SCR
13

March 24, 1977

The Municipal Health Commission, at their regular meeting of March 23, 1977, emphatically endorses the DEFEAT of SCR 13, SCR 14 for the following reasons:

1. The removal of such regulations would create inconsistencies through out the entire reimbursement system, particularly with regard to Medicare, Medicaid and General Relief Medical Assistance.
2. The mandate of the people for cost-consciousness and cost-containment in the provision of health services would be directly violated if these resolutions were to be adopted.
3. Existing regulations clearly define allowable and non-allowable construction costs under Hill-Burton on the basis of their legitimate and direct relationship to facility construction costs. Adding to the list of allowable costs adds to the dollar amount that the taxpayer will pay TWICE: first in general taxes to support construction under revenue sharing, and secondly as a part of the amortized costs built into the daily bed rate thru depreciation (NOTE: the daily bed rate is paid a THIRD time under Medicare, Medicaid and General Relief Assistance by the taxpayers.)
4. Local determination of applicable beds and properly certified construction efforts is necessary if planning is to have any effect on cost containment.

Position paper to follow.

Signed:

Adrian Barber, Chiropractor
Ben Barrerra, Vice President National Bank of Alaska
Joseph O'Gorman, University of Alaska, Anchorage
Jim Lewis, Associated General Contractors
Julie Kitka, Alaska Federation of Natives
Dalia Wolverton, Housewife
Edna Adrian, Senior Citizen
Rose Anderson, Counselor, McLaughlin Youth Center
Keith Brownsberger, M.D. , Internist Providence Hospital
Bonnie McGee, Chairman Municipal Health Commission, Housewife
Betty Payes, School Nur
Lois Kiehl, Nutritionist
Cynthia Meinke,Housing Referral Counselor
Sharon Schmidt, Teacher
Liz Jacks, Administrative Office C.E.T.A., Municipality of Anchorage
Kent Autor, Management Counsultant
Christie Hoke, Nurse
Diddy Hitchins, Professor University of Alaska, Anchorage
Patricia Yenney, Medical Librarian
Marv Janzen, Ex. Director Professional Standards Review Organization/Alaska
Charles Rigden, Associate Administrator Alaska Hospital and Medical Center

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#14 Ch 265, SLA 1976

(1) A.G. G.C

STATE OF ALASKA

WILLIAM A. EGAN, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K — STATE CAPITOL
JUNEAU 99801

DATE	ROUTE TO:	✓
	JP	✓
	FILE	

August 28, 1972

Office of the Commissioner

SEP 11 1972

RECEIVED

The Honorable Frederick McGinnis
Commissioner
Department of Health and Social
Services
Juneau, Alaska 99801

Dear Commissioner McGinnis:

You have asked our opinion of whether your present method of determining "total project costs" of eligible medical construction by relying on promulgations of the Department of Health, Education and Welfare pursuant to Title VI of the Public Health Services Act as amended, meets the requirements of AS 43.18.010(j). It is our opinion that the use of these promulgations is within the scope of your discretion in the administration of this program.

AS 43.18.010(j) states as follows:

> If construction of a facility began after January 1, 1968 and state matching aid for construction approved for payment to the local government or other facility sponsor constitutes less than 25 per cent of the total project cost, the state shall pay to the local goverment or other facility sponsor each fiscal year a sum equal to $2,500 a bed for the maximum number of beds provided for in the construction design of the facility. State aid provided for in this subsection shall continue until the local government or other facility sponsor has received an amount which, combined with state matching money for construction of the facility, equals 25 per cent of the total project cost. No funds received for construction shall be used for any other purpose. (Emphasis added)

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Comprehensive Health Planning Office

As AS 43.18.010(j) is the state counterpart of Title VI of the Public Health Services Act, 42 USCA 201 et seq., it is appropriate that you may follow standards promulgated in interpretation of that Act. To read the term "total project costs"

as used in AS 43.18.010(j) literally would mean allowing all costs even if lavish, wasteful or illegal. Since clearly that could not have been what was intended when the legislature enacted this section, your department has the implied duty to allow only those costs which are in line with the statutory purpose of this section. In this case, since no statutory guidelines are set out, you have broad discretion to define the meaning of such terms in accordance with the statutory purpose. Naturally then, these rules of the Department of Health, Education and Welfare, interpreting 42 USCA 201 et seq., may be used to assist you in defining the meaning of these statutory terms. In this case, however even more evidence of the legislature's intention in passing AS 43.18.010(j) can be seen by looking at similar state grants for other purposes.

AS 43.18.100 granting aid for school construction goes into great detail to specifically provide for the meaning of "costs of school construction." AS 43.18.100(f)(2). Since no mention of these items is made in AS 43.18.010(j) it is reasonable to assume that they were not intended to be included in the computation of "total cost" under that section and this is the general effect of following the Federal regulations.

Similarly in AS 43.18.300 providing grants for the construction of Community Facilities, express allowance is made for the cost of "feasibility studies". This term is unnecessary if "cost of construction" were to be read literally. Again, since no similar language is included in AS 43.18.010(j) it can be assumed that these costs were also not to be included.

Finally, in AS 46.03.030(b) providing funds for the cost of water systems, it is provided that the amount received is computed on the basis of those costs "not borne by the federal government". In this case, the regulations you are relying on in effect specifies those costs which will not be borne by the federal government. If it were the legislature's intention in passing AS 43.18.010(j) to pick up those costs not borne by the federal government, it would have added a similar phrase to that in AS 46.03.030(b), particularly as these two sections were before the legislature during the same session and were passed within a few days of one another.

In conclusion, it is within the scope of your administrative discretion to utilize the guidelines promulgated by the Department of Health, Education and Welfare in defining the term "total project cost" of eligible medical facilities under the provisions of AS 43.18.010(j).

Very truly yours,

JOHN E. HAVELOCK
ATTORNEY GENERAL

By: Peter A. Michalski
Peter A. Michalski
Assistant Attorney General

PAM:ss

(12)

TO: Senator Orsini
Chairman
Senate C&RA

DATE: March 9, 1977

FROM: Paul Conger
A.A.
Senate C&RA

RE: SCR 13, SCR 14
19AAC 30.020(9)(C)
19AAC 30.020(9)(D)
19AAC 30.140(3)

The concept to provide revenue sharing money to those constructing hospital facilities formally emanated in SB42, 1971. The following is a history of that bill and subsequent amendments to it.

SB 42 (See Attachment 1)
The Bill was originally intended to create a loan/grant fund to be established and administered in the Department of Health. It would create a revolving loan (5% interest) and grant funds to make payments to local governments, non profit corporations and non profit sponsors for the acquisition, construction, modernization, and other capital improvements of hospitals and related health facilities. A grant would be provided if it had been determined by the commissioner of health that a local government, non profit corporation, or non profit sponsor would have difficulty in paying back a loan.

CSSB 42 (See Attachment 2)
Local Government Committee dropped the original bill's suggestion of establishing a loan/grant fund to be administered by the Dept. of Health and transferred the issue of providing state assistance for hospital construction cost to Community and Regional Affairs. In their version of this bill, they adopted language that reflects section (j) which is currently at issue here.

At this stage, the provision dealing with revenue sharing for construction of hospitals was an "in addition" clause to section (h) which treats revenue sharing dollars for hospitals already in operation.

In this initial stage of the bill, only local governments were to be recipients of this revenue sharing money pertaining to construction cost assistance as indicated by the following:

AS 43.18.010(h) During each fiscal year the state shall pay to an organized borough or a city outside an organized borough, in which a health facility is operated.....

In addition, if construction of a facility was begun by a local government after January 1, 1968 and state matching aid for construction approved for payment to the local government constitutes less than 25 per cent of the total project cost, the state shall pay to the local government during each fiscal year a sum equal to $5,000 per bed for the maximum number of beds provided for in the construction design of the facility, until the local government has received from this aid an amount which, combined with state matching money for construction of the facility, equals 25 per cent of the total project cost. Sums received by a local government under this subsection shall be used for expenses of operation, maintenance or health services or facilities, as the local government determines.

As the language indicates, the key component thus far is local government. (Note that the next version of this bill (CSSB 42 HEW) which creates a section (j) which address the issue of revenue sharing for hospital construction, extends potential recipients of section (j) beyond local government to include "other sponsor facility". So we start moving away from the notion that this money is to be available only for local governments early in the makeup of this bill.

Attention should also be directed towards the term "total project cost". This phrase sustained itself through all the stages of revision and the word "total" was not substituted with any language that would suggest less than total project cost in computing the revenue sharing allowance to be provided. The only restraining language in this bill regarding construction cost states: "No funds received for construction shall be used for any other purpose."

CSSB 42 (HEW) 1971 (See Attachment 3)
HEW, recognizing that they were dealing with two separate issues, viz. hospitals in operation and hospitals under construction, amended this bill creating section (j) as a subsequent section to section (h). Section (h) continues to deal with providing revenue sharing money to an organized borough or a city outside an organized borough that has hospitals in operation. Then section (j) treats the issue of rendering revenue sharing money to offset cost relative to the construction of hospitals. The salient disparity between section (h) and section (j) (for our purposes) is that the committee did not rely on the same language that was used in sec (h) i.e. "during each fiscal year the state shall pay to an organized borough or a city outside an organized borough in which a health facility is operated"; or they did not limit the recipient of this money solely to a local government as was proposed in CSSB 42, but broadened the language in section (j) to state "If construction of a

facility began after Jan 1, 1968, and state matching aid for construction approved for payment to the local government or other facility sponsor ... of the total project cost ... the state shall pay to the local government or other facility sponsor ... State aid provided for in this subsection shall continue until the local government or other facility sponsor has received an amount which ... equals 25% of the total project cost.

It would appear that if the committee wanted the petitioner for construction money to be limited to an organized borough or a city outside an organized borough, they would have adopted this language and made it applicable to sec (j) as well as sec (h). However, the committee did not limit sec (j) (dealing with hospital construction) to these recipients but broadened it to include "local government or other facility sponsor." It was this language that remained through the life of the bill and became law.

Also section (j) retains the language "total project cost" and does not qualify this term by inserting any limitations on what "total project cost" entails. The only restrictive language in this section is "no funds received for construction shall be used for any other purpose".

The remainder of this bill amends section (i) (defining a health facility) to include sections(h) and (j) indicating that this meant a hospital (or facility) owned or operated or both by a local government or by a nonprofit corporation or other nonprofit sponsor.

CSSB 42 (Finance) (See Attachment 4)
Finance drops section (h) from this bill and just concentrates on section (j). The salient feature in this version of the bill is that the Senate Finance Committee approved the language that expanded those permitted to reap the benefits of the bill beyond local government to include other facility sponsor. (Remember in the first CSSB 42 only local governments were included to receive assistance with hospital construction cost, then in HEW's version, they included "other facility sponsor" in contrast to "an organized borough or a city outside an organized borough "that was used in sec (h). The Senate Finance Committee retained "other facility sponsor".)

In addition, the "total project cost" term is still retained in the bill. This has existed throughout the tenure of this bill and has not been diluted or pared at all.

The Senate Finance Committee dropped sec (i) dealing with the definition of a hospital facility but it is picked up again in HCS CSSB 42 discussed below:

HCS CSSB 42 (See Attachment 5)
No change was adopted in this revision that applies to "other facility sponsor" or "total project cost".

In the House HEW and Local Government Committees deliberations, sec (2) is brought back into this bill as sec (i) to include both secs (h) and (j).

CSSB 42 (Finance) amH (CH 127 SLA 1971)
This final version of the bill does not change the language referring to "other facility sponsor" or "total project costs" and is enclosed herewith as Attachment 6.

Subsequent amendments were made to this section, however, subsection (j) was untouched.

Nevertheless, section (h) and (i) became subjects of revision, and pertinent modifications in subsequent years regarding section (j) are listed below:

HCSSB 383 am H (Ch 71, SLA 72) (See Attachment 7)
Inserted the following language into sec (i) which became law: "(1) In (h) and (j) of this section "health facility" or "facility" includes hospitals ... which are licensed, when required by the state under AS 18.20.010 - 18.20.130 (Department of Health and Social Services dealing with hospital regulations) and are owned or operated or both by a local government or by a nonprofit corporation or other non profit sponsor; the term excludes facilities operated or wholly supported by the state or the federal government, and excludes nonprofit facilities leased from private profit-making groups or corporations". This became law in 1972 but was extracted in 1973 by CSHB 42 (Finance) am S discussed next:

HB 42 (Introduced 1973), (Attachment 8, p.2, line 14)
A bill designed to repeal and re-enact sec (h) and (i) of AS 43.18.010. In its original form, the bill omitted the language that became law in 1972 viz. "and excludes non-profit facilities leased from private profit-making groups or corporations". However, in the Local Government Committee's version of CSHB 42, (see Attachment 9, p.2, line 11), reinserts the above mentioned language. Subsequently, in CSHB 42 (HESS) affixed as Attachment 10, on p.2., line 13, they revised this section to read:

(B) excludes nonprofit facilities leased from private profit-making groups or corporations only as to use of shared revenue for capital improvements under (j) of this section, but not as to use of shared revenue for operating expenses under (h) of this section;

The Finance Committee (CSHB 42-Finance), (affixed as Attachment 11, p.2, line 8) in their version eliminated the above mentioned language and other language regarding "excludes nonprofit facilities leased from private, profit-making groups or corporations."

The bill was in this form, deleting the above language, when it passed the Senate as CSHB 42 (Finance) am S,(affixed hereto as Attachment 12, p.2, line 11) and became law, Ch 87, SLA 73.

Other provisions of Ch 87, SLA 73 of significance:

AS 43.18 is amended by adding new sections to read:

Sec. 43.18.040 REGULATIONS. The Department of Community and Regional Affairs shall adopt regulations necessary to carry out the purposes of this chapter.

Sec. 43.18.050 SPECIFIC EXPENDITURES. A municipality shall expend funds received for the operation and maintenance of hospitals and health facilities and services.

Subsequent changes to this bill are listed below. However none of the revisions pertain to AS 43.18.010(j).

Ch 127, SLA 1974 (Attachment 13)
Sec 44. AS 43.18.010(h)(4) is amended to read:

(4) funds received by a local government under (1), (2) or (3) of this subsection shall be used for expenses of operation maintenance, or health services or facilities, as the local government or hospital outside a municipality determines;

*Sec. 45. AS 43.18.040 is amended to read:

Sec. 43.18.040 REGULATIONS. The Department of Community and Regional Affairs shall adopt regulations necessary to carry out the purposes of secs. 10 - 99 of this chapter.

*Sec. 46 AS 43.18.050 SPECIFIC EXPENDITURES. A municipality shall expend funds received for the operation and maintenance of hospitals and health facilities and services under secs. 10 - 99 of this chapter only for those specific facilities and services.

Ch 265 SLA 1976 (See Attachment 14)
*Sec. 2 AS 43.18.010(h)(1), (2) and (4) are repealed and re-enacted to read:

(1) $2 per capita to a municipality which has the power to provide health facilities and services and in which a hospital is located;

(2) in addition to the payment made under (1) of this subsection

(A) The state shall make payments to a municipality which has the power to provide hospital facilities and services and which exercises the power on the basis of $1,000 per bed for each bed actually used for patient care limited to the number of beds provided for in the construction design of the hospital, or $75,000 for those hospitals with 10 or more beds, or $25,000 a hospital for those hospitals with less than 10 beds, as the municipality may elect; funds received under this subparagraph may be used only for hospitals and shall be apportioned among qualifying hospitals as the muncipality determines;

(B) the state shall make payments on the basis set out in (A) of this paragraph to a municipality for non profit hospitals not operated by a municipality if the municipality first certifies to the department that the hospital is in compliance with all standards for hospitals which have been adopted by the municipality; in the absence of this certification the funds which would have gone to the hospital lapse into the state general fund; payments to the municipality shall be transferred to the hospital in accord with the basis by which the entitlement was generated by the hospital and shall be applied to the annual cost of operation and maintenance of the hospital or for the provision of health care service at the hospital as the directors of the hospital determine;

(C) a hospital may not receive payment under both (A) and (B) of this paragraph;

(4) funds received by a municipality under (1) or (3) of this subsection shall be used for expenses of health services or operation and maintenance of facilities as the municipality determines;

*Sec. 3 AS 43.18.050 is repealed

*Sec 4 This act takes effect July 1, 1976.

ALASKA STATE LEGISLATURE - HOUSE OF REPRESENTATIVES

IN SESSION:

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REP. M. F. "MIKE" BEIRNE
DISTRICT 7, ANCHORAGE

MEMBER OF:
FIFTH STATE LEGISLATURE
NINTH STATE LEGISLATURE
TENTH STATE LEGISLATURE

COMMITTEES:
HEALTH
EDUCATION AND
SOCIAL SERVICES
FINANCE SUB-COMMITTEE
ON TRANSPORTATION

February 22, 1977

The Honorable Joseph Orsini
Senator, Alaska State Senate
Pouch V
Juneau, AK 99811

Dear Senator Orsini:

You have in your possession Senate Concurrent Resolutions 13 and 14 which void sections of certain regulations promulgated last year by the Department of Community and Regional Affairs.

For your information, Mr. Jack Chenoweth of Legislative Affairs has reviewed these resolutions as well as regulations and I think would be a substantial witness when the committee takes up these resolutions.

Also, and perhaps equally as important a witness, Mike Bradner of Fairbanks advised me that he was the prime sponsor of this original hospital grant revenue sharing program back in 1969, and the intent of the law is as the law states: "Total project costs". He volunteered to be a witness and recommended that the financial records of revenue sharing by the Fairbanks Community Hospital be procured to demonstrate that, in fact, everything from the kitchen sink to the grass in the front yard was included in the total project costs, and that was the intent of the law.

As you know, my position with the State has been that I want the same treatment for my hospital that the other hospital sponsors received for their hospitals -- nothing more, nothing less.

Also, Mr. Chenoweth suggests that perhaps the definition of "cost of school

construction" might be a reasonable substitute for the definition of "cost of hospital construction". He refers to Alaska Statute 43.18.100(g)(2) for a definition.

Sincerely,

Dr Mike Beirne /jp

Dr. Mike Beirne

MB:js

MILES S. SCHLOSBERG, INC.
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425 G STREET, SUITE 500, ANCHORAGE, ALASKA 99501
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MARK A. ERTISCHEK
MILES S. SCHLOSBERG

March 14, 1977

Honorable Joseph Orsini, Senator
Alaska State Senate
Pouch V
Juneau, Alaska 99811

Dear Senator Orsini:

Representative Beirne has asked us to provide you with an analysis of the legality of Senate concurrent resolutions Nos. 13 and 14 which have been introduced in the legislature of the State of Alaska. In our opinion, it would be both legal and proper for the legislature of the State of Alaska to annul administrative regulation 19 AAC 30.020(9)(C) and (D). 19 AAC 30.020(9)(C) is intended to import the criteria used in the administration of the federal Hilburton Construction Program into A.S. 43.18.010(j).

A.S. 43.18.010(j) provides:

> "If construction of the facility began after January 1, 1968 and state matching aid for construction approved for payment to the local government or other facility sponsor constitutes less than 25% of the total project cost, the state shall pay to the local government or other facility sponsor each fiscal year a sum equal to $2,500 a bed for the maximum number of beds provided for in the construction design of the facility. State aid provided for in this subsection shall continue till the local government or other facility sponsor has received an amount which combined with the state matching money for construction of the facility equals 25% of the total project cost. No funds received for construction shall be used for any other purpose."

The Lake Otis Clinic, a non profit corporation, applied for funds under the provisions of this section. Its appli-

cation was approved after January 1, 1968. Some of the funds which are required to be transmitted to the Lake Otis Clinic pursuant to the provisions of this section were transmitted to the clinic. The majority of the funds have not yet been transmitted to the clinic. In addition, the creators of the Lake Otis Clinic have in reliance upon the provisions of this statute and the approval of their application for funds expended considerable amounts of their own funds in an effort to acquire and pay the financing costs for the property necessary to complete the proposed medical facility. The Department of Community and Regional Affairs has, after the fact, promulgated regulations which prohibit the state from expending money under this section for site acquisition costs. The exclusion of site acquisition costs is explicitly noted in the regulation 19 AAC 30.020(9)(C) as being based on a similar requirement of the federal Hilburton Construction Program. A brief review of the federal statutes in question shows that it would be totally inappropriate to take these federal criteria and apply them to the state statute.

The federal criteria are set out in the definition of the tern "construction" in 42 U.S.C. 291(o)(i). In this section the term "construction" is defined to specifically exclude the cost of the acquisition of land. Alaska law is quite different, however. A.S. 43.18.010(j) refers not to construction costs, but to "total project cost". The tern "total project cost" is not defined further in the statute nor does the Department of Community and Regional Affairs make any attempt to define it in the regulations. Nevertheless, a review of the way in which the term "construction cost" has been used in related sections of the statute is instructive. A.S. 43.18.100 and A.S. 43.18.460 provide for reimbursement to municipalities within the state of Alaska for school construction costs and sports facilities construction costs. In both cases statutory definitions are provided for the term "cost of construction". In both cases, this term is defined specifically to include the cost of site acquisition. Even though the term "total project cost" in A.S. 43.18.010(j) is not defined, it would be very strange if these words which appear a few short pages from the other terms previously defined could be read to embody a legislative intent to narrow the broad definition of construction costs used in the other sections.

In 19 AAC 30.020(9)(D) the Department has attempted to limit the eligibility of the "other facility sponsors" to those situations in which the facility lies outside the boundaries of a municipality. The statute is equally bare of any basis for this interpretation.

A.S. 43.18.010(j) uses the clause "local government or other facility sponsor" three times to refer to the eligible recipient of the funds. The use of the word "or" indicates that both local governments and "other facility sponsors" would be proper recipients of the funds. The statute does not define "other facility sponsors" further or mention any special condition which other facility sponsors have to meet. It certainly does not contain any words which even imply that an "other facility sponsor" within the boundaries of a municipality would not be eligible for aid under this section. In this regard it is significant that sections A.S. 43.18.010(i)(1) and (2) which define the terms "hospital" and "health facility" also make absolutely no mention of the distinction which the Department has imported into its regulations. As the Attorney General's office noted in a legal opinion issued on December 20, 1974, one of the problems contained in the statute was the fact that "it fails to distinguish between the governmental sponsors and the non-governmental sponsors". The opinion was ended with the suggestion that the Department seek legislative amendment. The Department has failed to do so and instead has attempted to amend the statute through the regulations process.

The purpose of permitting administrative agencies to adopt regulations is quite simple. The legislature recognizes that it cannot deal explicitly in every statute with every problem that may occur some time in the future and that it is necessary to explain the general provisions of legislative enactments, to provide procedures for implementing those enactments, and to make more specific the sometimes general language included in the statutes. This statute certainly cannot be broadened to allow the regulation making process to be used for the purpose of changing the scope or intent of a statute to accord with the desires of the executive branch of the government. The administrative regulation in question goes beyond the scope allowed to regulations and represents an attempt to amend a clear requirement of the statute. If the Department of Community

and Regional Affairs believes it desirable to remove the term "total project cost" from A.S. 43.18.010(j), or differentiate between government and non-government sponsors, it should follow the suggestion of the Attorney General's office and request the legislature to amend the statute to eliminate this provision and include the definition of cost used in the federal act. It cannot proceed to do this through the regulations process on its own.

The propriety of the legislature's acting to annul administration regulations which are not in compliance with the intent of the legislature cannot be doubted at this state. As Congressman Elliot Levitas of Georgia noted in remarks to the section of administrative law of the American Bar Association during their 1976 Bicentennial Institute on the Oversight in Review of Agency Decision-Making, "We have identified in my office approximately one hundred thirty different acts of the congress, almost two hundred separate provisions of this type which have been cast heretofore mandating or authorizing some type of congressional review of contemplated or pending executive actions." The Congressman also noted that provisions requiring or permitting the legislative review of administrative regulations are found in the laws of the states of Connecticut, Nebraska, Alaska, Kansas, Virginia, Michigan, and Oregon, as well as such foreign nations as Great Britain, Australia, and New Zealand. Speaking in regard to proposed legislation providing for congressional review of certain administrative regulations, he said, "It seems to me that the basic proposition is the one I started off with. Who has the ultimate responsibility for the laws of this nation, whether they are acts of congress or laws which masquerade as administrative rules. I think the answer under our Constitution is it is the elected congress of the United States." Here, it is the elected representatives of the State of Alaska who have the responsibility to annul regulations which do not conform to the requirements of the statutes on which they are based. As Justice White noted in the case of Buckley vs. Valeo, 424 U.S. 1, "In the light of history and modern reality, the provision of congressional disapproval of agency regulation does not appear to transgress the constitutional design ... "

We would conclude in line with this that it would be both legal and proper to annul 19 AAC 30.020(9)(C) and (D). This regulation is by its own terms contrary to the specific provisions included in the statute upon which it is based.

It is, therefore, invalid and should be annuled by the legislature. Finally, we would like to note that the terms of the statute seem mandatory in requiring that the full amount of the entitlement be paid to the Lake Otis Clinic. This seems not only clear but equitable considering the fact that the sponsors of the project, whether governmental or non-governmental, put up a substantial amount of the financing. Certainly, hospitals would never be built if the sponsors had to operate subject to the possibility that shifts in administration policies subsequent to the commencement of a project could endanger a portion of the financing needed for completing the project. The Lake Otis Clinic project was scrutinized by the administration at the time of its initiation. Substantial amounts of money and effort have been expended in reliance upon the state's obligation to fulfill the terms set out in the statute. The administration should certainly not be able to back out of the project at this late date.

Very truly yours,

MILES S. SCHLOSBERG, INC.

Mark A. Ertischek

By Mark A. Ertischek

MAE:bmc

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPT. OF HEALTH AND SOCIAL SERVICES

OFFICE OF THE COMMISSIONER / POUCH H-01 – JUNEAU 99811

March 17, 1977

Document# Senate CRA #1

The Honorable Joseph L. Orsini
Chairman, Community & Regional
Affairs Committee
Pouch V
Assembly Building - Room 101
Juneau, Alaska 99811

Dear Senator Orsini:

I am writing this letter to clarify for the Community and Regional Affairs Committee the Department of Health and Social Services involvement in hospital and health facilities construction.

The Office of Planning and Research, within the Department, is responsible for administering Alaska Statutes, Sec. 18.20.080. This statute (attachment #1) is implemented through 7AAC 12.020 Regulations for Hospital Construction and Equipment (attachment #2). These regulations contain the same requirements as for Federal Hill-Burton construction. These regulations are updated as Hill-Burton requirements change. A current revision to conform to new Hill-Burton requirements is presently in the Attorney General's office. Thus, all hospitals built in the State of Alaska must meet Hill-Burton standards.

The Office of Planning and Research also administers Chapter 25, Assistance to Hospitals and Health Facilities (attachment #3) Hospitals, in most instances, are built utilizing local, state, and federal funds. The same criteria of allowable and non-allowable costs are applied to state funds as are applied to federal funds in hospital construction. Hence, state funds would not be expended for such items as site acquisition (except for public health centers), interest costs, off-site improvements, etc.

I hope the above information is helpful.

Sincerely,

Lois M. Judd

Lois M. Judd
Acting Commissioner

Enclosures

ALASKA STATE LEGISLATURE - HOUSE OF REPRESENTATIVES

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REP. M. F. "MIKE" BEIRNE
DISTRICT 7, ANCHORAGE

MEMBER OF:
FIFTH STATE LEGISLATURE
NINTH STATE LEGISLATURE
TENTH STATE LEGISLATURE

COMMITTEES:
HEALTH
EDUCATION AND
SOCIAL SERVICES
FINANCE SUB-COMMITTEE
ON TRANSPORTATION

March 21, 1977

Senator Joseph Orsini, Chairman
Senate Community & Regional Affairs Committee
Room 101, Assembly Building
Juneau, Alaska

Re: Senate Concurrent Resolutions 13 and 14

Dear Senator Orsini:

The purpose of this brief letter is to clarify some issues raised at the committee meeting on Tuesday, March 15. There was much discussion regarding related matters, but the question before the committee only concerns the legality of the regulations. I believe it is obvious that the regulations do change the law. If the Department wishes to change the intent of the law, it should come to the Legislature for that.

1. The Department of Community and Regional Affairs expressed confusion as to whether or not the 1975 application for grant funds was made through the Municipality or directly to the Department. This was the application that resulted in the payment of grant funds in the amount of $312,000.00.

CLARIFICATION:

A. This application was made directly to the Department under the law and the funds were paid by the Department directly to the Hospital Corporation.

B. At that time, the Borough Mayor was Jack Roderick, and he advised me in his office that if the Department sent the grant funds through the Borough,

that he would not cooperate, and that he would not transfer the funds to the Hospital. Therefore, the application was made directly.

C. This is a good example of local political interference with the orderly process of law, and is precisely why the legislature, in its wisdom, gave the local health facility the right to apply directly. Borough Mayor Jack Roderick acted improperly and contrary to the law.

D. The Department researched the project at that time and determined that by law the Hospital Corporation was indeed entitled to apply and receive grant funds directly from the State. Therefore, their new regulation attempts to frustrate the intent of the law.

2. Mr. McCarter, Departmental Division Director of Revenue Sharing, volunteered the information that there were no funds now being held for the hospital.

There is a letter of encumbrance in the Department files showing that in December of 1976, $200,000 was encumbered by the Department pending review of the question. To the best of my knowledge, these funds are still encumbered. They rightfully belong to the Hospital Corporation.

3. Mr. McCarter also noted that the audit showed no checks for some expenses claimed. That is only a nasty half-truth and I resent it.

Some expenses claimed include telephone, rent, secretarial services, etc., all routine and ordinary expenses which were paid out of other accounts since the Hospital had very limited funds of its own.

But all the major expenses, much more than sufficient to satisfy the matching fund requirements, were paid from the Hospital checking account, and they were double signature checks with one signature being that of an officer of the California company which was assisting us on the project at that time.

Further, the books and records of the corporation are perfectly clean and clear. The accountants from Peat, Marwick, Mitchell & Co. have always been the accountants and auditors of record for the hospital corporation, since inception, and I am sure under oath would testify to the records.

4. The Department expressed lack of knowledge as regards the Fairbanks and Soldotna hospital projects and their cost accounting records. This is ridiculous.

The administrator of the Soldotna hospital, at the time of receipt of State grant funds in 1972, told me personally of that project history and application. All costs were included and were accepted by the Department. No questions

were asked. The Department knows this, but it is just being coy. If they don't, or won't, produce the records, I think it speaks for itself.

5. Testimony clearly showed, I believe, that the regulations were developed by the Department solely to apply to this hospital project. I believe that they are not only unfair and improper but that they are illegal as well. The Department's efforts to make these regulations apply two years retroactively are further evidence of the personalized character of the attack against me.

Prompt action on the part of the committee would indeed be appreciated.

Very truly yours,

Dr. Mike Beirne
State Representative

MB:js

STATE
of ALASKA

MEMORANDUM

TO: Palmer McCarter
Director
Div. of Local Government Assistance
Dept. of Community & Regional Affairs

DATE: April 6, 1977

FILE NO:

TELEPHONE NO:

FROM: Lowell W. Swartz
Coordinator
Health Facilities Development
Office of Planning and Research
Dept. of Health & Social Services

SUBJECT: Construction Revenue Sharing

Construction funds authorized by AS43.18.010(j) were disbursed to the Fairbanks Memorial Hospital and the Central Peninsula Hospital at Soldotna in accordance with the Hill-Burton construction program allowable and non-allowable cost regulations. Use of the Hill-Burton regulations was authorized by the Attorney General in his opinion of August 29, 1972.

LWS:sy

S.ATE
of ALASKA

MEMORANDUM

TO: Palmer McCarter, Director
Division of Local Government
Assistance
Department of Community &
Regional Affairs

DATE : April 8, 1977

FROM: Richard A. Smith RA
State Internal Auditor
Department of Administration

SUBJECT: Comments to Senator Joseph Orsini, Chairman Senate Community & Regional Affairs Committee. Dated March 21, 1977, From Representative M. F. "Mike" Beirne

(Point 3, Paragraph 1)

"Mr. McCarter also noted that the audit showed no checks for some expenses claimed. That is only a nasty half-truth and I resent it."

Reply

Mr. McCarter's statement is completely factual. In numerous instances, as indicated in our report of 7/26/76, the documentation to support reported expenditures was non-existent. This includes checks, invoices or other supportive evidence.

(Point 3, Paragraph 2)

"Some expenses claimed include telephone, rent, secretarial services, etc., all routine and ordinary expense which were paid out of other accounts since the hospital had very limited funds of its own."

Reply

These costs were excluded due to the lack of supporting documentation. Costs were reportedly paid by companies controlled by M. F. Beirne. However, the financial records of LOC did not reflect these expenditures nor did they recognize a liability to the companies which reportedly paid these expenditures on LOC's behalf.

As An Example:

The total support for telephone expenses consisted of one invoice, for one months time, paid by Raypath, Inc.. There was no break down of the billing which would indicate that part of the bill related to the construction of the Lake Otis Hospital.

(Point 3, Paragraph 3)

"But all major expenses, much more than sufficient to satisfy the matching fund requirements, were paid from the hospital checking account, and they were double signature checks with one signature being that of an officer of the California company which was assisting us on the project at that time."

Reply

We examined all checks written from the hospital checking account presented to us by representatives of LOC. The total being $930,215.49 of which $861,843.87 reasonably appeared to be related to the construction of the hospital. Eligible construction costs are to be reimbursed at a rate of 25%. That amount determined by us as allowable for reimbursement was $215,460.97. LOC has received $312,500 making an over-payment to LOC of $97,039.03. However, our examination of 2/14/77 recommends that LOC pay back the entire $312,500.

(Point 4, Paragraph 4)

"Further, the books and records of the corporation are perfectly clean and clear. The accountants from Peat, Marwick, Mitchell & Co. have always been the accountants and auditors of record for the hospital corporation since inception, and I am sure under oath would testify to the records."

Reply

Supported by review of reports and direct discussion with staff of Peat, Marwick, Mitchell & Co., that firm has not performed any services for Lake Otis Clinic, Inc. since December 31, 1974 when they released an unaudited financial report for Lake Otis Clinic, Inc.

April 8, 1977

The accountant for LOC is Don Taylor, a private CPA who has worked with our Department on this examination for some time and as recently as March, 1977 telephoned and informed us that he is still trying to assemble LOC's records.

Taylor's address is:

Don Taylor
Room 104, Suite 201
3201 C Street
Anchorage, AK 99502
Phone Number 277-7700

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPT. OF COMMUNITY & REGIONAL AFFAIRS

DIVISION OF LOCAL GOVERNMENT ASSISTANCE

POUCH B – JUNEAU 99811

April 11, 1977

The Honorable Joseph Orsini
Chairman
Senate Community and Regional
Affairs Committee
Assembly Building, Room 101
Juneau, Alaska 99801

Dear Senator Orsini: Joe

RE: Senate Concurrent Resolutions 13 and 14

Although the Senate Community and Regional Affairs Committee has already taken action on the subject resolutions, I feel it necessary to respond to a letter dated March 21, 1977, from Dr. Michael Beirne, concerning the Lake Otis Clinic application and its relationship to the subject resolutions.

Prior to discussion on the statements made in Dr. Beirne's letter, I will apologize in advance for not being more fully prepared to answer the specific questions raised by Senator Bill Sumner and other committee members regarding the LOC project. It was my understanding that the committee was to discuss the resolutions before it and I hope that I did adequately testify to the satisfaction of committee members regarding the historical background and the current application of the hospital construction regulations which are proposed to be anulled by the two resolutions.

Since Dr. Beirne did, in his March 21 letter, attempt to "clarify" several points brought out in testimony before the committee and at one point accused me personally of having stated "nasty half-truths", I feel it incumbent upon me to respond to certain parts of that letter.

Since his point number one primarily deals with former Borough Mayor Jack Roderick and the position that the Greater Anchorage Area Borough took with respect to the LOC application, I will not attempt to provide other statements concerning the issue.

Regarding his second clarification, I did indicate that there were no funds being held for Lake Otis Hospital. Dr. Byrne is correct that an amount of $200,000 was encumbered , and is currently encumbered; however, this amount was encumbered only if

the internal audit of the State should indicate that the State owed additional funds to Lake Otis Clinic. As you are aware, the results of that audit by the State Internal Auditor indicated that not only were no additional funds due to LOC but, in fact, the report recommended that the State attempt to retrieve funds formerly paid to the Lake Otis Clinic project. Certainly we take the position that the $200,000 does not "rightfully belong to the Hospital Corporation".

Rather than respond directly to the concerns raised in Dr. Beirne's point number three, I have attached a letter from the State Internal Auditor which more adequately responds than I could ever hope to. I would hope that when and if the subject resolution should come before the Senate Finance Committee that the committee accept Dr. Beirne's suggestion that Peat, Marwick, Mitchell and Company be called upon to testify, under oath, as to the records of LOC.

With respect to the concerns raised in item number four of Dr. Beirne's memo, I again refer you to the attached statement from Lowell Swartz of the Department of Health and Social Services who, since the inception of the Municipal Revenue Sharing Program, has been the person who has reviewed all applications for construction aid under the program. I feel his statements, although brief, answer to the contradiction of Dr. Beirne's statements, as to what actually took place with respect to the Fairbanks and Soldotna hospital projects.

Finally, the regulations which are currently being considered by SCR 13 and 14 were the result of a mandate from the Legislature last year for the Department to adopt "minimum standards" concerning all aspects of the Municipal Revenue Sharing. The regulations do just that and as earlier stated in testimony, with the exception of Dr. Michael Beirne, were not the subject of criticism by any other hospital or municipality.

Sincerely,

LEE McANERNEY
COMMISSIONER

By: Palmer McCarter
Director
Local Government Assistance

Attachments

cc w/attachments: Senator John Sackett
Chairman
Senate Finance Committee

PMcC: gh

DAILY NEWS 2/17/77 SCR 13/14

Daily News photo by Rob Stapleton

Doc's No. 1

Dr. Roland Lombard, the Massachusetts veterinarian and veteran musher, shows his starting number for the World Championship Sled Dog Race, to be held Friday, Saturday and Sunday. Twenty mushers drew for positions Wednesday night at the Anchorage Westward Hotel, with last year's winner, George Attla, drawing the number 10 slot. Details in Sports, Page 15.

Beirne says he won't return funds to state

By PAUL NUSSBAUM
Our Juneau Bureau Chief

JUNEAU — Rep. Mike Beirne, R-Anchorage, will not return $312,000 in state revenue sharing funds, he said Wednesday. He was given the funds for a hospital he plans to build, but state auditors say the clinic may never be completed.

Legislative leaders said Wednesday they are concerned about a possible conflict of interest as a result of two resolutions introduced in the Senate which would remove legal barriers that are blocking Beirne's efforts to collect more state revenue sharing money for the Lake Otis Clinic. The resolutions were introduced in the Senate at Beirne's request.

THE STATE'S internal auditor Wednesday formally recommended that the state recover all $312,000 given Beirne "and that no subsequent payments be made until such time as LOC (Lake Otis Clinic Inc.) provides an accurate accounting of construction costs, obtains permanent financing and has title to the land for the hospital site dedicated irrevocably to a public purpose."

None of those conditions are met now, auditors say.

Beirne was asked last year to return about $97,000 of the $312,000 he was given in 1975 for hospital construction. The Anchorage pathologist is battling to retain that money.

"I'M NOT GOING to consider giving any of those funds back," Beirne said of the revenue sharing money Wednesday. "The Hammond administration is picking on small businesses in Alaska, and this is just another example."

Two resolutions introduced in the Senate at Beirne's request through the Administrative Regulations Review Committee would allow Beirne — or any other hospital

13 years later, federal report still haunts rebuilding in quake areas

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persuade federal officials to approve an all-Alaska natural gas line.

THE OMAR delegation came to Juneau to try to convince the legislators to speed their review of both houses. Gruening has expressed reservations about the weight the state action may carry with the Federal Power Commission or the Congress.

•Beirne won't repay

(Continued from Page 1)

costs involved in hospital construction. Under current regulations, only allowable costs are subject to state revenue sharing grants.

If Beirne collected 25 per cent of the projected $10 million cost of the 125-bed hospital, he would collect $2.5 million from the state.

THE AUDIT released Wednesday by the internal auditor says the state "may find that its revenue sharing money has gone to pay a past debt and no hospital will ever be fully constructed and in use by the people of Alaska. There must be good faith on the part of (Beirne) to fulfill his stated goals. (Beirne) in this case has voluntarily jeopardized the interest of the state . . ."

Lake Otis Clinic, at the intersection of Lake Otis Drive and 42nd Avenue, was started in 1973, but only foundation work has been completed so far. Beirne says construction will resume this spring and that the clinic will take about 18 months to complete.

The state attorney general's office says it has reached no decision on whether it should examine possible conflict of interest involved in the resolutions introduced at Beirne's request.

HOUSE Speaker Hugh Malone said that "probably the best course" would be to hold hearings with Beirne, the Dept. of Law and the Dept. of Community and Regional Affairs. But the House will take no action, as the bills were not introduced on that side.

The resolutions were referred first to the Senate Community and Regional Affairs Committee, chaired by Sen. Joe Orsini, R-Anchorage. Orsini said Wednesday he is "trying to get information about the resolutions," but has not scheduled any action on the resolutions in the near future.

"I'm not all that concerned with his individual case," Orsini said. "If they are bad regulations, they ought to be repealed, regardless of who is hurt or benefitted. I don't even plan to look at his individual situation unless maybe as an example of how the laws are unjust."

THE DEPT. of Law will sue if necessary to collect the $312,000 Asst. Atty. Gen. Rodger Pegues said Wednesday. But Beirne is immune from a suit until the legislative session is over.

Beirne says the efforts to block more revenue sharing money for the Lake Otis Clinic are spawned by the Hammond administration and the two hospitals already operating in Anchorage, Providence Hospital and Alaska Hospital and Medical Center.

"Those hospitals make millions of dollars a year . . . they know they'd lose several million a year if we open, and that would come right off the top — that would be part of their profits.

"The state has never audited those hospitals — they're just picking on the little guy."

Beirne said he asked Sen. Jalmar Kerttula, D-Palmer, to introduce the resolutions in the Senate rather than introducing them himself in the House because "I didn't want to put pressure on my fellow members . . . I got it as far away from myself as possible."

ANCHORAGE DAILY NEWS

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15th Avenue and I Street.

There, officers arrested a 17-year-old juvenile, who was later charged with armed robbery and released to his parents, and Phyllis Rae Gray, 25, of 3723 Thompson, who was taken to state jail annex. Her bail was set at $2,000.

The third suspect is still at large.

•Stevens

(Continued from Page 1)

of . . . the import duties on fisheries projects and all the fees, fines and penalties paid under the extended fisheries jurisdiction. Regional fisheries councils would be able to use these funds and award loans for research, development, and construction of fishing vessels or onshore facilities."

— The state's permanent fund. Stevens urged the state legislature not to use the permanent fund as a loan source of last resort.

— The capital move. Stevens said federal money used for the capital move will take the money that might otherwise have gone for other projects in the state.

"You can't view federal funds for a new capital in the same light as for, say, a new hospital in Bethel . . . The federal funding will just come out of existing federal expenditures."

AG Aware Of Beirne Charges

By The Associated Press

Atty. Gen. Avrum Gross said Tuesday that a conflict of interest allegation against state Rep. Mike Beirne, R-Anchorage, has been "brought to our attention," but no decisions has been made on whether to conduct an investigation.

"There has been an allegation of conflict of interest," Gross said. "I don't know what we're going to do. We've made no decision of what, if any, action we plan to take."

Gross made the statement in the wake of a disclosure by the Anchorage Daily News that doctor-lawmaker Beirne is pushing legislative proposals which could earn him as much as $2.5 million in taxpayers' money.

Alaska's conflict of interest law provides that "no public official may use his official position or office for the primary purpose of obtaining financial gain for himself, or his spouse, child, mother, or father, or business with which he is associated or owns stock."

At issue are two Senate resolutions introduced at Beirne's request to change Department of Community and Regional Affairs' regulations which are thwarting Beirne's efforts to collect state revenue sharing money for a $10 million, 125-bed hospital he is trying to build in Anchorage.

One resolution would allow Beirne to collect state revenue sharing funds for 25 per cent of total costs of the project as opposed to the currently-allowable reimbursement for "allowable costs."

Based on Beirne's estimate that the hospital will cost $10 million, a 25 per cent state grant would earn him $2.5 million.

Another resolution would eliminate existing requirements that applicants for state revenue sharing money submit applictions through a local municipality.

Beirne already has collected $312,000 for the project from the state, but the payment was made under protest of then-mayor of the Greater Anchorage Area Borough, Jack Roderick, who said delays in the start of construction on the hospital "has given us cause for conern about the appropriateness of revenue sharing funds for this purpose."

Beirne said he was pushing for the legislation because the Department of Community and Regional Affairs "is violating the intent of the law" which established revenue sharing by limiting costs which are eligible in calculating the awards.

Beirne acknowledged that conflict of interest questions "did bother me at first." But he added that "my speciality is health...I was very familiar with the law and spotted the inconsistencies immediately."

"I don't have anyy reservations about it..," he said. "It was my duty to respond."

In a dispatch from its capitol bureau, the Daily News also reported that a soon-to-be-released state audit on the hospital project will recommend that Beirne be forced to pay back the entire $312,000 he received on 1975.

According to auditors, the newspaper said, Beirne no longer even holds title to the land on which he hopes to build the Lake Otis Clinic.

The audit also charges that Beirne did not act in good faith in charing unreasonable costs to the project, the Daily News said.

Based on another audit conducted last year, state officials disallowed $2.3 million of the $3 million in costs claimed by Beirne in his revenue sharing calculations, and ordered him to repay $97,000 of the $312,000 total.

Beirne said he has contested the repayment order and will sue the state if it tires to take back the entire $312,000.

In the forthcoming audit, the Daily News said, auditors claim that the title to land for the hospital site is held by General Health Services of Culver City, Calif., a profit-making company which owns a string of clinics.

Beirne, however, disputed the claim. He said General Health Services holds a lien against the property, but he still holds the title.

But state officials, the Daily News added, say they are concerned that the involvement of General Health Services could be in violation of requirements that revenue sharing money be used in the public interest.

Beirne originally borrowed about $1 million from People's Bank and Trust in Anchorage for the hospital project. However, time delays and climbing interest charges increased his debt to more than $1.5 million, and Beirne was forced to borrow $150,000 from the National Bank of Alaska last November to stave off default.

The loan was made one day before Beirne was re-elected to the seat to which he originally was appointed by Gov Hammond

cont

SCR 13

Memo Says Beirne 'Covered'

JUNEAU (AP) — A state lawmaker cannot be prosecuted under Alaska's conflict of interest law for sponsoring self-serving legislation, the attorney general's office says.

In a memorandum released yesterday, Attorney General Avrum Gross said the Alaska Constitution insulates lawmakers from prosecution in connection with legislative actions despite provisions of the state's conflict of interest law.

The decision ruled out any prospect for charges being brought against Rep. Mike Beirne, R-Anchorage, in connection with two resolutions he is sponsoring to repeal regulations which are causing him financial problems.

But in concluding that Beirne couldn't be prosecuted, the attorney general's office emphasized it wasn't ruling on whether Beirne was involved in a conflict of interest and threw the simmering issue into the lap of the House leadership.

"If the legislature itself were to determine that a member was involved in improper conduct of any nature, it is free to take such action as it deems proper, including the possibility of censure," the memo said.

The 11-page memorandum was prepared by Assistant Attorney General Pat Gullufsen at the request of Dan Hickey, chief of the Department of Law's criminal division.

Hickey said he wanted an "assessment of the actions of Representative M. F. Beirne in sponsoring Senate Concurrent Resolutions 13 and 14 as they relate to possible criminal prosecution under" the state's conflict of interest law.

The resolutions in question would repeal Department of Community and Regional Affairs (CRA) regulations under which the state has challenged $312,000 in revenue sharing paid to Beirne for a financially troubled project, the Lake Otis Clinic, he is trying to build in Anchorage.

The memorandum said it was clear that the resolutions both originated with Beirne and would benefit him directly.

It said Berne has "publicly acknowledged that the resolutions are his," and concluded that they "would go a long way, if not all the way, towards resolving the dispute between CRA and Lake Otis Clinic — Beirne in favor of Beirne — and as a consequence entitle Lake Otis Clinic to just about all it wants..."

But in researching the case, Gullufsen wrote that the state conflict of interest law, which would appear to prohibit such acts, was in conflict with the state Constitution.

The conflict of interest law provides that "no public official may use his official position or office for the primary purpose of obtaining financial gain for himself...or business whith which he is associated or owns stock."

But the memorandum added that "the statute, if applied to acts by legislators including the introduction of bills or resolutions, creates immediate and difficult problems of proof."

"The key phrase in the act is 'primary purpose,'" the memorandum said, noting many lawmakers rightly introduce legislation in connection with their own fields of business.

The memorandum said it is assumed that the term primary purpose was used in the act in "an effort to distinguish the slutation where the real purpose of a legislator is purely to benefit himself as opposed to the situation where he will only incidentally benefit from an official action."

Concluding that the issue boiled down to the-always-difficult-to-prove question of motive, the memorandum said application of the conflict of interest law to the sponsorship of legislation would create "a vast grey area in which legislators are going to be afraid to tread."

"The result will be that, whether prosecution is intiated or not, legislators will be very loath to get involved in areas which may affect them, which is going to mean that out of fear of prosecution the public may lose the benefit of those most knowledgeable in particular legislative fields," the memorandum said.

Probably because of such fears, the memorandum added, the constitution was drafted to include language that "legislators may not be held to answer before any other tribunal for any statement made in the exercise of their duties while the legislature is in session..."

The memorandum acknowledged that "arguably, a resolution (like Beirne is sponsoring) would not be a protected statement," and also conceded that the state Supreme Court never has not ruled on the question.

However, the memorandum said a similarly worded provision in the U.S. Constitution has been interpreted by the courts to mean that "Beirne would be immune from questioning, indictment or prosecution under the circumstances of this case."

"This is not an easy question," the memorandum concluded "There are two competing public policies at work, the first avoiding conflicts by legislators and the second insuring that legislators feel free to act in what they believe to be the public interest, free of the fear of criminal prosecutions for their actions.

"We believe the Alaska Constitution has clearly struck the balance in favor of the second value, at least when the action takes place in the legislature itself through the means of debate or legislative action."