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STATE OF ALASKA  
THE LEGISLATURE

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May, 1986

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS date base CM 14. In order to save space copies of minutes have not been left in the files.

Jeanie Henry

House Judiciary	2/27/86	3 pm
" " "	4/21/86	1:30 pm

**HOUSE  
COMMITTEE REPORT**

(7)

Date referred: 2/28/86

FURTHER REFERRALS: FINANCE

DATE: \_\_\_\_\_

The JUDICIARY Committee has considered HB 514

"An Act relating to fire prevention activities; and providing for an effective date."

and recommends:

- do pass
- do not pass
- do pass with attached amendment(s)
- no recommendation
- replace with CSHB 514 (JUD)  same title
- new title

and recommends \_\_\_\_\_

further referral to the \_\_\_\_\_ Committee

- and attaches:
- letter of intent
  - first fiscal note
  - new fiscal note
  - zero fiscal note

SIGNING DO PASS:

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SIGNING OTHER RECOMMENDATIONS:

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\_\_\_\_\_  
Chairman

Original sponsors: Cato, Koponen,  
Hurley and Wallis

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE BILL NO. 514 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to fire prevention activities; and  
7 providing for an effective date."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 \* Section 1. AS 09.65.070(c) is amended to read:

10 (c) An [NO] action may not be maintained against an employee or  
11 member of a fire department operated and maintained by a municipality  
12 or village, or a fire department registered under AS 29.60.130, if the  
13 claim is an action for tort [OR BREACH OF A CONTRACTUAL DUTY] and is  
14 based upon the act or omission of the employee or member of the fire  
15 department in the execution of a function for which the department is  
16 established.

17 \* Sec. 2. AS 18.70.075 is amended to read:

18 Sec. 18.70.075. AUTHORITY OF MUNICIPAL OR REGISTERED FIRE  
19 DEPARTMENT OFFICERS [AND THEIR PERSONNEL]. (a) An officer of a  
20 municipal fire department or a fire department registered under  
21 AS 29.60.130 [OR HIS AUTHORIZED REPRESENTATIVE], while providing fire  
22 protection services, has the authority to

23 (1) control and direct activities at a [THE] fire;

24 (2) order a person to leave a building or place in the  
25 vicinity of a [THE] fire, for the purpose of protecting the person  
26 from injury;

27 (3) blockade a public highway, street, or private right-of-  
28 way temporarily while at a fire;

29 (4) trespass upon property at or near the scene of a fire

1 at any time of the day or night;

2 (5) enter a building, including a private dwelling, or  
3 [UPON] premises where a fire is in progress, or where there is reason-  
4 able cause to believe a fire is in progress, to extinguish [FOR THE  
5 PURPOSE OF EXTINGUISHING] the fire;

6 (6) enter a building, including a private dwelling, or  
7 premises near the scene of a [THE] fire for the purpose of protecting  
8 the building or premises or for the purpose of extinguishing the fire  
9 which is in progress in another building or premises;

10 (7) upon 24-hour notice to the owner or occupant, inspect  
11 for preplanning all buildings, structures, or other places within the  
12 municipality or the registered fire department's district, except the  
13 interior of a private dwelling, where combustible material is or may  
14 become dangerous as a fire menace to the building;

15 (8) direct the removal or destruction of a fence, house,  
16 motor vehicle, or other thing judged [WHICH HE MAY JUDGE] necessary  
17 [TO REMOVE OR DESTROY] to prevent the further spread of a [THE] fire.

18 (b) An owner or occupant of a building or place specified in  
19 this section or any other person on the site of a fire or other fire  
20 department emergency who refuses to obey the order of an officer of a  
21 municipal or registered fire department [OR HIS AUTHORIZED REPRESENTA-  
22 TIVE] in the exercise of [HIS] official duties is guilty of a class B  
23 misdemeanor [, AND UPON CONVICTION, IS PUNISHABLE BY IMPRISONMENT FOR  
24 ONE YEAR, OR BY A FINE OF NOT MORE THAN \$1,000, OR BY BOTH].

25 (c) In this section, "inspect for preplanning" means to conduct  
26 limited examinations [INSPECTIONS] for purposes of preparing a fire  
27 attack plan in the event of a future emergency, but does not include  
28 inspections for purposes of determining compliance with statutory or  
29 municipal fire code requirements.

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\* Sec. 3. AS 18.70.080 is amended to read:

Sec. 18.70.080. RELATIONS. The Department of Public Safety shall adopt [RULES AND] regulations for the purpose of protecting life and property from fire and explosion by establishing minimum standards for

(1) fire detection and suppression equipment;

(2) fire and life safety plan check criteria in commercial, industrial, business, institutional or other public buildings [BUILDING], and buildings used for residential purposes containing four or more dwelling units that are to be built, or are to be substantially remodeled in a way that will affect a fire or life safety feature;

(3) fire and life safety inspection criteria in the following types of buildings:

(A) a building used for public assembly, with a capacity of more than 50 persons;

(B) a building used for educational or child care purposes for more than six children;

(C) an institutional building, including structures for the full-time care of more than five children, hospitals, nursing homes, and adult and juvenile correctional facilities;

(D) a residential building that is more than two stories in height, and that has more than 15 dwelling units or 20 guest rooms;

(E) a high-rise building with a floor level used for human occupancy, which is 35 feet above the lowest level of fire department vehicle access;

(4) any activity in which combustible or explosive materials are stored or handled in commercial quantities;

(5) [(4)] conditions or activities carried on outside a

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building described in (2), (OR) (3), or (4) of this section likely to cause injury to persons or property.

\* Sec. 4. AS 18.70.080 is amended by adding a new subsection to read:

(b) The Department of Public Safety may establish, by regulation, reasonable fees to be charged for the fire and life safety plan check as described in (a)(2) of this section.

\* Sec. 5. AS 18.70.090 is amended to read:

Sec. 18.70.090. ENFORCEMENT OF REGULATIONS. The Department of Public Safety and the chief of each municipal or registered [CITY] fire department and their authorized representatives [IN THEIR RESPECTIVE AREAS] may enforce the regulations adopted by the Department of Public Safety for the prevention of fire or for the protection of life and property [AGAINST FIRE OR PANIC]. All state peace officers may assist the Department of Public Safety in the enforcement of AS 18.70.010 - 18.70.100 and the regulations adopted under those sections [IT]. The authority conferred in AS 18.70.010 - 18.70.100 extends to the enforcement of the provisions of AS 11.46.400 - 11.46.450, 11.46.484(a)(4), and AS 11.56.200(a)(3) [AS 11.46.400 - 11.46.430].

\* Sec. 6. This Act takes effect immediately in accordance with AS 01.10.070(c).

HOUSE BILL 514

POSITION PAPER

DEPARTMENT OF PUBLIC SAFETY

The Department of Public Safety supports passage of House Bill 514, "An Act relating to fire prevention activities; and providing for an effective date."

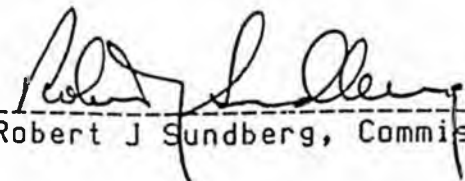
The bill is primarily a housekeeping measure, bringing some of the statutes dealing with fire protection into the current definitions and practices.

Sections 1 and 2 insert the term "registered" fire departments, including them in the protection from liability that municipal departments have. Section 2 also gives "registered" fire departments the same authority as municipal fire departments. It is believed that, by including the term "registered," all fire departments in Alaska are provided the same protection and authority.

Two significant changes are made in AS 18.70.080, by Section 3. Buildings subject to fire and life safety plan reviews are defined in (2), while (3) refines the definition of the types of buildings inspected by the department for fire and life safety criteria. These more accurately define the scope of effort by the department than the current statute. This scope was defined by policy several years ago at the urging of the Legislative Audit Division, and is achieving their recommendation of inspecting "high-risk" facilities.

New AS 18.70.080(b) specifically gives the department the authority to charge fees for plan reviews of new construction or major remodeling for fire and life safety. Charging fees was begun in 1979 at the recommendation of the Governor's Efficiency Review Committee. The Ombudsman, during an investigation of the Division of Fire Prevention in 1984, felt that while we have the authority to charge, it should be made specific.

Finally, the bill repeals AS 18.70.082, fire detection and alarm requirements for remote housing facilities. The department believes the current regulations and adopted codes provide equivalent protection.

  
-----  
Robert J Sundberg, Commissioner

**STATE OF ALASKA 1986 LEGISLATIVE SESSION  
FISCAL NOTE**

Revision Date : \_\_\_\_\_

**REQUEST**

**FISCAL DETAIL**

Bill/Resolution No. : HB 514  
 Title : An act relating to fire prevention activities.  
 Sponsor : Cato & Koponen  
 Requestor : H Comm & Regional Affairs  
 Date of Request : \_\_\_\_\_

Agency Affected : Public Safety  
 BRU : Fire Prevention  
 Components : \_\_\_\_\_

**EXPENDITURES/REVENUES : (Thousands of Dollars)**

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>

<b>CAPITAL</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>
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<b>REVENUE</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>
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**FUNDING : (Thousands of Dollars)**

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>

**POSITIONS :**

FULL-TIME						
PART-TIME						
TEMPORARY						

**ANALYSIS :** Attach a separate page if necessary

No fiscal impact is anticipated.

Prepared by : G.E. BRUNTON *bur*  
 Division : Fire Prevention

Phone : 465-4331  
 Date : 1/28/86

Approved by Commissioner : *[Signature]*  
 Agency : Public Safety

Date : 11/29/86

Distribution (by Agency preparing fiscal note) :

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)



Ombudsman

John B. Chenoweth

April 18, 1984

Sylvester Neal, Director  
Division of Fire Prevention  
Department of Public Safety  
Pouch 6313  
Anchorage, Alaska 99502

RECEIVED  
APR 23 1984  
DIRECTOR'S OFFICE  
DIVISION OF FIRE PREVENTION  
ANCHORAGE, ALASKA

RE: Ombudsman Complaint F83-1433

Dear Mr. Neal:

The above-referenced complaint, filed on November 10, 1983, in my Fairbanks office, alleged that the Division of Fire Prevention was improperly collecting plan review fees.

In filing this complaint, the complainant related that to build a small day care center the division required him to pay for the review and approval of his construction plans. The complainant felt that the mandated fee was unreasonable, particularly since the division is a public agency funded by the legislature, and argued that it was unfair for the state to force him to utilize and pay for the service of a state agency.

Preliminary examination of the complaint indicated to me that the complaint presented raised a question of whether the plan review fee was imposed by the division in accordance with law and not a question of whether the fee amount collected by the division in this particular instance was reasonable.

At the center of the complaint is the plan check fee levied and collected by the Department of Public Safety under 13 AAC 50.027:

13 AAC 50.027. PLAN CHECK AND APPROVAL. (a) Before beginning construction of all occupancies and buildings, plans and specifications regarding location on property, area, height, number of stories, type of construction, fire-resistive construction, interior finish, exit facilities, electrical systems, mechanical systems, automatic fire-extinguishing systems and fire alarm systems must be submitted to the state fire marshal for examination and approval.

(1) Upon application for a plan check, a plan check fee must be paid to the state fire marshal if

State of Alaska

Reply to:

- 3201 C Street, Suite 606  
Anchorage, Alaska 99503  
(907) 563-3673
- Pouch W0  
Juneau, Alaska 99811  
(907) 465-4970
- P. O. Box 74358  
Fairbanks, Alaska 99707  
(907) 452-4001

the value of the proposed construction exceeds \$25,000; the value of the proposed construction will be determined by the state fire marshal.

(2) The plan check fee is 40 percent of the building permit fee schedule as set forth in Table No. 3-A of the U.B.C.

13 AAC 50.027 specifically allows the Division of Fire Prevention to collect fees for plan checks. The regulation recites that it has been adopted under authority of AS 18.70.080:

AS 18.70.080. REGULATIONS. The Department of Public Safety shall adopt rules and regulations for the purpose of protecting life and property from fire and explosion by establishing minimum standards for

(1) fire detection and suppression equipment;

(2) fire and life safety criteria in commercial, industrial, business, institutional or other public building, and buildings used for residential purposes containing four or more dwelling units;

(3) any activity in which combustible or explosive materials are stored or handled in commercial quantities;

(4) conditions or activities carried on outside a building described in (2) or (3) of this section likely to cause injury to persons or property.

On December 5, 1983, Ombudsman Assistant Debbie Miller, to whom investigation of this complaint was assigned, wrote to you asking that you furnish an explanation of your understanding of the relationship between the regulation and the statute. Ms. Miller asked if there were statutory authority other than AS 18.70.080 on which administration of this program relied.

In your December 14 response, you explained that there was no other statutory authority aside from AS 18.70.080 which grants the Division of Fire Prevention the right to charge fees for plan reviews. You stated that it was the opinion of the division's legal advisors that the right to promulgate regulations to effectively carry out the division's statutory duties is clear. By way of a brief history of the provision, you noted that a Governor's Management and Efficiency Review Committee report of 1976 recommended that the division implement a standard fee schedule for plan reviews and also noted statutory authority for such regulations. Subsequently, emergency regulations were adopted in June of 1979 adopting the fee schedule model set out in the Uniform Building Code. You noted that other state agencies, such as the Department of Labor, charge an inspection fee for certain services and that the Division of Fire Prevention has adopted a "common, nationally, popular

procedure for recovering administrative costs associated with plan reviews." Finally, you suggested that the fees imposed under the fee schedule followed by the division were reasonable, noting that the fees imposed were less than those set by some of the larger municipalities in Alaska.

INVESTIGATION:

Based upon the response received to her letter of inquiry, Ms. Miller pursued four interrelated points relating to his letter and the complainant's allegations. Specifically, Ms. Miller

(1) reviewed the procedures by which the regulations were formally adopted in 1979;

(2) sought a legal perspective from the Department of Law regarding the relationship between AS 18.70.080 and 13 AAC 50.027;

(3) reviewed current statutes and regulations which authorize other state agencies to collect fees for services rendered; and

(4) examined other sources bearing on the issue presented.

Briefly, the regulation in question, 13 AAC 50.027, was initially adopted as an emergency regulation on June 14, 1979. The Department of Public Safety issued a finding that an emergency existed within the Division of Fire Prevention in that regulations were necessary for the "immediate preservation of public peace, health, safety or general welfare," thereby purporting to meet the legal requirements justifying adoption of the regulation. The statement noted that in 1978 Alaska led the nation in deaths and property losses resulting from fire, and that

... due to an insufficient general fund appropriation in the fire safety operating budget, for fiscal year 1980, and delays in promulgating substantive regulation changes in 13 AAC 50-55, one of which would have allowed the department to charge a plan check fee thus providing additional monies, the department finds it will be necessary to layoff at least two of its seven professional fire safety field personnel and reduce the level of programs and services accordingly, unless sufficient additional operating monies can be obtained. [Emphasis added.]

In accordance with AS 44.62.060, the permanent regulations were formally approved by the Department of Law and, on August 31, 1979, Avrum M. Gross, designee of the lieutenant governor, signed the certification of compliance and accepted and filed the regulations.

The record relative to the filing of the permanent regulations is noteworthy only in one other respect: The Department of Law file had four letters on file which opposed or strongly objected to the adoption of 13 AAC 50.027. The Alaska Professional Design Council, the City of Dillingham, an Anchorage based engineering consulting firm, and one

citizen, all submitted written comments. Additionally several municipalities requested that they be exempted from 13 AAC 50.027 because those municipalities had already assumed the responsibility of inspecting or reviewing construction plans for fire prevention. For the record, the objections filed by or on behalf of the municipalities were duly considered, for municipalities were granted exempt status pursuant to 13 AAC 50.027(b).

On February 22, 1984, Ms. Miller contacted Assistant Attorney General Art Peterson, the regulations attorney for the Department of Law. Mr. Peterson had reviewed and approved 13 AAC 50.027 in an August 24, 1979, memorandum to the Commissioner of Public Safety. Mr. Peterson verified that he signed the transmittal memorandum to Public Safety Department Commissioner Nix which approved the adoption of 13 AAC 50.027 in accordance with AS 44.62.060. A duplicate original of the memorandum was also sent to the lieutenant governor.

Responding to Ms. Miller's inquiry, Mr. Peterson confirmed that AS 18.70.080 was the correct and only citation for 13 AAC 50.027. In Mr. Peterson's opinion the regulation is valid and not contrary to statute. To Ms. Miller, Mr. Peterson noted that the consistency between AS 18.70.080 and 13 AAC 50.027 is in concert with AS 44.62.030:

AS 44.62.030. CONSISTENCY BETWEEN REGULATION AND STATUTE. If, by expressed or implied terms of a statute, a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute. [Emphasis added.]

Mr. Peterson considered the collection of fees for plan reviews to be a "reasonable implementation" of AS 18.70.080. He did acknowledge to Ms. Miller that the relationship between the statute and the regulation was questionable but expressed the opinion that, if the regulation were challenged in court, the challenger would not succeed because the nature of the fire prevention program is reasonable.

#### DISCUSSION:

The leading Alaska case that describes a procedure for determining the validity of regulations through judicial review is Kelly v. Zamarello, 486 P.2d 906 (1971). In testing the validity of a regulation, the opinion notes the key factors to be utilized during the review process:

. . . We hold, therefore, that 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, we 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.

Certain provisions of the Alaska Administrative Procedure Act provide guidance as to the standard of review for regulations adopted pursuant to an administrative agency's quasi-legislative rule-making function. AS 44.62.020 states in part:

To be effective, each regulation adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.

AS 44.62.030 states:

If, by express or implied terms of a statute, a state agency has authority to adopt a regulation to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation is valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute.

Thus, 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, we will review the regulation in the following manner: First, we 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, we will determine whether the regulation is reasonable and not arbitrary. This latter enactment is proper in the review of any legislative enactment.

486 P.2d 906, 911.

Under this so-called "scope of authority" test set out in Kelly v. Zamarello, before it may be determined that a regulation is "reasonable and not arbitrary," it must first be ascertained whether or not the regulation is consistent with and reasonably necessary to carry out the purposes of the statutory provisions. This first step in the review process serves the purpose of assuring that the adopting agency has not exceeded the power delegated by the legislature. A regulation may be

reasonable but if it is not consistent with statute and not reasonably necessary to carry out the purpose of the statutory provisions then it would be found invalid. Thus, the test of AS 44.62.030 is composed of two parts, one of evaluating "reasonable necessity" for carrying out the purpose of the statute, and one of "consistency" with the statute being interpreted or implemented.

Alone, the statute cited as authority for adoption of the regulation has little bearing on the department's authority to prepare and adopt regulations relating to the collection of fees for the services provided by it. AS 18.70.080 expressly grants the Department of Public Safety the authority to adopt regulations for the purpose of protecting life and property from fire and explosion. However, the statute addresses only the manner in which this should be accomplished, specifying that the department may adopt regulations by establishing minimum standards for fire equipment, fire and life safety criteria, and other conditions and activities noted in the statute.

There are case decisions in a number of jurisdictions concluding that a state may impose a reasonable fee or charge to meet the expenses of inspection. The principle that the ability of a state agency to impose a fee or charge for that purpose exists as an incident to the right to enact and enforce the law is well recognized in numerous court decisions. Those cases are reported, for example, at note 4, 42 Am. Jur. 2d § 11, "Inspection Laws," and 127 A.L.R. 330. One Utah case, Salt Lake City v. Bennion Gas & Oil Co., 15 P.2d 648 (Utah, 1932), summarizes the case law, the Utah Supreme Court, citing numerous authorities, concluding

. . . that the authority delegated to the [City of Salt Lake City] by the state to pass inspection ordinances carries with it as an incident to said power the right and power to charge and exact a fee to defray the cost of said inspection.

15 P.2d 648, 650.

It is doubtless true that the regulation in question, 13 AAC 50.027, is not an "inspection" ordinance as the term "inspection" is usually understood for, by its terms, the regulation is intended to apply principally to the plans applicable to unconstructed or proposed facilities.

In my judgment, however, there are two reasons to suggest that the distinction between "inspection" (which in context refers to examination of existing structures) and "plan approval" consistent with previously developed "minimum standards" for buildings not yet constructed or completed should not be permitted to make a difference, and that the regulation can be said to meet the test of "consistency."

First by case decision in Alaska, the courts have indicated that a regulation is to enjoy a presumption of validity:

[A]n administrative regulation must be accorded a presumption of validity, and the challenger of the regulation must demonstrate its invalidity. Kingery v. Chapple, 504 P.2d 831, 834 - 835 (Alaska, 1972); United States v. Lkberg, 291 F.2d 913, 921 (8th Cir., 1961), cert. denied, 368 U.S. 920, 82 S. Ct. 242, 7 L. Ed. 135 (1961). . . .

Cited in Union Oil Co. of California v. State, 574 P.2d 1266, 1271 (Alaska, 1978).

Second, 13 AAC 50.027 should not be read (as you and Mr. Peterson have) as a provision wholly dependent on AS 18.70.080. In context, AS 18.70.080 was enacted in 1955 as one section of a more comprehensive set of statutes defining the duties of the fire marshal in matters relating to fire prevention and investigation. The enacting statute, first adopted as Ch. 66, SLA 1955, included three other provisions relevant to our consideration of this matter:

AS 18.70.050. POWER OF DEPARTMENT TO INSPECT BUILDINGS. The Department of Public Safety may enter any building subject to regulation under AS 18.70.080 during reasonable hours for the sole purpose of inspecting the property or abating a fire hazard.

AS 18.70.070. ABATEMENT OF FIRE HAZARDS. The Department of Public Safety may require the owner of a commercial business or public property to abate a fire hazard which exists in violation of law or regulations, and the Department of Public Safety may take appropriate action to assure such abatement.

AS 18.70.090. ENFORCEMENT OF REGULATIONS. The Department of Public Safety and the chief of each city fire department and their authorized representatives in their respective areas may enforce the regulations adopted by the Department of Public Safety for the prevention of fire or for the protection of life and property against fire or panic. . . .

As part of a multi-section bill, AS 18.70.080 should be interpreted in context with these related provisions.

I am of the view that AS 44.62.020 and AS 18.70.090 save this regulation. Under AS 44.62.020, it is required only that "[t]o be effective, a regulation adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law." Legal authority for the adoption and implementation of 13 AAC 50.027 is not limited to the statement of authority set out following the regulation. In this case, it is clear to me that 13 AAC 50.027 is also dependent on AS 18.70.090. Section 90 is the principal means by which officials and employees of the Department of

Public Safety (and others) may be expected to compel adherence to the minimum standards otherwise established by regulation. And, as earlier indicated by my references to the case decisions in other jurisdictions, when the power to regulate is expressly granted, the weight of legal authority favors the ability to impose a reasonable fee or charge for services associated with the act of regulating.

Allowing, then, for the correction of the statement of authority on which the regulation in question is based as earlier indicated, I am of the view that the fee requirement meets the "consistency" element of the "scope of authority test" of Kelly v. Zamarello. The history of the regulation suggests that it also meets the companion test of "reasonable necessity." The fact that "regulation" under 13 AAC 50.027 takes the form of a "plan check" rather than the more common form of "inspection" should not disturb the result, and I believe the imposition of the fee under authority of the regulation is within the scope of agency authority.

FINDING:

This is an unusual question. On the record as I understand it, however, I cannot say that, as to 13 AAC 50.027, the Division of Fire Protection's authority to adopt an applicable regulation has been implemented in error.

I propose to advise the complainant that his complaint is unsupported. Again, I express no opinion on the merits as to the reasonableness or fairness of the dollar amount of the fee imposed. For reasons earlier mentioned, no such expression seems necessary.

\*

It is, as you noted in your correspondence to Ms. Miller, undisputed that other state agencies charge inspection fees for certain services. However, there is one major distinction between the Division of Fire Prevention's plan check and approval schedule and other agencies authorized to charge fees, for, according to Ms. Miller, research shows that all other state agencies collecting fees are specifically authorized by statute to collect revenues from citizens. In the case of the Department of Labor, for example, fees are collected for several types of safety inspections including boiler, elevator, and plumbing inspections. For each type of inspection the Department of Labor conducts, the department is authorized specifically by statute to collect fees for services rendered (See AS 18.60.360(a), AS 18.60.-715(d), and AS 18.60.800(b)(3)). As a general rule, where the legislature contemplates imposition of fees for services, the legislature has, by law, specifically authorized an agency to collect fees for licenses and services rendered.

It is, of course, the legislature that may render final judgment on this issue. There are, I am certain, a number of legislators who would, as a matter of administrative policy, disagree that an agency may, in the absence of express statutory authority, levy fees or charges for services. In my letter to the complainant, I will suggest that he

April 18, 1984

direct this matter to the attention of any legislators whom he may know. Separately, because of the unusual issue presented, I anticipate advising the Administrative Regulation Review Committee of my finding on this matter, inviting the committee to consider the regulation in question in accordance with law.

SUGGESTION:

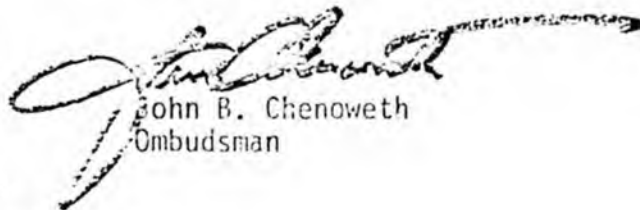
I would urge you to consider one matter:

The regulation in question is one applicable to enforcement of minimum standards. While defending the regulation, I am of the view that 13 AAC 50.027 is insufficient in that it omits citation of statutory authority directly pertinent to enforcement of "minimum standards," AS 18.70.090. As circumstances permit, you may want to add AS 18.70.090 as a citation of authority for adoption and subsequent implementation of the regulation.

I am concluding this investigation and closing the file in this matter. In doing so, Ms. Miller has asked to express her appreciation to you for your assistance earlier in the course of her work.

Please contact me if you have any questions concerning this investigation or its disposition.

Sincerely,



John B. Chenoweth  
Ombudsman

JBC:pjc

