MEMORANDUM

State of Alaska

Department of Law

TO: Hon. John B. "Jack" Coghill
Lieutenant Governor

DATE: November 29, 1993

FILE NO.: 663-94-0083

TEL. NO.: 465-3600

SUBJECT: Initiative application to re-legalize hemp

FROM: Barbara J. Blasco
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Governmental Affairs Section - Juneau

I. INTRODUCTION AND SUMMARY

You have asked us to review an application for an initiative petition to "re-legalize hemp." The application complies with the constitutional and statutory provisions governing the use of the initiative. Therefore, provided the required number of signatures and addresses of qualified voters have been submitted, we recommend that you certify the application. Preparation of the petitions may then commence in accordance with AS 15.45.090.

II. SUMMARY OF THE PROPOSED BILL

The bill proposed by this initiative application would add a new section to Alaska's Criminal Code concerning hemp products. The proposed section provides in paragraph I(1) that persons 21 years of age or older cannot be prosecuted, denied any right or privilege, or made subject to criminal or civil penalties for the possession, cultivation, distribution, or consumption of (1) "industrial hemp products"; (2) "hemp medicinal preparations"; (3) "hemp products for nutritional use"; and (4) hemp products for "personal use" in private. These terms are defined in paragraph I(2). Paragraph I(3) provides that "hemp medicinal preparations" are restored to the available list of medicines in Alaska, and paragraph I(4) provides that "hemp intoxicating products" shall be regulated "in a manner similar to alcoholic beverages." Paragraph I(5) provides that marketing and sales between adults of equipment or accessories used for a variety of activities with hemp shall not be prohibited.

Paragraph I(6) provides that the bill is to have retroactive application to include amnesty and clearing of all criminal records for cannabis/marijuana-related acts which are no longer illegal under the bill, and provides an application procedure for persons to request the destruction of their criminal records.

Paragraphs II and III, respectively, authorize the legislature to enact legislation "using reasonable standards" to (1) regulate or prohibit persons under the influence of hemp from operating a motor vehicle, heavy machinery, or otherwise engaging in conduct which may affect public safety, and (2) limit the use of "hemp intoxicating products" in public places.

Paragraph IV prohibits the use of Alaska law enforcement personnel or funds to assist in the enforcement of federal cannabis/marijuana laws governing acts that would no longer be illegal in Alaska. Paragraph V directs the legislature, the governor, and the attorney general to challenge federal cannabis/marijuana-related acts that conflict with this bill.

Paragraph VI is a severability provision. Paragraph VII provides that if "any rival or competing" initiative regulating any matter addressed by this initiative receives more votes, then all nonconflicting parts of this bill shall become effective.

Paragraph VIII provides that within 120 days after the effective date of this initiative, or by the end of "the current legislative session," whichever is earlier, the legislature "shall fund from law enforcement savings hereby generated" an advisory panel to study the feasibility and methods of making restitution to all persons who were imprisoned, fined, or had property forfeited as a result of any action for cannabis/marijuana-related acts that would no longer be illegal under this bill. The governor, the lieutenant governor the legislature, certain positions in the legislature, and the attorney general each appoint members of the panel. This paragraph also provides for the composition of the advisory panel, its minimum meeting schedule, and due dates for a report from the panel.

Finally, paragraph IX sets forth the purpose of the initiative and states that the bill is to be "liberally construed." Paragraph X makes the bill effective "when enacted according to law."[1]

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[1] The effective date of an initiated law is governed by the Alaska Constitution. Article XI, section 6, provides that "[a]n initiated law becomes effective ninety days after certification" of the election, provided a majority of the votes cast on the

III. ANALYSIS

Under AS 15.45.070, the lieutenant governor is required to review an application for a proposed initiative and either "certify it or notify the initiative committee of the grounds for denial." The grounds for denial of an application are that (1) the proposed bill is not in the required form; (2) the application is not substantially in the required form; or (3) there is an insufficient number of qualified sponsors. AS 15.45.080.

A. The Form of the Application

The form of an initiative application is prescribed in AS 15.45.030, which provides:

> The application shall include (1) the proposed bill to be initiated, (2) a statement that the sponsors are qualified voters who signed the application with the proposed bill attached, (3) the designation of an initiative committee of three sponsors who shall represent all sponsors and subscribers in matters relating to the initiative, and (4) the signatures and addresses of not less than 100 qualified voters.

The application meets the first three requirements. With respect to the fourth requirement, your office must determine whether the application contains the signatures and addresses of not less than 100 qualified voters.

With respect to the second requirement, while the sponsor pages include a statement that the sponsors are qualified voters, they do not include a statement that sponsors signed the application with the proposed bill attached. However, the first page of the application contains a statement that the sponsors signed the application "with the proposed bill enclosed" and, in fact, the proposed bill is printed on the back side of each of the original sponsor signature pages received by your office. This is sufficient to meet the requirements of AS 15.45.030(2).

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proposition favor its adoption. See also AS 15.45.220. Therefore, if the initiative were adopted, it would become effective as provided by the constitution, regardless of whether Paragraph X could be construed to call for an earlier effective date.

B. The Form of the Proposed Bill

The form of a proposed initiative bill is prescribed by AS 15.45.040, which requires that (1) the bill be confined to one subject; (2) the subject be expressed in the title; (3) the enacting clause state, "Be it enacted by the People of the State of Alaska;" and (4) the bill not include prohibited subjects. The prohibited subjects--dedication of revenue, appropriations, the creation of courts or the definition of their jurisdiction, rules of court, and local or special legislation--are listed in AS 15.45.010 and in article XI, section 7, of the Alaska Constitution. Constitutional amendments are also a prohibited subject. Starr v. Hagglund, 374 P.2d 316, 317 n.2 (Alaska 1962).

We conclude that the proposed initiative meets the requirements of AS 15.45.040. However, additional comment on the subject matter limitations is necessary.

1. The proposed initiative does not make or repeal an appropriation.

The initiative may not be used to make or repeal an appropriation. Alaska Const. art. XI, • 7; AS 15.45.010. The Alaska Supreme Court has reviewed and defined what constitutes an impermissible appropriation by initiative. Thomas v. Bailey, 595 P.2d 1 (Alaska 1979); Alaska Conservative Political Action Comm. v. Municipality of Anchorage, 745 P.2d 936 (Alaska 1987); City of Fairbanks v. Fairbanks Convention and Visitors Bureau, 818 P.2d 1153 (Alaska 1991); McAlpine v. University of Alaska, 762 P.2d 81 (Alaska 1988). The appropriation issue must be examined with regard to the first sentence of Paragraph VIII and Paragraph VI of the proposed bill.

We do not believe that either of these provisions constitutes an impermissible appropriation or repeal of an appropriation. In considering this issue, the rules of construction applicable to the constitutional and statutory provisions governing the use of the initiative must be considered.

The Alaska Supreme Court has mandated that "the people's right of initiative should be liberally construed." McAlpine, 762 P.2d at 91. In Boucher v. Engstrom, 528 P.2d 456 (Alaska 1974), the court established two primary rules governing the review of an initiative prior to submission to the voters. First, "the requirements of the constitutional and statutory provisions pertaining to the use of initiatives should be liberally construed so that 'the people [are] permitted to vote and express their will on the proposed legislation . . . .'" Id. at 462. Second, if an initiative can be interpreted in a manner consistent with the constitution, that interpretation must

prevail. "When one construction of an initiative would involve serious constitutional difficulties, that construction should be rejected if an alternative interpretation would render the initiative constitutionally permissible." Id. (footnote omitted).

The first sentence of paragraph VIII of the proposed bill provides that the legislature "shall fund" an advisory panel for certain purposes. The court examined similar language in the initiative at issue in McAlpine, 762 P.2d 81. In McAlpine, the initiative provided:

> There shall be established a separate independent Community College System in the State of Alaska. The University of Alaska shall transfer to the Community College System of Alaska such real and personal property as is necessary to the independent operation and maintenance of the Community College System. The amount of property transferred shall be commensurate with that occupied and operated by the Community Colleges on November 1, 1986. Properties created for the purpose of joint use by the University and Community College System shall continue to be jointly used.

Id. at 83.

The court took issue with the third sentence concerning the amount of property required to be transferred. The court held that this sentence would have required the legislature to spend a specifically defined amount of money on the new community college system, thereby eliminating the legislature's discretion over appropriations.

> We hold that, since the inclusion of the third sentence causes the community college's initiative to designate the use of state assets in a manner that is executable, mandatory, and reasonably definite with no further legislative action, the initiative would make an appropriation.

McAlpine, 762 P.2d at 91.

The court next considered whether the second sentence, even without the third sentence, caused the initiative to make an appropriation. The court held that it did not. In analyzing the second sentence, the court observed that it did, in fact, remove some appropriation discretion from the legislature. Nevertheless, the court concluded:

> As a practical matter, the second sentence leaves the legislature with all the discretion it needs with respect to appropriations for community colleges. Following the mandate which we have repeatedly stated that the people's right of initiative should be liberally construed, see Bailey, 595 P.2d at 3; Municipality of Anchorage v. Frohne, 568 P.2d 3, 8 (Alaska 1977); Engstrom, 528 P.2d at 462; we hold that the second sentence, independently of the third sentence, does not cause the initiative to make an appropriation.

762 P.2d at 91 (footnote omitted).

Applying the analysis in McAlpine to the proposed initiative, we conclude that the "shall fund" language in the first sentence of Paragraph VIII does not cause the initiative to make an appropriation. While it "may remove from the legislature the discretion to eliminate all appropriations" for the advisory panel, as did the similar language in the second sentence of the community college initiative in McAlpine, 762 P.2d at 91, this sentence "leaves the legislature with all the discretion it needs with respect to appropriations" for an advisory panel. Id. This conclusion is also consistent with the rule of liberal construction applicable to the people's right of initiative. Id.

Although the proposed hemp initiative does not repeal an appropriation, it could indirectly defeat an appropriation by blocking expenditure of funds already appropriated at the time it takes effect. Paragraph VII of the proposed initiative provides:

> No Alaska law enforcement personnel or funds shall be used to assist enforcement of federal cannabis/marijuana laws governing cannabis/ marijuana-related acts which are no longer illegal in the State of Alaska.

We believe that this provision does not violate the proscription on the use of the initiative to repeal an appropriation. The provision could not be effective to defeat any current FY 1994 appropriations for this purpose because the earliest date for an election on this initiative would be November 1994. It is unknown whether there will be any funds appropriated for this purpose when, if ever, this initiative becomes effective. Therefore, applying the rule that the people's right of initiative should be liberally construed, we conclude that this provision does not repeal an appropriation. Whether the initiative would be effective to bar expenditure of funds already appropriated at its effective date is a question of

implementation that may have to be addressed at a later time.[2]

2. The proposed initiative does not dedicate revenues.

The Alaska Constitution provides that the "initiative shall not be used to dedicate revenues." Alaska Const. art. XI, • 7. This prohibition is designed to ensure that the legislature is accorded the greatest flexibility and control in managing the state budget. The first sentence in Paragraph VIII of the proposed initiative arguably dedicates revenue when it states that the legislature shall fund an advisory panel "from law enforcement savings hereby generated . . . ."

The prohibition on the use of the initiative to dedicate revenues was construed by the Alaska Supreme Court in City of Fairbanks v. Fairbanks Convention and Visitors Bureau, 818 P. 2d 1153 (Alaska 1991). The court first considered its interpretation in State v. Alex, 646 P.2d 203 (Alaska 1982), of the dedicated tax prohibition in article IX, section 7, of the Alaska Constitution. In Alex, the court held that a mandatory tax on the sale of salmon, the proceeds of which were allocated to regional aquaculture associations for the enhancement of salmon production, was an -unconstitutional dedication of funds. In reaching that conclusion, the court relied on the fact that the allocation of revenues was mandatory and left no discretion to the legislature to spend the money in any other way. In addition, the court found that other statutory provisions entitled the associations to rely on the receipt of the tax funds as collateral for state loans and as evidence of their ability to establish sufficient equity in their hatcheries. Thus, the court concluded that the revenues were earmarked such that the associations had a "right" to them. Alex, 646 P.2d at 208.

In City of Fairbanks, the court considered an initiative that would create new arrangements for allocating hotel bed tax revenues. The ordinance sought to be repealed and reenacted by the initiative was a dedicated fund. The initiative provided that the revenues received from the reenacted tax were to be used "for the purpose of funding city facilities and services for the general public." 818 P.2d at 1158. The court distinguished the hotel bed tax allocation initiative from the tax allocation at issue in Alex and held that the initiative did not dedicate revenues. The court noted that in Alex, the allocation of revenues to the regional aquaculture associations

[2] The attorney general's office reached the same conclusion on this issue in 1980 in its review and approval of an initiative petition to limit state funding of abortions. 1980 Inf. Op. Att'y Gen. (Oct. 20; J-66-237-81).

was mandatory, "leaving no discretion to the legislature to spend the money in any other way." Alex, 646 P.2d at 208. In addition, the legislation considered in Alex created for the aquaculture associations something akin to a "right" to the tax revenue. The initiative in City of Fairbanks did not create a "right" for any group or person, nor did it create any mandatory expenditures. Id., 818 P.2d at 1158. The court concluded that the bed tax allocation initiative did not dedicate revenues because it did not infringe on flexibility in the budget process. Id. at 1159.

Applying the analysis in City of Fairbanks to the language in Paragraph VIII of the proposed hemp initiative, we conclude the initiative would not dedicate revenues. As with the provision examined in City of Fairbanks, the language here does not leave the legislature with no discretion to spend the money from law enforcement savings generated by this bill in any other way. The provision does not state that all savings generated by the bill are allocated to a particular purpose, nor is any particular expenditure of such savings mandatory.[3] Under the standard employed in City of Fairbanks, the initiative does not unduly infringe on the legislature's discretion to allocate funds in the budget process. Again, this conclusion is consistent with the rule that the use of the initiative should be liberally construed so that people are permitted to express their will on a proposed measure. As stated in Boucher v. Engstrom, 528 P.2d at 462, when one construction of an initiative would result in constitutional infirmities, that construction should be rejected if an alternative interpretation would render the initiative constitutional.

C. Other Issues Raised by the Proposed Bill

Your review of the proposed initiative is limited to the form of the application and the proposed bill for compliance with the constitutional and statutory provisions governing the initiative and the bill should not be rejected because of questions with its substantive constitutionality or ambiguities in its language. Review of these issues must await post-enactment challenge. Boucher v. Engstrom, 528 P.2d at 460 n.13. However, we would briefly discuss some of the issues presented by this bill.

The governor's clemency power is constitutional and discretionary. Alaska Const. art. III, • 21. Paragraph I(6) of the proposed bill purports to make amnesty mandatory. This

[3] In addition, the "law enforcement savings" that might be generated from the enactment of the proposed bill are unknown and not readily calculable.

provision conflicts with the executive's discretionary clemency power and therefore might be an unconstitutional violation of the separation of powers. The same paragraph requires the destruction of criminal records. This provision too might violate separation of powers, as might the paragraph which requires the governor and the attorney general (and the legislature) to "challenge federal cannabis/marijuana prohibitions which conflict with this initiative." Paragraph V.

Another potential problem with the bill is that much of the language is vague and ambiguous and its definitions might create unforeseen consequences. For example, it is unclear how and under what circumstances the state is required to "challenge" federal marijuana laws. Also, it provides in Paragraph II that the legislature is authorized to enact legislation "using reasonable standards to determine impairment" to regulate or prohibit persons under the influence of hemp from operating a motor vehicle, but then states that testing for "inert cannabis metabolites" cannot be used to determine impairment.

The definition of "hemp medicinal preparations" is very broad. It does not make reference to a doctor's prescription and includes "all products made from hemp, cannabis, or marijuana, that are designed, intended, or used for human consumption. . . ." The proposed bill would also legalize the possession, cultivation, distribution, or consumption of hemp products for "personal use in private." Paragraph I(1). The term "personal use" means "the use of any product or preparation of hemp, cannabis, or marijuana, intended for any relaxational, ritual, spiritual, or other personal use." Paragraph I(2)(e). This definition is also very broad, and could conceivably impact every marijuana law on the books, even commercial distribution of large amounts. It appears that this was perhaps not intended as in Paragraph I(4), the sponsors have attempted to distinguish between "personal" and "commercial production." However, it is unclear how this distinction relates to the other sections of the bill. It is also not clear what it means to regulate hemp intoxicating products "in a manner similar to alcoholic beverages." Paragraph I(4). For instance, alcohol is subject to local option laws, which means that even private possession of alcohol can be prohibited on a local basis.

As noted above, these and other questions regarding the implementation of the proposed bill do not affect your review of the form of the application and proposed bill.

IV. IMPARTIAL SUMMARY OF THE PROPOSED BILL

AS 15.45.090(2) requires that the initiative petitions include an impartial summary of the subject matter of the bill. We recommend the following for purposes to the impartial summary:

"An Act to re-legalize hemp, an initiative."

This bill, if passed, would amend Alaska's criminal code to make hemp legal in Alaska.

The bill provides that persons 21 years of age or older shall not be prosecuted, be denied any right or privilege, or be subject to criminal or civil penalties for the possession, cultivation, distribution, or consumption of (1) "industrial hemp products"; (2) "hemp medicinal preparations"; (3) hemp products for "nutritional use"; and (4) hemp products for "personal use" in private. Each of these terms is defined in the bill. The bill provides that "hemp medicinal preparations" are restored to the available list of medicines in Alaska, and that licensed physicians shall not be penalized for or restricted from prescribing such preparations for medicinal purposes to patients of any age. It provides that "hemp intoxicating products," a term defined in the bill, shall be regulated in a manner similar to alcohol. It also provides that manufacturing, marketing, distribution, or sales between adults of equipment or accessories designed for use in planting, cultivation, harvesting, curing, processing, packaging, storing, analyzing, consumption, or transportation of hemp may not be prohibited.

The bill provides that it is to have retroactive application to include amnesty and clearing of all criminal records for cannabis/marijuana-related acts that are no longer illegal under the bill. It also provides for an application procedure for persons to request destruction of their criminal records. It authorizes the legislature to enact legislation using reasonable standards to (1) regulate or prohibit persons under the influence of hemp from operating a motor vehicle, heavy machinery, or otherwise engaging in conduct which may affect public safety, and (2) limiting the use of "hemp intoxicating products" in public places. The bill prohibits the use of Alaska law enforcement personnel or funds to assist in the enforcement of federal cannabis/marijuana laws governing acts which would no longer be illegal in Alaska. It directs the legislature, the governor, and the attorney general to challenge federal cannabis/

marijuana prohibitions that conflict with this bill. The bill calls for the appointment of an advisory panel, to be funded from law enforcement savings generated by the enactment of the bill, to study the feasibility and methods of making restitution to all persons who were imprisoned, fined, or had property forfeited as a result of criminal or civil cannabis/marijuana-related acts that would no longer be illegal under the bill.

The bill also includes a purpose section which states that its purpose is to promote and protect the safety, welfare, health, and privacy of the people, to allow for industrial and medicinal uses of hemp, eliminate evils associated with unlicensed and unlawful cultivation and selling, and to promote temperance in the consumption of hemp as an intoxicant. It also provides that the bill is to be liberally construed to achieve its purposes.

This proposed summary is quite long because the bill itself is long and detailed. It is too long to be used as the "proposition" for ballot listing under AS 15.45.180(a). If the proposed bill eventually qualifies for placement on the ballot, we will then propose to you a "proposition" of the correct length.

Please contact us if we can be of further assistance.

BJB:tg

cc: Joseph Swanson, Director
Division of Elections