

STATE OF ALASKA

DEPARTMENT OF LAW

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May 13, 2008

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

Re: HCS CSSB 221 (FIN) am H -- Capital,
Supplemental, and Other Appropriations
Our file: 883-08-0119

Dear Governor Palin:

At the request of your legislative director, we have reviewed HCS CSSB 221(FIN) am H, making and amending appropriations, including capital appropriations, supplemental appropriations, and appropriations to capitalize funds; making appropriations under art. IX, sec. 17(c), of the Constitution of the State of Alaska, from the constitutional budget reserve fund; and providing for an effective date. In short, this is our legal review of the fiscal year 2009 capital budget.

I. General Comments

We have reviewed all appropriations set out in this bill and have several general comments on the bill overall. As in prior years, the bill has numerous expressions of legislative intent and contingencies accompanying certain appropriation items. *See, e.g.*, sec. 13, page 87, lines 27 - 29 and page 103, lines 8 - 9; sec. 28, p. 207, lines 1 - 5; and sec. 66(f), p. 224, lines 15 - 17. As noted in our review of the operating budget bill, CCS HB 310, this office has historically taken the position that such 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 *Alaska State Legislature v. Hammond*, Judge (now Justice) Carpeneti adopted a five-factor test to determine whether such language violates the confinement clause:

[T]he qualifying language must be the minimum necessary to explain the Legislature's intent regarding how the money appropriated is to be spent. It must not administer the program of expenditures. It must not enact law or amend existing law. It must not extend beyond the life of the appropriation. Finally, the language must be germane, that, appropriate, to an appropriations bill.

Memorandum of Decision at 44 - 45, No. 1JU-80-1163 (Alaska Super., May 25, 1983). Judge Carpeneti observed that this 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." *Id.* at 45. The Alaska Supreme Court subsequently adopted Judge Carpeneti's test on a "non-exclusive" basis in the *Knowles II* decision. *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 377 (Alaska 2001).

The courts have had relatively few opportunities to consider whether certain instances of intent language violate the confinement clause. Judge Carpeneti determined that most (but not all) of the intent language at issue in *Hammond* was invalid under the confinement clause. *Hammond*, No. 1JU-80-1163 at 46-58. In *Knowles II*, the Court found certain contingency language invalid (21 P.3d at 379-81), and certain descriptive language non-binding (*Id.* at 383), but upheld the following language:

This appropriation is for new CRC beds, not owned or controlled by municipalities, to provide space in institutions for violent felons. All beds will meet department standards for Community residential Centers. Contracts will be competitively bid.

Id. at 381 - 82. The Court found that while portions of this language violated some of the *Hammond* factors, these violations were offset by the fact that the language did not amend existing law and it did not extend beyond the life of the appropriation. *Id.* Accordingly, we think it is possible to craft intent language that is permissible under the confinement clause. In our experience, however, most uses of intent language in the budget violate the confinement clause. Nevertheless, we cannot rule out the possibility that some uses of intent language could be found by a court to be enforceable. 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, and we have not specifically addressed such language herein, 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.

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. Sections 1 - 3

Section 1 of the bill, pages 2 - 6, sets out supplemental changes in operating expenditures from the general fund or other funds to agencies for the fiscal year ending June 30, 2008. The agencies receiving supplemental changes in their operating budgets under this section are:

- a. Department of Corrections (\$534,200 for Inmate Health Care)
- b. Department of Health and Social Services (\$17,072,300 for Medicaid Services)
- c. Department of Public Safety (\$441,400 to Alaska State Troopers and \$4,600 for Statewide Support)
- d. Department of Revenue (\$416,400 for the Tax Division)
- e. Department of Transportation and Public Facilities (\$748,000 for the State equipment Fleet; \$1,071,400 for Highways, Aviation and Facilities; and \$3,290,100 for the Marine Highway System)
- f. University of Alaska (\$927,200 for Budget Reductions/Additions-Systemwide)¹
- g. Alaska Court System (\$217,700 for the Trial Courts).

Section 2 sets out the funding by agency for the appropriations made in sec. 1. And, sec. 3 sets out the statewide funding for the appropriations made in sec. 1. The supplemental appropriations in sec. 1 have an effective date of April 13, 2008. *See* sec. 77.

B. Sections 4 - 6

Section 4 of the bill, pages 7 - 8, make appropriations for capital projects and grants to the Department of Health and Social Services for an Alaska Psychiatric Institute Automation systems (\$1,200,000), and DOTPF for various airport and harbor projects, and surface road reconstruction (totaling \$35,751,500). The appropriations made in this section lapse under AS 37.25.020,² except as otherwise noted. Sections 5 and 6 set out the funding by agency and the statewide funding for the appropriations made in sec. 4. The capital appropriations and grants made in sec. 4 have an effective date of April 13, 2008. *See* sec. 77. We note no legal or constitutional concerns with these appropriations.

¹ This appropriation should be researched to determine if it constitutes an unallocated reduction. As we have previously opined in the review of other operating appropriations, unallocated reductions that purport to effect more than one appropriation may raise constitutional questions. *See* 2006 Op. Att'y Gen. 1 (June 16; 883-06-0104); 2005 Op. Att'y Gen. (June 22; 883-05-0102). We typically do not recommend a veto of such reductions. *Id.*

² 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. Section 7 - 9

Section 7, pages 11 - 29, sets out appropriations for named recipient grants under AS 37.05.316, grants to municipalities under AS 37.05.315, grants to unincorporated communities under AS 37.05.317, and capital appropriations through several state agencies. The appropriations in this section have an effective date of April 13, 2008.

We have some general comments about named-recipient grant appropriations administered through the Department of Commerce, Community, and Economic Development that apply not only to the appropriations made in sec. 7, but also to numerous other appropriations to named-recipient grantees in sections spread out over the bill. *See e.g.*, sec. 10, pages 34 - 43; sec. 13, pages 88 - 102, page 128, lines 18 - 26. Our general comments are set out below.

1. Department of Commerce, Community, and Economic Development - - Grants to Named Recipients (AS 37.05.316)

Named-recipient grants administered through the Department of Commerce, Community, and Economic Development (DCCED) are subject to a process in which the grantee must submit a proposal for administrative review before the grant is approved and finalized. A grant agreement must be executed before issuance of the grant and the department is charged with oversight of grant expenditures for conformance with legislative purposes and the public purpose clause of the Alaska Constitution.³ Grants not in the public interest must be rejected. There are numerous named-recipient grants but not all need to be commented on from a legal perspective. Therefore, as in past years we are providing discussion of particular grants for named recipients and noteworthy legal considerations.

a. Religious Entities

Section 7 of the bill contains several named-recipient grant appropriations to religious or religious-affiliated entities. Such grants raise legal concerns since the Alaska and U.S. Constitutions both prohibit the establishment of religion. Article I, sec. 4, Alaska Constitution; First Amendment, U.S. Constitution. The U.S. 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).

³ Art. IX, sec. 6 of the Alaska Constitution provides as follows: "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." (Emphasis added).

In the bill, we note appropriations to

- (1) Catholic Community Services:
 - a. page 13, lines 18 - 20, for Angoon Senior Center Stove, Refrigerator & Freezer (\$20,000)
 - b. page 37; lines 23 - 26, for Catholic Community Resources - Fairbanks Counseling & Adoption (\$300,000), and
 - c. page 93; lines 10 - 14, for Juneau-Hospice & Home Care Point of Care System (\$50,000).
- (2) Covenant House Alaska, page 94, lines 3 - 5, for Covenant House Facility Expansion (\$5,000,000)
- (3) Juneau Cooperative Christian Ministry, page 97, lines 12 - 14, for Glory Hole Dormitory Upgrades (\$75,000)
- (4) St. Vincent DePaul Society, page 101, lines 3 - 7, for Building Safety & Heating Upgrades, Facilities for Needy Youth (\$25,000);
- (5) YMCA of Alaska, page 102, lines 19 - 21, for Anchorage YMCA Expansion (\$850,000);
- (6) Salvation Army Clitheroe Center - Retrofit Facility for Secure Treatment of Chronic Substance Abusers, page 103, lines 10 - 15, as a municipal grant to Anchorage (\$435,000)

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.

b. Grants to Tribal Entities

There are numerous named-recipient grantees that are Alaska Native tribal entities (tribal councils, villages, and IRA councils). The majority of these appropriations are found in secs. 7, 10, and 13 of the bill. *See e.g.* sec. 7, page 13, lines 25 - 27 (Chilkat Indian Village IRA-ANS community Hall Renovation - \$25,000); sec. 10, page 38, lines 16 - 19 (Cook Inlet Tribal Council - Develop/Purchase "Chanlyut" Facility - \$3,000,000); sec. 13, page 98, lines 21 - 24 (Nanwalek IRA Council - Back-up Generator Purchase, Shipping and Installation - \$25,000); lines 25 - 27 (Native Village of Kotzebue - Multi Use Facility - \$250,000). Our general comment regarding such grants is that DCCED is reminded that it must obtain a waiver of sovereign immunity from the tribal entity on a form that has been approved by this office before grant moneys can be dispersed to the entity. Also, the grantee must, as with all grantees that

receive public funds, agree that the expenditure of the grant money will serve a public purpose.⁴ 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].

c. 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. 10, page 40, lines 28 - 31, for Kuspuk School District - Joseph and Olinga Gregory School Project Cost Overruns (\$400,000);
- (2) Sec. 10, page 42, lines 23 - 25, for United NonProfits - Mortgage and Renovations (\$370,000).⁵

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).

d. Private Educational Institutions

The bill provides a grant of \$300,000 to the Iisagvik College for a Workforce Development Program. Section 13, page 96, lines 19 - 21. According to its website, Iisagvik College is a two-year community college offering quality post-secondary academic, vocational and technical education aimed at matching workforce needs and is dedicated to perpetuating and strengthening Inupiat (Eskimo) culture, language, values and traditions, improvements, technology upgrades, equipment and supplies.⁶ Iisagvik College is not part of the University of Alaska system; therefore this appropriation raises constitutional concerns of providing public

⁴ Additionally, we note that on sec. 7, page 17, lines 19 - 22, the legislature made an appropriation of \$96,000 for renovation and repair to the Sons of Norway District Two, No. 23 Hall. Likewise, the grantee must agree that the expenditure of the grant money will be used to serve a public purpose.

⁵ The back-up material accompanying this appropriation request describes the purpose as "Funds are needed to relinquish [sic] the mortgage on the new building and complete the building renovations." Further, the "Detailed Project Description and Justification reads in relevant part: "These funds would allow for the relinquishment of the mortgage, providing stable rent for all the nonprofit organizations that are housed in this new building." Based upon a letter written to Representative Fairclough from the United Nonprofits on February 25, 2008, the mortgage amount is \$170,000. We do not have legal concerns with the amount of the appropriation request that would be used for renovations.

⁶ According to its website and registration forms, this college has a residency preference for tuition for persons who have been residents of the North Slope Borough for a least one year.

funds to a private educational institution. 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 (emphasis added).

The first inquiry is whether the appropriation will expend public funds. The \$300,000 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 educational institution. First, this is a grant to a named recipient, the Ilisagvik College. This benefit flows only to one private institution. Second, the funds in this proposed grant are designated to improve this private school's programs. Therefore, the primary use of these funds appears to involve government aid to education conducted outside the public schools. Third, a \$300,000 grant is not a trivial amount and could be deemed to provide a substantial benefit to this private school. Finally, the proposed grant provides for the money to be given from the state directly to a private institution, without the use of an intermediary (such as through the North Slope Borough).

Based on the information we have been able to review, to date, about this college and the use of the appropriation, we believe that this proposed grant should be considered for veto because it appears it will utilize public funds to provide a direct benefit to a private educational institution and therefore violates art. VII, sec. 1 of the Alaska Constitution.⁷ If more information becomes available about the institution or appropriation that would change our legal determination, we are available for consultation.

2. Section 7 -- Grants to Municipalities (AS 37.05.315)

The next section of the bill makes grants to municipalities under AS 37.05.315, page 19, line 8 to page 27, line 14. We find no substantial legal issues with these appropriations, but note that where the grant is to a municipality to benefit a private entity, the municipality is responsible for insuring that the grant will be spent for the purpose appropriated and assure that, to the extent consistent with the purpose of the appropriation, the facilities and services provided with the grant will be available for the use of the general public. AS 37.05.315(a). Of note are several appropriations for renovations to Alaska Native Brotherhood halls in the following municipalities: Haines p. 23, lines 24 - 26, Hoonah, lines 30 - 31, Klawock, p. 24, lines 23 - 25,

⁷ In 1980, the same legal conclusion of "direct benefit to a private educational institution" was reached concerning borough funding of Ilisagvik College. See 1980 Op. Att'y Gen. 6 (April 11; J-66-465-80).

Yakutat, p. 27, lines 8 - 10.

3. Grants to unincorporated communities (AS 37.05.317)

There is one grant to an unincorporated community in sec. 7 - Naukati Bay, for road completion in Naukati West, \$150,000. We see no issues with this appropriation.

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

D. Sections 10 - 13

The appropriations made in sec. 10 of the bill have an effective date of April 13, 2008. We will address only the most significant appropriations to the various departments and those for which we have legal concerns below.

1. Department of Administration

Some of the Department of Administration's capital project budget is set out on pages 32 - 34, which includes numerous deferred maintenance appropriations for public buildings. *See* e.g., pp. 33 - 34 (\$7,618,000 appropriated for facility deferred maintenance). We have no comments on this section.

2. Department of Commerce, Community, and Economic Development

On pages 34 - 63, there are appropriations to DCCED as well as more grants to named-recipients (pp. 34 - 43), grants to municipalities (pp. 43 - 62), and grants to unincorporated communities (pp. 62 - 63). We have commented on several legal issues on named-recipient grants which are included in this section under sec. C of this bill review and will not repeat them here.

Included in the grants to be administered by DCCED are numerous school-related grants to municipalities under AS 37.05.315, and 13 grants to Regional Educational Attendance Areas under AS 37.05.316. These grants range in size from \$2,500 to \$1,500,000.

We note that one of the appropriations in this section has been made contingent on the community providing an equal match from sources other than the state or federal government. *See* p. 46, line 33 - p. 47, lines 3 - 6 (\$3,500,000 to Anchorage for Safety Upgrade - 6th Avenue to Debarr Road). We have no concerns about this contingency based on the *Hammond* factors. We have no other comments on these appropriations.

3. Department of Corrections

On pages 63 - 64, there is an appropriation of \$8,678,000 to the Department of Corrections for deferred maintenance, renewal, replacement, renovation, remodeling, and repairs, with allocations set out per project. We see no issues with these sections.

4. Department of Education and Early Development (DEED)

On pages 64 - 66, there are appropriations to DEED for capital projects, including \$40,000 for outreach and compliance access database, \$2,500,000 for Alaska Commission on Post Secondary Education - Alaska Advantage Grants, \$9,500,000 for a major maintenance grant (AS 14.11.007) for Delta High School, and numerous named recipient grants to school districts ranging from \$30,000 to \$100,000. We have no legal concerns with these appropriations.

5. Department of Fish and Game

On pages 66 - 68, there are capital appropriations to the Department of Fish and Game. Of note are the following appropriations: (1) \$2,000,000 for a Fairbanks Regional Office Enclosed Secure Storage Compound Design/Construction (p. 66, lines 29 - 33), (2) \$2,000,000 for the Kodiak Near Island Facility (p. 67, lines 17 - 18); (3) \$1,000,000 for Statewide Deferred Maintenance, Repair, Upgrades, and Equipment (p. 67, lines 3 - 26), and (4) \$1,900,000 appropriated for Statewide Facility Deferred Maintenance with allocations set out per project (p. 67, lines 31 - p. 68, lines 3 - 12). We see no issues with these appropriations.

6. Department of Labor and Workforce Development

On pages 68 - 69, are capital appropriations to the Department of Labor and Workforce Development. There are several large projects covered in this section of the bill including \$6,000,000 for the Alaska Works Partnership Fairbanks Pipeline Training Center, \$8,659,000 for AVTEC Culinary Building Replacement and Instructional Equipment, \$3,350,000 for AVTEC Maritime Safety Training Facility, and \$3,700,000 for a Business Management Information System. We see no legal problems with the appropriations made in this section.

7. Department of Military and Veterans' Affairs (DMVA)

The appropriations to DMVA on pages 69 - 70, are for statewide facility deferred maintenance projects totaling \$7,911,915, with allocations set out per project. We see no legal issues with these appropriations.

8. Department of Natural Resources (DNR)

Capital appropriations made to DNR are found on pages 70 - 73, and include \$10,000,000 for EVOS parcel acquisition - Afognak; \$4,000,000 for Reservoir Studies to Evaluate Oil and Gas Resources on the North Slope; and \$6,323,000 in Statewide Facility Deferred Maintenance with allocations set out per project. We see no legal issues with these appropriations.

9. Department of Public Safety

On pages 73 - 75, there are capital appropriations to the Department of Public Safety, and of note are appropriations of \$3,000,000 for Anchorage Aircraft Hangar Replacement (p. 73, line 33 - p. 74, line 3); \$7,000,000 for APSIN Redesign, Year 3 of a 3-year Plan (p. 74, lines 4 - 5);

and \$12,000,000 for Statewide Crime Lab - Design & Site Preparation (p. 75, lines 14 - 16). We see no legal issues with these appropriations.

10. Department of Revenue

On page 75, lines 23 - 27, is a \$4,000,000 appropriation to the Department of Revenue for the Alaska Natural Gas Development Authority - Engineering and Economic Study on In State Gas Use. We see no legal issues with these appropriations.

11. Department of Transportation and Public Facilities (DOTPF)

On pages 75 - 80, there are appropriations to DOTPF for numerous projects. Some of the significant appropriations are (1) \$11,500,000 for Glenn Highway Rut Repairs (p. 74, lines 25 - 26); \$5,000,000 for Mat-Su Borough - Burma Road Upgrade (p. 77 lines 19 - 20); \$13,500,000 for New Seward Hwy-36th South 6-Lane (p. 77 lines 28 - 29); \$15,000,000 for State Equipment Fleet Replacement (p. 78, lines 19 - 20); and \$13,273,000 for Facilities Deferred Maintenance with allocations set out per project (p. 79, line 27 - p. 80). We find no legal issues with the appropriations made in this section.

12. University of Alaska

On pages 80 and 81 are capital appropriations to the University of Alaska. Of note are appropriations of \$15,000,000 for the UAA Sports Arena - Planning, Design and Site Preparation (p. 80, lines 22 - 24), and \$23,742,948 for Maintaining Existing Facilities and Equipment Renewal and Renovation Annual Requirement with allocations set out by project and campus (p. 80 line 27 - p. 81, line 8).

Section 11 of the bill sets out the funding by agency for the appropriations made in sec. 10 of the bill and sec. 12 sets out the statewide funding for these appropriations

E. Sections 13 - 15

The appropriations made in sec. 13 of the bill have an effective date of July 1, 2008. We will address only the most significant appropriations to the various departments and those for which have legal concerns.

1. Department of Administration

The Department of Administration is appropriated \$15,725,000 for the Palmer State Office Building. Page 87, lines 9 - 10. We see no legal issues with this appropriation.

2. Department of Commerce, Community, and Economic Development

This section of the bill makes appropriations to the Alaska Energy Authority totaling \$68,501,000, for specified hydro studies, energy projects and plans, renewable energy projects, and the Fire Island Wind Farm. Page 87, lines 14 - 26. The appropriation for the Fire Island Wind Farm (transmission lines), is made contingent on the owner of the generation being legally

obligated to build a generation facility through power sales agreements that are in place to accept the generation. The contingency appears to meet the *Hammond* factors to be valid, and it is focused upon ensuring that a public benefit will be derived from the publicly funded project.

There is also a \$3,000,000 appropriation to the Alaska Industrial Development & Export Authority for the Ketchikan Shipyard (p. 87, line 30) and a \$17,500,000 appropriation for the Kodiak Launch Facility (p. 88, lines 9 - 10).

Beginning on page 88, line 13 - page 102, line 29, there are more named-recipient grants (AS 37.05.316) to be administered through DCCED. We have already noted our legal concerns generally, as well as to specific appropriations to certain named recipients, in sec. C of this bill review. We find no additional legal concerns in the appropriations made in sec. 13 not already addressed.

Beginning on page 102, line 30 - page 133, line 30, there are more appropriations as grants to municipalities (AS 37.05.315) made through DCCED, many of which are grants for municipal schools. For example, see appropriations on page 103, line 20 - page 106, line 30. We have no legal concerns with these appropriations.

On page 133, line 31 - page 135, line 11, there are additional appropriations for grants to unincorporated communities (AS 37.05.317). We have no legal issues with these appropriations.

3. Department of Corrections

There are additional capital appropriations to the Department of Corrections on pages 135, lines 15 - 31.

4. Department of Education and Early Development

On pages 136 - 138, there are appropriations of \$106,421,074 for school construction projects from the school construction grant list of the Department of Education and Early Development under AS 14.11.005, and \$81,364,724 from the department's major maintenance grant list under AS 14.11.007. Together with the one project funded in sec. 10, page 64, line 26 (Delta High School -- \$9,500,000), and the four projects funded in sec. 61, the total funding for major maintenance in schools in this bill would be \$91,992,544. Section 13 also includes two grants to Regional Educational Attendance Areas under AS 37.05.316 through the Department of Education and Early Development. *See* page 138, lines 18 - 26.

Other education-related projects in sec. 13 to DEED include an appropriation of \$7,500,000 for the planning and design of a new state library, museum, and archives, and an appropriation of \$2,634,000 for deferred maintenance for the state boarding school, Mt. Edgumbe. *See* Page 136, line 6 - 12.

As noted above, many of appropriations for schools to departments other than DEED (such as DCCED), 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.

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).

We see no legal concerns with these appropriations.

5. Department of Environmental Conservation/Department of Fish and Game

Capital appropriations to the Department of Environmental Conservation (DEC) for numerous projects including Village safe water and wastewater infrastructure projects are set out on pages 138 - 148. And, the Department of Fish and Game appropriations are listed on page 148. Of note is the \$22,000,000 appropriation for the Pacific Coast Salmon Recovery Fund. Page 148, lines 12 - 13. We have no legal concerns with these appropriations.

6. Department Health and Social Services

Capital appropriations to the Department of Health and Social Services (DHSS) are found on pages 148 - 151. Of particular note is an appropriation of \$19,503,700 for the McLaughlin Youth Center Renovation, Phase 1 (page 149, lines 24 - 27) and \$7,191,600 for deferred maintenance, renovation, repair and equipment, with allocations set out per project. Page 150, line 8 - page 151, line 21. We see no legal concerns with these appropriations.

7. Department of Military and Veterans' Affairs

There are several capital appropriations made to Department of Military and Veterans' Affairs (DMVA) in sec. 13 (pp. 151 - 152). Of particular note in the DMVA appropriations is a \$9,500,000 million State Homeland Security Grant, p. 152, lines 13 - 14. We see no legal concerns with these appropriations.

8. Department of Natural Resources/Department of Public Safety

Capital appropriations to the Department of Natural Resources are found on pp. 152 - 154. And, Department of Public Safety appropriation for facilities deferred maintenance, repairs and improvements (\$1,715,000) with allocations set out per project are on pages 154 - 155. We see no legal concerns with these appropriations.

9. Department of Revenue

The Department of Revenue capital appropriations, which include appropriations to the Alaska Housing Finance Corporation, are found at pages 155 - 158. Of note is a \$2,620,800 appropriation for an Oil and Gas Product Tax System Replacement, p. 155, lines 26 - 27. We see no legal concerns with these appropriations.

10. Department of Transportation and Public Facilities

Additional capital appropriations to DOTPF are on pages 158 - 172, and they include appropriations and allocations for Community Harbor Deferred Maintenance & Transfer (pp. 159 - 160), Municipal Harbor Facility Grant Fund -- \$10,401,330 with allocations per project (p. 160), Statewide Federal Programs (p. 161), Airport Improvement Program (pp. 162 - 166), Surface Transportation Program (pp. 166 - 172), and a Congressional Earmark on of \$450,000 with allocations of \$300,000 for the Hoonah: Intermodal Ferry Dock and \$150,000 for the Wrangell: Ferry Infrastructure. P. 172, lines 16 - 20. We see no legal concerns with these appropriations.

11. University of Alaska

A significant portion of the capital appropriations to the University of Alaska are set out on pages 172 - 174, and it includes a \$21,480,014 appropriation (with allocations per project and campus) for maintaining existing facilities and equipment renewal and renovation annual requirement. We have no legal concerns with these appropriations.

12. Alaska Court System

Additional capital appropriations to the court system are set out on page 174 and include an \$8,000,000 appropriation for the Anchorage Campus Project (Phase I) and \$3,276,000 appropriation for Statewide facility deferred maintenance, with allocations set out per project. We have no legal concerns with these appropriations.

Section 14 of the bill sets out the funding by agency for the appropriations made in sec. 13 of the bill and sec. 15 sets out the statewide funding for these appropriations.

F. Sections 16 - 18

Section 16 of the bill, pages 180 - 182, appropriates to the Department of Commerce, Community, and Economic Development \$33,468,700 to disburse in the form of grants to municipalities under AS 37.05.315 for capital projects related to commercial passenger impacts in Alaska. We note that a grant recipients under AS 37.05.315 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. Some of the appropriation items contained in sec. 16 of the bill are subject to legal challenge as being in violation of spending restrictions imposed upon these tax proceeds under: 1) the Commerce Clause; 2) the Tonnage Clause; and, 3)

33 U.S.C. 5. However, based upon our review of these constitutional and statutory provisions and the applicable case law, we believe the state is in a good position to defend the appropriations contained in sec. 16 of the bill.

As described in sec. 17 of the bill, page 182, the funding sources for these capital projects are the commercial passenger vessel tax account in the general fund and the regional cruise ship impact fund. The commercial passenger vessel tax account is made up of tax proceeds collected from passengers who travel in Alaska on a commercial passenger vessel for more than 72 hours. Section 18 set out the statewide funding for the appropriations made in sec. 16.

G. Sections 19 - 21

Section 19, pages 185 - 188, provides for grants to certain municipalities (AS 37.05.315) to be administered through DCCED, totaling \$43,350,000. The funding source in sec. 20 is General Obligation bonds. Page 189.

Section 19 also makes an appropriation of \$271,700,000 from general obligation bonds (sec. 20), with allocations set out per project as authorized under a bond issuance. The amount of general obligation bonds to fund these appropriations in section 19 totals \$315,050,000. Section 21, page 189. We note that the anticipated bond proceeds are authorized by SCS CSHB 314(FIN). While we find no legal issues as to the authority to apply general obligation bond proceeds to capital projects provided the authorizing legislation permits, there are concerns if you anticipate use of your line-item veto power of appropriations in this section.

The Alaska Supreme Court has held that the governor may not use the line-item veto power to veto general obligation bond authorizations. *Thomas v. Rosen*, 569 P.2d 793, 796-97 (Alaska 1977). This section does not contain the bond authorizations, but rather appropriations of the "anticipated" bond proceeds authorized by SCS CSHB 314(FIN) that will be subject to approval by the voters if the bill becomes law. We question the necessity of including these as appropriation items in this bill since they are anticipatory. Yet, once included as appropriation items, it is arguable that they are subject to the governor's line-item veto. The dissent in *Thomas* suggested as much. *Id.* at 799; *see also* 1999 Op. Att'y Gen. 2 (Dec. 21; 663-00-0064).

We note, however, that the issue of anticipated general obligation bonds proceeds included in an appropriations bill (on bonds yet to be voted on and approved by the electorate) was not addressed in the *Thomas* case because the issue concerned the attempted line-item veto in a bond authorization bill. In that case the Court said:

. . . if the governor's veto of bond authorizations were to prevail, it would in effect allow the executive to interpose its judgment between the legislature and the electorate. Such an expansion of item veto power is unwarranted and does violence to the checks and balances mechanism built into our constitutional form of state government.

Id. at 797 *citing Bradner v. Hammond*, 553 P.2d 1, 5 - 6 (Alaska 1976).

And, the Court found valid reasons for

. . . differentiating between debt financing and other appropriations from public revenues. First, the check on the power of the legislature that lies in the people . . . means there is less need for the executive to have a 'strong control on the purse strings.' Second the purposes are quite often different. Third, even under our holding, the executive still has the power to veto *any* bill in its entirety.

Id. at 797 (emphasis in original). Thus, given the holding in *Thomas* if the line-item veto were applied to these anticipated general obligation bond appropriations, legal challenges could be raised. We are available for consultation on this issue if necessary.

H. Sections 22 - 27

Section 22, on pages 191 - 192, makes appropriations to implement the collective bargaining agreement with the Public Safety Employees Association representing the regularly commissioned public safety officers unit as set out in sec. 23 of the bill, page 193, secs. 23 and 24 set out the funding by agency and the statewide funding for appropriations made in sec. 22.

Section 25 provides for the appropriation of funds to each affected department to implement the collective bargaining agreement with Public Employees Local 71, for the labor, trades and crafts unit, for the fiscal year ending June 30, 2009. Section 74(g) provides that section 22 is contingent on the membership of PSEA ratifying the agreement. This appropriation is made contingent by sec. 74(h), which provides that sec. 25 is contingent on the membership of Public Employees Local 71 ratifying the agreement. Sections 26 and 27 set out the funding by agency and the statewide funding for appropriations made in sec. 25. We find no legal issues with these sections of the bill.

III. Language Sections (Secs. 28 - 74)

The language sections (secs. 28 - 74), 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 29 of the bill makes three appropriations for the Department of Commerce, Community, and Economic Development as follows: (1) for continuing upgrades to the division of insurance systems and further implementation of electronic transactions, (2) for the removal and disposal of a building in Haines, and (3) for road repair and paving in the Matanuska-Susitna Borough. We find no legal issues with this section of the bill.

Section 30, page 207 - 208, provides \$1,449,000 to the Department of Law for the purpose of paying judgments and settlements against the state for the fiscal year ending June 30, 2008.

Section 31 on page 208 of the bill relates to efforts by the Department of Natural Resources to value public school trust land. The trial court in *Kasayulie v. State*, Case No. 3AN-97-3782 CI, found that the state breached the public school trust when public school trust lands were legislatively designated general grant lands in 1978. This litigation also involves matters related to construction and maintenance of school facilities in rural Alaska. The trial court ordered that a valuation of all public school trust lands be completed before the trial court would address the appropriate remedy in either the public school trust or rural school facilities sides of the case. Section 31 of the bill amends prior legislation appropriating funds for the land valuation effort, so that the funding will be available through the fiscal year ending June 30, 2011. We see no legal problems with these appropriations.

Section 35, page 211, appropriates federal and other statutorily designated program receipts, and provides for reductions and shortfall of receipts where necessary to provide for consistency with federal law and state law. Section 35(d), page 211, lines 10 - 21, amends an appropriation made in the operating budget, SCS CSHB 310(FIN) am S (brf sup maj fld S), sec. 22(a), by adding "and receipts of the Alaska marine highway system fund described in AS 19.65.060(a)." We see no legal problems with this amendment.

Section 36, pages 211 - 212, provides for fund transfers to various departments and between funding sources. We see no legal problems with this section.

Section 38, page 212 - 213, 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 39, page 213, appropriates the balance of the rural electrification revolving loan fund (AS 42.45.030) on June 30, 2008 (estimated to be \$80,400), and also appropriates \$250,000 from the general fund to the Department of Commerce, Community, and Economic Development, Alaska Energy Authority, for the electrical emergencies program. We see no legal problems with this section.

Sections 40 - 57, pages 213 - 220, provide for reappropriations of the unexpended and unobligated balances of prior years' appropriations, for various projects. We have no particular legal concerns on any of these reappropriations.

Section 61 of the bill includes an appropriation of \$20,700,000 to the Department of Education and Early Development for distribution to school districts for energy relief under the same formula as foundation funding is distributed. Section 61 also funds four major maintenance grants through the department under AS 14.11.007. In addition, sec. 61 would also provide that appropriations for the major maintenance fund that are not expended on specific school projects identified by this bill may be expended on other projects on the department's major maintenance project rankings.

Section 63(a) provides for appropriations of investment earnings from various Fish and Game accounts for construction and renovation of the sport fish hatchery in Anchorage, not to exceed \$6,000,000. Page 222, lines 20 - 25. And, subsection (c) reappropriates \$62,140,000

from 2005 for sport fish hatcheries (sec. 1, ch 3, FSSLA 2005, page 55, lines 21 - 22), and distributes the funds between a sport fish hatchery in Fairbanks and a sport fish hatchery in Anchorage. Page 223, lines 2 - 4.

Section 66, pages 223 - 224, provides for appropriations and reappropriations to the Department of Transportation and Public Facilities for various projects. Subsection (g) (Page 224) appropriates money for fiscal year 2009 to implement the monetary terms of the state's collective bargaining agreement with the Inlandboatmen's Union of the Pacific under AS 23.40.215(a). We note that section 66(i), page 224, line 27, appropriates the sum of \$194,000, from federal receipts to the department to provide child safety and booster seat incentive grants. However, this appropriation has been made contingent on the passage on a version of SB 218 (see, sec. 74(c), which did not pass).

Section 67, pages 224 - 225, provide for appropriations and reappropriations to the Office of the Governor. Subsection (a) appropriates \$10,000 from the general fund for examining the possibility of designing a new state seal. Subsection (c), of the bill provides \$25,000 to the Office of the Governor to educate and provide information to the public regarding mining regulation and activities in the state, including information that "may influence the outcome of an election" on initiatives relating to mining. The appropriation was designated for fiscal years ending June 30, 2008 and June 30, 2009. *See* sec. 77. Section 67, paragraph (d), is intent language in which the legislature state its intent that the appropriation made in (c) of the section meets the requirements of AS 15.13.145.⁸ We do not take exception to this intent language because the state law, AS 15.13.145, specifically allows the legislature to appropriate funds so that state officials may address initiatives, including when such information may or does influence the outcome of an election. *See* 2 AAC 50.356

Section 68, page 225, appropriates (a) \$49,000,000 from the general fund to the judicial retirement trust fund under AS 22.25.048 for payment of the unfunded liability to that fund, and (b) \$10,000,000 from the general fund to the military retirement trust fund under AS 26.05.228, for payment to the National Guard retirement system liability.

Section 70, pages 225, 226, reappropriates several legislative appropriations for Legislative Budget and Audit Committee, Legislative Council, and Legislative Operating Budget.

Section 72 of the bill (p. 227) authorizes spending from the constitutional budget reserve fund (Alaska Const., art. IX, sec. 17). Section 72(a) provides that for the sum of \$400,000,000 from the general fund to the constitutional budget reserve fund for repayment of amounts owed the fund. Section 72(b) appropriates \$820,000 from the budget reserve fund to the Department of Revenue, treasury division, for operating costs related to management of the fund for the fiscal year ending June 30, 2008. And, sec. 72(c) appropriates \$4,080,000 from the budget reserve fund to the Department of Revenue, treasury division, for operating costs related to

⁸ AS 15.13.145 reads in relevant part: (b) Money held by an entity identified in (1) - (3) of this section may be used to influence the outcome of an election concerning a ballot proposition or question, but only if the funds have been specifically appropriated for that purpose by a state law or a municipal ordinance.

management of the fund for the fiscal year ending June 30, 2009. Under subsection (d), the management costs appropriated in (b) and (c) need a three-fourths vote of the legislature to be approved. These were passed by the requisite vote in each house. We see no legal issues with this section.

Section 74 of the bill (Page 227-28) - describes various contingencies for the appropriations contained in SB 221. These include subsection (b) which makes the appropriation in sec. 66(g) contingent on ratification of the collective bargaining agreement with the Inlandboatmen's Union of The Pacific (IBU) by the membership of that union. Section 66(g) provided for an appropriation from the general fund to the Department of Transportation and Public Facilities to implement a new collective bargaining between the state and IBU, which represents the unlicensed employees working aboard AMHS vessels. The state and IBU reached a tentative collective bargaining agreement but that agreement had not been ratified by the date the bill passed.

Sec. 74(g) provides that sec. 22, which provides an appropriation to implement a collective bargaining agreement covering the regularly commissioned public safety officers unit, is contingent upon ratification of the agreement by the Public Safety Employees Association. That agreement had not been ratified by the date the bill passed. Subsection (h) provides that sec. 25, which provides an appropriation to implement a collective bargaining agreement covering the Labor, Trades and Crafts bargaining unit, is contingent on the membership of Public Employees Local 71 ratifying the agreement. That agreement had not been ratified by the date the bill passed.

Section 74 also provides that particular sections of SB 221 are contingent on other bills being enacted. Subsection (a) is contingent on the enactment of HB 338, which was passed by the legislature. Subsection (c) is contingent on the enactment of SB 218, which was not passed by the legislature. Therefore the appropriation made in sec. 66(i) must be vetoed as the contingency was not met. Subsection (d) is contingent on the enactment of SB 303, which was passed by the legislature. Subsection (e) is contingent on the enactment of HB 273, which was passed by the legislature. Subsection (f) is contingent on the enactment of HB 152, which was passed by the legislature. Subsection (i) is contingent on the enactment of HB 2, which was passed by the legislature. These contingencies are appropriate conditions on appropriations under *Knowles*.

Section 75 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 76 of the bill provides for certain provisions of the bill to be retroactive.

Section 77 of the bill lists the provisions of the bill which have an effective date of April 13, 2008.

Section 78 of the bill lists those provisions of the bill that have an effective date of June 30, 2008.

Lastly, sec. 79 of the bill provides for an effective date for the bill (except as provided for in secs. 77 and 78), of July 1, 2008.

IV. 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:ajh