

MEMORANDUM

State of Alaska Department of Law

TO: Darwin Peterson
Legislative Director
Office of the Governor

DATE: March 20, 2016

TEL. NO.: (907) 465-2132

FROM: Jerry Juday
Assistant Attorney General
Labor and State Affairs Section

SUBJECT: Nonvoting Legislative
Membership on AGDC
Board; SB 125/HB 282

You requested a memorandum that you could provide to legislators addressing the question of whether the appointment of legislators to the Alaska Gasline Development Corporation Board (AGDC) would be constitutional. The short answer is that legislative membership on the AGDC board, even if the members would not be able to vote, is unconstitutional for the reasons discussed below.

The appointment of two legislators to the board of directors of a public corporation in the executive branch of state government is unlawful for two separate reasons. First, the appointments would contravene the prohibition against dual office holding set out in section 5, article II of the Alaska Constitution. Second, the appointments would violate the separation of powers doctrine.

The question becomes whether making the legislators nonvoting members changes the analysis and makes the appointment compliant with the constitution. It is our opinion that it does not.

Section 5, article II of the Alaska Constitution prohibits a legislator from holding “any other office or position of profit” of the United States or the State of Alaska. Further, this section of the constitution also prohibits a legislator from being nominated, elected, or appointed “to any other office or position of profit which has been created, or the salary or emoluments of which have been increased, while he was a member.” The appointment of sitting legislators as AGDC directors would cause these legislators to hold two different offices in state government at the same time, which the constitution forbids. As the Alaska Supreme Court noted in *Begich v. Jefferson*, 441 P.2d 27, 30 (Alaska 1968), this section of the Alaska Constitution makes it clear that the framers intended “there should be no dual office holding from the standpoint of a legislator.”

We do not believe it matters that the positions on AGDC’s board will be non-voting. As the court said in *State Board of Workforce Education and Career Opportunities v. King*, 985 S.W.2d 731, 735 (Ark. 1999), based on a similar constitutional prohibition, “it makes little difference whether [the legislator] actually votes on the issue at hand. He is unmistakably

exercising the power of the executive branch of government by his participation on the board.” The danger of “conflicts of interest, self-aggrandizement, concentration of power, and dilution of separation of powers” that the prohibition against dual office holding was meant to guard against would still be present. *Begich v. Jefferson*, 441 P.2d 27, 35 (Alaska 1968).

Prior opinions of the Department of Law are consistent with this conclusion. The term “office” as used in the constitution is to be broadly construed. The term extends to “a public charge or employment, the duties of which are prescribed by law, and he who performs the duties is an officer.” 1981 Inf. Op. Att’y Gen. (April 10; J-66-557-81), 1981 WL 38619, at *1. Such a public charge reasonably includes the duty prescribed by law to act as a director that advises and gives direction to a public corporation carrying out an executive function. “The term ‘office’ stands without further limitation. We believe it includes offices which effect or directly influence the execution... of the law.” 1988 Inf. Op. Att’y Gen. (Feb. 29; 663-88-0371), 1988 WL 249424, at *1. Moreover, “[m]embership by legislators is constitutionally precluded even if the position is construed as not ‘for profit’ and as advisory only.” 1996 Inf. Op. Att’y Gen. (May 24; 883-1996-0063), 1996 WL 915884, at *3.

Furthermore, we believe the separation of powers doctrine precludes legislators from sitting on the AGDC board as directors. The doctrine of separation of powers “prohibits one branch from encroaching upon and exercising the powers of another branch.” *Bradner v. Hammond*, 553 P.2d 1, 5 n.8 (Alaska 1976). Having legislators on AGDC’s board, even as nonvoting members, would contravene the governor’s executive power to appoint subordinate executive branch officials and generally implement and enforce the laws passed by the legislature. Separation of powers is of particular concern under the pending bills because the legislature would be making appointments to an executive branch entity in contravention of the governor’s power of appointment under section 1 and section 26 of article III of the Alaska Constitution. In addition, having legislators participate in executive sessions of the AGDC board to discuss confidential executive branch matters would violate the executive privilege that “is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.” *United States v. Nixon*, 418 U.S. 683, 708 (1974).

For the foregoing reasons, it is our opinion that legislators serving as nonvoting members on the AGDC board of directors is unconstitutional.¹

¹ This memorandum is focused on legislative membership on the board of directors of a public corporation that is charged with executive branch duties of carrying out a statutory program. Whether legislators can serve on other types of bodies, such as temporary, advisory boards, or investigatory task forces not charged with carrying out executive branch functions, is a different question that would require a different analysis.