

# MEMORANDUM

State of Alaska  
Department of Law

To: The Honorable Loren Leman  
Lieutenant Governor

Date: October 6, 2003

File No. 663-03-0179

Tel. No. 465-3600

From: Gregg D. Renkes  
Attorney General

Re: Review of Initiative Petition  
Application Relating to Cruise  
Ship Activities

## I. INTRODUCTION

At your request, we have reviewed a proposed initiative application relating to cruise ship activities, or in the parlance of the proposed bill, "commercial passenger vessels." The measure is entitled "An Act providing for taxation of certain commercial ship vessels, pertaining to certain vessel activities and related to ship vessel operations taking place in the marine waters of the State of Alaska."

This is a resubmittal of a similar initiative application that was rejected by your office based on our August 15, 2003, advice that the proposed bill violated the single-subject rule. The single-subject problems of the original initiative measure have been remedied. We also conclude that the proposed initiative does not violate the dedicated fund prohibition set out in article XI, section 7 of the Alaska Constitution. The initiative measure does not raise any other legal concerns under AS 15.45.040, AS 15.45.010, or article XI, section 7 of the Alaska Constitution. The proposed initiative complies with the constitutional and statutory provisions governing initiatives.

Provided the required number of signatures and addresses of qualified voters have been submitted in the application, we recommend that you certify the application. Preparation of the petitions may then commence in accordance with AS 15.45.090.

## II. SUMMARY OF BILL

The proposed bill would have several effects on cruise ship operations:

(1) the measure would levy an excise tax on commercial passenger vessels providing overnight accommodations in state marine

waters, and would provide for the proceeds to be distributed to municipalities;

(2) it would levy a tax on certain gambling activities conducted on cruise ships operating in Alaska;

(3) it would allow the calculation of Alaska Net Income Tax for cruise ships to be based on worldwide income rather than domestic income;

(4) it would require large commercial passenger vessels to have discharge permits for sewage, graywater, or other wastewater before discharging into state marine waters, and would require them to gather and report certain information about discharges;

(5) it would require commercial passenger vessels to carry a state-employed marine engineer while in state waters to monitor operations, and would levy a fee to cover the cost of this requirement;

(6) it would authorize citizen suits to enforce marine discharge statutes and permits; and

(7) it would require disclosures about on-ship promotions of shore-side businesses.

### III. ANALYSIS

The scope of our review is set by statute and confirmed by court decision. An initiative committee is required under AS 15.45.020 to submit an initiative application to the lieutenant governor for review. The lieutenant governor's review of the proposed initiative should include analysis of its compliance with the statutory and constitutional provisions that regulate initiatives. *Boucher v. Engstrom*, 528 P.2d 456, 461 (Alaska 1974), *overruled in part on other grounds, McAlpine v. University of Alaska*, 762 P.2d 81 (Alaska 1988).

Our initial inquiry is whether the defect in the original proposed initiative has been corrected and the initiative is confined to a single subject. After considering whether the initiative is properly limited in subject matter, we will also consider the express restrictions set out in article XI, section 7 of the Alaska Constitution, specifically whether the initiative is a proscribed dedication of revenues.

**A. The Proposed Initiative Does Not Violate the Single-subject Rule**

As discussed in my August 15, 2003 opinion, the contents of the original proposed initiative were not confined to a single subject as required by AS 15.45.040(1) and by the Alaska Constitution. While the constitution does not expressly apply the single-subject rule to initiatives, it provides that "[u]nless clearly inapplicable, the law-making powers assigned to the legislature may be exercised by the people through the initiative, subject to the limitations of article XI." Alaska Const. art. XII, § 11. The Alaska Supreme Court has determined that the foregoing provision makes the single-subject rule of article II, § 13 applicable to both the legislature and direct legislation by initiative. *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1179 n.2 (Alaska 1985). The initial proposed initiative was rejected on this basis.

The sponsors of the initiative have redrafted their measure so that each section relates to the general topic of cruise ships ("commercial passenger vessels"). As a general matter, the Alaska Supreme Court has required only that the bill "embrace[] one single general subject." *Evans ex rel Kutch v. State*, 56 P.3d 1046, 1069 (Alaska 2002). While the various provisions of a single enactment must "fairly relate to the same subject, or have a natural connection therewith," *Short v. State*, 600 P.2d 20, 24 (Alaska 1979), "what constitutes one subject for purposes of article II, § 13 is broadly construed," and . . . only a 'substantial and plain' violation of the one subject rule will lead [the Court] to strike down legislation on this basis." *Evans*, 56 P.3d at 1069 (quoting *State v. First Nat'l Bank of Anchorage*, 660 P.2d 406, 415 (Alaska 1982)).

The proposed bill covers taxes, discharge permits, gaming, unfair trade practices, and others issues, and generally unites these topics with the consistent theme of regulation of commercial passenger vessels. The three initiative sections that originally contained subject matter extending beyond the single subject of regulating cruise ships (sections 2, 3, and 9) have been changed to limit the topic of the proposed bill to regulation of cruise ships. We conclude that the initiative does not violate the single-subject rule.

**B. The Proposed Initiative Does Not Violate the Dedicated Fund Prohibition of the Alaska Constitution**

The initiative also suggests the possibility of another constitutional problem. Under article XI, section 7 of the Alaska Constitution, the initiative process "shall not be used to dedicate revenues."<sup>1</sup> This prohibition is meant "to preserve control of and

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<sup>1</sup> Article XI, § 7 provides in relevant part that "[t]he initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of

responsibility for state spending in the legislature and the governor” and to ensure that “the legislature would be required to decide funding priorities annually on the merits of the various proposals presented.” *Sonneman v. Hickel*, 836 P.2d 936, 938 (Alaska 1992); *see also City of Fairbanks v. Fairbanks Convention and Visitors Bureau*, 818 P.2d 1153, 1158 (Alaska 1991) (the purpose of the prohibition is to maintain flexibility in budgeting).

On its face, the language of the proposed initiative does not create a prohibited dedicated fund. It states the intent that the tax proceeds, which are segregated and deposited in a special account in the general fund, will be used for purposes related to cruise ship activities, and that certain municipalities be the beneficiaries of the revenues. Proposed AS 43.52.010 and .040. Despite the expressed intent that the fund should be used for particular purposes, the initiative measure is careful to assure that the legislature has final authority for determining how to spend the proceeds and provides that the legislature “may” appropriate money from the account for limited purposes. *See* proposed AS 43.52.040(a) (legislature “may appropriate” money from account for stated purposes); AS 43.52.040(b) and (c) (distribution of the funds to ports is “subject to appropriation by the legislature”).

The Alaska Supreme Court has held that such a segregation of funds, even with a stated express purpose regarding their intended usage, does not create a dedicated fund. *See, e.g., Sonneman*, 836 P.2d at 938-39 (provision in act that legislature “may appropriate” amounts in fund back to the Marine Highway system did not legally restrict the power of the legislature to appropriate and did not, by implication, prohibit the legislature from appropriating amounts from the fund for other purposes).<sup>2</sup>

While the language of the initiative itself does not create a dedicated fund, an argument can be made that a dedicated fund is created by federal law, which mandates that the state must spend revenues collected from vessels for specific purposes. The

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courts or prescribe their rules, or enact local or special legislation.” *See also* Alaska Const. art. IX, § 7 (providing in part that “[t]he proceeds of any state tax or license shall not be dedicated to any special purpose, except as provided in section 15 of this Article or when required by the federal government for participation in federal programs. This provision shall not prohibit the continuance of any dedication for special purposes existing upon the date of ratification of this section by the people of Alaska.”).

<sup>2</sup> Missing in the proposed bill is the explicit statement found helpful by the court in *Sonneman* that the purpose of the bill was to not create a dedicated fund. 836 P.2d at 939-40. However, we believe that a court would probably infer that intent from the express provisions of the initiative measure.

Maritime Transportation Security Act of 2002, P.L. 107 – 295 (codified at 33 U.S.C. § 5(b)), places certain limits on the ability of states to collect taxes on commercial passenger vessels operating in state waters. This federal law permits the state to collect reasonable fees from ships and passengers, provided that the revenue collected is used “solely to pay the cost of a service to the vessel or water craft” and to “enhance the safety and efficiency of interstate and foreign commerce.” 33 U.S.C. § 5(b)(2)(A), (B). While there are limitations imposed by federal law on the purposes for which the excise tax in section 1 of the proposed bill can be used, it would be a mistake to interpret this federal restriction as creating a prohibited dedicated fund.

There is no precedent on point that can guide our analysis of this unique dedicated funds question. In reviewing challenges to initiatives, the court generally is protective of the limitations the Alaska Constitution imposes on lawmaking by initiative, consistently stating that “[a]lthough liberal construction of initiative proposals is the general rule, constitutional limitations on the initiative power must also be broadly interpreted.” *Alaskans for Legislative Reform v. State*, 887 P.2d 960, 962 (Alaska 1994) (quoting *Citizens Coalition for Tort Reform v. McAlpine*, 810 P.2d 162, 168 (Alaska 1991)). This analysis would suggest that the court would be concerned that the cruise ship initiative might create a dedicated fund. On the other hand, in describing the general rule of liberal construction of initiatives, the court has stated that “[w]hen one construction of an initiative would involve serious constitutional difficulties, that construction should be rejected if an alternative interpretation would render the initiative constitutionally permissible.” *Boucher v. Engstrom*, 528 P.2d at 462.

The court has analyzed the issue of whether an initiative oversteps the constitution’s limitations on the initiative power by comparing the effect of the initiative’s provisions with the underlying purpose of the limitation. So, for example, in *City of Fairbanks v. Fairbanks Convention and Visitors Bureau*, 818 P.2d 1153, the court found that an initiative that would repeal a city ordinance designating that bed tax revenues be used for tourist and entertainment facilities was not a initiative that repealed an appropriation, which would have been unconstitutional under article IX, section 7. The court stated that while the city ordinance was arguably an appropriation, the purpose of the constitutional prohibition on repeal of appropriation by initiative – to retain control of the appropriation process in the legislative body – was not met by construing the term “appropriation” broadly in this context. *City of Fairbanks*, 818 P.2d at 1156-57; *see also Id.* at 1158-59 (court looked at fact that the initiative “does not infringe on flexibility in the budget process” – the reason for the prohibition against dedicated funds – in determining that it was not a dedicated fund). This analysis suggests that the court will consider whether the purpose of the constitution’s prohibition on dedicated funds would be met by finding that the cruise ship initiative effected a dedicated fund.

The cruise ship initiative does not create the harm that the dedicated fund provision was intended to prevent. As discussed above, the cruise ship initiative itself does not infringe on flexibility in the budget process. And it seems unlikely that the delegates to Alaska's Constitutional Convention meant to limit the state's taxing power whenever a federal law might restrict the use of the particular tax revenues. The federal restrictions on the use of state tax revenues would not create the harm that the delegates intended the dedicated fund prohibition to prevent – earmarking of funds that future legislatures could otherwise annually appropriate according to current priorities.

In this case, the state would not be able to collect taxes on vessels that fall under 33 U.S.C. § 5(b) unless it spends the proceeds “solely to pay the cost of a service to the vessel or water craft” and to “enhance the safety and efficiency of interstate and foreign commerce.” 33 U.S.C. § 5(b)(2)(A), (B). There is no possibility that these funds could be otherwise appropriated by the legislature.<sup>3</sup> They can be collected for the purposes specified in federal law, or they may not be collected. Thus, we conclude that the restriction on spending set by federal law is not a prohibited dedication of revenues by initiative, as contemplated by the Constitutional Convention delegates.

#### IV. IMPARTIAL SUMMARY OF THE PROPOSED BILL

It is our practice to provide you with a proposed title and summary to assist you in complying with AS 15.45.090(2) and AS 15.45.180. We believe that it is a good practice for the petition and ballot to conform to the requirements of a title (six words) and ballot summary (100 words) under AS 15.45.180. We do this in order to reduce the chance of collateral attack due to a divergence between the ballot and petition summaries. We therefore propose the following ballot and petition title and summary for your review:

##### CRUISE SHIP TAXATION AND REGULATION INITIATIVE

This initiative would impose a per person per voyage tax on cruise ships to pay solely for vessel services, and would tax

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<sup>3</sup> It is possible to comply with the federal statute without dedicating the proceeds of the cruise ship tax. Federal law would be satisfied without any earmarking of tax proceeds as long as the legislature authorizes expenditures for the stated purposes in an amount equivalent to the tax collected. *See, e.g., Evansville – Vanderburgh Airport Authority v. Delta Airlines, Inc.*, 405 U.S. 707, 720 (1972) (alright for the state to reimburse local expenditures through unrestricted revenues; “so long as the funds received by local authorities [don’t] . . . exceed their airport costs, it is immaterial whether those funds are expressly earmarked for airport use”).

cruise ship gambling in state waters. It would base cruise ship income tax on worldwide, not domestic, income. It would require cruise ships to gather and report information on, and get permits for, wastewater discharges. It assesses a fee for and requires cruise ships to have licensed marine engineers observe operations. It would authorize citizen suits to enforce wastewater discharge statutes and permits. It would require disclosures about on-ship promotions of shore-side businesses.

Should this initiative become law?

This summary has a readability test score of 52.733. We believe this summary meets the readability standards of AS 15.60.005.

## V. CONCLUSION

For the reasons discussed above, we conclude that the proposed initiative complies with the constitutional and statutory provisions governing the uses of the initiative. Therefore, provided the required number of signatures and addresses of qualified voters have been submitted in the application, we recommend that you certify the application and so notify the initiative committee. Preparation of the petitions may then commence in accordance with AS 15.45.090.

Please let us know if you have any questions.