislature (typically by state constitution), they are not "laws," and they are not a proper subject of the initiative. People's Advocate, 226 Cal. Rptr. at 645; Watson, 266 Cal. Rptr. at 413; Paisner, 458 N.E. 2d at 738; see also Castello, The

IV. IMPARTIAL SUMMARY OF THE PROPOSED BILL

AS 15.45.090(2) requires that the initiative petition include an impartial summary of the subject matter of the bill. We recommend the following for purposes of the impartial summary:

> Requiring the Alaska Legislature to Hold Regular Sessions at Locations in the Central Region of Alaska.
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> This initiative would amend state law and require that the Alaska Legislature hold its regular sessions at locations on the road system within the geographical confines of one hundred forty-four degrees (144•) and one hundred fifty-two degrees (152•) West Longitude; fifty-nine degrees (59•) and sixty-six degrees (66•) North Latitude, an area with approximate corners at Homer, Manley Hot Springs, Circle, and Valdez, Alaska.

V. CONCLUSION

For the reasons discussed above, it is concluded that the proposed initiative complies with the constitutional and statutory provisions governing the use of the initiative. Therefore, provided the required number of signatures and addresses of qualified voters have been submitted in the application, we recommend that you certify the application and so notify the initiative committee. Preparation of the petitions may then commence in accordance with AS 15.45.090.

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Limits of Popular Sovereignty: Using the Initiative Power to Control Legislative Procedure, 74 Cal. L. Rev. 491 (1986).

Whether the Alaska Supreme Court would reach the same conclusion as these courts is unknown. However, our court has recognized the legislature's constitutional prerogative to make, interpret and enforce its own procedural rules and the judiciary will not interfere with that prerogative. Abood v. League of Women Voters of Alaska, 743 P.2d at 338. Thus, the court might decide that the people, through the initiative, may not interfere with that legislative prerogative.

Please let us know if you have any questions.

Very truly yours,

Charles E. Cole
Attorney General

CEC:BJB:kh

cc: Joseph Swanson, Director
Division of Elections