

MEMORANDUM

State of Alaska
Department of Law

To: Hon. Loren Leman
Lieutenant Governor

Date: August 15, 2003

File No. 663-03-0179

Tel. No. 465-3600

From: Gregg D. Renkes
Attorney General

Re: Review of initiative
application relating to cruise
ship activities

At your request, we have reviewed a proposed initiative measure relating to cruise ship activities. The measure is entitled "An Act pertaining to cruise ship activities and related to ship vessel operations taking place in the marine waters of the State of Alaska." We advise that you reject this application because the proposed initiative includes subject matter that may not be enacted by initiative. Our analysis follows.

The initiative measure would have six different effects on cruise ship operations:

- (1) the measure would levy an excise tax on commercial passenger vessels providing overnight accommodations in state marine waters, and would provide for the proceeds to be distributed to municipalities;
- (2) it would levy a tax on certain gambling activities conducted in Alaska;
- (3) it would require large commercial passenger vessels to have discharge permits for sewage, graywater, or other wastewater before discharging into state marine waters, and would require them to gather and report certain information about discharges;
- (4) it would require commercial passenger vessels to carry a state-employed marine engineer while in state waters to monitor operations, and would levy a fee to cover the cost of this requirement;
- (5) it would authorize citizen suits to enforce marine discharge statutes and permits; and

(6) it would require disclosures about on-ship promotions of shore-side businesses.

The scope of our review is set by statute and confirmed by court decision. An initiative committee is required under AS 15.45.020 to submit an initiative application to the lieutenant governor for review. The lieutenant governor's review of the proposed initiative should include analysis of its compliance with the statutory and constitutional provisions that regulate initiatives. *Boucher v. Engstrom*, 528 P.2d 456, 461 (Alaska 1974), *overruled in part on other grounds, McAlpine v. University of Alaska*, 762 P.2d 81 (Alaska 1988).

Our analysis of the cruise ship initiative under these provisions identifies two potential legal issues: whether the initiative is confined to a single subject, and whether the initiative is a proscribed dedication of revenues. Because we conclude that the initiative would violate the single subject rule and therefore should not be certified, we discuss but do not reach a conclusion about whether the initiative would have the effect of creating a constitutionally prohibited dedicated fund.

The proposed initiative violates the single-subject rule.

The contents of the proposed initiative are not confined to a single-subject as required by AS 15.45.040(1) and by the Alaska Constitution. While the constitution does not expressly apply the single-subject rule to initiatives, it 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." Alaska Const. art. XII, § 11. The Alaska Supreme Court has determined that the foregoing provision makes the single-subject rule of article II, § 13 applicable to both the legislature and direct legislation by initiative. *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1179 n.2 (Alaska 1985).

The sponsors of the initiative apparently intended to draft their measure so that each section relates to the general topic of cruise ships, or in the parlance of the proposed bill, "commercial passenger vessels." As a general matter, the Alaska Supreme Court has required only that the bill "embrace[] one single general subject." *Evans ex rel Kutch v. State*, 56 P.3d 1046, 1069 (Alaska 2002). While the various provisions of a single enactment must "fairly relate to the same subject, or have a natural connection therewith," *Short v. State*, 600 P.2d 20, 24 (Alaska 1979), "what constitutes one subject for purposes of article II, § 13 is broadly construed," and . . . "only a 'substantial and plain' violation of the one subject rule will lead [the Court] to strike down legislation on this basis." *Evans*,

56 P.3d at 1069 (quoting *State v. First Nat'l Bank of Anchorage*, 660 P.2d 406, 415 (Alaska 1982)).

The proposed bill covers taxes, discharge permits, gaming, unfair trade practices, and others issues, and generally unites these topics with the consistent theme of regulation of commercial passenger vessels. Nevertheless, three of the initiative's sections pertain to subject matter that extends beyond the single subject of regulating cruise ships.

First, the gambling provisions of the bill can be interpreted to apply more broadly. While section 2 purports to regulate games of chance and contests of skill on ships operating in Alaskan waters, its actual language applies also to gambling conducted on land. The initiative would add to title 5 of the Alaska Statutes a new chapter, 16, entitled "Games of Chance and Contests of Skill on Ships Operating on Waters Within the Jurisdiction of Alaska." Proposed AS 05.16.010 states that the chapter applies to the use of enumerated gambling devices used on a voyage in state waters, and to "any other gambling activities, except those conducted under AS 05.15.015, in the state." (Emphasis added). A closely related section in this new chapter would impose a tax on "the operator of a [sic] gaming or gambling activities in the state other than those conducted under AS 01.15 [sic]." Proposed AS 05.16.020. Reading these two sections together, the initiative would impose a tax on all gambling not conducted under AS 05.15,¹ including but not limited to gambling on vessels. Since the gambling provisions of the initiative apply to these "other gambling activities," the initiative would extend beyond cruise ship activities, and thus introduce a separate, unrelated subject.

The second problematic provision of the initiative is section 3, which would amend AS 43.20.021(a) to remove language providing that "nothing in [AS 43.20] or in AS 43.19 (the Multistate Tax Compact) may be construed as an exception to or modification of 26 U.S.C. 883." Removal of this language would reinstate the Alaska Supreme Court's holding in *State, Dep't of Revenue v. OSG Bulk Ships, Inc.*, 961 P.2d 399, 404 (Alaska 1998), that the Internal Revenue Code gross income exemption for a foreign corporation's income (26 U.S.C. § 883) is impliedly excepted by the Alaska Net Income Tax Act, AS 43.20. This would impact the calculation of taxes for foreign-flagged aircraft and foreign-flagged vessels operating outside of the passenger cruise ship industry. See Minutes, House Labor & Commerce Committee, March 30, 1998 (impact on export of natural resources from the state; impact on foreign-flagged ships, aircraft, international air cargo, air couriers, airlines, fishers and seafood processors). Since section 3 would extend beyond cruise ships to affect the tax liability of all foreign-flagged ships and aircraft, the initiative would introduce another separate and unrelated subject.

¹ Gambling not conducted under AS 05.15 includes all illegal gambling and "social game[s]," as defined in AS 11.66.280(2) and (9).

Finally, section 9 of the initiative increases from \$500 to \$5,000 the minimum liability in civil actions for violations of the Alaska Department of Environmental Conservation statutes, regulations, permits, and orders. By increasing the minimum amount of liability for activities unrelated to cruise ships, the initiative again would introduce a separate and unrelated subject.

Since sections 2, 3 and 9 do not apply only to the passenger cruise ship industry, the proposed initiative violates the single-subject rule. Therefore, we advise that you reject the initiative application because it is not in the proper form.

The proposed initiative creates a revenue scheme that raises questions about its compliance with the dedicated fund prohibition of the Alaska Constitution.

The initiative also suggests the possibility of another constitutional problem. Under article XI, section 7 of the Alaska Constitution, the initiative process “shall not be used to dedicate revenues.”² This prohibition is meant “to preserve control of and responsibility for state spending in the legislature and the governor” and to ensure that “the legislature would be required to decide funding priorities annually on the merits of the various proposals presented.” *Sonneman v. Hickel*, 836 P.2d 936, 938 (Alaska 1992); *see also City of Fairbanks v. Fairbanks Convention and Visitors Bureau*, 818 P.2d 1153, 1158 (Alaska 1991) (the purpose of the prohibition is to maintain flexibility in budgeting).

On its face, the language of the proposed initiative does not create a prohibited dedicated fund. It states the intent that the tax proceeds, which are segregated and deposited in a special account in the general fund, will be used for purposes related to cruise ship activities, and that certain municipalities be the beneficiaries of the revenues. Proposed AS 43.52.010 and .040. Despite the expressed intent that the fund should be used for particular purposes, however, the initiative measure is careful to assure that the legislature has final authority for determining how to spend the proceeds, providing that the legislature “may” appropriate money from the account for limited purposes. *See*

² Article XI, § 7 provides in relevant part that “[t]he initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation.” *See also* Alaska Const. art. IX, § 7 (providing in part that “[t]he proceeds of any state tax or license shall not be dedicated to any special purpose, except as provided in section 15 of this Article or when required by the federal government for participation in federal programs. This provision shall not prohibit the continuance of any dedication for special purposes existing upon the date of ratification of this section by the people of Alaska.”).

proposed AS 43.52.040(a) (legislature “may appropriate” money from account for stated purposes); AS 43.52.040(b) and (c) (distribution of the funds to ports is “subject to appropriation by the legislature”). The Alaska Supreme Court has held that such a segregation of funds, even with a stated express purpose regarding their intended usage, does not create a dedicated fund. *See, e.g., Sonneman*, 836 P.2d at 938-39 (provision in act that legislature “may appropriate” amounts in fund back to the Marine Highway system did not legally restrict the power of the legislature to appropriate and did not, by implication, prohibit the legislature from appropriating amounts from the fund for other purposes).³

But while the language of the initiative above does not create a dedicated fund, a potential problem arises because of an applicable federal law that mandates that the state must spend revenues collected from vessels for specific purposes. The Maritime Transportation Security Act of 2002, P.L. 107 – 295 (codified at 33 U.S.C. § 5(b)), places certain limits on the ability of states to collect taxes on commercial passenger vessels operating in state waters. The law permits the state to collect reasonable fees from ships and passengers, provided that the revenue collected be used “solely to pay for the cost of a service to the vessel or watercraft” and “to enhance the safety and efficiency of interstate and foreign commerce.” 33 U.S.C. § 5(b)(2)(A), (B). It could be argued, therefore, that the effect of the proposed initiative is to create a dedicated fund by collecting a tax from commercial passenger vessels that federal law requires the state to use only for specified purposes.

Notwithstanding the fact that the Alaska Supreme Court has instructed us to carefully consider constitutional restrictions when evaluating initiatives, it seems unlikely that the delegates to Alaska’s Constitutional Convention meant to limit the state’s taxing power whenever a federal law might restrict the use of the particular tax revenues. Further, the federal restrictions on the use of state tax revenues would not create the harm that the delegates intended the dedicated fund prohibition to prevent – earmarking of funds that future legislatures could otherwise annually appropriate according to current priorities. The state may not collect taxes on vessels that fall under 33 U.S.C. § 5(b) unless it spends the proceeds as that law requires. There is no possibility that these funds could be otherwise appropriated by the legislature.

There is no precedent on point that can guide our analysis of this unique dedicated funds question. In reviewing challenges to initiatives, the court generally is protective of

³ Missing in this case is the explicit statement found helpful by the court in *Sonneman* that the purpose of the bill was to not create a dedicated fund. 836 P.2d at 939-40. However, we believe that the court would probably infer that intent from the express provisions of the initiative measure.

the limitations the Alaska Constitution imposes on lawmaking by initiative, consistently stating that “[a]lthough liberal construction of initiative proposals is the general rule, constitutional limitations on the initiative power must also be broadly interpreted.” *Alaskans for Legislative Reform v. State*, 887 P.2d 960, 962 (Alaska 1994) (quoting *Citizens Coalition for Tort Reform v. McAlpine*, 810 P.2d 162, 168 (Alaska 1991)). This analysis would suggest that the court would be concerned that the cruise ship initiative might create a dedicated fund.

On the other hand, the court has analyzed the issue of whether an initiative oversteps the constitution’s limitations on the initiative power by examining the effect of the initiative’s provisions on the underlying purpose of the limitation. So, for example, in *City of Fairbanks v. Fairbanks Convention and Visitors Bureau*, 818 P.2d 1153, the court found that an initiative that would repeal a city ordinance designating that bed tax revenues be used for tourist and entertainment facilities was not a initiative that repealed an appropriation, which would have been unconstitutional under article IX, section 7. The court stated that while the city ordinance was arguably an appropriation, the purpose of the constitutional prohibition on repeal of appropriation by initiative – to retain control of the appropriation process in the legislative body – was not met by construing the term “appropriation” broadly in this context. *Id.* at 1156-57. This analysis suggests that the court might consider whether the purpose of the constitution’s prohibition on dedicated funds would be met by finding the cruise ship initiative to effect a dedicated fund. As discussed above, the cruise ship initiative does not create the harm that the dedicated fund provision was intended to prevent.

Conclusion

It is not necessary that we reach a conclusion on the dedicated fund issue. Because the proposed initiative covers more than one subject, the application should not be certified. We recommend that you do not sever the offending provisions, but rather that you return the application to the sponsors, who then can decide whether to appeal our decision or resubmit the initiative in a different form together with a new application.