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M E M O R A N D U M March 5, 2012

SUBJECT: Article XI, section 4's "substantially the same" and the initiative establishing an Alaska Coastal Management Program
(Work Order No. 27-LS1430)

TO: Representative Alan Austerman
Attn: Erin Harrington

FROM: Doug Gardner
Director
and
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You asked whether a bill modeled on the provisions of the former Alaska Coastal Management Program, as those provisions would have been amended by the substantive portions of CCSHB 106 (27-GH1965\N) (HB 106),[1] would be interpreted as "substantially the same" as the initiative entitled "An Act establishing the Alaska Coastal Management Program."

Discussion

While both HB 106 and the initiative have the same general purpose -- establishing a state coastal management program -- the means by which that purpose is effectuated would be different. Given the relative scarcity of prior court cases interpreting the state constitution's art. XI, sec. 4 "substantially the same" language, it's not entirely clear to what degree this difference might result in HB 106 and the initiative being interpreted as not substantially the same.[2]

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[1] For the purposes of this memorandum, "HB 106" means the prior program as it would have been modified by that bill.

[2] When there is little case law, often it is helpful to turn to the minutes of Alaska's constitutional convention. While the article on direct legislation was the subject of extensive debate and discussion at the convention, in this case the minutes do not, as our court has observed, contain any "helpful discussion of what was the intended scope of the words 'substantially the same measure.'" *Warren v. Boucher*, 543 P.2d 731, 735 (Alaska 1975).

Under art. XI, sec. 4 of the Constitution of the State of Alaska[3] a proposed initiative is void if a law is enacted that is "substantially the same measure" as the proposed initiative.[4] Under AS 15.45.210, the lieutenant governor, with the concurrence of the attorney general, is responsible for determining whether an Act of the legislature is substantially the same as a proposed initiative.[5]

The question of whether an initiative and a legislatively enacted bill are "substantially the same" has been taken up only twice by our courts. In *Warren v. Boucher*, 543 P.2d 731 (Alaska 1975), the court was tasked with examining an initiative and a legislative bill relating to campaign finance reform. In *Warren*, the legislation "was broad and complicated, touching upon a great range of topics, including campaign spending limits, reporting of contributions and expenses, restrictions on anonymous contributions, penalties for non-compliance, the creation of an elections oversight committee to monitor elections, and several other topics." *State of Alaska v. Trust the People Initiative Committee*, 113 P.3d 613, 621 (Alaska 2005). In the second case, *Trust the People*, the court examined legislation that was "simple and straightforward, essentially dealing with only one substantive topic: filling of a U.S. Senate vacancy." *Id.* In both cases, the court employed the same test in deciding whether a bill and an initiative were substantially the same.

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[3] Article XI, sec. 4, Constitution of the State of Alaska states:

> **INITIATIVE ELECTION.** An initiative petition may be filed at any time. The lieutenant governor shall prepare a ballot title and proposition summarizing the proposed law, and shall place them on the ballot for the first statewide election held more than one hundred twenty days after adjournment of the legislative session following the filing. If, before the election, substantially the same measure has been enacted, the petition is void.

[4] This constitutional provision is unusual. Of the 21 state constitutions that permit citizens to propose laws through a petition process, we are aware of only one other state with a constitutional provision that permits its legislature to void an initiative through the passage of a measure that is "substantially the same." Article III, section 52(d) of the Wyoming constitution provides, in part, "If before the election, substantially the same measure has been enacted, the [initiative] petition is void." This clause in the Wyoming constitution has not yet been interpreted by a court.

[5] AS 15.45.210 states:

> **Determination of void petition.** If the lieutenant governor, with the formal concurrence of the attorney general, determines that an act of the legislature that is substantially the same as the proposed law was enacted after the petition had been filed, and before the date of the election, the petition is void and the lieutenant governor shall so notify the committee.

A. "Substantially the same" test in *Warren v. Boucher*

The test of how similar a bill and an initiative must be for the bill to invalidate the initiative was first articulated in *Warren v. Boucher*:

> It is clear that the legislative act need not conform to the initiative in all respects, and that the framers intended that the legislature should have some discretion in deciding how far the legislative act should differ from the provisions of the initiative. The question, of course, is how great is the permitted variance before the legislative act becomes no longer substantially the same.
>
> Upon reflection we have concluded that the legislature's discretion in this matter is reasonably broad. If in the main the legislative act achieves the same general purpose as the initiative, if the legislative act accomplishes that purpose by means or systems which are fairly comparable, then substantial similarity exists. It is not necessary that the two measures correspond in minor particulars, or even as to all major features, if the subject matter is necessarily complex or requires comprehensive treatment. The broader the reach of the subject matter, the more latitude must be allowed the legislature to vary from the particular features of the initiative.

543 P.2d at 736.

B. "Substantially the same" test revisited in *Trust the People*

In *Trust the People*, the court cited the *Warren v. Boucher* test:

> A court must first determine the scope of the subject matter, and afford the legislature greater or lesser latitude depending on whether the subject matter is broad or narrow; next, it must consider whether the general purpose of the legislation is the same as the general purpose of the initiative; and finally it must consider whether the means by which that purpose is effectuated are the same in both the legislation and the initiative.

Trust the People, 113 P.3d at 621.

1. Scope of subject matter

Turning to the first part of the test, as articulated by the court in *Trust the People*, it should be noted that the subject matter of this initiative, the establishment of an Alaska Coastal Management Program, is relatively complex and its reach is broad. Correspondingly, the legislature's discretion to vary from particular features of the initiative is broader in this instance than it might be in the context of a different initiative (i.e. the filling of a U.S. Senate vacancy in *Trust the People*). As the court described its

treatment of the legislatively enacted campaign finance bill in the *Warren v. Boucher* case:

> The legislature had made numerous changes to the initiative that implicated the scope of the law, its enforcement mechanisms, and other structural issues concerning the regulation of campaign finance reform. But because these changes were seen as promoting the shared goals of both the bill and the initiative, we were willing to accept the legislature's bill as "substantially the same" as its initiative counterpart, even though there were in fact differences in the texts.

Trust the People at 621 (footnote omitted).

HB 106 would most likely be interpreted to satisfy this element of the test. While direct comparison between the campaign finance legislation at issue in *Warren v. Boucher* and the legislation here is difficult, arguably a program that seeks to coordinate and unify permitting activities for all projects and activities in the state's coastal area between federal, state, and local governments, their respective agencies, and local inhabitants is more complex than legislation governing election contributions and expenditures in state election campaigns. So, in this instance, the court is likely to permit the legislature at least as much latitude to vary from the specific terms of the initiative as it allowed in *Warren v. Boucher*.[6]

2. Purpose of legislation and initiative

The next part of the test consists of examining whether the purposes of the legislation and the initiative are the same. The *Warren v. Boucher* test asks whether "the legislative act achieves the same general purpose as the initiative." *Id.* The establishment of a state coastal management program under both HB 106 and the initiative would, if approved by the National Oceanic and Atmospheric Administration (NOAA) Office of Ocean and Coastal Resource Management under the Coastal Management Act of 1972 (16 U.S.C. §§ 1451 - 1465), enable the state to formally review and influence federal activities affecting Alaska, allow the state to receive Coastal Zone Management Act grant funds, reestablish a coordinated permitting process for projects requiring state and federal authorizations, and result in greater local participation in state and federal permitting processes. Additionally, for a state coastal management program to be approved, the Secretary of Commerce must find that the program includes certain program elements that are consistent with Congressional declaration of policy (purpose) found at 16 U.S.C. § 1452.[7] Both HB 106 and the initiative are likely to be found to meet these federal

[6] The dissent in *Warren v. Boucher* pointed out: "of the 19 separate sections of the initiative, only six are the same as the statute," and "seven sections have been eliminated entirely by the statute." *Id.* at 741 (Erwin, J., dissenting). *Trust the People* at 621 n.30.

[7] See 16 U.S.C. § 1455(d)(2) for a list of the program elements.

requirements. Similarly, the program's scope and organization are much the same in HB 106 and the initiative, the prior program's sec. 45.40.020 (objectives) and the initiative's sec. 45.41.050 (objectives) are in large part the same, and the initiative even goes so far as to provide that coastal districts, district boundaries, and coastal district management plans approved under the prior program are incorporated into the initiative's program (see initiative sec. 46.41.040(b)). Consequently, the general purpose of HB 106 and the initiative would likely be interpreted as the same satisfying the second element of the *Trust the People* test.[8]

3. "Means" and the issue of local control

The third prong of the test involves considering whether the means by which this general purpose is effectuated is the same in the bill and the initiative. It is here that HB 106 and the initiative could be found to differ, because the initiative provides for greater local participation and control than the state's former coastal management program as it would have been modified by HB 106.

The former program, at the time of its repeal, was housed within the Department of Natural Resources, and that department was responsible for coordinating consistency reviews, reviewing and approving coastal management plans, offering technical assistance to coastal resource districts, and offering statutory and regulatory changes to improve coastal management.[9] Instead of direct state agency control of the program, the

[8] In *Warren v. Boucher*, the court examined the difference between two sets of campaign finance rules and the respective difference in their probable operation. In the present case, the most salient differences between the initiative and HB 106 cannot be characterized as those differences that might exist between two disparate sets of rules, but in how decision making power is allocated between the executive branch of state government and the coastal regions of the state. While this balance of power is an important component of the initiative, a court is not likely to find that the initiative's allocation of greater power to the local governments and the residents of the coastal regions of the state and their representatives on the initiative's Coastal Policy Board is a "purpose" of the initiative, but a means of effectuating "a balanced approach to development and protection of coastal resources." (This language is from the initiative sponsor's "Short-form Description of Initiative," which provides "This initiative would establish a coastal management program for Alaska. Alaska is the only state without an approved coastal management program. The initiative seeks a balanced approach to development and protection of coastal resources." Available on March 2, 2012, at http://www.elections.alaska.gov/petitions/11ACMP/11ACMP_Proposed_Language.pdf.)

[9] The consistency review process, in which private and public land and water uses and natural resources in the coastal zone are managed in a manner consistent with the policies of a state's coastal management program, is the heart of the 1972 Coastal Management Act (16 U.S.C. §§ 1450 - 1464).

initiative vests control of the program in an Alaska Coastal Policy Board (Board),[10] the majority of whose members are residents of the coastal regions of the state.[11] Similarly, the former program prevented coastal resource districts or areas from adopting enforceable policies relating to air, land, and water quality issues that are under the Department of Environmental Conservation's authority ("DEC carve-out"),[12] whereas the initiative does not.

An argument could be made that the initiative's (1) establishment of a Board with regulatory authority over the program, made up of residents from the coastal regions of the state, (2) elimination of the "DEC carve-out," and (3) greater emphasis on program elements relating to local control and participation, are not fairly comparable to the program that would be reestablished under HB 106.[13]

Alaska Coastal Policy Board. The greatest single factor which a court may consider as not substantially the same comparing the initiative and HB 106, is the role and responsibilities of the initiative's Alaska Coastal Policy Board. Note that in the *Warren v. Boucher* case, the court indicated, in the context of legislation governing election contributions and expenditures, that moving a compliance mechanism from the lieutenant governor to an "election campaign commission" did not vitiate the "aims of the initiative." *Boucher* at 739. If the legislature did the same here, and restored the program to one supervised by the executive branch, would a court be so likely to find that such a change renders the program not "substantially the same"? It may be, in contrast to *Warren v. Boucher* -- where the location of the enforcement mechanism was seen as complimentary to the purposes of the initiative -- that here a court could interpret the legislature's action as "vitiating" the local control and local participation aspects contained in the initiative. In eliminating the Board, with its power to adopt regulations and otherwise make law by interpreting them, HB 106 could be interpreted by a court as not substantially the same as the initiative, despite the broader discretion afforded the legislature based on the complexity of the coastal zone program.

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[10] While CCSHB 106 established a board, the board was advisory in nature. See secs. 3 and 12 of 27-GH1965\N.

[11] The initiative's Board would be located in the Department of Commerce, Community, and Economic Development.

[12] See former AS 46.40.040(b), AS 46.40.040(c), and AS 46.40.096(i). For a discussion of the "DEC carve-out," see the Alaska Coastal Management Program Audit Part I, pages 25 - 27, available March 2, 2012, at: http://www.legaudit.state.ak.us/pages/digests/2011/30060adig.htm.

[13] In *Warren v. Boucher*, the court found that the means for accomplishing the purpose were "fairly comparable," even thought they did not "correspond . . . as to all major features." 543 P.2d at 736.

"DEC Carve- Out." The second significant difference, the absence of the "DEC carve-out" from the initiative, on its own, is not likely to be interpreted as creating enough of a variance between the initiative and HB 106, given the latitude accorded the legislature in a complex matter that requires comprehensive treatment, for a court to find HB 106 not substantially the same. While incorporating the "DEC carve out" would limit the scope of regulations the Board could adopt and what enforceable policies a coastal district could adopt, given the existing range of limitations placed on what sort of enforceable policies could be adopted under the initiative's sec. 46.41.060(b)(2), this is a less likely outcome.

Local Control and Participation. The initiative's greater emphasis on local participation and local control, and the values of local participation and control, is found in the initiative's sec. 46.41.050(1) and (9) - (11), which amend the prior program's objectives to add new language and new paragraphs relating to local participation and control. It's difficult to state what substantive effects these additional objectives might be interpreted to have. The initiative's added objectives can be summarized as (1) "coordination of planning and decision-making . . . among levels of government," (2) "participation of the public, local governments, and agencies of the state and federal governments," and (3) requiring state resource agencies to carry out their duties, powers and responsibilities in the manner provided by the initiative. What it might mean in practice for the program to "be consistent with [these] objectives" (see initiative's sec. 46.41.050) is impossible to predict. [14]

C. Conclusion

It is hard to predict how the lieutenant governor, or a court, would interpret the significance of this different balance of power between state agencies and local governments in determining whether the bill would be "substantially the same" as the

[14] While the addition of these objectives might not affect the subject matter, scope, or purpose of the program, because policy considerations relating to "coordination and participation" between "levels of government" (namely the balance of power between state agencies and local governments) animated the debate that surrounded the former program during the First Session of the 27th Legislature and the two subsequent special sessions, it may be important to note that in the context of a "substantially the same" evaluation of an initiative and a competing legislatively enacted bill by a court, these policy considerations, taken in isolation, are unlikely to exercise the same gravity. In *Trust the People*, the court noted that

> [w]hile the state raises serious policy arguments in favor of [the legislatively enacted bill], they relate to the wisdom of the legislation -- and thus are more properly directed to the voters considering the proposed initiative -- and not to the question whether the proposed initiative and the [legislatively enacted bill] are substantially the same.

Id. at 624.

initiative. While it may be useful for discussion to consider each component of HB 106 and the initiative separately and apply the substantially similar test from *Warren v. Boucher*, consideration of the entire program utilizing this test is difficult. Perhaps the best conclusion to a macro application of the test in *Warren v. Boucher* to HB 106 and the initiative is to observe that if each of the features discussed above individually raised "substantially the same concerns," then it would be likely that when all key differences were combined, that a court would find it a very close question as to whether HB 106 is substantially the same as the initiative.

You asked if this "substantially the same" analysis would be different if the initiative was compared with CSSB 45(CRA) (27-GS1965\B.A). It would not. The differences between CCSHB 106 (27-GH1965\N) and CSSB 45(CRA) are not significant for the purposes of the analysis. A comparison document is enclosed.

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Enclosure