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MEMORANDUM (Opinion)

To: **Director, DPH&SS**

From: **Attorney General**

Subject: **Interpretation of P.L. 28-80 (Natasha Protection Act of2005)**

You have requested our Opinion as to whether any smoking in described public places is possible since the American Society of Heating and Air Conditioning Engineers (ASHRAE) has no standards which describe equipment which would purify the air according to the dictates of P.L. 28-80.

It is not quite correct to say that there are no ASHRAE standards on the elimination of carcinogenic hazards from "second hand smoke", the prime purpose of Guam's law. Rather, ASHRAE has adopted a Policy Statement to the effect that **there is no technology available which would accomplish the desired purification.** The Executive Summary of the ASHRAE "Environmental Tobacco Smoke" position document (Approved by the ASHRAE Board on June 30, 2005) states, in pertinent part:

> ASHRAE concludes that:
>
> - **Ar present, the only means of effectively eliminating health risk associated with indoor exposure is to ban smoking activity.**
> - Although complete separation and isolation of smoking rooms can control ETS exposure in non-smoking spaces in the same building, adverse health effects of the occupants of the **smoking room cannot be controlled by ventilation.**
> - **No other engineering approaches, including current and advanced dilution ventilation or air cleaning technologies, have been demonstrated or should be relied upon to control health risks from ETS exposure in spaces where smoking occurs.** Some engineering measures may reduce the exposure and the corresponding risk to some degree while also addressing to some extent

> the comfort issues of odor and some forms of irritation. (ASHRAE Position Statement at p. 2) (Emphasis in original)

Since ASHRAE has concluded that no devices can be used to meet the intent of P.L. 28-80, specifically 10 GCA §90107 as amended by P.L. 28-80 However, Section 90107 is poorly written. Section 90107 is titled, "Where smoking is not Regulated." Subsection (a) states, as its first sentence:

> Notwithstanding any other provisions of this Chapter, the following areas shall not be subject to the smoking restrictions of this Chapter:

Yet subsection of the same §90107 provides:

> All public places and facilities located within an enclosed area where smoking is permitted or allowed to any extent by this Chapter shall employ an appropriate smoke ventilation device. Smoking shall not be permitted at any time within enclosed areas not meeting the requirements of this provision.

Subsection (a) is quite clear in saying that the specified places "shall not be subject to the smoking restrictions of this Chapter". Subsection (b) attempts to regulate some of these same places. Further, subsection (b) cannot be enforced as written because there are no purification devices which could conform to the law.

Guam courts have interpreted laws which seem to be inconsistent. In a case where the law had two, inconsistent, directions, the Supreme Court of Guam has said:

> [21] Courts are reluctant to declare a statute void because of conflicting provisions. See > Southern Canal Co. v. State Board of Water Engineers, 159 Tex. 227, 318 S.W.2d 619, 624 (Tex.1958); > Folks v. Barren County, 313 Ky. 515, 232 S.W.2d 1010, 1013 (Ken.1950). It is axiomatic that in interpreting a statute courts are to look to legislative intent in an effort to harmonize conflicting provisions. See > Southern Canal Co., 318 S.W.2d at 624; > Folks, 232 S.W.2d at 1013; > Great Lakes Pipe Line Co., 396 P.2d at 299. However, where a statute is so internally contradictory that any effort to enforce it would be wholly impossible, courts have no alternative but to render the statute void. See > Southern Canal Co., 318 S.W.2d at 624 (citations omitted). Our reading of subsection (b) of > section 21111 (1998) impels us to declare it void. *Bank of Guam v. Reidy*, at 2001 WL 686949 (2001)

That court continued in the next paragraph:

> [22] Further, when faced with a statute that contains contradictory legislative directives, a court cannot simply elect to give effect to one directive over the other in an effort to save the statute. Such would be an exercise in judicial legislation,

> which is clearly not the prerogative of the courts. See > Great Lakes Pipe Line Co., 396 P.2d at 300. Because the statute is void for ambiguity, there cannot be any duty in Reidy, or correlative right in BOG, flowing from the 1998 enactment. Further, because we hold that the 1998 enactment is void, the prior enactment and codification of subsection (b) remains in force. See > State ex rel. Clover Valley Lumber Co. v. Sixth Judicial Dist. Ct. in and for Pershing County, 58 Nev. 456, 83 P.2d 1031, 1034 (Nev.1938) (declaring valid and effective a prior enactment where its later amended version was found to be invalid); > Rosenfield v. Drake, 112 Pa.Super. 1, 170 A. 414, (Pa.Super.Ct.1934) (holding that a statute that is held to be invalid does not act to repeal its predecessor unless the statute employs language showing an intent to repeal the earlier statute even if later found invalid); see also > Dewrell v. Kearly, 250 Ala. 18, 32 So.2d 812, 814 (Ala.1947). A reading of the prior law, enacted in 1968 and later codified as > 5 GCA § 21111(b) (1993), reveals that the statute does not suffer from the contradictory language which resulted in our invalidation of the 1998 enactment. We find this predecessor version to be valid. *Bank of Guam v. Reidy*, ¶22.

Just as with the statue being interpreted in *Reidy*, §90107 in its prior state is clear and unambiguous, excepting from the anti-smoking law certain establishments. In fact, it is subsection (a) unchanged. The only new enactment is subsection (b).

However, while we realize that the legislature had a purpose in subsection (b), it cannot be fulfilled as it conflicts with (a) and, as shown above, is impossible of fulfillment. The intent is to permit limited smoking, but the standards imposed would do the opposite, prohibit all smoking. Following the conclusion in *Reidy*, it is our opinion that 10 GCA §90107 is void for ambiguity and that, therefore the previous 10 GCA §90107 is once again the statute that is in force.

It is our further opinion that, considering the dual incompatibilities of the statute, the matter be referred to the legislature for their correction and changes in view of the statements of ASHRAE. What those changes will be, we do not hazard to guess.

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/s/ *Douglas B. Moylan*

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