

# STATE OF ALASKA

## DEPARTMENT OF LAW

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June 3, 2010

The Honorable Sean Parnell  
Governor  
State of Alaska  
P.O. Box 110001  
Juneau, Alaska 99811-0001

Re: HCS CSSB 230(FIN) am H -- Capital,  
Supplemental, and Other Appropriations  
Our file: JU2010201353

Dear Governor Parnell:

At the request of your legislative director, we have reviewed HCS CSSB 230(FIN) am H, making and amending appropriations, including capital appropriations, supplemental appropriations, and appropriations to capitalize funds. In short, this is our legal review of the fiscal year 2011 capital budget.

### **I. General Comments**

We have reviewed all appropriations set out in this bill and have several general comments on the bill overall. As in prior years, the bill has numerous expressions of legislative intent and contingencies accompanying certain appropriation items. *See, e.g.*, p. 92, lines 14 - 26 and p. 106, lines 19 - 20 (legislative intent); p. 178, Section 58 (contingencies). As previously noted, this office historically has 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.

We will also set out our specific comments regarding appropriations of which you have raised questions as well as other appropriations that raise particular legal concerns, or are otherwise significant.

## **II. Sectional Analysis**

### **A. Sections 1 - 2**

Section 1 of the bill, pages 2 - 6, sets out the appropriations for supplemental capital projects and grants to various named state agencies. Significant appropriations in this section include \$14,990,300 to the Department of Health and Social Services to complete the Medicaid Management Information System (p. 2, lines 25 - 27) and \$18,957,500 for airport improvements (p. 4, line 27). The effective date of the appropriations made in sec. 1 is April 19, 2010. *See* sec. 61. Section 2 of the bill sets out the funding by source and agency for each of the appropriations made in sec. 1. Page 7. Section 3 of the bill sets out the statewide funding for the appropriations made in sec. 1. Page 8. We find no legal concerns with these sections.

### **B. Sections 4 - 6**

Section 4 of the bill, pages 9 - 14, makes appropriations for deferred maintenance capital projects and grants to various named state agencies, including \$10,250,000 to the Department of Administration for governor's house deferred maintenance (\$1,000,000) and the remaining \$9,250,000 for statewide deferred maintenance projects. Page 9, lines 10 - 23. This section also appropriates \$37,500,000 to the University of Alaska for maintenance and renovations (p. 14, lines 18 - 21) and \$2,500,000 to the Alaska Court System for deferred maintenance projects (p. 14, lines 25 - 26). Named recipient grants under AS 37.05.316 are made to several hatchery facilities. Page 10, lines 3 - 11. Section 5 of the bill sets out the funding by source and agency for each of the appropriations made in sec. 4. Section 6 of the bill sets out the statewide funding for the appropriations made in sec. 4. The effective date of the appropriations made in sec. 4 is April 19, 2010. *See* sec. 61. We find no legal concerns with these sections.

### **C. Sections 7 - 9**

Section 7 of the bill, pages 18 - 55, sets out appropriations for capital projects and grants to numerous state agencies. Significant appropriations in this section include the following:

- (1) Department of Commerce, Community, and Economic Development (DCCED) -- \$10,000,000 for Alaska Energy Authority (AEA) Railbelt Large Scale Hydro Planning, Design and Permitting (p. 19, lines 16 - 19); \$50,250,000 to the AEA for Renewable Energy Round Three Grants (p.19, lines 20 - 22); \$24,500,000 to AEA for energy projects (p. 20, lines 22 - 33); \$5,970,000 for community block grants and \$3,186,500 for community development assistance (p. 21, lines 4 - 28).
- (2) Department of Education and Early Development -- \$24,786,959 to the major maintenance grant fund, allocated to various schools and education programs (p. 22, lines 16 - 33; p. 23, lines 3 - 12).
- (3) Department of Environmental Conservation -- \$4,071,900 drinking water capitalization grant subsidy funding (p. 23, lines 19 - 21); \$48,500,000 for Village Safe Water and Wastewater Projects (p. 23, lines 27 - 33 to p. 24, line 3);

- \$42,921,576 for Municipal Water, Sewage, and Solid Waste Facilities Grants (AS 46.03.030), allocated to various municipalities (p. 24, lines 4 - 33 to p. 26, lines 3 - 10).
- (4) Department of Fish and Game -- \$9,000,000 for Pacific Coastal Salmon Recovery Fund and \$7,500,000 for Salmon Treaty Chinook Fishery Mitigation (p. 27, lines 9 - 13).
  - (5) Department of Health and Social Services -- \$9,880,000 for Johnson Youth Center Renovation and Remodel to meet Safety and Security Needs - Phase 1 (p. 28, lines 13 - 16).
  - (6) Department of Labor and Workforce Development -- \$4,000,000 for Fairbanks Pipeline Training Center Construction, Utilities and Equipment (p. 28, lines 31 - 33).
  - (7) Department of Military and Veteran's Affairs -- \$8,342,000 for Army Guard Facilities Projects (p. 19, lines 12 - 14); \$6,000,000 for Interior Alaska Veterans Cemetery Design and Planning (p. 29, lines 21 - 23); and \$9,500,000 for State Homeland Security Grant Programs (p. 29, lines 26 - 27).
  - (8) Department of Public Safety -- \$5,000,000 for Public Safety Academy Driver Training Facility Land Acquisition and Construction (p. 33, lines 4 - 7).
  - (9) Department of Revenue, Alaska Housing Finance Corporation (AHFC) -- \$9,708,504 for AHFC San Roberto Redevelopment (p. 34, lines 26 - 27); \$6,000,000 for AHFC Housing Loan Program with allocations to teacher, health and public safety professionals housing and village public safety officers housing (p. 35, lines 15 - 21).
  - (10) Department of Transportation and Public Facilities -- \$9,000,000 for Fairbanks Metropolitan Transportation System College Road Pavement Rehabilitation (p. 36, lines 19 - 23); \$22,022,000 to Highways and Facilities, allocated to various projects (p. 37, lines 11 - 33); \$66,800,000 for statewide federal programs, allocated to various projects (p. 38, lines 21 - 33 to p. 39, line 12); \$267,940,500 to the airport improvement program (p. 39, lines 13 to p. 43, line 24); \$537,350,240 to the surface transportation program (p. 43, line 25 to p. 54, line 15).
  - (11) University of Alaska -- \$10,000,000 for UAF Engineering & Technology Project Design and Development (p. 54, line 33 to p. 55, line 4); \$20,600,000 for UAF Life Sciences Classroom and Lab Facility and \$15,000,000 for University Receipt Authority (p. 55, lines 5 - 9).
  - (12) Alaska Court System -- \$18,000,000 Boney Courthouse Campus Renovation (p. 55, lines 13 - 14).

Section 8 of the bill sets out the funding by source and agency for each of the appropriations made in sec. 7 (pp. 56 - 59). Section 9 of the bill sets out the statewide funding for the appropriations made in sec. 7 (pp. 60 - 61). We find no legal concerns with these sections.

#### **D. Sections 10 - 12**

Section 10 of the bill, pages 62 - 112, sets out appropriations for grants to municipalities

under AS 37.05.315, public library construction grants, and grants to unincorporated communities under AS 37.05.317 to be administered by the DCCED. We find no substantial legal issues with these appropriations, but note that where the grant is to a municipality to benefit a private entity, the municipality is responsible for ensuring that the grant will be spent for the purpose appropriated and assure that, to the extent consistent with the purpose of the appropriation, the facilities and services provided with the grant will be available for the use of the general public.

In this section, there are several appropriations with intent language that are of legal significance. One is the appropriation of \$4,800,000 to the City of Homer from the general fund for a natural gas pipeline project from Anchor Point to Homer (p. 92, lines 12 - 26). Among other things, the intent language provides that consumer costs for providing natural gas from this state-funded pipeline not be less than the costs to other consumers in the Cook Inlet basin; that the funds be used to offset consumer costs for providing natural gas in the Cook Inlet basin; that the funds be used to offset consumer rates for natural gas in the Cook Inlet Region; and that the funds be used by the City of Homer to create a pipeline development plan, which would include areas inside and outside Homer's municipal boundary. Because the intent language appears to (1) go beyond "the minimum necessary to explain the legislature's intent regarding how the money is to be spent," (2) attempts to administer the program, (3) "enact law," (4) "extend beyond the life of the appropriation," and (5) includes language that is not germane to the appropriation, it is quite possible that a court could hold that the intent language violates the confinement clause of the Alaska Constitution if it were challenged. Alaska Const. art. II, sec. 13; *See Alaska Legislative Council v. Knowles*, 21 P.3d at 377. That said, "in approaching confinement clause disputes, we are mindful that the Alaska Supreme Court will assume that an act of the legislature is constitutional. *Knowles*, 21 P.3d at 379 ("The burden of showing constitutionality is on the party challenging the enactment; doubtful cases are to be resolved in favor of constitutionality.") Of course, Homer may, at its option, comply with the legislative intent to the extent it is able. We are available for additional consultation to the affected state agency if needed.

On page 106, lines 16 - 20, there is an appropriation of \$15,000,000 for the Sitka Blue Lake Hydroelectric Expansion. The intent language accompanying this appropriation is for the appropriation to be matched 50/50 with local funds. However, this appropriation is made under AS 37.05.315, which does not mandate that appropriations be matched with local funds. It is not known if such a match is expected to be forthcoming from Sitka. It is our understanding that the expansion will cost more than the amount appropriated here. Thus, compliance with the intent language may be the practical reality of accepting the appropriation.

The appropriations to DCCED to administer the matching grant program for library construction and expansion under AS 14.56.355 - 14.56.356 are on pages 108 and 109. The funds from these appropriations will be disbursed in the form of grants to municipalities under AS 37.05.315 for public library construction projects identified by the Alaska Library Association. We note that the appropriation on page 109, line 7 for the Cordova Center project in Cordova, Alaska is intended to provide a social, educational, and economic anchor for the City of Cordova that is still hard hit by the collapse of several fisheries. The Center will contain the city administrative offices, library, and museum as well as conference facilities. The money

appropriated in this is a critical part of leveraging an additional \$7 million to be provided by the Exxon Valdez Oil Spill Trustee Council to Cordova for the project. The Trustee Council conditioned its grant of the monies on the City of Cordova obtaining firm commitments for the full funding of the estimated \$21 million needed to construct the Center no later than December 31, 2010. Absent this appropriation and a second appropriation contained on page 87, line 20, it is likely that the City will not be able to meet that goal.

Section 11 of the bill sets out the funding by source and agency for each of the appropriations made in sec. 10. Section 12 of the bill sets out the statewide funding for the appropriations made in sec. 10. The effective date of the appropriations made in sec. 10 is April 19, 2010. *See* sec. 61. Except as noted, we have no other legal concerns with these sections.

### **E. Sections 13 - 15**

Section 13, pages 115 - 146, makes appropriations for capital project grants to named recipients under AS 37.05.316 to be administered through the DCCED or the Department of Education and Early Development (DEED).

We have some general comments about named-recipient grant appropriations. Our general comments are set out below.

Named-recipient grants administered through DCCED and DEED are subject to a process in which the grantee must submit a proposal for administrative review before the grant is approved and finalized. A grant agreement must be executed before issuance of the grant and a department is charged with oversight of grant expenditures for conformance with legislative purposes and the public purpose clause of the Alaska Constitution.<sup>1</sup> Grants not in the public interest must be rejected. There are numerous named-recipient grants but not all need to be commented on from a legal perspective. Therefore, as in past years we are providing discussion of particular grants for named recipients and noteworthy legal considerations.

#### **1. Religious Entities**

Section 13 of the bill contains several named-recipient grant appropriations to religious or religious-affiliated entities. Such grants raise legal concerns since the Alaska and United States Constitutions both prohibit the establishment of religion. Article I, sec. 4, Alaska Constitution; First Amendment, United States Constitution. The United States Supreme Court evaluates establishment clause issues with three tests:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits

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<sup>1</sup> Art. IX, sec. 6 of the Alaska Constitution provides as follows: "No tax shall be levied, *or appropriation of public money made*, or public property transferred, nor shall the public credit be used, except for a public purpose." (Emphasis added).

religion . . .; finally, the statute must not foster "an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111 (1971). The Court continues to use these tests. *See McCreary County, Ky v. American Civil Liberties Union*, 73 U.S.L.W. 4639, 125 S.Ct. 2722 (2005).

In the bill, we note appropriations to several Catholic Community Services, Inc., entities: page 124, lines 13 - 33; page 125, lines 3 - 14. There is also a \$3,000,000 appropriation to the Covenant House Alaska for facility construction. Page 127, lines 29 - 31. And, there is an appropriation to the Juneau Cooperative Christian Ministry for Glory Hole Dormitory Upgrades (\$65,000). Page 134, lines 11 - 13. These religious or religious-affiliated entities provide social services to the general public in the areas in which they are located. We understand that each of these grants is to assist the entity in its delivery of social services to the general public. We further understand that the social services these organizations provide are made available to those in need on a non-sectarian basis. Accordingly, we believe that the *Lemon* tests are satisfied. Providing social services on a non-sectarian basis is a legitimate secular purpose that neither advances nor inhibits religion. Moreover, we do not see excessive government entanglement through these grants.

## 2. Grants to Tribal Entities

There are numerous named-recipient grantees that are Alaska Native tribal entities (tribal councils, villages, and IRA councils) in this section of the bill. Our general comment regarding such grants is that DCCED is reminded that it must obtain a waiver of sovereign immunity from the tribal entity on a form that has been approved by this office before grant monies can be dispersed to the entity. Also, the grantee must, as with all grantees that receive public funds, agree that the expenditure of the grant money will serve a public purpose. *See* 1981 Inf. Op. Att'y Gen. (April 27; File No. J-66-335-81) *citing* art. IX, sec. 6 of the Alaska Constitution [public purpose clause].

Section 14 of the bill sets out the funding by source and agency for each of the appropriations made in sec. 13. Section 15 of the bill sets out the statewide funding for the appropriations made in sec. 13. Except as noted above, we find no legal issues in these appropriations.

### **F. Sections 16 - 18**

Section 16 of the bill, pages 149 - 151 appropriates to the DCCED \$49,525,000 to disburse in the form of grants to municipalities and named recipients under AS 37.05.315 - 37.05.316 for capital projects related to commercial passenger impacts in Alaska. We note that a grant recipient must first submit a proposal that will then be subject to administrative review before the grant is finalized. A grant agreement must be executed before issuance of the grant.

As described in secs. 17 and 18 of the bill, pages 152 and 153, the funding source for these capital projects is the commercial vessel passenger tax account and the regional cruise ship

impact fund, both in the general fund. Both of these accounts are made up of tax proceeds collected from passengers who travel in Alaska on a large commercial passenger vessel (250 berths or more) for more than 72 hours.

Some of the appropriation items contained in sec. 16 of the bill are subject to legal challenge as being in violation of spending restrictions imposed upon these tax proceeds under: (1) the Commerce Clause; (2) the Tonnage Clause; and, (3) 33 U.S.C. sec. 5. Based upon our review of the above constitutional and statutory provisions and applicable case law, although there is some grey area in this area of the law, we believe that we are in a good position to defend appropriations that defray the cost of services or facilities provided to safely and efficiently accommodate large commercial passenger vessels and its passengers while visiting Alaska.

That said, the following appropriations may be vulnerable to legal challenge either because the back-up documents do not demonstrate that the project is related to a transactional benefit received by the taxpaying passengers or large commercial passenger vessels, or because the project conveys more than an incidental benefit upon Alaska residents or other visitors, yet no effort was made to apportion the costs between user groups<sup>2</sup>:

- (1) Southeast Alaska State Fair Inc (Harriet Hall ADA upgrades);
- (2) Juneau (Centennial Hall emergency relief center improvements);
- (3) Petersburg (design and construction of commercial dock)<sup>3</sup>; and
- (4) Sitka (Swan Lake recovery and improvements).

Section 16 of the bill also makes a grant to an unincorporated community that is a federally recognized tribe, Chilkat Indian Village of Klukwan (Klukwan). This is an appropriation of \$2 million dollars to purchase a private dock and vessel located in the city of Haines. According to the back-up documents, Klukwan plans to purchase this dock and vessel from Klukwan, Inc. for \$1.5 million dollars and use the remaining \$500,000 to repair the vessel and cover various start-up costs. Their business plan is to run the vessel from Haines to Skagway to bring cruise ship passengers back to Haines to participate in shore-based excursions in and around Haines, including the option of riding a bus to the Jilkaat Kwann Cultural Heritage Center in Klukwan.

It also bears noting that because there is already a private business in Haines offering a ferry service between Haines and Skagway, this appropriation may lead to criticism that the State of Alaska is unfairly helping one business compete with an already existing private business that is not the recipient of a state subsidy.

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<sup>2</sup> *Bridgeport and Port Jefferson Steamboat Company v. Bridgeport Port Authority*, 567 F.3d 79 (2nd Cir. 2009) (Passenger fee in violation of Commerce because nothing in record indicated how the portion of dredging costs borne by taxpaying ferry passengers compared to costs borne by larger vessels using same dock).

<sup>3</sup> This dock will not accommodate large commercial passenger vessels or passengers disembarking from such vessels.



**G. Sections 19 - 21**

Section 19 of the bill makes appropriations for capital projects from \$397,200,000 in anticipated general obligation bond proceeds. Pages 154 - 157. The general obligation bonds to fund the projects in sec. 19 are authorized under separate legislation, SCS CSHB 424(FIN); however, that bill has not yet been transmitted to your office.

Appropriations of particular note in sec. 19 include \$128,500,000 to the School Construction Grant Fund (AS 14.11.005), allocated to certain schools located in the Lower Yukon and Lower Kuskokwim school districts. Page 154, line 23 through page 155, line 5. And, we note appropriations to the University of Alaska for the UAA Sports Arena (\$60,000,000) and UAF Life Sciences Classroom and Lab Facility (\$88,000,000). Page 155, lines 26 - 30. While we find no legal issues as to the authority to apply general obligation bond proceeds to capital projects provided the authorizing legislation permits, there are concerns if you anticipate use of your line-item veto power of appropriations in this section.

The Alaska Supreme Court has held that the governor may not use the line-item veto power to veto general obligation bond authorizations. *Thomas v. Rosen*, 569 P.2d 793, 796-97 (Alaska 1977). This section does not contain the bond authorizations, but rather appropriations of the "anticipated" bond proceeds authorized by SCS CSHB 424(FIN) that will be subject to approval by the voters if the bill becomes law. We question the necessity of including these as appropriation items in this bill since they are anticipatory. Yet, once included as appropriation items, it is arguable that they are subject to the governor's line-item veto. The dissent in *Thomas* suggested as much. *Id.* at 799; *see also* 1999 Op. Att'y Gen. 2 (Dec. 21; 663-00-0064). We note, however, that the issue of anticipated general obligation bonds proceeds included in an appropriations bill (on bonds yet to be voted on and approved by the electorate) was not addressed in the *Thomas* case because the issue concerned the attempted line-item veto in a bond authorization bill. In that case the Court said:

... if the governor's veto of bond authorizations were to prevail, it would in effect allow the executive to interpose its judgment between the legislature and the electorate. Such an expansion of item veto power is unwarranted and does violence to the checks and balances mechanism built into our constitutional form of state government.

*Id.* at 797 *citing Bradner v. Hammond*, 553 P.2d 1,5-6 (Alaska 1976).

And, the Court found valid reasons for ". . . differentiating between debt financing and other appropriations from public revenues. First, the check on the power of the legislature that lies in the people . . . means there is less need for the executive to have a 'strong control on the purse strings.' Second the purposes are quite often different. Third, even under our holding, the executive still has the power to veto *any* bill in its entirety." *Id.* at 797 (emphasis in original). Thus, given the holding in *Thomas*, if the line-item veto were applied to these anticipated general obligation bond appropriations, legal challenges could be raised. We are available for

consultation on this issue if necessary.

Section 20 of the bill sets out the funding by source and agency for each of the appropriations made in sec. 19. Section 21 of the bill sets out the statewide funding for the appropriations made in sec. 19. Except as noted above, we find no legal issues in these appropriations.

### **III. Language Sections (Secs. 22 - 58)**

The language sections (secs. 22 - 58), are set out on pages 158 - 179 of the bill. These sections contain numerous reappropriations, contingencies, and expressions of intent from the legislature. We will discuss only those sections that have legal issues or are otherwise noteworthy.

Section 22, page 158, lines 1 - 16, appropriates federal and other statutorily designated program receipts, and provides for reductions and shortfall of receipts where necessary to provide for consistency with federal law and state law. We see no legal problems with this section.

Section 23, page 158, lines 17 - 30, makes appropriations to capitalize certain funds, including sec. 23(a) \$140,000,000 to the Alaska Gasline Inducement Act reimbursement fund (AS 43.90.400(a)); sec. 23(b) appropriations to the election fund required by the federal Help America Vote Act; sec. 23(c) \$2,400,000 to the emerging energy technology fund (AS 42.45.375) -- which has a contingency noted in sec. 58 of the bill; and sec. 23(d) \$2,500,000 to the trauma care fund (AS 18.08.085). We note no legal problems with the appropriations made in this section.

Section 24(a) of the bill appropriates the earnings from what is called the "Amerada Hess" portion of the principal of the permanent fund to the Alaska capital income fund (AS 37.05.565). This appropriation is under AS 37.13.145(d), which contemplates that the earnings from the amounts deposited in the permanent fund from the Amerada Hess royalty litigation will not be used to fund permanent fund dividends.

Section 26, pages 159 - 160, sets out the appropriations to municipalities under the National Petroleum Reserve - Alaska Impact Grant Program (AS 37.05.530; 42 U.S.C. 6508), which is administered through DCCED. We see no legal problems with this section.

Section 27 of the bill appropriates \$3 million from the Alaska Children's Trust as a grant to the Alaska Community Foundation. The Department of Law has concerns about this appropriation. Legislative Legal issued opinions expressing concerns that privatizing the Alaska Children's Trust was a violation of the constitutional prohibition against dedicated funds in art. IX, sec. 7 of the Alaska Constitution. Memo of Jack Chenoweth to Rep. Anna Fairclough of Feb. 9, 2009; Memo of Jean Mischel to Rep. Anna Fairclough of July 29, 2009. The Department of Law concurred in those views and advised against using all or some of the funds in the Alaska Children's Trust to capitalize a private endowment. In order to address those concerns, the

Department of Law assisted in drafting legislation that creates the Alaska children's trust grant account, a state account in the general fund into which funds from the Alaska Children's Trust could be appropriated, and from which the Alaska Children's Trust Board could make grants. CSHB 190(FIN). The Department of Law further advised that the legislature could appropriate any amount of funds from the Alaska Children's Trust to the new grant account.

In sec. 27, however, the legislature has elected to appropriate \$3 million to the Alaska Community Foundation, an entity that manages private endowment funds. The apparent intent of the legislature is to use these funds to capitalize a private endowment. We are concerned that this appropriation is contrary to the advice provided by Legislative Legal and the Department of Law, and contrary to the passage of CSHB 190(FIN), which provided a state account mechanism for the Alaska Children's Trust Board to readily grant funds appropriated by the legislature. We note that CSHB 190(FIN) passed in the last minutes of the session, and there was insufficient time to conform this appropriation so that it was consistent with the passage of CSHB 190(FIN).

Section 30 of the bill appropriates \$2.45 million from the general fund to the Alaska Municipal Bond Bank Authority to issue a one percent interest loan to the City of Galena for the primary purpose of refinancing debt. (see also sec. 10, p. 102, lines 8 - 11, \$1.5 million appropriation for debt retirement for Nenana City Public School). In the past, we have raised concerns whether appropriations to retire or refinance debt are for a public purpose. We think, however, that reducing debt service obligations can serve a public purpose in that it relieves a governmental entity of cash obligations and thereby increases funding resources to pay for important governmental services.

Section 32 of the bill, page 162, lines 8 - 12 appropriates to the DCCED \$35,000 to disburse to Life Alaska Donor Services, Inc. in the form of a grant to a named recipient under AS 37.05.316 for the purpose of promoting the Donor Registry Program under AS 13.50.

Section 32 of the bill, page 162, lines 13 - 16 appropriates to the DCCED \$250,000 to disburse to World Trade Center Alaska in the form of a grant to a named recipient under AS 37.05.316 for the purpose of enabling Alaska to participate in the 2010 World Expo in Shanghai, China.

Section 32 of the bill, page 162, lines 17 - 21 appropriates to the DCCED \$2,000,000 to disburse to the Alaska Travel Industry Association in the form of a grant to a named recipient under AS 37.05.316 for the purpose of financing a national television campaign to promote tourism in Alaska.

Section 34 of the bill, page 162 lines 28 - 31 to page 163, lines 1 - 19, is an appropriation to the Department of Law to pay the judgment issued against the state in the case of *Carlson v. State, Commercial Fisheries Entry Commission*, Case No. 3AN-84-5790 Civil (Anchorage Superior Court). The *Carlson* judgment required partial refunds of differentials paid by nonresidents for commercial fishery entry and interim use permits. The subsecs. of sec. 34 provide separate appropriations from the general fund for (a) \$12,443,959, the principal amount of damages, (b) \$7,029, the litigation costs, (c) \$7,482,569.73, the attorney fees awarded by the

court, and (d) \$62,356,738, the interest on the principal amount applied by the court. Subsection (e) provides that, if the amount available in the general fund is insufficient, the amount necessary to fully fund the appropriations is appropriated from the budget reserve fund. Subsection (f) expresses legislative intent that the Department of Law administers the appropriations to minimize their expenditures. Under provisions in the court's judgment, if these appropriations are paid by June 30, 2010, no interest will accrue on the judgment after January 31, 2010, and the monies paid will be held in a trust account pending resolution of court appeals and be refunded to the state in an amount consistent with the extent of the success of the state's appeal. This appropriation has an immediate effective date (sec. 63) and the appropriation will lapse June 30, 2014 (sec. 59(d)).

Section 36 of the bill appropriates approximately \$4.7 million from the general fund to the state bond committee to pay for the expenses of general obligation bonds for education purposes. This is in connection with the passage of SCS CSHB 424(FIN) authorizing such general obligation bonds.

Section 37, page 164, lines 7 - 15, makes an appropriation of \$60,000,000 from the Alaska marine highway vessel replacement fund (AS 37.05.550) to the Department of Transportation and Public Facilities for construction of an Alaska class ferry. This section also contains language expressing the legislature's intent that the commissioner of transportation and public facilities carefully scrutinize whether competition to construct the new Alaska class ferry could or should be restricted to a shipyard located in the state. The legislature expresses its intent to construct the ferry at a shipyard located in the state unless the commissioner's evaluation of costs and benefits indicates it would not be in the best interest of the state to restrict competition to an in-state shipyard. The intent language lists specific factors the legislature expects the commissioner to consider including, perhaps most significantly, the cost implications of foregoing federal construction funding should competition be limited to a shipyard located in the state. This section of the bill is given an effective date of April 19, 2010. *See* sec. 61.

Section 38, page 165, lines 25 - 30, appropriates money from the general fund to the office of the governor for the development of an in-state natural gas pipeline plan. Section 38 relates to SCS CSHB 369(FIN), an act that directs an in-state gasline team to develop a plan for an operational in-state natural gas pipeline. This section is conditioned by sec. 58(d), which is discussed further below.

Sections 39 - 56, pages 165 - 176, are reappropriations in the various House Districts and the Legislature. We have just a few comments on these reappropriations.

Section 41 of the bill contains several reappropriations in House District 5. Sec. 41 (a) of the bill, page 166, lines 14 - 20 reappropriates money to the DCCED \$1,500,000 to disburse to the City of Hoonah in the form of a grant to a municipality under AS 37.05.315 for the purpose of constructing a walkway for cruise ship passengers to utilize. The funds were originally appropriated to provide a grant to the City of Hoonah for the construction of a mooring buoy system for cruise ships to use while lightering passengers to Icy Points Strait within the borough of Hoonah.

Section 41(e), (h), and (i), page 167, lines 6 - 10, 23 - 31, and page 168, lines 1 - 4, are reappropriations of money to the DCCED for grants to the Chatham School District.

Section 48(a), (b) and (c), page 171, lines 2 - 26, amend previous appropriations to add additional expenditure authority for the Anchorage School District.

Section 56(d) of the bill re-appropriates the unexpended and unobligated balance of a \$19.5 million line item for the legislative budget and audit committee in the fiscal year 2010 operating budget to the statutory budget reserve fund (AS 37.05.540).

Section 57 of the bill, pages 176 - 178, include amendments to school construction grants to school districts for fiscal year 2008 by \$1,083,427, and the allocation of that increase. Section 57 also includes amendments to increase appropriations for fiscal year 2008 and fiscal year 2009 major maintenance grants to school districts by a total of \$1,531,444, and the allocations of those increases.

Section 58 of the bill, pages 178 - 179, provides for contingent appropriations based on the passage of certain pieces of legislation. Section 58 has an immediate effective date. *See* sec. 63. We will discuss each contingency below.

Section 58(a) of the bill provides that the appropriation in sec. 23(c) [\$2,400,000 to the energy technology fund], is contingent on the passage of a bill creating an emerging energy technology fund. HCS CSSB 220(FIN) (SB 220) which passed the legislature establishes an emerging energy technology fund. If the governor signs SB 220 or otherwise allows it to become law, the contingency will be satisfied.

Section 58(b) of the bill provides that the appropriation in sec. 23(d) is contingent on the passage of a bill creating a trauma care fund. SCS CSHB 168(FIN) (HB 168) which passed the legislature establishes a trauma care fund. If the governor signs HB 168 or otherwise allows it to become law, the contingency will be satisfied.

Section 58(c) of the bill provides that the appropriation in sec. 29(c) is contingent on the passage of a version of HB 369. SCS CSHB 369(FIN) passed the legislature and was signed into law by the governor. Therefore, the contingency is satisfied.

Section 58(d) of the bill provides that the appropriations in sec. 38 [appropriations to office of the governor for development of an in-state natural gas pipeline], are contingent on the failure of a version of HB 369 to pass. SCS CSHB 369(FIN) was signed into law by the governor and therefore the contingency is not satisfied, and the appropriations in sec. 38 have no effect.

Section 58(e) of the bill provides that the appropriations in sec. 16 are proportionally reduced if a bill decreases the tax in AS 43.52.210 below \$46. CSSB 312(FIN) am H (SB 312) was passed by the legislature which reduces this tax below \$46. If the governor signs SB 312 or

otherwise allows it to become law, the appropriations in sec. 16 are reduced proportionate to the shortfall that is due to the decrease in the tax rate.

Section 58(f) of the bill provides that the appropriation in sec. 36 is contingent on the passage of a version of HB 424 relating to general obligation bonds for library, research, and education facilities. SCS CSHB 424(FIN) (HB 424) which passed the legislature relates to general obligation bonds for library, research, and education facilities. If the governor signs HB 424 or otherwise allows it to become law, the contingency will be satisfied.

Section 58(g) of the bill provides that the appropriation in sec. 30(a) is contingent on an agreement being reached between the Alaska Municipal Bond Bank Authority and the City of Galena that the loan is secured by the city and is subject to the state aid intercept provisions of AS 44.85.170(b). If this agreement is reached, the contingency will be satisfied.

Section 58(h) of the bill provides that the appropriation in sec. 24(d) is contingent on the passage of a version of SB 301. HCS SB 301(RLS) (SB 301) passed the legislature. If the governor signs SB 301 or otherwise allows it to become law, the contingency will be satisfied.

Section 58(i) of the bill provides that sec. 57 is contingent on the passage of a version of SB 237 providing for school construction grants to a regional education attendance area and extending the deadline for authorizing school construction debt reimbursed by the state. HCS CSSB 237(FIN) am H (SB 237) which passed the legislature provides for school construction grants to a regional education attendance area and extending the deadline for authorizing school construction debt reimbursed by the state. If the governor signs SB 237 or otherwise allows it to become law, the contingency will be satisfied.

Section 59, page 179, identifies the sections that are for the capitalization of funds and do not lapse and those appropriations that are for capital projects and lapse under AS 37.25.020.<sup>4</sup> And, sec. 59(d) notes that the appropriation made in sec. 34 (*Carlson* case appropriation) will lapse June 30, 2014.

Section 60 of the bill lists the provisions of the bill that have a retroactive effective date to March 1, 2010.

Section 61 of the bill lists those provisions of the bill that have an effective date of April 19, 2010.

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<sup>4</sup> AS 37.25.020 reads: "An appropriation made for a capital project is valid for the life of the project and the unexpended balance shall be carried forward to subsequent fiscal years. Between July 1 and August 31 of each fiscal year, a statement supporting the amount of the unexpended balance required to complete the projects for which the initial appropriation was made and the amount that may be lapsed shall be recorded with the Department of Administration."

Section 62 of the bill lists those provisions of the bill that have an effective date of June 30, 2010.

Section 63 of the bill lists those provisions of the bill that have an immediate effective date under AS 01.10.070(c).

Lastly, sec. 64 of the bill provides for an effective date for the bill (except as provided for in secs. 61 - 63), of July 1, 2010.

#### **IV. Conclusion**

As we have stated in the past, please be advised 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 sure that appropriations are implemented consistent with enabling statutes and valid legislative intent. Additionally, we will assist as needed regarding the numerous retroactive provisions, effective dates, and lapse dates that will have to be carefully regarded by the agencies in implementing this legislation.

Sincerely,

Daniel S. Sullivan  
Attorney General

DSS:MLV:ajh