

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101


State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

April 19, 2019

SUBJECT: Constitutional Amendment: New or Increased Taxes
(HJR5; Work Order No. 31-GH1070\A)

TO: Representative Zach Fields
Attn: Logan Basner

FROM: Emily Nauman
Deputy Director 

You asked whether any constitutional conflicts¹ existed in HJR 5, the governor's constitutional amendment requiring voter approval of bills that establish or increase a tax and legislative approval of the establishment or increase of a tax by initiative. The changes to the constitution proposed in HJR 5 appear to be a revision requiring a constitutional convention under art. XIII, sec. 1, Constitution of the State of Alaska. If a court determines the changes are a revision, they could not be advanced by the legislature through a resolution.

Under art. XIII, sec. 1, Constitution of the State of Alaska, an *amendment* to the constitution may be made with a two-thirds vote of each house of the legislature and a majority vote of the electorate. Under art. XIII, sec. 4, a *revision* to the constitution may only be made at a constitutional convention. The Alaska Supreme Court has issued a single case that attempts to delineate an amendment from a revision. In *Bess v. Ulmer*, the Alaska Supreme Court analyzed three proposed amendments to the Constitution of the State of Alaska to determine whether the proposed *amendments* were actually *revisions* to the constitution requiring a constitutional convention.² The *Bess* court laid out guidelines for determining whether a change to the constitution constitutes an amendment or a revision. A court will analyze the quantity and quality of the proposed changes: whether the proposed changes are "few, simple, independent, and of comparatively small importance" or "whether the changes are so significant as to create a

¹ The resolution suffers from other legal, structural, and drafting issues. If you would like additional briefing about those issues, please let me know.

² 985 P.2d 979, 981 (Alaska 1999).

need to consider the constitution as an organic whole."³

A. Quantitative Effects. The proposed changes in the attached resolution amend one section and add a new subsection to an existing section in the constitution. Relative to the remainder of the Constitution of the State of Alaska, the resolution contains a small number of changes that are discrete.

B. Qualitative Effects. The amendment prevents the legislature from imposing new tax or increasing a tax without voter approval. The result will be a fundamental shift in the constitutional authority of the legislature to tax. As identified in *Bess* the changes seem to "substantially alter the substance and integrity of the state constitution as a document of independent force and effect."⁴ It has long been recognized that the power of taxation lies, when discussing separation of powers issues, within the powers of a state legislature. The United States Supreme Court stated "[taxation] is a high act of sovereignty, to be performed only by the legislature upon considerations of policy, necessity, and the public welfare" and continued that a state legislature "[has] the sole power to authorize [a] tax."⁵ The Alaska Supreme Court has also recognized "taxation is inherently a function of the legislature."⁶ Given the importance of the taxing power and

³ *Id.* at 987 (quoting Judge John A. Jameson, *A Treatise on Constitutional Conventions; Their History, Powers, and Modes of Proceeding*, sec. 540 (Chicago, Callaghan and Company, 4th ed. 1887)).

⁴ *Bess*, 985 P.2d at 987, quoting *Raven v. Deukmejian*, 801 P.2d 1077, 1087 (Cal. 1990) (note omitted).

⁵ *Meriwether v. Garrett*, 102 U.S. 472, 515, 26 L. Ed. 197 (1880). *See also State ex rel. S. Bank v. Pilsbury*, 105 U.S. 278, 291, 26 L. Ed. 109 (1881) ("The equality and uniformity required throughout the State were only obtainable by confining the exercise of the power of taxation to the legislature, whose authority was coextensive with the territorial limits of the State."); *City of New Orleans v. Clark*, 95 U.S. 644, 654, 24 L. Ed. 521 (1877) ("Of the expediency of the taxation or the wisdom of the appropriation [the legislature] is the sole judge."); *Lane Cty. v. State of Oregon*, 74 U.S. 71, 77, 19 L. Ed. 101 (1868) ("The extent to which [a tax] shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the States commit the exercise of the power. That discretion is restrained only by the will of the people expressed in the State constitutions or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the national government.").

⁶ *Dissolution of Mountain View Pub. Util. Dist. No. 1, In re*, 359 P.2d 951, 955 (Alaska 1961) ("Taxation is inherently a function of the legislature and can be exercised only under its authority."). The Alaska Supreme Court seems to back away from the rigidity of the language of the United States Supreme Court, perhaps this is because the people may legally shape the tax law of the state by initiative.

its historical assignment of that power to the legislature, a limitation of that power may constitute evidence of a significant change to the structure of the constitution amounting to a revision.⁷

Increasing the concern, the changes to the constitution will have a lasting impact on the amounts available to the legislature for appropriation each year. Because the appropriation power of the legislature acts to balance the power of the executive branch, the changes will also likely result in a shift of constitutional authority. It is difficult to predict how a court might determine the issue, as there have not been any other Alaska cases on this issue post-*Bess*. However, given the qualitative nature of the changes, including the resulting shifting of fundamental powers between governmental branches, a court is very likely to see the changes as a revision.

If I may be of further assistance, please advise.

ELN:amt
19-044.amt

⁷ On the other hand, the court might consider the change an amendment on the basis that it is similar to existing initiative and referendum authority to add or repeal taxes, and thus does not constitute a significant revision to the general structure of the constitution.