

# STATE OF ALASKA

## DEPARTMENT OF LAW

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June 13, 2007

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

Re: HCS CSSB 53(FIN) am H -- 2008  
Capital, Supplemental, and Other  
Appropriations (**2nd Revised**)  
Our file: 883-07-0071

Dear Governor Palin:

At the request of your legislative director, we have reviewed HCS CSSB 53(FIN) am H, making and amending appropriations, including capital appropriations, supplemental appropriations, and appropriations to capitalize funds; ratifying certain expenditures; and providing for an effective date. In short, this is our review of the fiscal year 2008 capital budget.

We are recommending a veto of the appropriation to the Gateway School & Learning Center, as providing a direct benefit to a private religious educational institution in violation of the Alaska Constitution. See pages 3 and 4 of this letter for analysis.

### **I. General Comments**

We have reviewed all appropriations set out in this bill and have several general comments on the bill overall. First, we note that expressions of legislative intent accompanying an appropriation item, while of limited number in this bill, are nonbinding on the executive branch; you may choose to follow the intent language accompanying an appropriation item or ignore it. However, please be advised that expressions of intent may no longer be vetoed by you as a line item veto separate from the appropriation itself.<sup>1</sup> The legislature may use "minimum necessary" language to explain what purpose

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<sup>1</sup> *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 371-75 (Alaska 2001) ("*Knowles II*") (expressions of legislative intent do not constitute "items" subject to governor's veto power under art. II, sec. 15, of the Alaska Constitution).

the legislature intends to permit for the appropriation. *Knowles II*, 21 P.3d at 377 (explain how, when, or on what the money is to be spent). We will discuss particular expressions of intent that need analysis as to whether they violate the confinement clause by improperly conditioning an appropriation (i.e., using qualifying language that is more than minimally necessary; trying to administer the program of expenditure; enacting law or amending existing law; extending the intent language beyond the life of the appropriation; or the intent is not germane to an appropriations bill).<sup>2</sup>

There is also the question of what you are to do when the legislature attaches a possibly unconstitutional condition to an appropriation. There are two cases that discuss conditions on appropriations. One is *O'Callaghan v. Coghill*, 888 P.2d 1302, 1303-04 (Alaska 1995), *overruled on other grounds by O'Callaghan v. State, Director of Elections*, 6 P.3d 728, 730 (Alaska 2000), in which the court ruled that the attorney general could not take legal action based on his or her determination that a law was unconstitutional without a court ruling confirming that determination unless the provision was clearly unconstitutional. But, in *Legislative Council v. Knowles*, 988 P.2d 604 (Alaska 1999) (*Knowles I*), the court ruled that, under art. III, sec. 16, of the Alaska Constitution, the governor may not sue the legislature even for a declaration of law, the otherwise logical avenue to pursue a dispute about the validity of a contested condition to an appropriation.

When conditions on appropriations are clearly unconstitutional, then the court in *Knowles II* stated that the governor may announce an intent to ignore them without falling afoul of the *O'Callaghan* principle. Other conditions may not be so plainly illegal. And, the court indicated that the legality of conditions must generally be decided on a case-by-case basis. There would be two choices if unconstitutionality was a concern: either announce an intent to ignore the condition, or sue some party (other than the legislature) to obtain a determination of constitutionality. This latter course seems highly undesirable. Another route to litigation would be an *ex rel* suit in which the attorney general or some other state official sues another department head for a declaration as to the validity of the condition. However, we note that measures would need to be taken to ensure that the suit is adversarial in nature. The preferable course would seem to be announcing an intent to ignore the condition after the attorney general reviews and advises upon the question of validity.

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<sup>2</sup> These five criteria are referred to as "the Hammond factors." *Knowles II*, 21 P.3d at 377-79. These five factors used to analyze whether intent language violates the confinement clause were first presented in the superior court decision in *Alaska State Legislature v. Hammond*, No. 1JU-80-1163 (Alaska Super., May 25, 1983).

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. Section 1**

Section 1 of the bill, pages 2 - 80, sets out the capital appropriations for the Departments of Commerce, Community, and Economic Development (DCCED); Corrections; and Transportation and Public Facilities (DOTPF); and the court system. The appropriations have an effective date of June 30, 2007. See sec. 65.

#### **1. Department of Commerce, Community, and Economic Development**

##### **(i) Appropriations for named recipient grants (AS 37.05.316)**

The majority of appropriations for named recipient grants are set out on pp. 2 - 37 of the bill. Additional named recipient grants are found in sec. 4, pp. 85 - 86. We note that a grant recipient under AS 37.05.316 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 and the department must provide oversight of grant expenditures for conformance with legislative purpose. Grants not in the public interest must be rejected. There are numerous grants under this section. Accordingly, not all need to be commented on from a legal perspective. Therefore, we are providing discussion of particular grants for named recipients and noteworthy legal considerations.

##### **a. Gateway School & Learning Center**

The bill provides a grant of \$50,000 to the Gateway School & Learning Center, a private Christian school, for facility improvements, technology upgrades, equipment and supplies. p. 19, lines 30 - 33. However, the Alaska Constitution prohibits the payment of money from public funds "for the direct benefit of any religious or other private educational institution." Art. VII, sec. 1, Alaska Constitution. In short, because this proposed grant of public funds provides a direct benefit to a private religious educational institution in violation of the Alaska Constitution, we recommend that you veto this proposed appropriation.

The first inquiry is whether the appropriation will expend public funds. The \$50,000 for this proposed grant is an appropriation from the general fund. There is no

dispute that this proposed grant will utilize public funds.

The second inquiry is whether these public funds will provide a direct benefit to a religious or private educational institution. In *Sheldon Jackson College v. State*, 599 P.2d 127 (Alaska 1979), the Alaska Supreme Court considered four issues in determining if the government action was prohibited by art. VII, sec. 1 of the Alaska Constitution: (1) Does the benefit flow only to private institutions? (2) Does the benefit involve government aid to education conducted outside the public schools? (3) Is the benefit trivial or substantial? (4) Are the funds transferred directly to a private school or through an intermediary?

Applying these criteria leads us to conclude that this proposed grant provides a direct benefit to a private religious educational institution. First, this is a grant to a named recipient, the Gateway School & Learning Center. This benefit flows only to one private institution. Second, the funds in this proposed grant are designated to improve this private school's facilities, upgrade its technology, and provide needed equipment and supplies. Therefore, the primary use of these funds involves government aid to education conducted outside the public schools. Third, a \$50,000 grant is not likely to be a substantial benefit to this private school, but it likewise not trivial. Finally, the proposed grant provides for the money to be given from the state directly to private institution, without the use of an intermediary.

Based on the foregoing, we believe that this proposed grant should be vetoed because it will utilize public funds to provide a direct benefit to a private religious educational institution and therefore violates art. VII, sec. 1 of the Alaska Constitution.

#### b. Religious Entity Grants

This section contains a number of appropriations to religious entities. 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 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). We shall apply these tests to each of these grants.

On page 10, lines 4 - 6, there is a \$25,000 grant to Bingle Camp Ministries for Capital Improvements. The website of the Bingle Camp states its mission is "[h]elping people to know, love and serve Jesus Christ through quality Christian programs." And while it does not discriminate as to who may attend the camps, taken as a whole, we have concerns that this grant is not consistent with the *Lemon* tests. We understand that the camp is a nonprofit sec. 501(c) corporation and serves the public generally. However, it is apparent from its own website that the primary overall mission of the Bingle Camp is to advance the cause of religion. Like the grant appropriated to this entity last year (\$50,000), the grant is rather small, so we doubt that it creates an excessive government entanglement with religion. See 2006 Inf. Op. Att'y Gen. (June 23; 883-06-0109). To the extent this grant is not vetoed, we believe it may be prudent to provide for a grant agreement with repayment provisions to the state (with interest) assuming this can be accomplished under the department's statutory authority. This would protect the state, if the grant is successfully challenged on establishment of religion grounds. This office may be consulted to assist in drafting the agreement and repayment provisions, if necessary. *Id.*

This section also contains numerous grants to religious entities providing social services:

1. Catholic Community Services Grants (p. 11, lines 13 - 24):

\$ 20,000	Angoon Senior Center (Stove, Refrigerator, & Freezer)
\$ 15,000	Haines Senior Services Center
\$ 500,000	Phoenix Program Pilot Project <sup>3</sup>

2. Salvation Army Alaska Division Grants (p. 30, line 33; pg 31, lines 1 - 17):

\$ 52,000	Booth Memorial Youth & Family Services Upgrades
\$1,250,000	Family Enrichment Center Construction
\$ 19,500	Sitka Army Corps Site Preparation and Pier Work
\$ 15,000	Clithroe Center - Treatment Curriculum Supplies and Materials

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<sup>3</sup> The background literature accompanying the request for this appropriation describes the Catholic Community Services Phoenix Pilot Project as a family strengthening project that is an innovative approach to service delivery utilizing a combination of technology to provide cost-effective distance delivery and hands-on services to strengthen and preserve Alaska's families. It is a two-year pilot project with a projected budget of \$250,000 per year that will cover not only program design and implementation, but will also include a full report to the Alaska Legislature and the Department of Health and Social Services within 90 days of completion of the project.

There is also a \$38,000 grant to the Juneau Cooperative Christian Ministry for Glory Hole Dining Area Renovation and Repairs and ADA Upgrades, p. 22, lines 24 - 28.

We understand that each of these grants is to assist an organization in its delivery of social services. 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.

On page 86, lines, 3 - 6, there is a grant of \$1.5 million for the Anchorage Sportsplex, Inc. The Anchorage Sportsplex is a 177,000 square foot sports facility proposed to be built on property adjacent to ChangePoint, a church in Anchorage. As noted in our bill review last year in which a \$700,000 appropriation was made in the capital budget for this facility (*see* ch 82, SLA 2006 (HCS CSSB 231(FIN) am H (brf sup maj pfld H)), the proponents of the sports facility have claimed that the users of the facility will include "non-profit organizations from Anchorage School District, all youth and adult soccer organizations, softball, American Legion baseball, Little League baseball, Pop Warner football, the University of Alaska, Special Olympics" and others. We have not changed our opinion that an appropriation for the Anchorage Sportsplex probably satisfies the *Lemon* test, as the sports facility apparently is not being constructed for or will be used for a secular purpose. 2006 Inf. Op. Att'y Gen. (883-06-0109; June 23). The primary effect of the grant neither advances nor inhibits religion, though we recognize that a secondary effect of the grant is to increase traffic on the ChangePoint campus, which may well increase the membership of ChangePoint. Finally, the grant does not appear to excessively entangle government with religion.

As we recommended last year in our bill review, there may come a time when the ChangePoint congregation would want to use the sports facility for religious or sectarian purposes. We think that if it were to do so, the *Lemon* test would be undermined. Therefore we again recommend that the grant agreement contain a repayment provision that requires repayment of the grant, with interest, should the sports facility in the future be used for religious or sectarian purposes. *Id.*

c. Other

On page 21, line 33, page 22, lines 3 - 4, there is an appropriation of \$500,000 to the Inter-Island Ferry Authority -- Debt Retirement and Assistance. It is a general rule that the retirement of a pre-existing debt confers no benefit on the public. *See* 1995 Inf.

Op. Att'y Gen. (June 15; 883-95-0113). Failure to confer a public benefit violates the public purpose doctrine set out in art. IX, sec. 6, of the Alaska Constitution.<sup>4</sup> When the purpose of an expenditure is to retire a pre-existing debt, there is no new consideration passing to the public. However, as long as the debt was originally incurred through the provision of a public service (here, for a public use ferry service for the smaller communities in Southeastern Alaska)<sup>5</sup> we have opined in the past that the debt reimbursement is likely to survive scrutiny. 2006 Inf. Op. Att'y Gen. (June 23; 883-06-0109). The continued operation of the Inter-Island Ferry Authority is undoubtedly in the public interest and we believe this appropriation would pass scrutiny in satisfying the requirement of art. IX, sec. 6, of the Alaska Constitution.

d. Misnamed Entities

On page 4, lines 11 - 14, there is a \$1,500,000 grant to "Alaska General Contractors and the Alaska Homebuilder's Association -- Construction Academies." Because the legislature did not indicate how this appropriation was to be allocated, then each entity is considered to be appropriated half of the grant amount. However, we understand that the true name of "Alaska General Contractors" is actually titled "Associated General Contractors of Alaska." Therefore, in order to protect the legislative purpose for which this grant was appropriated, half of this appropriation should be earmarked and the intended recipient's name corrected to "Associated General Contractors of Alaska" in a supplemental bill next session so that a grant can be made to the appropriate entity. The grant to Alaska Homebuilder's Association may be made under normal procedures for named-recipient grants.

Under sec. 4, which makes additional grants to named recipients, there is an appropriation of a \$500,000 grant to Abbott Loop Community Park for Ballfield Surface & Playground Improvements. Sec. 4, p 85, lines 15 - 17. There is no legal entity named for this grant who can sign a named-recipient grant agreement. Further, it appears that this should have been a municipal grant made to the Municipality of Anchorage (as it

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<sup>4</sup> Article IX, sec. 6, of the Alaska Constitution reads: "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."

<sup>5</sup> The website for the authority reads as follows: Communities in southern Southeast Alaska formed the Inter-Island Ferry Authority (IFA) in 1997. The alliance developed among communities surrounding Prince of Wales Island seeking to improve the transportation services available to them. The IFA is a public corporation established under the Alaska Port Authority Act. Member communities include Craig, Klawock, Thorne Bay, Coffman, Wrangell, and Petersburg.

owns the Abbott Loop Community Park). As with the appropriation discussed above, we suggest that this money be earmarked and the recipient's name be changed to Municipality of Anchorage and the grant be changed to a municipal grant under AS 37.25.315 in a supplemental bill next session.

(ii) Grants to Municipalities (AS 37.05.315)

The next section of the bill makes grants to municipalities under AS 37.05.315, pp. 37 - 76. More grants to municipalities under AS 37.05.315, are set out in sec. 4, pp. 86 - 88. We find no legal issues with any of these appropriations.

(iii) Grants to unincorporated communities (AS 37.05.317)

The grants to unincorporated communities are set out on pp. 76 - 77. We see no issues in this section.

**2. Department of Corrections**

There is one appropriation for the Department of Corrections in this section of the bill on p. 77, lines 21 - 22. It is for \$53,000 for dental equipment for Lemon Creek Correction Center.

**3. Department of Transportation/Public Facilities**

Some of the Department of Transportation and Public Facilities capital project budget is set out on pp. 77 - 79. We have no comments on this section.

**4. Alaska Court System**

On page 80, lines 6 - 13, there are appropriations to the Alaska Court System for (1) Anchorage Campus Project -- Prisoner Elevator and Holding Cells -- \$1,430,000; (2) Block 39 Planning and Design -- \$240,000; and (3) Critical Courtroom and Case Management Technology -- \$1,500,000. We have no comments on these appropriations.

**B. Sections 2 - 3**

Sections 2 and 3 and the bill (pp. 81 and 82) provide summaries and totals by funding source and agency for the appropriations made in sec. 1 of the bill. We see no issues with these sections.



### **C. Sections 4 - 6**

Section 4 of the bill sets out appropriation items for capital projects and grants from the general fund and other funds as set out in sec. 5 of the bill (by funding source) to the agencies named for the purposes expressed and lapse under AS 37.25.020, unless otherwise noted. And, sec. 56 of the bill sets out the statewide funding for appropriations made in sec. 4.

In sec. 4, the Department of Administration's capital budget is set out on pp. 83 - 84. Of particular note is an appropriation of \$24,117,215 for the Telecommunications Systems (SATS)/Alaska Land Mobile Radio (ALMR) Build Out and Support Project (p. 83, line 33, p. 84, lines 3 - 6). ALMR is a cooperative emergency communications project between the state, federal and local municipal governments. We understand that the development of this emergency communications system is the first of its kind in the United States. There are also appropriations for (1) Statewide Administrative Systems Replacement Phase 2 -- Financials and Procurement System (\$41,000,000, p. 84, lines 7-10); and (2) \$17,000,000 for Telephone System Replacement and Stabilization Phase 3, p. 84, lines 11 - 13).

Capital appropriations to the Department of Commerce, Community, and Economic Development are set out on pp. 84 - 88 (which include the additional named-recipient grants and municipal grants discussed under our review of sec. 1 of the bill). We have no other comments on these appropriations.

The primary capital appropriations to the Department of Education and Early Development's budget are set out at pages 88 - 89. We note that as in prior years, the legislature has also made numerous appropriations for educational expenses to school districts and private organizations through departments other than DEED. *See e.g.*, sec. 1, Grants to Named Recipients, pp. 2 - 37; and Grants to Municipalities, pp. 37 - 76. When appropriations are made directly to a school district, or worse, to a private organization, through a department other than the DEED, then DEED's ability to effectively monitor the project is impaired. Moreover, we understand that many of these appropriations to departments other than DEED are for expenses not associated with the priorities for construction and major repair under the priority list maintained under AS 14.11.014(a) and (b) and 14.11.102. Many are for consumable supplies that districts can pay for with foundation formula funds under AS 14.17. *See, e.g.* p. 4, lines 5 - 10, p. 12, lines 6 - 26, or p. 14, lines 23 - 32. However, we do note that the appropriations to DEED for construction and maintenance are for the most part among the priorities adopted under AS 14.11.

Appropriations outside of the priority system developed under AS 14.11 could be problematic under *Kasayulie v. State*, No. 3AN-97-3782 CI (Alaska Super., Sept. 1, 1999) (Order Granting Preliminary Motion for Partial Summary Judgment). The plaintiffs in *Kasayulie* brought equal protection and Title VI of the Civil Rights Act of 1964 claims and alleged that there is discrimination in the method used to finance construction and maintenance of school facilities in rural school districts. The superior court ruled that there is a fundamental right to equal treatment in the method of financing construction and maintenance of schools. *Id.*; see also 2005 Inf. Op. Att'y Gen. (May 27; 883-05-0107) (discussing school bond debt reimbursement provisions of CCS SB 73). However, we note that many of the projects funded via through other departments are in rural districts, so we do not anticipate that these appropriations will have much impact in the defense of *Kasayulie*. We also note that the amount of funding for construction and maintenance within the statutory priorities, approximately \$48 million, is substantial.

We see no problems with these appropriations.

Capital appropriations to the Department of Environmental Conservation (DEC) for numerous projects including water and wastewater infrastructure projects are set out on pages 89 - 92. And, the Department of Fish and Game appropriations are listed on pages 92 - 94. We have no legal concerns with these appropriations.

Section 4 of the bill, page 94, lines 12 - 17, appropriates to the Office of the Governor \$22 million of federal funds from the Pacific Coastal Salmon Recovery fund. Pursuant to the Memorandum of Understanding between the State and the National Marine Fisheries Service, these funds must be used to fund projects for salmon habitat restoration, salmon stock enhancement, and salmon research. This appropriation includes non-binding intent language indicating the legislature's desire to see a significant percentage of these funds utilized to fund salmon enhancement projects, which has the effect of increasing economic opportunities for the Alaska salmon industry. Your office may honor the stated intent as a matter of comity if it so desires.

Capital appropriations to the Department of Health and Social Services (DHSS) are found on pages 94 - 95. And, there are several capital appropriations to the departments of Labor and Workforce Development (p. 96, lines 7 - 17) and Military and Veteran's Affairs (pp. 96 - 97). Of particular note in the DMVA appropriations is a \$9.5 million State Homeland Security Grant, p. 97, lines 9 - 10.

Capital appropriations to the Department of Natural Resources are found on pp. 97 - 101. And, Department of Public Safety appropriations are set out on pages 101 - 102. We note no problems with these appropriations.

The Department of Revenue capital appropriations, which include appropriations to the Alaska Housing Finance Corporation, are found at pages 102 and 103. Of note is a \$30 million appropriation for the Mat-Su Prison toward implementation of sec. 5, ch. 160, SLA 2004.

Additional capital appropriations to DOTPF are also set out in this section and they include appropriations and allocations for Statewide Federal Programs (pp. 104 - 105), Airport Improvement Program (pp. 105 - 110), Surface Transportation Program (pp. 110 - 117), and a Congressional Earmark of \$4,250,000 for the Fairbanks Intermodal Distribution Grant Program (p. 117, lines 12 - 15). We note there is intent language from the legislature on p. 105, lines 19 - 20, stating its intent that Federal Aid Highway Match funds appropriated in this section may be used for advance right-of-way acquisition for Federal Aide Highway Program eligible projects. DOTPF may abide by this intent language as a matter of comity.

The University of Alaska's capital budget items are set out on pages 117 - 118. We have no legal concerns with these appropriations.

#### **D. Sections 7 - 9**

Section 7(a) and (b) of the bill on page 125 provide for the appropriation of funds covering labor costs and adjustments for employees in the following collective bargaining units: the Labor, Trades and Crafts unit; the Confidential unit; the Masters, Mates and Pilots unit; the Licensed Engineers unit; and the Teachers' Education Association of Mt. Edgecumbe unit. This section also provides for a corresponding reduction if the collective bargaining agreements are not ratified by the membership of these collective bargaining units.

Section 8 of the bill sets out the funding by agency for the appropriations made in sec. 7 of the bill, while sec. 9 sets out the statewide funding for the appropriations made in sec. 7.

#### **E. Sections 10 - 12**

Section 10 of the bill would make supplemental operating budget appropriations for FY 07. Upon enactment, these appropriations have an effective date of May 16, 2007. *See* Sec. 64. Section 11 sets out the funding by agency for the supplemental appropriations made in sec. 10, and sec. 12 sets out the statewide funding for the appropriations made in sec. 10.

## **F. Language Sections (secs. 13 - 66)**

The language sections (secs. 13 - 66), are set out on pp. 146 - 187 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 13(a) and (b) of the bill concern appropriations totaling \$400,000 made in 2006 by sec. 24(a) and (b) of ch. 82, SLA 2006 for investigation related to potential litigation on behalf of the public employees' (PERS) and teachers' (TRS) retirement systems. The appropriations from 2006 are amended by sec. 13 (a) and (b) of this bill. Rather than fund the \$400,000 equally from the PERS and TRS funds, under the amendments the larger PERS fund, with its larger membership base, is the source of \$288,000 of the appropriation, and the TRS fund provides \$112,000 of the amount for the investigation costs. This allocation better reflects the value of the investigation to the two systems' funds, in keeping with generally accepted accounting procedures (GAAP).

Section 14(d) of the bill would amend an appropriation made in 2004 (sec. 10(b), ch. 159, SLA 2004), by removing the contingency language for a loan made to the City of Delta Junction under ch. 159, SLA 2004 (\$1,200,000 from the Jobs and Growth Reconciliation Act of 2003 as a no-interest loan to the city to pay the costs of a settlement agreement<sup>6</sup> for litigation regarding the establishment of a private prison in the vicinity of the city). The city was to repay the loan in annual increments of \$50,000 from amounts received as municipal assistance under AS 29.60. The contingency in subsection 10(b) of ch. 159, SLA 2004 provides that, upon the formation of a borough that encompasses the City of Delta Junction, the balance owing on the loan would convert to a grant under AS 37.05.315 on the date of incorporation. We note that while the Local Boundary Commission recently approved a petition for the incorporation of the Deltana Borough (petition approved April 26, 2007; reconsideration denied on May 10, 2007), the decision must be ratified by the voters of the area proposed for incorporation. A by-mail election has been scheduled to begin July 30, 2007, and end August 21, 2007. Also, the decision of the LBC approving the petition for incorporation of the Deltana Borough has been appealed to the superior court. *Murphy v. Local Boundary Commission*, Case No. 4FA-07-01738 CI. Removing the contingency language of borough formation and converting the loan to a municipal grant before a borough is formed may raise issues of public funds being used to pay a preexisting debt and thus run afoul of art. IX, sec. 6 of the Alaska Const. See e.g., 2003 Inf. Op. Att'y Gen. (June 10; 883-03-0045).

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<sup>6</sup> The State of Alaska was not a party to the court case in which the City of Delta Junction entered into a settlement agreement to pay a private entity the agreed upon amount. See 2002 Inf. Op. Att'y Gen. (June 28; 883-02-0058).

Section 24 of the bill contains ratification of expenditures from past fiscal years to reverse negative account balances for several departments.

Section 30 of the bill 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 the Department of Commerce, Community and Economic Development.

Section 44(b) of the bill of the bill is a reappropriation of the unexpended and unobligated balance of a municipal grant to the city of Wales made in 1998, and amended in 2005, to become a grant for the purpose of debt repayment to the Internal Revenue Service (IRS) and Department of Labor for 2005 and 2006 payroll taxes, penalties, and interest. Accordingly, as noted earlier, use of public funds to pay a preexisting debt raises constitutional concerns as to whether these appropriations are for a public purpose. *See* 1995 Inf. Op. Att'y Gen. (June 15; 883-96-0113) (general rule that the retirement of a pre-existing debt confers no benefit on the public; failure to confer a public benefit violates the public purpose doctrine set out in art. IX, sec. 6, of the Alaska Constitution). However, considering the appropriation is to a municipality, as we have opined before, this raises the presumption the appropriation is for a public purpose. 1997 Inf. Op. Att'y Gen. (883-97-0111; June 16). Even though an appropriation is for the purpose of paying a municipality's preexisting debt, this may serve a public purpose by relieving the municipality of a burden that has inhibited its ability to deliver municipal services for the health and welfare of its residents. And, because a municipal government exists for the purpose of providing public services to its residents, the municipality's continued viability is in the public interest. *See* 2006 Inf. Op. Att'y Gen. (883-06-0109; June 23). For these reasons, we believe this appropriation would pass scrutiny in satisfying the requirement of art. IX, sec. 6, of the Alaska Constitution. We caution that this presumption might be rebutted if there were some indication that the debt arose as result of some egregious wrongdoing by municipal officials and it may be prudent for the administering department to investigate the cause of the IRS debts before providing the appropriated funds.

Section 48 of the bill contains one capital reappropriation divided up in subsections (b) and (c), which are major appropriations for education funding. Subsection (b) provides to each school district the equivalent of one quarter of the increase to AS 14.17.460 school district cost factors recommended in a 2005 study by the Institute of Social and Economic Research. This appropriation was made in lieu of amendments to AS 14.17.460. The legislature intends to study the district cost factor during the interim. *See* SCR 11. Subsection (c) provides school improvement grants equal to those provided in the last fiscal year.

Section 52 of the bill provides for grant appropriations from the Railbelt Energy Fund (AS 37.05.520 as named-recipient grants under AS 37.05.316 as well as municipal grants under AS 37.05.315. There is intent language in sec. 52(j), that the \$229,000 appropriation made in (b) to the Matanuska Electric Association (\$12,500,000 for new substations and transmission lines and infrastructure development) be used to construct an electrical line extension to Alaskan Beauty Estates located within the Matanuska-Susitna Borough. This intent language is not binding. And, for DCCED to attempt to enforce it in a grant agreement even as a matter of comity, may be considered as violating the provisions of AS 37.05.318, which reads:

**Sec. 37.05.318.** Notwithstanding AS 44.62 (Administrative Procedure Act), AS 37.07 (Executive Budget Act), and other provisions of this chapter, a state agency may not adopt regulations or impose additional requirements or procedures to implement, interpret, make specific, or otherwise carry out the provisions of AS 37.05.315 - 37.05.317, unless required by the federal government for participation in federal programs.

Therefore, we believe the department should make the grant recipient aware of the legislative intent in sec. 52(j). Then, assuming both DCCED and the recipient are agreeable to comply with the request, it could be included in the grant agreement. Otherwise, it would be a matter of voluntary compliance of the legislature's intent by the recipient.

Sections 53 and 54 of the bill are reappropriations of legislative appropriations to Legislative Council and the Legislative Budget and Audit Committee and reappropriation of the unexpended and unobligated amounts of FY 07 legislative operating budget to FY 08.

Section 55 of the bill provides for grants to municipalities with designated amounts to each municipality (sec. 55(b)), and to unincorporated communities (sec. 55(c)). Section 55(a) provides the legislature's intent that these grants are to be used to assist these entities to defray increased energy costs and other costs. This intent language may be followed by the recipient entities as a matter of comity and, considering the legislature's expressed intent that it can be used for "other costs" as well as to defray increased energy costs, the entities are free to use the funds for the public purpose they choose.

Section 55(e) and (f) of the bill would make a \$185,000,000 appropriation from the general fund to the Department of Administration for deposit in PERS defined benefit accounts provides contribution rate relief to PERS employers in FY 08. The

appropriation is designed to be a partial payment of PERS employers' contributions for FY08, so that the employers' only have to pay an "effective" 22 percent contribution rate, unless their actuarial contribution rate for FY08 is less than 22 percent, in which case they will pay their actual rate or 14.48 percent, whichever is higher. We note that these subsections replace secs. 15(c) and (d) in the operating budget (HB 95), which are repealed in sec. 59 of this bill.

Section 56 of the bill is an interesting provision. Section 56(a) provides for the sweep of unappropriated amounts in the general fund into the Alaska capital income fund on June 30, 2007. The Alaska capital income fund is a subaccount in the general fund, and is thus sweepable to the Constitutional Budget Reserve (CBR) account under art. IX, sec. 17(d) of the Alaska Const. But under the reverse sweep provision in the operating budget (sec. 31(a), HB 95), whatever is swept from the Alaska capital income fund into the CBR, will get swept right back into the Alaska capital income fund. And, sec. 56(b) provides that, in the event there are insufficient monies in the general fund to fund general fund appropriations for the fiscal year ending June 30, 2007, that an amount necessary to balance revenue and general fund appropriations is to be covered by an appropriation from the Alaska Housing Capital Corporation, a subsidiary of Alaska Housing Finance Corporation (AHFC). It is our understanding, however, that this provision is most likely unnecessary as it is projected there are sufficient funds in the general fund to cover the relevant appropriations.

Section 57 of the bill would appropriate \$50,000,000 from the general fund to the constitutional budget reserve fund (art. IX, sec. 17, Alaska Const).

Section 58 of the bill is intent language that describes the desire of the legislature that the additional amounts contributed to PERS and TRS in the operating budget are not to be construed as an offset to any recovery we get from Mercer litigation under the collateral source statute (AS 09.17.070). However, the PERS appropriation to which this refers was repealed from the operating budget and reinserted into this bill. This intent language was not updated to track these actions; therefore, assuming comity to this intent is desired, this language should be amended in a future appropriations bill in the event the Mercer case goes forward.

Sections 60 and 63 of the bill contain a contingency and effective date regarding sec. 59 of this bill. Namely, HB 95 has to be enacted in order for the repeal of sec. 15(c) and (d) of the operating budget to happen. HB 95 passed the legislature and been transmitted to your office, therefore, the contingency will have been met when it becomes law and sec. 59 would be repealed per secs. 60 and 63 of this bill.

Section 61 of the bill identifies the sections that are for the capitalization of funds and do not lapse, those that have specific lapse dates, and those that are for capital projects and lapse under AS 37.25.020.

Section 62 of the bill provides for certain provisions of the act to be retroactive.

Section 64 of the bill lists the provisions of the bill which have an effective date of May 16, 2007.

Section 65 of the bill lists those provisions of the bill that have an effective date of June 30, 2007.

Lastly, sec. 66 of the bill provides an effective date for the bill (except as provided for in secs. 63 - 65), of July 1, 2007.

### **III. 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,

Talis J. Colberg  
Attorney General

TJC:MLV:jm