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**IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU**

ERIC FORRER,)
)
 Plaintiff,)
)
 v.)
)
 STATE OF ALASKA and LUCINDA)
 MAHONEY, in her official capacity as)
 COMMISSIONER OF THE)
 DEPARTMENT OF REVENUE,)
)
 Defendants.)

Filed in the Trial Courts
STATE OF ALASKA, FIRST DISTRICT
AT JUNEAU

JUN 19 2020

By _____ Deputy

Case No. IJU-20-00644 CI

**STATE’S MOTION FOR SUMMARY JUDGMENT
DISMISSING COMPLAINT AS MOOT**

The plaintiff, Eric Forrer, filed a complaint for “declaratory relief and potential equitable relief” on Wednesday, May 13, claiming that the Legislative Budget and Audit Committee’s (LB&A) approval of the Governor’s proposed expenditure of federal CARES Act funding violated the Alaska Constitution on the theory that the expenditures required action by the full legislature through passage of legislation. Soon thereafter, to clear up any legal uncertainty about this, the legislature reconvened and passed a bill—HB 313—explicitly approving the expenditures, which was signed into law by the governor on May 21.¹ This legislation has mooted the questions about the LB&A process raised by Mr. Forrer’s lawsuit because the full legislature has ratified the LB&A Committee’s actions and approved and authorized the expenditure of the federal

¹ Ch. 32, SLA 2020.

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receipts. A copy of the bill is attached for the Court’s reference. Because Mr. Forrer’s complaint is now moot, the State moves for summary judgment and dismissal of the complaint.

FACTS

In March 2020, an outbreak of COVID-19—a disease caused by a new strain of coronavirus—began to spread across the United States, triggering both a national declaration of a public health emergency by President Trump and a state emergency declaration by Governor Dunleavy on March 11. The Alaska State Legislature moved to quickly pass a state budget for Fiscal Year 2021 and then went into recess on March 29.²

On March 26, the United States Congress passed the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), which was signed into law by President Trump on March 27. The CARES Act included approximately \$1.5 billion of aid for the State of Alaska to spend on mitigating the devastating impact of the pandemic.

With the legislature in recess—and given the dire economic straits that many Alaskans found themselves in—on April 21, the Governor sought expedited authority to spend the CARES Act funds by presenting Revised Program Legislative Requests (RPLs) to the LB&A Committee. Budget bills authorize the spending of unanticipated

² Under the 121-day constitutional limit, the legislature could remain in session until May 20; through concurrent resolution, the legislature agreed to an extended recess of longer than three days. CSSCR 14 (RLS), Legislative Resolve 22.

federal receipts³ through the process provided in AS 37.07.080(h), which requires submission of RPLs to the LB&A Committee.⁴ The Governor's RPLs for the CARES Act money included funding for community assistance payments,⁵ relief for small businesses⁶ and fisheries,⁷ and funding for rural airports and other transportation needs.⁸

³ In HB 39, the operating budget bill for FY 2020, the relevant language is in Section 32(a):

FEDERAL AND OTHER PROGRAM RECEIPTS. (a) Federal receipts that are received during the fiscal year ending June 30, 2020, and that exceed the amounts appropriated by this Act are appropriated conditional on compliance with the program review provisions of AS 37.07.080(h).

⁴ AS 37.07.080(h) provides:

The increase of an appropriation item based on additional federal or other program receipts not specifically appropriated by the full legislature may be expended in accordance with the following procedures:

- (1) the governor shall submit a revised program to the Legislative Budget and Audit Committee for review;
- (2) 45 days shall elapse before commencement of expenditures under the revised program unless the Legislative Budget and Audit Committee earlier recommends that the state take part in the federally or otherwise funded activity;
- (3) should the Legislative Budget and Audit Committee recommend within the 45-day period that the state not initiate the additional activity, the governor shall again review the revised program and if the governor determines to authorize the expenditure, the governor shall provide the Legislative Budget and Audit Committee with a statement of the governor's reasons before commencement of expenditures under the revised program.

⁵ RPL #08-2020-0250.

⁶ RPL #08-2020-0251.

⁷ RPL #08-2020-0054.

⁸ RPLs #25-2020-8771 and -8772.

In early May, the Governor revised many of these RPLs and issued others as the administration developed and refined its policies aimed at mitigating the devastating economic impact of the pandemic.

Some legislators, however, were concerned that some of the proposed RPLs might not comply with the requirements of AS 37.07.080(h) and that the spending could not be validly authorized through this process. The legislature's attorneys raised similar concerns in a May 5 memo, identifying a number of RPLs that they believed were not consistent with that statute.⁹ According to the memo, the Governor's RPLs would be valid only if there was an existing appropriation for the same purpose and that appropriation included some federal funding.¹⁰ Despite these concerns, the LB&A Committee approved some of the RPLs on May 1, and the rest on May 11.

On May 13, Mr. Forrer filed this lawsuit claiming that the LB&A process did not comply with the constitutional requirements for state spending. Specifically, he alleged that the approval of an RPL by the LB&A Committee was not a valid appropriation under Article IX, section 13 of the Alaska Constitution and that CARES Act funds could not be spent absent such an appropriation. On May 18, Mr. Forrer filed a motion for a preliminary injunction to prevent the expenditure of CARES Act funding until the

⁹ Memorandum from Megan A. Wallace to Rep. Chris Tuck, May 5, 2020, re: Cares Act RPLs—May 1st submission, attached as Exhibit B.

¹⁰ *Id.* at 1 (“The governor could not rely on a community assistance appropriation as the appropriation authority for the RPL, because there is no FY 20 community assistance appropriation, and the FY 21 community assistance appropriation contains no federal funding that would make it eligible for the RPL process.”)

validity of the LB&A Committee's process was determined.

In order to eliminate the resulting uncertainty about the legality of spending CARES Act funding pursuant to the RPLs, legislators returned to Juneau to consider ratifying legislation. HB 313 was introduced on May 18. The bill has three sections amending the uncodified law of the State of Alaska. The section titled "Legislative Findings and Purpose" describes the development of the pandemic and the declaration of state and national public health disaster emergencies, congressional enactment of the CARES Act, the Governor's proposal and the LB&A Committee's approval of the RPLs. It then declares that it is

the purpose of this Act to approve the expenditure of federal receipts proposed by the governor and to ratify the approval of the RPLs identified under (a) of this section by the Legislative Budget and Audit Committee, in order to remove any uncertainty as to the status of the expenditures under the RPLs.¹¹

HB 313 passed the House by a vote of 38 to 1 on May 19, and the Senate by a vote of 19 to 1 on May 20. The Governor signed the bill into law on May 21.

ARGUMENT

Because HB 313 is valid curative legislation authorizing the expenditure of CARES Act funding, Mr. Forrer's lawsuit is now moot and should be dismissed.

The State does not agree with Mr. Forrer's position that the LB&A Committee's approval of the RPLs was invalid or constitutionally insufficient to authorize spending CARES Act funding, but this Court need not reach that question. Even assuming

¹¹ Enrolled HB 313, sec. 1(b). Exhibit A.

Mr. Forrer’s arguments had merit, HB 313 cured any alleged deficiencies in the LB&A Committee process. The Alaska Supreme Court has expressly recognized that curative legislation can resolve questions about the constitutionality of state spending; and HB 313 is valid curative legislation. It has, therefore, mooted this litigation.

A. The legislature can rescue otherwise unconstitutional spending decisions by passing curative legislation.

The legislature’s power to cure constitutional problems with spending decisions through curative legislation was confirmed in *Fairbanks North Star Borough v. State (Fairbanks II)*.¹² As the Alaska Supreme Court explained in that case, a curative statute is passed “to cure defects in prior law” or “to validate . . . acts of public and private administrative authorities” which otherwise “would be void for want of conformity with existing legal requirements, but which would have been valid if the statute had so provided at the time of enacting.”¹³

The curative statute at issue in *Fairbanks II* ratified the Governor’s decision—in the face of a dire budget shortfall—not to spend all of the funds appropriated by the legislature for that fiscal year. In the preceding case *State v. Fairbanks North Star Borough (Fairbanks I)*,¹⁴ the Alaska Supreme Court held that the Governor’s impoundment of the funds was invalid because AS 37.07.080(g)(2)—which at the time

¹² 753 P.2d 1158 (Alaska 1988).

¹³ *Id.* at 1160 (quoting 2 C. Sands, Sutherland Statutory Construction § 41.11 (4th ed. 1973)).

¹⁴ 736 P.2d 1140 (Alaska 1987).

authorized the Governor to cut appropriations whenever “estimated receipts and surpluses will be insufficient to provide for appropriations”¹⁵—was an unconstitutional delegation of legislative power.¹⁶ After the Court’s decision in *Fairbanks I*, the legislature quickly passed a bill that “explicitly ratified and approved all of the restrictions imposed by the governor.”¹⁷ And in *Fairbanks II*, the Court upheld that curative legislation under a two-part test, explaining that “Courts have uniformly upheld the validity of curative legislation where (1) the legislature originally had the power to authorize the acts done, and (2) there is no unconstitutional impairment of vested rights as a result of the act’s passage.”¹⁸

Thus, the legislature can resolve any alleged constitutional problems with the proposed expenditures of CARES Act money in the RPLs by passing curative legislation as long as: (1) the legislature originally had the power to authorize the spending; and (2) the spending did not unconstitutionally impair any vested rights.

B. HB 313 is valid curative legislation.

HB 313 easily satisfies the *Fairbanks II* test. There can be no question that the legislature has the power to authorize spending; and there is no impairment—unconstitutional or otherwise—of any vested rights as a result of the CARES Act

¹⁵ *Id.* at 1142.

¹⁶ *Id.* at 1143.

¹⁷ *Fairbanks II*, 753 P.2d at 1159.

¹⁸ *Id.* at 1160.

spending. Indeed, unlike *Fairbanks II*—where the legislature ratified *reductions* in spending—no person is negatively impacted by HB 313.¹⁹ Like the curative statute in *Fairbanks II*,²⁰ HB 313 clearly expresses the legislature’s intention to validate the Governor’s RPLs and the LB&A Committee’s approval of those RPLs. In fact, the legislature expressly cited *Fairbanks II* during debate over HB 313, and modeled the bill’s language after the language upheld in that case.²¹ And, like the statute in *Fairbanks II*, because HB 313 meets the test for “a valid curative act, it should be given its intended retroactive effect, thereby legitimizing”²² the expenditure of CARES Act funds, despite any alleged infirmity in the LB&A process.

The State expects Mr. Forrer to argue that the Legislature had to enact a valid appropriations bill to fix the problem with some of the RPLs; and that HB 313 cannot “ratify” unconstitutional spending. But even assuming that a valid appropriations bill is required, HB 313 *is* a valid appropriations bill.

An “appropriation” is the dedication of revenue to a particular purpose. As the Alaska Supreme Court has explained: “We have previously defined an ‘appropriation’

¹⁹ *Id.* (“appellant local governments approach this court seeking compelled payment of the originally appropriated funds.”).

²⁰ *Id.* (“[T]he state legislature passed H.B. 132 with the express intention of validating the governor’s impoundment orders, which had been rendered void by the *Fairbanks I* decision. *See* ch. 9, § 1(b), SLA 1987.”).

²¹ *See*, Minutes Senate Rules Standing Committee, May 19, 2020, available at <http://www.akleg.gov/basis/Meeting/Detail?Meeting=SRLS%202020-05-19%2011:00:00>

²² *Fairbanks II*, 753 P.2d at 1160.

as ‘the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other.’ ”²³ Although HB 313 does not follow the traditional format of an appropriations bill, it clearly sets aside certain sums of money for specified objects. The bill identifies particular purposes for spending specific sums of money in section 1(a) by referring to a series of RPLs, and then expressly “approve[s]”²⁴ and “authoriz[es]” the increase of “the appropriations identified in the RPLs identified under (a) of this section”²⁵ Indeed, section 1(b) states: “It is the purpose of this Act to approve the expenditure of federal receipts proposed by the governor,”²⁶ and thus the bill clearly appropriates CARES Act funding for the purposes identified by the Governor in the RPLs.

The State recognizes that some legislators’ actions and comments during the debate over HB 313 indicate that they did not believe the bill was an appropriations

²³ *Alaska Legislative Council ex rel. Alaska State Legislature v. Knowles (Knowles III)*, 86 P.3d 891, 898 (Alaska 2004) (quoting *Thomas v. Rosen*, 569 P.2d 793, 796 (Alaska 1977); see also, *Alaska Legislative Council v. Knowles (Knowles II)*, 21 P.3d 367, 371 (Alaska 2001) (“[W]e now define ‘item’ as ‘a sum of money dedicated to a particular purpose.’ ”).

²⁴ HB 313, sec. 1(b).

²⁵ HB 313, sec. 1(c).

²⁶ HB 313, sec. 1(b).

bill,²⁷ but their beliefs do not affect the substantive meaning of the bill—which is to authorize the spending of “certain sum[s] of money for a specified purpose.”²⁸ Magic words are not required to create an appropriations bill. If a bill dedicates revenue to a specific purpose, then it is an appropriations bill, notwithstanding any comments by legislators opining otherwise. HB 313 dedicates revenue to a specific purpose by “approv[ing],” “ratify[ing],” and “authorizing” the expenditure of federal receipts for the purposes outlined in the RPLs; therefore, it is an appropriations bill.

CONCLUSION

Because HB 313 is valid curative legislation that authorizes the expenditures approved by the LB&A Committee, any alleged constitutional problems with those expenditures have been resolved, and this lawsuit is now moot and should be dismissed.

DATED: June 22, 2020.

KEVIN G. CLARKSON
ATTORNEY GENERAL

By: /s/ Margaret Paton Walsh
Margaret Paton Walsh
Alaska Bar No. 0411074
Bill Milks
Alaska Bar No. 0411094
Assistant Attorneys General

²⁷ See e.g., Peter Segall, “After nearly a month, CARES Act funding is heading out,” Homer News, May 21, 2020; available at <https://www.homernews.com/news/after-nearly-a-month-cares-act-funding-is-heading-out/>.

²⁸ *Knowles III*, 86 P.3d at 898.



LAWS OF ALASKA

2020

Source
HB 313

Chapter No.

AN ACT

Approving and ratifying the actions of the governor and executive branch in expending certain federal receipts and of the Legislative Budget and Audit Committee in approving the expenditure of certain federal receipts during fiscal years 2020 and 2021; and providing for an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

THE ACT FOLLOWS ON PAGE 1

AN ACT

1 Approving and ratifying the actions of the governor and executive branch in expending
2 certain federal receipts and of the Legislative Budget and Audit Committee in approving the
3 expenditure of certain federal receipts during fiscal years 2020 and 2021; and providing for an
4 effective date.

5

6 * **Section 1.** The uncodified law of the State of Alaska is amended by adding a new section
7 to read:

8 LEGISLATIVE FINDINGS, PURPOSE, AND INTENT. (a) The legislature finds that

9 (1) in December 2019, a novel coronavirus known as severe acute respiratory
10 syndrome coronavirus 2 (SARS-CoV-2) was first detected in Wuhan, Hubei province,
11 People's Republic of China, leading to outbreaks of novel coronavirus disease (COVID-19)
12 that have now spread globally;

13 (2) on March 11, 2020, the governor issued a declaration of a public health
14 disaster emergency under AS 26.23.020 in anticipation of the spread of COVID-19 to the

1 state; through passage and enactment into law of ch. 10, SLA 2020, the legislature extended
2 the public health disaster emergency until November 15, 2020;

3 (3) on March 27, 2020, the President of the United States signed into law H.R.
4 748 (P.L. 116-136, Coronavirus Aid, Relief, and Economic Security Act (CARES Act)) in
5 response to the COVID-19 pandemic;

6 (4) on March 29, 2020, the legislature recessed the Second Regular Session of
7 the Thirty-First Alaska State Legislature indefinitely in the face of the COVID-19 pandemic;

8 (5) on April 9, 2020, the President of the United States approved a major
9 disaster declaration for the State of Alaska;

10 (6) on April 21, 2020, in response to the anticipated receipt of additional
11 federal receipts appropriated to states as part of the CARES Act that were not specifically
12 accounted for in passage of the fiscal year 2020 or fiscal year 2021 budgets, the governor
13 issued a revised program legislative (RPL) package, including RPLs 08-2020-0250
14 (\$562,500,000), 08-2020-0251 (\$300,000,000), 05-2020-0074 (\$48,000,000), 05-2020-0075
15 (\$5,000,000), 05-2020-0076 (\$421,500), 08-2020-0054 (\$100,000,000), 12-2020-4049
16 (\$3,585,351), 25-2020-8766 (\$29,000,000), 25-2020-8771 (\$49,000,000), 25-2020-8772
17 (\$3,034,100), and 45-2020-0002 (\$5,000,000), under the authority conferred by
18 AS 37.07.080(h);

19 (7) on May 1, 2020, the governor revised RPLs 08-2020-0250 (\$257,548,754),
20 08-2020-0251 (\$290,000,000), 05-2020-0074 (\$44,911,411), 05-2020-0075 (\$41,869,617),
21 05-2020-0076 (\$421,500), 12-2020-4049 (\$3,585,351), 25-2020-8771 (\$49,000,000), 25-
22 2020-8772 (\$3,034,100), and 45-2020-0002 (\$5,000,000) and issued new RPLs 08-2020-0260
23 through 08-2020-0382 (\$311,024,132) and 04-2020-1059 (\$10,000,000) under the authority
24 conferred by AS 37.07.080(h);

25 (8) on May 1, 2020, the Legislative Budget and Audit Committee approved
26 RPLs 05-2020-0074 (\$44,911,411), 05-2020-0075 (\$41,869,617), 05-2020-0076 (\$421,500),
27 12-2020-4049 (\$3,585,351), 25-2020-8766 (\$29,000,000), and 45-2020-0002 (\$5,000,000), as
28 revised;

29 (9) on May 7, 2020, the governor revised RPLs 25-2020-8771 (\$49,000,000)
30 and 25-2020-8772 (\$1,350,000) and issued new RPLs 25-2020-8776 (\$1,219,100) and 25-
31 2020-8777 (\$465,000);

1 (10) on May 11, 2020, the governor again revised RPL 08-2020-0251
2 (\$290,000,000) under the authority conferred by AS 37.07.080(h);

3 (11) on May 11, 2020, the Legislative Budget and Audit Committee approved
4 RPLs 08-2020-0250 (\$257,548,754), 08-2020-0251 (\$290,000,000), 25-2020-8771
5 (\$49,000,000), 25-2020-8772 (\$1,350,000), 25-2020-8776 (\$1,219,100), 25-2020-8777
6 (\$465,000), 08-2020-0260 through 08-2020-0382 (\$311,024,132), 08-2020-0054
7 (\$100,000,000), and 04-2020-1059 (\$10,000,000), as revised;

8 (12) the approval of the RPLs on May 1, 2020, and May 11, 2020, was in
9 response to the public health disaster emergency facing the state and was in no way intended
10 to abdicate the legislature's power of appropriation;

11 (13) the approval of the RPLs has been challenged in court.

12 (b) It is the purpose of this Act to approve the expenditure of federal receipts
13 proposed by the governor and to ratify the approval of the RPLs identified under (a) of this
14 section by the Legislative Budget and Audit Committee, in order to remove any uncertainty as
15 to the status of the expenditures under the RPLs.

16 (c) In authorizing the expenditure of federal receipts as proposed by the governor in
17 the RPLs identified under (a) of this section, it is the intent of the legislature that the
18 appropriations identified in the RPLs identified under (a) of this section are increased as
19 approved by the Legislative Budget and Audit Committee.

20 * **Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section to
21 read:

22 APPROVAL AND RATIFICATION. The actions of the governor and executive
23 branch in expending the federal receipts in accordance with the revised program legislative
24 (RPL) package identified under sec. 1(a) of this Act and the actions of the Legislative Budget
25 and Audit Committee in approving the expenditure of federal receipts in accordance with the
26 RPLs identified under sec. 1(a) of this Act are approved and ratified.

27 * **Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to
28 read:

29 SUSPENSION OF OTHER LAW. The provisions of sec. 2 of this Act are effective
30 notwithstanding the provisions of any other law, including AS 37.07.080(h).

31 * **Sec. 4.** This Act is retroactive to May 1, 2020.

1 * **Sec. 5.** This Act takes effect immediately under AS 01.10.070(c).

LEGAL SERVICES

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MEMORANDUM

May 5, 2020

SUBJECT: Cares Act RPLs – May 1st submission-
(Work Order No. 31-LS1806)

TO: Representative Chris Tuck
Attn: Aurora Hauke

FROM: Megan A. Wallace 
Director

You have asked for a review of the RPLs submitted by the governor on May 1, 2020.¹

RPL Analysis

1) RPL #08-2020-0250 - Community Assistance Payments - \$257,548,754²

The governor originally cited an FY 20 appropriation to the Department of Commerce, Community, and Economic Development (DCCED), community and regional affairs, as appropriation authority.³ This appropriation contains federal receipt authority. The governor could not rely on a community assistance appropriation as the appropriation authority for the RPL, because there is no FY 20 community assistance appropriation,⁴ and the FY 21 community assistance appropriation contains no federal funding that would make it eligible for the RPL process. The FY 20 appropriation to the DCCED, community and regional affairs essentially funds the Division of Community and Regional Affairs' operations. As part of that appropriation and allocation, there was \$636,900 allocated for the following grants:

- Alaska Maritime Safety Education, Boat Receipts - \$196.9

¹ On May 1, 2020, the Legislative Budget and Audit Committee (LB&A) approved RPLs # 05-2020-0074, 05-2020-0075, 05-2020-0076, 12-2020-4049, 25-2020-8766, and 45-2020-0002.

² The original amount of this RPL was \$562,500,000.

³ See sec. 1, ch. 1, FSSLA 2019, page 5, line 28.

⁴ The governor vetoed the \$30,000,000 FY 20 community assistance appropriation on three separate occasions. See sec. 33(a), ch. 1, FSSLA 2019, sec. 11(a), ch. 2, SSSLA 2019, and sec. 16(c), ch. 7, SLA 2020.

- Kawerak, Inc. for Essential Air Service to Little Diomedede - \$200.0
- Rural Utility Business Assistance Program - \$160.0
- Life Alaska Donor Services, Anatomical Gift Awareness Fund - \$30.0
- Unavailable Revenue to grant to Life Alaska Donor Services due to reduced annual donation trends to the fund - \$50.0

The appropriation cited as authority for this RPL provides no community assistance function; therefore the purpose of the RPL is not the same as the appropriation it seeks to increase. Because the RPL process may not be used to establish a new appropriation or change the purpose of an existing appropriation, it does not comply with AS 37.07.080(h).

The governor has added AS 44.33.020(a)(20) as statutory authority for this expenditure.⁵ AS 44.33.020(a)(20) provides:

(a) The Department of Commerce, Community, and Economic Development shall . . .

(20) administer state and, as appropriate, federal programs for revenue sharing, community assistance, grants, and other forms of financial assistance to community and regional governments;

While the above provision appears to give DCCED sufficient authority to disburse CARES Act funds to local governments as community assistance payments, the statute does not set out any specific distribution criteria, and there is none elsewhere in the Alaska Statutes. Based on testimony by OMB before the House Finance Committee on April 24, 2020, the governor modified the formula for community assistance payments the legislature established in AS 29.60.850 - 29.60.879. Instead of relying on the existing statutory formula the governor developed a new formula by applying portion of the statutory community assistance payment formula, adjusted by selected data collected by DCCED. It is my understanding that this formula was further adjusted for certain communities under the May 1, 2020 RPLs.⁶ The governor has cited no authority, and there does not appear to be any, that would allow for the governor to develop the new community assistance payment formula used in this RPL, absent legislative action.

⁵ The governor previously cited AS 29.60.850 - 29.60.879 (community assistance) and AS 37.05.315 (grants to municipalities) as statutory authority for this RPL.

⁶ The governor also submitted new RPLs #08-2020-0260 - 08-2020-0382 for COVID-19 Community Directs Costs for a total of \$311,024,132. Each of these RPLs uses the same appropriation and statutory authority discussed above for RPL #08-2020-0250. For the same reasons, RPLs #08-2020-0260 - 08-2020-0382 do not comply with AS 37.07.080(h).

Representative Chris Tuck
May 5, 2020
Page 3

Based on the foregoing, in my opinion, this RPL does not comply with AS 37.07.080(h), as it is not an increase to an existing appropriation item, but instead attempts to create a new appropriation, which requires legislative action.⁷

2) RPL #08-2020-0251 - Small Business Relief - \$290,000,000

The governor continues to cite DCCED, investments, as the appropriation authority for this RPL. These appropriations contain no federal receipt authority. Therefore, there is no federal receipt authority to increase by RPL and for that reason alone this RPL does not comply with AS 37.07.080(h).

Further, the purpose of this appropriation does not appear to be for providing small business loans, especially to the extent proposed. The RPL now proposes:

The Investments Section of the Department of Commerce, Community and Economic Development in cooperation with the Alaska Industrial Development and Export Authority (AIDEA), the existing Sustaining Alaska's Future Economy (AK SAFE) program, and Alaska Regional Development Organizations (ARDORs) will provide assistance to Alaska businesses based on the size, assets, resources, financial history, and needs of the business in the form of grants.

ARDORs will be allocated \$750,000.00 of the total amount for the purpose of facilitating the grant program and assisting small businesses in applying for State programs. Information related to how the ARDORs facilitated the grant process and assisted businesses in accessing resources made available by the State will be included in the annual ARDOR report, required under AS 44.33.896(e).

While the RPL provides that ARDORs will be allocated \$750,000, it does not specify where the remaining funds will be allocated. Will the remaining funds go to the AK SAFE program, or will they remain in DCCED? In addition, if AIDEA is going to make loans, the legislature might consider instead appropriating funds directly to those entities.⁸

⁷ As previously advised, any CARES Act funds appropriated to municipalities "must be used for actions taken to respond to the public health emergency." As of May 5, 2020, U.S. Treasury guidance continues to advise that "[f]und payments may not be used for government revenue replacement." See <https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Frequently-Asked-Questions.pdf>

⁸ The CARES Act guidance from the U.S. Department of Treasury specifically authorizes payments to small businesses, noting that eligible expenditures include those "related to

Nevertheless, this RPL does not comply with AS 37.07.080(h), and appears to create a new appropriation, which requires legislative action.

3) RPL #08-2020-0054 - COVID - 19 Economic Stimulus for Alaskan Fisheries - \$100,000,000

The governor continues to cite DCCED, executive administration, commissioner's office, as the appropriation authority. There is no federal funding attached to these appropriations to which the CARES Act funds may be added and no federal receipt authority. In addition, the funding for this allocation is primarily for personal services funded from interagency receipts. There is no money appropriated to the grants line. It is not clear why the governor cited this as appropriation authority. Therefore, this RPL does not comply with AS 37.07.080(h).

The legislature did not contemplate and did not provide authority for the commissioner to make these types of stimulus payments.⁹ The statutory authority cited, AS 44.33.020, only provides the general duties of the department. Because there is no statutory authority specifically outlining a program for fishery stimulus payments, the legislature may need to specifically determine how these funds are to be distributed. In my opinion, this RPL attempts to create a new appropriation, which requires legislative action.

4) RPL #25-2020-8771 - Statewide Aviation and Rural Airport System CARES FAA Funding - \$49,000,000

This RPL increases the amounts appropriated in the fiscal year 2020 and fiscal year 2021 operating budgets to the Department of Transportation and Public Facilities for administration and support and allocated to the commissioner's office by a total of \$49 million.¹⁰ According to the RPL, "CARES Act Airport Grants will be used for statewide aviation and rural airport system operating and maintenance expenses, where additional expenditure needs have occurred due to the COVID-19 public health emergency." The RPL provides that the federal funds will increase the funding allocated

the provision of grants to small businesses to reimburse the costs of business interruption caused by required closures." Therefore, the CARES Act funds can ultimately be used to provide small business loan, but probably not through the RPL process.

⁹ Indeed, other fishery disaster funds have been appropriated to the Department of Fish and Game in the capital budget. See sec. 1, ch. 3, FSSLA 2019, page 4, lines 6 - 10 (Pacific Coastal Salmon Recover Fund; Pink Salmon Disaster - 2106 Gulf of Alaska). Therefore, I doubt the legislature contemplated the commissioner of DCCED would be distributing fishery disaster funds.

¹⁰ See sec. 1, ch. 1, FSSLA 2019, page 32, lines 30 - 31; sec. 1, ch. 8, SLA 2020, page 32, lines 24 - 25.

to the commissioner's office for fiscal years 2020 and 2021 and the commissioner will allocate the funding to state owned airports. There does not appear to be federal funding attached to these appropriations and, as a result, there is no federal receipt authority to be increased through the RPL process. In addition, the funding for these allocations is primarily for personal services.

As statutory authority for the RPL, the governor cites AS 37.20.010 and AS 44.42.060.¹¹ While these statutes authorize the governor and the commissioner to accept federal funds on behalf of the state, an expenditure of federal funds must be consistent with the purpose of the underlying appropriation. The purposes of the appropriations cited in this RPL do not appear to provide for operating and maintenance expenses associated with state owned airports. Thus, the expenditures described in the RPL appear to be inconsistent with the purposes of the appropriation authority cited. The funding described in the RPL does not appear to supplement the underlying appropriations cited and, because there are no federal funds attached to those appropriations, there is insufficient appropriation authority to support the RPL. Therefore, this RPL does not comply with AS 37.07.080(h).

**5) RPL #25-2020-8772 - MSCVC & Whittier Access and Tunnel 5001(d)
CARES funding - \$3,034,100**

This RPL increases the amounts appropriated in the fiscal year 2020 and fiscal year 2021 operating budgets to the Department of Transportation and Public Facilities for administration and support and allocated to the commissioner's office by a total of \$3,034,100.¹² According to the RPL, "[f]unding will be used to cover unbudgeted and unanticipated personal services costs and expenditures related to ensuring continuity of operations and program delivery within this appropriation." The RPL provides that the federal funds will increase the funding allocated to the commissioner's office for fiscal years 2020 and 2021 and the commissioner will allocate the funding to measurement

¹¹ AS 37.20.010 provides:

The governor is authorized to accept on behalf of the state all federal grants and transfers of property of an emergency, transitional, or omnibus nature upon conditions imposed by the federal government.

AS 44.42.060 provides:

The commissioner may apply for and accept, on behalf of the state, grants from the federal government or an agency of it, or from another state, a foundation, or any person, for any of the functions or purposes of the department.

¹² See sec. 1, ch. 1, FSSLA 2019, page 32, line 31; sec. 1, ch. 8, SLA 2020, page 32, line 25.

standards and commercial vehicle compliance (MS/CVC), northern region highway and aviation, and Whittier access and tunnel. There does not appear to be federal funding attached to these appropriations and, as a result, there is no federal receipt authority to be increased through the RPL process. In addition, the funding for these allocations is primarily for personal services.

The governor cites AS 37.20.010 and AS 44.42.060 as statutory authority. While these statutes authorize the governor and the commissioner to accept federal funds on behalf of the state, an expenditure of federal funds must be consistent with the purpose of the underlying appropriation. Expenses related to MS/CVC, northern region highway and aviation, and Whittier access and tunnel do not appear to be within the scope of the appropriations cited in the RPL. Thus, the expenditures described in the RPL appear to be inconsistent with the purposes of the appropriation authority cited. The funding described in the RPL does not appear to supplement the underlying appropriations cited and, because there are no federal funds attached to those appropriations, there is insufficient appropriation authority to support the RPL. Therefore, this RPL does not comply with AS 37.07.080(h).

Other Legal Issues

If, despite the legal issues described above, LB&A approves these RPLs or the governor moves forward and expends funds after the 45-day waiting period under AS 37.07.080(h), that expenditure would likely constitute an unconstitutional delegation of the legislature's power of appropriation.

In *State v. Fairbanks North Star Borough*, an Alaska law that authorized the governor to administratively reduce the amount of an appropriation was found to be an unconstitutional delegation of legislative power.¹³ AS 37.07.080(g)(2), which has since been repealed, read:

- (g) The governor may direct the withholding or reduction of appropriations to a state agency at any time during the fiscal year only if the governor determines that
 - (1) the planned expenditures can no longer be made due to factors outside the control of the state which make the expenditure factually impossible;
 - or
 - (2) estimated receipts and surpluses will be insufficient to provide for appropriations.

In support of its decision that AS 37.07.080(g)(2) was an unconstitutional delegation of legislative power to the executive branch, the Alaska Supreme Court found that the statute would permit the governor to cut the entire budget for a particular department or

¹³ *State v. Fairbanks North Star Borough*, 736 P.2d 1140 (Alaska 1987).

project and the governor could effectively veto a project by using the process in AS 37.07.080(g)(2) even when the legislature had overridden the governor's veto.¹⁴

Similarly, if the governor asserts that AS 37.07.080(h) authorizes the expenditure of funds in the manner set out in the RPLs described above, if challenged, a court would likely find that the governor's interpretation of AS 37.07.080(h) would result in an unconstitutional delegation of the legislature's power of appropriation. AS 37.07.080(h) allows the governor to increase an existing appropriation but does not permit the creation of a new appropriation or change the purpose of an existing appropriation. As described above, these RPLs attempt to create new appropriations because the appropriations cited to increase federal receipts are inconsistent with existing authority and the purpose for the proposed expenditures. If the governor expends funds in accordance with the RPLs and those expenditures are challenged, a court would likely find that the RPLs do not comply with AS 37.07.080(h). Further, a court would likely find that if AS 37.07.080(h) allowed the governor to create a new appropriation, as proposed in the RPL, the statute itself would be an unconstitutional delegation of the legislature's power of appropriation.

If LB&A were to approve the above RPLs, I strongly recommend that the legislature ratify those expenditures at a later date if the legislature supports the appropriations. In 1987, the legislature retroactively ratified the actions of Governor Sheffield in impounding the appropriations previously discussed. Governor Sheffield impounded ten percent of funds intended for municipalities under AS 37.07.080(g), which became the subject of litigation. Later, the legislature went back and considered each of the impoundments and ratified Governor Sheffield's actions. The municipalities challenged the ratification, and the Alaska Supreme Court upheld the power of the legislature to retroactively ratify the actions of Governor Sheffield.¹⁵ In *Fairbanks North Star Borough*, the court explained:

A curative statute is

a statute passed to cure defects in prior law, or to validate legal proceedings, instruments, or acts of public and private administrative authorities which, in the absence of such an act would be void for want of conformity with existing legal requirements, but which would have been valid if the statute had so provided at the time of enacting.¹⁶

The Court also held that:

¹⁴ *Id.* at 1143.

¹⁵ *Fairbanks North Star Borough v. State*, 753 P.2d 1158 (Alaska 1988).

¹⁶ *Id.* at 1159 - 1160.

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Courts have uniformly upheld the validity of curative legislation where (1) the legislature originally had the power to authorize the acts done, and (2) there is no unconstitutional impairment of vested rights as a result of the act's passage.¹⁷

While ratification may be an option, it is also not without risk. Just as Governor Sheffield's impoundment was challenged (successfully), if LB&A approves the RPLs or if the governor moves forward with expenditures after the 45-day wait period, the expenditures may still be subject to challenge and litigation until the legislature ratifies the expenditures.¹⁸ Further, if the legislature fails to subsequently ratify the expenditures, the expenditures will be subject to challenge.

If you have any questions, please advise.

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¹⁷ *Id.* at 1160.

¹⁸ If the expenditures were challenged, the legislature may consider reconvening to approve the expenditures.

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**IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU**

ERIC FORRER,)
)
 Plaintiff,)
)
 v.)
)
 STATE OF ALASKA and LUCINDA)
 MAHONEY, in her official capacity as)
 COMMISSIONER OF THE)
 DEPARTMENT OF REVENUE,)
)
 Defendants.)

Case No. IJU-20-00644 CI

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the **State's Motion for Summary Judgment Dismissing Complaint as Moot** and the accompanying proposed order were served on the following via email:

Joseph G. Geldhof
Law Office of Joseph W. Geldhof
joeg@alaskan.com

/s/Richard J. Carter 6/19/2020
Richard J. Carter Date
Law Office Manager

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