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April 22, 2009

Honorable Thomas H. Kean, Jr.
203 Elm Street, 1st Floor
Westfield, New Jersey 07090

Dear Senator Kean:

This legal opinion is in response to the request submitted on your behalf by Mr. James Harkness of the Senate Republican Office concerning the Governor's proposed suspension of so called "poison pill" provisions through the annual appropriations act. You have requested an opinion as to whether amounts statutorily dedicated for appropriation through a poison pill may be overcome by an annual appropriations act. Intertwined with that issue, is also the novel question of whether poison pill collection cessation provisions, which are triggered when the statutory dedications are not met, may also be overcome by an annual appropriations act. You are advised that a statutory dedication for appropriation may be overcome by a subsequent appropriations act for the State fiscal year to which the appropriation act is applicable. However, attempting to suspend a poison pill's collection cessation provision through an annual appropriations act may violate the one object requirement of the New Jersey Constitution. Such a suspension may best be undertaken through separate legislation.

Generally, a "poison pill" is a type of statutory mechanism that calls for certain dedications of particular revenues. If the dedications are not met, the poison pill is said to be triggered and the revenue collection generating the dedications ceases to be collected.

As referenced in your request, the Governor's proposed annual appropriations act language provisions includes a provision which specifies that "[n]otwithstanding any other law or regulation to the contrary, because of the economic downturn and the crisis in the financial markets, it is not possible in Fiscal Year 2010 to appropriate monies to fund all programs authorized by statute. As a result, the Governor's Budget Message and Recommendations for Fiscal Year 2010 recommended, and the Legislature agrees, *that either no State funding or less than the statutorily-required amount be appropriated* for certain of these statutory

programs.” GOVERNOR’S PROPOSED GENERAL LANGUAGE PROVISIONS FOR THE STATE FISCAL YEAR 2009-2010 ANNUAL APPROPRIATIONS ACT, P. F8, available at: <http://www.state.nj.us/treasury/omb/publications/10budget/pdf/generalprov.pdf> (last accessed 04.17.09) (emphasis added).^{1, 2}

The basis upon which an annual appropriations act may override a statutory dedication for appropriation is the Legislature’s “inherent power to disregard prior fiscal enactments.” Camden v. Byrne, 82 N.J. 133, 147 (1980). In Camden v. Byrne, the New Jersey Supreme Court faced the question of whether the statutory dedications of certain tax revenues were properly overridden by a subsequent annual appropriations act. The Court concluded that “a definite legislative intent as reflected in the general appropriation laws necessarily supersedes any previously expressed legislative desires at least for the duration of the particular appropriation act. The earlier statutes cannot coexist with the enacted appropriation and, consequently, must be deemed to be suspended by adoption of the later appropriation acts.” Id. at 154. Moreover, construing a statutory dedication as an appropriation would be “inconsistent with the constitutional provisions requiring appropriations to be incorporated into a single balanced budget”³ Id. at 151.

However, in overriding the amounts statutorily dedicated for appropriation in a poison pill, an annual appropriation act would trigger the poison pill’s collection cessation provision. That

¹ It may also be noted that the Governor’s proposed annual appropriations act language provisions also includes the following passage, “[i]f any law requires annual State funding, and if the amount of the funding in this act is insufficient to meet the requirement, the statutory requirement shall be deemed to be suspended for the current fiscal year to the extent that the funding is insufficient.” GOVERNOR’S PROPOSED GENERAL LANGUAGE PROVISIONS FOR THE STATE FISCAL YEAR 2009-2010 ANNUAL APPROPRIATIONS ACT, P. F7, available at: <http://www.state.nj.us/treasury/omb/publications/10budget/pdf/generalprov.pdf> (last accessed 04.17.09)

² The statutory references of poison pill provisions potentially affected by an annual appropriations act proposal which attempts to suspend such mechanisms include: the State hotel and motel occupancy fee as linked to the funding of certain cultural and tourism related programs (N.J.S.A. 54:32D-2); the State portion of the realty transfer fee as related to the funding of neighborhood preservation; shore protection and Highlands protection (N.J.S.A. 46:15-10.2, N.J.S.A. 13:19-16.1 and N.J.S.A. 46:15-7); the Corporation Business Tax as is linked to the Energy Tax Receipts Property Tax Relief Fund (N.J.S.A. 52:27D-439 and N.J.S.A. 52:27D-441); the greenhouse gas emissions allowance trading program (N.J.S.A. 26:2C-51 and N.J.S.A. 26:2C-53); the solid waste facility recycling tax (N.J.S.A. 13:1E-96.7 and N.J.S.A. 13:1E-96.5); and the user fee on certain sales of litter-generating products as related to the funding of the Clean Communities Program Fund (N.J.S.A. 13:1E-216, N.J.S.A. 13:1E-217 and N.J.S.A. 13:1E-223).

³ See *infra* text of N.J. Const. (1947), Art. VIII, Sec. II, par. 2 at P. 5.

is to say, if the statutory dedications for appropriation are not met, then the collection of the revenue source at issue is to be halted.^{4, 5}

Presumably to address the potential discontinuation of various revenue raising devices as prescribed via statutory poison pill collection cessation provisions, the aforementioned proposed language provision from the Governor also provides that “a lack of appropriations represents the intent of the Legislature to suspend in full or in part the operation of the statutory programs, *including any statutorily-imposed restrictions or limitations on the collection of State revenue* that is related to the funding of those programs.” GOVERNOR’S PROPOSED GENERAL LANGUAGE PROVISIONS FOR THE STATE FISCAL YEAR 2009-2010 ANNUAL APPROPRIATIONS ACT, P. F8, available at: <http://www.state.nj.us/treasury/omb/publications/10budget/pdf/generalprov.pdf> (last accessed 04.19.09) (emphasis added).

The novel question then arises whether the collection cessation provisions contained in poison pills may be properly overridden by a subsequent annual appropriations act. Such a maneuver might be characterized as authorizing revenue raising. Cast in such a light, including a provision to override poison pill collection cessation provisions in the annual appropriations act may be inconsistent with the traditional contents of the annual appropriations act and the New Jersey Constitution’s one object requirement.

New Jersey’s Constitution specifically provides:

To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, *every law shall embrace but one object*, and that *shall be expressed in the title*. N.J. Const. (1947), Art. IV, Sec. VII, par. 4 (emphasis added).

⁴ Conceptually, the collection cessation provision of the State hotel and motel occupancy fee is an example of how poison pills generally halt the collection of revenues. It reads “[t]he Director of the Division of Taxation shall, no later than five days after certification by the Director of the Division of Budget and Accounting in the Department of the Treasury pursuant to subsection d. of this section that the [appropriations called for by the] provisions of subsection c. of this section have not been met or have been violated by an amendment or supplement to the annual appropriations act, notify each person required to collect tax of the certification and that the [State hotel and motel occupancy] fee . . . shall no longer be paid or collected.” N.J.S.A. 54:32D-2, subsection e. See *supra* references of other poison pill provisions in footnote 2.

⁵ It should be noted that the poison pill attached to the greenhouse gas emissions allowance trading program essentially suspends the program. See N.J.S.A. 26:2C-51 and N.J.S.A. 26:2C-53. This may mean that an annual appropriations act seeking to suspend this poison pill may, in addition to authorizing revenue raising, be authorizing the continuation of a program.

Since the annual appropriations act must be a “law,” it is subject to the one object requirement.⁶

The New Jersey Supreme Court has opined that “the standard by which compliance with the single object rule will be measured . . . [is] the relatedness *vel non* of the various matters embraced within one enactment.” Correction v. Lan, 80 N.J. 199, 206 (1979) (citing New Jersey Association on Correction v. Lan, 164 N.J. Super. 115, 122 (App.Div. 1978), rev’d, Correction v. Lan, 80 N.J. 199 (1979)).⁷ As noted by the New Jersey Supreme Court, “[t]he evil intended to be guarded against [by the single object rule] was not the inclusion in one act of more than a single matter, but the inclusion therein of matters not properly related among themselves.” Id. (second alteration in original) (citations omitted).⁸ “The purpose of the constitutional requirement is ‘to prevent frauds upon legislation by means of uncertain, misleading or deceptive titles to statutes.’” State v. Zelinski, 33 N.J. 561, 565 (1960) (citation omitted).⁹

The title of the annual appropriations act has generally been:

An act making appropriations for the support of the State Government and the several public purposes for the fiscal year ending June 30, XXXX and regulating the disbursement thereof.

This title bears a notable resemblance to paragraph 2 of Section II of Article VIII of the New Jersey Constitution, which reads:

⁶ See *infra* text of N.J. Const. (1947), Art. VIII, Sec. II, par. 2, at P. 5.

⁷ It should be noted that the New Jersey Supreme Court agreed with the Appellate Division’s “synthesis” of the standard for the one object requirement under paragraph 4 of Section VII of Article IV of the New Jersey Constitution and the “single object” requirement under the debt limitation clause for laws initiating certain debts as provided in subparagraph a. of paragraph 3 of Section II of Article VIII of the New Jersey Constitution. Correction v. Lan, 80 N.J. 199, 206 (1979) (citing New Jersey Association on Correction v. Lan, 164 N.J. Super. 115, 122 (App.Div. 1978), rev’d, Correction v. Lan, 80 N.J. 199 (1979)).

⁸ See *supra* explanation of “synthesis” of standard related to “one object” and “single object” requirements in footnote 7 and note that the Appellate Division considered both objects to be aimed at preventing “‘logrolling’ . . . [which occurs when] a weak or unpopular measure is coupled with an unrelated popular one in order to facilitate its passage.” New Jersey Association on Correction v. Lan, 164 N.J. Super. 115, 122 (App.Div. 1978), rev’d, Correction v. Lan, 80 N.J. 199 (1979).

⁹ A discussion of the one object rule may be found in Justice Pashman’s dissenting opinion in Vreeland v. Byrne, 72 N.J. 292, 340 (1977) (Pashman, J., dissenting). The one object rule “is intended to prevent ‘logrolling,’ and to give notice to the public and legislators of the subject to which an act relates.” Id. (citations omitted).

All moneys for the support of the State government and for all other State purposes as far as can be ascertained or reasonably foreseen, shall be provided for in one general appropriation law covering one and the same fiscal year

It seems that the "usual title" for the annual appropriations act is an expression designed to comply with the constitutional mandate pertaining to the contents of one general appropriation law.¹⁰ Moreover, the New Jersey Supreme Court has accepted the meaning of an appropriation as "an authorization, statutorily enacted by the Legislature, for the withdrawal of monies from the State treasury for governmental purposes." Karcher v. Kean, 97 N.J. 483, 491 (1984) (citations omitted). The concept of authorizing the withdrawal of monies as pronounced in the usual title of the annual appropriations act may not as a matter of course encompass the authorization to continue the imposition of revenue raising devices in contravention of a poison pill's statutorily provided collection cessation provision.

While "the title of a statute is intended to be a label and not an index," it must give notice to the Legislature and to the public of the general purpose of the act and must not be misleading. Painter v. Painter, 65 N.J. 196, 206-207 (1974) (citations omitted). "If the Legislature included provisions that were totally alien to the central subject of the appropriations law and completely divorced from either the appropriations of funds for state purposes or the manner in which appropriated monies are to be spent, such action would most certainly be in constitutional jeopardy." Karcher v. Kean, 97 N.J. 483, 506-507 (1984) (citations omitted).

Although it is not entirely clear what the standard might be for provisions to be considered "totally alien" or "completely divorced," the quotation clearly denotes that there is a limit to what may be properly included within an annual appropriations act. Given the traditional scope of the annual appropriation act, which does not include revenue raising, as is denoted by the usual title and the nature of appropriations as a term, it would seem as though overriding a poison pill's statutory collection cessation provision through the annual appropriations act may violate the one object requirement of the New Jersey Constitution.

While it is the conclusion of this opinion that the authority to impose a revenue raising device may fall beyond the one-object of the annual appropriations act and its usual title, it may be noted that there are grounds upon which one might assert otherwise with regard to the

¹⁰ The term "usual title" is borrowed for use from a formal opinion of the Attorney General of New Jersey. A.G.F.O. 1975-No.15.

issue at hand. The New Jersey Supreme Court has provided that “[t]here are . . . no specific constitutional standards or rules for determining the content or format of an appropriations act. Therefore, some inherent flexibility and discretion attend the fiscal-formulation process.” Karcher v. Kean, 97 N.J. 483, 491 (1984). Moreover, in considering the one object requirement the Court has said, “we must keep in view the total legislative process. We cannot look merely at the end-product and decide the challenge without regard to events which led to it.” State v. Zelinski, 33 N.J. 561, 565 (1960).

It may be further noted that the New Jersey Supreme Court reviews matters with a presumption in favor of the Legislature to have acted constitutionally. *See* Karcher v. Kean, 97 N.J. 483, 506 (1984) This presumption as applied to the inclusion of a seemingly unrelated provision in the annual appropriations act could be used to imply the “intention to relate such conditions to the appropriations contained in the Act.” *Id.* at 507. The Court might “presume that the Legislature, by including such conditions, intended to act constitutionally in exercising its fiscal power over appropriations and that such conditions were intended to relate to and govern the expenditure of appropriated funds.” *Id.* This rationale may be linked to the Court’s “broad rather than a strict or hyper-technical approach” in measuring the “relatedness concept.” Correction v. Lan, 80 N.J. 199, 213 (1979). In relying on such a rationale one might assert that a poison pill’s collection cessation provision is related to and within a broadly defined one object of the annual appropriations act.

However, it should be noted that if the suspension of poison pills were undertaken through legislation separate from the annual appropriations act, the one object analysis at issue in this opinion would not be necessary.¹¹ Such an undertaking would release the poison pill suspension provision from the annual appropriations act specific one object analysis and subject the provision to separate voting, perhaps in accordance with the purpose of the one object requirement.

¹¹ Please note this opinion does not address the question of whether the suspension of each poison pill provision must be undertaken by separate legislation for purposes of complying with the one object requirement.

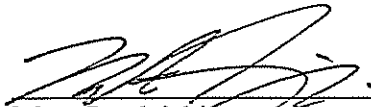
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In conclusion, you are advised that poison pill provisions statutorily dedicating certain amounts for appropriation may be overcome by a subsequent appropriations act for the State fiscal year to which the appropriation act is applicable. However, attempting to suspend a poison pill's collection cessation provision through an annual appropriations act may violate the one object requirement of the New Jersey Constitution. Such a suspension may better be undertaken through separate legislation.

Very truly yours,

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