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June 22, 2005

The Honorable Frank H. Murkowski
Governor
State of Alaska
P.O. Box 110001
Juneau, Alaska 99811-0001

Re: CCS HB 67(brf sup maj fld H) -- Fiscal Year 2006 Operating Budget (**revised**)
Our file: 883-05-0102

Dear Governor Murkowski:

At the request of your legislative office, we have reviewed CCS HB 67(brf sup maj fld H), the operating budget for fiscal year 2006 (beginning on July 1, 2005, and ending on June 30, 2006). We have only a few comments on the bill overall.

The introductory language to sec. 1 of the bill at page 2, lines 4 - 6 includes a provision that "[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." Similar language is included in sec. 2 on page 41, lines 8 - 11. This is identical language included in the operating budget in the past two years. We note only one unallocated reduction in this bill -- a $50,000 agency-wide unallocated reduction for the Department of Environmental Conservation (page 12, line 12). As a general observation on the issue of unallocated reductions, we have discussed in the past that unallocated reductions that purport to affect more than one appropriation is an approach that raises constitutional questions. *See* 1999 Inf. Op. Atty. Gen. (June 28; 883-99-0062); 2004 Inf. Op. Atty Gen. (June 7; 883-04-0035). However, we did not recommend any vetoes as a result of those possible constitutional concerns. We adhere to that discussion and advice.

We also note that the bill has numerous expressions of legislative intent accompanying certain appropriation items that are non-binding -- you may choose to follow the intent or ignore legislative intent. However, as we advised in our reviews of intent language in previous appropriations bills, an expression of legislative intent may no longer be vetoed by you as a line item veto separate from the appropriation itself. In

Alaska Legislative Council v. Knowles, 21 P.3d 367 (Alaska 2001), 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. The legislature may use "minimum necessary" language to explain what purpose the legislature intends to permit for the appropriation (i.e., to explain how, when, or on what the money is to be spent). *Id* at 377.

Expressions of legislative intent that may be followed or ignored appear throughout the bill, and we do not address individual provisions that do not raise other legal issues. We will discuss particular expressions of intent that need legal analysis as to whether they violate the confinement clause of the Alaska Constitution by using qualifying language that 1) is more than minimally necessary; 2) administers the program of expenditures; 3) enacts law or amends existing law; 4) extends beyond the life of the appropriation; or 5) expresses intent that is not germane to an appropriations bill.[1]

On page 9 of the bill, under the allocation of money for Department of Corrections "Administration and Support," lines 5 through 9, the following language appears:

> It is the intent of the legislature that the funding appropriated for the Kotzebue Jail contract be made available to the department only at the time the contract is signed. If Kotzebue fails to enter into an agreement with the Department of Corrections to provide jail services, $350,000 General Funds shall be made available for prisoner transport and $450,000 will be reduced in the FY06 supplemental bill during the 2006 Legislative Session.

Only the first part of this provision contains "intent" lead-in language. The remaining language might be seen as an attempt to alter contract terms and to administer a program. However, if read in this manner, this language would violate the confinement clause of the Alaska Constitution. Also, the language does not specifically make compliance with the language a condition of the appropriation. And, the action proposed in a future supplemental bill if Kotzebue fails to enter into an agreement with the Department of Corrections (a specific reduction of $450,000 in the FY06 supplemental in the next legislative session), could be changed in future legislation. We therefore think that the language must be read simply as part of an overall expression of legislative intent.

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[1] Under the confinement clause of art. II, sec. 13 of the Alaska Constitution, "[b]ills for appropriations shall be confined to appropriations." In *Alaska Legislative Council v. Knowles*, 21 P.3d at 377-79, the court used these five criteria to analyze whether intent language violates the confinement clause, referring to them as the "Hammond factors." The factors were first set out in the superior court decision in *Alaska State Legislature v. Hammond*, Case No. 1JU-80-1163 (Alaska Super., May 25, 1983).

Under the appropriations for Department of Corrections on page 9, we also note the line item "Inmate Transportation," line 11. It is our understanding that this appropriation is to cover costs for state-charged inmates to travel to and from the correctional facilities, and also includes funds in the Department of Corrections' budget for state troopers (through a reimbursable services agreement) to transport the Municipality of Anchorage-charged prisoners to and from the Anchorage Jail. While we find no legal problems with the appropriation for transportation of the Municipality of Anchorage-charged prisoners, we are making note of it because transfer of municipally-charged prisoners is normally a cost borne by and is a responsibility of a municipality.

On page 16, lines 9 - 15 (and again on page 19, lines 11 - 17), is language conditioning the appropriation to the Department of Health and Social Services (DHSS) as follows:

> 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.

Virtually identical language appeared in the past two years' operating budget bills, and, as we opined before, this language is intended to prevent expenditures from these appropriations for therapeutic or medically necessary abortions, even though the DHSS is under a 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 of Alaska, Dept. of Health & Social Services v. Planned Parenthood of Alaska*, 28 P.2d 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 these two provisions is not available under the analysis of *Legislative Council v. Knowles* that is discussed above.

Four 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.

The bill also contains intent language regarding an appropriation to the DHSS, Alaskan Pioneer Homes, which arguably goes beyond being an expression of intent, but is an attempt to make substantive changes to program requirements through an appropriation bill. This raises concerns of potential violations of the confinement clause of the Alaska Constitution. That language, found on page 17, lines 5 - 11 reads:

> 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 shall complete the forms for him/her, obtain the individuals' or designee's signature and submit for eligibility per AS 47.25.120.

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. Similarly, the legislature, through intent language in an appropriation bill, cannot legally require relatives or DHSS staff to fill out forms on behalf of pioneers or veterans to obtain such supplemental program funding. Therefore, we recommend that DHSS ignore this intent language.

On page 17, lines 16 - 24, is language regarding the Behavioral Health appropriation, directing DHSS to establish "evidence based" prevention programs at the community level through a competitive request for proposal (RFP). While the language does not indicate that it is intent, the language can be treated as such by the DHSS. This language also appears to prorate funding without authority of substantive law. Thus, this intent language is not legally binding on DHSS, but can be followed as a matter of comity or ignored.

On page 22, lines 5 - 26, the intent of the legislature as expressed relates to personal care attendant program. The section sets out the legislature's intent that the DHSS implement regulatory changes in a number of specified ways "to control and reduce costs." As stated above, this language is not legally binding on the DHSS. This language goes beyond the legal criteria of expressing mere intent, but is an attempt to require specific action by DHSS that is not placed in the statutory duties of the DHSS. The DHSS, though, may follow the intent in the interest of comity, so long as to do so would not violate existing statutes and other legal obligations.

On page 32, lines 14 - 15, is an appropriation to the Council on Domestic Violence and Sexual Assault (CDVSA). On page 32, lines 16 - 18, 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.

We note that, as in last year's budget, 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." The "notwithstanding" language in the bill is apparently 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.

The intent language found on page 35, lines 10 - 19, concerning appropriations to the Department of Transportation and Public Facilities (DOT&PF), Administration and Support. The legislature asserts its intent for DOT&PF to establish a certain training and certification program with a specific goal -- to reduce accidents and preventable damage to equipment and gives the DOT&PF a deadline for implementation of June 1, 2006. Further, the legislature states its intent that DOT&PF adopt an integrated vegetation management (IVM) approach to controlling problem and invasive plants on state-owned property along highways and airports with a standard for successful implementation of the program as acquiring the necessary Alaska Department Environmental Conservation environmental permits by June 1, 2006. This intent language, like so many other sections in this bill, gives directives that are substantive in nature. Thus, the intent language may violate the confinement clause of the Alaska Constitution, as it is not just a mere expression of legislative intent, and you may ignore it.

On page 37, lines 20 - 21, regarding the appropriations to the DOT&PF, Highways, Aviation and Facilities, we note a special lapse provision as follows: "The amounts allocated for highways and aviation shall lapse into the general fund on August 31, 2006." This special lapse provision makes the appropriations available for expenditure until they lapse into the general fund on August 31, 2006.

Section 5, on page 65 of the bill, sets out the legislature's intent that, "the amounts appropriated by this Act are the full amounts that will be appropriated for those purposes for the fiscal year ending June 30, 2006. Further, it is the intent of the legislature that positions authorized by the legislature are the full number of positions necessary to fulfill the duties and responsibilities of each agency." The intent section further purports to require the governor's office of budget and management to submit a position report to the Legislative Budget and Audit Committee each calendar quarter, which must include a listing of positions created by each agency for the preceding three months and the fund source used to pay for each new position. This intent language arguably goes beyond the "minimum necessary to explain the legislature's intent." This intent language seeks, through a declaration, to limit the authority and exercise of discretion of the executive and judicial branches by declaring that the legislature has appropriated amounts for "the full number of positions necessary to fulfill the duties and responsibilities of each agency." Whether or not the number of positions financed by the legislature in this budget (or any budget) is adequate or are considered fully financed in a manner for an agency to fulfill its duties and responsibilities is a determination to be made by the agencies. This requires a determination affected by numerous variables (*i.e.*, pay range of positions; unanticipated workload increase; or natural disasters). This intent language could also be viewed as raising issues of violations of the separation of powers doctrine. This is a doctrine well recognized by the Alaska Supreme Court as being clearly implied in Alaska Constitution's separate articles creating the executive, legislative, and judicial branches of the Alaska government. *Rust v. State*, 582 P.2d 134, 138 n.11 (Alaska 1978). Further, the Alaska Supreme Court has embraced a strict view of the autonomy of the state's governmental branches, which precludes each branch from improperly interfering with the autonomy and discretion of the others with respect to their core constitutional powers. The separation of powers doctrine requires that the blending of governmental powers between the branches will not be inferred in the absence of an express constitutional provision. *Bradner v. Hammond*, 553 P.2d. 1, 6 - 8 (Alaska 1976). However, notwithstanding our concerns as to separation of powers, we again note that this is intent language and it can be ignored or complied with as a matter of comity at the discretion of the affected agencies.

Section 24 of the bill appropriates a sum for benefit adjustments for officials and employees of the executive, judicial, and legislative branches. It constitutes approval under AS 23.40.215(a) of the monetary terms of collective bargaining agreements for the bargaining units listed.

Section 31 of the bill contains language that conditions funds appropriated by this bill, or any other bill passed by the First Regular Session or First Special Session of the Twenty-Fourth Alaska State Legislature and enacted into law, or by another Act enacted by a prior legislature, by prohibiting the use of funds toward the cost of building a new capitol in the current capital site (AS 44.06.010). This provision raises concerns whether it meets the germaneness requirement for a valid condition to satisfy the confinement clause of the Alaska Constitution, since it is attached to every appropriation regardless of the purpose for which the appropriation was made. While the Alaska Supreme Court has not addressed the validity of such a broad provision, it raises legal concerns that we wanted to bring to your attention.

Section 32 of the bill appropriates to the budget reserve fund, the unrestricted interest earned on investment of the general fund balances for the fiscal year ending June 30, 2006.

Section 33 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 34 allows for retroactive effect to June 30, 2005, for certain appropriations made in sec. 1 of the bill. Section 35 provides for an effective date of June 30, 2005, for the appropriations made in sec. 29 (University of Alaska) and 34 (retroactivity). Finally, sec. 36 provides for the bill to have an effective date of July 1, 2005, except as provided in sec. 35.

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,

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