MEMORANDUM

State of Alaska

Department of Law

TO: The Honorable Fran Ulmer
Lieutenant Governor
Office of the Lieutenant Governor

DATE: July 6, 1999

FILE NO.: 663-99-0260

TELEPHONE NO.: (907) 465-2127

SUBJECT: Initiative Petition for an Act Increasing the Alcoholic Beverage Tax

FROM: John B. Gaguine
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Governmental Affairs Section – Juneau

You have asked us to review an initiative application that proposes an act increasing the alcoholic beverage tax, to determine if the proposed initiative complies with AS 15.45.030 and AS 15.45.040. We believe that section 1 of the initiative complies, and that the application should therefore be certified, but that section 2, providing for an effective date different from the effective date for initiatives set out in art. XI, § 6 of the Alaska Constitution (and also in AS 15.45.220), should be stricken from the proposal and not included in the petition.

Section 1 of the proposal would amend AS 43.60.010(a) to raise the alcoholic beverage tax on malt beverages from 35 cents a gallon or fraction thereof to $3.02; the tax on wine or other beverages of 21 percent alcohol or less from 85 cents a gallon or fraction thereof to $7.25; and the tax on beverages of more than 21 percent alcohol from $5.60 a gallon to $37.60. Section 2 provides that "[t]he increase in taxes as set forth above shall take effect on the first day of the month after the month in which this bill has been approved by a vote of the people."

AS 15.45.030 deals with the form of an application for an initiative. It requires that the application include the proposed bill to be initiated, a statement that the sponsors are qualified voters who signed the application with the proposed bill attached, the designation of an initiative committee of three sponsors, and the signatures and addresses of not less than 100 qualified voters. The proposed initiative on its face meets these requirements, though we of course cannot state that all the signatures are authentic, that the addresses are correct, or that the signers are qualified voters. We leave it to the Division of Elections to check this aspect of the application.[1]

From a literal standpoint the proposed bill is not "attached," as it is in fact included on the sheets bearing the signatures. However, we have no doubt that a court, if confronted with a challenge claiming that the bill was not "attached," would reject such a challenge. The intent of the requirement -- that sponsors know exactly what they are sponsoring -- is clearly met here.

AS 15.45.040 provides that the proposed bill must be confined to one subject, must have the subject of the bill expressed in the title, and must include an enacting clause that reads, "Be it enacted by the People of the State of Alaska." Again, these requirements are met. The form of the proposed bill is a little odd: the title is at the top, and is followed by the phrase "The proposed bill to be initiated is:". Strictly speaking, under this construction the title would not be seen as part of the bill, and of course the title is part. Again, though, we are sure that a court would reject a challenge to certification of the application based upon this defect. The title is clearly set out for the prospective sponsors to see.

As noted above, section 2 of the bill is invalid, because it conflicts with the Alaska Constitution. While ordinarily questions about the constitutionality of a bill proposed by initiative are not considered until the bill passes, there is an exception when the proposed bill would violate a provision of art. XI of the constitution (on initiative, referendum, and recall). *See, e.g., Citizens Coalition for Tort Reform, Inc. v. McAlpine*, 810 P.2d 162 (Alaska 1991) (upholding the lieutenant governor's denial of certification of an initiative application that would have prescribed or amended court rules, in violation of art. XI, § 7).

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[1] We would note in passing that under a recent decision of the United States Supreme Court, *Buckley v. American Constitutional Law Foundation*, _____ U.S. _____, 67 U.S.L.W. 4043 (1999), the statutory requirement that sponsors be qualified voters may violate the federal constitution. Since, however, all the sponsors here have certified that they are qualified voters, there is no need to address this question, unless it turns out that fewer than 100 signers are in fact qualified voters.

Our conclusion gives rise to another question: if section 2 would be unconstitutional, should certification of the application be denied, or should certification be granted while striking section 2? We previously addressed this question in 1993, in reviewing another initiative application that contained an effective date section inconsistent with the constitution. In that opinion, we concluded that the effective date section should be severed from the proposed bill, and cited in support of our conclusion *McAlpine v. University of Alaska*, 762 P.2d 81, 94 (Alaska 1988). 1993 Inf. Ops. Att'y Gen. at 305 n.1 (Aug. 4, 663-93-0173). We continue to adhere to that view. Hence our advice to you is that section 2 should be stricken from the application, and the application, minus the offending section, should be certified.

We should note that it is still an open question in Alaska as to whether the initiative may be used to amend tax laws. Some courts in other jurisdictions have ruled that referenda attempting to repeal legislatively enacted tax increases involve appropriations, and are therefore illegal. *See Thomas v. Bailey*, 595 P.2d 1, 5 n.19 (Alaska 1979). However, in a 1985 informal opinion, we stated that "since we have discovered no direct authority which concludes that tax measures are 'appropriations' within initiative or referendum restrictions, we have substantial doubt whether the court would extend the scope of the section 7 restrictions." 1985 Inf. Ops. Att'y Gen. at 367 (May 10, 366-401-85. We also continue to adhere to this view.

Please feel free to contact us if you have any questions about this memorandum.

JBG:bw