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New Jersey State Legislature

OFFICE OF LEGISLATIVE SERVICES
STATE HOUSE ANNEX
PO BOX 068
TRENTON NJ 08625-0068

PERI A. HOROWITZ
Executive Director
(609) 847-3901

LEGISLATIVE COUNSEL

JASON M. KRAJEWSKI
Legislative Counsel

MARCI LEVIN HOCHMAN
First Assistant Legislative Counsel
Ethics Counsel

JAMES G. WILLSON
Assistant Legislative Counsel

GABRIEL R. NEVILLE
Senior Legislative Counsel

ELIZABETH J. BOYD
Associate Legislative Counsel

December 23, 2015

Honorable Bob Smith
216 Stelton Road, Suite E-5
Piscataway, New Jersey 08854

Dear Senator Smith:

This is in response to your request for a legal opinion concerning whether the Executive is authorized to spend \$19.972 million for Parks Management from corporation business tax revenues constitutionally dedicated for open space preservation, when the Legislature adopted language in the Fiscal Year (FY) 2016 appropriations bill to appropriate funds for Parks Management from the Clean Energy Fund, and the Governor then removed reference to the Clean Energy Fund in the enacted FY 2016 appropriations act through use of the line-item veto.

Put another way, the question presented is whether the Governor may, through use of the line-item veto and an expression of intent in the Executive's Line-Item Veto message, create a controlling condition on an appropriation, namely that the funds appropriated come from the Governor's proffered source.

It is the opinion of Legislative Counsel that the authority to appropriate funds lies solely with the Legislature. Since no appropriation for Parks Management has been directed to be made by law in the annual appropriations act from the constitutionally dedicated account in the General Fund for the preservation of open space pursuant to Article VIII, Section II, paragraph 6 of the State Constitution, the Governor may not expend funds from this account.

Background

The relevant facts are as follows: The Governor's FY 2016 Budget Recommendations requested a \$19.972 million appropriation from corporation business tax revenues dedicated

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for open space preservation pursuant to Article VIII, Section II, paragraph 6 of the State Constitution to be used for Parks Management.¹ Subsequently, the Legislature adopted language in the FY 2016 appropriations bill providing that the \$19.972 million appropriation come from the Clean Energy Fund, instead of from constitutionally dedicated corporation business tax revenues.² Following the Legislature's passage of the FY 2016 appropriations bill, the Governor used the line-item veto to delete reference to the Clean Energy Fund. The Executive's Line-Item Veto Message of June 26, 2015 stated with regard to the appropriation: "This language is modified to delete the inappropriate reference to the Clean Energy Program and preserve the original intent of the Governor's budget recommendations for Fiscal Year 2016, consistent with the dedication set forth in Article VIII, Section II, paragraph 6 of the State Constitution and the General Provisions of this act." There was no subsequent legislative override of the veto.

Analysis

The question presented requires analysis of the respective roles and powers of the Legislative and Executive branches, and of the provisions of the FY 2016 appropriations act.

As part of the annual budget process "[t]he Governor is statutorily authorized to 'examine and consider all requests for appropriations' and to 'formulate . . . budget recommendations to be forwarded to the Legislature for its consideration and ultimate approval.' N.J.S.A. 52:27B-20." Karcher v. Kean, 97 N.J. 483, 489 (1984).

"The power and authority to appropriate funds are vested in the legislative branch of government . . ." Karcher, supra, 97 N.J. at 489 (citing City of East Orange v. Palmer, 52 N.J. 329, 337 (1968)). "An appropriation is an authorization, statutorily enacted by the

¹ Article VIII, Section II, paragraph 6 provides, in relevant part, "The amount annually credited pursuant to this subparagraph shall be dedicated and **shall be appropriated from time to time by the Legislature only for:** providing funding, including loans or grants, for the preservation, including acquisition, development, and stewardship, of lands for recreation and conservation purposes, . . ." N.J. Const. Art. VIII, Sec. II, par.6 (emphasis added).

² The language of the FY 2016 appropriations bill passed by the Legislature stated "Notwithstanding the provisions of any law or regulation to the contrary, there is appropriated \$19,972,000 from the Clean Energy Fund for Parks Management."

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Legislature, for the withdrawal of monies from the State treasury for governmental purposes.” Karcher, supra, 97 N.J. at 491 (citing City of Camden v. Byrne, 82 N.J. 133, 149 (1980)).

The Constitution of the State of New Jersey provides:

No money shall be drawn from the State treasury but for appropriations made by law. 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;
. . . . N.J. Const. Art. VIII, Sec. II, par.2.

However, “[t]he . . . legislative authority over appropriations is subject to checks and balances from the executive.” Karcher, supra, 97 N.J. at 489. “The Governor’s statutory authority to propose the State budget, and his constitutional power to exercise a selective veto over legislative appropriations, constitute significant responsibilities for the State’s fiscal affairs, and are essential to an efficient, modern system of government.” Id. The Governor’s line-item veto power is granted in Article V, Section I, paragraph 15 of the New Jersey Constitution. As interpreted by the courts of this State, that power extends to language provisions regarding an appropriation, including conditions, limits, and restrictions, as well as dollar amounts in line items. Karcher, supra, 97 N.J. 483. The Legislature may override such line-item veto upon approval by two-thirds of the membership of each house. N.J. Const. Art. V, Sec. I, par.15.

The expending of public money is distinct from the appropriation of public money. To expend is “to lay out; spend.” To appropriate is “to set apart for a specific use.” Webster’s II New College Dictionary at 394, 56 (1999) see Brown v. Honiss, 74 N.J.L. 501 (E. & A. 1906). Our courts recognize the distinction between the power to appropriate or not appropriate funds, a legislative function, and the power to expend the appropriated funds, an executive function. Communications Workers of America, AFL-CIO v. Florio, 130 N.J. 439, 461 (1992)(citing In re Karcher, 190 N.J.Super. 197, 213 (1983) (quoting Brown v. Honiss, 74 N.J.L. 501, 521 (E. & A. 1906)).

The Governor is vested with the executive power of the State. N.J. Const. Art. V, Sec. I, par.1. In the exercise of this function “the Governor is to execute state programs funded by items of appropriations” Karcher, supra, 97 N.J. at 502. While the Governor has responsibility for the executive function of making expenditures, those expenditures can only be done in the execution of the terms and conditions that apply to the enacted appropriation, or permission to spend.

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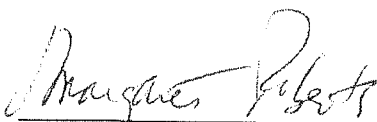
P.L.2015, c.63 contains seven language provisions for Fiscal Year 2016 that expressly authorize the expenditure of constitutionally dedicated corporation business tax revenue for appropriations from that dedicated revenue. No such language is attached to the \$19.972 million appropriation for Parks Management. Further, there is an overarching general direction set forth in the first sentence of section one of P.L.2015, c. 63: "The appropriations herein or so much thereof as may be necessary are hereby appropriated out of the General Fund, or such other sources of funds specifically indicated or as may be applicable, for the respective public officers and spending agencies and for the several purposes herein specified for the fiscal year ending on June 30, 2016."

Conclusion

Upon review of the annual appropriations act, case law concerning powers of appropriation, and executive authority concerning the expenditure of appropriations, we know of no controlling or persuasive legal authority that supports the proposition that an Executive's expression of intent as contained in a Line-Item Veto Message creates a controlling condition or restriction on an appropriation. In the absence of a specific language provision in P.L.2015, c.63 appropriating from corporation business tax revenues constitutionally dedicated for open space preservation, it is the opinion of Legislative Counsel that there is no authorization for the Governor to expend funds for Parks Management from the constitutionally dedicated corporation business tax revenues.

Very truly yours,

Jason M. Krajewski
Legislative Counsel

By: 
Margaret Roberts
Associate Counsel

JK:mr/sh