

MEMORANDUM

STATE OF ALASKA DEPARTMENT OF LAW

TO: Mike Nizich
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Office of Governor

DATE: April 26, 2011

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FILE NO.: JU2010201740

SUBJECT: Sections 4, 36 and 37, CSSB
46(FIN) Contingency, Non-
severability, and Legislative
Intent Language

Introduction

As you requested, we have reviewed the contingency language in section 36, CSSB 46(FIN),¹ the non-severability provisions in section 37, and the legislative intent in section 4.² As set forth more fully below, our advice to you is as follows:

- (1) The Alaska Constitution establishes an appropriations process in which (a) the Governor is required to submit a budget for the legislature's consideration; (b) the legislature has the power to pass appropriation bills; (c) the Governor has line item veto authority of appropriations; and (d) the legislature has authority to override the Governor's veto.
- (2) Section 36 of CSSB46(FIN) links together all of the appropriation items contained in section 4 of the bill and requires enactment of all or none, without reduction.
- (3) This condition is unconstitutional and unenforceable because it deprives the Governor of his constitutional authority to review and reduce or strike individual appropriation items that do not serve the State's best interests.
- (4) Section 37 provides that if the condition in section 36 is invalid, all of the appropriation items that have been linked together in section 4 of the bill become invalid as well.

¹ Work Draft 27-GS1740\T, ("CSSB 46(FIN)").

² Legislative intent language in section 4 expresses that "the package of appropriations and projects listed [in section 4] are all necessary to achieve a statewide balance in addressing the state's diverse energy needs."

- (5) Because enforcement of this provision by a reviewing court would usurp the Governor's constitutionally assigned power to line item individual appropriation items, it is void and severable from the legislation.

Analysis

If enacted, the contingency language in section 36 of CSSB 46(FIN), the non-severability provisions in section 37, and the legislative intent in section 4 each would violate the Alaska Constitution in two ways: (1) by improperly impairing the Governor's line item veto power (art. II, section 15), and (2) by violating the confinement clause (art. II, section 13).

Governor's Constitutional Veto Power

Alaska's constitutional convention delegates intended to "create a strong executive branch with 'a strong control on the purse strings' of the state." *Thomas v. Rosen*, 569 P.2d 793, 795 (Alaska 1977). The Constitution gives the Governor this strong control in part by granting the Governor the power "by veto, [to] strike or reduce items in appropriation bills," commonly known as line item veto authority.³

The Alaska Constitution establishes an appropriations process in which (a) the Governor is required to submit a budget for the legislature's consideration (art. IX, section 12); (b) the legislature has the power to pass appropriation bills (art. II, secs. 1 and 13); (c) the Governor has line item veto authority of appropriations (art. II, sec 15); and (d) the legislature has authority to override the Governor's veto (art. II, sec. 16). *Simpson v. Murkowski*, 129 P.3d 435, 446 (Alaska 2006). Sections 36 and 37 of CSSB 46(FIN) would violate this process by negating the Governor's constitutional power to strike or reduce the individual energy project appropriation items in section 4.

Section 36 violates the Governor's constitutional powers by linking the appropriation for each energy project item to the passage and enactment of every other appropriation made in section 4, without reduction. This would usurp the Governor's line item veto power, thus upsetting the checks and balances between the executive and legislative branches. If

³ Alaska Const. art. II, § 15; *see also Simpson v. Murkowski*, 129 P.3d at 446 (the Governor may not only veto entire bills, he may by veto, strike or reduce items in appropriation bills).

the legislature could link one appropriation to another (or to 50 other appropriations), the legislature would eliminate the Governor's power to strike or reduce individual line items. The Governor would have only two choices — to accept or to veto every appropriation as a group. Allowing the linking of appropriations with such a contingency would too easily permit the legislature to circumvent the Governor's constitutional veto authority. *See Karcher v. Kean*, 479 A.2d 403, 412 (New Jersey 1984).⁴

Section 37 exacerbates this constitutional violation by doubling the unconstitutional linkage of appropriations for energy projects. If a court finds the contingency in section 36 to be invalid, the legislature attempts to achieve the same result through different means—by making that contingency provision non-severable from the energy project appropriations. Thus, even if section 36 does not survive court challenge, the legislature would still circumvent the Governor's line item veto power if a court upholds section 37. The bill effects an “all or nothing” approach to energy project appropriations either through application of either the contingency provision of section 36 or, if that does not work, through the non-severability provision of section 37.

A non-severability clause that would enable a legislature to overstep its constitutional authority would itself be unconstitutional and severable from legislation. *See Legislative Research Comm'n v. Brown*, 664 S.W.2d 907, 919 (Ky. 1984) (applying statutory severability clause to void and sever a non-severability clause used as part of a legislative attempt to usurp the Governor's constitutional authority). Upholding section 37 of CSSB 46(FIN) would promote the legislature's desire to unconstitutionally logroll the appropriations for multiple energy projects. These improper purposes underlying section 37 should lead a court to invalidate and, under AS 01.10.030, sever the non-severability clause from CSSB 46(FIN).

These contingency and non-severability provisions create inherent harm to Alaska's appropriation process. Even if the Governor were to choose not to line item veto any appropriation made in section 4, each appropriation would still be subject to legal challenge. Section 37's non-severability clause would invalidate every appropriation in section 4 if the legislature's attempt to usurp the Governor's constitutional veto powers

⁴ This would lead to uncontrolled “logrolling,” — “the practice of adding together in a single bill provisions supported by various legislators in order to create a legislative majority” — and would significantly limit the Governor's strong control on the purse strings. Richard Briffault, *The Item Veto in State Courts*, 66 Temp. L.Rev. 1171, 1177 (1993), *quoted in Alaska Legislative Council v. Knowles*, 21 P.3d 267, 373 n.33 (Alaska 2001).

with the section 36 contingencies is held to be unlawful. Any litigant opposed to even a single energy project contained in section 4 could effectively invalidate every section 4 appropriation by successfully challenging section 36.

This litigation risk would place a cloud over each appropriation that could impair the development of important energy projects. Sections 36 and 37 will potentially jeopardize the funding for energy projects until a court rules on the validity and severability of both sections. Until that time, no project proponent could rely on the availability of funds for an energy project from the section 4 appropriation. This uncertainty would make it difficult for project proponents to obtain necessary contracts to develop energy projects, and they may be exposed to contract damages if a project must be stopped because an expected appropriation is invalidated. It would also be difficult or impossible for a project proponent to finance additional project costs if funding from an appropriation is uncertain. Any lender or bond financing will require that all project funding be secured before additional financing will be made available on reasonable financial terms.

These legal risks would arise solely in the context of the legislature's attempt to usurp the Governor's constitutional power to exercise line item vetoes. A court should invalidate and sever sections 36 and 37 to avoid the harm done to the constitutional appropriation process. Severing those provisions would still leave the legislature with ultimate control over funding for the energy projects. If the Governor were to line item veto any of the appropriation items in section 4, the legislature has constitutional power to override that veto. Alaska Const. art. II, § 16. This legislative power makes the legislature's attempt in sections 36 and 37 to negate the Governor's constitutional veto power even more suspect.

In sum, the invasion of executive power functions make the contingency language in section 36 and the non-severability clause in section 37 unconstitutional under Article II, section 15, invalid, and severable from the legislation under AS 01.10.030.

Confinement Clause

The confinement clause (art. II, sec. 13) of the Alaska Constitution provides that “[b]ills for appropriations shall be confined to appropriations.” In *State Legislature v. Hammond*, Judge (now Chief Justice) Carpeneti adopted a five-factor test to determine whether language added to an appropriations bill violates the confinement clause:

- (1) The qualifying language must not administer the program of expenditures;

- (2) It must not enact law or amend existing law;
- (3) It must be the minimum necessary to explain the Legislature's intent regarding how the money appropriated is to be spent;
- (4) The language must be germane, that is, appropriate, to an appropriations bill; and,
- (5) It must not extend beyond the life of the appropriation.⁵

The Alaska Supreme Court adopted Judge Carpeneti's test on a “nonexclusive” basis in *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 377 (Alaska 2001).⁶

The contingency, non-severability, and legislative intent language in secs. 4, 36 and 37 violate the *Hammond* test in several ways. The legislature in these sections of the bill links multiple appropriations the legislature believes are necessary to implement a state energy policy based upon AS 44.99.115. But, AS 44.99.115 does not mandate that energy policy must be implemented by linking energy projects or appropriations. The relevant statutory energy policy language underlying the intent expressed in section 4 is:

“Therefore, it is the policy of the state to . . . (2) encourage economic development by . . . (C) working to identify and assist with development of the most cost-effective, long-term sources of energy for each community.”

AS 44.99.115(2)(C). This portion of the state energy policy encourages state agencies to work with individual communities to identify and develop cost effective sources of energy. Nothing in AS 44.99.115(2)(C), nor the remainder of that AS 44.99.115, makes state assistance to individual communities for the types of energy projects listed in section 4 dependent upon state assistance being provided “to achieve a statewide balance in addressing the state’s diverse energy needs.” *Quoting* section 4, CSSB 46(FIN). To the contrary, placing at risk the funding for any (and every) of the important energy projects listed in section 4 undercuts the statutory state energy policy by impairing the assistance which otherwise would be provided to develop “the most cost-effective, long-

⁵ Memorandum of Decision at 44 - 45, No. 1JU-80-1163 (Alaska Super., May 25, 1983).

⁶ The court described that it approaches confinement clause disputes with an assumption that an act of the legislature is constitutional.

term sources of energy for each community.” AS 44.99.115(2)(C). The legislature’s attempt to link “the package” of appropriations and energy projects for a statewide balance does not implement AS 44.99.115. Rather, the linkage exhibits improper logrolling as legislators attempt to ensure funding for the listed projects.

To the extent that the linkage of projects is intended to be connected to a state energy policy or program, the linkage would both create and control a new state energy policy or program, violating the confinement clause under the Hammond test. *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 377 (Alaska 2001). The legislative attempts to control how monies are spent on energy projects violates several parts of the *Hammond* test, as well as violating the separation of powers doctrine, which grants the power to administer the energy policy and program to the executive branch. The attempt to control expenditures violates part one of the Hammond test related to legislative attempts to administer programs of expenditure. The attempt to change and control the scope of the state energy policy also demonstrates a legislative attempt to modify the existing law related to energy policy, violating part two of the *Hammond* test.

The contingency, non-severability and intent language also violates the *Hammond* requirement that legislative appropriation language be limited to the “minimum necessary” to explain the appropriation. The Alaska Supreme Court has explained that this “minimum necessary” factor limits the legislature’s ability to include substantive law in an appropriation bill by cloaking it as a “description.” *Alaska Legislative Council v. Knowles*, 21 P.3d at 377-78. The attempt by the legislature to control the scope of the energy policy program by linking many appropriations and projects cloaks into the appropriation bill those substantive law results that the legislature desires to implement. This violates the “minimum necessary” component of the *Hammond* test.

The contingency, non-severability, and intent language also violate the germaneness test. Under the germaneness test, the Alaska Supreme Court observed in *Alaska Legislative Council v. Knowles*, 21 P.3d at 379, courts generally will uphold conditions expressed as purposes for the appropriation. Thus, courts will generally uphold appropriation language identifying the facilities, employee positions, buildings or types of buildings on which the money could be spent. And courts will uphold contingencies on appropriations that relate to the receipt or nonreceipt of specific funds, or relate to the occurrence or nonoccurrence of something that would make the expenditure desirable. However, contingencies that relate to things other than the need for or use of the money or the need for the activity, may be found insufficiently “connected” to the appropriation.’ *Id.*

The contingency, non-severability, and intent language in secs. 4, 36, and 37 of CSSB 46(FIN) likewise violate the germaneness test. Each appropriation for each energy project in section 4 stands on its own. Each appropriation will fund a separate and distinct energy project that promotes the state's energy policy under AS 44.99.115. The attempt in sections 36 and 37 of CSSB 46(FIN) to link the appropriation for each energy project in section 4 to the multiple appropriations for multiple other energy projects goes beyond what is germane to an appropriation bill.

In sum, the contingency and intent language, if enacted, would specifically violate multiple parts of the *Hammond* test, and would be unconstitutional under the Article II, section 13, of the Alaska Constitution.

Conclusion

Because the contingency language in section 36, the non-severability clause in section 37, and the legislative intent language in section 4 of CSSB 46(FIN), usurps the Governor's line item veto power (art. II, section 15) and violates the confinement clause (art. II, section 13), a reviewing court will likely find these provisions unenforceable.