

## **LEGISLATIVE COUNCIL**

November 2, 2006

### **1. ROLL CALL**

The Legislative Council meeting was called to order at 9:42 a.m. by Representative Kott, Chairman, Legislative Council, in the Anchorage LIO, 2<sup>nd</sup> Floor Conference Room and via teleconference.

The roll was taken. In attendance were Council members: Representatives Kott, Gatto, Rokeberg, Gruenberg, Senators Cowdery, Davis, and Therriault. Members via teleconference: Representatives Coghill, Harris, Weyhrauch, Senators Ben Stevens, Gary Stevens, Wagoner, and Wilken. Other Legislators present: Representatives Gara, Kerttula, Seaton, Senators Seekins, and Stedman. Staff present: Varni, Ohmer, Williams, Bannister, Bullock, Collins, Finley, Ibesate, Mischel, and Schofield.

### **2. TEMPORARY RESTRAINING ORDER**

Representative Pete Kott stated that Legislative Council had two matters before them today; the first matter to take up was the complaint for declarative judgment and injunctive relief, which was filed in the Fairbanks area yesterday.

Senator Therriault moved that Legislative Council go into Executive Session under the Uniform Rules so the Council could hear from our attorney on where we stand in the litigation.

Representative Gruenberg objected. He stated that his objection was because there was a lot of public interest in this and he requested that once in Executive Session that only things really confidential be discussed and the rest of the discussion be in public.

Representative Gruenberg removed his objection.

Senator Ben Stevens objected. He stated the lawsuit was public record and he saw no reason to go into Executive Session to discuss a lawsuit that had already been filed.

Senator Therriault requested that Mr. Large, attorney for the plaintiff come forward. If Mr. Large believes he can discuss the conversations he's had with the Attorney General's Office on the record without putting himself or Legislative Council at a disadvantage that would be fine with him.

Mr. Large of Large and Associates, attorney for the plaintiff, stated it would be difficult to pick and choose what was confidential and what was not, to choose between privileged matters and what were not privileged matters.

Representative Gruenberg commented that Mr. Large could discuss the case and if they reached an area that was confidential they could go into Executive Session at that time.

Senator Therriault removed the motion regarding Executive Session.

Senator Cowdery indicated that Legal Services had provided opinions to Senator Stedman, which stated that Legislative Council could authorize a lawsuit in the interim if they voted to do so in a meeting. The second opinion stated that LB&A could use its Committee funds to pay for its share of the expenses of a lawsuit if the lawsuit was an expense of the Committee. Senator Cowdery asked that the opinions be distributed. The opinions were distributed.

Discussion followed.

Senator Therriault moved that Legislative Council authorize the work being done by Mr. Large, and that Legislative Council authorize that retroactively. Then Legislative Council can move on to a discussion on the negotiations that are taking place between Mr. Large and the Attorney General's Office.

Discussion followed.

Senator Therriault stated that Senator Seekins, Chair of the Senate Judiciary Committee and Chair of the Senate Special Committee on Oil and Gas, came to him with concerns relating to conversations Senator Seekins had with Governor Murkowski as to whether or not Governor Murkowski intended to sign the contract or not. These concerns were heightened even more when the Special Session was called as once the Legislature is in Session the call can be expanded. He checked with members of the Legislative Council and once he got to eight we proceeded because the feeling was that the Governor could very well sign the contract if he suspected there was litigation to prevent him. Once we got into court the Judge did not grant the restraining order but ordered an expedited hearing set for 2:00 p.m. this afternoon. He asked that we notify the Administration which we did Tuesday evening. Mr. Large and the Attorney General are negotiating how to dispense with this matter in an orderly manner.

Discussion followed.

Senator Therriault removed his previous motion and moved that the Legislative Council approve joining the lawsuit on behalf of the Legislature.

Senator Ben Stevens objected.

Representative Rokeberg asked that Mr. Large give the Council an update.

Mr. Large stated that the lawsuit was brought because of concern that Governor Murkowski was considering signing the fiscal contract without legislative authorization. The statute is very clear that legislative authorization is necessary. However, there have been a couple of legal opinions saying that perhaps requiring the Legislature to act almost like the Executive in approving the Governor's contract may be a violation of the separation of powers doctrine. It is possible, although Mr. Large thought it extraordinarily unlikely, that a Court may read that part of the statute out, and the position was that perhaps the Governor's signature may be effective. Mr. Large's opinion would be that he doesn't believe that the Alaska Supreme Court would permit the entire Stranded Gas Act to stand if that important legislative authorization portion was taken out because

when he looked back at how things were conducted in 1998, legislative authorization was an important part of getting the thing passed in the first place. The lawsuit seeks clarification.

Discussion followed.

The question was called.

YEAS: Kott, Coghill, Gatto, Harris, Rokeberg, Weyhrauch, Gruenberg, Gary Stevens, Therriault, Wagoner, Wilken, and Davis.

NAYS: Cowdery and Ben Stevens

ABSENT: None

The motion passed 12 - 2.

Representative Gruenberg moved that the Council recognize that the Legislature should not have been on the original verified complaint. The Council also recognizes that we have now voted to join the lawsuit and the Legislature should be on the lawsuit now. Therefore, Counsel should be directed to ensure that either the current lawsuit be considered either an amended complaint under Alaska Rule 15 or a new document and supporting affidavits be filed pursuant to Alaska Civil Rule 15.

Discussion followed.

YEAS: Kott, Coghill, Gatto, Harris, Rokeberg, Weyhrauch, Gruenberg, Gary Stevens, Therriault, Wagoner, Wilken, and Davis.

NAYS: Cowdery and Ben Stevens

ABSENT: None

The motion passed 12 – 2.

Senator Therriault moved that Legislative Council be authorized to underwrite the expense of this endeavor and it be retroactive to the date the motion was filed with the Court.

Representative Kott asked Mr. Large if he could give an estimate of the cost.

Representative Rokeberg asked Mr. Large if he had any conflicts of interest.

Mr. Large stated he had no conflicts of interest at this point.

Representative Gruenberg offered a friendly amendment to the motion authorizing payment for work done on this lawsuit commencing with work on the documents preparing for this lawsuit.

Representative Gruenberg also stated for the record that no double billing would be allowed on this contract and no payments would be made for political expenses.

Mr. Large stated that this lawsuit would probably be of limited duration. He stated \$50,000 would cover the costs at least until the Legislature was back in session.

Representative Gruenberg stated if this goes to litigation it is not unlikely this would wind up in the Supreme Court. He stated he would like the scope of the contract to be to the Superior Court. He would like any work done on appeal approved by Legislative Council. This lawsuit could well require other attorney's becoming involved in the litigation team and it should not solely be Mr. Large. As necessary, other attorneys may perform services at the discretion of the Chair of Legislative Council.

Discussion followed.

Senator Therriault restated the motion. He moved Legislative Council authorize a contract to Mr. Large for work he has done, authorizing the Chairmen the opportunity to set a dollar amount of the contract not to exceed \$50,000.

Chairman Kott assigned Ted Popely as Project Director.

Senator Therriault stated that Mr. Large had been working under a separate contract with Legislative Budget and Audit and Mr. Large will separate that work product from when he really started in earnest preparing the litigation.

YEAS: Kott, Coghill, Gatto, Harris, Rokeberg, Weyhrauch, Gruenberg, Gary Stevens, Therriault, Wagoner, Wilken, and Davis

NAYS: Cowdery and Ben Stevens

ABSENT: None

The motion passed 12 - 2.

### **3. ACLU v. STATE OF ALASKA (3AN-99-11179CI)**

Senator Ben Stevens stated that the Executive Branch was already involved in a lawsuit and he felt it was time to have a deliberation as to whether Legislative Council should join in the lawsuit. He recommended that Legislative Council approve and enter into an amicus brief in the case ACLU v. State of Alaska. Commissioner Nordstrand can outline the chronology of the case and where the case is now. Senator Ben Stevens said he was concerned that one, actions of a Superior Court can force the Legislature into a Special Session to remedy something the Court is trying to order that he doesn't believe they have jurisdiction to do. Two, under the same argument, he believes the Court has violated separation of powers by trying to force the Administration to implement regulations, that would in fact incur an appropriation, and the Courts don't have the power of appropriation, only the Legislature does, and this is a significant issue and that given the amount of time that the Legislature has left under this Administration and in this calendar year, the Legislative Council should join the State in a motion to stay before the Alaska Supreme Court to give more time for the next Legislature to adequately deliberate this topic.

Scott Nordstrand, Commissioner, Department of Administration, presented a timeline of events, and materials related to the case. In 1999, the ACLU filed suit against the State of Alaska and the Municipality of Anchorage, alleging that failure to provide same sex partner benefits, both health and retirement, was a violation of the equal protection clause in the Alaska Constitution. Ultimately, the Superior Court ruled in 2001 in the State's favor and concluded that there was no violation of the equal protection clause. In October of 2005, the Supreme Court reversed the Superior Court ruling and concluded that there was a violation of the equal protection clause. Their analysis was that the marriage amendment passed in 1998, essentially requires that marriage under Alaska law can only be between a man and a woman. The Supreme Court looked at that prohibition and concluded that same sex partners were prohibited from being married; therefore they were being discriminated against in a way that was not applicable to heterosexual partners, which may become married. It is not discrimination not to provide benefits to unmarried heterosexual partners because they could become married under Alaska law. The decision did not say what to do about it. The parties filed briefs with the Supreme Court and waited to find out what the Supreme Court felt the appropriate remedy was. They issued their decision on June 1, 2006 basically requiring the State of Alaska to begin providing these benefits to same sex partners of State employees and retirees by January 1, 2007. The State filed a series of briefs with the Superior Court over the summer outlining how they thought they could do this by administrative regulations and this concept was approved by the Superior Court. The Superior Court instructed the Department of Administration to submit an advance copy of the regulations to them.

Commissioner Nordstrand proceeded to bring the Council up to date on the status of the regulations and the Court Case.

He stated the ACLU has filed a motion to adopt emergency regulations. The ACLU believes the Department of Administration's regulations are unconstitutional and wants the Court to fix them and then order the Department of Administration to enforce them and make the regulations be effective immediately. The Department of Administration believes they are constitutional. The Commissioner proceeded to explain the actual regulations in greater detail.

Discussion followed.

Senator Wagoner called the question.

Senator Ben Stevens moved Legislative Council engage to file an amicus with the Supreme Court of Alaska for injunction on the timeline to allow the next Legislature to adequately address the statutory changes required on this topic.

Representative Rokeberg objected for purposes of discussion. He wanted to hear from Representative Weyhrauch about a letter he wrote to the Speaker.

Representative Weyhrauch stated that his letter should become part of the record so anyone could have it. The letter asked the Speaker to ask the Governor to rescind his request for a Special Session for several reasons. Representative Weyhrauch stated that he believed for the Legislature to deal with same sex partners this month would be premature and that because there was a recent Superior Court Order which had just come out and was now before the Supreme Court that anything that the Legislature would do could either be changed by the Supreme Court or dealt with in some manner which would potentially moot whatever the Legislature does in Special Session. It would inject us into a legal process that's full of uncertainty at this point and it would be better left to a Regular Session of the Legislature. Representative Weyhrauch didn't object to the amicus, he thought it was more appropriate than a Special Session.

Discussion followed.

Senator Ben Stevens stated that he thought there was a timeline for filing which was 10 days to file after the decision, which was issued by the Superior Court and 10 days to file with the Supreme Court. Hence the immediacy of this action by the Legislative Council in order to have the authority to enter an amicus.

Commissioner Nordstrand stated that he just wanted to make it clear that this did not become a crisis in terms of benefits we may be



providing until there was an October 19, 2006 motion made to issue emergency regulations to essentially codify standards that could be in concrete going forward, combined with the action by the Lieutenant Governor on October 23, 2006 where he stated he did not believe the Commissioner of Administration had sufficient statutory authority to issue regulations.

Discussion followed.

Representative Gruenberg offered an amendment to the motion. His amendment was that Legislative Council, instead of authorizing an amicus brief, authorizes a motion to intervene for the limited purpose of filing a very specific, limited motion. The motion would be to ask the Court to delay the implementation until the next legislative session or some date to be decided upon, and ask the Court to consider the stay on an expedited basis. Number two, if the Court grants the motion that the Governor be requested to rescind the call for the Special Session.

Representative Rokeberg objected.

YEAS: Weyhrauch, Gruenberg, and Davis

NAYS: Kott, Coghill, Gatto, Harris, Rokeberg, Cowdery, Ben Stevens, Gary Stevens, Wagoner, and Wilken

ABSENT: Therriault

The amendment failed 10 – 3.

Representative Rokeberg offered another amendment to give flexibility either it's an amicus brief or appropriate action to accomplish the same action.

Representative Weyhrauch suggested that the proper thing to do would be to move to intervene and in the alternative file as an amicus.

Senator Ben Stevens said he had no objection to the suggestion made by Representative Weyhrauch.

Representative Weyhrauch moved the amendment that Legislative Council would move to intervene or in the alternative file an amicus.

YEAS: Kott, Coghill, Gatto, Harris, Rokeberg, Weyhrauch, Gruenberg, Cowdery, Ben Stevens, Gary Stevens, Wagoner, Wilken, and Davis

NAYS: None

ABSENT: Therriault

The amendment passed 13 - 0.

Representative Kott stated that the amendment to the motion passed bringing the Legislative Council back to the original motion.

YEAS: Kott, Coghill, Gatto, Harris, Rokeberg, Weyhrauch, Cowdery, Ben Stevens, Gary Stevens, Wagoner, and Wilken

NAYS: Gruenberg and Davis

ABSENT: Therriault

The motion passed 11 – 2.

Representative Rokeberg moved Legislative Council authorize the Chair of Legislative Council to retain legal support that is necessary with a budget of \$25,000 to implement the last motion.

Representative Weyhrauch objected. He asked if the work could be done in house.

Discussion followed.

Representative Weyhrauch withdrew his objection.

YEAS: Kott, Coghill, Gatto, Harris, Rokeberg, Weyhrauch,  
Cowdery, Ben Stevens, Gary Stevens, Wagoner, and  
Wilken

NAYS: Gruenberg and Davis

ABSENT: Therriault

The motion passed 11 – 2.

Legislative Council adjourned at 1:25 p.m.