

# LEGAL SERVICES

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

(907) 465-2450  
LAA.Legal@akleg.gov  
120 4th Street, Room 3

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

### MEMORANDUM

December 16, 2022

**SUBJECT:** Litigation Considerations  
(Work Order No. 33-LS0236)

**TO:** Jessica Geary  
Executive Director  
Legislative Affairs Agency

**FROM:** Emily Nauman  
Deputy Director



You asked whether the Legislative Council (the Council) may pay for the representation of a legislator in a lawsuit naming the legislator, and what guidance there is to aid the Council in making that determination. In sum, the decision of whether to bear the expense of litigation or indemnify the legislator is a discretionary determination that must be made by the Council. This memorandum sets out legal guidance to aid in your determination.

#### Legal Standard for Defending or Indemnifying a Legislator

There is no law in this state that requires the legislature to defend or indemnify a legislator. Therefore, whether to pay for the costs of the legal defense of a legislator is a discretionary decision of the Council.

There is no case or statute in this state setting out a standard for when the Council may defend or indemnify a legislator. However, in general, a public body may pay the legal expenses of a public official if (1) the lawsuit arises from the performance of official duties; (2) the official acted in good faith; and (3) a public purpose is served.<sup>1</sup>

---

<sup>1</sup> See, e.g., *Powers v. Goodwin*, 291 S.E.2d 466, 472 (W.Va. Ct. App. 1982) ("In order to justify indemnity from public funds, the underlying action must arise from the discharge of an official duty in which the government has an interest; the officer must have acted in good faith; and the agency seeking to indemnify the officer must have either the express or implied power to do so."). The Alaska attorney general has adopted a similar standard (public officers may have expenses they incur in defending against ethics complaints paid or reimbursed if (1) the officers are exonerated of any violation of the Ethics Act or other wrongdoing; (2) the officers acted within the course and scope of their offices or employment; (3) the expenses incurred were reasonable; and (4) there are appropriate sources of funds available to pay the expenses), finding that "these conditions ensure that the spending will serve a public purpose." 2009 Op. Alaska Att'y Gen. (Aug. 5).

i. Official Duties and Good Faith

Because the "good faith" and "scope of duties" requirements do not have a constitutional dimension, it is likely that a court would decline, on separation of powers grounds, to decide whether a particular act is made in good faith or is within the scope of duties of a legislator.<sup>2</sup> Therefore, a court is unlikely to overturn a Council determination that the legislator's action was in good faith and within the legislator's scope of duties.

ii. Public Purpose

Unlike the "good faith" and "scope of duties" requirements, the public purpose requirement does have a constitutional dimension. It is therefore likely a court would analyze the issue; an action found to violate the public purpose requirement would be rejected by a court.

Article IX, sec. 6, Constitution of the State of Alaska, states "[n]o tax shall be levied, or appropriation of public money made, or public property transferred, nor shall the public credit be used, except for a public purpose." In *Dearmond v. Alaska State Dev. Corp.*, the Alaska Supreme Court set out a standard for determining whether an expenditure had a public purpose:

At the outset we observe that the phrase 'public purpose' represents a concept which is not capable of precise definition. We believe that it would be a disservice to future generations for this court to attempt to define it. It is a concept which will change as changing conditions create changing public needs. *Whether a public purpose is being served must be decided as each case arises and in the light of the particular facts and circumstances of each case.*

In determining the question presented this court adopts for its guidance the general rule, supported by the great weight of authority, *that where the legislature has found that a public purpose will be served by the expenditure or transfer of public funds or the use of the public credit, this court will not set aside the finding of the legislature unless it clearly*

---

<sup>2</sup> See *Abood v. League of Women Voters*, 743 P.2d 333 (Alaska 1987); *Des Moines Reg. & Tribune Co. v. Dwyer*, 542 N.W.2d 491, 496 (Iowa 1996) ("It is entirely the prerogative of the legislature, however, to make, interpret, and enforce its own procedural rules, and the judiciary cannot compel the legislature to act in accordance with its own procedural rules so long as constitutional questions are not implicated. Furthermore, the legislature has complete control and discretion whether it shall observe, enforce, waive, suspend, or disregard its own rules of procedure, and violations of such rules are not grounds for the voiding of legislation.") (internal citations omitted).

*appears that such finding is arbitrary and without any reasonable basis in fact.*<sup>3</sup>

In sum, a court will not find an expenditure unconstitutional unless the legislature's finding that there is a public purpose is "arbitrary and without any reasonable basis in fact." The Council's determination of whether a public purpose is being served therefore need only meet the broad interpretation historically granted to the public purpose requirement, based on the facts and circumstances specific to each case.<sup>4</sup>

A number of states<sup>5</sup> provide by statute for the defense of public officials or employees if the legal or administrative action involves an act or omission within the scope of the employee's duties, indicating the belief of those legislatures that such expenditures are for

---

<sup>3</sup> *Dearmond v. Alaska State Dev. Corp.*, 376 P.2d 717, 721 (Alaska 1962) (emphasis added).

<sup>4</sup> The court has accepted a broad range of purposes as legitimate public purposes. *See Weber v. Kenai Peninsula Borough*, 990 P.2d 611, 615 n.24 (Alaska 1999), which lists cases finding public purpose in several different types of expenditures:

*See, e.g., Lake Otis Clinic, Inc. v. State*, 650 P.2d 388, 394 (Alaska 1982) (holding that the state's reimbursement to a guarantor who paid off a private, non-profit hospital's construction loan served a legitimate public interest); *Wright v. City of Palmer*, 468 P.2d 326, 330 - 31 (Alaska 1970) (holding that the city's issuance of general obligation bonds to finance a community development plan providing for the purchase of a site and the construction of a manufacturing and processing facility that would be leased to a private corporation did not violate the constitution's public purpose requirement because it would help boost the city's failing economy); *Walker v. Alaska State Mortgage Ass'n*, 416 P.2d 245, 252 (Alaska 1966) (the Alaska State Mortgage Association provides citizens with health, safety, welfare, comfort, security and economic benefits and thus serves a legitimate public purpose); *Suber v. Alaska State Bond Comm.*, 414 P.2d 546, 552 (Alaska 1966) (recognizing that the relief and support of the poor as well as the "aiding [of] those persons . . . who have suffered a substantial financial burden as a result of natural disaster" as public purposes); see also *Wright*, 468 P.2d at 328 n. 2 (listing cases upholding municipal financing of improvement projects).

<sup>5</sup> For example, California (Cal. Gov't Code § 16640-16642 (2007)), Illinois (5 Ill. Comp. Stat. 350/2.), Louisiana (La. Rev. Stat. § 13:5101), Massachusetts (Mass. Gen. Laws Ann. ch. 258, § 9), Montana (Mont. Code Ann. § 2-9-305), New York (N.Y. Pub. Off. Law § 17 (McKinney)), Oregon (Or. Rev. Stat. § 30.285 (West)), and Washington (Wash. Rev. Code § 4.24.490 (West)) all have public official indemnity statutes (this list is not exhaustive).

a public purpose. Courts appear to agree with this view, finding that providing for costs of defense serves a public purpose by encouraging people to fill positions that by their nature carry a fairly high risk of litigation.<sup>6</sup> The Alaska attorney general has also opined that a policy of indemnifying public officials has the public purpose of encouraging public service.<sup>7</sup>

Therefore, the Council could likely legally choose to pay for the legal defense of a legislator for official actions taken in good faith by the legislator, for the public purpose of encouraging public service.

#### Limitations

Legislative expenditures are not without statutory limitations. Legislative ethics laws prohibit public funds from being used "for a nonlegislative purpose, for involvement in or support of or opposition to partisan political activity, or for the private benefit of the legislator."<sup>8</sup> So, the Council may be in danger of violating ethics laws if litigation costs are determined to be for a nonlegislative, partisan, or private purpose. The Legislative Ethics Committee may be able to give the Council additional guidance on these limitations.

#### Conclusion

In sum, the Council may bear legal costs for a lawsuit against a legislator if the Council determines (1) the lawsuit arises from the performance of official duties; (2) the official acted in good faith; and (3) a public purpose is served.

If I may be of further assistance, please advise.

ELN:mjt  
22-318.mjt

---

<sup>6</sup> See, e.g., *Filippone v. Mayor of Newton*, 467 N.E.2d 182 (Mass. 1984); *Snowden v. Anne Arundel County*, 456 A.2d 380 (Md. 1983); *City of Chattanooga v. Harris*, 442 S.W.2d 602 (Tenn. 1969).

<sup>7</sup> 2009 Op. Alaska Att'y Gen (Aug. 5) ("The state may not spend public money for public officers' defense in ethics matters unless doing so serves a public purpose and appropriations exist for the expenditures. Defending officers accused of ethics violations or covering their legal expenses when they are exonerated clearly has a public purpose: citizens may be reluctant to serve in state government--or be inhibited in performing their official duties--if they must bear the cost of defending themselves against unfounded ethics charges related to their state duties.")

<sup>8</sup> AS 24.60.030(a)(2).