



THE STATE  
*of* **ALASKA**  
GOVERNOR MICHAEL J. DUNLEAVY

**Department of Law**

CIVIL DIVISION

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August 2, 2019

The Honorable Michael J. Dunleavy  
Governor  
State of Alaska  
P.O. Box 110001  
Juneau, Alaska 99811-0001

Re: SB 2002: Capital Budget; Supplemental  
(CSSB 2002(FIN))  
Our file: 2019200633

Dear Governor Dunleavy:

At the request of your legislative director, we have reviewed CSSB 2002(FIN), making appropriations, including capital appropriations, supplemental appropriations, reappropriations, and other appropriations; amending appropriations; making appropriations to capitalize funds; making appropriations for the capital expenses of the state's integrated comprehensive mental health program; and making appropriations under art. IX, sec. 17(c), Constitution of the State of Alaska, from the constitutional budget reserve fund.

**I. General Comments**

This is the second capital budget bill passed by the legislature this year. The first bill, SB 19 (Ch. 3, FSSLA 2019), made a number of appropriations that were unfunded largely as a result of the failure to obtain the necessary super-majority vote to appropriate money from the constitutional budget reserve fund ("CBRF"). As set forth below, here the legislature obtained the necessary super-majority vote to appropriate money from the CBRF.

We also note that 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 other legal issues with the appropriations in this bill.

### *Legislative Intent*

This bill includes expressions of legislative intent accompanying certain appropriation items. 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.” The Alaska courts have used a five factor test to determine whether language added to an appropriations bill violates the confinement clause. Under this test (the *Hammond factors*), 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.<sup>1</sup>

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, we recommend further consultation with this office so that we may advise as to the extent the 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 not be vetoed by the governor as a line item veto separate from the appropriation itself. On this point, the Alaska Supreme Court has ruled that expressions of intent do not constitute “items” subject to your veto power.<sup>2</sup>

### *Contingency Language*

The bill also includes a contingency provision in sec. 21. The Alaska Supreme Court has also found that contingency language in general should be subject to the same analysis as legislative intent language.<sup>3</sup>

The contingency provision in sec. 21 makes appropriations from the CBRF in secs. 1 - 9 of the bill contingent on passage and enactment into law of the appropriation in sec. 17(a) of this bill which is commonly referred to as the “reverse sweep” appropriation. Under art. IX, sec. 17(d), of the Alaska Constitution, money in the general

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<sup>1</sup> *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 377 (Alaska 2001).

<sup>2</sup> *Knowles*, 21 P.3d at 371-375.

<sup>3</sup> *Knowles*, 21 P.3d at 378-384.

fund available for appropriation at the end of a fiscal year must be deposited into the CBRF until the CBRF is repaid for prior appropriations from the CBRF. Section 17(a) is an appropriation from the CBRF to reverse the constitutionally required deposit into the CBRF of money in the general fund subaccounts at the end of the previous fiscal year.

The effect of the contingency provision in sec. 21 is to effectively tie the appropriations in secs. 1 - 9, which are appropriations from the CBRF for capital projects, with the reverse sweep appropriation from the CBRF to general fund subaccounts. Contingency provisions that seek to tie separate appropriations together raise constitutional issues because they can impair the constitutional authority of the governor to exercise the veto power to strike or reduce “items in appropriation bills,” (art. II, sec. 15), and potentially violate the confinement clause that requires appropriation bills to be confined to appropriations (art. II, sec. 13). The Department of Law has previously taken the position that tying appropriations together in such a manner as to require enactment of all or none of the appropriations without reduction likely violates these constitutional provisions.<sup>4</sup> A full review of the constitutional problems presented by tying appropriations was published a few years ago in the *Alaska Law Review*.<sup>5</sup> If you desire to strike or reduce the appropriation in sec. 17(a), we are available to provide a more in-depth analysis of the issue for your consideration.

### *Appropriating Future Revenues*

We note that the appropriations in secs. 12 and 14(a) attempt to appropriate state revenues (receipts) beyond the next fiscal year. The Attorney General advised in an opinion dated May 8, 2019, that similar appropriations that sought to “forward fund” education through the commitment of future state revenues were unconstitutional under article IX of the Alaska Constitution. The appropriations in secs. 12 and 14(a) suffer from this same legal infirmity and thus the portion of the appropriations that attempt to appropriate money beyond FY20 would be considered invalid appropriations by the Department of Law. We recommend using the line-item veto authority to strike the unlawful portion of the appropriations, namely the future fiscal years.

## **II. Sectional Analysis**

Section 1, pages 2 - 7, would make appropriations for capital projects and grants from the general fund or other funds. Except as otherwise noted, these appropriations

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<sup>4</sup> See Memorandum from the Attorney General to the Office of the Governor (Apr. 26, 2011).

<sup>5</sup> The Item Veto and the Threat of Appropriations Bundling in Alaska; 30 *Alaska L. Rev.* 125.

lapse under AS 37.25.020.

Section 2, pages 8 - 9, sets out the funding by agency for the appropriations made in sec. 1. Section 3, page 10, sets out the statewide funding for the appropriations made in sec. 1. Under sec. 20(c) of the bill, secs. 1 - 3 take effect retroactively to July 1, 2019.

Section 4, page 11, would make appropriations for supplemental capital projects and grants. Except as otherwise noted, these appropriations lapse under AS 37.25.020. Section 5, page 12, sets out the funding by agency for the appropriations made in sec. 4. Section 6, page 13, sets out the statewide funding for the appropriations made in sec. 4. Under sec. 20(a) of the bill, secs. 4 - 6 are retroactive to May 15, 2019.

Section 7, page 14, would make appropriations for mental health capital projects and grants that lapse under AS 37.25.020 unless otherwise noted. Section 8, page 15, sets out the funding by agency for the appropriations made in sec. 7 of the bill. Section 9, page 16, sets out the statewide funding for the appropriations made in sec. 7. Under sec. 20(c) of the bill, secs. 7 - 9 take effect retroactively to July 1, 2019.

Section 10 of the bill provides for the ratification of certain expenditures made in fiscal years 2002, 2008, 2016, and 2017 by amending prior appropriations.

Section 11(a) would appropriate \$200,000 from the Exxon Valdez oil spill restoration fund to pay as a grant under AS 37.05.316 to the Prince William Sound Science and Technology Institute for planning and construction of a research facility. Section 11(b) would appropriate \$2,000,000 from the AIDEA receipts to pay as a grant under AS 37.05.316 to the Northwest Arctic Borough for costs of school construction and major maintenance. Section 11(c) would appropriate \$4,000,000 from the AIDEA sustainable energy transmission and supply development fund to the Department of Commerce, Community, and Economic Development for payment as a grant under AS 37.05.316 to Interior Gas Utility for the construction and expansion in North Pole of a liquefied natural gas storage facility. Under sec. 19(c), grants awarded to named recipients under AS 37.05.316 are for capital projects and lapse under the statute unless designated for a specific fiscal year. Under sec. 20(c), sec. 11 is retroactive to July 1, 2019.

Section 12 would appropriate the proceeds from the sale of Department of Education and Early Development state-owned land in Sitka during the 2020, 2021, and 2022 fiscal years for maintenance and operations of Mt. Edgecombe boarding school during the 2020, 2021, and 2022 fiscal years. Section 12 would be retroactive to July 1, 2019 according to sec. 20(c). As noted above, this section seeks to appropriate future state revenues (for fiscal years 2021 and 2022). The Attorney General in an opinion dated May 8, 2019 addressing similar appropriations that sought to “forward fund” education

through the commitment of future state revenues concluded that such appropriations would be unconstitutional under article IX of the Alaska Constitution.

Section 13 would reappropriate \$34,577 to the Department of Natural Resources for the Flattop Mountain Trail clean up pilot project. Section 13 would be retroactive to June 30, 2019, under sec. 20(b).

Section 14(a) would appropriate proceeds from the sale of the Alaska marine highway system assets during fiscal years 2020, 2021, and 2022 to the Alaska marine highway system vessel replacement fund. Section 14(a) would be retroactive to July 1, 2019, under sec. 20(c). As set forth above, this is another provision that seeks to appropriate future revenues in a manner that would be unconstitutional according to the Attorney General's opinion dated May 8, 2019.

Section 14(b) would reappropriate \$1,604,457 to the harbor facility grant fund for harbor facility matching grants. Section 14(b) would take effect June 30, 2019, under sec. 20(b).

Section 15 amends an appropriation regarding the Ketchikan Marine Moorage Facility. Section 15 would take effect June 30, 2019, under sec. 20(b).

Section 16(a) would make reappropriations from various accounts of approximately \$9,252,203 to the Alaska Housing Capital Corporation account. Section 16(b) would reappropriate funds, remaining after a prior appropriation, to the Alaska Housing Capital Corporation. Section 16 is for the capitalization of a fund and does not lapse, under sec. 19(b). The appropriations in sec. 16 are retroactive to June 30, 2019, under sec. 20(b).

Section 17 contains provisions relating to the CBRF. As noted above, the CBRF was established in art. IX, sec. 17 of the Alaska Constitution.

Section 17(a) provides that deposits in the CBRF for fiscal year 2019 that were made from subfunds and accounts of the general fund by operation of art. IX, sec. 17(d) of the Alaska Constitution to repay prior appropriations from the CBRF are appropriated from the CBRF back to the subfunds and accounts from which they were transferred. This is commonly known as the "reverse sweep" appropriation.

Section 17(b) provides for appropriations from the CBRF to the general fund for fiscal year 2020 if the unrestricted state revenue available for appropriation in fiscal year 2020 is insufficient to cover the general fund appropriations that take effect in fiscal year 2020 made in the following appropriations bills: this bill (SB 2002); ch. 1, FSSLA 2019 (HB 39 operating budget); ch. 2, FSSLA 2019 (HB 40 mental health budget); ch. 3,

FSSLA 2019 (SB 19 capital budget); a version of HB 2001 or a similar bill; and ch. 6, SLA 2018 (education appropriations in HB 287 passed in 2018).

Section 17(c) provides that if after the appropriation in sec. 17(b), the unrestricted state revenue available for appropriation is insufficient to cover the general fund appropriations that take effect in fiscal year 2020, the amount necessary to balance revenue and general fund appropriations, not to exceed \$250,000,000, is appropriated to the general fund from the CBRF.

Section 17(d) provides that the appropriations made under subsections (a) - (c) and under secs. 1 - 9 of the bill are made under art. IX, sec. 17(c) of the Alaska Constitution. As noted above, these appropriations received the required three-fourths vote of the membership of each house and thus are valid under this constitutional provision.

Section 18 repeals the appropriations made in secs. 30(b) and (c) of ch. 3, FSSLA 2019.

Section 19(a) provides that appropriations in secs. 1 - 9 and 13 of the bill are for capital projects and lapse under AS 37.25.020. Section 19(b) provides that the appropriations in secs. 14 and 16 are for capitalization of funds and do not lapse. Section 19(c) provides that a grant awarded under this bill to a named recipient is for a capital project and lapses under AS 37.05.316 unless designated for a specific fiscal year.

Section 20 provides for retroactive effect to May 15, 2019, June 30, 2019, and July 1, 2019 for certain appropriations in the bill.

Section 21 is the contingency provision discussed in detail above regarding appropriations from the CBRF.

Section 22 provides that the bill takes effect immediately under AS 01.10.070(c).

### **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.

Sincerely,

KEVIN G. CLARKSON  
ATTORNEY GENERAL

By:

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Senior Assistant Attorney General  
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