

LEGAL SERVICES

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MEMORANDUM

March 6, 2006

SUBJECT: Delegation of authority to a gaming commission
(Work Order No. 24-LS1745)

TO: Representative Tom Anderson
Attn: Heath Hilyard

FROM: Tamara Brandt Cook *TBC*
Director

You ask whether it is possible for the legislature to delegate to a gaming commission the power to expand the type of gaming or gambling permitted in the state. I understand that the commission would consist of appointed, rather than elected, members and would be a board in the executive branch of state government.

Our Supreme Court has expressed grave reservations regarding the delegation of legislative power to private groups. It has stated: "One reason for the prohibition against delegation to private groups is that when amendments are adopted by these groups the public does not necessarily receive notice of, or have an opportunity to comment on or criticize the amendments, as it does when they adopted by the legislature or promulgated under the Alaska Administrative Procedure Act." (Northern Lights Motel v. Sweaney, 561 P.2d 1176 (Alaska 1977) *reh. den.* 563 P.2d 256 at 1187) The delegation of the legislative taxing power to private parties by allowing them to approve the imposition of a tax is clearly prohibited by the Alaska Constitution under Art. IX, sec. 1. (Alex v. State, 646 P.2d 203 (Alaska 1982))

It is also clear that the legislature may not delegate to itself the authority to exercise its own powers in a manner that does not conform with the procedures for enactment of law set out in the constitution. (A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980) overturning AS 44.62.320(a) which authorized the legislature to annul a regulation by adoption of a concurrent resolution) Nor may the legislature delegate to one of its committees the power to exercise legislative powers. (Kelley v. Hammond, Alaska Superior Court, First Judicial District at Juneau, Partial Summary Judgment, Case No. C.A. 77-4, April 19, 1978)

However, when a delegation to the executive branch is at issue, rather than a delegation to a private or legislative entity, the court uses a different approach in its reasoning. Former AS 37.07.080(g)(2) granted to the governor the power to impound appropriated funds to meet a budget shortfall. The court found that statute to be an unconstitutional

violation of the separation of powers principle for two reasons: (1) it delegated power over appropriations to the executive branch, a power which is exercised by the legislature in accord with the procedures mandated by Art. II; and (2) the statute lacked standards to guide the exercise of administrative discretion. (State v. Fairbanks N. Star Borough, 736 P.2d 1140 (Alaska 1987)) The last point is significant. The court specifically noted:

This court does not hold that the legislature could not draft a statute which would permit the executive to exercise limited authority to control expenditures as Governors Cowper and Sheffield have done. Rather this court holds that the legislature unconstitutionally delegated legislative authority when it enacted AS 37.07.080(g)(2) without providing any meaningful guidance.

Indeed, the court has upheld significant delegations of legislative authority to executive branch agencies and boards. In Boehl v. Sabre Jet Room, Inc., 349 P.2d 585 (Alaska 1960) at 588 the court observed: "a strict theory of separation of powers ignores [the] realities and the practical necessities [footnote omitted] of government.... The real question, then, is not whether there may be delegation. Rather it is how far the legislature may go in delegating power to an agency...." In DeNardo v. State, 741 P.2d 1197 (Alaska 1987) the court explained:

Thus DeNardo's argument that the division [of elections] generally has no power to make election laws is without merit. The legislature is constitutionally empowered to delegate legislative authority to regulatory agencies under certain circumstances.

The question remain whether the specific regulation actually adopted by the division is valid. Resolution of this question involves a two-part inquiry: first, is the regulation consistent with and reasonably necessary to carry out the purposes of the statutory provisions conferring rule-making authority on the agency, [footnote omitted] and second, is the regulation reasonable and not arbitrary.

Therefore, the legislature may delegate limited legislative power to an executive branch agency when it provides appropriate standards for the exercise of that power and requires the agency to exercise the power in a manner that provides for public notice and comment, such as through the adoption of regulations. (See Municipality of Anchorage v. Anchorage Police Department Employees Association, 839 P.2d 1080 (Alaska 1992); Usibelli Coal Mine, Inc. v. State, Department of Natural Resources, 921 P.2d 1134 (Alaska 1996)) It is at least hypothetically possible that the legislature could by statute delegate to a gaming commission in the executive branch the power to expand the type of gaming permitted in the state if the statute requires that the delegated authority be exercised by regulation and, somehow, adequately limits the delegated authority and provides standards under which the authority must be exercised.