

May 31, 2011

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

Re: HCS CSSB 46(FIN) -- making and amending appropriations, including capital appropriations, savings deposits in the form of appropriations to the statutory budget reserve fund, and other appropriations; and making appropriations to capitalize funds
Our file: JU2011200296

Dear Governor Parnell:

At the request of your legislative director, we have reviewed HCS CSSB 46(FIN), making and amending appropriations, including capital appropriations, savings deposits in the form of appropriations to the statutory budget reserve fund, and other appropriations; and making appropriations to capitalize funds. In short, this is our legal review of the fiscal year 2012 capital budget.

I. General Comments

We have reviewed all appropriations set out in this bill and have several comments on general legal issues affecting the bill overall.

A. Legislative Intent Language

As in prior years, the bill has numerous expressions of legislative intent and contingencies accompanying certain appropriation items. This office has historically taken the

position that most expressions of legislative intent are non-binding because they violate the confinement clause of the Alaska Constitution ("[b]ills for appropriations shall be confined to appropriations." Art. II, sec. 13).

In *State Legislature v. Hammond*, Judge (now Chief Justice) Carpeneti adopted a five-factor test to determine whether such language added to an appropriations bill violates the confinement clause. Under this test, the qualifying language must (1) not administer the program of expenditures; (2) not enact law or amend existing law; (3) be the minimum necessary to explain the Legislature's intent regarding how the money appropriated is to be spent; (4) be germane, that is, appropriate, to an appropriations bill; and, (5) not extend beyond the life of the appropriation. Memorandum of Decision at 44 - 45, No. 1JU-80-1163 (Alaska Super., May 25, 1983). The Alaska Supreme Court adopted Judge Carpeneti's test on a "nonexclusive" basis in *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 377 (Alaska 2001) (*Knowles II*).¹

The courts have had relatively few opportunities to consider whether certain instances of intent language violate the confinement clause. Judge Carpeneti observed that the five-factor test could not "easily or mechanistically be applied" and that every section of challenged intent language "is a new case which must be examined separately." *Hammond*, No. 1JU-80-1163 at 44 - 45. This analytical process makes it difficult to predict the outcome of a confinement clause dispute. Judge Carpeneti determined that most (but not all) of the intent language at issue in *Hammond* was invalid under the confinement clause. *Id.* at 46-58. In *Knowles II*, the Court found certain contingency language invalid (*e.g.*, 21 P.3d at 379-81), and certain descriptive language non-binding (*e.g.*, *id.* at 383), but upheld certain contingency language (*e.g.*, *id.* at 381 - 82).

Analysis by the Alaska Supreme Court in *Knowles II* suggests how the *Hammond* test would be applied to confinement clause issues. The basic purpose of the confinement clause is to prevent the legislature from enacting substantive policy in the context of making an appropriation. "An appropriation for a statutory program may not include provisions changing

¹ The court described that it approaches confinement clause disputes with an assumption that an act of the legislature is constitutional.

the requirements of that program, even temporarily for the purposes of that appropriation." *Id.* at 377-78. The "minimum necessary" language test limits language to that necessary to explain the "legislature's purpose"; i.e., to explain how, when, or on what the money is authorized to be spent. *Id.* 'This factor limits the legislature's ability to include in an appropriation bill legislation cloaked as a "description.'" *Id.* Similarly under the "germaneness" test, courts generally will uphold conditions expressed as purposes for the appropriation. *Id.* at 379. Thus, courts will generally uphold appropriation language identifying the facilities, employee positions, buildings or types of buildings on which the money could be spent. And courts will uphold contingencies on appropriations that relate to the receipt or non-receipt of specific funds, or relate to the occurrence or nonoccurrence of something that would make the expenditure desirable. 'However, contingencies that relate to things other than the need for or use of the money or the need for the activity, may be found insufficiently "connected" to the appropriation.' *Id.*

The bill includes several types of legislative intent and contingency language, only a few of which appear to be potentially enforceable under the *Hammond* test. For example, sec. 10, page 150, lines 7 - 8, would make the \$14,724,714 allocation for the Kivalina K-12 School "contingent upon the community of Kivalina moving to a permanent new location where the new school can be safely constructed." This language would appear to potentially satisfy the *Hammond* test because the language relates to the occurrence or nonoccurrence of something that would appear to make the expenditure desirable. I.e., the permanent location of the community to a place where a school can be safely constructed would appear to make "desirable" the expenditure of money to construct the new school.²

Other legislative intent language appears unlikely to be enforceable under the *Hammond* test. For example, the bill includes legislative intent related to grants to municipalities, to named

² Sec. 4, page 136, lines 29 - 30, includes legislative intent that the "state's capital investment into energy generation projects not exceed 50% of the total investment required to fully complete those projects." While less obvious, this language could be interpreted as meeting at least a portion of the *Hammond* test analysis. The language arguably connects the appropriation to other funding sources, and arguably makes the expenditure more desirable by both requiring other funding sources for the projects and ensuring that the state makes only limited investment in the projects.

recipients, and to unincorporated communities that the Department of Commerce, Community, and Economic Development for grants of \$50,000 or less (1) eliminate certain reporting requirements, and (2) make a single up-front payment if the recipient certifies and agrees (a) to use the full grant amount for its intended purpose, (b) to return all unexpended funds to the state upon project completion, and (c) to follow all other terms of the department's grant agreement. Section 1, page 5, lines 5 - 11; page 45, lines 14 - 20; and page 76, line 32 to page 77, line 7. Interpreting this language to mandate certain action by an agency would apparently violate the *Hammond* test. That interpretation would suggest the legislature was administering the program of expenditures and enacting new law by establishing substantive provisions regarding how the grants are to be administered. The language would also be more than the minimum necessary language to explain the appropriation, and would not be germane to the appropriation.³

The bill includes certain language by which the legislature appears to describe its intentions without attempting to impose conditions or otherwise affect the related appropriation. *See, e.g.,* sec. 1, page 44, lines 28 - 32 (grants intended to satisfy highest ranked public library construction); sec. 4, page 126, lines 6 - 12 (grants and appropriations intended to provide statewide balance addressing the state's diverse energy needs); sec. 10, page 145, lines 6 - 7 (appropriations intended to be considered a single comprehensive K-12 education infrastructure investment program for fiscal year 2012); and sec. 10, page 149, lines 26 - 28 (appropriations intended to address recommendations in litigation case). These expressions of legislative intent should not impact agency implementation regarding those appropriations.

The bill also includes language which appears to request subsequent notification to the legislature of certain events. Section 1, page 20, lines 16 - 19 expresses intent that the Municipality of Anchorage will submit quarterly progress reports to the Senate president and House speaker detailing any cost overruns or changes in project scope relating to the Port of Anchorage expansion project. Section 1, page 100, line 32 to page 101, line 6; and page 117,

³ Similarly, intent language requiring the Department of Transportation and Public Facilities to notify the legislature when certain transportation projects are added to the Statewide Transportation Improvement Plan (STIP) is unlikely to be found enforceable under the *Hammond* Test. *See* sec. 1, page 100, line 32 to page 101, line 6; and page 117, lines 3 - 8.

lines 3 - 8, expresses intent that the Department of Transportation and Public Facilities notify the legislature when certain transportation projects are added to the Statewide Transportation Improvement Plan (STIP). None of these provisions appear to condition or affect the underlying appropriations, and should not impact agency implementation regarding those appropriations.

In the past, we have advised that expressions of intent may generally be ignored or followed as a matter of comity. We continue to offer this advice, however, in the event your office or a recipient agency is disinclined to follow intent language as a matter of comity, we recommend further consultation with this office so that we may advise as to the extent such language may be enforceable under the *Hammond* factors.

Finally, as we advised in our reviews of intent language in previous appropriations bills, an expression of legislative intent may no longer be vetoed by the governor as a line item veto separate from the appropriation itself. In *Knowles II*, the Alaska Supreme Court ruled that expressions of intent do not constitute "items" subject to your veto power under art. II, sec. 15, of the Alaska Constitution. *Id.* at 377.

B. Grants to Tribal Entities

Several sections of the bill refer to tribes or tribal entities. The entities fall into three categories: corporations under state law, federally recognized tribes, and village councils.⁴

⁴ Section 1 Capital Grants and Projects
Page 57, lines 19 - 20 (Eagle IRA Council)
Page 63, lines 26 - 28 (Kaagwaantaan, Inc. - Alaska)
Page 67, lines 6 - 9 (Native Village of Unalakleet)
Page 67, lines 17 - 20 (Newtok Traditional Council)
Page 68, lines 14 - 16 (Nunapitchuk IRA Council)
Page 70, lines 13 - 15 (Skagway Traditional Council)
Page 74, lines 12 - 14 (Yakutat Tlingit Tribe)
Page 74, lines 26 - 28 (Yuut Elitnaurviat)
Page 77, line 33 to page 78, line 3 (Klukwan)
Section 4, Energy Projects and Grants
Page 126, lines 27 - 30 (Alaska Energy Authority for project based in Metlakatla)
Page 133, lines 26 - 28 (Akiachak Native Community)
Page 134, lines 29 - 32 (Metlakatla Indian Community)

While theoretical limitations exist on the legislature's ability to appropriate monies to tribes,⁵ as a general rule nothing prevents properly implemented appropriations to native corporations, federally recognized tribes, or village councils. Our general comment regarding such grants is to remind state agencies that they must obtain a waiver of sovereign immunity from the tribal entity on a form that has been approved by this office before grant monies can be dispersed to the entity. To the extent that the state enters a contract or commercial transaction with a tribe, contract or grant language specifying state court jurisdiction may be advisable as the state might otherwise submit itself to tribal jurisdiction. The grantee must, as with all grantees that receive public funds, agree that the expenditure of the grant money will serve a public purpose. [FN4] See 1981 Inf. Op. Att'y Gen. (April 27; File No. J-66-335-81) citing art. IX, sec. 6, of the Alaska Constitution [public purpose clause]. Finally, some caution should be exercised about the specific entity to whom the appropriation or grant monies should be distributed. While councils and the tribes may be closely related, they are technically separate. A tribal council is merely the "elected lawmaking bod[y] of tribal governments."⁶

C. Grants to Religious Entities

Page 135, lines 4 - 6 (Native Village of Cantwell)
Section 4, p. 135, lines 20-23 (Metlakatla Indian Community)
Section 28, p. 162 - 163 - Department of Health and Social Services Grants
Section 28, p. 163, lines 5 - 11 (Energy assistance grants to tribes)
Section 50, House District 38 Appropriations
Page 177, lines 22 - 24 (grant to Association of Village Council Presidents for demonstration project)

⁵ See, e.g., 1981 Inf. Op. Att'y Gen. 543, 544-545, 1981 WL 38636 (noting potential equal protection, public purpose, and local government constitutional issues associated with state revenue sharing with councils). The expenditure of state funds will sometimes be contingent on agreement by a tribe to anti-discrimination clauses, and to waivers of sovereign immunity.

⁶ Cohen's Handbook of Federal Indian Law § 4.04[3][c], at 260 (Nell Jessup Newton ed., 2004 ed.). Note that the council or council members may also be able to assert sovereign immunity. *Id.* at 636 (immunity protects tribal officials acting within the scope of their authority).

The bill contains three appropriations for grants to named-recipients that are religious or religious-affiliated entities, the Salvation Army [sec. 1, page 72, lines 24 - 27 (\$1,500,000 grant for construction of Anchorage Corps Community Center); and sec. 45(e), page 173, lines 2 - 8 (reappropriation for grant to Salvation Army's Clitheroe Center and Secure Treatment Unit, including design, construction, and installation of a water filtration system)] and Wellspring Revival Ministries [sec. 1, page 73, lines 18 - 20 (\$38,000 grant for heating upgrades to Joel's Place Skate Park and Youth Center)]. Such grants raise legal concerns since the Alaska and United States Constitutions both prohibit the establishment of religion. Article I, sec. 4, Alaska Constitution; First Amendment, United States Constitution. The United States Supreme Court evaluates establishment clause issues with three tests:

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

These religious or religious-affiliated entities provide social services to the general public in the areas in which they are located. We understand that each of these grants is to assist the entity in its delivery of social services to the general public. We further understand that the social services these organizations provide are made available to those in need on a non-sectarian basis. Accordingly, we believe that the *Lemon* tests are satisfied. Providing social services on a non-sectarian basis is a legitimate secular purpose that neither advances nor inhibits religion. Moreover, we do not see excessive government entanglement through these grants.

D. Pre-existing Debt

There are two appropriations in this bill that merit mention as appropriations made for the purpose, in whole or in part, of paying a pre-existing debt. Those appropriations are:

- (1) Sec. 38 of the bill, page 167, lines 21 - 26, reappropriation as a municipal grant to the City of Craig for reimbursement of 2008 and 2009 expenditures for Craig cold storage (the unexpended and unobligated amount is estimated to be \$200,000); and
- (2) Sec. 47(c) of the bill, page 175, line 27, to page 176, line 1, a grant to named recipient to Senior Citizens of Kodiak, Inc. for fire sprinkler system emergency replacement debt reimbursement.

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. When the purpose of 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, 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).

E. Section 28(c)

A legal problem exists with sec. 28(c) of the bill, page 163, lines 12 - 19. Section 28(c) is apparently intended to appropriate general fund money not to exceed \$4,627,000 to cover shortfalls in anticipated federal receipts appropriated for the public assistance, energy assistance program, for fiscal year 2012. This appropriation, however, misidentifies sec. 1 of the bill as the source of the appropriation of federal receipts for the public assistance, energy assistance program for fiscal year 2012. Section 1 of the bill does not appropriate any amount for the assistance program, meaning there could never be a shortfall of funding from that appropriation source. This error invalidates the intended purposes of the appropriation. The source of the appropriation referenced in sec. 28(c) is actually sec. 1, CCS HB 108. An amendment to sec. 28(c) to identify the correct appropriation source should be considered.

II. Sectional Analysis

A. Sections 1 - 3

Section 1 of the bill, pages 2 - 119, would make appropriation for capital projects and grants, including grants to municipalities, grants to named recipients, and grants to unincorporated communities. The appropriations made in this section would take effect on July 1, 2011 under sec. 60 of the bill, and except as otherwise noted, would lapse under AS 37.25.020.⁷ Section 2 of the bill sets out the funding by agency for the appropriations made in sec. 1 of the bill. Section 3 of the bill sets out the statewide funding for the appropriations made in sec. 1 of the bill.

B. Sections 4 - 6

Section 4 of the bill, pages 126 - 138, would make appropriations for capital projects and grants related to energy. The section would make an appropriation to the Alaska Industrial Development and Export Authority for a coal to liquids certification project, would make appropriations to the Alaska Energy Authority for energy projects and grants, and makes appropriations to the Alaska Housing Finance Corporation (AHFC) for Alaska gasline development, and funding for AHFC programs regarding weatherization and home energy rebates. The appropriations made in this section would take effect on July 1, 2011 under sec. 60 of the bill, and except as otherwise noted, would lapse under AS 37.25.020. Section 5 of the bill sets out the funding by agency for the appropriations made in sec. 4. Sec. 6 of the bill sets out the statewide funding for the appropriations made in sec. 4.

⁷ AS 37.25.020 reads: "An appropriation made for a capital project is valid for the life of the project and the unexpended balance shall be carried forward to subsequent fiscal years. Between July 1 and August 31 of each fiscal year, a statement supporting the amount of the unexpended balance required to complete the projects for which the initial appropriation was made and the amount that may be lapsed shall be recorded with the Department of Administration."

C. Sections 7 - 9

Section 7 of the bill, pages 141 - 142, would make appropriations for grants to municipalities and to named recipients under AS 37.05.315 - 37.05.316 for capital projects related to commercial passenger impacts in Alaska. The appropriations made in this section would take effect on July 1, 2011 under sec. 60 of the bill, and except as otherwise noted, would lapse under AS 37.25.020. Section 8 of the bill would set out the funding by agency, and sec. 9 of the bill would set out the statewide funding for the appropriations made in sec. 7.

The commercial vessel passenger tax account is the funding source for \$13,634,000 of this appropriation. Spending restrictions imposed upon funds from the tax account arise under: 1) the Commerce Clause; 2) the Tonnage Clause;⁸ and, 3) 33 U.S.C. 5. Based upon our review of these constitutional and statutory provisions and the applicable case law, we believe that it we are in a good position to defend appropriations that defray the cost of services or facilities provided to safely and efficiently accommodate large commercial passenger vessels and its passengers while visiting Alaska. The construction and improvement of docking facilities to accommodate large passenger vessels satisfy these spending restrictions. There are over \$40 million dollars in such projects contained in sec. 7 of the bill. Thus, we do not believe these appropriations are vulnerable to legal challenge.

D. Sections 10 - 12

Section 10 of the bill, pages 145 - 150, would make appropriations for K-12 education infrastructure, including grants to municipalities, grants to named recipients, appropriations and allocations related to the major maintenance grant fund and the school construction grant fund, and appropriations for deferred maintenance. The appropriations made in sec. 10 would take

⁸ Article I, sec. 10, cl. 3 of the United States Constitution prohibits states or municipalities from "laying any duty of tonnage," meaning a charge imposed upon a vessel, according to its tonnage for entering or leaving a port, or navigating the public waters of the country. *See, e.g., Polar Tankers, Inc. v. City of Valdez*, 129 S.Ct. 2277 (2009).

effect on July 1, 2011 under sec. 60 of the bill, and except as otherwise noted, would lapse under AS 37.25.020. Section 11 of the bill would set out the funding by agency for the appropriations made in sec. 10. Section 12 of the bill would set out the statewide funding for the appropriations made in sec. 10.

E. Sections 13 - 15

Section 13 of the bill, pages 153 - 155, would make supplemental appropriations for capital projects and grants, including a grant to named recipients. The appropriations made in sec. 13 would take effect on May 17, 2011 under sec. 58, and except as otherwise noted, lapse under AS 37.25.020. Section 14 of the bill would set out the funding by agency for the appropriations made in sec. 13. Sec. 15 of the bill would set out the statewide funding for the appropriations made in sec. 13.

F. Sections 16 - 36

Sections 16 - 36 of the bill would make or amend various appropriations, as described below. Except as otherwise noted, the appropriations would take effect on July 1, 2011 under sec. 60 of the bill.

Section 16 of the bill, page 158, would appropriate the entire unobligated balance of the Alaska children's trust, estimated to be around \$7.8 million to the Alaska children's trust grant account for the purpose of being disbursed through a three-year grant to the Alaska Community Foundation for the Friends of the Alaska Children's Trust to aid in the prevention of child abuse and neglect. Because the board of the Alaska Children's Trust has authority under AS 37.14.205(b) and AS 37.14.230(a)(2) to award grants to community-based programs to aid in the prevention of child abuse and neglect, we see no legal problem with this appropriation. However, we suggest the grant agreement for this award be for a period of three years and require the recipient to seek these funds on a cost reimbursement basis rather than a lump-sum award.

Section 17 of the bill, page 158, would appropriate amounts to the Department of Administration and the state bond committee to defease (i.e., retire early) revenue bonds and certificates of participation, and thereby avoid future interest expense associated with the debt. Section 17(a) relates to bonds which financed the Anchorage Jail. Section 57(a) of the bill would make the appropriation in sec. 17(a) contingent upon the state bond committee certifying the amount required for defeasance of the callable bonds. Section 17(b) relates to certificates of participation which financed three state facilities. The bill does not include a contingency related to sec. 17(b).

Section 18 of the bill, page 158 - 159, would appropriate federal and other statutorily designated program receipts, and would provide for reductions and shortfall of receipts where necessary for consistency with federal law and state law.

Section 19 of the bill, page 159, appropriates federal and general fund monies to capitalize certain funds. Under sec. 55(b) of the bill, the appropriations made by sec. 19 do not lapse.

Section 20 of the bill, page 159, would appropriate general funds and Alaska Housing Finance Corporation receipts to capitalize certain funds, and to provide for transfers between certain funds. The appropriation to the Alaska Housing Capital Corporation account [sec. 20(d)] would take effect June 30, 2011 under sec. 59 of the bill. The remainder of sec. 20 would take effect July 1, 2011 under sec. 60 of the bill. The appropriations made by sec. 20 capitalize funds and would not lapse under sec. 55(b) of the bill. The appropriation made in sec. 20(f) is contingent upon the Twenty-Seventh Alaska State Legislature creating a fund for the purpose of providing education grants or performance scholarships, similar to HB 104. That bill passed the House but not the Senate during the 2011 legislative session.

Section 21 of the bill, pages 159 - 160 would appropriate amounts received in settlement insurance claims from the general fund to the state insurance catastrophe reserve account or to the appropriate state agency to mitigate the loss. The appropriation to the state insurance catastrophe reserve account capitalizes that fund and does not lapse under sec. 55(b) of the bill.

Section 22 of the bill, pages 160 - 161, would set 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. Subsection (b) authorizes the Department of Commerce, Community, and Economic Development to work with municipalities to reduce allocations if the amount received is less than the allocations. The appropriations in the section would lapse under AS 37.25.020 under sec. 55(a) of the bill.

Section 23 of the bill, page 161, would amend a prior appropriation to broaden its scope so that the appropriation can be also used for the time and attendance project (ASSET). This appropriation would take effect May 17, 2011 under sec. 58 of the bill.

Section 24(a) of the bill, page 161, lines 15 - 19, would make an appropriation for a grant to named recipient Cook Inlet Aquaculture Association to monitor out-migration of salmon smolt from Tustumena Lake for fiscal year 2011 and fiscal year 2012, at the end of which the appropriation lapses. This appropriation is effective May 17, 2011 under sec. 58 of the bill. Section 24(b), page 161, lines 20 - 24, would make an appropriation for the University of Alaska Fairbanks plant materials laboratory to undertake seed potato testing required by the negotiated trade protocol with China for fiscal year 2012 and fiscal year 2013, at the end of which the appropriation would lapse.

Section 25 of the bill, page 161, would appropriate \$1,200,000 to the Department of Corrections to allow it during fiscal year 2012 to test equipment, security measures, and systems at the Goose Creek Correctional Center to ensure each works as promised under warranties. The testing will be "under load" -- that is with prisoners present. The appropriation would lapse at the end of fiscal year 2012.

Section 26(a) - (c) of the bill, page 161, line 28 - page 162, line 13, would reappropriate the unexpended and unobligated balance of appropriations related to public school construction projects, not to exceed certain amounts. If the amounts reappropriated are less than \$5,000,000,

the appropriations are proportionally reduced by the amount of the shortfall. The appropriations would take effect June 30, 2011 under sec. 59 of the bill, and under sec. 55(a) of the bill, sec. 26(a) and (b) would lapse under AS 37.25.020.

Section 26(d) of the bill, page 162, lines 14 - 19, would amend appropriations for three school construction projects to change the funding source from the School Construction Grant Fund to the 2010 Education Project Fund. Chapter 95, SLA 10, authorized issuance of general obligation bonds and creation of the 2010 Education Project Fund, contingent upon voter ratification of the general obligation bonds. The voters ratified the general obligation bonds, creating the funding source for the three school construction projects. The amendment takes effect May 17, 2011, under sec. 58 of the bill.

Section 27(a) of the bill, page 162, lines 20 - 25, relates to wastewater projects and would reappropriate the unexpended and unobligated balance of a prior appropriation to a different project. This appropriation would take effect June 30, 2011, under sec. 59 of the bill, and under sec. 55(a) of the bill, would lapse under AS 37.25.020.

Section 27(b) of the bill, page 162, lines 26 - 29, would make an appropriation for a recreational shellfish beach monitoring program for fiscal year 2012, fiscal year 2013, fiscal year 2014, and fiscal year 2015, at the end of which the appropriation lapses.

Section 28(a) of the bill, page 162, line 30 to page 163, line 4, reappropriates unexpended and unobligated amounts from a mental health program to relocation expenses for a residential treatment facility, Nugents Ranch. This appropriation would take effect June 30, 2011 under sec. 59 of the bill, and under sec. 55(a) of the bill, would lapse under AS 37.25.020.

Section 28(b) of the bill, page 163, lines 5 - 11, would appropriate from the general fund, an amount equal to the fiscal year 2011 minus fiscal year 2012 federal receipts received directly by tribes for the Low Income Home Energy Assistance Program, not to exceed \$3,373,000.

Section 28(c) of the bill, page 163, lines 12 - 19, would appropriate general fund money not to exceed \$4,627,000 to cover shortfalls in anticipated federal receipts appropriated for the public assistance, energy assistance program, for fiscal year 2012. As described in part I.E. above, a legal issue exists with this appropriation as it misidentifies the appropriation of federal receipts for the public assistance, energy assistance program, for fiscal year 2012, as sec. 1 of the bill, rather than sec. 1, CCS HB 108. This appropriation would lapse at the end of fiscal year 2012.

Section 29(a) of the bill, page 163, lines 20 - 25, would appropriate money to the Alaska Workforce Investment Board, in partnership with the Department of Commerce, Community, and Economic Development, for the award of grants for training Alaskans in the film and television industry for fiscal year 2012, fiscal year 2013, fiscal year 2014, and fiscal year 2015, at the end of which the appropriation would lapse. The department has the authority to award such grants under AS 23.15.820(b) and 23.15.840.

Section 29(b) of the bill, page 163, line 26 to page 164, line 1, would amend a prior appropriation made regarding AVTEC Culinary Academy. The appropriation would take effect May 17, 2011, under sec. 58 of the bill.

Section 30 of the bill, page 164, would make appropriations related to litigation expenses for certain oil and gas issues, including the British Petroleum Exploration (Alaska), Inc. corrosion case for fiscal year 2012 and fiscal year 2013; and Point Thomson and Federal Energy Regulatory Commission proceeds on the Trans Alaska Pipeline System for fiscal year 2011, fiscal year 2012, and fiscal year 2013. The appropriation in sec. 30(c) would take effect May 17, 2011, under sec. 58 of the bill. The appropriations in subsecs. (a) and (b) would lapse at the end of fiscal year 2013, and the appropriation in subsec. (c) would lapse at the end of fiscal year 2012.

Section 31 of the bill, page 164, would make appropriations related to the Kodiak Launch Complex for fiscal year 2012, at the end of which the appropriation lapses.

Section 32 of the bill, page 164, would reappropriate amounts for Alaska Peninsula energy development. This appropriation takes effect May 17, 2011, under sec. 58 of the bill and under sec. 55(a) of the bill, would lapse under AS 37.25.020.

Section 33 of the bill, page 164, would appropriate amounts for Alaska Public Safety information network migration. This appropriation takes effect May 17, 2011, under sec. 58 of the bill, and under sec. 55(a) of the bill, would lapse under AS 37.25.020. Section 33 is retroactively effective to January 1, 2011, under sec. 56 of the bill.

Section 34(a) of the bill, page 164, lines 28 - 31, would appropriate amounts from the dividend fund for software training for the permanent fund dividend division for fiscal year 2012, at the end of which the appropriation lapses.

Section 34(b) of the bill, page 165, lines 1 - 5, reappropriates amounts for natural gas commercialization for fiscal year 2012, at the end of which the appropriation lapses. This appropriation takes effect May 17, 2011, under sec. 58 of the bill.

Section 35 of the bill, pages 165 - 166, reappropriates or amends prior appropriations made to the Department of Transportation and Public Facilities. Subsection (a) would expand the use of a prior appropriation from a ferry serving the Ketchikan airport, and would take effect June 30, 2011, under sec. 58 of the bill. Subsections (b) - (e) substitute general fund monies for outstanding general obligation bonds, the proceeds from which were used (or authorized to be used) to finance various highway projects throughout the state. Under sec. 57(b), the appropriations in subsecs. (b) - (e) are contingent on the state bond committee certifying to the office of management and budget that the entire proceeds from certain outstanding bonds have been expended. Subsections (f) - (i) relate to road projects. The reappropriations in subsecs. (f) - (g) would take effect June 30, 2011, under sec. 59 of the bill, and under sec. 55(a) of the bill, would lapse under AS 37.25.020. The amendment in sec. 35(i) would take effect May 17, 2011, under sec. 58 of the bill.

Section 36(a) and (b) of the bill, page 166, lines 21 - 26, would make appropriations to fund the 2011 State Officers Compensation Commission recommendations for the fiscal year ending June 30, 2012. Pursuant to AS 39.23.540, the State Officers Compensation Commission recommended salary increases for the governor and the lieutenant governor and those recommendations were not disapproved by the legislature pursuant to AS 39.23.540(d). Under AS 39.23.540(g), the recommendations for increasing these officials' salaries are not effective unless each of the recommended salary increases is fully funded. Section 36(a) and (b) would provide for appropriation of funds to fully fund the recommended salary increases for the governor and lieutenant governor.

Section 36(c) of the bill would reappropriate the unexpended and unobligated balance of certain appropriations to make those amounts available for operating expenses of the Office of the Governor for fiscal year 2012, at the end of which the reappropriation would lapse. This reappropriation would take effect June 30, 2011, under sec. 59 of the bill.

G. Sections 37 - 51

Sections 37 - 51 of the bill would make reappropriations or amend various appropriations related to projects in various House Districts. The reappropriations generally authorize the unexpended and unobligated balance of prior appropriations to be used for new projects or grants to named recipients. The amendments generally expand the scope of the purposes for which expenditure is authorized. The projects or related provisions by subsection include:

- 37(a) Petersburg North Harbor deferred maintenance and replacement;
- 37(b) Wrangell street, sidewalk, and infrastructure improvements;
- 38(a) Craig cold storage reimbursement of 2008 and 2009 expenditures;
- 38(b) Haines transmission line and water system;
- 39(a) Northway Village Council community projects, equipment, and improvements;
- 39(b) City of Marshall community projects, equipment, and improvements;
- 40(a) Chena road and bike path;

- 40(b) Fairbanks - Pioneer Museum deferred maintenance;
- 40(c) Fairbanks - Chena Slough project;
- 40(d) Fairbanks - Arctic Winter Games;
- 40(e) Cold Climate Housing Research Center demonstration project;
- 40(f) Morris Thompson Cultural and Visitors Center operations and exhibit completion for fiscal year 2012, fiscal year 2013, and fiscal year 2014;
- 40(g) Pleasant Valley Community Association for community center;
- 41(a) Delta-Greely School District wood chip heating system project;
- 41(b) Valdez - improvements for pedestrian environment near cruise ship dock uplands;
- 42(a) Wasilla downtown water station;
- 42(b) Mat-Su Borough for Port MacKenzie port development and rail line improvements;
- 42(c) Mat-Su Borough for Hatcher Pass ski area construction;
- 42(d) Wasilla street and road improvements;
- 42(e) Mat-Su Borough Parks Highway Frontage Road and intersection improvements at Trunk Road;
- 43 Upper Susitna Seniors, Inc. for a support structure for senior center and an emergency shelter;
- 44 Alaska Veterans Museum
- 45(a) Anchorage Kasuun Elementary School computer lab.
- 45(b) Anchorage Fire Department Station 5 construction;
- 45(c) Anchorage Parks Foundation to renovate Minnesota Park;
- 45(d) Anchorage updates to U-Med District Plan;
- 45(e) Anchorage renovations or retrofits to Salvation Army's Clitheroe Center and Secure Treatment Unit;
- 45(f) Anchorage Taku Elementary School technology upgrades;
- 45(g) Anchorage Fire Department Station 9 remodel or reconstruction;
- 45(h) Anchorage for Kincaid Park remediation, claims, and enhancements;
- 46(a) Kenai for industrial park development;

- 46(b) Kenai Peninsula Economic Development for the Kenai Peninsula Construction Academy facility;
- 46(c) Kenai Peninsula Economic Development District facility and utility upgrades;
- 46(d) Kenai for Kenai Spur Road bike path repairs;
- 46(e) Soldotna traffic light at Birch Street;
- 46(f) Kenai Peninsula Borough for Nikiski Fire tanker and pumper replacements;
- 46(g) Kenai Peninsula Borough for playground;
- 46(h) provides for proportional reduction of sec. 46(f) and (g) if funding shortfall from reappropriations;
- 47(a) Kenai Peninsula Borough for SMART boards for William H. Seward Elementary School;
- 47(b) Seward construction of new water storage tank and restroom improvements in harbor area;
- 47(c) Senior Citizens of Kodiak for debt reimbursement for fire sprinkler system emergency replacement;
- 47(d) Friends of Jesse Lee Home for stabilization project;
- 48 Old Harbor dock reconstruction and airport extension project;
- 49(a) Saint George for community facilities, equipment upgrades, and community infrastructure development;
- 49(b) Sand Point road construction and improvements;
- 50 allows to be used in fiscal year 2012 prior reappropriation to Association of Village Council Presidents for demonstration project to use wood as a heating source;
- 51 City of Emmonak for purchase of heavy equipment.

Sections 37 - 51 of the bill have various effective dates. Sections and subsections making reappropriations take effect June 30, 2011, under sec. 59 of the bill [subsecs. 38(a), 39, 40(b) - (g), 41, 42, 43, 45(c) - (f), 45(h), 46, 47, 49(a), and 51]. Sections amending appropriations take effect May 17, 2011, under sec. 58 of the bill [secs. 37, 38(b), 40(a), 44, 45(a) - (b), 45(g), 48, 49(b), and 50]. Remaining sections and subsections take effect on July 1, 2011, under sec. 60 of the bill.

Sections 37 - 51 of the bill have various lapse dates. Section 44 (amendment to reappropriation for Alaska Veterans Museum) would lapse June 30, 2016, under sec. 55(c) of the bill. Sections 39(a), 40(c), 40(e), 40(g), 41, 43, 45(c), 46(b) - (c), and 47(c) - (d) are for capital projects and under sec. 55(a) of the bill lapse under AS 37.25.020.

H. Sections 52 - 54

Section 52 of the bill, pages 177 - 179, would amend or reappropriates various appropriations made for the legislature, including for the Legislative Council, legislative committees (Legislative Budget and Audit, Rules, and Finance), and the Office of the Speaker of the House. The section would take effect June 30, 2011, under sec. 59 of the bill. Subsection (a), page 177, line 30 to page 178, line 8, would expand the authorized scope of the multidisciplinary study of large mine development beyond the Bristol Bay drainage to statewide, and extends the lapse date to the end of fiscal year 2014. Subsections (b) - (h) would reappropriate unexpended and unobligated amounts for various purposes related to legislative buildings and facilities, operating expenses, and expenses associated with meetings. Subsection (i) would reappropriate the unexpended and unobligated amount, not to exceed \$500,000, for a municipal grant related to shared costs of a United States Army Corps of Engineers study of the Point MacKenzie shoal. The appropriation made in subsection (b) (related to legislative buildings and facilities) would lapse under AS 37.25.020 under sec. 55(a) of the bill.

Section 53 of the bill, page 179, would make two appropriations of \$50,000,000 to the statutory budget reserve fund (AS 37.05.540). The appropriation made in sec. 53(a) would take effect June 30, 2011, under sec. 59 of the bill, while the appropriation in sec. 53(b) would take effect July 1, 2011, under sec. 60 of the bill. Both appropriations capitalize a fund and do not lapse under sec. 55(b) of the bill.

Section 54 of the bill, page 179, would repeal sec. 13(g), CCS HB 108, Twenty-Seventh Alaska State Legislature. CCS HB 108 passed the legislature and is awaiting transmittal to the Governor. Section 13(g), CCS HB 108 would appropriate an amount, not to exceed \$9,000,000,

for a contract with a qualified trade association for tourism marketing activities for fiscal year 2012 (*see* AS 44.33.125(a)). The appropriation would be contingent upon receipt of funds. Section 54 of the bill would take effect May 17, 2011, under sec. 58 of the bill.

I. Sections 55 - 60

Sections 55 - 60 of the bill, pages 179 - 80, would provide for lapse and effective dates, and contingencies.

Section 55 of the bill, pages 179 - 80, identifies sections and subsections that capitalize funds and do not lapse, those that have specific lapse dates, and those that are for capital projects or grants and lapse under AS 37.25.020.

Section 56 of the bill, page 180, would make sec. 33 of the bill (appropriation for Alaska Public Safety information network migration) retroactively effective to January 1, 2011.

Section 57 of the bill, page 180, would establish contingencies (described above) for subsecs. 17(a) and 35(b) - (e) of the bill.

Section 58 of the bill, page 180, identifies sections which take effect May 17, 2011.

Section 59 of the bill, page 180, identifies sections which take effect June 30, 2011.

Section 60 of the bill, page 180, would make sections take effect July 1, 2011, if not identified in secs. 58 or 59 of the bill.

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 statues 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,

John J. Burns
Attorney General

JJB:BDB:pav