

# 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 28, 2011

**SUBJECT:** Line Item Veto

**TO:** Senator Hollis French  
Chair of the Senate Judiciary Committee

**FROM:** Doug Gardner  
Director  
and  
Pamela Finley  
Revisor of Statutes

You have asked for a discussion of cases from other jurisdictions on the item veto, including those cited by the attorney general, as well as the meaning of "item" and "strike or reduce" as used in art. II, sec. 15, Constitution of the State of Alaska.

### I. The Meaning of "Item".

The second sentence of art. II, sec. 15 of the state constitution reads as follows:

He [the Governor] may, by veto, strike or reduce items in appropriation bills.

In *Alaska Legislative Council v. Knowles*, 21 P.3d 367 (Alaska 2001) (hereinafter "*Knowles*"), the court defined "item" as "a sum of money dedicated to a particular purpose":

Based on the language of our constitution, the historical purposes of the item veto, and the pertinent public policy considerations, we now define "item" as "a sum of money dedicated to a particular purpose."

*Knowles*, 21 P.3d at 371. The court noted that the "word 'item' conveys a notion of unity between two essential elements of an appropriation: the amount and the purpose." *Knowles*, 21 P.3d at 372. Although the court did not explicitly discuss the issue, footnote 28 in *Knowles* suggests that an item could have several purposes:

Consider, for example, the [undesirable] effect of striking from an appropriation's descriptive language a negative, a limiting date for expending the money, or one of several purposes. (emphasis added)

However, it appears from the court's discussion that an "item" can only have one amount. The court stated that "an item reduction must have a quantitative effect, implying that reduction must affect the appropriation's amount." *Knowles* at 372. In addition, two of the cases the court cited with approval indicate that an item may only have one amount: *Inter Faculty Org. v. Carlson*, 478 N.W.2d 192, 195 (Minn. 1991) (defining "item of appropriation" as "a separate and identifiable sum of money appropriated from the general fund dedicated to a specific purpose") and *Commonwealth v. Dodson*, 11 S.E.2d 120, 127 (Va. 1940) (defining "item" as "an indivisible sum of money dedicated to a stated purpose"). Cited in *Knowles*, 21 P.3d at 371, footnote 19. This is also the definition that governors in Alaska have used in exercising the item veto by vetoing allocations that have dollar amounts attached to them and reducing the appropriation by the amount of the allocation.<sup>1</sup>

Based on the definition in *Knowles*, an item could be any one of the following:

- "Four million for roads in Anchorage"
- "Four million for roads X, Y, and Z in Anchorage"
- "One million for road X in Anchorage"
- "One million for road Y in Anchorage"
- "Two million for road Z in Anchorage"

The last three items give the legislature more control over the specific projects, but can be vetoed individually as items. The first two are more general, but the governor's item veto would be limited to striking the entire line, or reducing the four million.

## II. The Meaning of "Strike or Reduce."

*Knowles* makes it clear that "reduce" refers to reducing the amount of the appropriation, not changing the purpose:

Reduction implies diminution. This suggests that an item reduction must have quantitative effect, implying that reduction must affect the appropriation's amount.

*Knowles*, 21 P.3d at 372. The court went on to explain that "strike" is just a greater version of reduce:

Reducing an item appears to be a lesser form of striking an item. This implies that these two forms are qualitatively similar and have equivalent

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<sup>1</sup> See also *In Re Advisory Opinion to the Governor*, 239 So.2d 1, 6 and 22 - 23 (Fla. 1970) (Governor's constitutional power to veto "any specific appropriation" applied to lines consisting of purpose and amount, even though grouped together.)

effects, i.e., they diminish the amount appropriated. Reducing an item lessens its amount; striking it lessens its amount to nothing.

*Knowles*, 21 P.3d at 372 - 373. The court in *Knowles* was quite clear that the power to "strike or reduce" was not the power to edit the purpose or descriptive language of an appropriation:

The item veto permits the governor only to tighten or close the state's purse strings, not to loosen them or to divert funds for a use the legislature did not approve. . . .

. . . [I]t [the item veto] was intended only to limit the legislature's appropriation power, not to grant the executive a quasi-legislative appropriation power permitting appropriations the legislature never enacted. . . .

Altering the purpose of the appropriation by striking descriptive words interferes with that unity [between the amount and purpose of the appropriation] because the result is no longer the item the legislature enacted.

*Knowles*, 21 P.3d at 372.

These purposes [of the item veto] seem most directed at the amount of an appropriation. Permitting a governor to strike descriptive language would not limit expenditures or help balance a budget.

*Knowles*, 21 P.3d at 373.

In short, "strike or reduce" means to eliminate the entire item or reduce the dollar amount of the item. Other deletions are not allowed.

### III. Case Law from Other Jurisdictions.

#### A. The Attorney General's Opinion.

Alaska Attorney General John Burns, in a memorandum to Chief of Staff of the Office of Governor Sean Parnell, cited *Karcher v. Kean*, 479 A.2d 403, 412 (New Jersey 1984), and *Legislative Research Comm'n v. Brown*, 664 S.W.2d 907, 919, (Ky. 1984) respectively, for the proposition that the contingency language in section 36 of CSSB 46(FIN), and the nonseverability clause in section 37 of CSSB 46(FIN), violate the separation of powers in art. II, sec. 13 (legislature has the power of appropriation), and art. II, sec. 15 (governor has line item veto authority). Neither case is fully supportive of the attorney general's position that either the contingency language of sec. 36, or the

nonseverability clause in sec. 37, are separation of powers violations. Both cases require discussion.

In *Karcher v. Kean*, 479 A.2d 403, 412 (New Jersey 1984), the New Jersey Legislature passed an appropriation bill, that provided for road construction projects totaling \$12 million. Of the total \$12 million, \$7 million was state matching funds for federally aided interstate highway projects, and \$5 million was for non-federally funded highway projects. *Karcher*, 479 A.2d at 411. The governor of New Jersey vetoed a line item appropriation for a highway project, but did not veto the legislature's estimated expenditure of \$3 million for that project, or the \$7 million total for state matching funds for federal highway projects. In addition, the governor used his line item veto to eliminate a highway reconstruction project, and the legislature's estimate for the cost of that project, but did not reduce the lump sum of \$5 million for non-federally funded projects, or the total of \$12 million total appropriation for the projects identified by the legislature.

In summary, the governor vetoed parts of the legislature's appropriations eliminating projects, but not the total appropriation amounts. *Id.* The *Karcher* court concluded that the governor appropriately exercised his veto authority, based on the fact that the New Jersey Constitution allows the governor to use line item veto authority to veto "whole or in part any such item or items while approving other portions of the bill." *Id.* at 489 citing art. V, sec. 1 para. 15 of the New Jersey Constitution.

Such a practice in Alaska would be unauthorized by art. II sec. 15 of the Alaska Constitution, and contrary to the reasoning in *Legislative Council v. Knowles*, 21 P.3d 367, 374 (Alaska 2001), where veto may be applied to an "item," which is defined as "a sum of money dedicated to a particular purpose." *Id.* In addition, vetoing parts of an appropriation (i.e. specific projects), without reducing the total appropriation, would have the effect of increasing appropriations for non-vetoed projects by reducing total projects, but allowing surviving items, or projects, to receive additional funding, in violation of art. II sec. 15, which limits the governor's veto power to "strike or reduce" an item. Based on the contrary provisions in the Alaska and New Jersey Constitutions, and the definition of what constitutes an "item" in *Knowles*, citation to *Karcher* does not support the proposition that the contingency language in sec. 36 creates a separation of powers violation.

The attorney general also cites *Legislative Research Comm'n v. Brown*, 664 S.W.2d 907, 919, (Ky. 1984), arguing that this case supports the proposition that the nonseverability language in sec. 37, constitutes a similar separation of powers violation. In *Brown*, there were two nonseverability provisions that the court addressed. The first nonseverability provision that the court addressed, involved legislation that placed a restriction on the executive, effectively eliminating the executive's ability to pass regulations that were not approved by a legislative body called the LRC. The legislation also provided for a nonseverability clause that provided if the LRC could not review regulations with the authority to "veto proposed regulations," that the executive could not issue any further

regulations. *Id.* at 919. The court found that the nonseverability clause so interfered and reallocated the constitutional powers of the executive to the legislative branch, that it refused to enforce the nonseverability clause. This is the portion of *Brown*, that the attorney general cited to in his memorandum.

Reading further in *Brown*, there was a second nonseverability clause that the court addressed. This second nonseverability clause involved legislation that provided that the LRC had the power to modify any application by the executive branch or overrule the executive branch's decision to apply for a federal block grant. *Id.* at 928. As previously discussed, the *Brown* court found that the LRC's usurping of the executive branch's power was a separation of powers violation. So the question for the court, was whether to enforce a separate nonseverability clause, that provided, "if any section of K[entucky] R[evised] S[tatute] 45.351 to KRS 45.358 is declared unconstitutional, then *no block grant* money received from the United States government shall be spent. . . ." *Id.* The Supreme Court of Kentucky held that since the "adoption of the state budget" is within the purview of the legislature, that the nonseverability clause related to the budget would be upheld. Accordingly, the *Brown* decision does not necessarily stand for the proposition that all nonseverability clauses are unenforceable; clearly in the context of appropriations, the *Brown* case stands for the proposition that a nonseverability clause in the context of an appropriation, is enforceable. *Brown* is perhaps more supportive of the legislature's prerogative to appropriate in the manner it chooses, and include a nonseverability clause in an appropriation bill if it is not permitted to appropriate in the manner it chooses.

The best guidance on how a court might approach a nonseverability clause comes from the U.S. Supreme Court's reasoning in *Alaska Airlines v. Brock*, 480 U.S. 678, 680 (1987), where the Court held:

Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law. . . . The final test . . . is the traditional one: the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.

*Id.* at 684-85.

In summary, based on the reasoning in *Alaska Airlines v. Brock*, and the *Brown* court's upholding the nonseverability clause in the context of block grant appropriations, the presence of a nonseverability clause would likely be seen by a reviewing court as strong, if not irrefutable evidence of the legislature's intent, that the legislature did not intend to enact the legislation if it could not do so in the manner that it originally chose.

B. Cases from Other Jurisdictions.

Because *Knowles* establishes both the test for violations of the Confinement Clause and the definition of "item", we have concentrated our research in the limited time available on cases where a veto of one appropriation affected another or affected the governor's power. Please note, however, that the law in this area varies from jurisdiction to jurisdiction so that cases from other states may or may not be convincing to Alaska's Supreme Court.

In *Commonwealth of Virginia v. Dodson*, 11 S.E.2d 120, 130 (Va. 1940), cited in *Knowles*, in footnotes 19 and 38, the court held that an item veto was invalid because the appropriation was integrally tied to other unvetoes budget provisions, even though it would have been subject to the item veto if it had not been tied to the other provisions. In *In Re Advisory Opinion to the Governor*, 239 So.2d 1 (Fla. 1970), the court was asked its opinion of a contingency that made numerous appropriations for education contingent on the passage of a substantive bill that was related to some but not all of those appropriations. The substantive law bill passed and the court did not find that contingency was unconstitutional, stating that "[a]ppropriations may constitutionally be made contingent upon matters or events reasonably related to the subject of the appropriation, but may not be made to depend upon entirely unrelated events." *Id.* 239 So. 2d at 22. In *Rush v. Ray*, 362 N.W.2d 479 (Iowa 1985), the governor was empowered to transfer funds under certain circumstances, but the legislature passed an appropriation with the condition attached that the governor's power to transfer did not apply to that appropriation. The governor maintained that the condition was an unconstitutional restriction on his power. The court disagreed:

[The provision allowing the transfer] is a limited and qualified delegation of a legislative power. An impingement on that authority, restricting its exercise against qualifications to appropriations, cannot be construed as a violation of an executive power. It did not invade or prevent the governor's exercise of his constitutional veto power. As we have discussed, the matters vetoed were qualifications rather than items. . . . Thus the executive power was not invaded.

*Rush v. Ray*, 362 N.W. 2d 479, 483.

Perhaps the most interesting case in this area is *Brault v. Holleman*, 230 S.E.2d 238 (Va. 1976). The legislature had passed appropriations for the integrated transportation system, but had done so by assigning separate dollar amounts for administration, buses, adjacent parking lots, and capital costs of the actual rail system. The governor vetoed the costs of the actual rail system, but left the others. Members of the legislature sued, alleging that the appropriations were linked in purpose and therefore could not be vetoed separately. The court recognized that the appropriations were logically linked and that "the various appropriations for the Metro system are 'tied up' one with the other." *Brault v. Holleman*, 230 S.E.2d at 243. However, the court held that the linkage between appropriations must

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be stated in the appropriation bill itself, and not be established by extrinsic evidence. Because the "singularity of purpose . . . does not appear from the terms of the appropriation bill," the court upheld the item veto. *Id.* 230 S.E.2d at 244. It appears from the discussion, however, that the court might have upheld a contingency linking all the appropriations had one been written into the bill.

If you have any questions about the above, please contact us.

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