HB

334

MEMO

TO: Rep. Bussell, Chmn; Rep. Liska, Vice Chmn; Reps. Barnes, Clocksin, Hayes, Malone & Wendte

FROM: Staff Counsel

TOPIC: HB 334--"An Act relating to stays during appeals of administrative orders under the Administrative Procedures Act, (AS 44.62.570." --By Labor & Commerce Committee

1--This bill would amend paragraph (g) of existing law, AS 44.62.570, Scope of Review, which reads:

> (g) No stay may be imposed or continued if the court is satisfied it is against the public interest.

2--In one form or another, the proposed language has been used or referred to in court decisions over the years, However, the most strikingly similar language is expressed in Powell v. City of Anchorage, 536 P. 2d 1228 (decided 1973). (attached)

This case is Xeroxed and in Committee files. The language referred to is on the 2nd page, in footnote 2, which I bracketed and underlined for your reference. (I did not include the dissent which is twice as long as the opinion).

(The case dealt with topless and bottomless dancers which the city ordinance prohibited. The Superior Court first enjoined enforcement of the ordinance, later dissolved the injunction--so it would be enforced--and the dancers at The Embers appealed. THe Supreme Court agreed with the Superior Court, and nude dancing in Anchorage was banned--for a while).

3--The bill simply clarifies and puts in legislation guidelines courts actually have been using in staying orders of lower tribunals.

STATE OF ALASKA
FISCAL NOTE

Revision Date , 1983

I. REQUEST

Bill/Resolution No.: HB 334
Title: "An Act relating to stays..."
Sponsor: House Labor & Commerce
Requestor: House Judiciary Committee

II. FISCAL DETAIL

Agency Affected: Department of Law
Program Category Affected: General Govt.
BRU, Program of Subprogram(s) Affected: Legal Services

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY.87	FY 88
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

N/A

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: Richard I. Pegues, Director
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Division: Administrative Services Division
Date: May 2, 1983

Approved by Commissioner: Richard L. Pegues for Norman C. Gorsuch, Attorney General
Date: May 2, 1983
Department: Department of Law

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HB 334
Fiscal Note
Analysis

This bill clarifies the standards of review whereby the courts may grant stays during appeals of administrative orders under the Administrative Procedure Act. The Department of Law's legal staff believes that this clarification will assist the courts to make more timely and equitable rulings when stays are requested, saving both the public and regulatory agencies time and expense. This bill will not have a fiscal impact on the Department of Law.

Darlon POWELL et al., Petitioners,

v.

CITY OF ANCHORAGE, Respondent.

No. 2001.

Supreme Court of Alaska.

Decided June 27, 1973.

June 13, 1975.

Released for Publication June 13, 1975.

On appeal from an order of the Superior Court, Third Judicial District, Anchorage, Edmond W. Burke, J., dissolving a preliminary injunction against enforcement of a municipal ordinance which, in effect, prohibited nude dancing in premises licensed for sale or consumption of intoxicating liquor, appellant applied for an order staying the order of the Superior Court pending appeal. The Supreme Court, Rabinowitz, C. J., held that stay would be denied where appellants did not first present their application for a stay to the Superior Court and did not explain such failure.

Motion denied.

Connor, J., with whom Erwin, J., joined, dissented and filed opinion.

1. Appeal and Error ⇨458(1), 479(2)

Judgments in action for injunction are not stayable as of right; rather, whether a stay pending appeal of an order granting or dissolving an injunction will be granted is a question directed to the sound discretion of the court. Rules of Civil Procedure, rule 62(c); Rules of Appellate Procedure, rule 7(d)(2).

2. Appeal and Error ⇨478

In considering whether to grant a stay pending appeal, the lower court must consider criteria much the same as it would in determining whether to grant a preliminary injunction. Rules of Civil Procedure, rules 62(c), 65(d).

3. Appeal and Error ⇨478

In the unusual case when application for stay pending appeal is made in the Supreme Court without having previously been denied by the court below, there should be some explanation for failure to apply to the court below. Rules of Appellate Procedure, rules 7(d)(2), 25(b).

4. Appeal and Error ⇨477

In the usual case, the trial court should be given the first opportunity to consider an application for a stay of a judgment granting or denying an injunction, but exceptions should be made where the applicant makes a showing that relief in the superior court is unavailable, or that relief to be effective must be immediate and that it is improbable that the superior court can afford such immediate relief. Rules of Civil Procedure, rule 62(c); Rules of Appellate Procedure, rules 7(d)(2), 25(b).

5. Appeal and Error ⇨478

Stay pending appeal of order dissolving preliminary injunction against enforcement of allegedly unconstitutional city ordinance prohibiting, in effect, nude dancing in premises licensed for sale or consumption of intoxicating liquor would be denied where application for stay was not first presented to the superior court and there was no explanation for such failure, particularly where there was an almost total lack of showing on issue of irreparable injury and no contention was made before the Supreme Court in briefs and affidavits that denial of stay pending appeal would infringe First Amendment Rights. Rules of Civil Procedure, rule 62(c); Rules of Appellate Procedure, rules 7(d)(2), 25(b); U.S.C.A.Const. Amend. 1.

Stanley P. Cornelius, Cornelius, Inc., Anchorage, for petitioners.

John R. Spencer, City Atty., Anchorage, for respondent.

Before RABINOWITZ, Chief Justice, and CONNOR, ERVIN, BOOCHEVER and FITZGERALD, Justices.

ORDER *

RABINOWITZ, Chief Justice.

Petitioner Darion Powell owns an Anchorage cocktail lounge known as The Embers. The Embers, and several other local bistros, have in recent times gained a measure of notoriety by providing for their customers' viewing pleasure "topless and bottomless" dancers. Section 4-3(g) and (r) of the Code of Ordinances of the City of Anchorage prohibits a person from either appearing or authorizing another person to appear "in a licensed premises in which intoxicating liquor is offered for sale or consumed" while so "costumed or dressed so that the genitalia or pubic area is wholly or substantially exposed to view." On October 28, 1972, Powell, Powell's bartender petitioner George Goolsby, and petitioner Sheila Diane Bell were all arrested following a dance by Ms. Bell. The complaint charged, *inter alia*, that Bell had performed her dance in a licensed liquor establishment while "dressed or costumed" in a fashion prohibited by the ordinances.

The petitioners, shortly thereafter, filed a civil action against the City of Anchorage in which they asked the court to declare the ordinances unconstitutional and to permanently enjoin the City from further arrests and prosecutions under those ordinances. The superior court granted petitioners a preliminary injunction on November 27, 1972. Then on May 24, 1973, the superior court granted the City's motion for summary judgment, dismissed the petitioners' complaint with prejudice, and dissolved the preliminary injunction. Notice of appeal was filed on May 25, 1973. Petitioners have now presented this Court with an application for an order staying the May 24, 1973, order of the superior court. We deny petitioners' motion.

[1, 2] Judgments in actions for injunctions are not stayable as of right. Under Alaska Rule of Civil Procedure 62(c) the superior court is empowered to "suspend, modify, restore or grant" an injunction pending an appeal from a final judgment granting or denying an injunction. Whether a stay of an injunction pending appeal will be granted is a question directed to the sound discretion of the court.[1] In considering whether to grant such an injunction, the lower court must consider criteria much the same as it would in determining whether to grant a preliminary injunction.[2]

[3] The Supreme Court may also, in the exercise of its jurisdiction and "as part of its traditional equipment for the administration of justice," stay the enforcement of a judgment pending the outcome of an appeal.[3] Alaska Rule of Appellate Proce-

* This case was not placed in the Pacific Reporter at the time it was decided. Because various counsel have made reference to it in connection with other cases, it is now being published.

1. Shinholt v. Angle, 90 F.2d 297 (5th Cir. 1937); Kim v. China, 20 Cal.2d 12, 123 P.2d 438 (Cal.1942).

2. *See* 7 J. Moore, Federal Practice ¶ 62.05, at 62-24 (2d ed. 1972). Professor Moore suggests a four factor test:

(1) the likelihood that the petitioner will prevail on the merits of the appeal,
(2) irreparable injury to the petitioner unless the stay is granted,
(3) no substantial harm to other interested persons, and
(4) no harm to the public interest.

7 J. Moore, *supra* ¶ 62.05, at 62-25. *See also* Perry v. Perry, 88 U.S.App.D.C. 337, 190 F.2d 901 (1951); A. J. Industries, Inc. v. Alaska Public Service Commission, 470 P.2d 537 (Alaska 1970). Professor Moore observes that it may be the unusual case in which the trial judge would arrive at the conclusion that appellant is likely to prevail on appeal. But, that may occur in areas of the law where doubt clouds the correctness of the decision; and, there the court may stay an injunctive order.

Civil Rule 65(d) requires that *every* order granting an injunction shall set forth the reasons for its issuance.

3. State v. Norene, 457 P.2d 926, 927 (Alaska 1969) (quoting with approval Scripps-Howard Radio v. Federal Communications Comm'n, 316 U.S. 4, 9-10, 62 S.Ct. 875, 879, 86 L.Ed. 1229, 1234 (1942)).

dure 7(d)(2) regulates the procedure for seeking stays of judgments of the superior court pending appeal. That rule requires that an application for a stay of a judgment should first be made to the superior court and that ordinarily an original application to this court for a stay of judgment pending appeal will not be entertained unless it has previously been denied by the court below.[4] As we held in *State v. Norene*,[5]

> . . . [T]his rule does not require in all cases that applications for stay must be made to the superior court, . . . [nevertheless] departure from the rule should be accompanied by some explanation for the failure to apply to the superior court.[6]

No application was made to the superior court in this case, and the petitioners offer no explanation for their failure to do so.

[4, 5] As Professor Moore states, "[t]he stay or suspension of such judgments often involves a delicate balancing of the equities that only the court thoroughly familiar with the case is able to make."[7] We think that in the usual case the trial court should first consider an application for a stay of a judgment granting or denying an injunction. The Supreme Court, in *Cumberland Telephone and Telegraph Co. v. Public Service Commission*,[8] noted the desirability of having the trial court first pass on the application for a stay:

> [T]he court which is best and most conveniently able to exercise the nice discretion needed to determine this balance of convenience is the one which has considered the case on its merits, and therefore is familiar with the record.[9]

We think that it is a sound policy for the superior court to first consider applications for stays of judgment. Exceptions from this rule should be made where the applicant makes a showing that relief in the superior court is unavailable; or that relief to be effective must be immediate, and that it is improbable the superior court can afford such immediate relief.[10] Since the petitioners did not present their application for stay to the superior court and since they did not explain this failure, we deny their motion.

We further note the almost total lack of showing offered by petitioners going to the issue of irreparable injury. Here there is no showing that economic hardship or artistic handicaps will flow to petitioners if, pending final resolution of the merits, Bell performs her dance routine in a somewhat more modest fashion than heretofore. Nor has any contention been made before this court by petitioners in their briefs and affidavits that the operation of the injunction pending disposition of the appeal will in any manner infringe First Amendment rights.[11]

4. Appellate Rule 25(b) places the same requirement upon the party seeking a stay or an injunction of a judgment.

5. 457 P.2d 926 (Alaska 1969).

6. *Id.* at 929 (footnote omitted).

7. 9 J. Moore, Federal Practice ¶ 208.04, at 1409 (2d ed. 1973).

8. 260 U.S. 212, 43 S.Ct. 75, 67 L.Ed. 217 (1922).

9. *Id.* at 219, 43 S.Ct. at 77, 67 L.Ed. at 223. *See also* People *ex rel.* San Francisco Bay Conservation and Development Commission v. Town of Emeryville, 69 Cal.2d 533, 72 Cal. Rptr. 790, 446 P.2d 790 (Cal.1968).

10. *See* 9 J. Moore, Federal Practice ¶ 208.07, at 1423 (2d ed. 1973).

11. We note in passing that applicants fail to make the following necessary allegations in support of an application for stay of judgment granting or denying injunctive relief: they do not argue the likelihood of success on appeal, nor do they assert that the balance of hardships tips in their direction. *See supra* n. 2.

However, nothing we have said in this order precludes petitioners from moving the superior court to stay its final order. In the event that such a motion is denied, they are free again to seek review from our court.