STATE OF ALASKA

DEPARTMENT OF LAW

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May 9, 2008

The Honorable Sarah Palin
Governor
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Re: CCS HB 310 -- making appropriations for the operating and loan program expenses of state government, for certain programs, and to capitalize funds; making appropriations under art. IX, sec. 17(c), Constitution of the State of Alaska
Our file: 883-08-0074

Dear Governor Palin:

At the request of your legislative office, we have reviewed CCS HB 310, making appropriations for the operating and loan program expenses of state government, for certain programs, and to capitalize funds; and making appropriations under art. IX, sec. 17(c), Constitution of the State of Alaska. This bill is otherwise known as the fiscal year 2009 operating budget (beginning on July 1, 2008, and ending on June 30, 2009). We review the highlights of the bill below.

I. INTRODUCTION

This budget, as well as the budgets for the last few years, has set out the following introductory language in sec. 1: "[a] department-wide, agency-wide, or branch-wide unallocated reduction set out in this section may be allocated among the appropriations made in this section to that department, agency, or branch." Section 1, p. 2, lines 4 - 6; see also sec. 2, p. 46, lines 8 - 11.

We note two unallocated reductions in this bill: (1) a $46 million agency-wide unallocated reduction for the Department of Health and Social Services, sec. 1, p. 25, lines 25 - 26; and (2) a $300,000 reduction for the University of Alaska. Section 1, p. 42, lines 24 - 26. As we have previously stated, unallocated reductions that purport to effect more than one appropriation may raise constitutional questions. *See* 2006 Op. Att'y Gen. 1 (June 16; 883-06-0104); 2005 Op. Att'y Gen. (June 22; 883-05-0102). We typically do not recommend a veto of such reductions. *Id.*

II. GENERAL INTENT LANGUAGE

As in prior years, the bill has numerous expressions of legislative intent accompanying certain appropriation items. *See, e.g.*, sec. 1, p. 4, lines 13 - 15; p. 6, lines 18 - 19; p. 17, lines 24 - 25. The Department of Law has historically taken the position that such expressions of legislative intent are non-binding because they violate the confinement clause of the Alaska Constitution ("[b]ills for appropriations shall be confined to appropriations." art. II, sec. 13). In *Alaska State Legislature v. Hammond*, Judge (now Justice) Carpeneti adopted a five-factor test to determine whether such language violates the confinement clause:

> [T]he qualifying language must be the minimum necessary to explain the Legislature's intent regarding how the money appropriated is to be spent. It must not administer the program of expenditures. It must not enact law or amend existing law. It must not extend beyond the life of the appropriation. Finally, the language must be germane, that, appropriate, to an appropriations bill.

Memorandum of Decision at 44 - 45, No. 1JU-80-1163 (Alaska Super., May 25, 1983). Judge Carpeneti observed that this test could not "easily or mechanistically be applied" and that every section of challenged intent language "is a new case which must be examined separately." *Id.* at 45. The Alaska Supreme Court subsequently adopted Judge Carpeneti's test on a "non-exclusive" basis in the *Knowles II* decision. *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 377 (Alaska 2001).

The courts have had relatively few opportunities to consider whether certain instances of intent language violate the confinement clause. Judge Carpeneti determined that most (but not all) of the intent language at issue in *Hammond* was invalid under the confinement clause. *Hammond*, No. 1JU-80-1163 at 46-58. In *Knowles II*, the Court found certain contingency language invalid (21 P.3d at 379-81), and certain descriptive language non-binding (*Id.* at 383), but upheld the following language:

> This appropriation is for new CRC beds, not owned or controlled by municipalities, to provide space in institutions for violent felons. All beds will meet department standards for Community residential Centers. Contracts will be competitively bid.

Id. at 381 - 82. The Court found that while portions of this language violated some of the *Hammond* factors, these violations were offset by the fact that the language did not amend existing law and it did not extend beyond the life of the appropriation. *Id.* Accordingly, we think it is possible to craft intent language that is permissible under the confinement clause. In our experience, however, most uses of intent language in the budget violate the confinement clause. Nevertheless, we cannot rule out the possibility that some uses of intent language could be found by a court to be enforceable.

In the past, we have advised that expressions of intent may generally be ignored or followed as a matter of comity. We continue to offer this advice, however, in the event your office or a recipient agency is disinclined to follow intent language as a matter of comity, and we have not specifically addressed such language herein, we recommend further consultation with this office so that we may advise as to the extent such language may be enforceable under the *Hammond* factors.

Finally, as we advised in our reviews of intent language in previous appropriations bills, an expression of legislative intent may no longer be vetoed by the governor as a line item veto separate from the appropriation itself. In *Knowles II*, the Alaska Supreme Court ruled that expressions of intent do not constitute "items" subject to your veto power under art. II, sec. 15, of the Alaska Constitution. *Id.* at 377.

III. DEPARTMENT OF EDUCATION AND EARLY DEVELOPMENT

Similar to last year, the legislature has stated that a school district may not receive state education aid if it has a policy barring military, ROTC, CIA and FBI recruiters, the boy scouts, or ROTC programs from its schools. Section 1, p. 11, lines 3 - 14. As we concluded last year, we think this language probably violates the confinement clause. *See* Op. Att'y Gen. 2 - 3 (June 6; 883-07-0070).

In *Knowles II*, the legislature sought to make certain appropriations to the Alaska Seafood Marketing Institute contingent on ASMI not having any employees located outside the state with a salary over a certain level. The Alaska Supreme Court held that such conditional language violated four of the five Hammond factors (discussed in the margin above) in that the language (i) went beyond the minimum necessary language because it did not describe how the appropriated money was to be spent, (ii) sought to administer the agency's program, (iii) was not germane to the appropriations, and (iv) was substantive in nature. *Knowles II*, 21 P.3d at 380-81.

For similar reasons, we think the military recruiter language in the Department of Education and Early Development's budget violates the confinement clause. It is not the minimum necessary language because it does not describe how the appropriation is to be spent. It seeks to administer the agency's program by requiring that certain policies to be adopted. The military recruiter language is not germane to the foundation program appropriation. By requiring certain military recruiter policies on school districts, it resembles substantive law.

We recognize that in some cases, courts have upheld language conditioning an appropriation. *Knowles II*, 21 P.3d at 379. But there needs to be a substantial nexus between the condition and the appropriation -- this appears to be the purpose of the "germaneness" requirement. Here there is little nexus between a military recruiter access policy and the foundation formula.

Accordingly, we believe this language is unenforceable. The legislature may seek to pass a substantive bill that requires schools to provide military recruiter access.

IV. DEPARTMENT OF FISH AND GAME

The legislature has set out intent language that "regional resource development biologists be supervised by the senior management position responsible for the hatchery and mariculture programs." Section 1, p. 14, lines 29 - 31. This intent language plainly violates the second of the *Hammond* factors by seeking to administer the appropriation. We think it also violates the separation of powers doctrine in that it encroaches upon the power of the executive. We conclude that this intent language is unenforceable.

V. OFFICE OF THE GOVERNOR

The legislature has appropriated $7,290,800 to the Office of the Governor to distribute among various state agencies "for activities related to development of oil and gas resources in the state." Section 1, p. 17, lines 6 - 9. The legislature has further stated its intent that the Office of the Governor "provide an annual expenditure report for the fund appropriated for oil and gas development." *Id.*, lines 9 - 11. Generally speaking all expenditures of the executive branch, including these, must be tracked and reported for governmental financial accounting purposes. AS 37.05.210. Thus, this intent language is superfluous. Moreover, we have previously advised that reporting requirements are normally set out in statute. 2007 Op. Att'y Gen 2 (June 6; 883-07-0070).

VI. DEPARTMENT OF HEALTH AND SOCIAL SERVICES

There are several items in the Department of Health and Social Services (DHSS) portions of the budget that warrant mention. We discuss each in this section.

A. Abortion Funding

This year's budget, as did the past several years' budgets, contains the following language regarding abortion funding:

> No money appropriated in this appropriation may be expended for an abortion that is not a mandatory service required under AS 47.07.030(a). The money appropriated for Health and Social Services may be expended only for mandatory services required under Title XIX of the Social Security Act and for optional services offered by the state under the state plan for medical assistance that has been approved by the United States Department of Health and Human Services. This statement is a statement of the purpose of the appropriation and is neither merely descriptive language nor a statement of legislative intent.

Section 1, p. 17, lines 17 - 23. As we opined before, this language is intended to prevent expenditures from these appropriations for therapeutic or medically necessary abortions. DHSS, however, is under a superior court order to operate its Medicaid program in a constitutional manner by providing payment for them. That superior court order has been upheld by the Alaska

Supreme Court, which specifically rejected an argument that the separation-of-powers doctrine precluded the superior court from ordering the state to pay. *State, Dept. of Health & Social Services v. Planned Parenthood of Alaska*, 28 P.3d 904 (Alaska 2001). Thus, the DHSS is faced with a ruling from the state's highest court that the limit on payment for abortion services results in the operation of the Medicaid program in an unconstitutional manner, while DHSS is ostensibly without the money available to pay for services to operate the program legally. A veto of this provision is not available under as described in our analysis of *Knowles II*.

Six years ago, the plaintiffs in the Planned Parenthood case asked the superior court to clarify how similar budget restrictions impacted its judgment. The superior court, three days after the supreme court affirmed the judgment, issued an opinion ordering the DHSS not to comply with the restrictions. To date, therefore, DHSS has obeyed the superior court's order and we must advise DHSS to continue to obey it; *i.e.*, to continue to pay for these medically necessary abortions, until such time as a court reverses the order that is now in effect.

B. Grant Programs

The legislature has added intent language requesting that DHSS eliminate report requirements for grant recipients whose grants are $50,000 or less. Section 1, p. 18, lines 7 - 10. The language goes on to provide direction regarding grant procedures. *Id.* at lines 11 - 21; *see also id.* at p. 19, lines 20 - 29. This intent language strays into the administration of these grant programs, and accordingly we think violates the confinement clause. We also note that this intent language is internally inconsistent in that it requests that some reporting be terminated, but then requests that future grants be awarded on past performance, which might be difficult to comply with if there was no report on which to judge past performance.

C. Pioneer Homes

The bill contains the same intent language from previous years regarding an appropriation to the DHSS, Alaska Pioneers' Homes, which arguably goes beyond an expression of intent. The language appears to make changes to program requirements through an appropriation bill:

> It is the intent of the legislature that all pioneers' homes and veterans' homes applicants shall complete any forms to determine eligibility for supplemental program funding, such as Medicaid, Medicare, SSI, and other benefits as part of the application process. If an applicant is not able to complete the forms him/herself, or if relatives or guardians of the applicant are not able to complete the forms, Department of Health and Social Services staff may complete the forms for him/her, obtain the individuals' or designee's signature and submit for eligibility per AS 47.25.120.

Section 1, p. 18, line 30 - p. 19, line 8. The expression of intent that pioneers' home and veterans' home applicants complete forms to determine eligibility for supplemental program funding must be accomplished by statute or, if appropriate, regulations. Thus, we think there are confinement clause concerns with this language.

D. Fiscal Audit Directives

The legislature has set out intent language related to fiscal audits required in ch. 66, SLA 2003 of Medicaid providers. Section 1, p. 25, line 28 - p. 26, line 9. The intent language requests that the DHSS develop certain regulations and training standards. The appropriate place for this language is in a substantive law bill amending the original fiscal audit legislation.

VII. DEPARTMENT OF PUBLIC SAFETY

With respect to the Council on Domestic Violence and Sexual Assault (CDVSA) appropriation, the legislature provides as follows:

> Notwithstanding AS 43.23.028(b)(2), up to 10% of the amount appropriated by this appropriation under AS 43.23.028(b)(2) to the Council on Domestic Violence and Sexual Assault may be used to fund operations and grant administration.

Section 1, p. 36, lines 21 - 25. Under AS 43.23.028(a)(3), the commissioner of revenue is required to disclose to the public the amount by which each permanent fund dividend has been reduced as a result of appropriations from the dividend fund. However, money appropriated from the dividend fund to specified corrections and crime victims programs is not subject to the disclosure requirement, to the extent the amount appropriated from the fund to all the programs is less than the dividends that would have been paid to criminals who are ineligible under AS 43.23.005(d). Under AS 43.23.028(b)(2), appropriations from the dividend fund to the CDVSA "for grants for the operation of domestic violence and sexual assault programs" are among the appropriations that need not be included in the disclosure under AS 43.23.028(a)(3).

The exemption from disclosure under AS 43.23.028(b)(2) is limited to appropriations "for grants for the operation of domestic violence and sexual assault programs." To the extent that the "notwithstanding" language in the bill is intended to allow the CDVSA to use up to 10 percent of its appropriation from the dividend fund for the CDVSA's operations and grant administration, without affecting the appropriation's exemption from the disclosure requirement, this should be accomplished by a substantive amendment to AS 43.23.028(b)(2), not by language in an appropriation bill. Therefore, this provision is ineffective to alter the limitations on the exemption from the statutory disclosure requirement for appropriations to the CDVSA. If this is not the legislature's intent, it seems to us that the legislature could simply drop the "notwithstanding" language in the future -- there is nothing in AS 43.23.028(b)(2) that limits the legislature's authority to appropriate for fund operations and grant administration.

VIII. DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

As we have noted in previous years, there is a special lapse provision in the Department of Transportation and Public Facilities budget: "The amounts allocated for highways and aviation shall lapse into the general fund on August 31, 2009." Section 1, p. 41, lines 15 - 16. This special lapse provision makes the appropriations available for expenditure until they lapse into the general fund on August 31, 2009.

IX. UNIVERSITY OF ALASKA

The legislature has added new intent language requesting that the University of Alaska submit a report to the Legislative Budget and Audit Committee (LB&A) "which describes in detail the movement of funds and positions between allocations as well as reimbursable services agreements between University appropriations." Section 1, p. 42, lines 20 - 23. As noted above, reporting requirements should be set out in statute. Moreover, LB&A is statutorily authorized to obtain this information. AS 24.20.201(a). The intent language is unnecessary.

X. NEW LEGISLATION

Section 2 of the bill sets out the appropriations for several pieces of new legislation. If the legislation should fail to pass, then the appropriation lapses.

XI. LANGUAGE SECTIONS

Section 5(a) sets out legislative intent that the amounts appropriated in the operating budget are the full amounts to be appropriated for the identified purpose. Section 5(b) sets out new legislative intent requesting that money from the general fund be expended "conservatively" and that where an appropriation is funded by both program receipts and the general fund, that program receipts be expended first. With respect to the conservative expenditure of general fund dollars, an appropriation is authorization spend up to that amount -- but expenditures may only be made if the agency recipient has determined that the expenditure is appropriate and within the scope of the appropriation. With respect to the order of expenditure of funds, this intent language seems reasonable - program receipts in the form of agency fees may not exceed the actual operating costs of the agency. AS 37.10.050. In other words, program receipts are intended to defray the operating costs of agencies -- not saved and used as a budgetary cushion. Nevertheless, this expression of intent seeks to enact law with respect to how agency funds are to be accounted and spent. While reasonable, it belongs in statute, and therefore we think it violates the *Hammond* factors.

Section 6 of the bill states that funds appropriated in the operating budget include any amounts necessary to pay for job reclassifications.

Section 7 of the bill sets out intent language that "agencies restrict transfers to and from the personal services line." Moreover, the legislature requests that OMB submit two reports with respect to such transfers during FY 2009. The legislature has authorized transfers between

allocations in AS 37.07.080(e). Thus, this intent language seeks to amend existing law and therefore violates the *Hammond* factors. Moreover, it contains a reporting requirement, which as we have elsewhere noted, is normally set out in statute.

Section 8 of the bill appropriates to the Alaska Aerospace Development Corporation all federal receipts in excess of the amounts appropriated in sec. 1.

Section 9 of the bill appropriates from the earnings reserve account of the permanent fund the amount necessary to pay for PFDs and to inflation-proof the permanent fund. This section also appropriates oil and gas revenue to the principal of the permanent fund as required by the constitution and statute. Finally, this section appropriates the income from the Amerada Hess monies in the permanent fund to the Alaska capital income fund.

Section 10 of the bill appropriates from the state insurance catastrophe reserve account to the Department of Administration amounts necessary to fund the uses set out in AS 37.05.289(a).

Section 11(a) appropriates national forest income that will lapse in FY 2009 to the Department of Transportation and Public Facilities and to political subdivisions. Section 11(a) and (b) makes the usual appropriations related to the salmon enhancement and seafood development taxes to qualified regional associations and qualified regional seafood development associations, respectively.

Section 12 of the bill makes an appropriation to the Department of Education and Early Development for the school incentive program.

Section 13 of the bill makes an appropriation in the amount of $206,300,000 for the state's additional contribution under AS 14.25.085 to pay TRS unfunded liability, and in the amount of $241,600,000 for the state's additional contribution under AS 39.35.255 to pay PERS unfunded liability. Section 13 also makes an appropriation of $1,722,500 to the Department of Military and Veterans' Affairs for the Alaska National Guard and Naval Militia retirement system.

Sections 14 - 18 of the bill make various appropriations to the Departments of Labor and Workforce Development, Military and Veteran's Affairs, Natural Resources, Public Safety and Revenue.

Section 19 of the bill appropriates certain amounts to the Office of the Governor for distribution to agencies for relief from high energy costs. The amounts of the appropriations are tied to the price of oil and decrease as the price of oil declines. This section also sets forth a methodology for allocating the appropriation between agencies.

Section 20 of the bill appropriates certain license plate fees to the University of Alaska.

Section 21 of the bill appropriates federal and other program receipts.

Section 22 of the bill makes several fund transfers. Of note is the appropriation of NPRA proceeds in sec. 22(c). This language was changed this year to mirror the language in AS 37.05.530(g) such that payment of any NPRA funds for power cost equalization purposes is subordinated to payments to the permanent fund after grants to impacted communities are made, as required by federal law. In other words, until the payments to the permanent fund reach 25 percent of the gross amount of NPRA receipts, no NPRA receipts may be appropriated for power cost equalization purposes.

Section 22(s) of the bill appropriates a certain portion of oil and gas production tax to the community revenue sharing fund (AS 29.60.850), created this session by the enactment of SB 72.

Section 23 of the bill appropriates proceeds, if any, from claim settlements against reclamation bonds.

Section 24 of the bill appropriates retained fees and bankcard service fees. This provision now explicitly covers contingency fees.

Section 25 of the bill appropriates a sum for benefit adjustments for officials and employees of the executive, judicial, and legislative branches and to implement the terms of certain collective bargaining agreements.

Section 26 of the bill appropriates the proceeds of certain taxes and fees for refund to local governments. Section 26(c) of the bill sets out intent language to the effect that refunds to local governments may be assigned to another state agency. The Department of Revenue has recently encountered instances when a political subdivision has assigned the right to receive such shared taxes to a state agency, usually as a means to pay an existing obligation. This intent language seeks to enact substantive law and should be set out in statute.

Section 27 of the bill appropriates amounts necessary for debt service on a range of bonds.

Section 28(a) of the bill is the constitutional budget reserve (CBR) "reverse sweep" provision. Deposits in the CBR for FY 2008 that were made from subfunds and accounts other than the operating general fund to repay appropriations from the CBR are appropriated from the budget reserve fund to the subfunds and accounts from which they were transferred.

Section 28(b) of the bill appropriates to the CBR the unrestricted interest earned on investment of the general fund balances for FY 2009. This amount is intended to compensate the CBR for any use by the general fund of CBR monies for cash flow purposes during the fiscal year.

Section 28(e) of the bill appropriates $1 billion from the general fund to the CBR.

Section 29 of the bill sets out those sections of the bill for which the appropriations do not lapse as they are for capitalization of funds.

Section 30 of the bill allows for retroactive effect to June 30, 2008, for certain appropriations made in sec. 1 of the bill.

Section 31 of the bill sets out the sections that take effect only if other legislation passes. In each case the condition was satisfied. In sec. 31(a), sec. 22(s) takes effect because SB 72 was enacted into law. In sec. 31(b), the $18 million appropriation takes effect because HB 417 was enacted into law. In sec. 31(c), the appropriations in sec. 13 take effect because FCCS SB 125 was enacted into law.

Sections 32 - 33 of the bill set out the effective dates of the various sections of the bill.

XIII. CONCLUSION

Although we have identified no other constitutional or legal issues in this bill, please be advised that it is not always possible to identify or comment on all legal issues in a bill of this complexity. 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 certain that appropriations are implemented in a manner that is consistent with enabling statutes and valid legislative intent.

Sincerely,

Talis J. Colberg
Attorney General

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