# LEGAL SERVICES

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**MEMORANDUM** March 21, 2011

**SUBJECT:** Constitutionality of HB 168 relating to security for injunction (Work Order No. 27-LS0395\B)

**TO:** Representative Max Gruenberg
Attn: Gretchen Staft

**FROM:** Dennis C. Bailey DCB
Legislative Counsel

You have asked me to review constitutional considerations with respect to HB 168 in light of two decisions, Patrick v. Lynden Transport., 765 P.2d 1375 (Alaska 1988) and Ware v. City of Anchorage, 439 P.2d 793 (Alaska 1968).

HB 168 amends AS 09.40.230 by adding a new subsection that requires a party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit that affects an industrial operation to give security in an amount determined by a court for costs and damages that may be incurred by an industrial operation that has been wrongfully enjoined or restrained. It also requires that the amount determined by the court "must include an amount for the payment of wages and benefits for the employees of an industrial operation and the contractors and subcontractors of the operation."

The new subsection added by HB 168 parallels the requirements of Alaska Civil Rule 65(c), which requires a court to require a person seeking an injunction to provide security to protect a person who may be wrongfully restrained or enjoined. Civil Rule 65(c) reads:

> (c) **Security.** No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the state or a municipality or of an officer or agency thereof, or unless otherwise ordered by the court, in domestic relations actions or proceedings. A surety upon a bond or undertaking under this rule submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The

> motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

Civil Rule 65(c) exists to protect the interests of a party who is the subject of a temporary restraining order or a preliminary injunction. The analysis used by a court issuing a preliminary injunction is set out as follows:

> The showing required to obtain a preliminary injunction depends on the nature of the threatened injury. If the plaintiff faces the danger of "irreparable harm" and if the opposing party is adequately protected, then we apply a "balance of hardships" approach in which the plaintiff "must raise 'serious' and substantial questions going to the merits of the case; that is, the issues raised cannot be 'frivolous or obviously without merit.'" [State v. Kluti Kaah Native Vill. of Copper Ctr., 831 P.2d 1270, 1273 (Alaska 1992) (citations omitted).] If, however, the plaintiff's threatened harm is less than irreparable or if the opposing party cannot be adequately protected, then we demand of the plaintiff the heightened standard of a "clear showing of probable success on the merits." [Id. at 1272 (quoting A.J. Indus., Inc. v. Alaska Pub. Serv. Comm'n, 470 P.2d 537, 540 (Alaska 1970)), modified in other respects, 483 P.2d 198 (Alaska 1971).]

HB 168 differs from Civil Rule 65(c) because under HB 168, (1) the security requirement applies not only to a temporary restraining order or a preliminary injunction, but also includes "an order vacating or staying the operation of a permit that affects an industrial operation"; and (2) requires that the amount of the security determined by the court must include "an amount for the payment of wages and benefits for employees and payment to contractors and subcontractors of the industrial operation."

Arguably, the change proposed by HB 168 applying the security requirement to a stay of the operation of a permit, could be in the form of an injunction, although the issue is less clear with an order vacating the operation of a permit, which seems more likely to be the result of litigation rather than the subject of a preliminary injunction. On the other hand, application for injunctive relief and the associated security under Civil Rule 65(c) may be interpreted not to apply to an "order" that is not in the form of an injunction.

With respect to the requirement that the court include an amount for wages and contract payments, the bill does not specify an amount that is required, and does not affect the discretion of the judge to determine the amount. The bill does not explicitly say that the amount of security is the amount of the payments for wages and contract payments. However, an argument could be made that HB 168 was intended to impose a requirement that the full amount of the wages and contracts must be included in the amount of the security.

Whether HB 168 actually changes the application of Civil Rule 65(c) may determine whether a two-thirds vote is required. An argument can be made that the court has the same authority both before and after enactment of HB 168. Under this argument, the court could apply the new provisions under HB 168 and require security for a preliminary injunction relating to the vacation or stay of a permit using existing law, and, also under existing law, the court could consider and include an amount for wages, benefits and contract payments. Under this interpretation, the bill does not enact a change to a court rule. If, however, HB 168 is interpreted to require wages, benefits, and contract payments to be covered by security, then HB 168 may be interpreted to change a court rule.

In Ware v. City of Anchorage, 439 P.2d 793 (Alaska 1968), the court addressed the issue of whether the statute that required a nonresident to post security for litigation costs and attorney fees was invalid based on the argument that the legislature may not make a court rule relating to practice and procedure, it may only change a court rule under art. IV, sec. 15 of the Alaska Constitution. Article IV, sec. 15 provides:

> **Section 15. Rule-Making Power.** The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

Rule 39(e) of the Uniform Rules requires:

> (e) If a bill or portion of a bill contains matter changing a supreme court rule governing practice and procedure in civil or criminal cases, the bill must contain a section expressly citing the rule and noting what change is being proposed. The section containing the change in a court rule must be approved by an affirmative vote of two-thirds of the full membership of each house. If the section effecting a change in the court rule fails to receive the required two-thirds vote, the section is void and without effect and is deleted from the bill. The fact that a bill contains a section which changes a court rule shall also be noted in the title of the bill.

In order to decide whether a court rule change requires a two-thirds vote, a determination must be made whether the change to the court rules is

(1) a substantive change to court rules, e.g., limitations of actions, burden of proof, presumption, creation of courts, and matters of jurisdiction, which may be changed without special voting requirements;

(2) a matter of practice or procedure of the courts, e.g., forms of action, how an action is commenced, the manner of notice, pleading and motion practice, joinder, pre-trial practice, discovery, the conduct of trial, stay of proceedings, enforcement

procedures, post-trial procedures, appeal, venue evidence and special proceedings such as adoption and probate; or

(3) a rule of administration which is protected from legislative modification based on principles of separation of power.[1]

Whether the measure creates a substantive court rule change requiring no special voting requirements or a change to a matter of practice and procedures, which would require a two-thirds vote, is a close question. The problems created by this distinction are readily acknowledged by the court.

> We then turned to the definitions of the terms "procedural" and "substantive." . . . But while this distinction claims venerable origins, it has been recognized that the definition falls far short of drawing an unequivocal line. Decisions on the method of enforcing a right often affect substantive rights, and the regulation of substantive rights may have an impact upon judicial procedure.

State v. Native Village of Nunapitchuk, 156 P.3d 389, 397 (Alaska 2007) (citations omitted).

An argument could be made that the proposed change offered by HB 168, even if it limits the court's discretion in determining the amount of security required, would be considered a matter of procedure. The Alaska Supreme Court found that AS 09.60.060, which allowed the Court to require security for costs and attorneys fees, to be a substantive matter. Ware v. Anchorage, 439 P.2d 793, 794 (Alaska 1968). The Court said, "The authorities generally agree that substantive law creates, defines and regulates rights, while procedural law prescribes the method of enforcing the rights." The Court acknowledged differing decisions on similar facts in both state and federal courts, but concluded that AS 09.60.060 enacted a substantive change to the court rules. The Court reasoned that the act created a new right in the resident defendant and a new liability in the nonresident plaintiff which are separate and apart from, and go beyond, the procedure of computing and assessing costs and attorney's fees. Ware, at 795.

In the more recent case, Nunapitchuk, supra, the court concluded that changes to Civil Rule 82, which relates to attorneys fees, is a rule of practice and procedure that would require a two-thirds vote, but the change to the public interest litigant exception to the attorney fees rules was a rule of substantive law which could be changed by the legislature without a two-thirds vote. Further, the court concluded that when deciding whether the changes to the public interest litigant attorney fees provisions impede access

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[1] See, Manual of Legislative Drafting, p. 48 - 51 for a general discussion of these categories.

to the courts, the court would not strike the statute down entirely but would determine whether application of the statute would impede access to the courts on a case-by-case basis.

A court considering whether a court rule change and a two-thirds vote is required for HB 168 could take a position similar to Ware and conclude that the changes relating to posting security creates a new liability and is, therefore, a substantive change. Or, a court could conclude that the changes are a procedural change which would require a two-thirds vote. How the issue would be decided cannot be predicted with any certainty.

The current bill draft takes the approach that the change is a substantive change. Taking this approach presumes that a two-thirds vote is not required but runs the risk that a court could conclude that the measure makes a procedural change so a court rule change had actually occurred, and because a two-thirds vote was required, but not obtained, the change is invalid. With respect to the voting requirement, the safest procedure would be to treat the measure as requiring a rule change and obtain the two-thirds vote required to approve a rule change.

You also asked about the constitutionality of HB 168 in light of the holding in Patrick v. Lynden Transport., 765 P.2d 1375 (Alaska 1988). That case involved a statute that required payment of security for court costs and attorney fees when the plaintiff is a nonresident as a condition for maintaining the lawsuit in Alaska. The court found that access to the courts is a fundamental right, analyzed the case on equal protection grounds under the Alaska Constitution, and relied heavily on the residency versus non-residency issues presented by the case to reach the conclusion that the statute was unconstitutional.

HB 168 differs from the issue present in Patrick v. Lynden. In Patrick v. Lynden the plaintiff could not maintain the action without filing security for costs and fees. In contrast, HB 168 does not explicitly deny access to the courts, although, arguably it may have the same effect by denying access to restraining order or preliminary injunction. Another important difference is that HB 168 does not involve residency issues comparable to those in Patrick v. Lynden Transport and that were used by the court as the basis for the court's decision.

In short, the precedent established in Patrick v. Lynden does not determine whether HB 168 is constitutional, although it does establish that access to the courts is a fundamental right. Whether the requirements of HB 168 infringe on that right is an open question.

If I may be of further assistance, please advise.

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