



THE STATE
of **ALASKA**
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June 6, 2018

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

Re: SB 142 – Capital Budget
(HCS CSSB 142(FIN) am H)
Our file: 2018200471

Dear Governor Bill Walker:

At the request of your legislative director, we have reviewed HCS CSSB 142(FIN) am H, making appropriations, including capital appropriations, supplemental appropriations, reappropriations, and other appropriations; amending appropriations; and making appropriations to capitalize funds.

Following is our legal review of the fiscal year 2019 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. Unless specifically noted, we found no legal issues with the appropriations in this bill.

Legislative Intent and Contingency Language

The fiscal year 2019 capital budget bill contains several expressions of legislative intent and contingency. Legislative intent language is located in sec. 1, on page 6, lines 4 – 8; sec. 1, on page 9, line 33 – page 10, line 7; and sec. 4, on page 19, lines 22 – 25. We believe that most expressions of legislative intent are not binding on the executive branch because such expressions violate the confinement clause in art. II, sec. 13 of the Alaska Constitution “[b]ills for appropriations shall be confined to appropriations.”

In *Alaska State Legislature v. Hammond*, Judge Carpeneti adopted a five-factor test to determine whether 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

In *Knowles II*, the court explained 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 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 would 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.*

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, we note that an expression of legislative intent may not be vetoed by the governor as a line item veto separate from the appropriation itself because the court, in *Knowles II*, held that expressions of intent do not constitute “items” subject to your veto power. *Id.* at 377.

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

The bill also contains four contingencies in sec. 38. The first contingency in sec. 38(a) makes the appropriation in sec. 23 for \$5,000 to the Department of Fish and Game for publication of an information pamphlet regarding aquatic invasive species contingent upon passage by the Thirtieth Alaska State Legislature in the Second Regular Session and enactment into law of a bill relating to aquatic invasive species. Such a bill was not passed, so the appropriation in sec. 23 does not occur.

The second contingency in sec. 38(b) makes the appropriation in sec. 24 for \$760,000 to the Department of Health and Social Services for a marijuana education and treatment program contingent upon passage by the Thirtieth Alaska State Legislature in the Second Regular Session and enactment into law of a bill establishing a marijuana education and treatment fund and program. On May 12, 2018, HCS CSSB 104(FIN) am H was passed by the Legislature. If signed into law, the contingency will be satisfied; otherwise, the funds will not be appropriated.

The third contingency in sec. 38(c) makes the appropriations in sec. 25 for \$10,000 to the Department of Revenue for programming changes to the permanent fund dividend division database and online applications and for \$25,000 to the Department of Revenue for the advertising and promotion of a permanent fund dividend raffle contingent upon passage by the Thirtieth Alaska State Legislature in the Second Regular Session and enactment into law of a bill establishing a permanent fund dividend raffle. On May 12, 2018, SCS CSHB 213(RLS) was passed by the Legislature. If signed into law, the contingency will be satisfied; otherwise, the funds will not be appropriated.

The final contingency in sec. 38(d) makes the appropriation in secs. 27(c) and the repeal in sec. 35 contingent upon passage by the Thirtieth Alaska State Legislature in the Second Regular Session and enactment into law of a bill establishing the curriculum improvement and best practices fund. The appropriation in sec. 27(c) is for \$19,500,000 for fund capitalization for the curriculum improvement and best practices fund. Section 35 repeals sec. 2, CCS HB 286, Thirtieth Alaska State Legislature, page 46, lines 17 – 20. That section appropriated \$19,500,000 for fund capitalization for a curriculum improvement and best practices fund. On May 12, 2018, HCS CSSB 104(FIN) am H was passed by the Legislature. If signed into law, the contingency will be satisfied; otherwise, the repeal and new appropriation will not occur.

II. Sectional Analysis

Sections 1 – 3

Section 1, pages 2 – 11 would make appropriations for capital projects and grants from the general fund or other funds. Except as otherwise noted, these appropriations lapse under AS 37.25.020. Section 2, pages 12 – 15, sets out the funding by agency for

the appropriations made in sec. 1. Section 3, pages 16 – 17, sets out the statewide funding for the appropriations made in sec. 1. Under sec. 42 of the bill, secs. 1 – 3 take effect on July 1, 2018, unless the bill is signed into law after July 1, 2018, in which case secs. 1 – 3 take effect retroactively to July 1, 2018, under sec. 37(c).

Sections 4 – 6

Section 4, pages 18 – 20 would make appropriations for supplemental capital projects and grants from the general fund or other funds. Except as otherwise noted, these appropriations lapse under AS 37.25.020. Section 5, page 21, sets out the funding by agency for the appropriations made in sec. 4. Section 6, page 22, sets out the statewide funding for the appropriations made in sec. 4. Under sec. 37(a) of the bill, if secs. 4 – 6 take effect after May 16, 2018, the sections are retroactive to May 16, 2018. Otherwise, under sec. 39, sec. 4 takes effect May 16, 2018.

Sections 7 – 9

Section 7, pages 23 – 24 would make appropriations for operating expenditures from the general fund or other funds. These appropriations are for the fiscal year beginning July 1, 2017 and ending June 30, 2018. Section 8, page 25, sets out the funding by agency for the appropriations made in sec. 7. Section 9, page 26, sets out the statewide funding for the appropriation made in sec. 7. Under sec. 37(a) of the bill, if secs. 7 – 9 take effect after May 16, 2018, the sections are retroactive to May 16, 2018. Otherwise, under sec. 39, secs. 7 – 9 take effect May 16, 2018.

Sections 10 – 14

Section 10 would amend an earlier appropriation of \$792,000 to the Department of Administration for costs related to labor contract negotiations to remain in effect until June 30, 2019. Section 11(a) would appropriate \$400,000 from the municipal capital project matching grant fund under AS 37.06.010 to the Department of Education and Early Development, Mt. Edgecumbe boarding school, for maintenance and operation of its aquatic center for fiscal years ending June 30, 2018, and June 30, 2019.

Section 11(b) would reappropriate one percent from Mount Edgecumbe High School aquatic facility, estimated to be \$200,000, reserved for the arts under AS 35.27.020, for the purchase of equipment for the aquatic center. AS 35.37.020 provides for at least one percent of the construction cost of a facility be reserved for public art. This statute, however, is limited by the legislature's constitutional authority to appropriate funds for any public purpose. Section 36(a) of the bill specifies that the appropriation under sec. 11(b) lapses under AS 37.25.020

Section 12 would appropriate \$5,000,000 from the general fund to the Department of Health and Social Services for the Alaska temporary assistance program. The section also appropriates various amounts from the general fund, designated program receipts, and interagency receipts to the Alaska Psychiatric Institute for operating expenses for the fiscal year ending June 30, 2018, and June 30, 2019.

Section 13 would appropriate \$3,370,486 from the general fund to the Department of Law for the payment of judgments and settlements. Section 14 would appropriate \$2,000,000 from the general fund to the Department of Transportation and Public Facilities for the Knik-Goose Bay Road reconstruction, Vine Road to Settler's Bay Drive project. Section 36(a) of the bill specifies that the appropriation under sec. 14 lapses under AS 37.25.020. Under sec. 37(a) of the bill, if secs. 10 – 14 take effect after May 16, 2018, the sections are retroactive to May 16, 2018. Otherwise, under sec. 39, secs. 10 – 14 take effect May 16, 2018.

Sections 15 – 19

Section 15 is for fund capitalizations. Section 15(a) would appropriate \$3,000,000 in federal receipts to the election fund, and sec. 15(b) would reappropriate \$800,000 from various appropriations and reappropriations to the election fund. Section 15(c) would appropriate \$6,200,000 from the general fund to the disaster relief fund. Section 16 would appropriate \$20,000,000 from the general fund to the Alaska marine highway system fund. Section 36(b) of the bill specifies that the appropriation under secs. 15 and 16 are for the capitalization of funds and do not lapse.

Section 17 would appropriate various federal and other program receipts. Section 18 would appropriate amounts received in settlement of insurance claims to the state insurance catastrophe reserve account under AS 37.05.289(a) or to the appropriate state agency. Section 36(b) of the bill specifies that the appropriation under sec. 18(1) is for the capitalization of a fund and does not lapse. Section 36(a) of the bill specifies that the appropriation made is sec. 18(2) lapses under AS 37.25.020. Section 19 would appropriate amounts received by the National Petroleum Reserve – Alaska special revenue fund under AS 37.05.530(a) to various municipalities and boroughs.

Under sec. 37(a) of the bill, if secs. 15 and 16 take effect after May 16, 2018, the sections are retroactive to May 16, 2018. Otherwise, under sec. 39, secs. 15 and 16 take effect May 16, 2018. Under sec. 37(c) of the bill, if secs. 17 – 19 take effect after July 1, 2018, the sections are retroactive to July 1, 2018. Otherwise, under sec. 42 of the bill these sections take effect July 1, 2018.

Sections 20 – 26

Section 20 would reappropriate \$1,605,479 to the Department of Corrections for security upgrades at correctional facilities. Under sec. 40 of the bill this appropriation takes effect June 30, 2018, and is retroactive to that date under sec. 37(b) if the bill is signed into law after June 30, 2018. Section 21 would reappropriate an amount not to exceed \$3,400,000 to the Department of Education and Early Development for cleanup of the Pitka Point school site, appropriate \$6,000,000 from the general fund to the Department of Education and Early Development for pre-kindergarten grants, appropriate \$20,000,000 from the general fund to the Department of Education and Early Development for grants to school districts, and appropriate \$403,400 from the general fund to the Department of Education and Early Development for crisis response. Under sec. 40 of the bill, sec. 21(a) takes effect June 30, 2018, and is retroactive to that date under sec. 37(b) if the bill is signed into law after June 30, 2018. Section 21(b) – (d) takes effect July 1, 2018 under sec. 42, and is retroactive to July 1, 2018 under sec. 37(c) if the bill is not signed until after that date. Section 22 would reappropriate an amount not to exceed \$200,000 to the Department of Environmental Conservation for water quality enhancement, water supply, sewage, and solid waste facilities grants to municipalities. Section 22 takes effect June 30, 2018, under sec. 40, and is retroactive to June 30, 2018, under sec. 37(b).

Section 23 is a contingent appropriation to the Department of Fish and Game for the publication of an invasive aquatic species pamphlet. As discussed above, the contingency has not been met, so the appropriation will not occur. Section 24 contains two contingent appropriations from the marijuana education and treatment fund to the Department of Health and Social Services for \$760,000 and \$65,000. The funds are to be used for a marijuana use education and treatment program and for behavioral health treatment grants respectively. This contingency will be met if HCS CSSB 104(FIN) am H is signed into law. Section 25 contains two contingent appropriations to the Department of Revenue, and as discussed above, if SCS CSHB 213(RLS) is signed into law the appropriation will occur. The first appropriation is for \$10,000 from the general fund for programming changes to the permanent fund division database and online dividend applications. The second appropriation is for \$25,000 for a permanent fund dividend raffle. Sections 23 – 25 take effect July 1, 2018 under sec. 42, and if necessary, take effect retroactively to that date under sec. 37(c).

Section 26 contains numerous appropriations and reappropriations to the Department of Transportation and Public Facilities. Subsections (a) – (f) contain various reappropriations for federal-aid highway match. Subsection (g) provides that if the sums reappropriated in (b) – (f) are less than \$65,000,000, the shortfall shall be appropriated from the general fund. Section 26(h) would reappropriate \$10,000,000 for rehabilitation of the runways and taxiways of the Alaska international airport system. Section 26(i)

would reappropriate \$21,285,000 for the Juneau access project. Section 26(j) would appropriate \$2,500,000 from the general fund for the Knik Arm Crossing project. Under sec. 40, sec. 26(a), (b), (e), (h), and (i) takes effect June 30, 2018, and under sec. 42, sec. 26(c), (d), (f), (g), and (j) takes effect July 1, 2018. These sections may take effect retroactively to their respective effective date if necessary under sec. 37. Under sec. 36(a), secs. 20, 21(a), 22, and 26 are for capital projects and lapse under AS 37.25.020.

Sections 27 - 35

Section 27 contains appropriations and reappropriations for fund capitalization. Section 27(a) reappropriates \$1,968,897 from the Alaska Energy Authority, Kake-Petersburg intertie to the harbor facility grant fund under AS 29.60.800. This section takes effect on June 30, 2018, under sec. 40 of the bill, and there is a retroactivity provision in section 37(b) in the event the bill is signed after June 30, 2018. Section 27(b) appropriates \$4,000,000 from the general fund to the community assistance fund under AS 29.60.850. This section takes effect July 1, 2018, under sec. 42, and is retroactive to that date under sec. 37(c). Section 27(c) appropriates \$19,500,000 from the general fund to the curriculum improvement and best practices fund under AS 14.07.182. As discussed above, the appropriation in sec. 27(c) is contingent upon HCS CSSB 104(FIN) am H being signed into law. The section takes effect July 1, 2019, under sec. 41.

Section 28 transfers an estimated \$8,700,000 from the large passenger vessel gaming and gambling tax account under AS 43.35.220 to the Alaska marine highway system fund under AS 19.65.060. This section takes effect on July 1, 2018, under sec. 42, and is retroactive to that date if necessary under sec. 37(c). Sections 29 through 33 contain various appropriations and reappropriations to House Districts. Section 34 makes reappropriations from various funds to the Alaska Legislature, Legislative Council, and council and subcommittees for renovation and repair of technology improvements to and for other facility related projects. This section lapses under AS 37.25.020. As discussed above, sec. 35 is a contingent repeal of a \$19,500,000 appropriation contained in the operating budget for fiscal year 2018. The section will go into effect if HCS CSSB 104(FIN) am H is signed into law.

III. Conclusion

Although we have identified no other constitutional or legal issues in the 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 the 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.

This bill presents no legal problems or other concerns.

Sincerely,

JAHNA LINDEMUTH
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