

# LEGAL SERVICES

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## MEMORANDUM

February 12, 2013

**SUBJECT:** Limiting judicial review (SSHB 4; Work Order No. 28-LS0021\O)

**TO:** Representative Mike Hawker  
Attn: Rena Delbridge

**FROM:**   
Donald M. Bullock  
Legislative Counsel

You asked whether the legislature has the power to limit judicial review as offered in sec. 13 of the above-referenced bill. Although the legislature has the power to establish jurisdiction for the courts under art. IV, sec. 1, Constitution of the State of Alaska,<sup>1</sup> what the legislature categorizes as an issue of jurisdiction may be found by the courts to be a violation under the separation of powers doctrine.

Section 13 of SSHB 4 adds two new subsections to AS 38.35.200 -- AS 38.35.200(c) and (d).<sup>2</sup> New subsection AS 38.35.200(d) describes appeals that are not subject to the

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<sup>1</sup> Article IV, sec. 1: **Judicial Power and Jurisdiction.** The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature. *The jurisdiction of courts shall be prescribed by law.* The courts shall constitute a unified judicial system for operation and administration. Judicial districts shall be established by law. (Emphasis added.)

<sup>2</sup> Section 13, SSHB 4:

\* **Sec. 13.** AS 38.35.200 is amended by adding new subsections to read:

(c) Except as provided for an applicant in (a) of this section and notwithstanding any contrary provision of law, an action or decision of the commissioner or other state officer or agency concerning the issuance or approval of a necessary right-of-way, permit, lease, certificate, license, or other authorization for the planning, financing, acquisition, maintenance, development, construction, or initial operation of a natural gas pipeline by the Alaska Gasline Development Corporation under AS 31.25 that uses a right-of-way subject to this chapter may not be subject to judicial review, except that a claim alleging the invalidity of this subsection must be brought within 60 days after the effective date of this Act, and a claim alleging that an action will deny rights under the Constitution of the State of Alaska must be brought within 60 days following the date of that

limitations in AS 38.35.200(c), therefore this analysis addresses only AS 38.35.200(c) (subsection (c)). Subsection (c) limits appeals and provides for an accelerated process for judicial appeals from administrative actions related to the natural gas pipeline project. Subsection (c) is similar to AS 43.90.420<sup>3</sup> in the Alaska Gasline Inducement Act (AGIA) and 15 U.S.C. 720e in the Alaska Natural Gas Pipeline Act (ANGPA), both of which also provide for expedited resolution of disputes that would otherwise delay a natural gas pipeline project to transport North Slope natural gas to market. So far as I am aware, the ANGPA statutes have not been challenged in court.

Subsection (c) bars or limits access to the courts in two situations. First, the subsection bars or limits appeals from certain administrative actions, and second, the subsection sets a time period in which a person may make a challenge to the statute itself. Once in court, subsection (c) also restricts the authority of the superior court to grant injunctive relief.

### **Limiting appeals from administrative actions**

Generally, administrative decisions are presumed to be judicially reviewable, unless the legislature provides otherwise. The bill provides otherwise in subsection (c) by denying a judicial appeal except where a constitutional right is affected.

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action. A claim that is not filed within the limitations established in this subsection is barred. A complaint under this subsection must be filed in superior court, and the superior court has exclusive jurisdiction. Notwithstanding AS 22.10.020(c), except in conjunction with a final judgment on a claim filed under this subsection, the superior court may not grant injunctive relief, including a temporary restraining order, preliminary injunction, permanent injunction, or stay, against the issuance of a necessary right-of-way, permit, lease, certificate, license, or other authorization for the planning, financing, acquisition, maintenance, development, construction, or initial operation of a natural gas pipeline by the Alaska Gasline Development Corporation. In this subsection, "natural gas pipeline" has the meaning given in AS 38.34.099.

(d) An appeal of a permitting decision or authorization by the Department of Environmental Conservation under AS 46.03 or AS 46.14 that is made under a program approved or delegated by the United States Environmental Protection Agency is not

(1) subject to the limitation in (a) of this section;  
(2) included in the actions or decisions described in (c) of this section.

<sup>3</sup> **Sec. 43.90.420. Statute of limitations.** A person may not bring a judicial action challenging the constitutionality of this chapter or the constitutionality of a license issued under this chapter unless the action is commenced in a court of the state of competent jurisdiction within 90 days after the date that a license is issued.

In *Bethel Utilities, Corp. v. City of Bethel*,<sup>4</sup> the Alaska Supreme Court considered the issue of whether the superior court had jurisdiction to consider an appeal from an administrative decision made by the City of Bethel. The Court described the presumption that an appeal from an administrative decision was appealable to the superior court:

Unless the legislature provides otherwise, administrative decisions are presumed to be judicially reviewable. 5 K. Davis, *Administrative Law* §§ 28.1; 28.4 (2d ed. 1984). Here, the Bethel City Council has not precluded judicial review. Therefore, the law does provide for appeals from the city council's administrative decisions. Thus, the appellate rules apply . . . .<sup>[5]</sup>

The case seems to make the point that, because of the general jurisdiction of the superior court, a specific grant of superior court jurisdiction for an administrative appeal is not necessary.<sup>6</sup> Subsection (c) affirmatively bars an appeal to court from an administrative action described in the subsection, but could face the same fate as AS 22.10.020(d), to which the court did not defer in *Bethel*.

The part of subsection (c) that addresses the type of action from which a judicial review is prohibited is as follows:

[A]n action or decision of the commissioner or other state officer or agency concerning the issuance or approval of a necessary right-of-way, permit, lease, certificate, license, or other authorization for the planning, financing, acquisition, maintenance, development, construction, or initial operation of a natural gas pipeline by the Alaska Gasline Development

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<sup>4</sup> 780 P.2d 1018 (Alaska 1989).

<sup>5</sup> *Id.* at 1022 (footnotes omitted).

<sup>6</sup> The holding seems to conflict with AS 22.10.020(d), which states that the superior court has jurisdiction in all matters appealed to it from an administrative hearing when the appeal is provided by law. AS 22.10.020(d) states:

The superior court has jurisdiction in all matters appealed to it from a subordinate court, or administrative agency *when appeal is provided by law*, and has jurisdiction over petitions for relief in administrative matters under AS 44.62.305. The hearings on appeal from a final order or judgment of a subordinate court or administrative agency, except an appeal under AS 43.05.242, shall be on the record unless the superior court, in its discretion, grants a trial de novo, in whole or in part. The hearings on appeal from a final order or judgment under AS 43.05.242 shall be on the record. (Emphasis added.)

Corporation under AS 31.25 that uses a right-of-way subject to this chapter [AS 38.35] may not be subject to judicial review[.]

The limitation in this subsection only applies to administrative approval of actions that are typically within the authority of state, including authority for land use and leasing, environmental permits not addressed in the next subsection, and business regulation. The bar of a judicial appeal is limited to necessary authorizations for single project -- a natural gas pipeline that uses a right-of-way subject to AS 38.35 that is being developed by the Alaska Gasline Development Corporation (AGDC), a state corporation. In other words, the limitation does not apply to a natural gas pipeline developed by any other person, does not apply to a pipeline that does not use a state right-of-way subject to AS 38.35, and does not apply to a permit issued by a federal agency that is outside of the state's authority.<sup>7</sup>

Subsection (c) includes an exception to the bar against a judicial appeal -- the allowance for the filing of "a claim alleging that an action will deny rights under the Constitution of the State of Alaska." A common issue in administrative actions is the right to due process, which is presumably a right that may be the basis for an allowable appeal. The right to due process in art. I, sec. 7, Constitution of the State of Alaska, is as follows:

**Due Process.** No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

A person claiming that a state action violates due process or affects another a constitutional right must file an appeal from the action within 60 days. The 60-day period in subsection (c) is twice as long as the 30-day period for filing a judicial review of a final administrative order under AS 44.62.560(a) (Administrative Procedure Act). The period for making an appeal seems adequate.

#### **Limiting the period for challenging the statute**

The second of the two situations relating to a court appeal is a challenge to the validity of subsection (c). A challenge to the validity of statute must be filed within 60 days after the effective date of the subsection.

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<sup>7</sup> AS 38.35.200(d) specifically exempts "[an] appeal of a permitting decision or authorization by the Department of Environmental Conservation under AS 46.03 or AS 46.14 that is made under a program approved or delegated by the United States Environmental Protection Agency." The failure to comply with requirements imposed by the federal government may result in the withdrawal of federal approval or delegation and the return of certain environmental regulation from the state to the federal government.

The legislature has enacted a number of statutes that requires a person bring an action within a limited time period, including the statutes of limitation in AS 09.10 and the period for filing from an administrative order as mentioned above. This limited period is similar to the limitations for appeals under AGIA and ANGPA and is based on the intent to expedite appeals that would cause unreasonable or unnecessary delays in bringing North Slope natural gas to market.

One problem with limiting the period for challenging the statute (or AGIA for that matter) is that the failure to bring a constitutional challenge within a limited period does not make an unconstitutional statute constitutional. Ultimately, it will be up to the court to decide whether a late-filed constitutional challenge will be allowed. Although the legislature may limit the period for bringing the appeal, a superior court might nevertheless exercise what it interprets to be its general jurisdiction under AS 22.10.020(a) and consider the challenge.

#### **Limiting the court's injunction powers**

Subsection (c) limits the powers of the superior court with regard to injunctions, stays, and restraining orders. That part of subsection (c) reads as follows:

Notwithstanding AS 22.10.020(c), except in conjunction with a final judgment on a claim filed under this subsection, the superior court may not grant injunctive relief, including a temporary restraining order, preliminary injunction, permanent injunction, or stay, against the issuance of a necessary right-of-way, permit, lease, certificate, license, or other authorization for the planning, financing, acquisition, maintenance, development, construction, or initial operation of a natural gas pipeline by the Alaska Gasline Development Corporation.

If AS 22.10.020(c)<sup>8</sup> is strictly jurisdictional under art. IV, sec. 2, Constitution of the State of Alaska, the prohibition against injunctions, stays, and restraining orders could be upheld. On the other hand, the Alaska Supreme Court could find that injunctions, stays, and restraining orders are necessary tools of the superior court in the exercise of its constitutional powers, and find that the prohibitions in subsection (c) are not binding.

The Alaska constitution provides for the separation of powers by allocating powers between the legislature (art. II, sec. 1), the governor and the executive branch (art. III, sec. 1), and the judiciary (art. IV, sec. 1). The legislature may change court rules governing the administration of the courts or those governing practice and procedure by a

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<sup>8</sup> AS 22.10.020(c): "The superior court and its judges may issue injunctions, writs of review, mandamus, prohibition, habeas corpus, and all other writs necessary or proper to the complete exercise of its jurisdiction. A writ of habeas corpus may be made returnable before any judge of the superior court."

vote of two thirds of the members elected to each of the two houses,<sup>9</sup> but the legislature cannot reallocate constitutional powers. So long as Supreme Court finds that what the legislature considers a jurisdictional issue is actually one of judicial power, the Supreme Court may reject the limitations.

As discussed above, the Supreme Court has already rejected a jurisdictional limitation in AS 22.10.020 in favor of court power in *Bethel, supra*. In that case, the Alaska Supreme Court rejected limiting the language in AS 22.10.020(d) (that the superior court could only consider an appeal from an administrative agency "when provided by law") and ruled that "unless the legislature provides otherwise, administrative decisions are presumed to be judicially reviewable."<sup>10</sup> It is possible that a limitation by the legislature that prohibits an injunction, stay, or restraining order as provided in subsection (c) similarly could be set aside by the court if in conflict with the court's constitutional powers.

The resolution of the seeming conflict between the judicial power in art. IV, sec. 1, Constitution of the State of Alaska, and the jurisdiction of the courts prescribed by the legislature under the same constitutional provision and AS 22.10.020 cannot be predicted with certainty. The *Bethel* decision found authority for an administrative appeal when not specifically authorized by law; the Supreme Court could find authority for injunctions, stays, and restraining orders despite the enactment of subsection (c), which removes the authority, except in conjunction with a final order.

### **Conclusion**

Subsection (c) limits appeals, injunctions, stays, and restraining orders that could slow or stop progress in the development of an in-state natural gas pipeline by AGDC. The restrictions raise issues of legislative and judicial power and the separation of those powers. While the limitations provide protection for rights under the Alaska constitution, the resolution of the power conflict between the legislative and judicial branches may need to be settled by an action in court.

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<sup>9</sup> Article IV, sec. 15, Constitution of the State of Alaska.

<sup>10</sup> 780 P.2d at 1022.