SB

340

COMMITTEE REPORT

SENATE

1/17/80

FURTHER: None

Date: 1/17

Mr. President:

The Committee on JUDICIARY has had SB 340

requiring legislative approval of regulations

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[ ] replace with CS for _____ [ ] same title [ ] new title

and recommends _____

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS:

_____

CHAIRMAN

S 60 (Rev. 12/78)

Alaska State Legislature

BETTYE FAHRENKAMP
ALASKA STATE SENATOR
FAIRBANKS, ALASKA 99701
4016 EVERGREEN
907-479-3550

WHILE IN JUNEAU
POUCH V
JUNEAU, ALASKA 99811
OFFICE 907-465-3763
HOME 907-789-9182

Senate

Memorandum

To: Senator Ziegler

From: Senator Fahrenkamp

Re: SB 340

We are all aware of the difficulties which arise through an agency's interpretation and administration of legislation which may impose greater or lesser control on the public than the legislation intended. A further problem exists when the promulgators of a regulation, perhaps having an education or experience level acceptable for designing the regulations, may not have the practical or field experience that shows the relationship of the regulation to the regulated activity. In addition, agencies and even departments within agencies may have regulations which counteract each other. Agencies are not usually aware of other agency regulations.

In attempting to change regulations after they have been drafted, the interested citizen has many barriers to hurdle. First, he is viewing a set of regulations which, while not set in cement, have undergone several drafts within the agency (likely without public or outside participation) and which are less likely to be changed due to the time already spent on drafting. The citizen's views may be noticed, but are not required to be specifically addressed in the review process. (Nor should they be; however, a citizen should be able to prepare or give testimony on a particular set of regulations with the knowledge that his concerns will be considered). Second, his time is likely spent in the private sector trying to earn a living. He may not have the time or money available to prepare testimony or appear at a hearing as an interested party. (Hearings are not known for being convenient). Third, there is a difficulty for the citizen in even learning about a hearing or receiving notice. Much of the information (and misinformation) regarding government is passed by word of mouth. If the person misses the hearing he has no other opportunity to address the issue.

Finally, the preponderance of effort and the number of regulations involved may simply wear down an individual's ability to participate.

At times, an agency gets frustrated with current legislative procedure. In a recent hearing regarding proposed regulations the director of the agency stated that his agency had tried several times to get bills passed by the legislature, but had been unsuccessful. Since the bills never got anywhere, he had promulgated the proposed regulations so that the changes could be made without going through the legislative process. This appears to be a prime example of the need for legislative involvement in the rule-making process.

Separate from all this are the agencies' declarations that drafting regulations is the least enjoyed aspect of their responsibilities.

On February 19, 1980, the Supreme Court held as unconstitutional a statute which permitted the legislature to annul by concurrent resolution regulations issued by the executive department and agencies. In effect, this decision removes the authority for the Regulation Review Committee to do anything but ask that an agency change its regulations. Due to this decision it becomes evident that action is necessary.

The court struck down the statute because it allowed the legislature to legislate without following the safeguards included in Article II of the Constitution. Some of the safeguards include the limitation of one subject per bill, the requirement of three readings per bill and the right of the governor to veto the legislation. Concurrent resolutions are not subject to these provisions.

In the dissenting opinion, Justice Boochever held that the provisions in Article II do not apply to regulations. Noting that a regulation does not have to comply with these provisions to be validly issued, compliance is also not necessary for a regulation's valid annulment. He observed that rule-making is an essentially legislative function which the legislature has delegated to the executive branch of government, that the power of the executive is not infringed by the legislature's retention of the authority to review and annul regulations.

Alaska policy, as stated in AS 44.62.312:, " It is the policy of the state that (1) the governmental units mentioned in 310(a) of this Chapter exist to and in the conduct of

the people's business;" (2) It is the intent of the law that actions of those units be taken openly and that their deliberations be conducted openly; (3) The people of this state do not yield their sovereignty to the agencies which serve them; (4) The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know; (5) The people's right to remain informed shall be protected so that they may retain control over the instruments they have created.

Something needs to be done and SB 340 may provide the answer. When SB 340 was introduced there were questions as to whether or not a concurrent resolution would be strong enough to approve regulations of the executive branch, since challenges to the same procedures in other states had been upheld by the court systems. Since the decision came out, we have communicated with legal affairs. (Their memorandum is attached.) Their recommendations for corrections to the bill are contained in the attached sponsor substitute. (The other change in the legislation is the sixty day requirement for the approval of regulations, including those emergency regulations which are being permanently adopted.) I hope you will consider the changes in the sponsor substitute for SB 340 and pass this bill from your committee with a Do Pass recommendation.

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K–STATE CAPITOL
JUNEAU, ALASKA 99811

February 27, 1980

The Honorable Bettye Fahrenkamp
Senator
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Re: Sponsor substitute for
SB 340 (legislative approval
of regulations)

Dear Senator Fahrenkamp:

I have reviewed the Sponsor Substitute for SB 340 which you brought to the meeting of the Senate Judiciary Committee yesterday. It is a great improvement over the original SB 340 -- removing some of that version's constitutional and other problems -- but the Department of Law still cannot support it.

As we discussed at yesterday's meeting of the Senate Judiciary Committee, I will be in Anchorage and will not be able to attend the committee's Thursday, February 28, meeting at which this bill will be considered. Therefore, I am sending a copy of this letter to Senator Ziegler, and will include some comments on the original SB 340 since your sponsor substitute has not yet been formally introduced.

It is our opinion that the bill still suffers two serious defects: (1) it violates the separation-of-powers doctrine, and (2) the 60-day to almost a year's delay in a regulation's effective date is not workable. The delay and the constitutional issue are inextricably related in that the delay so interferes with the execution of the laws, for which the executive branch is responsible, that the executive branch is prevented from performing its constitutionally required functions.

As a practical matter, it is simply not feasible for the Board of Fisheries, for example, to delay the effective date of a June 1 fisheries opening until the following year when the legislature will have had 60 days to consider what to do about

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that date. If the regulation is filed, for example, by the lieutenant governor on May 1 and the legislature adjourns May 10, this bill would require that the regulation lie before the legislature for another 50 days during the next regular session -- to convene the following January. In addition, any regulation filed after adjournment of the regular legislative session would have to wait until the full 60 days of the next regular session before taking effect. Again, for many regulations, such a deferred effective date would not be in the best interests of the state. Events and circumstances requiring adoption or amendment or repeal of administrative regulations do not necessarily coincide with legislative sessions, and thus this bill would seriously interfere with the executive branch's performance of its constitutionally required functions. AS 44.62.270 says that it is "state policy that emergencies are held to a minimum and are rarely found to exist," and the emergency regulation approach should be used sparingly.

Concerns similar to those being expressed now in the legislature were expressed in 1975 when the legislature enacted the bill which became ch. 27 SLA 1975, creating the Administrative Regulation Review Committee. At that time, it was recognized that the legislature should not interfere with the regulations-adoption process as a means of executing statutorily required functions. The legislature felt that what was needed was a systematic means of review. See the second sentence of AS 24.20.400 (the last portion of which, as you know, was held invalid on February 19, 1980, by the Alaska Supreme Court in State v. A.L.A.V.E. Voluntary). Section 2, ch. 27 SLA 1975 enacted AS 44.62.320(b), requiring the lieutenant governor to submit a regulation to the new committee within 45 days after the regulation is filed. Believing that an earlier transmission to the committee would be even more helpful, in 1978 the legislature amended AS 44.62.320(b) (see sec. 5, ch. 64 SLA 1978) to require the lieutenant goverror to submit the regulation to the committee "at the same time" that the regulation is filed by the lieutenant governor.

The current system involving prompt review of regulations by the Administrative Regulations Review Committee appears to adequately address the concern expressed in Sponsor Substitute for SB 340, and does so without raising the serious constitutional and practical issues that this bill raises.

However, in the A.L.I.V.E. Voluntary case, the Alaska Supreme Court stated (at page 24 of the advance copy), "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." Citing cases from other jurisdictions, our court indicated that a statute expressing some administrative agency's role in performing an oversight function would be valid. Perhaps some such arrangement based upon referrals from the Administrative Regulation Review Committee could be developed.

I would like to comment on three statements contained in your undated, but presumably February 26, 1980, memo to Senator Ziegler covering your proposed sponsor substitute. Near the middle of your second paragraph on page 1 you state that "a citizen should be able to prepare or give testimony on a particular set of regulations with the knowledge that its concerns will be considered." The last sentence of AS 44.62.-210(a) already requires this, stating "The state agency shall consider all relevant matter presented to it before adopting, amending or repealing a regulation." An earlier legislature anticipated your concern and enacted a statute covering it.

The last sentence on your first page says "If the person misses the hearing he has no other opportunity to address the issue." That is not quite correct. If an oral hearing is scheduled, and someone is not able to appear in person, he or she may present written comments or arguments. AS 44.62.210(a). If the person misses the opportunity for submitting written comments, AS 44.62.220 gives him or her the right to petition for a change in the regulations. AS 44.62.230 sets out the procedure for such a petition. In addition, AS 44.62.060 prohibits the lieutenant governor from filing a regulation unless it has been approved for legal matters by the Department of Law. If a person has a legal concern regarding a proposed or newly adopted regulation, he or she can submit that concern to the Department of Law with the assurance that it will be considered. If the person believes that a regulation is invalid and the Department of Law has not agreed with that point of view, the person can submit the matter to court for a declaratory judgment under AS 44.62.300. And, of course, if all of these procedures fail to

produce the result sought by the individual, he or she is free to work with the legislature in enacting legislation to supersede the offending regulation.

In the second sentence of the fourth paragraph on page 2 of your memo, you state that the A.L.I.V.E. Voluntary decision "removes the authority for the regulation review committee to do anything but ask that an agency change its regulations." That too is not quite correct. The committee is always free to work for legislative amendment of the statutes under which the regulations were adopted. As a committee of the legislature, it is, of course, in a good position to do so.

With regard to the original bill, I generally agree with Legislative Counsel Joe Guthrie's February 25 comments on the A.L.I.V.E. Voluntary case and the bill's unconstitutionality. As to more technical problems with the original bill, the "or" between paragraphs (3) and (4) of sec. 260 is confusing. It appears to make each paragraph stand independently. For example, an emergency regulation may not remain in effect unless, under paragraph (2), the agency certifies compliance with secs. 60 and 150 -- 210 of the APA, indicating that legislative approval is not required if the agency complies with those sections; but I wonder if that is what you intended. Also, under paragraph (3), an emergency regulation may not remain in effect unless the legislature has approved it under sec. 275; but sec. 275 does not provide for notice, hearing, or the attorney general's legal approval; thus, if the legislature approves the regulation it will remain in effect even though there has been no notice, hearing, or legal approval. And, under paragraph (4), the emergency regulation will not remain in effect unless the time period under sec. 275(c) has not expired; sec. 275(c) sets a one-year period for legislative approval; so, it appears that an emergency regulation could remain in effect a year, but then that is inconsistent with the lead-in line for sec. 260(a) which says 120 days. If the word "and" was intended to be used in place of the word "or," and all four requirements must be met, what happens when the legislature is not in session and it is necessary to adopt an emergency regulation? In addition, line 29 on page 2 of the original bill refers to filing "with" the lieutenant governor; however, under the rest of the APA,

regulations are "submitted to" him and "filed by" him; this distinction is significant because it is the filing by him that starts the time period running under current law.

In summary then, the Department of Law, upon consideration of both the constitutional and practical problems inherent in both the original SB 340 and the proposed Sponsor Substitute for SB 340, cannot support either version. The current law, providing for prompt review of regulations by the Administrative Regulations Review Committee, appears to be adequate, but we are open to suggestions for improving the system within the bounds of the constitution.

Thank you for this opportunity to offer our comments. We would be pleased to discuss this with you and other legislators if you and they wish.

Yours truly,

AVRUM M. GROSS
ATTORNEY GENERAL

By: Arthur H. Peterson
Arthur H. Peterson
Assistant Attorney General

AHP:md

cc: Keith Specking
Legislative Assistant
Governor's Office

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 that 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 it 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

MEMORANDUM

February 25, 1980

SUBJECT: Constitutionality of SB 340 in light of State v. A.L.I.V.E. Voluntary.

TO: Senator Bettye Fahrenkamp

FROM: Joseph A. Guthrie
Legislative Counsel

As you may know, on February 19, 1980 the Alaska Supreme Court held in State v. A.L.I.V.E. Voluntary, No. 2022, that the use of a concurrent resolution to annul regulations, as authorized by AS 44.62.320, is unconstitutional. The Court equated annulment of regulations with repeal of statutes in finding that the use of a concurrent resolution to annul regulations violates the procedures specified for lawmaking in Article II of the Alaska Constitution. These procedures, which the Court described as safeguards against ill considered action, include the requirement that each bill be confined to one subject, have a descriptive title, contain an enactment clause of prescribed wording, be read three times on three separate days, and be passed by the recorded votes of a majority of each house.

None of these safeguards, of course, apply to concurrent resolutions.

SB 340 would require that all regulations be approved by concurrent resolution adopted by the legislature before becoming effective. While A.L.I.V.E. Voluntary, supra, is concerned with the annulment of regulations, not their prior approval, the decision turns on the use of the concurrent resolution to effectuate what the Court considered to be lawmaking. That the Court would consider a requirement of prior approval of regulations to be lawmaking seems clear, since the Court cited with approval Reith v. South Carolina State Housing Authority, Ct. C. P., 11th Jud. Dist. (August 28, 1975), rev'd on other grounds, 225 S.E.2d 847, 848, (S. C. 1976). In that case, the South Carolina Court of Common Pleas held invalid a statute stating that regu-

lations adopted would be invalid unless approved by a concurrent resolution of the South Carolina General Assembly on the grounds that the General Assembly could not perform a legislative function by means of a concurrent resolution. Therefore, it seems clear that the legislation you requested is now unconstitutional.

After consulting with your staff assistant, I drafted a sponsor substitute for SB 340 which would require that newly adopted regulations, before becoming effective, be placed before the legislature while it is in session for 60 days. This would afford the legislature an opportunity, before the regulation becomes effective, to review the regulation, consult with the executive regarding any modifications thought necessary, and if need be, enact a bill disapproving the regulation.

JAG:ljb

Enclosure

Sharp copy

STATE OF ALASKA
THE LEGISLATURE

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

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

February 27, 1980

SUBJECT: Rationale for the addition of section 2 to the Judiciary Committee Substitute for SB 340

TO: Senator Bettye Fahrenkamp

FROM: Joseph A. Guthrie
Legislative Counsel

You will note that we have added a section 2 to the Senate Judiciary Substitute for SB 340 repealing AS 24.20.445. That section authorizes the Administrative Regulation Review Committee to suspend the effectiveness of regulations adopted since the end of the last session of the legislature until 30 days into the next session. Since your bill would provide that no regulation becomes effective until it is before the legislature for 60 days, regulations adopted since the end of the last session of the legislature would not be effective in any case, and therefore the power of suspension is rendered nugatory.

JAG:ljb

Enclosure

March 5 1980

Senator Robert H. Ziegler Sr.
Pouch V
Juneau, Alaska 99811

Dear Senator Ziegler:

Last night, for the first time ever, I had the opportunity (just took the time) to watch "Capitol 80" on television. Regarding the business of regulations, I applaud your comments and I sincerely hope you can find some way to maintain control over the regulatory powers of agencies and commissioners. I loved your comment about them only wishing to be the legislature themselves! How true, how true!

I have stated repeatedly that commissioners are given far too much power - we've had regulations imposed by the Department of Public Safety on the school bus industry - we've got the Department of Natural Resources proposing some absolutely asinine fire control regulations - and it goes on and on. Commissioners are not elected representatives and should be answerable to those who are! There have been many times that regulations have been gross misinterpretations of legislative intent. The legislature must keep some control over this situation. DON'T GIVE UP!

Public hearings on regulations: what a joke! This last batch of fire control regs being pushed by Resources never had a hearing in the Delta area and we'll be greatly affected. When we objected, they said that a hearing was held in Fairbanks. Perhaps, but it was not announced within the Delta area. No one here knew about it. And the agency rep could not "remember" <u>when</u> it was advertised in the Fairbanks paper! The public needs your attitude on regulations - hang in there and keep legislative control.

E. C. PHILLIPS & SON, INC.
Box 8235
KETCHIKAN, ALASKA 99901

March 2, 1980

The Honorable Bettye Fahrenkamp
Alaska State Senate
Pouch V
Juneau, Alaska 99811

Dear Senator Fahrenkamp:

We support Senate Bill No. 340 which you introduced, requiring that all regulations be approved by the legislature before becoming effective 30 days after approval.

Sincerely,

Paul M. Ohashi

cc: Senator Robert H. Ziegler, Sr., Alaska State Senate
Richard B. Lauber, Pacific Seafood Processors Ass'n.

3/6/80

One way or another, we're going to take care of the regulation situation. Give my regards to your mother, Paul, when you see her.

Regards,

BL3

Phone: (907) 225-2080

THE ALASKA CHAPTER

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

SKILL
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INTEGRITY

BOX 4-2500 • ANCHORAGE, ALASKA 99509
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3201 SPENARD ROAD
ANCHORAGE
H. GLENZER, JR.
MANAGER

February 28, 1980

The Honorable Robert H. Ziegler
Chairman, Senate Judiciary Committee
Alaska State Senate
Juneau, Alaska 99811

Dear Senator Ziegler:

At its duly constituted February Board of Directors meeting held in Juneau, Alaska on February 27 and 28, 1980, the members of the Board of Directors of the Alaska Chapter Associated General Contractors of America passed the following resolution in support of Committee Substitute for Senate Bill 340.

BE IT RESOLVED that the Board of Directors of the Alaska Chapter of the Associated General Contractors of America wish their testimony to become a matter of record in support of Committee Substitute for Senate Bill 340.

FURTHER BE IT RESOLVED that no member of the Board of Directors of the Alaska Chapter A.G.C. can recall that any present elected member of the State of Alaska Legislature can be identified as having sought election to office who espoused the increased regulation of the lives or businesses of the citizens of the State of Alaska, and that quite the contrary, to the best of our knowledge all the present elected Senators and Representatives of the State of Alaska had as one of their campaign promises the stopping of quasi-legislative law being promulgated by the regulation writers who form such a substantive portion of the employees of various State agencies and departments.

FURTHER BE IT RESOLVED that the Board of Directors of the Alaska Chapter A.G.C. of America is desirous of seeing the responsibility of the laws enacted by the State of Alaska legislature returned totally to their rightful location, which is the legislature itself, and removed from the various regulation writers within the State agencies and commissions.

FURTHER BE IT RESOLVED that it is the opinion of the Board of Directors of the Alaska Chapter A.G.C. of America, acting as spokesman for the over 500 general, associate and sub-contractor members from throughout the entire State of Alaska, that the legislature should concern itself to a much greater degree with the elimination of existing regulations that stifle the freedom of the individual, and which are used as a tool of the radical element of the environmental community to delay, impede or stop the economic development of the State of Alaska.

FURTHER BE IT RESOLVED and noted that it is the opinion of the Board of Directors of the Alaska Chapter A.G.C. of America that the problem addressed by Committee Substitute for Senate Bill 340 is not localized to the State of Alaska but is of national concern and is a root cause of the extremely high inflationary burden being placed upon the citizens of the entire United States by bureaucrats dedicated to the proposition that they alone know what is best for the citizenry in America.

We therefore unanimously have passed this resolution with the hope and intent that the laws of the State of Alaska and the regulations related thereto be returned to the people's elected representatives and removed from the bureaucratic bastions within the various agencies and commissions.

Sincerely,

Con Frank, President
Alaska Chapter Associated General Contractors of America

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K—STATE CAPITOL
JUNEAU, ALASKA 99811

February 27, 1980

The Honorable Bettye Fahrenkamp
Senator
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Re: Sponsor substitute for SB 340 (legislative approval of regulations)

Dear Senator Fahrenkamp:

I have reviewed the Sponsor Substitute for SB 340 which you brought to the meeting of the Senate Judiciary Committee yesterday. It is a great improvement over the original SB 340 -- removing some of that version's constitutional and other problems -- but the Department of Law still cannot support it.

As we discussed at yesterday's meeting of the Senate Judiciary Committee, I will be in Anchorage and will not be able to attend the committee's Thursday, February 28, meeting at which this bill will be considered. Therefore, I am sending a copy of this letter to Senator Ziegler, and will include some comments on the original SB 340 since your sponsor substitute has not yet been formally introduced.

It is our opinion that the bill still suffers two serious defects: (1) it violates the separation-of-powers doctrine, and (2) the 60-day to almost a year's delay in a regulation's effective date is not workable. The delay and the constitutional issue are inextricably related in that the delay so interferes with the execution of the laws, for which the executive branch is responsible, that the executive branch is prevented from performing its constitutionally required functions.

As a practical matter, it is simply not feasible for the Board of Fisheries, for example, to delay the effective date of a June 1 fisheries opening until the following year when the legislature will have had 60 days to consider what to do about

cc-CBLM

that date. If the regulation is filed, for example, by the lieutenant governor on May 1 and the legislature adjourns May 10, this bill would require that the regulation lie before the legislature for another 50 days during the next regular session -- to convene the following January. In addition, any regulation filed after adjournment of the regular legislative session would have to wait until the full 60 days of the next regular session before taking effect. Again, for many regulations, such a deferred effective date would not be in the best interests of the state. Events and circumstances requiring adoption or amendment or repeal of administrative regulations do not necessarily coincide with legislative sessions, and thus this bill would seriously interfere with the executive branch's performance of its constitutionally required functions. AS 44.62.270 says that it is "state policy that emergencies are held to a minimum and are rarely found to exist," and the emergency regulation approach should be used sparingly.

Concerns similar to those being expressed now in the legislature were expressed in 1975 when the legislature enacted the bill which became ch. 27 SLA 1975, creating the Administrative Regulation Review Committee. At that time, it was recognized that the legislature should not interfere with the regulations-adoption process as a means of executing statutorily required functions. The legislature felt that what was needed was a systematic means of review. See the second sentence of AS 24.20.400 (the last portion of which, as you know, was held invalid on February 19, 1980, by the Alaska Supreme Court in State v. A.L.I.V.E. Voluntary). Section 2, ch. 27 SLA 1975 enacted AS 44.62.320(b), requiring the lieutenant governor to submit a regulation to the new committee within 45 days after the regulation is filed. Believing that an earlier transmission to the committee would be even more helpful, in 1978 the legislature amended AS 44.62.320(b) (see sec. 5, ch. 64 SLA 1978) to require the lieutenant governor to submit the regulation to the committee "at the same time" that the regulation is filed by the lieutenant governor.

The current system involving prompt review of regulations by the Administrative Regulations Review Committee appears to adequately address the concern expressed in Sponsor Substitute for SB 340, and does so without raising the serious constitutional and practical issues that this bill raises.

However, in the A.L.I.V.E. Voluntary case, the Alaska Supreme Court stated (at page 24 of the advance copy), "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." Citing cases from other jurisdictions, our court indicated that a statute expressing some administrative agency's role in performing an oversight function would be valid. Perhaps some such arrangement based upon referrals from the Administrative Regulation Review Committee could be developed.

I would like to comment on three statements contained in your undated, but presumably February 26, 1980, memo to Senator Ziegler covering your proposed sponsor substitute. Near the middle of your second paragraph on page 1 you state that "a citizen should be able to prepare or give testimony on a particular set of regulations with the knowledge that its concerns will be considered." The last sentence of AS 44.62.-210(a) already requires this, stating "The state agency shall consider all relevant matter presented to it before adopting, amending or repealing a regulation." An earlier legislature anticipated your concern and enacted a statute covering it.

The last sentence on your first page says "If the person misses the hearing he has no other opportunity to address the issue." That is not quite correct. If an oral hearing is scheduled, and someone is not able to appear in person, he or she may present written comments or arguments. AS 44.62.210(a). If the person misses the opportunity for submitting written comments, AS 44.62.220 gives him or her the right to petition for a change in the regulations. AS 44.62.230 sets out the procedure for such a petition. In addition, AS 44.62.060 prohibits the lieutenant governor from filing a regulation unless it has been approved for legal matters by the Department of Law. If a person has a legal concern regarding a proposed or newly adopted regulation, he or she can submit that concern to the Department of Law with the assurance that it will be considered. If the person believes that a regulation is invalid and the Department of Law has not agreed with that point of view, the person can submit the matter to court for a declaratory judgment under AS 44.62.300. And, of course, if all of these procedures fail to

produce the result sought by the individual, he or she is free to work with the legislature in enacting legislation to supersede the offending regulation.

In the second sentence of the fourth paragraph on page 2 of your memo, you state that the A.L.I.V.E. Voluntary decision "removes the authority for the regulation review committee to do anything but ask that an agency change its regulations." That too is not quite correct. The committee is always free to work for legislative amendment of the statutes under which the regulations were adopted. As a committee of the legislature, it is, of course, in a good position to do so.

With regard to the original bill, I generally agree with Legislative Counsel Joe Guthrie's February 25 comments on the A.L.I.V.E. Voluntary case and the bill's unconstitutionality. As to more technical problems with the original bill, the "or" between paragraphs (3) and (4) of sec. 260 is confusing. It appears to make each paragraph stand independently. For example, an emergency regulation may not remain in effect unless, under paragraph (2), the agency certifies compliance with secs. 60 and 150 -- 210 of the APA, indicating that legislative approval is not required if the agency complies with those sections; but I wonder if that is what you intended. Also, under paragraph (3), an emergency regulation may not remain in effect unless the legislature has approved it under sec. 275; but sec. 275 does not provide for notice, hearing, or the attorney general's legal approval; thus, if the legislature approves the regulation it will remain in effect even though there has been no notice, hearing, or legal approval. And, under paragraph (4), the emergency regulation will not remain in effect unless the time period under sec. 275(c) has not expired; sec. 275(c) sets a one-year period for legislative approval; so, it appears that an emergency regulation could remain in effect a year, but then that is inconsistent with the lead-in line for sec. 260(a) which says 120 days. If the word "and" was intended to be used in place of the word "or," and all four requirements must be met, what happens when the legislature is not in session and it is necessary to adopt an emergency regulation? In addition, line 29 on page 2 of the original bill refers to filing "with" the lieutenant governor; however, under the rest of the APA,

regulations are "submitted to" him and "filed by" him; this distinction is significant because it is the filing by him that starts the time period running under current law.

In summary then, the Department of Law, upon consideration of both the constitutional and practical problems inherent in both the original SB 340 and the proposed Sponsor Substitute for SB 340, cannot support either version. The current law, providing for prompt review of regulations by the Administrative Regulations Review Committee, appears to be adequate, but we are open to suggestions for improving the system within the bounds of the constitution.

Thank you for this opportunity to offer our comments. We would be pleased to discuss this with you and other legislators if you and they wish.

Yours truly,

AVRUM M. GROSS
ATTORNEY GENERAL

By: Arthur H. Peterson
Arthur H. Peterson
Assistant Attorney General

AHP:md

cc: Keith Specking
Legislative Assistant
Governor's Office

STATE OF ALASKA
THE LEGISLATURE

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

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM February 25, 1980

SUBJECT: Constitutionality of SB 340 in light of State v. A.L.I.V.E. Voluntary.

TO: Senator Bettye Fahrenkamp

FROM: Joseph A. Guthrie
Legislative Counsel

As you may know, on February 19, 1980 the Alaska Supreme Court held in State v. A.L.I.V.E. Voluntary, No. 2022, that the use of a concurrent resolution to annul regulations, as authorized by AS 44.62.320, is unconstitutional. The Court equated annulment of regulations with repeal of statutes in finding that the use of a concurrent resolution to annul regulations violates the procedures specified for lawmaking in Article II of the Alaska Constitution. These procedures, which the Court described as safeguards against ill considered action, include the requirement that each bill be confined to one subject, have a descriptive title, contain an enactment clause of prescribed wording, be read three times on three separate days, and be passed by the recorded votes of a majority of each house.

None of these safeguards, of course, apply to concurrent resolutions.

SB 340 would require that all regulations be approved by concurrent resolution adopted by the legislature before becoming effective. While A.L.I.V.E. Voluntary, supra, is concerned with the annulment of regulations, not their prior approval, the decision turns on the use of the concurrent resolution to effectuate what the Court considered to be lawmaking. That the Court would consider a requirement of prior approval of regulations to be lawmaking seems clear, since the Court cited with approval Reith v. South Carolina State Housing Authority, Ct. C. P., 11th Jud. Dist. (August 28, 1975), rev'd on other grounds, 225 S.E.2d 847, 848, (S. C. 1976). In that case, the South Carolina Court of Common Pleas held invalid a statute stating that regu-

lations adopted would be invalid unless approved by a concurrent resolution of the South Carolina General Assembly on the grounds that the General Assembly could not perform a legislative function by means of a concurrent resolution. Therefore, it seems clear that the legislation you requested is now unconstitutional.

After consulting with your staff assistant, I drafted a sponsor substitute for SB 340 which would require that newly adopted regulations, before becoming effective, be placed before the legislature while it is in session for 60 days. This would afford the legislature an opportunity, before the regulation becomes effective, to review the regulation, consult with the executive regarding any modifications thought necessary, and if need be, enact a bill disapproving the regulation.

JAG:ljb

Enclosure