

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES  
LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA

(907) 465-3867 or 465-2450  
FAX (907) 465-2029  
Mail Stop 3101

State Capitol  
Juneau, Alaska 99801-1182  
Deliveries to: 129 6th St., Rm. 329

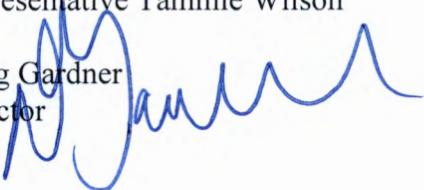
## MEMORANDUM

April 26, 2018

**SUBJECT:** Letter of Intent for HB 411 (Work Order No. 30-LS1549\J)

**TO:** Representative Tammie Wilson

**FROM:** Doug Gardner  
Director



### **Question Presented**

You referred me to the following proposed letter of intent available on BASIS, that I understand is to be adopted in conjunction with the passage of HB 411:

It is the intent of the legislature that this proposed legislation be forwarded to the Legislative Oil & Gas Working Group that was established with the passage of HB 111 during the 30th Alaska State Legislature for their consideration. The Legislative Oil & Gas Working Group is requested to utilize all three consultants available to the legislature. By January 1, 2019, the group shall submit a report and proposed legislation for an effective long-term tax regime, considering HB 411 as a basis, for the State of Alaska to the presiding officers of both bodies and the co-chairs of the house resources and finance committees.

### **Discussion**

#### **a. Summary of Discussion**

In summary, the letter of intent set out above may be offered for adoption at the time the bill is passed from committee, or passed on the floor. A letter of intent is a document recognized in the *Manual of Legislative Drafting* that is to accompany a bill. A letter of intent that does not accompany a bill is not, in my view, provided for in the *Manual of Legislative Drafting*. However, the legislature has not previously precluded the practice of offering a letter of intent that does not accompany a bill so I cannot advise that offering a letter of intent without an accompanying bill cannot be done. This office warns, in certain circumstances as set out below, that a letter of intent should not be used in place of a directive that should be in the language of the bill itself.

Please note that in HB 111, ch. 3, SLA 17, the Legislative Oil and Gas Working Group was directed to prepare the analysis and report contemplated by the above letter of intent for consideration by the legislature during the second regular session of the 30th Alaska State Legislature. The letter of intent provides a different deadline for submission of the working group's report of January 1, 2019, is really an amendment of existing uncodified

law and might be better addressed by amending the law. The essence of our warning in these cases, where the letter of intent is directing a person or entity to do something, is that letters of intent are not enforceable. In this case, since the letter of intent is directing that the Legislative Oil & Gas Working Group conduct an inquiry and prepare a report, and the entity is a legislative one, the typical concerns regarding a letter of intent seem to be lessened considerably under these facts. Accordingly, I am providing a discussion of letters of intent in the interests of completeness. It is, however, still my advice that the better path forward is by amending uncodified law, rather than by adopting a letter of intent.

**b. Letters of Intent**

A letter of intent does not constitute law. It is part of the legislative history and, therefore, only one extrinsic aid in resolving ambiguities in the law that is adopted. This is why the "*Manual of Legislative Drafting*" states at page 14: "The purpose or intent of a bill should be clear from the body of the bill or expressed in a letter of intent or other legislative history so that a general provision spelling out the purpose or legislative intent of the bill should be unnecessary." The circumstances of each case will determine what, if any, weight a court will give to the letter as evidence of the meaning of the law.

In situations involving the construction of a statute, a court does, at times, look to the legislative intent in passing the statute to help with that determination. *State v. City of Haines*, 672 P.2d 1047 (Alaska 1981). A letter of intent can provide evidence of what the legislature, in fact, intended by particular statutory language. The court has cautioned, however, that a letter of intent cannot serve as a substitute for a formally enacted provision of law nor can it modify a provision of law. *State v. Alaska State Employees Association/AFSCME Local 52*, 923 P.2d 18 (Alaska 1996).

A letter of intent may be considered at any time, but, as a practical matter, the later a letter of intent is adopted after passage of the bill it relates to, the less persuasive it will be. The legislature has gone so far as to comment in a letter of intent on laws adopted by a previous legislature. Also, a letter of intent adopted by a committee does not carry the weight that a letter of intent adopted by the full legislature does. The Alaska Supreme Court discussed these types of letters in some detail in *South Central Health Planning v. Comm'r*, 672 P.2d 1047 (Alaska 1981):

A letter of intent of the House Committee on Health and Social Services accompanying its report on a bill which, after several changes, eventually became part of Chapter 122, expresses the view that 'nursing portions of Pioneers' Homes are not subject to certificate of need provisions.' 1978 House Journal 1485. Taken at face value this letter of intent is the expression of one committee of the legislature as to the meaning of an enactment passed by a prior legislature. As such, it is entitled to only secondary weight.

A letter of intent is also a way for the legislature to communicate its wishes regarding program administration and other matters to the executive branch. It is my impression that executive branch agencies take these expressions of legislative intent seriously. However, if a direction in a letter of intent conflicts with law, the law controls and the agency does not have discretion to abide by the direction to the extent that it conflicts with law.

**1. If a letter of intent is adopted by one house but not the other, should it be sent to the governor?**

A letter of intent is not legislation and is not subject to rules dealing with the transmittal of bills to the governor. Therefore, it is up to each house to determine its own course of action with respect to how letters will be procedurally treated. Whether a letter of intent is adopted by one house, or by both houses, or only by a committee is significant only as to its value as evidence of the intent of the full legislature. So, a letter adopted by one house does not supply evidence about what the other house may have intended. Nonetheless, if one house adopts a letter of intent I would think that house would want the executive branch to be aware of the contents and would want it sent to the governor in the hope that the affected agencies would be encouraged to conform to the wishes of that house. The letter need not be sent with the bill and probably should be sent by the house that adopts it, since the other house may not agree with the contents.

**2. Stand-alone letter of intent**

A letter of intent, being separate from the bill, need not even be voted on at the same time the bill is acted on. Thus, nothing prevents the legislature from adopting a letter of intent concerning legislation that was previously passed, although a letter on a law adopted by a previous legislature is entitled to little weight.<sup>1</sup>

**d. Procedural Considerations**

A letter of intent is a proper main motion for presentation on the floor during debate on the bill it is designed to accompany. *Mason's Manual of Legislative Procedure*, (Mason's) Sec. 156(1) (2010 ed.) provides:

1. It is the duty of the presiding officer to accept or to entertain any proper motion whenever it is in order. A motion is in order when presented at an appropriate time, violates no rule, and is not clearly dilatory.

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<sup>1</sup> *South Central Health Planning and Development, Inc. v. Comm'r*, 628 P.2d 551 (Alaska 1981).

A letter of intent is a main motion subject to debate<sup>2</sup>, and is subject to amendment.<sup>3</sup> As noted in *Mason's* Sec. 179:

1. All general questions of a substantive nature are main questions. The main question is usually stated as follows: to pass, to adopt, to approve, to ratify, to confirm, to concur, or to appoint, to elect or to take other like action. The main question may sometimes be stated in such form as to reject, to rescind, to repeal, to annul, to remove, to refuse to concur or in some other form dispose of some substantive question.

I would suggest that during the daily calendar, a motion to adopt a letter of intent could appear in two places. First, and foremost, the letter of intent could be considered during debate on the bill, and presented for consideration after the body has considered all amendments and passed the bill. Second, it is possible, but it seems to me less desirable, to present the letter of intent for the body's consideration during unfinished business.

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<sup>2</sup> *Masons'* Sec. 81(1) provides that "[a]ll main motions are debatable because they present substantive questions for determination."

<sup>3</sup> *Masons'* Sec. 396 provides that "[e]very original main motion may be amended . . . ."