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Mike Dunleavy
Senator

MEMORANDUM

TO: Gov. Bill Walker
Sen. Gary Stevens, Chair
Legislative Council
Rep. Mike Hawker, Chair
Legislative Budget & Audit

FROM: Senator Mike Dunleavy

DATE: August 11, 2015

SUBJECT: Medicaid Reformation and Expansion

As you know, Governor Walker introduced SB 78 & HB 148 to the legislature with about one month remaining in the 2015 regular legislative session. The bills were heard in several committees and were making their way through the normal legislative process when our session ended. I for one was not on any committees which heard either version.

In anticipation of addressing both the reformation and expansion issues related to Medicaid in the upcoming 2016 legislative session, I directed my staff to focus their attention on doing the in-depth research necessary for me to cast an intelligent vote on these very complex issues which have such huge economic and health impacts on Alaskans. Independent experts are being retained to analyze our Medicaid program and make recommendations, and we were expecting their recommendations in advance of the regular 2016 session. It would certainly behoove us to examine these reports before taking definitive action.

However, the announcement on July 16 by Governor Walker that he would unilaterally expand Medicaid by superseding the normal public process of legislative hearings means the voice of my constituents via me as their elected senator is being quashed. Under this process, his proposal need not ever be approved or disapproved by the legislature.

The number of people who would enroll in Medicaid Expansion in Alaska is apparently still very unclear. Estimates range from approximately 26,000 to over 75,000. I urge either Legislative Budget & Audit or Legislative Council to have an independent analysis completed of the number and percentage of Alaskans eligible for the "expanded" class as well as estimated enrollment, along with the number of those anticipated to receive actual benefits. Similar data for the "current" class of Alaskans entitled to and receiving Medicaid services should be developed for comparison purposes. There have been recent well-publicized reports of several other states that grossly underestimated the numbers and cost involved. Any analysis we undertake should also include all of that information so that we understand all risks before we are asked to make a final decision which will impact our state well into the future.

The corresponding cost of covering recipients is also of concern. In mid-July, federal actuaries at the Centers for Medicare and Medicaid Services revealed that the cost to cover people who qualified for Medicaid in 2014 was significantly higher than they'd previously estimated. Since the governor's announcement was within days of this information being made available, I urge Legislative Council to request an updated analysis of the costs to expand.

I also request a 10-year projection showing overall costs to the state if we expand per the governor's proposal compared to costs if we maintain our current Medicaid eligibility. It's important that all Alaskans, and particularly we as representatives of the people, have access to this information.
In consideration of these factors, I request that Legislative Council and the Legislative Budget & Audit Committee take action now to urge Governor Walker to:

a) not proceed with his intended actions to expand Medicaid in Alaska through the RPL process; or
b) extend the date by which his administration will implement the expansion until the legislature fully vets all of the complex issues in either a special legislative session in the fall of 2015 or as the first item of business in the 2016 regular session.

If the governor agrees to either of these actions, I urge the leadership in both the House and the Senate to publicly commit to take up either SB 78 or HB 148 as the first order of business in the 2016 regular session, or, if requested by the Governor to convene a special session in October 2015 for the same purpose with the commitment to have the legislation voted upon on the floor on record.
If the governor will not agree to any of these actions by August 21, I urge Legislative Council to commence with a lawsuit regarding the legislature's appropriations authority.
There are multiple points upon which to base a lawsuit but I'll enumerate just a few here.

1) There seems to be some concern that the Legislature's unequivocal intent language relating to this issue may be held unenforceable by a court. This is, in my opinion, nothing but a red herring. This Medicaid issue is, if nothing else, a political issue and it is not necessary to rely upon only the "intent" language to arrive at the Legislature's stance on this subject. The existing law, A.S. 47.07.020 (d), directly addresses this issue and has no ambiguity whatsoever. It clearly reads: "(d) Additional groups may not be added unless approved by the legislature."
2) A.S. 47.01.020(a) dictates that all residents eligible for the mandatory Medicaid services plus some additional specified classes are eligible for medical assistance under the Social Security Act. The current RPL submitted by the Governor would extend the benefits to the newly expanded class unilaterally in violation of subsection (d) noted above. Equally important and with huge financial implications, the RPL would entitle that expanded class to receive the optional medical services for which the state is financially responsible into the future. Secondly, the verbiage of the recent Sebelius case by the U.S. Supreme Court clearly left open to each state whether they chose to expand or not expand. Unless and until the Alaska legislature makes that decision as earlier noted, Alaska remains among those states that have not exercised that expansion option.
3) In addition to this Sebelius case, our own Alaska Supreme Court has ruled on the question of what is constitutionally required in relation to the power to appropriate in our state. In the two attached cases between the state and the Fairbanks North Star Borough, our Supreme Court in considering another subsection of A.S.37.07.080, ruled it an "unconstitutional delegation of legislative power." Those cases arose when Governors Sheffield and Cowper impounded funds when oil revenue took a sharp decline during the budget year. In other words, the governors were trying to *save* the state from over-committing monies without incurring any additional long-term financial commitments. This contrasts sharply with this present RPL in that there is no question whatsoever that into the future, this Governor's RPL will *expand* the State's financial obligation to a substantially larger group of recipients. To quote from the actual language used by our Alaska Supreme Court to describe the statute: "statute which amounts to legislative abdication" and they pointed out that the statute as interpreted by Fairbanks would "effectively place the purse strings in the hands of the judiciary, a branch no more qualified to possess them than was the executive."
4) There is also the Superior Court case of Kelley v Hammond in which Judge Tom Stewart, in directly ruling on subsection (h) with respect to expenditure of "additional program receipts" as does the RPL of Governor Walker, ruled that to be "both an improper delegation of the legislative power to appropriate to a committee and a violation of the separation of powers doctrine to the extent that the provision authorized a legislative committee to exercise jointly with the governor's expenditure authority".

5) In addition to the financial considerations which will be borne by Alaskans for many years to come, there are very important policy questions which are directly impacted by any decision to expand formula-based programs and this is also clearly a decision to be made by the legislative branch of our government. For instance, would our resources be better spent in enhancing the medical assistance to current enrollees or will it be necessary to curtail their optional benefits if additional groups are added? Looking into the future, is it of a higher priority to fund the expansion than to provide better police protection, schools etc. And of utmost importance in our current financial outlook, can we afford to take this step?

And so the fundamental problem with AS 37.07.080 remains: the legislature and only the legislature maintains the power of appropriation. If the legislature decides to either decline to appropriate funds (whether state, federal or other) OR decides to fund specific programs at certain levels, that decision, if not successfully vetoed, is the law of the land.

Finally (though there are certainly legal concerns not covered in this memo) allow me to make one more point. AS 37.14.041(1) declares that mental health trust funds may only be used in fulfillment of the state's mental health program. I would therefore contend that there is a looming question about the legality of allowing the funds we as the legislature appropriated to the Alaska Mental Health Trust to be used to pay the first year administrative costs of expanding Medicaid in Alaska, as Governor Walker's administration has proposed.

I respectfully request both LB&A and Legislative Council act promptly upon the requests for action outlined in this letter. Thank you very much.

Court Cases Follow

State v. Fairbanks North Star Borough

736 P.2d 1140 (1987)

STATE of Alaska, William Sheffield, Governor of the State of Alaska, Marshall Lind, Commissioner of Education, Eleanor Andrews, Commissioner of Administration, Emil Notti, Commissioner of Community & Regional Affairs, Loren Lounsbury, Commissioner of Commerce & Economic Development, Milton Barker, Acting Commissioner of Revenue, all in their official capacities, Appellants, Cross-Appellees, v. FAIRBANKS NORTH STAR BOROUGH and Fairbanks North Star Borough School District, Appellees, Cross-Appellants.

Nos. S-2122, 2141.

Supreme Court of Alaska.

May 6, 1987.

Robert M. Maynard, Asst. Atty. Gen., Grace Berg Schaible, Atty. Gen., Juneau, for appellants/cross-appellees.

Mark Andrews, Asst. Borough Atty., Gordon W. Duval, Staff Atty., Paul H. Cragan, Borough Atty., Fairbanks, for appellees/cross-appellants.

Before BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

PER CURIAM.

The judgment is affirmed on the opinion of the superior court, attached as appendix, except as noted hereafter. The traditional rule that judicial decisions should apply retroactively governs this case as the resolution of the issue presented was foreshadowed by prior opinions of the state attorney general, there has been no irremediable reliance on the statute in question, and inequity would result if only the appellees were to receive the benefit of this ruling. See Commercial Fisheries Entry Commission v. Byayuk, 684 P.2d 114, 117 (Alaska 1984).

Accordingly, we remand this case to the superior court with instructions to modify its judgment to allow for total retroactivity.

*1141 AFFIRMED on the merits, REMANDED as to effect.

RABINOWITZ, C.J., not participating.

APPENDIX

FAIRBANKS NORTH STAR BOROUGH, and FAIRBANKS NORTH STAR BOROUGH SCHOOL DISTRICT, Plaintiffs,

vs.

STATE OF ALASKA, WILLIAM SHEFFIELD, Governor of the State of Alaska, MARSHALL LIND, Commissioner of Education, ELEANOR ANDREWS, Commissioner of Administration, EMIL NOTTI, Commissioner of Community & Regional Affairs, LOREN LOUNSBURY, Commissioner of Commerce & Economic Development, MILTON BARKER, Acting Commissioner of Revenue, all in their official capacities, Defendants.

Case No. 4FA-86-2528 Ci. IN THE SUPERIOR COURT FOR THE STATE OF ALASKA FOURTH JUDICIAL DISTRICT OPINION

This case comes before the court on the State's motion for summary judgment and the Borough's cross-motion. The motions require the court to resolve questions of constitutional and statutory interpretation. The facts are undisputed.

In December of 1985, Governor Sheffield submitted his proposed budget for fiscal year 1987 (FY87) to the legislature. His proposal was based on the Department of Revenue's December revenue forecast, which predicted that $2718.9 million in unrestricted funds would be available for FY87.

On March 12, 1986, the Department issued a new forecast, which projected a drop in revenue of $641.3 million. The decline was due to sharply reduced oil prices. Revenues derived from oil comprise approximately eighty-five percent of the State's income.

The budget passed by the legislature in early June of 1986 was approximately $400 million less than that submitted by the Governor in December. The Governor then exercised his veto power to further reduce appropriations to within $40 million of the June revenue projection. The budget was approved with item vetoes on June 9, 1986.

On July 16, 1986, the Department of Revenue issued the June forecast, which projected a further decline of $857.2 million, for a total projected deficit of $897.2 million.

At about the same time, the final accounting for FY86 was completed. Funds which remained unspent under the 1986 appropriations the unrestricted surplus totalled $17.3 million. That amount lapsed back into the general fund.

To cope with the substantial projected deficit, the Governor decided to act without recalling the legislature for a special session. He announced that he would restrict the obligation of revenues set aside by appropriation for FY87. On August 22, 1986, he issued Administrative Order No. 90, which stated that he had determined it to be in the State's best interest to withhold expenditure authority for certain appropriations.[1] His purpose was to avoid deficit spending which is prohibited by Article IX, sec. 8 of the Alaska Constitution.

Under Administrative Order No. 90, expenditure authority for different classes of appropriations was restricted by different percentages. Some appropriations were unrestricted. Appropriations which were intended to provide funds for municipalities were restricted ten percent; the ten percent restriction on those appropriations is at issue in this case.[2] Expenditures of *1142 appropriations for State agencies were limited by fifteen percent and those for capital projects sixty-five percent. The restrictions totalled approximately $450 million.

The Governor based his authority to issue Administrative Order 90 on Article III, secs. 1 & 24 of the Alaska Constitution[3] and AS 37.07.080(f) and (g).[4] The central question in this case is whether AS 37.07.080(g)(2) is constitutional.

AS 37.07.080(g)(2), a provision of the Executive Budget Act, provides that:

(g) The governor may direct the withholding or reduction of appropriations to a state agency at any time during the fiscal year only if the governor determines that ... . (2) estimated receipts and surpluses will be insufficient to provide for appropriations.

"Appropriation," for the purposes of the Executive Budget Act, is defined to mean "a maximum amount available for expenditure by a State agency for a stated purpose set out in an appropriation act." AS 37.07.120(3).

The Borough has argued that AS 37.07.080(g)(2) is unconstitutional for two reasons: first, because it delegates power over appropriations, a power which can only be exercised by the legislature in accord with the procedures mandated by Article II of the Alaska Constitution; second, because the statute lacks standards to guide the exercise

of administrative discretion. In either case, the Borough argues that the statute violates the principle of separation of powers.

The doctrine of separation of powers is implicit in the Alaska Constitution. As Justice Brandeis said, the doctrine was adopted

> not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the government powers among three departments, to save the people from autocracy.

Myers v. United States, 272 U.S. 52, 293, 47 S.Ct. 21, 85, 71 L.Ed. 160, 242-243 (1926). The question then is whether AS 37.07.080(g)(2) permits the arbitrary exercise of power.

On its face, AS 37.07.080(g)(2) purports to endow the Governor with discretion to reduce appropriations in effect, to amend the budget when anticipated revenues appear inadequate to meet appropriation levels. The State contends that the legislature intended only to delegate discretion over expenditures in such a situation. This interpretation would comport with prior decisions which have held that the legislature may delegate discretion to the executive to spend or not spend appropriated funds. The existence of such discretion is a question of legislative intent, as manifested by the language and legislative history of the statute. Ellis v. City of Valdez, 686 P.2d 700, 705 (Alaska 1984).

This court is under a duty to construe a statute to avoid constitutional infirmity where possible. However, it cannot go so far as to redraft defective legislation. State v. Campbell, 536 P.2d 105, 110-111 (Alaska 1975). The limiting construction suggested by the State cannot save this statute. AS 37.07.080 fails because it authorizes the exercise of sweeping power over the entire budget with no guidance or *1143 limitation. The statute is thus an unconstitutional delegation of legislative power.

The Alaska court has never applied the delegation doctrine to a statute of comparable breadth. This is not a case where the legislature has delegated broad authority to an agency with expertise to regulate a narrowly defined field. See Boehl v. Sabre Jet Room, Inc., 349 P.2d 585, 588 (Alaska 1960). Nor is this a case where the Act's purpose and standards are explicit and detailed. See Walker v. Alaska State Mortgage Association, 416 P.2d 247 (Alaska 1966). Indeed, the legislature has declined to provide even the general limitations and policy statements which were sufficient to

guide administrative discretion involved in making loans to promote economic development. De Armond v. Alaska State Development Corporation, 376 P.2d 717, 723 (Alaska 1962). Surely a delegation of authority over the entire budget deserves no less.

The delegation doctrine was developed in the federal courts; therefore, it may be useful to assess this statute under the standard articulated in a recent federal case, Synar v. United States, 626 F. Supp. 1374, 1383-89 (D.D.C. 1986). In Synar, the court found that a limited delegation of power over appropriations was not an unconstitutional delegation of legislative power. In that court's view, the constitutionality of a delegation is determined on the basis of the scope of the power delegated and the specificity of the standards to govern its exercise. "When the scope increases to immense proportions ... the standards must be correspondingly more precise." Id. at 1386. The essential inquiry is whether the specified guidance "sufficiently marks the field within which the administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will." Id. at 1387 quoting Yakus v. United States, 321 U.S. 414, 426, 64 S.Ct. 660, 668, 88 L.Ed. 834, 849 (1944).

The statute at issue in Synar permitted administrators to affect spending levels over a specified range of federal programs and only to a limited degree. Id. at 1386. The Act provided explicit direction as to the procedures to be followed and established basic assumptions, definitions and criteria to guide the administrators. Id. at 1387-89. The court held that Congress had provided an adequate "intelligible principle to guide and confine administrative decision making." Id. at 1389.

The detailed direction described in Synar stands in sharp contrast to the statute at issue here. The legislature has articulated no principles, intelligible or otherwise, to guide the executive. Under AS 37.07.080(g)(2), the governor decides when projected revenues are inadequate to meet appropriations.[5] Once he makes that determination, he may or may not assume authority under the statute. If he decides to act, he has total discretion as to which appropriations to cut and to what extent. The statute does not expressly require him to limit his cuts to the extent of the shortfall nor does it provide for adjustment of the cuts to the actual revenues received.

Most importantly, the executive is provided with no policy guidance as to how the cuts should be distributed. The State conceded at oral argument that the statute would permit the Governor to cut the entire budget for a particular department or project. Indeed, nothing in the statute would prevent him from effectively vetoing a project where

his veto had previously been overridden. An appropriation could be eliminated entirely, cut in half or left untouched. In short, the effect of an exercise of authority under AS 37.07.080(g)(2) is no more predictable than the identity and priorities of our next governor.

This memorandum is not intended to impugn the motives or good faith of Governors Sheffield and Cowper. Both have interpreted the grant of authority under AS 37.07.080(g)(2) narrowly and have acted in accord with that narrow interpretation. *1144 However, the issue in this case is not what has been done under the statute; rather it is what can be done. As one court has said,

> [W]e find nothing in [the statute] whatsoever to indicate that the legislature was granting the authority to be exercised only in the circumstances and under the conditions which respondent says it has imposed on itself. As we read the section, the grant is absolute and totally devoid of restraints, direction or rules. Accordingly, the fact that respondent acted only under certain self-imposed restraints can in no way serve to supply what has been omitted.

State ex rel. Holmes v. State Board of Finance, 69 N.M. 430, 367 P.2d 926, 932 (1961). The limited exercise of authority undertaken in Administrative Orders 90 and 91 cannot save a statute which amounts to legislative abdication.

Nevertheless, the actions taken by the governors are relevant to the final issue in the case: the effect of this decision holding that AS 37.07.080(g)(2) is an unconstitutional delegation of legislative power. The State contends that this ruling should be given only prospective effect.

The Supreme Court has identified four conditions indicating the propriety of nonretroactive treatment in civil cases: 1. the holding is one of first impression ... and was not foreshadowed in earlier decisions; 2. there has been justifiable reliance on an alternative interpretation of the law; 3. the purpose and intended effect of the holding is best accomplished by prospective application; 4. undue hardship would result from retroactive application. Plumley v. Hale, 594 P.2d 497, 503 (Alaska 1979) (citations omitted).

In this case, the factors listed above favor partial prospective application of the holding in this case. The decision is one of first impression which was not clearly foreshadowed in prior Alaska cases applying the delegation doctrine. The governors acted reasonably in justifiable reliance on the statute when they issued the Administrative Orders; it is

probable that the legislature and the public have relied on those Orders as well. In addition, retroactive application would not further the purpose of this ruling. 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.

In the final analysis, the determination of the effect of this decision must be guided primarily by equitable considerations: what is necessary, what is fair, and what is workable. Id. at 504, n. 28 (citation omitted). The court is aware that the governor, the legislature and the public are now attempting to cope with the effects of diminished revenues. Stability is an important factor in making that adjustment. Total invalidation of Administrative Orders 90 and 91 now would only inject additional uncertainty into an already difficult calculation. The court notes that others in positions similar to plaintiffs have elected not to join this suit. As a practical matter then, it would be unduly burdensome, indeed unnecessary, to require the legislature to reconsider the entire $450 million deficit that the Administrative Orders served to remedy. The court therefore holds that this decision applies only prospectively except as to the plaintiffs in the case at bar. Whether plaintiffs ultimately obtain funding depends, of course, on legislative action or inaction.

SUMMARY

1. AS 37.07.080(g)(2) is unconstitutional.

2. Insofar as they are applicable to plaintiffs Fairbanks North Star Borough and Fairbanks North Star Borough School District, Administrative Orders Nos. 90 and 91 are set aside.

3. In light of the foregoing, it is unnecessary for the court to reach the other issues raised in plaintiffs' complaint.

*1145 DATED at Fairbanks, Alaska this 6th day of April 1987.

/s/ James R. Blair JAMES R. BLAIR Superior Court Judge NOTES

[1] On December 8, 1986, Governor Cowper issued Administrative Order No. 91 for the same purpose and under the same authority cited in Administrative Order No. 90.

Fairbanks North Star Borough v. State

753 P.2d 1158 (1988)

FAIRBANKS NORTH STAR BOROUGH and Fairbanks North Star Borough School District, Appellants, v. STATE of Alaska, William Sheffield Governor of the State of Alaska, Marshall Lind, Commissioner of Education, Eleanor Andrews, Commissioner of Administration, Emil Notti, Commissioner of Community and Regional Affairs, Loren Lounsbury, Commissioner of Commerce and Economic Development, Milton Barker, Acting Commissioner of Revenue, all in their official capacities, Appellees.

No. S-2254.

Supreme Court of Alaska.

May 6, 1988.

*1159 Eugene P. Hardy and Mark Andrews, Asst. Borough Attys., Gordon W. Duval, Staff Atty., Fairbanks, Paul H. Cragan, Hughes, Thorsness, Gantz, Powell & Brundin, Fairbanks, for appellants.

James Baldwin and Robert M. Maynard, Asst. Attys. Gen., Grace Berg Schaible, Atty. Gen., Juneau, for appellees.

Before MATTHEWS, C.J., and BURKE, COMPTON and MOORE, JJ.

OPINION

BURKE, Justice.

This case is before us for the second time on appeal. In State v. Fairbanks North Star Borough, 736 P.2d 1140, 1140-41 (Alaska 1987) (Fairbanks I), we affirmed the superior court's decision holding unconstitutional the governor's impoundment of certain legislative appropriations under the authority of AS 37.07.080(g). We concluded that that statute permitted the governor so much discretion as to amount to an unconstitutional delegation of legislative power to the executive branch. Id. at 1142-44. As a result of our decision, the governor's Administrative Orders,[1] which had withheld expenditure authority on funds earmarked for, among others, plaintiffs Fairbanks North Star Borough and Fairbanks North Star Borough School District (collectively "Borough"), were vacated, clearing the way for payment of the appropriated funds. Id. at 1144.

Before any payment was made, however, the legislature enacted ch. 9, SLA 1987 (H.B. 132),[2] which explicitly ratified and approved all of the restrictions imposed by the governor. The trial court, on remand,[3]*1160 concluded that H.B. 132 was a valid curative act, and modified its earlier judgment to affirm the withholdings. Now, with the governor and the legislature in complete agreement on the cuts, appellant local governments approach this court seeking compelled payment of the originally appropriated funds. We affirm the modified decision of the trial court.

A curative statute is

> a statute passed to cure defects in prior law, or to validate legal proceedings, instruments, or acts of public and private administrative authorities which, in the absence of such an act would be void for want of conformity with existing legal requirements, but which would have been valid if the statute had so provided at the time of enacting.

2 C. Sands, Sutherland Statutory Construction § 41.11 (4th ed. 1973); see generally School District No. 26 Bouse Elementary of Yuma County v. Strohm, 106 Ariz. 7, 469 P.2d 826, 828 (1970); McCormack v. Houston, 84 Cal. App.2d 665, 191 P.2d 569, 576-77, cert. denied, 335 U.S. 868, 69 S.Ct. 138, 93 L.Ed. 412 (1948). In this case, the state legislature passed H.B. 132 with the express intention of validating the governor's impoundment orders, which had been rendered void by the Fairbanks I decision. See ch. 9, § 1(b), SLA 1987. Thus, if the statute qualifies as a valid curative act, it should be given its intended retroactive effect, thereby legitimizing the governor's heretofore improper exercise of executive power.

Courts have uniformly upheld the validity of curative legislation where (1) the legislature originally had the power to authorize the acts done, and (2) there is no unconstitutional impairment of vested rights as a result of the act's passage. See State ex rel. Tomasic v. Kansas City, 230 Kan. 404, 636 P.2d 760, 775 (1981); accord Strohm, 469 P.2d at 828; Hoffman v. City of Red Bluff, 63 Cal.2d 584, 47 Cal. Rptr. 553, 558, 407 P.2d 857, 862 (1965); Labor Inv. Corp. v. Russell, 405 P.2d 1008, 1012 (Okla. 1965); 2 C. Sands, Sutherland Statutory Construction § 41.11-.12 (4th ed. 1973), see also Zurfluh v. State, 620 P.2d 690, 692-93 (Alaska 1980) (applying retroactively a curative statute relating to criminal sentencing). H.B. 132 easily satisfies both requirements.

First, it can hardly be argued that the legislature is without power to enact a statute authorizing the governor to withhold payment on specific appropriations. See, e.g., State ex rel. Holmes v. State Board of Finance, 69 N.M. 430, 367 P.2d 925, 929 (1961);

State ex rel. Boyle v. Ernst, 195 Wash. 214, 78 P.2d 526, 528 (1938); see also Fairbanks I, 736 P.2d at 1144 ("[t]his 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 [the governor has] done"). H.B. 132 does not grant the governor "sweeping power over the entire budget with no guidance or limitation," as did AS 37.07.080(g)(2). Fairbanks I, 736 P.2d at 1142-43. Rather, it is narrowly tailored to authorize only those impoundments specified in Administrative Orders 90 and 91. See ch. 9, § 2, SLA 1987. The Borough's argument that H.B. 132 "is unconstitutional for the same reasons AS 37.07.080(g)(2) was unconstitutional" is therefore unconvincing.

Second, H.B. 132 does not unconstitutionally impair any vested rights. The Borough's claimed violations of due process and equal protection fail for a number of reasons, not the least of which is our recent holding in Kenai Peninsula Borough v. State, Department of Community and Regional Affairs, 751 P.2d 14, 18-19 (Alaska 1988), wherein we concluded that political subdivisions of the state are prohibited from asserting due process and equal protection claims against their creator. In sum, we see no bar to enforcement of H.B. 132 as a valid curative act.[4]

*1161 Our decision in Fairbanks I comports with our analysis here. In Fairbanks I, we affirmed the trial court's finding that the governor acted unconstitutionally in withholding the Borough's funds because he purported to act under the authority of a statute so broadly worded as to amount to an abrogation of the legislature's responsibility over appropriations. 736 P.2d at 1142-43. The legislature has since recognized its responsibility, and has taken it upon itself to consider and approve each of the heretofore unconstitutional impoundments. To now hold, as the Borough suggests, that our earlier decision gave the Borough some inviolate right to receipt of the funds, would be to effectively place the purse strings in the hands of the judiciary, a branch no more qualified to possess them than was the executive.

We conclude that H.B. 132 is a valid and constitutional exercise of the legislative power, which effectively cured may constitutional infirmities in the governor's earlier actions. Accordingly, the judgment of the superior court is AFFIRMED.

RABINOWITZ, J., not participating.

NOTES

[1] Former Governor Sheffield issued Administrative Order No. 90 in August, 1986. 736 P.2d at 1141. A very similar order, Administrative Order No. 91, was issued by Governor-elect Cowper in December, 1986. Id. at n. 1. For purposes of convenience, we refer to these executive actions herein simply as those of "the governor."

[2] We decided Fairbanks I on May 6, 1987. However, we granted a ten-day stay of judgment on the basis of the state's assertion that such time was needed to allow the legislature to respond to the situation. H.B. 132 was enacted May 15, 1987.

[3] In Fairbanks I, we affirmed the superior court on the merits, but we remanded with instructions that the court modify its earlier judgment to allow for total retroactivity. 736 P.2d at 1140-41. After enactment of H.B. 132, the state moved this court for rehearing in Fairbanks I. We denied the motion, but we expressly noted that our denial was "without prejudice to appellants' right to move for a modified judgment in the superior court" on remand.

[4] We reject as meritless the Borough's numerous other claims of error.

Governor Cowper made a ten percent actual cut in expenditures for school debt retirement.

[2] Those appropriations included amounts set aside for municipal grants, school bond debt reimbursement, State shared revenue, municipal assistance, day care assistance, public school foundation account, tuition for military schools, education of youth in detention, grants for community schools and transportation.

[3] Art. III, sec. 1 provides that:

The executive power of the State is vested in the governor.

Art. III, sec. 24 provides that:

Each principal department shall be under the supervision of the governor.

[4] AS 37.07.080(f) and (g) provide as follows:

(f) The office shall report quarterly to the governor and the legislature on the operations of each state agency, relating actual accomplishments to those planned and modifying, if necessary, the operations plan of any agency for the balance of the fiscal year.

(g) The governor may direct the withholding or reduction of appropriations to a state agency at any time during the fiscal year only if the governor determines that

(1) the planned expenditures can no longer be made due to factors outside the control of the state which make the expenditure factually impossible; or

(2) estimated receipts and surpluses will be insufficient to provide for appropriations.

[5] Before the Governor can take any action under AS 37.05.159, the statute creating a reserve for emergency operating expenses, he must make an express finding that there is an "imminent danger" that the State will be unable to meet its operating budget expenses. AS 37.05.159(b)(1). AS 37.07.080(g)(2) does not explicitly require a similar finding.