

May 13, 2015

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

Re: CCS HB 72(brf sup maj fld H):
Fiscal Year 2016 Operating Budget
Our file: JU2015200328

Dear Governor Walker:

At the request of your legislative director, we have reviewed CCS HB 72(brf sup maj fld H), making appropriations for the operating and loan program expenses of state government and for certain programs, capitalizing funds, and amending appropriations. The bill is otherwise known as the fiscal year 2016 operating budget, beginning on July 1, 2015, and ending on June 30, 2016. We review the highlights of the bill below.

I. Introduction.

This budget, as well as the budgets for the last few years, sets out the following introductory language in sec. 1 of the bill: "[a] department-wide, agency-wide, or branch-wide unallocated reduction set out in this section may be allocated among the appropriations made in this section to that department, agency, or branch." Section 1, p. 2, lines 4 - 6. We identified a number of unallocated reductions in this year's operating budget. We have previously advised that because AS 37.07.080(e) authorizes the transfer of money between allocations, so long as the unallocated reduction is for a specific amount, there is no constitutional concern with inclusion of the negative appropriations in a budget bill. See 1993 Inf. Op. Att'y Gen. (June 17; 883-93-0073); 1992 Inf. Op. Att'y Gen. (June 30; 883-92-0141).

II. General intent language.

As in prior years, the bill contains numerous expressions of legislative intent accompanying certain appropriation items. And, as we have opined in the past, the expressions of legislative intent in the operating budget may 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

Carpeneti adopted a five-factor test to determine whether the 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 is, 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 court has had 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 Alaska Supreme 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 Alaska Supreme 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 this budget bill 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 that language herein, we recommend

further consultation with this office so that we may advise as to the extent the particular language at issue 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, Alaska Constitution. *Id.* at 377. The Alaska Supreme Court removed any ambiguity on this point in a subsequent case also brought by the Legislative Council against Governor Knowles: "We now explicitly adopt *Knowles II's* exclusively monetary characterization of article II appropriations items and hold that the governor's appropriations veto applies only to monetary appropriations." *Alaska Legislative Council v. Knowles*, 86 P.3d 891, 895 (Alaska 2004).

III. Department of Administration.

In sec. 1 of the bill, the commissioner of administration may transfer up to \$750,000 between appropriations. Section 1, p. 2, lines 12 - 13. Because this delegation of authority raises constitutional and budget tracking concerns, the Department of Law and the office of management and budget will work closely with the commissioner of administration should circumstances arise that would give rise to the need to transfer funding between appropriation items.

Also, in sec. 1 of the bill, the legislature provides several expressions of legislative intent.

First, the legislature expressed its intent that the Department of Administration (DOA) document the cost drivers of services it provides to other departments and establish a method linking the cost drivers to the rates charged other departments for DOA's services and submit the method and supporting data to the legislature by December 1, 2015. Section 1, p. 2, lines 14 - 18. We have previously advised that reporting requirements such as these are normally set out in statute. 2007 Op. Att'y Gen. 2 (June 6; 883-07-0070). To the extent that this reporting requirement is not otherwise set out in statute, DOA may wish to comply as a matter of comity.

Second, the legislature expressed its intent that DOA implement the plan to consolidate statewide information services technology, including procurement, support, services, and contractual services. The stated goal of the plan is to improve services while obtaining savings of approximately 30 percent over three fiscal years. Section 1, p. 2, line 28, through p. 3, line 4.

Third, the legislature expressed its intent that DOA submit a report to the legislature annually for the next three years identifying the paths and tasks taken to achieve these savings. Section 1, p. 3, lines 4 - 7. As set out above, reporting requirements such as these are normally set out in statute. 2007 Op. Att'y Gen. 2 (June 6; 883-07-0070). To the extent that this reporting requirement is not otherwise set out in statute, DOA may wish to comply as a matter of comity.

Fourth, the legislature expressed its intent regarding the appropriation to the Alaska Public Offices Commission (APOC) that the Department of Administration retain the 2015 fee structure for candidates filing for public office during the fiscal years ending June 30, 2016, and June 30, 2017. Section 1, p. 5, lines 29 - 31. This intent language appears to be based on an inaccurate premise, as candidate filing fees are not collected or set by the Department of Administration or APOC. Instead, the division of elections collects candidate filing fees. *See* AS 15.10.105. The fee structure is set by statute and applies only to state and judicial offices. *See* AS 15.25.030, 15.25.050, 15.35.041, 15.35.057, and 15.35.071.

Additionally, it is noted that the legislature provides that, at the discretion of the commissioner of administration, a cost-neutral appropriation is created within DOA in order to consolidate information technology procurement, as well as support and contractual services, for information technology that are presently being performed by various executive branch agencies and that the office of management and budget shall authorize the transfer of funding related to those services. Section 1, p. 3, lines 8 - 14. Finally, the legislature provides that, for the allocation for retirement and benefits, up to \$500,000 may be transferred between several retirement funding codes. Section 1, p.3, lines 27 - 31.

IV. Department of Commerce, Community, and Economic Development.

In sec. 1 of the bill, the appropriation for corporations, business, and professional licensing, the legislature expressed its intent that the Department of Commerce, Community, and Economic Development (DCCED) (1) set occupational license fees at a rate sufficient to cover the cost of the occupation being regulated as required under AS 08.01.065(c); and (2) annually provide the legislature with a six-year report for each licensing board covering license fees and other revenue received, expenditures made by line item, number of licensees; carry forward balance, and potential license fee changes based on statistical analysis. Section 1, p. 6, lines 19 - 33 through p. 7, lines 3 - 7. We have previously advised that reporting requirements such as these are normally set out in statute. 2007 Op. Att'y Gen. 2 (June 6; 883-07-0070). To the extent that this reporting requirement is not otherwise set out in statute, DCCED may wish to comply as a matter of comity.

An additional expression of legislative intent and reporting requirement is set out at p. 7, lines 8 - 17. Here, the legislature expressed its intent that DCCED (1) develop a standard methodology for determining fees to ensure that the fees collected for each licensing program equal the approximate cost of regulation of that profession in accordance with AS 08.01.065, including a plan for collecting deficit balances for each licensing program; (2) propose statutory changes if it determines that existing statutes do not provide sufficient guidance; and (3) provide the methodology or a letter to the chairs of the finance committees by November 1, 2015. Once again, to the extent that this reporting requirement is not otherwise set out in statute, DCCED may wish to comply as a matter of comity.

V. Department of Corrections.

In sec. 1 of the bill, appropriating funds to the Department of Corrections, the legislature expressed its intent that the Department of Corrections work with the Alaska Court System and the Departments of Law, Administration, and Public Safety to develop solutions to reduce the costs of transporting prisoners when community and regional jail contracts are reworked. Section 1, p. 9, lines 28 - 31.

VI. Department of Education and Early Development.

In sec. 1 of the bill, appropriating funds to the Department of Education and Early Development (DEED), the legislature included two expressions of legislative intent. First, the legislature expressed its intent that libraries using Online with Libraries (OWL) establish a fee structure that covers the cost of that program in fiscal year 2017. Section 1, p. 13, lines 17 - 18. Second, the legislature expressed its intent that the Alaska Student Loan Corporation reduce the operating expenditures of the Alaska Commission on Postsecondary Education with the objective of generating a dividend to the state in fiscal year 2017. Section 1, p. 13, lines 30 - 32. We do not think these statements of legislative intent are enforceable under the *Hammond* standard discussed above, but DEED may comply as a matter of comity.

VII. Department of Environmental Conservation.

In sec. 1 of the bill, appropriating funds to the Department of Environmental Conservation (DEC), the legislature included two expressions of legislative intent. First, the legislature expressed its intent that DEC develop a plan to reduce the cost of the oil spill response drills and exercises and report its findings to the finance committees. Second, the legislature expressed its intent that DEC develop a plan to increase cost recovery efforts for spill prevention and response and report its findings related to that plan to the finance committees. Section 1, p. 14, line 33, through p. 15, lines 3 - 7. As set

out above, we have previously advised that reporting requirements such as these are normally set out in statute. 2007 Op. Att'y Gen. 2 (June 6; 883-07-0070). To the extent that these reporting requirements are not otherwise set out in statute, DEC may wish to comply as a matter of comity.

VIII. Department of Fish and Game.

In sec. 1 of the bill, the legislature included several expressions of legislative intent regarding the Department of Fish and Game (DFG). The legislature expressed its intent that DFG focus its research and management of fishery systems on stocks of concern in order to manage sustained yield. Section 1, p. 15, lines 18 - 20. Second, the legislature expressed its intent that DFG not reduce personnel or appropriations to any program or project that is directly linked to stocks of concern. Section 1, pg. 15, lines 21 - 23. Third, the legislature expressed its intent that the DFG submit an annual report to the legislature addressing 20-year, or other historical, average return information for stocks of concern. Section 1, pg. 15, lines 24 - 27. Fourth, the legislature expressed its intent that DFG submit an annual report of the revenues subject to AS 16.05.130. Section 1, pg. 15, lines 28 - 29. Fifth, the legislature expressed its intent that DFG establish certain baselines regarding smolt outmigration at specified locations. Section 1, pg. 15, lines 30 - 33. Sixth, the legislature expressed its intent that DFG's comments, science data, and technical reports that are provided to the Board of Fish or the Board of Game be filed with each board and be available for public review at least 60 days before a board meeting. Section 1, p. 16, lines 3 - 6. As set out above, to the extent that these reporting requirements are not otherwise set out in statute, DFG may wish to comply as a matter of comity.

Additionally, the legislature includes a statement of intent regarding its placement of the allocation for the commercial fisheries Entry Commission (CFEC) allocation under the commercial fisheries appropriation. Section 1, p.16, line 30, through p. 17, line 3. This statement provides that the placement of this allocation does not affect or diminish the budgetary or judicial autonomy or authority possessed by CFEC under statute, and it does not provide the commissioner of fish and game any budgetary or operational control over CFEC.

IX. Office of the Governor.

In sec. 1 of the bill, appropriations to the Office of the Governor, the legislature did not include any intent language and there are no apparent legal concerns with this section. Section 1, p. 17, line 30, through p. 18, line 17.

X. Department of Health and Social Services.

In sec. 1 of the bill, the legislature included several expressions of legislative intent regarding the appropriations to the Department of Health and Social Services (DHSS). First, the legislature expressed its intent that reductions to the Juneau Pioneer Home should be taken from the contractual line and not the personal services line so that staffing levels for direct care would be sufficient. Section 1, p. 18, lines 22 - 24. Second, the legislature expressed its intent that DHSS draft regulations to obtain maximum collection from participants of the cost of the 24/7 program. Section 1, p. 19, lines 5 - 6. Third, the legislature expressed its intent that the division of health care services seek authority from the federal government to deny Medicaid travel if services can be provided in local communities. Section 1, p. 20, lines 3 - 4. Fourth, the legislature expressed its intent that the division of public health evaluate and implement strategies that would result in maximizing collections for billable services. Section 1, p. 21, lines 20 - 21. We do not think these statements of legislative intent are enforceable under the *Hammond* standard discussed above, but DHSS may comply as a matter of comity.

Additionally, the bill provides that the unexpended and unobligated balance of federal unrestricted receipts from the Children's Health Insurance Program Reauthorization Act of 2009, P.L. 111-3 is appropriated and that the funding may be transferred among appropriations in DHSS. Section 1, p. 22, lines 22 - 26. Because this delegation of authority raises constitutional and budget tracking concerns, the Department of Law and the office of management and budget will work closely with the commissioner of health and social services should circumstances arise that would give rise to the need to transfer funding between appropriation items.

There are two provisions under the appropriations for Medicaid services which require review.

First, the legislature included the following intent language regarding abortion funding:

No money appropriated in this appropriation may be expended for an abortion that is not a mandatory service required under AS 47.07.030(a). The money appropriated for Health and Social Services may be expended only for mandatory services required under Title XIX of the Social Security Act and for optional services offered by the state under the state plan for medical assistance that has been approved by the United States Department of Health and Human Services.

Section 1, p. 23, lines 17 - 23. As we have opined previously, this language is intended

to prevent expenditures from these appropriations for therapeutic or medically necessary abortions. However, DHSS is under a superior court order to operate its Medicaid program in a constitutional manner by providing payment for therapeutic or medically necessary abortions. That superior court order has been upheld by the Alaska Supreme Court, which specifically rejected an argument that the separation-of-powers doctrine precluded the superior court from ordering the state to pay. *State, Dept. of Health & Social Services v. Planned Parenthood of Alaska*, 28 P.3d 904 (Alaska 2001). Thus, DHSS is faced with a ruling from the state's highest court that the limit on payment for abortion services results in the operation of the Medicaid program in an unconstitutional manner, while DHSS is ostensibly without the money available to pay for services to operate the program legally. A veto of this provision is not available as described in our analysis of *Knowles II*.

Ten years ago, the plaintiffs in the Planned Parenthood case asked the superior court to clarify how similar budget restrictions impacted its judgment. Three days after the Alaska Supreme Court affirmed the judgment, the superior court issued an opinion ordering DHSS not to comply with the restrictions. Therefore, to date, DHSS has obeyed the superior court's order and we must advise DHSS to continue to obey the superior court's order; i.e., to continue to pay for these medically necessary abortions, until such time as a court reverses the order that is now in effect.

Second, the legislature included the following intent language regarding Medicaid:

No money appropriated in this appropriation may be expended for services to persons who are eligible pursuant to 42 United States Code section 1396a(a)(10)(A)(i)(VIII) and whose household modified adjusted gross income is less than or equal to one hundred thirty-three percent of the federal poverty guidelines.

Section 1, p. 23, lines 24 - 27. This funding restriction may violate the confinement clause because it arguably amends substantive law. In particular, AS 47.07.036, which governs how Medicaid funds must be allocated and AS 47.07.020(a), which establishes eligibility for Alaska Medicaid according to the categories of people and services that are required under federal law. Under *Legislative Council v. Knowles*, 21 P.3d at 367, 377-380 (Alaska 2001), an appropriations bill cannot be used to amend existing law because that would violate the confinement clause. An analysis of this provision must also take into consideration sec. 24(b), page 80, lines 22 - 23 in which the legislature attempts to prevent spending federal funds on Medicaid expansion by placing restrictions on the use of the funds, which we discuss further on in this review. We are available to provide further assistance and analysis regarding this provision.

XI. Department of Labor and Workforce Development.

A number of Department of Labor and Workforce Development (DLWD) programs receive federal funds. The bill continues the practice of including any federal receipts from prior fiscal years that have not been spent or obligated in the amounts allocated for management services (sec. 1, p. 24, lines 19 - 22) and vocational rehabilitation administration (sec. 1, p. 26, lines 16 - 19). We see no legal concerns with these appropriations.

The bill also would include an appropriation of certain federal unemployment insurance modernization funds received in 2010 as a result of the state's compliance with certain conditions. Section 1, p. 25, lines 18 - 19. The federal funds may be appropriated by the legislature for DLWD to deliver employment services. We see no legal concerns with the appropriation.

A number of DLWD programs receive nonpublic funds, either for services provided or as contributions from taxpayers. The bill would continue the practice of including any amounts received in prior fiscal years that have not been spent or obligated in the amounts allocated for Alaska Safety Advisory Council, which receives fees from persons attending the governor's safety conference, as provided in AS 18.60.840 (sec. 1, p. 25, lines 12 - 14), and for the Alaska Vocational Technical Center, which receives fees for services or contributions by individual or certain organizational taxpayers (sec. 1, p. 26, lines 28 - 31).

Section 1 also includes a statement of intent that DLWD implement a plan to annually supplant \$600,000 of general funds with private or federal funds until, after five years, the Construction Academy Training program requires no general funds. Section 1, p. 26, lines 10 - 12. We do not believe the statements of legislative intent are enforceable but DLWD may comply as a matter of comity.

XII. Department of Law.

In sec. 1 of the bill, appropriations to the Department of Law, the legislature did not include any intent language and there are no apparent legal concerns with the section. Section 1, p. 27, line 4, through p. 28, line 20.

XIII. Department of Military and Veterans' Affairs.

In sec. 1 of the bill, appropriating funds to the Department of Military and Veterans' Affairs, the legislature did not include any intent language and there are no apparent legal concerns with the section. Section 1, p. 28, line 22, through p. 29, line 22.

XIV. Department of Natural Resources.

In sec. 1 of the bill, appropriating funds to the Department of Natural Resources (DNR), the legislature included three statements of legislative intent. First, the legislature expressed its intent that DNR, office of project management and permitting, work with the United States Army Corps of Engineers to develop a wetlands mitigation bank and in-lieu fee program. Section 1, p. 29, line 32, through p. 30, line 6. Second, the legislature expressed its intent that a reimbursable services agreement (RSA) should be developed by DNR for state agencies that use the services of DNR, division of geological survey. Section 1, p. 31, lines 6 - 8. It is noted that the correct name for the division is the "division of geological and geophysical surveys." Third, the legislature expressed its intent that DNR enter into partnerships with state and federal agencies and organizations in order to fund the operation of the Wildland Fire Academy in McGrath. Section 1, p. 31, lines 11 - 13. We do not think these statements of legislative intent are enforceable under the *Hammond* standard discussed above, but DNR may comply as a matter of comity.

XV. Department of Public Safety.

In sec. 1 of the bill, appropriations to the Department of Public Safety (DPS), the legislature included language expressing the intent of the legislature that DPS work with the Alaska Court System and the Departments of Corrections, Law, and Administration in an effort to reduce the cost of prisoner transports. Section 1, p. 32, lines 21 - 23. As set out above, expressions of legislative intent are not enforceable but DPS may comply as a matter of comity.

XVI. Department of Revenue.

In sec. 1 of the bill, appropriation for the Department of Revenue, the legislature provides that up to \$500,000 of budget authority may be transferred between several retirement fund codes from specific allocations. Specifically, this sum may be transferred between the fund codes for the allocation for the treasury division; the allocation for the Alaska Retirement Management Board; and the allocation for the Alaska Retirement Management Board custody and management fees. Section 1, p. 34, lines 12 - 32. We see no legal issues with this provision.

XVII. Department of Transportation and Public Facilities.

The legislature has included several expressions of legislative intent regarding the appropriations to the Department of Transportation and Public Facilities (DOTPF) in sec. 1 of the bill. First, the legislature expressed its intent that the state equipment fleet begin a

standardization program to be applied to all agencies based on the minimum need to maintain fleet vehicles, to operate the vehicles safely, and to meet the intended mission. The legislature expressed its intent that the departments evaluate their fleet for optimum usage as part of the fiscal year 2017 budget preparations and that DOTPF prepare a report on fleet right sizing for each of the next three years and submit that report to the finance committees. Section 1, p. 38, line 33, through p. 39, line 8. As set out above, we have previously advised that reporting requirements such as these are normally set out in statute. 2007 Op. Att'y Gen. 2 (June 6; 883-07-0070). To the extent that these reporting requirements are not otherwise set out in statute, DOTPF may wish to comply as a matter of comity. Additionally, as discussed above, expressions of legislative intent are not enforceable but DOTPF may comply as a matter of comity.

The legislature also included two expressions of legislative intent regarding the Alaska marine highway system: (1) that the marine highway system continue its existing service levels during the peak summer months and that if any reduction in service levels is to take place, the reductions should take place in the nonpeak months; and (2) that DOTPF explore options for providing ferry service to communities at the lowest expense and report to the legislature not later than February 1, 2016. Section 1, p. 40, lines 18 - 23. We believe this language strays into the administration of DOTPF's program. But, DOTPF may comply as a matter of comity.

Additionally, as we have noted in previous years, there is a special lapse provision in the DOTPF budget: "The general funds allocated for highways and aviation shall lapse on August 31, 2016." Section 1, p. 39, line 10. This special lapse provision makes the appropriations available for expenditure until they lapse into the general fund on August 31, 2016.

XVIII. University of Alaska.

In sec. 1 of the bill, appropriations to the University of Alaska, the legislature did not include any intent language and there are no apparent legal concerns with the section. Section 1, p. 41, line 3, through p. 42, line 6.

XIX. Alaska Court System.

In sec. 1 of the bill, appropriations to the Alaska Court System, the legislature did not include any intent language and there are no apparent legal concerns with the section. Section 1, p. 42, lines 8 - 20.

XX. Legislature.

In sec. 1 of the bill, appropriations to the Alaska Legislature, we see no apparent legal issues with this provision. Section 1, p. 42, line 22 through p. 43, line 14.

XXI. New legislation and funding source.

Section 2 of the bill sets out the appropriations for several pieces of new legislation. If a particular piece of legislation should fail to pass, or if its substance is not incorporated in some other measure, or is vetoed by the governor, then the appropriation for that legislation lapses. Section 3 of the bill sets out the funding by agency for the appropriations made in secs. 1 and 2 of the bill. Section 4 of the bill sets out the statewide funding for the appropriations made in sec. 1 and sec. 2 of the bill.

XXII. Language sections.

Section 5 of the bill sets out legislative intent that the amounts appropriated in the operating budget are the full amounts to be appropriated for the identified purpose. This section also expressed the intent of the legislature that state agencies and instrumentalities should pursue discussions and negotiations with the University of Alaska regarding whether the University of Alaska could provide research, consultation, performance of studies, needs assessments, or analysis to state agencies or instrumentalities before seeking to contract for those services from other parties. The legislature expressed its intent that state agencies and instrumentalities should use the University of Alaska for such services unless it would be contrary to the best interests of the state or contrary to law. Section 5, p. 64, lines 4 - 10.

Section 6 of the bill sets out legislative intent regarding reducing Alaska recidivism. It provides that the Department of Corrections, Department of Health and Social Services, Department of Labor and Workforce Development, Alaska Mental Health Trust Authority, Alaska Housing Finance Corporation, Alaska Criminal Justice Commission, and the Alaska Court System continue to work together to implement a recidivism reduction plan with the objective of reducing the state's recidivism rate and reduce the rate of growth of the state's prison population. The legislature also expressed its intent that the state agencies work with Alaska Native organizations to analyze criminal justice data, identify promising practices that may address the rise of the prison population, and outline a plan to be phased in over five years, including proposed programs and services to meet these objectives. Finally, the legislature expressed its intent that the draft implementation plan be delivered to the office of management and budget on September 30, 2015, for consideration for budget and legislative proposals and that the final plan be delivered to the legislature in January 2016. Section 6, p. 64, line 11, through p. 65, line 17.

Section 7 of the bill states that funds appropriated in the operating budget include any amounts necessary to pay for job reclassifications. The section is contemplated by AS 39.25.150(2), which provides for legislative approval of the state's pay plan.

Section 8 of the bill states the intent of the legislature concerning agency transfers to and from personal services line items. The intent is that agencies restrict those transfers and that the office of management and budget submit a report to the house and senate finance committees on January 15, 2016, describing and justifying all the transfers during the first half of the fiscal year and again submit a report on October 1, 2016, describing and justifying all the transfers during the second half of the fiscal year. This section is nonbinding in its entirety under *Knowles II*, 21 P.3d at 379-80. You need not comply with these requirements, but you may comply out of comity.

Section 9 of the bill would appropriate to the Alaska Aerospace Corporation all federal and other corporate receipts received during the fiscal year June 30, 2016, in excess of the amounts appropriated to the Alaska Aerospace Corporation in sec. 1 of the bill.

Section 10 of the bill would make appropriations to the Alaska Housing Finance Corporation from the adjusted net income from the preceding fiscal year, for various purposes including debt service and deposit to the Alaska capital income fund (AS 37.05.565). We have not identified any legal issues that cause concern.

Section 11 of the bill would appropriate from the earnings reserve account (AS 37.13.145) of the permanent fund the amount necessary to pay for permanent fund dividends and to inflation-proof the permanent fund. The legislature has estimated these amounts; but because these estimates are dependent on investment returns and inflation that have yet to occur, these estimates are fairly speculative. The section also would appropriate oil and gas revenue to the principal of the permanent fund as required by the constitution and statute.

Section 12 of the bill would appropriate to the Alaska capital income fund (AS 37.05.565) amounts not otherwise appropriated from the estimated \$17,650,000 dividend to be declared by the Alaska Industrial Development and Export Authority. We see no legal concerns with this appropriation.

Section 13(a) and (b) of the bill would appropriate from the state insurance catastrophe reserve account and the working reserve account to the Department of Administration amounts necessary to fund the uses set out in AS 37.05.289(a) and 37.05.510(a). Section 13(c) of the bill would appropriate the amount received in a settlement of a bond claim, approximately \$150,000, to the Alaska Oil and Gas

Conservation Commission to reclaim state, federal, or private land affected by a use covered by the bond. We see no legal concerns with these appropriations.

Section 14 of the bill would make appropriations related to the Department of Commerce, Community, and Economic Development. Section 14(a) would appropriate national forest income that will lapse at the end of fiscal year 2015 to political subdivisions where national forest land is located in accordance with the formula provided under AS 41.15.180(c) and (d). Section 14(b) would appropriate from federal receipts for national forest receipt payments, if the amount appropriated for this purpose in sec. 1 of the bill is insufficient. Sections 14(c) would appropriate from federal receipts for federal revenue sharing programs, if the amount appropriated for this purpose in sec. 1 of the bill is insufficient. Section 14(d) makes the usual appropriation related to the salmon enhancement tax to qualified regional associations. Section 14(e) makes the usual appropriation from the seafood development tax to the qualified regional seafood development associations, but in this year's appropriation the legislature specifically identifies six purposes for which these appropriated funds can be used. Section 14(f) of the bill would provide an appropriation to the Alaska Energy Authority from the power cost equalization endowment fund for the power cost equalization allocation. Section 14(g) would provide a general fund appropriation to the Alaska Energy Authority if the amount available for appropriation from the endowment fund is insufficient to fully fund the power cost equalization allocation. Section 14(h) would provide for appropriation to the Department of Commerce, Community, and Economic Development, tourism marketing, for the purpose of matching each dollar in excess of the appropriation in sec. 1 as contributions from the tourism industry. We see no legal concerns with the various appropriations in sec. 14 of the bill.

Section 15(a) of the bill would appropriate an amount equal to the dive fishery management assessments collected in fiscal year 2015 to the Department of Fish and Game for payment to qualified regional dive fishery development associations in the area where the assessments were collected. Section 15(b) of the bill appropriates the remaining balance of the sport fishing enterprise account in the fish and game fund, but not to exceed \$500,000 and following the appropriation made in sec. 25(l) of the bill, to the Department of Fish and Game for sport fish operations.

Section 16(a) - (c) of the bill would appropriate amounts necessary to make all benefit payments from the fishermen's fund (AS 23.35.060), the second injury fund (AS 23.30.040(a)), and the workers' compensation benefits guaranty fund (AS 23.30.082) in fiscal year 2016 not covered by amounts appropriated in sec. 1 of the bill. Section 16(d) of the bill would appropriate surplus contributions received by the Alaska Vocational Technical Center (AVTEC) to AVTEC. We see no legal concerns with these appropriations.

Section 17 of the bill would appropriate amounts related to the Alaska veterans' memorial endowment fund (AS 37.14.700).

Sections 18(a), (b), and (d) of the bill would make various appropriations to the Department of Natural Resources for purposes of fire suppression, mine reclamation, and operation of an oil production platform in Cook Inlet, pending reclamation. Section 18(c) of the bill would appropriate the amount received in a settlement of a bond claim, approximately \$50,000, to the Department of Natural Resources to reclaim state, federal, or private land affected by a use covered by the bond. Section 18(e) of the bill would appropriate from the general fund up to \$1,125,000 to the Department of Natural Resources for fire suppression if any portion of the federal receipts appropriated in sec. 18(d) of the bill are not received. We see no legal concerns with these appropriations.

Section 19 of the bill would make an appropriation to the Department of Revenue that is a state match for federal receipts received for child support enforcement efforts. We see no legal concerns with this appropriation.

Section 20 of the bill would appropriate to the University of Alaska the amounts of fees collected in fiscal year 2015 for the issuance of special request university license plates, less the cost of issuing the license plates.

Sections 21(a) - (e) of the bill would appropriate certain amounts from the general fund to the Office of the Governor for distribution to agencies for relief from high energy costs. The amounts of the appropriations are tied to the price of oil and decrease as the price of oil declines. This section also sets out a methodology for allocating the appropriation among agencies. We see no legal concerns with the appropriation.

Section 22 of the bill would appropriate retained fees and bankcard service fees. We see no legal concerns with this appropriation.

Section 23 of the bill would appropriate amounts necessary for debt service, including arbitrage rebate payments, on a range of notes, certificates of participation, and bonds. Section 23(k) of the bill would appropriate from the general fund the amount necessary for state aid for costs of school construction under AS 14.11.100, estimated to be \$99,523,009, after an appropriation of \$23,900,000 from the School Fund (AS 43.50.140). The School Fund is a dedicated fund into which cigarette taxes, fees, and penalties are deposited. Amounts deposited into the School Fund may only be used to rehabilitate, construct, or repair the state's school facilities, or to pay certain insurance costs related to the state's school facilities. The School Fund was established in 1955. *See* sec. 16, ch. 187, SLA 1955. Because the School Fund existed when the Alaska Constitution was ratified on April 24, 1956, the School Fund does not violate the

dedicated fund clause (art. IX, sec. 7, of the Alaska Constitution). Section 23 of the bill also would authorize a short term general fund appropriation to cover general obligation bond project costs subject to repayment when bond proceeds are received by the state. We see no legal concerns with these appropriations.

Section 24(a), (c), and (d) of the bill address and appropriate certain federal receipts, designated program receipts, information services fund program receipts, Exxon Valdez oil spill trust receipts, Alaska House Finance Corporation receipts, Alaska marine highway receipts, University of Alaska receipts, and commercial fisheries test fishing operations receipts. We see no legal concerns with these appropriations.

Section 24(b) includes an attempt to condition the receipt of federal funds that may become available with Medicaid expansion. The language reads as follows:

(b) Federal designated program receipts under AS 47.07.060 for the proposed expansion of the state's Medicaid program may not be accepted or expended without an acceptable reformation plan and appropriation approved by the legislature.

Page 80, lines 28 - 30. Like the language at sec. 1, p. 23, lines 24 - 27, this provision may also violate the confinement clause. Section 24(a), appropriates excess federal receipts. But, sec. 24(b) attempts to place conditions on the expenditure of federal funds that may be received for an expanded Medicaid program. Specifically, this provision appears to require three conditions: the governor creates a reformation plan; this reformation plan is found to be acceptable by the legislature; and the legislature somehow "approves" the appropriation of these funds for use for an expanded Medicaid program. Under *Legislative Council v. Knowles*, the legislature may not "us[e] appropriation bills to make programmatic changes." 21 P.3d at 378. This language arguably seeks to require the executive to make substantive changes in the Medicaid program and reserves to the legislature the authority to determine if such changes are "acceptable." Additionally, as noted above, an appropriations bill may not be used to amend existing law or improperly administer a program, and language in an appropriation bill must be germane to the appropriation. *Id.* at 377; 380. As noted previously, AS 47.07.020 establishes eligibility for Alaska Medicaid and AS 47.07.036 governs the allocation of Medicaid funds. Additionally, AS 47.07.060 addresses receipt of federal Medicaid funds. We are available to provide further assistance and analysis regarding this provision.

Section 25 of the bill would provide for capitalization of various funds, including the Alaska children's trust grant account, the community revenue sharing fund, the disaster relief fund, the oil and gas tax credit fund, Alaska municipal bond bank authority reserve fund, the Alaska clean water fund, the Alaska drinking water fund, Alaska fish

and game revenue bond redemption fund, the crime victim compensation fund, and the election fund. We see no legal concerns with these appropriations.

Section 26(a) of the bill would appropriate to the Alaska permanent fund (art. IX, sec. 15, of the Alaska Constitution) and to the public school trust fund (AS 37.14.110(a)) according to AS 37.05.530(g)(1) - (3), amounts not appropriated for grants from the National Petroleum Reserve - Alaska special revenue fund (AS 37.05.530). The appropriation to the public school trust fund is required to help satisfy the state's obligation to compensate the public school trust for trust lands redesignated as general grant lands in 1978 (ch. 182, SLA 1978). Matters related to compensating the public school trust for trust lands are currently pending in litigation captioned *Citizens Alliance Protecting School Lands v. State*, 1 JU-13-00582 Civil. We see no legal concerns with the appropriation.

Section 26(b) of the bill would appropriate the loan origination fees collected by the Alaska Commission on Postsecondary Education. We see no legal concerns with this appropriation.

Section 26(c) of the bill would appropriate \$157,000,000 from the in-state natural gas pipeline fund (AS 31.25.100) to the public education fund (AS 14.17.300). We see no legal concerns with the appropriation.

Section 26(d) would make an appropriation from the general fund to the public education fund (AS 14.17.300) of an amount necessary after other specified appropriations to fund the total amount for the 2016 fiscal year of state aid calculated under the public school funding formula under AS 14.17.410(b) multiplied by 0.9859, estimated to be \$950,555,700. The other specified appropriations referred to in this section are the appropriations made in sec. 26(c) referred to above, and to an appropriation in section 28(c), ch. 16, SLA 2014, as amended by section 31 of this bill, which is discussed below. We see no legal concerns with these appropriations.

Section 26(e) provides that if the amount appropriated in sec. 26(c) described above is less than \$157,000,000, the appropriation in sec. 26(d) described above is reduced on a dollar-to-dollar basis so that the reduction is equal to the reduction in sec. 26(c).

Section 26(f) of the bill would appropriate to the oil and hazardous substance release prevention account and sec. 26(g) of the bill would appropriate to the oil and hazardous substance release response account. We see no legal concerns with these appropriations.

Section 26(h) of the bill would appropriate the balance of the Alaska clean water administrative income account (AS 46.03.034(a)(2)) on June 30, 2015, estimated to be \$513,000, to the Alaska clean water administrative operating account (AS 46.03.034(a)(1)). There are no legal concerns with the provision.

Section 26(i) of the bill would appropriate the balance of the Alaska drinking water administrative income account (AS 46.03.038(a)(2)) on June 30, 2015, estimated to be \$624,000, to the Alaska drinking water administrative operating account (AS 46.03.038(a)(1)). There are no legal concerns with the provision.

Section 26(j) of the bill would appropriate the following fees, estimated to total \$888,000, to the fish and game fund (AS 16.05.100): (1) fees collected from state operated shooting ranges; (2) receipts from the sale of waterfowl conservation stamp prints; (3) fees collected from state sanctuary access permits; and (4) fees collected from state operated boating and angling access sites. We see no legal concerns with the appropriation.

Section 26(k) of the bill states that the balance of the mine reclamation trust fund income account, estimated to be \$50,000, and money deposited in that account during the fiscal year ending June 30, 2016, are appropriated to the mine reclamation trust fund operating account. There are no legal concerns with the provision.

Section 26(l) of the bill would make appropriations to the regional educational attendance area and small municipal school district school fund. We see no legal concerns with the appropriation.

Section 26(m) of the bill would appropriate vaccine assessment program receipts collected under AS 18.09.220, estimated to be \$31,200,000 to the vaccine assessment account (AS 18.09.230). We see no legal concerns with the appropriation.

Section 27(a) of the bill would make an appropriation of \$126,520,764 from the general fund to the Department of Administration for deposit in the defined benefit plan account of the public employees' retirement system as an additional contribution under AS 39.35.280. Section 27(b) provides for an appropriation of \$130,108,327 from the general fund to the Department of Administration for deposit in the defined benefit plan account in the teachers' retirement system as an additional contribution under AS 14.25.085. Section 27(c) makes an appropriation of \$5,890,788 to the Department of Administration for the purpose of funding the judicial retirement system under AS 22.25.046. We see no legal concerns with these appropriations.

Section 28 of the bill sets out that, under AS 23.40.215, the monetary terms of the collective bargaining agreements with the following labor organizations for the fiscal year ending June 30, 2016, are rejected “unless separate legislation is enacted that contains explicit language approving the monetary terms of that agreement”: Alaska Correctional Officers Association; Confidential Employees Association; Alaska Public Employees Association representing the supervisory unit; Alaska State Employees Association; Public Safety Employees Association; Alaska Vocational Technical Center Teachers’ Association; Inlandboatmen’s Union of the Pacific, Alaska Region; International Organization of Masters, Mates, and Pilots; and the Marine Engineers’ Beneficial Association. In addition, sec. 28 would reject the monetary terms of the following collective bargaining agreements entered into by the University of Alaska: Fairbanks Firefighters’ Union, IAFF Local 1324; United Academics - American Association of University Professors, American Federation of Teachers; United Academics - Adjuncts - American Association of University Professors, American Federation of Teachers; Alaska Higher Education Crafts and Trades Employees, Local 6070; and University of Alaska Federation of Teachers. There has been no separate legislation passed providing for approval of the monetary terms of any of these agreements for the fiscal year ending June 30, 2016.

As noted, sec. 28 states that the monetary terms of these agreements are rejected under AS 23.40.215. This statute provides that “(t)he monetary terms of any agreement entered into under AS 23.40.070 - 23.40.260 are subject to funding through legislative appropriation.” AS 23.40.215(a). The Alaska Supreme Court has considered the issue of funding collective bargaining agreements and held that “the monetary terms [of a collective bargaining agreement] do not become effective unless and until the legislature specifically funds them.” *Univ. of Alaska Classified Employees Ass’n v. Univ. of Alaska*, 988 P.2d 105, 108 (Alaska 1999). Further, the court has stated that “a legislative appropriation funding monetary terms in one year of a multi-year collective bargaining agreement does not oblige a public employer to pay according to those terms in subsequent years.” *Id.* at 109.

Finally, although the phrase “monetary terms” could be interpreted broadly, it is our understanding from the legislative record that the legislature intended by this provision only to reject general salary increases - often referred to as cost of living or “COLA” - scheduled to become effective in the fiscal year ending June 30, 2016, for employees covered by these collective bargaining units.

Section 29(a), (b), (c) and (d) of the bill would appropriate the proceeds of certain taxes and fees for refund to local governments.

Section 30 would reduce the appropriation to each department under the bill to reverse negative account balances in amounts of \$1,000 or less. We see no legal concerns with the appropriation.

Section 31 concerns the public education fund. This provision amends section 28(c) from last year's operating budget bill (Ch. 16, SLA 2014) to reduce the appropriation from the general fund to the public education fund (AS 14.17.300) from \$1,202,568,100 to \$77,008,600.

Section 32 of the bill concerns the constitutional budget reserve fund (CBR) which is established in art. IX, sec. 17 of the Alaska Constitution. Section 32(a) and (b) concerned appropriations from the CBR and section 32(d) provided that the appropriations under (a) and (b) were made under art. IX, sec. 17(c) of the Alaska Constitution. Appropriations under art. IX, sec. 17(c) require the affirmative vote of three-fourths of the member of each house. Those votes failed for the appropriations under section 32(a) and (b). Thus, there are no appropriations from the CBR. Section 32(c) appropriates to the CBR unrestricted interest earned on investment of general fund balances for fiscal years 2015 and 2016. This amount is intended to compensate the CBR for any use by the general fund of CBR monies for cash flow purposes during fiscal years 2015 and 2016.

Section 33 of the bill is a contingent appropriation to be effective only upon the occurrence of two events: if the appropriation in section 32(a) from the Constitutional Budget Reserve did not pass with a three-fourths vote of the members of each house, and the unrestricted state revenue available for fiscal year 2015 appropriation is insufficient to cover the general fund appropriations that take effect in fiscal year 2015. If each of those occurrences take place, then section 33 provides that the amount necessary to balance revenue and general fund appropriations is appropriated from the Alaska higher education fund (AS 37.14.750) to the general fund. As set forth above, the first of these occurrences has taken place: the appropriation in section 32(a) did not receive the required three-fourths vote of each house which is required for an appropriation from the Constitutional Budget Reserve under art. IX, sec. 17(c).

Section 34 of the bill would provide that certain appropriations in the bill are for capitalization of funds and do not lapse.

Section 35 of the bill would allow for retroactive effect to June 30, 2015, for certain appropriations made in sec. 1 of the bill.

Section 36 of the bill provides that the appropriation in sec. 33 of the bill from the Alaska higher education investment fund (AS 37.14.750) is contingent upon the

occurrence of a specific event: the failure of the appropriation in section 32(a) to pass with a three-fourths vote of the members of each house of the legislature. The appropriation in section 32(a) did fail because it did not receive the three-fourths vote of the members required for an appropriation from the Constitutional Budget Reserve under article IX, section 17(c). Accordingly, the contingency for the appropriation in sec. 33 of the bill has been met.

Sections 37 and 38 set out the effective dates of the various sections of the bill.

XXIII. 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,

/s/

Craig Richards
Attorney General

CWR:WEM:rjc