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From: Rep. Max Gruenberg
Sent: Wednesday, April 27, 2011 4:43 PM
To: Mark Gnad
Subject: FW: Transcript of Attorney General Burns Press Conference on 4/26/2011:

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From: Carolyn Kuckertz
Sent: Tuesday, April 26, 2011 6:18 PM
To: keymedia
Subject: Transcript of Attorney General Burns Press Conference on 4/26/2011:

Good Evening Everyone!

Here is a transcript of the press conference held by Attorney General John Burns this afternoon:

If you would rather watch or listen: http://gavelalaska.org/media/?media_id=PRAV110426A

First of all, I would like to welcome all of you. I apologize that we are a little bit late, but I wanted to do is also provide you a copy of the memorandum that has been issued by my office so that you have a full copy of it. I am confident it will answer any of the questions you have relative to this.

The principles of our democratic form of government are grounded in the constitution and it is the constitution that governs resolution of the issue on which the capital budget seems to have floundered.- the injection of contingency and non-severability language that is unabashedly aimed at constraining the constitutional power of the Executive Branch. My responsibility as Attorney General, and in fact the responsibility of all public officials whether they be elected or appointed, is to uphold the constitution. Politics must always yield to the constitutional principles that govern the administration of our state.

The irony of what the Senate Finance Committee is proposing by injecting contingency and non-severability language into the appropriation bill is that far from protecting the energy projects that are listed in Section 4 of the Capital Appropriations Bill, the contingency and non-severability language actually jeopardizes those projects and exposes them to potential litigation from third parties.

Even if the governor were to choose not to line item veto any appropriation, the reality is that each appropriation would still be of dubious of legal validity if the non-severability provision were upheld. Any litigant opposed to any single energy project could invalidate every appropriation by successfully challenging the Legislature's unconstitutional attempts through section 36 to usurp the governor's constitutional veto power. The contingency language in Section 36 of Senate Bill 46 and the non-severability provisions of Section 37 each violate the Alaska Constitution by improperly impairing the governor's line item veto as found in Article 3, Section 15. Each of these provisions is invalid and unenforceable.

Section 36, which in layman's terms is considered a poison pill provision, would make each energy project appropriation contingent upon passage and enactment of every other appropriation without reduction in the amount of the appropriation. Section 37, on the other hand, provides that if the contingency language in Section 36 is invalid, then in essence all of the projects must fail. It is an all or nothing package.

The simple reality is that the contingency and non-severability language violates the constitution because it violates the governor's line item veto power by prohibiting the governor from striking or reducing any individual appropriation made in section 4 of the Capital Appropriations bill.

Alaska's Constitutional Convention Delegates intended to create a strong executive branch with a strong control on the purse strings of the state. That's a quote. Article 3, Section 15 of the Alaska Constitution gives the governor strong control by granting the governor the power by veto to strike or reduce items in appropriation bills, a power that is commonly known as the line item veto.

The Alaska Constitution also clearly establishes the parameters by which the Appropriations process must be followed. First, the governor is required to submit a budget to the Legislature for consideration. The Legislature, in turn, has the power to pass appropriation bills. The governor, once that has been done, the governor has line item veto authority of appropriations. Finally, the legislature has the authority to override a governor's veto.

Section 36 and Section 37 would violate this process by negating the governor's constitutional power to strike or reduce any individual energy project appropriation. Section 36 violates the governor's constitutional power by linking, I call it the linkage provision, by linking the appropriations of each energy project item to the passage or enactment of every other appropriation made in Section 4. This usurps the governor's line item veto power, thus upsetting the checks and balances on which our constitution is premised.

Think about it logically- If the Legislature could link one appropriation to another or 50, 60 or 70 different appropriations, the Legislature could effectively eliminate the governor's power to reduce individual line items. The governor would have two choices: either veto them all or accept each and every appropriation. Allowing the linkage of appropriations with such a contingency would too easily permit the Legislature to circumvent the governor's constitutional veto authority.

Section 37, in turn, exacerbates this constitutional violation by doubling the unconstitutional linkage to appropriations for energy projects. If it a contingency in Section 36 is held invalid, the legislature attempts to achieve the same unconstitutional result by making the contingency not severable from the energy project appropriation. If section 37 were found valid, the Legislature would effectively be usurping the governor's line item veto power by painting the all or nothing approach. A non-severability clause which would enable the Legislature to overstep its constitutional authority is itself unconstitutional and severable from the legislation. Upholding the validity of Section 37 would do nothing more than promote the Legislature's desire to usurp the governor's veto power and unconstitutionally logroll the appropriations from multiple energy projects.

From a practical perspective, equally significant in what is being overlooked by the political posturing that is taking place, is the risk that public interest litigation could place a cloud over each appropriation, which in turn would impair the development of important energy projects. Sections 36 and 37 make the funding intended for energy projects uncertain until a court rules on the validity of both sections. Until that time, no project proponent could rely upon actually receiving the money that is appropriated in Section 4. It would be both difficult and imprudent for project proponents to contract, to develop those energy projects when state funding is uncertain. Contract damages could arise if a project had to be stopped because an expected appropriation was held invalid. It was also be difficult or impossible for a project to obtain financing. Any lender or bond financing would require that all project funding be secured before additional financing would be made available on reasonable financial terms.

In sum, the invasion of the Executive Power functions makes the contingency language in Section 36 and the non-severability clause in Section 37 unconstitutional and invalid under the Alaska Constitution.

I have taken the liberty of providing a copy of the memo to those of you who are here and it will also be set forward under the link. It'll be in the link to our website at the Department of Law.

I'm happy to answer a few questions. I'm confident any questions you will have be answered in the memorandum. But, Becky?

Question: Where do you go from here? The governor yesterday said that if you get the bill with this language, you would have to test the bounds of it which suggests court action of some sort. Where do you take this? Do you let this play out in a court at some point?

Attorney General Burns: It is appropriate that it plays out in the Legislature until such time as the Legislature has finalized the Capital bill, it rightfully belongs with the Legislature to deal with the issues.

Question: Attorney General, let me see if I have your argument in summary that any language in that bill that would serve to limit the governor's line item veto power would be unconstitutional. It doesn't matter the exact sentencing, anything that does that?

Attorney General Burns: Yes.

Question: A senator from Anchorage this morning raised a 10-year-old court opinion. Are you aware of the opinion he raised on the Senate Floor and do you worry at all that your legal advice will conflict with that court decision from 2001.

Attorney General Burns: I believe you are referring to the Knowles, that case. I think the opinion of the Department of Law is very much consistent with the Knowles opinion. And again, I appreciate the press conference on availability and I will again, as I said, it's before you, the memorandum. It's also available by link. This is the Senate's language. At this juncture, it resides with the Senate. It's within the Senate's power to make those modifications before it's forwarded to the House. My intent in holding this press conference is just to unequivocally state the opinion of the Department of Law as it relates to that issue. Because again, I want to emphasize that you have to look at the practical implications of this. The practical implications are that in reality, many of these projects will, notwithstanding the fact that they may have appropriations, until these issues are resolved, either judicially, which I would hope would never get to that point, or legislatively through the Senate fixing the language, no project could rightfully go forward without being under a cloud.

Question: If you are talking about both legal questions and practical concerns and considerations- when you mention third party litigants and the prospect of third party litigants, do you have someone that you, that the state worries might go after a legal challenge? Who might sue over something like this?

Attorney General Burns: Anybody who feels that the process has been corrupted, that's there been a usurpation of the constitutional powers. Anyone. There are a myriad of potentials. It could be someone opposed to a project, somebody who just feels that, as I clearly do, that the constitution needs to be upheld. It's anyone who's a potential public interest litigant.

Question: Do you feel that the language in Section 37, the non-severability language, could be struck by line-item veto or does that not meet the definition of an item?

Attorney General Burns: It does not meet the definition of an item.

Question: So, it's more that you would potentially raise a court challenge to the language, not that you would recommend vetoing it?

Attorney General Burns: It's the effect of it. You know, the Legislature has the power to legislate, to state the obvious. So, the governor does not have the power to line item language. That's vested with the Legislature. It's the consequence of that language as it relates to the usurpation of the Executive branch's ability to act appropriately within its constitutional rights.

Question: What do you say to some of those of leaders in the Senate who say 'Our role is the appropriator and we just want to make clear that this money and these projects go forward.' As one Senator said yesterday, if the governor wants to veto, he just vetoes a larger chunk. You talked about the governor's authorities, but what about legislature's authorities. They think that they are on solid ground.

Attorney General Burns: The Legislature, it's their prerogative to lay whatever intent language they feel appropriate. But that intent language cannot infringe on the constitutional power that rests in the Executive Branch on the line item veto. Because, remember, in the end the Legislature retains the power to override a veto. That's the checks and balances. You don't allow one branch to usurp the rights of another just because they feel it may be convenient.

Question: Attorney General- You're saying in effect the governor has to veto that language if the Senate's Section 36 and 37 are in the bill. That your advice to him would be to veto those things to uphold the constitutional...

Attorney General Burns: At this juncture I've given no advice as to how to approach it and it would be speculative depending what the ultimate result of the language is. So I am going to reserve comment on that. But certainly he has multiple options. Thank you.

Carolyn Kuckertz

Press Secretary

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