

# LEGAL SERVICES

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### MEMORANDUM

April 3, 2011

**SUBJECT:** Purpose of retroactivity and revival provision in Amendment 27-GH1965\A.23, and providing that provision as a stand-alone amendment in Amendment 27-GH1965\A.27 (Amendment 27-GH1965\A.27)

**TO:** Representative Paul Seaton  
Representative Eric Feige  
Co-Chairs of the House Resources Committee  
Attn: Louie Flora

**FROM:** Alpheus Bullard  
Legislative Counsel

This memorandum accompanies amendment 27-GH1965\A.27 (A.27) which provides a modified version of the "retroactivity and revival" provision found in Amendment 27-GH1965\A.23 (A.23).<sup>1</sup> You have asked about the purpose of, and need for, such a provision.

What "sec. 3" of A.23 and "sec. 2" of A.27 add respectively, to the bill is a provision that addresses what will occur if the bill becomes law under AS 01.10.070 after July 1, 2011.<sup>2</sup>

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<sup>1</sup> The "retroactivity and revival provision" in A.23 contains an additional subsection (c) that applies to the "Alaska coastal policy board" and "Alaska coastal policy appeals board" that are established by that amendment. Amendment A.27 does not establish these boards, so this subsection is not included.

<sup>2</sup> Note that subsection (a) of the "retroactivity and revival" provisions of both A.23 and A.27 also serves to make the bill's amendment to AS 44.66.020(a)(5) retroactive to January 1, 2011. AS 44.66.020(a)(5) provides that the Alaska coastal management program is "subject to legislative termination during the regular legislative session" convening in January, 2011.

It is my opinion that this element of the respective "retroactivity and revival" provisions is less significant than the retroactive application of the change to ch. 31, SLA 2005, and the accompanying revival of the provisions that make up the Alaska coastal management program, because a court is unlikely to treat AS 44.62.020(a)(5)'s deadline as mandatory, but rather one that is "directory." The Alaska Supreme Court has relatively recently reiterated the distinction:

Even though HB 106 has an immediate effective date (see the bill's sec. 3), there exists the possibility that the bill might not become law until after the Alaska coastal management program is repealed, and the program is terminated.<sup>3</sup> The legislature could fail to pass the bill's effective date provision,<sup>4</sup> or even if the immediate effective date provision is passed, the governor could fail to sign the bill on or before July 1, 2011.

The bill will become law only after the bill is either signed by the governor or the period for the governor to sign or exercise a veto has expired.<sup>5</sup> Before the bill is transmitted to the governor, the processes of enrollment, engrossment, and transmittal have sometimes stretched out over a period of months. Given that the immediate effective date provision may not pass, and the possibilities of delay in transmitting the bill to the governor, a "retroactivity and revival" provision is included in A.23 and A.27 because it is my opinion that, if the bill does not become law on or before July 1, 2011, under

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Whether a party must strictly comply with a procedural rule, regulation, or statute turns on whether the language of the law is mandatory or directory. If a statute is mandatory, strict compliance is required; if it is directory, substantial compliance is acceptable absent significant prejudice to the other party. A statute is considered directory if (1) its wording is affirmative rather than prohibitive; (2) the legislative intent was to create "guidelines for the orderly conduct of public business"; and (3) "serious, practical consequences" would result if it were considered mandatory.

*South Anchorage Concerned Coalition, Inc. v. Municipality of Anchorage Bd. of Adjustment*, 172 P.3d 768, 771 - 772 (Alaska 2007).

<sup>3</sup> Under sec. 22, ch. 31, SLA 2005, on July 1, 2011, the statutory provisions that set out the Alaska Coastal Management Program will be repealed, and the program will cease to statutorily exist.

<sup>4</sup> Article II, section 18 of the state constitution requires that an immediate effective date for an Act, be approved by two-thirds of the membership of each house. If an effective date provision fails, an Act will become effective 90 days after enactment.

<sup>5</sup> The governor has 15 days during sessions and 20 days outside of sessions to either sign or veto a bill once the legislature passes the bill and transmits it to the governor, under article II, sec. 17, of the Alaska Constitution. Sundays are not included in these computations.

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AS 01.10.100(c),<sup>6</sup> a court is likely to hold that the statutes that establish the Alaska coastal management program, and are repealed by sec. 22, ch. 31, SLA 2005 on July 1, 2011, cannot be revived unless their revival is specifically provided for.

Louie also asked whether a temporary repeal of the program followed by its revival, as is provided for in the amendments, would result in issues under federal law for the program. Given the time allotted, I have not had time to fully research the matter, but it seems to me that an answer would not be significant to the question of whether a "retroactivity and revival" provision should be included in HB 106.

If the bill does not become law before July 1, 2011, and if it is to be revived under state law, such a provision is required. While such a revival might lead to issues for the program under federal law, if it is not included, the program will be terminated under state law. If it is the intent of the legislature to pass the bill and see it become law, the inclusion of such a provision can only contribute towards that end.

If you have questions, please do not hesitate to contact me.

TLAB:plm  
11-214.plm

Enclosure

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<sup>6</sup>AS 01.10.100(c) provides:

(c) When an act repealing a former act, section, or provision is itself repealed, that repeal does not revive the former act, section, or provision, unless it is expressly so provided.

Adopted  
UC

27-GH1965\A.27  
Bullard  
4/3/11

AMENDMENT #7

OFFERED IN THE HOUSE  
TO: HB 106

BY REPRESENTATIVE SEATON

1 Page 2, following line 5:

2 Insert a new bill section to read:

3 "\* **Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section to  
4 read:

5 **RETROACTIVITY AND REVIVAL.** (a) The amendment to AS 44.66.020(a)(5)  
6 made by sec. 3 of this Act is retroactive to January 1, 2011.

7 (b) If, under AS 01.10.070(c), sec. 3 of this Act takes effect on or after July 1, 2011,  
8 sec. 3 of this Act is retroactive to July 1, 2011, and sections repealed by sec. 18, ch. 31, SLA  
9 2005, are revived. If a revived section is amended by this Act, it is revived as amended by this  
10 Act. The revived sections are subject to repeal under sec. 22, ch. 31, SLA 2005, as amended  
11 by sec. 3 of this Act."

12

13 Renumber the following bill sections accordingly.