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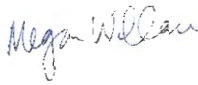
State Capitol
Juneau, Alaska 99801-1182
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MEMORANDUM

March 18, 2021

SUBJECT: Extending a disaster (Work Order No. 32-LS0702)

TO: Representative Benjamin Carpenter

FROM: Megan A. Wallace
Director 

You asked several questions regarding the legislature's power to extend a disaster declaration issued by the governor, particularly where the declaration has already expired.

AS 26.23.020(c) states:

(c) If the governor finds that a disaster has occurred or that a disaster is imminent or threatened, the governor shall, by proclamation, declare a condition of disaster emergency. The disaster emergency remains in effect until the governor finds that the danger has passed or the disaster has been dealt with so that the emergency no longer exists. The governor may terminate the disaster emergency by proclamation. *A proclamation of disaster emergency may not remain in effect longer than 30 days unless extended by the legislature by a concurrent resolution.* The proclamation must indicate the nature of the disaster, the area threatened or affected, and the conditions that have brought it about or that make possible the termination of the disaster emergency. A proclamation to declare a condition of disaster emergency must also state whether the governor proposes to expend state funds to respond to the disaster under (i) or (j) of this section.¹

While AS 26.23.020(c) does not specifically contemplate the legislature extending a declaration that has already expired, in my opinion, so long as there is a retroactivity provision contained in the measure the legislature uses to extend the disaster declaration, the legislature may do so retroactively. As explained in the *Manual of Legislative Drafting*,

¹ Emphasis added.

The definition of retroactivity approved by the Alaska Supreme Court with respect to whether statutory or constitutional considerations are important is the following: "A retroactive (retrospective) statute is one which gives to pre-enactment conduct a different legal effect from that which it would have had without the passage of the statute." Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960), cited in *Norton v. ABC Board*, 695 P.2d 1090 (Alaska 1985). Therefore, if a statute does not relate to the legal effect of prior conduct, there are no statutory or constitutional restrictions related to retroactive application. In this regard, it is important to distinguish between procedural changes in laws and laws that affect substantive rights. The constitutional and statutory restrictions on retroactivity are inapplicable to statutes that make only procedural changes in the law and do not affect substantive rights. (*Matanuska Maid, Inc. v. State*, 620 P.2d 182, 187 (Alaska 1980), cited with approval in *Kjarstad v. State*, 703 P.2d 1167 (Alaska 1985)). See *State v. Doe*, 297 P.3d 885 (Alaska 2013), for a discussion relating to the retroactive application of a court rule.²

Retroactive application of the disaster extension does not appear to affect any substantive rights and is therefore likely to be upheld if challenged. Nevertheless, because AS 26.23.020(c) does not specifically contemplate extension after expiration of a disaster declaration, there is some risk of challenge. In addition, the longer the break between the expiration of the disaster declaration and the extension, the more risk there is. In my opinion, if the legislature were to extend a disaster declaration in the same legislative session during which the disaster declaration expired, a court is likely to uphold an extension with a valid retroactivity provision. This, however, would be a matter of first impression for Alaska courts.

In addition, although AS 26.23.020(c) states that the legislature may extend a disaster declaration by concurrent resolution, AS 26.23.025(b) provides that if a disaster occurs during the legislative session, any action the governor takes after the end of session is void if it was not "ratified by law adopted during that session." AS 26.23.025(c) allows the legislature to "terminate a disaster emergency at any time by law." The phrase "by law" does not include a resolution. In addition, the Alaska Supreme Court has held that the state constitution only allows the legislature to take actions affecting people outside the legislature by enacting a bill. A disaster declaration affects agencies and individuals outside the legislature. Therefore, any action the legislature takes to terminate, extend, or otherwise affect a disaster declaration must be taken by law.

In *State v. A.L.I.V.E. Voluntary*, the Alaska Supreme Court considered whether the legislature has the power to annul a regulation adopted by an executive agency by

² *Manual of Legislative Drafting* at p. 33-34.

concurrent resolution.³ The court held that the legislature could not exercise its legislative power without following the provisions of the constitution governing the enactment of a bill, including single subject, descriptive title, three readings in both houses, presentation to the governor, and the opportunity for the governor to veto the bill.⁴ "The Alaska Constitution defines with specificity the mechanisms for legislation. Each provision has a purpose 'designed to engender a responsible legislative process worthy of the public trust.'"⁵ "[W]hen the legislature wishes to act in an advisory capacity it may act by resolution. However, when it means to take action having binding effect on those outside the legislature it may do so only by following the enactment procedures."⁶

The legislature does not have the power to authorize itself to take action by a less formal means than that prescribed by the constitution.⁷ For that reason, despite the language in AS 26.23.020(c) "unless extended by the legislature by a concurrent resolution," the legislature likely cannot give itself the power to revise an action taken by the governor by an informal means such as a concurrent resolution.

Finally, you also asked about the single subject requirement. In my opinion, CSHB 76(HSS) relates to disasters and does not violate the single subject requirement.

Let me know if you have any questions.

MAW:mjt
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³ 606 P.2d 769 (Alaska 1980).

⁴ *Id.* at 772.

⁵ *Id.* (quoting *Plumly v. Hale*, 594 P.2d 497, 500 (Alaska 1979)).

⁶ *Id.* at 773. The Alaska Supreme court suggested that the only legislative veto power permitted by resolution was the type spelled out in the state constitution. Specifically, the court stated, "[t]he express provision in the Alaska Constitution of two specific legislative veto mechanisms supports our view that no implied general power to veto agency regulations by informal legislative action exists." *Id.* at 774. The two express legislative veto provisions are art. III, sec. 23 (disapproval of executive orders) and art. X, sec. 12 (disapproval of municipal boundary changes), Constitution of the State of Alaska.

⁷ If Legislative Council, or any other committee, attempted to extend the governor's disaster declaration, this would be a less formal means of action than that prescribed in the Alaska Constitution.