

SB

308





# Alaska State Legislature

## Senate

### Committee on Judiciary

Pouch V  
State Capitol  
Juneau, Alaska 99811

Official Business

February 1, 1980

Clem V. Tillion,  
President of the Senate  
Room 101 Capital Building  
Juneau, Alaska

Re: SB 293.

Dear Mr. President:

When the Senate Judiciary Committee considered the captioned bill at its regularly scheduled hearing on January 29, 1980, Donald P. Koch of the Division of Insurance testified before us, advising us that the Division was not opposed to the legislation.

However, Mr. Koch stated that there had been an occasion when a life insurance company, notwithstanding the double indemnity provision for accidental death contained in its policy, had paid the beneficiary only the face amount of the policy.

It is the intent of the Senate Judiciary Committee that a presumptive death certificate shall have the same force and effect as a regularly issued death certificate insofar as ascertaining the amount of insurance proceeds payable is concerned.

Respectfully submitted,

  
\_\_\_\_\_  
SENATOR ZIEGLER, CHAIRMAN

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SENATOR MELAND, MEMBER

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SENATOR BENNETT, MEMBER

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SENATOR DANKWORTH, MEMBER

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SENATOR RAY, MEMBER

**DARRY DONNELLAN**  
Attorney at Law

P.O. Box 73795 • Fairbanks • Alaska • 99707 • (907) 456-2309

February 8, 1980

The Honorable Robert H. Ziegler, Sr.  
Alaska State Senate  
Pouch V  
Juneau, Alaska 99811

Re: Senate Bills 340 and 355

Dear Senator Ziegler:

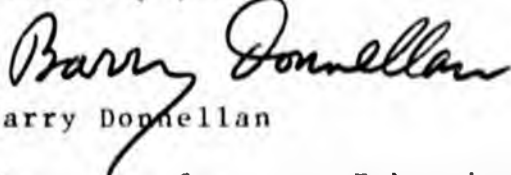
This office represents many mining claim holders throughout most of Alaska. This affords me an excellent opportunity to gauge the mood of a large segment of our population.

I can assure you, Senator Ziegler, that the question of regulations is foremost in the minds of my clients. A major flaw in our system of government is the fact that the regulations are promulgated by bureaucrats insensitive to and immune from the will of the electorate.

It is my impression that if the power to promulgate regulations is not rescinded and vested in those responsive to the will of the electorate, it is only a matter of time until the people of Alaska will take the law into their own hands. With a view to averting such a catastrophe, it is hereby suggested that you utilize the full power of your office to expedite passage of Senate Bills 340 and 355.

Many thanks for your attention to this very important matter.

Sincerely yours,



Barry Donnellan

Copy: Senators Fahrenkamp and Sumner

(b) Only this section and § 180 of this chapter apply to

(1) a regulation which prescribes the organization or procedure of an agency, or

(2) Repealed by § 4 ch 45 SLA 1969. (§ 2(1) art IV (ch 1) ch 143 SLA 1959; am § 17 ch 143 SLA 1968; am § 8 ch 40 SLA 1969; am § 4 ch 45 SLA 1969)

**Legislative committee report.** — For report on ch. 45, SLA 1969 (HB 20 am S), see 1969 House Journal, p. 414.

**Am. Jur. reference.** — 42 Am. Jur., Public Administrative Law, §§ 26, 27.

## Article 5. Judicial Review.

### Section

#### 300. Court review

**Sec. 44.62.300. Court review.** An interested person may get a judicial declaration on the validity of a regulation by bringing an action for declaratory relief in the superior court. In addition to any other ground the court may declare the regulation invalid (1) for a substantial failure to comply with §§ 10 — 320 of this chapter, or (2) in the case of an emergency regulation or order of repeal, upon the ground that the facts recited in the statement do not constitute an emergency under § 250 of this chapter. (§ 1 art V (ch 1) ch 143 SLA 1959)

**Judicial review from nonadjudicatory legislative action is provided in the Administrative Procedure Act under this section,** which section specifically provides for declaratory relief, but not for a statute of limitations on actions. *Moore v. State*, Sup. Ct. Op. No. 1284 (File Nos. 2551, 2587), 553 P.2d 8 (1976).

**In the past the supreme court has departed from a restrictive interpretation of the standing requirement.** *Coghill v. Boucher*, Sup. Ct. Op. No. 900 (File No. 1798), 511 P.2d 1297 (1973).

**Standing may be allowed one without direct interest in outcome.** — The need for review in certain cases may make it desirable to allow standing to one whose primary interest is not in the direct outcome of the administrative action, but in its competitive effect on his economic interest. *Coghill v. Boucher*, Sup. Ct. Op. No. 900 (File No. 1798), 511 P.2d 1297 (1973).

**Registered voters held "interested persons" to challenge election regulations.** — Residents and registered voters held to possess standing as "interested persons" under the Administrative Procedure Act (AS 44.62) to challenge the regulations promulgated by the lieutenant governor under AS

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**The distinction between legislative and interpretative rule making is a helpful one when reviewing regulations adopted by state administrative agencies.** *Kelly v. Zamarello*, Sup. Ct. Op. No. 705 (File Nos. 1255, 1256), 486 P.2d 906 (1971).

**The difference in judicial attitude toward certain administrative rules has been characterized as a distinction between "legislative regulations" and "interpretative regulations."** "Legislative rule" has been defined as "the product of an exercise of legislative power by an administrative agency, pursuant to a grant of legislative power, the legislative body." "Interpretative rules" are rules which do not rest upon a legislative grant of power (whether explicit or implicit) to the agency to make law. The distinction is not always easy to draw, since interpretative

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Two distinct types of administrative decisions on questions of law are recognized. One type involves questions in which the particularized experience and knowledge of the administrative personnel goes into the determination. When this type of question is presented to the court for review, deference should be given to the administrative interpretation, since the expertise of the agency would be of material assistance to the court. The amount of deference will vary depending upon the apparent degree of reasonableness of the administrative decision and the degree to which the problem involves knowledge peculiar to an industry, business, etc. The other kind of case presents questions of law in which knowledge and experience in the industry affords little guidance toward a proper consideration of the legal issues. These cases usually concern statutory interpretation or other analysis of legal relationships about which courts have specialized knowledge and experience. Consequently, courts are at least as capable of deciding this kind of question as an administrative agency. *Kelly v. Zamarello*, Sup. Ct. Op. No. 705 (File Nos. 1255, 1256), 486 P. 2d 906 (1971).

**Manner of review.** — Where an administrative regulation has been adopted in accordance with the procedures set forth in the Administrative Procedure Act, and it appears that the legislature has intended to commit to the agency discretion as to the particular matter that forms the subject of the regulation, the supreme court will review the regulation in the following manner: First, it will ascertain whether the regulation is consistent with and reasonably necessary to carry out the purposes of the statutory provisions conferring rule-making authority on the agency. This aspect of review insures that the agency has not exceeded the power delegated by the legislature. Second, the supreme court will determine whether the regulation is reasonable and not arbitrary. This latter inquiry is proper in the review of any legislative enactment. *Kelly v. Zamarello*, Sup. Ct. Op. No. 705 (File Nos. 1255, 1256), 486 P.2d 906 (1971).

**Scope of review.** — When a regulation has been adopted under a delegation of authority from the legislature to the administrative agency to formulate policies and to act in the place of the legislature, the supreme court should not examine the content of the regulation to judge its wisdom, but should exercise a scope of review not unlike that exercised with respect to a statute. *Kelly v. Zamarello*, Sup. Ct. Op. No. 705 (File Nos. 1255, 1256), 486 P.2d 906 (1971).

**Standard of review generally.** — AS 44.62.020 and AS 44.62.030 provide guidance as to the standard of review for regulations adopted pursuant to an administrative agency's quasi-legislative rule-making function. *Kelly v. Zamarello*, Sup. Ct. Op. No. 705 (File Nos. 1255, 1256), 486 P.2d 906 (1971).

**"Reasonable basis" standard of review.** — See *Kelly v. Zamarello*, Sup. Ct. Op. No. 705 (File Nos. 1255, 1256), 486 P.2d 906 (1971).

The reasonable basis approach should be used for the most part in cases concerning administrative expertise as to either complex subject matter or fundamental policy formulations. *Kelly v. Zamarello*, Sup. Ct. Op. No. 705 (File Nos. 1255, 1256), 486 P.2d 906 (1971).

Application of the reasonable basis test is extremely useful where the administrative action under review resembles executive as opposed to legislative or judicial activity. *Kelly v. Zamarello*, Sup. Ct. Op. No. 705 (File Nos. 1255, 1256), 486 P.2d 906 (1971).

The reasonable basis approach, in the review of agency action which is essentially executive in character, recognizes that the application of law to facts in an administrative setting may require techniques quite different from those traditionally associated with judicial functions. *Kelly v. Zamarello*, Sup. Ct. Op. No. 705 (File Nos. 1255, 1256), 486 P.2d 906 (1971).

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310. Agency meetings pub.  
312. State policy regarding

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Quoted in *State v. Tanana Valley Sportsmen's Ass'n*, Sup. Ct. Op. No. 1716 (File No. 3433), 583 P.2d 854 (1978).

**Article 5. Judicial Review.****Sec. 44.62.300. Court review.**

Two distinct types of administrative decisions, etc.

The supreme court has distinguished between two types of questions which may confront a court in judicial review of administrative action. Where the agency decision involves the formulation of fundamental policy or the particularized expertise and experience of administrative personnel, the court will defer to the administrative decision, inquiring only whether it has a reasonable basis. On the other hand, where the issues to be resolved turn on statutory interpretation, the knowledge and expertise of the agency is not conclusive of the intent of the legislature in passing a statute. Statutory interpretation is within the scope of the court's special competency, and it is the court's duty to consider the statute independently. *Hood v. State*, Sup. Ct. Op. No. 1559 (File No. 3289), 574 P.2d 811 (1978).

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In accord with 2nd paragraph in original. See *Stevenson v. Burgess*, Sup. Ct. Op. No. 1514 (File No. 2791), 570 P.2d 728 (1977).

Where there is primarily a question of a statutory interpretation and legislative intent, it is a question of whether "the administrative agency has acted within the scope of its authority" and concerns "statutory interpretations requiring the special competency of the courts." Therefore, the reasonable basis test is not the appropriate standard of review. *Stevenson v. Burgess*, Sup. Ct. Op. No. 1514 (File No. 2791), 570 P.2d 728 (1977).

**Alaska Workmen's Compensation Board.** — Although the Alaska Workmen's Compensation Board is a quasi-judicial agency, the same criteria for judicial review of any administrative action should apply. *Hood v. State*, Sup. Ct. Op. No. 1559 (File No. 3289), 574 P.2d 811 (1978).

**Article 7. Legislative Review of Rules.****Section****320. Legislative annulment of regulations and review****Sec. 44.62.320. Legislative annulment of regulations and review.**

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

(b) At the same time a regulation is filed by the lieutenant governor, the lieutenant governor shall submit the regulation to the chairman of the Administrative Regulation Review Committee for review under AS 24.20.400 — 24.20.460. (§ 1 art VII (ch 1) ch 143 SLA 1959; am § 3 ch 149 SLA 1962; am § 2 ch 72 SLA 1963; am § 2 ch 27 SLA 1975; am § 5 ch 64 SLA 1978)

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February 14, 1980

LETTER OF INTENT

SENATE JUDICIARY COMMITTEE

The Senate Judiciary Committee, in reporting out SB 308, "Relating to the Validity of Regulations", feels that various state agencies and departments from time to time promulgate regulations which are totally out of line and beyond the pale of reason.

The bureaucrats of the state are running roughshod over the people and do not seem to understand the ever-increasing public resentment for which the regulations are directly responsible. The public is sick unto death of the amount of unprovoked good that is being done for them.

It is the unanimous opinion of the committee that by compelling the state to uphold the validity of regulations when they are challenged that, although it may be true that the agencies and departments involved may become swamped with litigation and challenges, much better the onus on their backs to justify the validity of regulations than on the backs of the 400,000 some-odd citizens of the state to have the regulations adjudicated invalid.

Strong letter follows!

Respectfully submitted,

  
\_\_\_\_\_  
Senator Ziegler, Chairman

  
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Senator Meland, Member

  
\_\_\_\_\_  
Senator Ray, Member

  
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Senator Dankworth, Member

  
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Senator Bennett, Member



Official Business

# Alaska State Legislature

## Senate

### Committee on Judiciary

Pouch V  
State Capitol  
Juneau, Alaska 99811

February 14, 1980

#### LETTER OF INTENT

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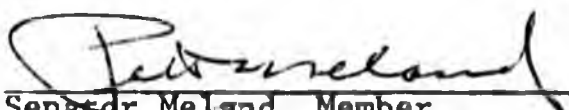
Strc.ig letter follows!

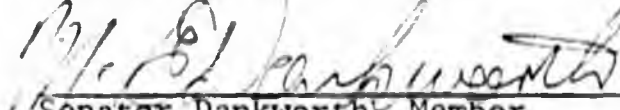
Respectfully submitted,

  
\_\_\_\_\_  
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Senator Dankworth, Member

# STATE OF ALASKA

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

SB 308  
JAY S. HAMMOND, GOVERNOR

POUCH K-STATE CAPITOL  
JUNEAU, ALASKA 99811

February 26, 1980

The Honorable Terry Gardiner  
Speaker of the House  
Alaska State Legislature

The Honorable Samuel Cotten  
Chairman  
Rules Committee  
House of Representatives

The Honorable Charles Parr  
Chairman  
Judiciary Committee  
House of Representatives

The Honorable Mike Miller  
Chairman  
State Affairs Committee  
House of Representatives

Re: SB 308 (burden of proving  
validity of regulations)

Gentlemen:

This bill passed the Senate by a substantial vote. (1980 S.J., p. 359) If enacted into law, it will create extremely serious problems. A floor amendment which would have alleviated some of those problems was offered yesterday and then withdrawn. I am writing in the hope that you will consider these problems before any definitive House action on the subject. I understand that the Senate recognizes that there are serious problems in this bill and anticipates substantial amendment in the House.

This bill would require that, when an administrative regulation is challenged under AS 44.62.300, the state bear the burden of "proving" it valid. There are two areas of difficulty: (1) the basic policy the bill reflects, and (2) more-or-less technical, legal difficulties. I am convinced that this bill would be inimical to the interests of the State of Alaska, not just of the executive branch.

The Honorable Terry Gardiner  
The Honorable Samuel Cotten  
The Honorable Charles Parr  
The Honorable Mike Miller

February 26, 1980

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In reversing the presumption of validity of administrative regulations, the bill destroys the presumption heretofore applicable to statutes, regulations, and other governmental actions. Singling out regulations for a presumption of invalidity attacks an essential means of assuring governmental fairness in dealing with all people. Administrative regulations serve two fundamental governmental functions: (1) since statutes must speak in more-or-less general terms, regulations provide the details necessary to deal with the complexities of a highly technical, highly populous twentieth century society; and (2) they establish a standard for people in dealing with their government and with each other, to avoid their being subjected to possible arbitrary, ad hoc decision making by that government.

Numerous statutes expressly require the adoption of administrative regulations, and numerous statutes expressly authorize the adoption of others. In addition, several supreme court decisions have indicated that agency action taken in the absence of administrative regulations is invalid. Even the ombudsman has filed complaints about the absence of regulations. Administrative agencies thus required to adopt regulations would be unable to execute the statutes for which they are responsible if the regulations necessary to implement those statutory functions do not have the benefit of the presumption of validity.

A bill such as this, essentially stating that administrative regulations are presumed invalid, invites challenges. A complaint need not even be well founded in order to force the state through the hoops of "proving" validity. The attendant expense of such a proposal is difficult to predict precisely, but it is evident that it would be substantial. With the great number of challenges certain to be inspired by this bill if it passes, the witness fees, attorney fees, and related litigation costs would require greatly expanded agency budgets. In addition, the already crowded court dockets would become even more unmanageable. Thus the bill would increase the court overload, increase the cost to the state, and provide a windfall to lawyers.

The Honorable Terry Gardiner  
The Honorable Samuel Cotten  
The Honorable Charles Parr  
The Honorable Mike Miller

February 26, 1980

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While there is certainly a popular sentiment against government regulation, it appears most logical to deal with regulations in a way that allows one to distinguish between good ones and bad ones. This bill, in a wholesale fashion, would establish a presumption applicable to all regulations -- from fish and game season opening dates to oil and gas lease provisions to rules of the road to public assistance application procedures, etc.

Many people have in mind a favorite example of a regulation that appears unnecessary or unwise, but the literally thousands of regulations which are essential to the functioning of statutorily created programs, and which raise little if any controversy, would be as affected by this bill as the controversial or questionable ones.

It has been said in support of the bill that one of its purposes is to avoid having people "presumed guilty" under some regulation and to enable them to enjoy the traditional presumption of innocence until proven guilty. But most regulations do not deal with a question of guilt or innocence. They establish procedures, set standards, set prerequisites for application for some state benefit, regulate relationships among people, and do many things unrelated to a presumption of guilt or innocence.

Moreover, the bill creates internal conflicts within the Administrative Procedure Act. The presumption of invalidity is established by this bill in AS 44.62.300. But the bill does not amend AS 44.62.100 which embodies a presumption of validity. There is thus a conflict between the bill and the existing statute in that a presumption of validity is not operable if, in fact, the agency has the burden of proving that the plaintiff's alleged facts are untrue or that if true are not sufficient grounds for invalidating the regulation.

In addition, it is not really clear what the bill means by the "burden of proving." The general concept of "burden of proof" has two essential parts: the burden of "going forward" and the burden of "persuasion." In traditional legal concepts, a presumption, such as the presumption of invalidity established by this bill, would operate only on the burden of going forward. But it is not clear whether that is what the bill means.

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Another point left unclear by the bill is the standard for "proving" the regulation's validity. In reviewing various kinds of administrative actions, the courts have developed four standards. The one applicable to administrative regulations is known as the "reasonable and not arbitrary" test. But that goes to the substance of a regulation rather than to the procedure followed in adopting it. The bill leaves the point untouched.

It has also been asserted in support of this bill that it will make agencies more concerned about citizens' rights. It has been my experience through many years of dealing with state agencies that a concern for citizens and their rights is directly related to the quality of people working for the agency, and would have no relation whatsoever to statutes establishing burden of proof tests in future lawsuits. Of course, the mere fact that an agency reaches a policy decision different from the one some individual citizen or some legislator might make does not mean that the agency is not concerned about citizens' rights or that it is disregarding opinions that were expressed during the regulations-adoption process. Obviously, both houses of the legislature often have quite different opinions of what their respective constituencies require but that does not mean that either house is disregarding the needs of the people.

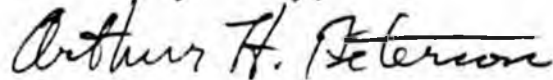
It has been suggested that this bill would provide a means that would be more expeditious and less expensive for individuals to relieve themselves of the requirements of regulations they do not like (whether or not thousands of other people, as well as the agency involved and perhaps a majority of the legislators, think that the regulation is wise and generally beneficial). The other avenues of protest open to an individual are AS 44.62.210's opportunity to comment; AS 44.62.230's procedure for petitioning for the adoption, amendment or repeal of a regulation; AS 44.62.060's legal review by the Department of Law; AS 44.62.300's opportunity for declaratory relief; and, of course, working with the legislature for enactment of a statute that would supersede the regulation. None of these methods is necessarily time-consuming or expensive to the individual, and they have the advantage of not interfering with the regular performance of functions by various administrative agencies. This bill, on the other hand, would be a serious disruption to the very programs mandated by the legislature and would be very expensive to the taxpayers of the state.

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There is certainly a good deal of sentiment today against the multitude of regulations that affect our lives. However, before taking drastic action to respond to that sentiment, it is well to reflect on the fact that most, if not all, of these regulations, have been adopted because the legislature directed the agencies to do so. There are other ways to deal with the problem, and I would be happy to discuss them with you, but this approach would create many more serious problems that it would solve.

Yours very truly,



*for* Avrum M. Gross  
Attorney General

AMG:md

cc: The Honorable Clem V. Tillion  
President  
Alaska State Senate

The Honorable Robert H. Ziegler, Sr.  
Alaska State Senate

The Honorable Glenn Hackney  
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