

STATE OF ALASKA

DEPARTMENT OF LAW

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June 6, 2007

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

Re: CCS HB 95(Corrected) -- 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
Our file: 883-07-0070

Dear Governor Palin:

At the request of your legislative office, we have reviewed CCS HB 95(Corrected), 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. This bill is otherwise known as the fiscal year 2008 operating budget (beginning on July 1, 2007, and ending on June 30, 2008). 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." Sec. 1, p. 2, lines 4 - 6; see also sec. 2, p. 44, lines 9 - 11.

We note only one unallocated reduction in this bill -- a \$250,000 agency-wide unallocated reduction for the Department of Environmental Conservation. Sec. 1, p. 13, lines 27 - 28. As we have previously stated, unallocated reductions that purport to effect more than one appropriation may raise constitutional questions. *See* 2006 Inf. Op. Att'y Gen. 1 (June 16; 883-06-0104); 2005 Inf. 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 that are non-binding. *See, e.g.*, Sec. 1, p. 6, lines 17 - 20 (Alaska Aerospace Development Corporation travel reports). You may choose to follow or ignore such 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 the governor 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

We now turn to issues raised in the budgets of various agencies.

III. DEPARTMENT OF COMMERCE, COMMUNITY, AND ECONOMIC DEVELOPMENT

The legislature has set out intent language requesting that the Alaska Aerospace Development Corporation provide travel reports for fiscal years 2007 and 2008 in sec. 1, p. 6, lines 17 - 20. Typically, the legislature sets out reporting requirements in statute -- not in the operating budget. To the extent, however, that this particular reporting requirement is not set out in statute, we think the legislature can obtain this information through the Legislative Budget and Audit Committee. *See* AS 24.20.201.

IV. DEPARTMENT OF EDUCATION AND EARLY DEVELOPMENT

In past years the legislature has included intent language with the foundation program line item that expresses the intent of the legislature that school districts not bar military, ROTC,

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*, No. 1JU-80-1163 (Alaska Super., May 25, 1983).

CIA and FBI recruiters, the boy scouts, or ROTC programs from schools. *See* sec. 1, p. 11, lines 13-20, ch. 33, SLA 2006. We have advised that such intent language is non-binding. *See* 2006 Inf. Op. Att'y Gen. 1-2 (June 16; 883-06-0104).

This year, however, this language is no longer phrased as intent language. *See* sec. 1, p. 10, line 32 - p. 11, line 12. Rather it simply states 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. We think this probably violates the confinement clause.

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 appears to be no substantial 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.

V. DEPARTMENT OF HEALTH AND SOCIAL SERVICES

There are several items in the DHSS portions of the budget that warrant mention. We discuss each in this section.

A. Abortion Funding

This year's budget, as did the prior four 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.

Sec. 1, p. 17, lines 14-20. 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*.

Five 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. Pioneer Homes

The bill contains the same intent language from last year regarding an appropriation to the DHSS, Alaskan Pioneer 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.

Sec. 1, p. 18, lines 16 - 22. In past bill reviews we have expressed concerns about requiring DHSS staff to complete forms -- the language in this year's (and last year's) budget, however does not require completion of forms, but suggests that DHSS staff "may" do this. This intent language nevertheless continues to raise concerns of potential violations of the confinement clause of the Alaska Constitution. 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.

C. Personal Care Attendant Program

As it did the last two years, the legislature has expressed intent relating to the personal care attendant program. Sec. 1, p. 23, line 28 - p. 24, line 19. The legislature intends for the DHSS to implement regulatory changes in a number of specified ways "to control and reduce costs." This language is not legally binding on the DHSS. This language goes beyond the mere expression of intent and attempts to require specific action by DHSS that is not set out in the statutory duties of the DHSS. The DHSS, though, may follow the expressed intent in the interest of comity, so long as doing so would not violate existing statutes and other legal obligations.

D. Fiscal Audit Directives

The legislature has set out intent language related to fiscal audits required in ch. 66, SLA 2003 of Medicaid providers. Sec. 1, p. 24, line 31 - p. 25, line 12. 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.

E. Office of Faith Based & Community Initiatives Grants

Under the Office of Faith Based & Community Initiatives line item, the legislature has allocated \$500,000 for "grants to areas ineligible for Human Services Grants." Sec. 1, p. 25, lines 16-17. Under *Knowles II*, we believe this is a permissible allocation. *Knowles II*, 21 P.3d at 379.

F. Municipal Accountability Reports

The legislature has set out intent language that the DHSS require municipalities to submit certain reports on an annual and quarterly basis. Sec. 1, p. 26, lines 14 - 22. As noted above, reporting requirements are typically set out in statute, not in the operating budget.

VI. DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT

The legislature has added intent language to the Unemployment Insurance line item requesting that the "Fairbanks Unemployment Insurance call center remains open and that no positions are transferred from the Fairbanks call center to other call centers." Sec.1, p. 28, lines 4 - 6. Decisions regarding how to administer programs are entirely executive in nature. Whether to comply with this intent language is within the discretion of the Department of Labor and Workforce Development.

VII. DEPARTMENT OF LAW

The legislature has added intent language to the Labor and State Affairs line item requesting that the Department continue to provide representation to the court system for non-tort claims. Sec. 1, p. 29, line 33 - p. 30, line 5. We understand that the funding for this work was restored to the Labor and State Affairs line item, therefore the Department of Law at this time intends to continue to provide this representation.

VIII. DEPARTMENT OF MILITARY AND VETERANS' AFFAIRS

Under the Alaska National Guard Benefits, Education Benefits line item the legislature has set out intent language requiring the Department of Military and Veterans' Affairs to submit a supplemental appropriation request to cover any shortfall in the amount appropriated for this line item. Sec. 1, p. 31, lines 19 - 23. While it is laudable that the legislature wishes to ensure full funding for this line item, the constitutional power to submit an appropriation request to the legislature resides solely in the governor. Thus, should the Department of Military and Veterans' Affairs wish to comply with this intent language, it must do so only through the established executive branch budget submission process.

IX. 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 percent 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.

Sec. 1, p. 35, lines 26 - 28. 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) which limits the legislature's authority to appropriate for fund operations and grant administration.

X. 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, 2008." Sec. 1, p. 40, lines 8 - 9. This special lapse provision makes the appropriations available for expenditure until they lapse into the general fund on August 31, 2008.

XI. 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.

XII. LANGUAGE SECTIONS

Section 5 of the bill sets out legislative intent that the amounts appropriated in the operating budget are the full amounts to be appropriated for the identified purpose.

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

Section 8 of the bill would make various appropriations related to the Alaska Housing Finance Corporation (AHFC). Subsection (a) states that the AHFC dividend for fiscal year 2008 is \$81,412,850. Under subsec. (b), as contemplated by AS 18.56.089(c), the costs of debt service for certain bonds is retained by the AHFC. Under subsec. (c), the remainder is appropriated to the Alaska capital income fund. Subsection (d) appropriates corporate receipts to AHFC. Subsection (e) would appropriate from the receipts in subsec. (d), \$800 million for non-subsidized AHFC housing loans. Subsection (f) would appropriate from the receipts in subsec. (d), \$30 million for subsidized AHFC loans and projects. Subsection (g) would appropriate \$30 million from federal receipts for "Section 8" housing assistance payments.

Section 9 of the bill would appropriate \$10 million from AIDEA to the Alaska capital income fund.

Section 10 of the bill would appropriate from the earnings reserve account of the permanent fund the amount necessary to pay for permanent fund dividends 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 11 of the bill would appropriate \$1.2 million from the Alaska Student Loan Corporation to the Alaska capital income fund.

Sections 12 - 14 would make various appropriations to the Department of Administration; the Department of Commerce, Community, and Economic Development; and the Department of Education and Early Development.

Section 15(a) of the bill would appropriate \$269,992,300 to the Department of Administration for deposit in the defined benefit plan of the teachers' retirement system. The intent of the appropriation, as described in subsec. (b), is to "buy down" the employer contribution rate that employers in the TRS pay to 12.56 percent. Subsections (c) and (d) are repealed in the capital budget and replaced with similar provisions appropriating \$185 million to the Department of Administration for deposit in the defined benefit plan in the public employees' retirement system. *See* sec. 55(e) - (f), HCS CSSB 53(FIN) AM H. The intention there is to buy down the employer contribution rate that employers in the public employees' retirement system pay to 22 percent.

Sections 16 - 21 of the bill would make various appropriations to the Department of Health and Social Services; the Department Labor and Workforce Development; the Department of Military and Veterans' Affairs; the Department of Natural Resources; the Department of Public Safety; and the Department of Revenue.

Section 22 of the bill would appropriate 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 out a methodology for allocating the appropriation between agencies.

Section 23 of the bill appropriates certain license plate fees to the University of Alaska.

Section 24 of the bill would appropriate federal and other program receipts.

Section 25 of the bill would make several fund transfers. Section 25(a)(5) would appropriate money from the investment loss trust fund (AS 37.14.300) to the debt retirement fund. The investment loss trust fund is required to maintain a certain balance in order to hold certain persons harmless from Executive Life investment losses. We understand that the amount appropriated from the trust fund is over and above what is necessary to have in the fund for this purpose, and therefore is available for appropriation.

Section 26 of the bill would appropriate proceeds, if any, from reclamation bonds.

Section 27 of the bill would appropriate retained fees and bankcard service fees.

Section 28 of the bill would appropriate a sum for benefit adjustments for officials and employees of the executive, judicial, and legislative branches.

Section 29 of the bill would appropriate the proceeds of certain taxes and fees for refund to local governments.

Section 30 of the bill would appropriate amounts necessary for debt service on a range of bonds.

Section 31(a) of the bill is the constitutional budget reserve (CBR) "reverse sweep" provision. Deposits in the CBR for fiscal year 2007 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 31(b) of the bill would appropriate to the CBR the unrestricted interest earned on investment of the general fund balances for the fiscal year ending June 30, 2006. 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 32 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 33 of the bill would allow for retroactive effect to June 30, 2007, for certain appropriations made in sec. 1 of the bill.

Sections 34 and 35 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

TJC:MAB:ajh