

# LEGAL SERVICES

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## MEMORANDUM

December 7, 2015

**SUBJECT:** Legislative Members on AGDC Board  
(Work Order No. 29-LS1227)

**TO:** Senator Mia Costello  
Attn: Weston Eiler

**FROM:** Emily Nauman   
Legislative Counsel

You asked whether a member of the legislature or a person selected by the legislature could serve on the board of the Alaska Gasline Development Corporation (AGDC). The short answer is that legislators or legislative representatives on a state corporation board within the executive branch likely raises a separation of powers issue.

### 1. Legislators as Board Members

A member of the legislature serving on the board of AGDC likely violates the constitutional separation of powers doctrine.<sup>1</sup> The board clearly has statutory authority, as created by the legislature, and the power to implement and execute the law is a function of the executive branch and cannot be assumed by the legislature.

There is also a second constitutional issue raised by art. II, sec. 5 of the Constitution of the State of Alaska which states in part: "No legislator may hold any other office or position of profit under the United States or the State." The Alaska Attorney General has concluded that in this constitutional provision "of profit" modifies "position" but not "office", so that service in any "office" is prohibited regardless of whether the legislator receives compensation for that service. If a legislator exercises executive branch powers or duties the arrangement is likely to violate the separation of powers doctrine.

The Department of Law (DOL) has consistently argued that appointments of legislators to executive branch boards are unconstitutional.

Legislative membership violates art. II, sec. 5 of the Alaska Constitution, which precludes legislators from dual office-holding. See *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 777 - 78 (Alaska 1980). In *Begich v. Jefferson*, 441 P.2d 27 (Alaska 1968), the court explained the rationale is

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<sup>1</sup> See *Bradner v. Hammond*, 553 P.2d 1 (Alaska 1976), *State v. Toomey*, 335 P.2d 1051 (Mont. 1958); and *State ex rel. Weinberger v. Miller*, 99 N.E. 1078 (Ohio 1912).

to "guard against conflicts of interest, self-aggrandizement, concentration of power, and dilution of separation of powers. . . ." There is a consistent line of opinions from this office that legislators may not hold positions on executive branch boards. Cf. 1980 Op. Att'y Gen. No. 21 (September 14; J-66-212-81) (legislators may not serve on statehood commission); 1988 Inf. Op. Att'y Gen. 226 (April 12; 883-33-0022) (legislative appointments to children's trust unconstitutional); 1988 Inf. Op. Att'y Gen. 37 (July 1; 663-88-0430) (state legislator should not serve on land use advisory committee); 1989 Inf. Op. Att'y Gen. 297 (May 1; 663-89-0506) (legislators should not serve on commission to investigate Exxon Valdez spill); 1989 Inf. Op. Att'y Gen. 45 (July 1; 883-89-0111) (inclusion of legislators of Amateur Sports Authority is unconstitutional).<sup>[2]</sup>

DOL has stated that it might be possible for legislators to serve on temporary advisory boards. In an opinion the department said "It is not our opinion that either the separation of powers doctrine or the prohibition against dual-office holding absolutely forbids the formation of inter-branch committees which are established as clearinghouses for an exchange of ideas and advice on a given subject and which do not exercise sovereign power, i.e., which do not make, execute, or declare the law, do not offend either prohibition . . . . Put another way, discussing and advising on the matter may be done by an inter-branch committee; deciding upon and acting on the matter may not."<sup>3</sup> DOL has allowed that it may be permissible for legislators to hold a position on a purely advisory committee, but the AGDC board is not a purely advisory committee.

## 2. Legislative Representatives as Board Members

The separation of powers issue related to the appointment of legislators to an executive board also extend to members of the board selected by the legislature. Art. III, sec. 16 of the Constitution of the State of Alaska provides that "[t]he governor shall be responsible for the faithful execution of the laws." The Alaska Supreme Court has determined that "the appointment of executive officers is an executive function; for without such a power, the responsibility for executing executive duties would be diffused and the goal of separation of branches of government, avoiding too great a concentration of power in one branch, would be defeated."<sup>4</sup>

Similar separation of powers issues also likely exist in the other legislative control possibilities Mr. Eiler and I discussed, including legislative confirmation of board

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<sup>2</sup> 1996 Op. Att'y Gen. (May 24; 883-96-0063).

<sup>3</sup> 1977 Inf. Alaska Att'y Gen. Op., file no. J-66-265-78, (November 16) (citations omitted).

<sup>4</sup> *Bradner v. Hammond*, 553 P.2d 1, 6-7 (Alaska 1976).

members<sup>5</sup> and legislative selection of candidates.

### 3. Ex Officio Members

As Mr. Eiler and I discussed on the phone, it may be possible to reduce the infringement on executive branch powers by making legislative members of the task force non-voting, ex officio members. I am not sure this resolves the problem, however.

If I may be of further assistance, please advise.

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<sup>5</sup> The legislature does not have the power to confirm board members of a public corporation. The power of the legislature to confirm executive branch appointments to a board or commission is contained in art. III, sec. 26 of the Constitution of the State of Alaska, that provides, "when a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law." Members of art. III, sec. 26 boards and commissions are subject to confirmation and may only be removed as the legislature has provided by law. The Alaska Supreme Court in *Bradner*, recognized this and said "removal of Section 26 board or commission members is as provided by law and, therefore, not necessarily at the governor's pleasure. Section 26 marks the outer limits of the legislature's authority to require confirmation and provide for the removal of board members."