

LEGAL SERVICES

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MEMORANDUM

December 11, 2017

SUBJECT: Aircraft registration and fees
(Work Order No. 30-LS1124)

TO: Senator John Coghill
Attn: Rynniva Moss

FROM: Linda M. Bruce
Legislative Counsel



You have asked for an opinion on the Department of Transportation and Public Facilities' (department) statutory authority to establish and implement aircraft registration and fees. In short, while the department has broad rulemaking authority under statute, the legislature specifically repealed the department's express authority, under former AS 02.20.010, to register aircrafts and collect fees in 2001. Therefore, it is likely that the department may not adopt regulations to register aircrafts and collect fees. However, if you would like to resolve any ambiguity over the issue, you should request a bill that explicitly prohibits or authorizes the department to adopt regulations relating to aircraft registrations and fees. Below is a brief discussion of the issue.

"Administrative agencies are creatures of statute, deriving from the legislature the authority for the exercise of any power they claim. Accordingly, regulations promulgated by an executive department must be authorized by statute."¹ An agency may receive the authority to adopt regulations through either "express or implied terms of a statute."² In determining the validity of a regulation where a statute grants general rulemaking authority to the administrative agency, Alaska courts "will ascertain (1) whether the regulation is within the scope of authority conferred on the [agency]; i.e., whether it is consistent with and reasonably necessary to carry out the purposes of the enabling statute, (2) whether it is reasonable, and (3) whether it directly conflicts with any other state statute."³

The department does not have express statutory authority to establish and implement aircraft registration and fees as in the proposed regulations. The department previously had express statutory authority to register aircrafts in the state and collect registration fees

¹ *Warner v. State*, 819 P.2d 28, 30 - 31 (Alaska 1991) (internal citations and quotations omitted).

² AS 44.62.030.

³ *Warner*, 819 P.2d at 32.

under former AS 02.20.010, but this statutory authority was repealed in 2001 by HB 127. *See* § 14, ch. 56 SLA 2001. However, the department has a duty to supervise aeronautics in the state and broad rulemaking authority relating to aeronautics.⁴ Although the proposed regulations appear to be within the scope of the broad authority conferred on the agency and may be reasonable under these general statutes, the regulations may nevertheless be invalidated by a court if challenged since they directly conflict with the legislature's repeal of AS 02.20.010.

A reasonable argument may be made that when the legislature repealed the department's express authority to register aircrafts and collect registration fees in 2001, it intended to deny that authority to the department. If the department still maintained the authority to register aircrafts under a then co-existing general statute after the repeal of AS 02.20.010, then the act of the legislature in repealing AS 02.20.010 was a nullity and without effect. As a matter of statutory construction, it is presumed that the legislature does not engage in fruitless acts and that an amendment of a statute is intended to be a substantive change of law.⁵

Furthermore, the minutes for HB 127 from 2001 do not indicate that the legislature intended for the department to retain residual implied authority to implement aircraft

⁴ *See* AS 02.10.010 and AS 44.42.020(a)(12) (the department has a duty to supervise aeronautics in the state); AS 02.15.020 (department shall adopt regulations necessary to carry out the provisions of AS 02.15 (Alaska Aeronautics Act of 1949)); AS 02.15.220 (authorizes the department to enforce regulations relating to aeronautics); AS 02.15.230 (grants police powers to the department); and AS 44.42.030 (granting the department broad rulemaking authority). As Ms. Moss noted in her November 29th email to this office, the fee provisions under AS 44.62.020(b) are limited. Without additional information, it is unclear whether the proposed registration fees conform to these provisions. *See* AS 44.62.020(b)(5) ("the department may charge reasonable fees to cover the costs of issuing easements, licenses, and permits and to cover the costs of reproduction, printing, mailing, and distribution of contract and bid documents and design and construction standards manuals); and AS 44.62.020(b)(6) ("the department may charge and collect fees for training services and technical assistance provided by department personnel.").

⁵ *See Torkko/Korman/Engineers v. Penland Ventures*, 673 P.2d 769, 773 - 74 (Alaska 1983) ("an amendment to an unambiguous statute is generally presumed to indicate a substantive change in the law."); *Kilbane v. Dir. of Dep't of Revenue*, 544 S.W.2d 9, 11 (Mo. banc 1976) ("in amending a statute or in enacting a new one on the same subject, it is ordinarily the intent of the legislature to effect some change in the existing law; if this were not so the legislature would be accomplishing nothing, and legislatures are not presumed to have intended a useless act."); 1A Sands, *Sutherland Statutory Construction* § 22.30 at 265 (5th ed. 1992 rev.) ("the courts have declared that the mere fact that the legislature enacts an amendment indicates that it thereby intended to change the original act by creating a new right or withdrawing an existing one. Therefore, any material change in the language of the original act is presumed to indicate a change in legal rights.") (footnote omitted).

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registrations and fees through regulation despite the repeal of its express authority. If the legislature had intended for the department to continue the aircraft registration program, the legislature could have amended AS 02.20.010 to reflect that intent rather than repealing the statute entirely.

However, I cannot predict with certainty whether a court would consider an administrative regulation adopted under an agency's broad rulemaking authority to be in direct conflict with the legislature's repeal of an express statutory provision on the matter. Therefore, I recommend that you request a bill to enact an express statutory prohibition if you would like to resolve any ambiguity over this issue.

If I may be of further assistance, please advise.

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