# Coastal Zone Mgt - Legal Opinions

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K–STATE CAPITOL
JUNEAU, ALASKA 99811

March 6, 1980

The Honorable Arliss Sturgulewski
Senator
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Re: SCR 51-54

Dear Senator Sturgulewski:

This responds to your request for our views on the use of resolutions in the light of the ruling in State v. A.L.I.V.E. Voluntary. In preparing this response we have reviewed that decision and the memorandum from Director Barrier of the Legislative Affairs Agency to Representative Anderson and the memoranda from Legislative Counsel Cook to you. We would agree with them that the use of resolutions as a veto over regulations, programs, or other actions or proposed actions has been placed in great doubt. Indeed, we believe that the ruling makes their use a nullity.

In A.L.I.V.E., the court quoted the terms of the Administrative Procedure Act which provide for the legislature to annul a regulation by a concurrent resolution and said:

> This statute encompasses a variant of what has come to be called the legislative veto. The question in this case is whether this device violates article II of the Alaska Constitution. We hold that it does.

State v. A.L.I.V.E. Voluntary, ___ P.2d ___ (Op. No. 2022, Feb. 17, 1980), at 2 (citation omitted, emphasis added).

Accordingly, the ruling is on the basis that, except as expressly provided for by the constitution, the legislative veto is itself constitutionally impermissible, and -- as the dissent makes clear -- the court's decision leaves no room for argument.

The principal question posed by the ruling in A.L.I.V.E. is whether the court will treat the several statutory requirements for legislative vetoes as severable or nonseverable, that

is, whether the entire statute is invalid or just the provisions for the legislative veto. We can offer no general answer. Each statute must be examined separately. All that we can say is that a serious question exists, and if the legislature does not act to answer it with amendatory legislation, the court will do so on a case-by-case basis as each statute becomes the subject of litigation.

Sincerely yours,

AVRUM M. GROSS
ATTORNEY GENERAL

By: Rodger W. Pegues
Assistant Attorney General

RWP:md

# STATE OF ALASKA
# THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

## LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

March 6, 1980

SUBJECT: Status of approval of coastal zone management regulations

TO: Senator Arliss Sturgulewski, Chairman
Senate Community and Regional Affairs Committee

FROM: Billy G. Berrier BGB
Director
Division of Legal Services

You have asked what effect the recent decision in State of Alaska v. A.L.I.V.E. Voluntary, (Feb. 19, 1980 Opinion No. 2022) has on approval of coastal zone management programs required by AS 46.40.080.

I have discussed this case in an earlier opinion for Representative Anderson. With his permission, I have made this opinion available to other legislators. A copy of that opinion is attached.

For coastal zone management programs simply requiring approval by bill rather than by concurrent resolution could create substantial problems under Article II, section 19 of the Constitution which prohibits the use of local or special acts where a general act can be made applicable. It may be possible that the legislation can be restructured to bring approval by law within the test for special legislation used in State v. Lewis, 559 P.2d 630 (Alaska 1977) which is the case approving the Cook Inlet land transfer; but this would involve substantial policy decisions by the legislature.

In my earlier opinion, I recommended proceeding in the areas by the use of concurrent resolutions knowing there is a risk involved. This is, of course, a policy decision to be made by the legislators. It would appear probable in this context that if the approval mechanism were held invalid, a court would hold the approval mechanism unnecessary to the validity of the programs and sustain the programs.

BGB:jdn

Attachment

# STATE OF ALASKA
# THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

## LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M  February 28, 1980

SUBJECT: State of Alaska v. A.L.I.V.E. Voluntary

TO: Representative Nels A. Anderson, Jr.
House Majority Leader

FROM: Billy G. Berrier
Director
Division of Legal Services

You have asked my comments on the decision of the Supreme Court in the case of State of Alaska v. A.L.I.V.E. Voluntary, (File No. 3670). A copy of the decision is attached.

The case concerns a regulation relating to games of skill and chance annulled by the legislature. The authority for annulment was AS 44.62.320(a) which provides:

> The legislature, by a concurrent resolution adopted by a vote of both houses, may annul a regulation of an agency or department.

The Administrative Procedure Act was adopted by the First State Legislature in 1959. This Act provided, among other things, for the procedure by which regulations of agencies or departments are promulgated and the section was enacted as part of that procedure.

The Court held, with a majority opinion of three justices and a strong dissent by two justices, that regulations could not constitutionally be annulled by concurrent resolution since a resolution is not enacted in accordance with the requirements in Article II of the Constitution for adoption of law. The result, of course, is a non sequitor since the majority opinion avoided addressing the difference between regulation and law and finding that despite the difference, the enactment procedures applied. They, therefore, assumed the middle term of the syllogism and rambled widely to provide a substitute for the missing logic. Various cases were cited, only one of which was relevant and that one is no longer good law in its own jurisdiction.

For this reason, it is very difficult to determine the effect of the decision.

The holding is explicit that regulations may not be annulled by concurrent resolution. Although it is not explicitly stated, there is a clear implication that annulment by bill is constitutional.

Beyond that, the Court made several statements which do not appear necessary to the holding in this case. Much of this dicta is in sweeping terms. It casts doubt over substantial areas and, since the reasoning is essentially stream of consciousness rather than coherent, gives only minimal clues concerning the legal status of these areas.

Essentially the areas affected fall into two classes

(1) regulations and legislative oversight of regulations; and

(2) other areas of law where concurrent resolutions are used to provide legislative oversight.

On regulations the majority opinion states broadly:

> "The express provision in the Alaska Constitution of two specific legislative veto mechanisms supports our view that no implied general power to veto agency regulations by informal legislative action exists.
>
> * * *
>
> "In our view, the specificity with which the constitution deals with the legislative veto powers it does grant leads logically to the conclusion that no other veto power is implied."

The case law on regulations which the majority opinion cited is not helpful. One of the cases is on point but is no longer good law in its own jurisdiction, the second is a trial court decision and the last is a federal case where the question of a one-house veto was present but not reached. The discussion of this last case illustrates the difficulty in following the reasoning in the majority opinion. The Court referring to the United States Circuit Court decision in Atkins v. United States, 556 F2d 1028 (1977) said:

> The court implied that for one House to have the authority to make such a change would be unconstitutional: "Nor could one House do anything more than preserve existing law . . ." Id. at 1064. In contrast, the annullment provisions of AS 44.62.320(a) permit the legislature to void administrative regulations which are in effect. Such regulations are laws in every meaningful sense, and annulling any one of them effects a change in the law.

The connection and logic totally escape me.

In its discussion of delegation of power to annul regulations, an issue injected into the opinion since no delegation is involved in the case before the Court, the opinion is even less helpful. The majority opinion observes:

> "While the power to void agency regulations could be exercised by either the legislature, or by an agency, when the legislature exercises such power it must do so while acting as a legislature. It may not grant itself the power to act as an agency.
>
> "It might be supposed that if the legislature could condition the validity of a regulation upon the subsequent disapproval by both of its houses by concurrent resolution, it could condition the same upon disapproval by a committee, or a single legislator. Using the theory, propounded by the Amici, that a veto is merely a condition there is no principled distinction between these cases. It is therefore worth observing that most authorities have rejected the validity of laws conferring either affirmative or negatory legislative powers on individual legislators or legislative committees."

Perhaps the second point made by the majority opinion in discussing the desirability of legislative oversight of administrative regulations gives the best clue. The opinion stated:

> Second, at least according to a recent case study, the legislative veto has been unimpressive in practice. See Bruff & Gellhorn, Congressional Control of Administrative Regulation: A Study of Legislative Vetoes, 90 Harv. L. Rev., 1369 (1977). That study concludes, essentially, that the legislative veto encourages secretive, poorly

> informed, and politically unaccountable legislative action. Id. at 1409-20. It is consequences such as these that the enactment provisions of our constitution are designed to guard against.

It should be pointed out that the facts concerning the annulment which was the subject matter of the case do not support a conclusion that the annulment resulted from "secretive, poorly informed and politically unaccountable legislative action" but that, of course, is not material.

It is my conclusion that any annulment of regulation other than by law would be unconstitutional under this case. Although the question is not discussed since it is not relevant to the case, it is very clear that regulations which have the effect of law require statutory authorization and the legislature can withdraw the authorization or establish standards in whatever degree of specificity the legislature desired. Since in case of conflict between statute and regulation the statute controls, it is also clearly permissible to make the substantive statutes detailed thereby leaving less or no areas which must be dealt with by regulations. This latter course, however, involves a loss of flexibility and administrative expertise.

It appears that any form of legislative oversight of administrative regulations would be regarded with suspicion by the court. However, devices such as providing chat no regulation can become effective until it has been before the legislature in session for a set time or even a provision that no regulation may become effective unless approved by law are not clearly precluded.

In Plumley v. Hale, 594 P.2d 497 (Alaska 1979), our Court discussed the question of non-retroactive treatment in civil cases. The Court in that case stated:

> In accord with United States Supreme Court precedent, we have previously identified four conditions indicating the propriety of non-retoractive treatment in civil cases: 1) the holding is one of first impression, or overrules prior law, and was not foreshadowed in earlier decisions; 2) there has been justifiable reliance on an alternative interpretation of the law; 3) undue hardship would result from retroactive application; and 4) the

> purpose and intended effect of the holding is best accomplished by prospective application.

The case concerned approval of free conference committee reports without a recorded roll call vote. The Court held the criteria to be satisfied and the decision to be prospective only. In my opinion the facts here, while not as compelling as the facts in Plumley, would lead to a conclusion that annulment of regulations which occurred prior to this case are not affected by the case.

The second major problem area is legislative oversight exercised by concurrent resolution in other areas than regulation oversight. The majority opinion made a very broad statement saying:

> The question presented by this case is whether the legislature can exercise its legislative power without following these enactment provisions. In our view the answer must be in the negative, for otherwise they would serve no purpose.

(The dissenting opinion quite correctly pointed out this is not the question at all. Justice Boochever said

> In my opinion, the majority misstates the question presented as being whether the legislature can exercise its legislative power without the usual constitutional safeguards. The real question is whether, having exercised its legislative power, subject to all those safeguards, it may condition the delegation of regulatory power to an executive agency upon a provision for legislative oversight. I agree with our statement in Boehl that the legislature has that power.

This view will be significant in subsequent cases which concern the use of concurrent resolutions in context other than annulment of regulations placing as it does the issue before the Court in focus.)

The majority opinion went on the say:

> Of course, when the legislature wishes to act in an advisory capacity if may act by resolution. However, when it means to take action having a binding effect on

those outside the legislature it may do so only by following the enactment procedures.

While the dissent noted that numerous other statutes provide some specific legislative review function by concurrent resolution, the majority opinion does not specifically address this. The sweeping generality of the majority opinion clouds, and on its face forbids, these other functions.

These include:

1. AS 18.45.025 -- Approval of facilities siting permit for nuclear facilities.

2. AS 18.65.060 -- Disapproval of regulations relating to compilation of criminal justice information and release of this information.

3. AS 28.05.021 -- Approval of compacts with other states relating to motor vehicle registration and driving licenses.

4. AS 28.15.141 -- Approval of regulations relating to classification of drivers licenses.

5. AS 28.15.081 -- Approval of regulations relating to drivers license examination.

6. AS 35.10.080 -- Approval of physical facility procurement and planning policy.

7. AS 37.05.280 -- Approval of leases by the state with a rental in excess of $12,000. (While this has general application, it was adopted as part of and specifically relates to construction of public buildings by ASHA for lease to the state and is necessary for the validity of the revenue bonds issued by ASHA.)

8. AS 37.12.080 -- Approval of investments in a single project or to a single applicant by Alaska Renewable Resources Corporation if the investment exceeds $1,500,000 or five percent of the resources of the corporation.

9. AS 38.05.037 -- Disapproval of zoning by the division of lands in the unorganized borough.

10. AS 38.05.182 -- Disapproval of a determination by the Commissioner of the Department of Natural Resources that the taking of royalty on natural resources in money rather than in kind is in the best interests of the state.

11. AS 38.05.065 -- Approval of disposition of oil and gas and contracts for sale of state owned royalty gas or oil.

12. AS 39.23.080 -- Approval of salary commission recommendations. (This is now repealed but until the pay bill this year went into effect, it was the basis on which higher government officials, including the governor, legislators and judges, were paid.)

13. AS 44.55.110 -- Approval of Alaska Power Authority plans. This approval is a specific condition on bonding.

14. AS 44.57.210 -- Approval of projects of the Alaska Toll Bridge Authority. This approval is required before bonds may be issued.

15. AS 46.03.758 -- Disapproval of regulations establishing civil penalties for discharge of oil.

16. AS 46.40.080 -- Approval of Alaska coastal management programs.

While all of these are clouded by the language in the majority opinion, that language is clearly dicta except on the point of annulment of regulations. In my opinion, an attempt to determine whether in later cases the court would follow the broad sweep in the instant case, narrow that sweep depending on the issue before it, or even confine the case to its facts would be pure speculation. Courts have frequently done all three. The majority opinion with its conclusionary approach unsupported by a coherent rationale is of little assistance in determing the scope of the opinion.

Earlier in the opinion, I discussed retro-activity as it applied to regulations annuled by concurrent resolution before the opinion. There is an even stronger case for holding that retroactive application cannot be given to a decision in the areas where annulment of regulations is not in question.

I am, however, very distrubed by the possibility that a future decision in this area could be retroactive to the date of this decision based on a finding by the Court that this decision "clearly foreshadowed" a subsequent decision that resolutions could not be used as prescribed in these statutes. I do not think this would be the decision since certainly at the time of enactment of the laws referred to there was no foreshadowing and bringing all legislative action to a halt in areas of major concern to the state while the legislature re-wrote the law in these areas is certainly not reasonable.

Since the alternative would be to halt, among other things, power development, coastal zone management, and oil and gas sales based on a possibility that the Court will look on legislative oversight in these areas as unfavorably as it does on legislative oversight of regulations, I recommend continuing to operate within the statutory framework now established until the Court, by a subsequent decision, clarifies its position.

I would also recommend that the legislature consider the question of what options are open to it to meet the serious problems created by the case.

BGB:jdn

# STATE OF ALASKA
# THE LEGISLATURE

POUCH Y · STATE CAPITOL
JUNEAU ALASKA 99811
907-465-3800

## LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M  February 26, 1980

SUBJECT: Legislative role in approving coastal management programs.

TO: Senator Arliss Sturgulewski, Chairman
Senate Community and Regional Affairs Committee
Attn: Margo Waring, A.A.

FROM: Tamara Brandt Cook TBC
Legislative Counsel

AS 46.40.080 simply provides for adoption by the legislature of coastal management programs which have already been reviewed and approved by the council. Clearly under the terms of this statute the legislature may approve the program or disapprove the program. Although the statute does not provide for the situation involving legislative approval of only part of a program, there is also no clear requirement that the legislature approve or disapprove the entire program. In fact, the legislature has done just that on previous occasions, so there is some precedent for the proposition that under the terms of AS 46.40.080 the legislature may approve a program in part and disapprove it in part. SLA 1978, Legislative Resolve Number 41.

Under AS 46.40.060 all district coastal management programs are submitted to the Alaska Coastal Policy Council for review and approval. Standards for council review are itemized in AS 46.40.070. In view of these provisions, an argument could be made that the legislature should not disapprove a program or part of a program that has been adopted by the council unless it finds that the council failed to properly apply the standards set out.

Since there is no case law on point and the language of the statute does not specifically restrict the legislative role, the legislature appears to be free to approve a management program, disapprove a program, or approve it in part and disapprove it in part. Note that the recent case, State of Alaska, and Department of Revenue v. A.L.I.V.E. Voluntary, No. 2022, February 19, 1980 casts considerable doubt upon the ultimate effect of legislative resolutions.

TBC:ljb

# OF ALASKA
# THE LEGISLATURE

## LEGISLATIVE AFFAIRS AGENCY

POUCH V STATE CAPITOL
JUNEAU ALASKA 998[illegible]
907-465-3800

M E M O R A N D U M February 26, 1980

SUBJECT: Constitutionality of legislative approval or disapproval by resolution of agency regulations.
(Work Orders No. 8190, 8191, 8192, and 8193)

TO: Senator Arliss Sturgulewski, Chairman
Senate Community and Regional Affairs Committee

FROM: Tamara Brandt Cook
Legislative Counsel

AS 44.62.320(a) which provides that the legislature, by a concurrent resolution, may annul a regulation of an agency or department, was recently held to be unconstitutional. State of Alaska, and Department of Revenue v. A.L.I.V.E. Voluntary, No. 2022, February 19, 1980. Essentially, that case held that specific provisions of the Alaska Constitution set out in Article II, sections 13, 14, and 18 must be complied with before the legislature can make new law. Additionally, the governor must have the opportunity to veto any new law. In view of these mechanics, the Supreme Court has concluded that the legislature may not create new law through resolution. The proposition that administrative regulations are not the same as bills and ought not to be subject to the same requirements was specifically presented and rejected by the Court. "Such regulations are laws in every meaningful sense, and annulling any one of them effects a change in the law." State of Alaska, and Department of Revenue v. A.L.I.V.E. Voluntary, supra, 21.

The Court recognized that the legislature may delegate law-making power to an administrative agency, and that the delegation could be made subject to a condition. But the condition must be lawful. Making a delegation subject to later change by the legislature through informal action (resolution) was held to be an unlawful condition. The Court reasoned that whenever the legislature exercises its law-making power, it must do so pursuant to the mechanics

set out in the constitution. While an agency may adopt regulations without following any of the same mechanics, the legislature may not act as an agency itself.

In view of this broad holding, AS 46.40.080, requiring approval of amendments to the state coastal management program by adoption of concurrent resolution or by majority vote while both houses are convened to confirm executive appointments, is questionable constitutionally since both these methods constitute informal law-making on the part of the legislature. Although this case did not deal with AS 46.40.080 specifically, it is significant to note that AS 46.40.080 was identified in the dissenting opinion as another example of a statute similar to the one held to be unconstitutional. State of Alaska, and Department of Revenue v. A.L.I.V.E. Voluntary, supra, 46.

TBC:ljb

Enclosure