

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.

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- Kawerak, Inc. for Essential Air Service to Little Diomedes - \$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).

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.