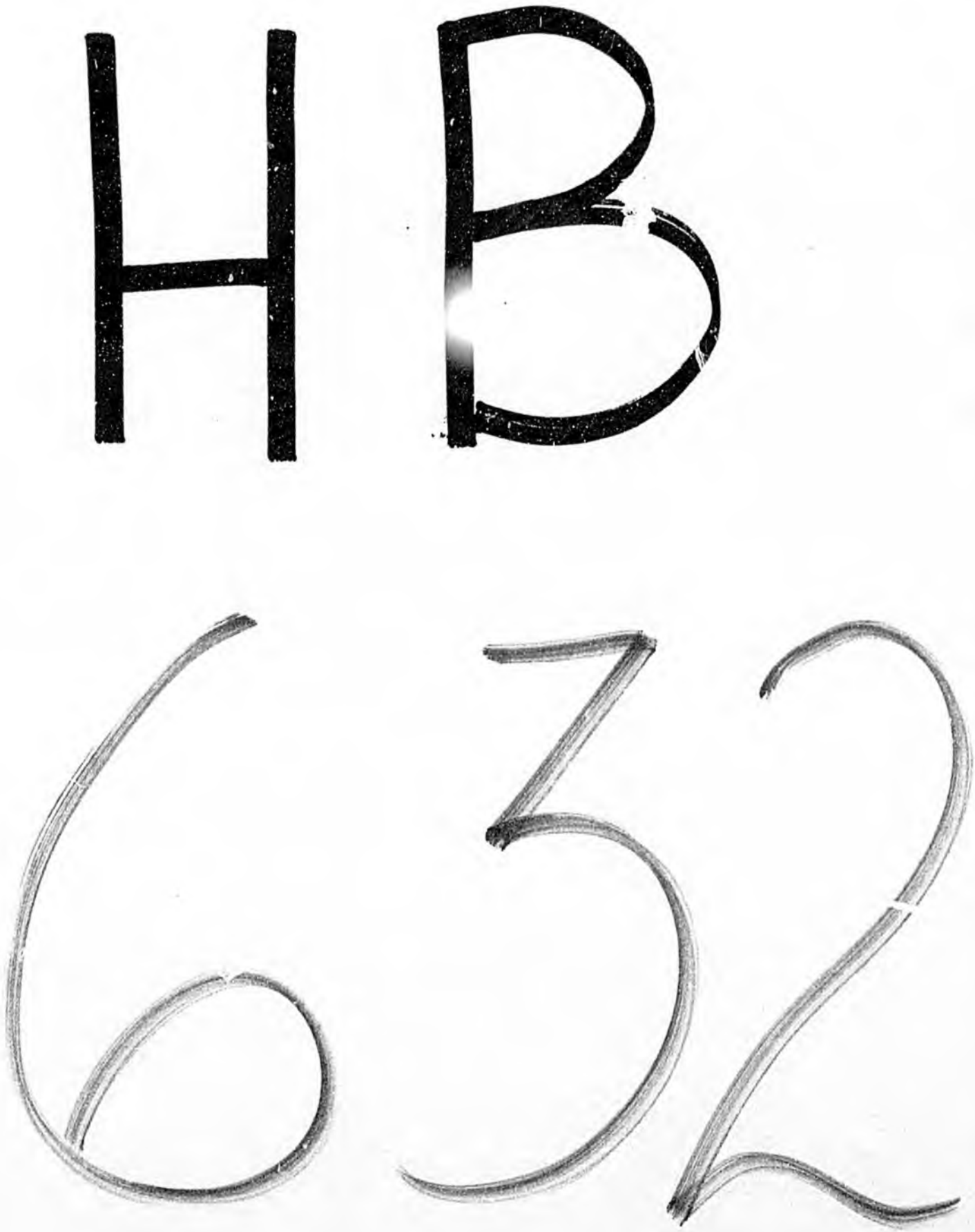

HB
632

HOUSE
COMMITTEE REPORT

3/2

(9)

Date referred: 2/17/86

FURTHER REFERRALS: JUDICIARY

DATE: March 26, 1986

The RESOURCES Committee has considered HB 632

"An Act relating to a right to farm."

and recommends:

[ ] do pass

[ ] do not pass

[ ] do pass with attached amendment(s)

[ ] no recommendation

[XX] replace with CS for HB 632 (Resources) [XX] same title

[ ] new title

and recommends Do Pass

[ ] further referral to the _____ Committee

and attaches: [ ] letter of intent
[ ] first fiscal note
[ ] new fiscal note
[XX] zero fiscal note first

SIGNING DO PASS:

Shultz Dick Shultz

Herrmann Adelheid Herrmann

Cato Bette Cato

Jenkins Pete Jenkins

Pearce Lyda Pearce

Sund

Wallis J. Kay Wallis

SIGNING OTHER RECOMMENDATIONS:

David W. Thompson - NO REC
Thompson

Co-Chairman Dick Shultz
Shultz

Bradley
3/25/86

Original sponsor: Resources Committee

IN THE HOUSE BY THE RESOURCES COMMITTEE

CS FOR HOUSE BILL NO. 632 (Resources)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to a right to farm."

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

* Section 1. LEGISLATIVE FINDINGS. The legislature finds that agriculture makes an important contribution to the economy of the state and that the encouragement, development, improvement, and preservation of agriculture will result in a general benefit to the health and welfare of the people of the state. The legislature further finds that conflict between agricultural operations and urban and suburban land uses threatens the permanent loss of agricultural land.

* Sec. 2. AS 09.45 is amended by adding a new section to read:

Sec. 09.45.235. AGRICULTURAL OPERATIONS AS PRIVATE NUISANCES. (a) An agricultural operation and an operation appurtenant to an agricultural operation is not and does not become a private nuisance by a changed condition that exists on neighboring land if the agricultural operation has been in operation for more than three years and if the agricultural operation was not a nuisance at the time the agricultural operation began.

(b) The provisions of (a) of this section do not apply to a nuisance resulting from improper or negligent conduct of agricultural operations or operations appurtenant to an agricultural operation.

(c) The provisions of (a) of this section supersede a municipal ordinance or regulation to the contrary.

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date : _____

REQUEST

Bill/Resolution No. : HB 632
Title : Right to Farm

Sponsor : House Resources Committee
Requestor : House Resources Committee
Date of Request : 3/24/86

FISCAL DETAIL

Agency Affected : Natural Resources
BRU : Agricultural Management

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						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING : (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS :

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

Prepared by : Carol Wilson
Division : Commissioner's Office
Phone : 465-2400
Date : 3/24/86

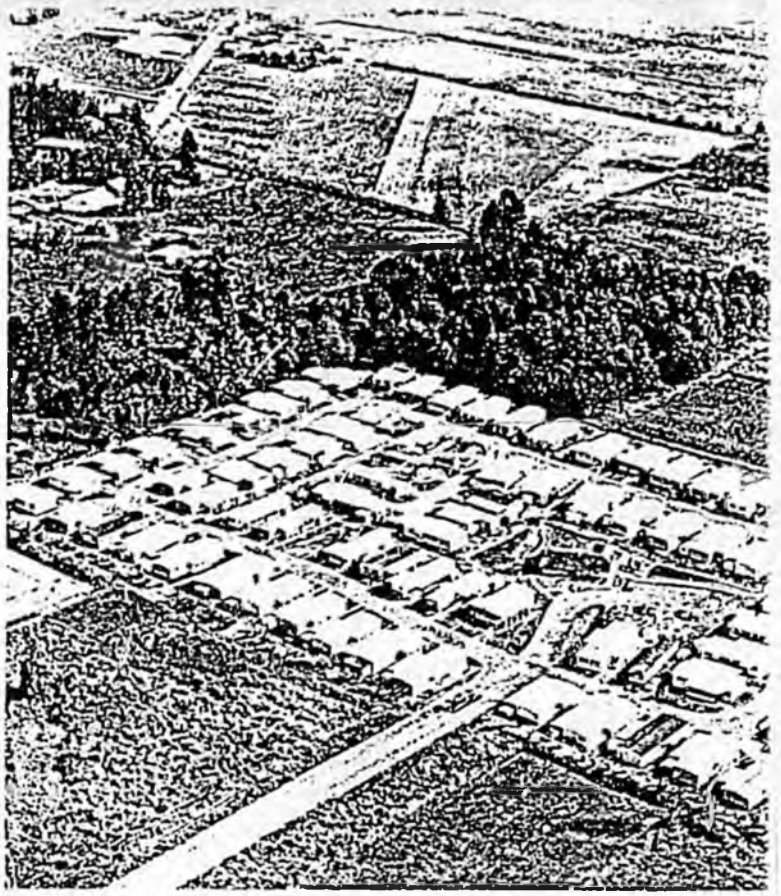
Approved by Commissioner : by Carol Wilson Signature
Date : 3/24/86
Agency : Department of Natural Resources

Distribution (by Agency preparing fiscal note) :
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

10/25/85

Right-to-farm laws: Do they resolve land use conflicts?

By Mark B. Lapping, George E. Penfold, and Susan Macpherson



Doug Wilson

UNDERLYING much of the farmland controversy are local land use conflicts between farmers and rural and suburban residents and industrial users. The irony of the situation is obvious: While farming creates and maintains the atmosphere and bucolic landscape so many wish to be part of, it is the business of agriculture, which mandates certain practices and functions, that many find offensive. The result is conflict that prompts nonfarming neighbors to attempt to restrict or eliminate agricultural practices. This often translates itself into a nonfarming majority that employs land use controls to regulate farming or that resorts to nuisance lawsuits to enjoin or restrict certain practices. What many seek, then, is farmland without farms!

About 30 states have "right-to-farm" laws to address these conflicts. Although they vary considerably, all of the laws attempt to do two things. First, they seek to supersede the common law of nuisance. Second, they favor agricultural uses of land above all others. The statutes thus attempt to establish a "first-in-time, first-in-right" logic whereby pre-existing agricultural uses have a primacy against all others. The presumption is this: If a farm constitutes a nuisance, it does so only as neighboring land uses change, and the owners of the neighboring land are themselves responsible for any liabilities to their property or person.

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New York the forerunner

The genesis of right-to-farm laws can be found in New York State's pioneering agricultural district law (1971). While providing a means for farmers to create a district to preserve critical masses of farmland, the law also deals with the issue of potentially restrictive controls or lawsuits:

"No local government shall exercise any of its powers to enact local laws or ordinances within an agricultural district in a manner which would unreasonably restrict or regulate farm structures or farming practices in contravention of the purposes of the act unless such restrictions or regulations bear a direct relationship to the public health or safety."

Similar statements occur in the agricultural district laws of Virginia (1977) and Illinois (1979). Maryland's statute (1977) is more specific, noting that the "operation at any time of any machinery used in farm production or the primary processing of agricultural products..." is acceptable so long as farm practices do not "cause bodily injury or directly endanger human health...."

The effectiveness of these sections of state agricultural district laws cannot be easily ascertained. Farmers apparently perceive them to be beneficial because conflict between neighbors is a specific, long-term concern of the farming community (*12*). This element of the New York law has seldom been used, but its existence may be enough to deter governments and individuals from pressing claims or promulgating restrictive ordinances (3).

North Carolina's statute (1979) has been used as a model for many right-to-farm laws. The purposes of that law are straightforward:

"It is the declared policy of the State to protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products. When nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits. As a result, agricultural operations are sometimes forced to cease operations. Many are discouraged from making investments in farm improvements. It is the purpose of this (law) to re-

duce the loss to the State of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed a nuisance."

The law maintains that a nuisance does not exist if three conditions can be established: the farm did not constitute a nuisance at the time of initial operation for at least one year prior to the suit; the claim of nuisance is based upon changing local land uses and does not arise from either negligence or improper operation on the part of the farmer; and the alleged nuisance does not contribute either to flooding or water pollution.

A more sophisticated approach was incorporated into Iowa's livestock feedlot nuisance law. The purpose of this law is to provide specific protection for feedlots from nuisance suits brought by neighbors who establish themselves subsequent to the feedlot's establishment. Section 2 of the act reads:

"In any nuisance action or proceeding against a feedlot brought by or on the benefit of a person whose date of ownership of realty is subsequent to the established date of operation of that feedlot, proof of compliance with sections three (3) and four (4) of this Act shall be an absolute defense, provided that the conditions or circumstances alleged to constitute a nuisance are subject to regulatory jurisdiction in accordance with either section three (3) or four (4) of this Act."

Compliance with the appropriate sections of the act relate to the Iowa Department of Environmental Quality's water pollution abatement program and relevant local zoning ordinances, where they exist (*6*). In this way Iowa seeks to guarantee that feedlots will be brought into compliance with overall state environmental objectives and appropriate local land use controls.

The State of Washington's law contains elements of both the standard North Carolina approach and some of the specificity of the Iowa law. But unlike all the other right-to-farm laws, Washington's law seeks to prevent rural land subdivisions that may trigger nuisance-like disputes and actions. Under the Washington statute any agricultural operator who "sells or has sold a portion of that land contiguous to a farm for residential uses" forfeits the right to qualify for protection under the law. Although the logic of preventing farmers from contributing to the problem through the creation of new lots appears self-evident, no other jurisdiction has enacted such a provision.

Characteristics of right-to-farm laws

State	Type of Agricultural Operation Protected*	Farm Must Predate Other Land Uses	Must Predate by 1 Year Minimum	Supercedes Local Ordinances
Alabama			X	X
Arizona	agricultural operations	X		
Connecticut			X	
Delaware			X	
Florida			X	X
Georgia			X	X
Idaho	agricultural operations		X	X
Illinois	farms		X	
Indiana	agricultural operations		X	
Kentucky	agricultural operations		X	X
Maryland	agricultural operations		X	
Massachusetts				X
Michigan	farms, farm operations	X		
Mississippi	agricultural operations		X	
Missouri	agricultural operations		X	
New Hampshire	agricultural operations		X	
New Jersey	commercial farms			X
New Mexico	agricultural operations		X	
New York	agricultural activities	X		
North Carolina			X	X
North Dakota	agricultural operations		X	X
Oklahoma	agricultural activities			
Oregon	farms			X
Rhode Island	agricultural operations			X
South Carolina			X	X
Tennessee		X		
Vermont	agricultural activities	X		
Virginia	agricultural operations		X	X
Washington				
Wisconsin	agricultural practices	X		

*Note: Agricultural operations include farming, processing, and all manner of agriculturally related enterprises; agricultural activities appear to be more farm-related and less food industry-oriented.

The matter of scope

A variety of farming and farm-related operations are covered under the right-to-farm statutes. In some cases, "farms" receive protection. In others, "agricultural operations" are covered. Some laws protect food processing and related commercial enterprises. Most of the laws require that protected agricultural operations predate competing land uses, though a majority specify only a minimum of one-year prior operation. Nearly all note that appropriate state and federal laws, such as environmental regulations, cannot be superseded even though local ordinances that are contrary to agriculture are nullified.

While farms and related operations receive protection under these statutes, the laws almost uniformly require that the farms and related operations be managed properly. The most common requirement is that farms maintain "good farming practices," though these are rarely defined. Some laws do not cover farm operations that pollute or "change" water conditions, are run in a negligent or improper manner, or that negatively affect health and safety standards.

Because most right-to-farm laws are relatively new, few have been tested in the courts. An exception is Connecticut's statute, which was held valid in *De Capua v. Cella et al* (*7, 11*). In this case, the judge noted that the "plaintiff came to the nuisance" and that "the total inconvenience... is relatively small in comparison with the nature and conditioning of defendents' operation as dairy farmers." Moreover, because the farm was operated "in a proper manner," as specified by an inspector for the state's agricultural department, the plaintiff was "not entitled to an injunction" or "an order for monetary damages."

The matter of trespass

Right-to-farm laws are aimed, in the main, to protect farmers against nuisance suits and local ordinances that would make farms nuisances because of changes in neighborhood land uses. Another aspect of the problem, that of trespass, has not been

Conditions not protected under right-to-farm laws.

State	Negligent Management	Improper Management	Water Pollution or Changed Condition	Affects to Health/Safety
Alabama	X	X	X	
Arizona	X			X
Connecticut	X			
Delaware	X	X		
Florida				X
Georgia				
Idaho	X	X		X
Illinois	X	X	X	
Indiana				
Kentucky	X	X	X	
Maryland				
Massachusetts				
Michigan				
Mississippi				
Missouri	X	X	X	
New Hampshire	X	X		X
New Jersey				X
New Mexico	X			
New York				
North Carolina	X	X	X	
North Dakota	X	X	X	
Oklahoma				
Oregon	X			X
Rhode Island	X	X		
South Carolina	X	X	X	
Tennessee				
Vermont				X
Virginia	X	X	X	X
Washington				
Wisconsin				

adequately dealt with in the context of these laws. Historically, trespass requires a physical invasion of property. In recent decades, however, at least 10 jurisdictions have rendered judgments that accord dust, noise, and odors—traditional nuisance externalities—trespass status. As one commentator noted of Oregon's right-to-farm law, "Without protection against trespass, the right-to-farm is virtually ineffective" (*10*).

An evaluation

What, then, are we to make of right-to-farm laws? First, right-to-farm laws are popular with state legislatures and the agricultural community. Even granting the newness of these laws, it is surprising that so few court tests have arisen as a result of their promulgation. This may suggest that such laws are long on rhetoric and short on impact and delivery. Perhaps further court tests are needed (*4*).

Second, whereas most policies in the past were directed toward the solution of certain basic land use issues and problems, right-to-farm laws respond to site-specific concerns and particular agricultural practices.

Third, right-to-farm laws tend to ignore the contemporary practice of nuisance law. Court-inspired remedies are seldom either/or judgments. Instead, they often force the nuisance generator to use technological mitigation techniques to reduce or eliminate externalities so that both parties can carry on their activities with a minimum of economic and spatial disruption. If we follow the practice established by the nonpoint pollution program of the U.S. Department of Agriculture, this is very likely to mean that the costs of mitigation must be absorbed overwhelmingly by farmers. This invariably raises a number of important equity questions, especially given the dubious nature of the types of nuisances involved.

Fourth, an evaluation of right-to-farm laws indicates that many of these legal instruments use vague terminology, are ambiguous, and may be open to due-process challenges. And, as Ed Thompson of the American Farmland Trust has noted, "creative legal draftsmanship by county and township commissions might very easily result in local ordinances which are entirely consistent with 'right-to-farm' laws, but which significantly restrict agricultural operations" (*9*).

For all their weaknesses, however, right-to-farm laws represent an attempt to deal with some of the problems associated with changing land use and community values brought about, in part, by the "counterstream" or return migration to rural areas (*1*). Perhaps not unlike the restoration of some urban neighborhoods, there is more than a trace of class conflict involved in what may be seen as "the gentrification of the countryside." Certainly this phenomena can be observed in a number of local ordinances and plans that erect barriers against the siting of mobile homes and mobile home parks in many rural regions of the country (*5*). If nothing else, right-to-farm laws attempt to educate a public long separated from the processes of food production.

Perhaps the best solution to these problems was suggested by Noel Perrin in his essay "The Rural Immigration Law." "The solution" to the problems of newcomers with new values who seek to change rural areas is "a good, thorough immigration law. It wouldn't actually keep Don and Sue out, it would just require them to learn rural values before they were allowed to stay" (*8*). Sometimes that which is said in jest may be more astute and appropriate than the laws of the land. In terms of the right to farm, this may indeed prove to be the case.

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□

CHAPTER 5

INCENTIVES: RIGHT-TO-FARM LEGISLATION*

I. INTRODUCTION

There is a basic incompatibility between many types of agricultural activity and residential use. As city people begin to move into rural areas, they object to the smells, noises, dust, pesticides, and other by-products of operating a modern farm. These complaints can take several forms. A landowner may sue the farmer, claiming that his farm operations are a nuisance. He may try to persuade the local government to pass an ordinance limiting various farm activities. He may report the farmer to a county or state agency that is responsible for enforcing air or water pollution control laws for the purpose of getting an order to end the offending farm practices.

Farmers find that defending themselves against such actions can be expensive, time-consuming and aggravating, even if they are successful. They have turned with increasing frequency to their state legislators for protection. The laws that have been passed in response have been called "right-to-farm" laws. They recognize that just as new residents in a rapidly urbanizing area should be protected against the unhealthful and offensive odors of a nuisance, such as a large feedlot, that has become "a right thing in the wrong place—like a pig in the parlor, instead of the barn,"[1] so too must farmers in agricultural areas be protected against legal actions by their neighbors and local governments arising from the fact that homes have been built in the wrong places—so that parlors open out on pigpens.

II. PURPOSES AND CHARACTERISTICS OF RIGHT-TO-FARM LEGISLATION

At least seventeen states, listed in Table 5-1, have adopted some form of right-to-farm legislation.[2] They fall into four major groups, each of which is based to a greater or lesser extent on a different prototype.

A. Laws Based on New York's Statute

New York's law was enacted in 1971 and has served as a model for the Illinois, Oregon, Virginia, and the Twin Cities Metropolitan Area legislation. It provides:

> No local government shall exercise any of its powers to enact local laws or ordinances within an agricultural district in a manner which would unreasonably restrict or regulate farm structures or farming practices in contravention of the purposes of the act unless such restrictions or regulations bear a direct relationship to the public health or safety.

As reported in Chapter 4, little explicit use has been made of the law, and there have not been any judicial interpretations of its language. Regulations that restrict farm structures and practices in support of the purposes of the act are permitted, as are regulations of lot size, subdivision, and partitioning that do not restrict farm structures or practices. Regulations that bear a direct relationship to the public health or safety are permitted by the law even though they unreasonably restrict farm structures and practices in contravention to the purposes of the act. (However, it is not clear how a local regulation could be constitutional if it regulates farm structures and practices in an unreasonable way.) Only regulations that protect the public morals or general welfare, such as certain provisions of zoning ordinances, are curtailed by the law, and even then are permissible if the restrictions they impose on farming are reasonable. This is specifically recognized in Virginia's legislation. It is not clear exactly how a farmer would avail himself of the protections provided by the act. Presumably, he could use it in a political way to persuade his local government not to adopt restrictive regulations. If he were unsuccessful in doing so, he might be able either to bring a declaratory judgment action to have the resulting ordinance declared invalid, or to use the law as a legal defense should the local government seek to enforce the ordinance against him. In such an event the judge would have to address the central and most difficult question presented by the act: How will the balance be struck between, on the one hand, the extent to which the ordinance restricts a farming operation in contravention of the purposes of the agricultural districting law

* The principal author of this chapter was John C. Keene.

TABLE 5-1
STATES WITH RIGHT-TO-FARM LAWS**

Laws Protecting Against Local Government Regulations

Alabama (1980)	New York* (1971)
Delaware (1980)	North Carolina (1979)
Illinois* (1979)	Oregon (1973)
Kentucky (1980)	Tennessee (1979)
Louisiana (1978)	Virginia* (1977)
Maryland* (1977)	
Minnesota (Twin Cities)* (1980)	

Laws Protecting Against State Regulations

Tennessee (1979)	Oregon* (1973)

Laws Protecting Against Private Nuisance Lawsuits

Alabama (1980)	Mississippi (1980)
Delaware (1980)	North Carolina (1979)
Florida (1979)	Oklahoma (1980)
Georgia (1980)	Tennessee (1979)
Kentucky (1980)	Washington (1979)
Louisiana (1978)	

* The statute applies only in agricultural districts or, in the case of Oregon, in exclusive farm use zones.
** Some states provide more than one form of protection.

and, on the other, the degree to which the ordinance protects the public's health and safety? The statute gives no guidance to assist in this delicate balancing process.

Oregon's law does not extend its protections to farm practices that generate odor, dust, or other materials that interfere with the use of lands outside the exclusive farm use zone. It also contains a specific disclaimer of any intent to limit the powers of all levels of government to protect the public's health, safety, and welfare.

B. Laws Based on North Carolina's Statute

North Carolina's right-to-farm law takes a different approach in that it seeks to modify traditional principles of the common law of nuisance. Some or all of its provisions have been adopted by Alabama, Delaware, Florida, Georgia, and Kentucky and Louisiana. The law provides as follows:

Section 106-700. It is the declared policy of the State to conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products. When non-agricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits. As a result, agricultural operations are sometimes forced to cease operations. Many others are discouraged from making investments in farm improvements. It is the purpose of this Article to reduce the loss to the State of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed to be a nuisance.

Section 106-701. (a) No agricultural operation or any of its appurtenances shall be or become a nuisance, private or public, by any changed conditions in or about the locality thereof after the same has been in operation for more than one year, when such operation was not a nuisance at the time the operation began; provided, that the provisions of this subsection shall not apply whenever a nuisance results from the negligent or improper operation of any such agricultural operation or its appurtenances.

(b) For the purposes of this Article, "agricultural operation" includes, without limitation, any facility for the production for commercial purposes of crops, livestock, poultry, livestock products, or poultry products.

(c) The provisions of subsection (a) shall not affect or defeat the right of any person, firm, or corporation to recover damages for any injuries or damages sustained by them on account of any pollution of, or change in condition of, the waters of any stream or on the account of any overflow of lands of any such person, firm, or corporation.

(d) Any and all ordinances of any unit of local government now in effect or hereafter adopted that would make the operation of any such agricultural operation or its appurtenances a nuisance or providing for abatement thereof as a nuisance in the circumstance set forth in this section are and shall be null and void; provided, however, that the provisions of this subsection shall not apply whenever a nuisance results from the negligent or improper operation of any such agricultural operation or any of its appurtenances. Pro-

vided further, that the provisions shall not apply whenever a nuisance results from an agricultural operation located within the corporate limits of any city at the time of enactment hereof.

(e) This section shall not be construed to invalidate any contracts heretofore made but insofar as contracts are concerned, it is only applicable to contracts and agreements to be made in the future.

In order to understand the North Carolina approach, it is necessary to know some rudimentary facts about the common law of nuisance.

Nuisance law has been recognized as a confused and confusing area of the law. Still, it is possible to set out some general principles that are widely accepted.[3] First, it is necessary to distinguish between private nuisance and public nuisance. Private nuisance law protects a property owner's right to the use and enjoyment of his land and gives him remedies against someone who interferes improperly with that right. Public nuisance is a crime and involves actions which cause injury to the public on a whole, such as serious air pollution, the storage of explosives in a city, and so forth.[4] Some acts that are private nuisances may affect so many people that they also constitute public nuisances. Even though they have the same name, private and public nuisances rest on distinctly different legal theories.

In determining whether one activity so interferes with another person's activities and enjoyment of his land that it constitutes a private nuisance, a court will determine whether its utility is outweighed by the gravity of the harm it causes. In doing so, the court will consider all the circumstances, including the locality and character of the surroundings, the nature of both activities and the manner in which they are conducted, the value to the community of both activities, the actor's ability to reduce the harm, and the extent to which the actor would be damaged by an injunction and the landowner damaged by the failure to enjoin. The court can also consider priority of use.[5] Whether or not the person causing the alleged nuisance was there first is only one of many considerations that must be weighed. Courts have had to decide whether an activity that was creating significant air pollution or otherwise interfering with the enjoyment of nearby land was to be insulated from liability simply because it was there first or whether, even though at one time it affected few people because of its remoteness, it should now be deemed a nuisance because the growth of an urban area has brought new homes into its vicinity whose owners are being injured by its operations.

The North Carolina right-to-farm law and its progeny attempt to elevate the principle of first-in-time, first-in-right to a position of preeminence in the law of nuisance as it affects agricultural operations.[6] The law provides that a court cannot declare a farming operation a nuisance if it finds the following:

1. The agricultural operation was not a nuisance at the time it began,

2. The only basis for the claim that it is a nuisance is that conditions have changed in or about the locality where the farm is located,

3. The agricultural operation had been in operation for at least one year before the lawsuit was brought,

4. The alleged nuisance did not result from negligent or improper operation of the agricultural activity, and

5. The alleged nuisance does not involve water pollution or flooding.

It should be noted that the law applies both to farmers and to producers of livestock and poultry products, such as slaughterhouses.

This law presents several questions to which there are currently no authoritative answers because of the lack of judicial interpretation. First, we should be clear as to the central objective and effect of this law and its progeny to make it possible for certain farms and food-processing industries that would otherwise be declared to be nuisances because communities have grown up around them, to continue their nuisance-producing activities without interference.

Second, there are several questions arising out of the first requirement above: who has the burden of proving that the farm operation was not a nuisance at the time it began, the neighbor or the farmer? How will he provide it if the operation started ten, twenty, or more years ago? What legal principles will govern those in effect

at the time of commencement of the farm operation, or those in effect now?

Third, it can be assumed that plaintiffs' lawyers will allege that the agricultural activity is a nuisance for reasons other than changed conditions in the locality. For instance, if they have been unable to show that it was a nuisance when it started, they will attempt to demonstrate that the operation is using different farming techniques, different fertilizers, pesticides, and herbicides, and generally that its technology has evolved over the years so that it is now a nuisance without regard to changed conditions nearby. Thus, much of the protection hoped for will be lost.

Fourth, the statute provides neighbors with a one-year period after the commencement of a farming operation within which to attempt to have it declared a nuisance. The statute does not make it clear, however, whether this same right would be available in the event that a farmer adopts drastically different farming techniques that produce a lot more noise, dust, or other environmental pollution. If this right is not available, then the statute exposes neighbors to serious health risks; if it is available, the law may have the effect of restricting the ability of farmers to improve their farming techniques, and in any case, presents the issue of how much change is necessary before the farmer loses the protection accorded by the law.

Fifth, the North Carolina statute and some of its progeny withhold their protections from agricultural operations that cause injury to others because of "negligent" (Kentucky) or "negligent or improper" (North Carolina, Alabama) conduct. Negligence is a different type of wrong from nuisance and has a completely different legal basis from the one on which nuisance is based, although certain acts may result in liability for both negligence and nuisance. To put it simply, one person can recover damage from another for injuries resulting from negligence if he can prove that the other did not act as a reasonable person would have under all the circumstances. The main part of the statute concerns only nuisance liability and does not attempt to limit liability for damages caused by negligence, so the language concerning negligence is superfluous. Furthermore, it is not clear what the legislators meant by "improper." The word has no established legal meaning and could cover all kinds of morally reprehensible actions. Thus, for example, if pesticides were causing a neighbor's family to be sick, he might be able to recover damages from the farmer even though he could not prove negligence. In fact, maintaining a nuisance is a good example of "improper" activity which is not negligent.

Finally, the law extends its protection to agricultural operations even after the land on which they operate has been annexed by a city, if the annexation takes places after the effective date of the act. The legislature made the judgment that even if the land around an agricultural operation becomes so urbanized that it is politically desirable to incorporate it into a city, the protection against municipal regulations based on change of conditions should continue. Such a long-term, universal protection for nuisance-like activities seems not to take into account the varying conditions which will be found across a state.

C. Tennessee's Statute

Tennessee's right-to-farm law is itself derived from feedlot laws that have been enacted in states such as Wyoming and Iowa. It recognizes that air, water, and noise pollution are now governed by complex sets of federal and state regulations, as a result of the enactment of laws such as the federal Clean Air Act, Clean Water Act, the Resources Conservation and Recovery Act, and their state counterparts. The Tennessee statute applies only to feedlots, dairy farms, and egg production houses — agricultural activities that are important to its economy and can generate serious concentrated air and water pollution. It provides that any such activity that is subject to the regulatory jurisdiction of the state department of health is insulated against liability for private nuisance if the activity is in compliance with state regulations and if the agricultural activity started operations before the complaining neighbor bought or started using his property. If the operations are expanded, the original activity maintains its priority date and the new activity receives a priority date as of the time it was established.

The statute also provides limited exemptions from state environmental regulations and local zoning and farm nuisance regulations. Feedlots, dairy farms, and egg production houses must comply first with regulations and standards applicable under a permit from the National Pollutant Discharge Elimination System created by the federal Clean Water Act, second, with regulations of the state Health Department and local governments that were in effect on April 12, 1979, the effective date of the act, and third, with any such regulations that take effect before the agricultural activity is established. The activities are exempt from rules and regulations that are passed after the effective date of the law and the date they began operation. The protected agricultural activities are also exempted from post-1979 zoning and anti-nuisance regulations that become applicable to them because a city has annexed the land on which they are conducted.

Tennessee's approach recognizes that effective control over certain types of agricultural pollution rests in the hands of the state Department of Health. On the one hand it applies a limited first-in-time, first-in-right principle that protects certain activities from changed state regulations. The only issue that this seems to raise is whether the state can permit certain types of pollution that federal laws prohibit. On the other hand, the statute protects agricultural activities that are complying with state rules from most private nuisance suits and hostile local regulations. The law incorporates by reference the detailed environmental standards established by the Department of Health. Operators of the designated agricultural activities must meet them in order to avoid nuisance liability and local regulation.

D. Laws Based on Washington's Statute

The laws of Washington and Oklahoma provide:

> Agricultural activities conducted on farmland, if consistent with good agricultural practices and established prior to surrounding non-agricultural activities, are [conclusively, in Washington] presumed to be reasonable and do not constitute a nuisance unless the activity has a substantial adverse effect on the public health and safety.
>
> If that activity is undertaken in conformity with federal, state, and local laws and regulations, it is presumed to be good agricultural practice and not adversely affecting the public health and safety.

This approach incorporates by reference all the relevant federal, state, and local standards and insulates farm activities that are meeting them from nuisance liability to property owners who buy land or begin activity after the start of the agricultural activity. Obviously, an operation that was not would be exposed to administrative action as well. It does not attempt to deal with overly restrictive local ordinances. Even though federal and state environmental protection laws have largely supplanted local regulation and established minimum water and air quality standards, it is still possible that local governments may have the power to set standards that could have a serious impact on agricultural activities without providing commensurate protection of the public health and safety. This possibility should be addressed in right-to-farm legislation.

E. Other Approaches

Some states, such as California, have not attempted to create a right to farm but have simply exempted certain types of agricultural activities, such as burning, aerial spraying, and the use of pesticides, from certain requirements of their air pollution control laws.[8] Mississippi's law provides only that an agricultural operation that has been in existence for a year is immune from liability for public or private nuisance if the conditions alleged to constitute a nuisance have existed substantially unchanged since the date the operation started. Expansions are entitled to their own priority date, as is the case in Tennessee.

In a recent proposal for a program for farmland retention in New Jersey,[9] it was suggested that the state should develop specifications of acceptable farm management practice that would both tell farmers what they could do without exposing themselves to liability for environmental pollution or nuisance, and at the same time protect the health and safety of the state's residents.

The proposal stressed that all of the following activities should be covered by right-to-farm legislation: growing crops and raising poultry and cattle; processing and marketing produce; applying fertilizers, pesticides and herbicides; clearing woodlands; installing water and soil conservation facilities; designing farm structures; using water; burning in the open; disposing of organic wastes on the farm; and providing supplies, processing facilities, and markets near farming areas. The report suggested that a special, non-adversary arbitration process be established that would handle complaints about farm nuisance.

III. EFFECTIVENESS

There is, at the time of writing, little evidence bearing on the effectiveness of the various types of right-to-farm legislation. This is at least partly true because much of it has been enacted in the last year and a half. Serious questions of a practical and legal nature arise concerning many of the statutes. Much can be learned from the experience with feedlots, where the environmental problems are severe and the need for protection against local regulation and nuisance suits is great. Tennessee's approach of identifying a small number of particularly onerous or nuisance-like activities and granting them limited protections if they comply with state and federal environmental regulations has much to commend it. It recognizes, as does New Jersey's farmland retention proposal, that to protect farmers against unreasonable environmental regulations and lawsuits, while at the same time protecting the public's health and safety, requires a cooperative public and private effort involving careful data-gathering and analysis, and preparation of a statement establishing balanced state level farm management practices. Conditions will vary from state to state and from one part of a state to another. Clearly it is not an appropriate undertaking for a judge in a private nuisance suit to determine what best management practices are and to balance the needs of farmers against the needs of the non-farm public. Farm organizations and agricultural extension programs must play an important role in developing the kinds of protection that farmers are demanding.

FOOTNOTES-CHAPTER 5

1. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, (1926). See Spur Industries, Inc. v. Del E. Webb Dev. Co., 108 Ariz. 178, 494 P 2d. 700 (1972).

2. Ala. Code, Section 6-5-127 (Cumm. Supp. 1980); Del. Code tit. 3 Section 1401; Fla. Stat. Ann. Section 823.14 (1980 Supp.); Ga. Laws, 1980 Sess. Act 1297; *Ill. Stat. Ann. ch. 5, Section 1018 (Smith-Hurd Supp. 1980); Ky. Rev. Stat. Ann. ch. 413 (Ky Acts 1980 ch. 214); La. Rev. Stat. Ann. Section 51:1202 (Supp. 1981); *Md. Ann. Code, Agriculture, Section 2-513 (Supp. 1980); *Minn. 1980 Session Laws, ch. 566, Section 473H.12: Miss. Code 95-3-29 (Cumm. Supp. 1980); *N.Y. Agric. & Mkts. Law Section 305(2) (McKinney 1972); N.C. Gen. Stat. Sections 106-700 and 106-701 (Supp. 1979); Okla. Stat. Ann. tit. 50, Section 11 (1980 Session Laws, 2d. Sess., ch. 189); *Ore. Rev. Stat. Section 215.25 (Repl. 1979-80); Tenn. Code Ann. Sections 53-6701, 53-6704 (Supp. 1979); *Va. Code Ann., Section 15.1-1512B (Cumm. Supp. 1980); Wash. Rev. Code, Sections 7.48.300, 7.48.305, and 7.48.310 (Supp. 1980). Several local governments have passed right-to-farm ordinances, and it is possible that other states have too.

* In states marked with an asterisk, the statute applies only to land in agricultural districts or, in the case of Oregon, in exclusive farm-use.

3. See William L. Prosser, *The Law of Torts* (St. Paul, Minn., West Pub. Co., 1971, 4th ed.) p. 571.

4. Spur Industries, Inc. v. Del E. Webb Development Co., 108 Ariz. 178, 494 P. 2d 700 (1972).

5. McQuade v. Tucson Tiller Apts., 25 Ariz. App. 312, 543 P. 2d 150 (1975). See also, *Restatement of Torts, 2d* (St. Paul, Minn., American Law Inst. Publishers, 1979) Sections 821A -840E.

6. See Edward P. Thompson, "Right to Farm Laws Examined," *Aglands Exchange*, Nov.-Dec., 1980 (Washington, D.C.: National Association of Counties Research Foundations) for a thoughtful discussion of these laws.

7. The law is taken from the same model as statutes such as those of Wyoming (Wyo. Stat. Ann. ch. 39, Sections 11-39-101 to 11-39-104), and Iowa (Iowa Code Ann. Sections 172D.1 to 172D.4) that apply only to feedlots. They, in turn, build on older feedlot laws such as that of Kansas (Kan. Stat. Ann. Section 47-1505) which provides that feedlots operated in compliance with the statute are deemed not to be nuisances. Parenthetically, the Attorney General of Iowa gave an opinion that a proposed law placing limitations on maintaining nuisance actions against the operation of feedlots was of questionable constitutionality. Iowa Code Ann., Section 172D.1, annotation (Supp. 1980)

8. Cal. Health and Safety Code, Section 41704(b).

9. "Grassroots: An Agriculture Retention and Development Program for New Jersey," N.J. Departments of Agriculture and Environmental Protection (1980).

CHRONOLOGY OF STATES WITH

RIGHT-TO-FARM LAWS

1979

ALABAMA
FLORIDA
MASSACHUSETTS
NORTH CAROLINA
TENNESSEE
WASHINGTON

1980

DELAWARE
KENTUCKY
MISSISSIPPI
OKLAHOMA
SOUTH CAROLINA
PILESGROVE TOWNSHIP,N.J.

1981

GEORGIA
NEW JERSEY
ARIZONA
ARKANSAS
CONNECTICUT
IDAHO
ILLINOIS
VIRGINIA
INDIANA
MAINE
MARYLAND
COLORADO
MONTANA
NEW HAMPSHIRE
NORTH DAKOTA
TEXAS
UTAH
VERMONT
OREGON
NEW YORK
MICHIGAN

1982

RHODE ISLAND

OTHER STATES LAWS PASSED
DATE UNKNOWN

NEW MEXICO
CALIFORNIA

PENDING IN LEGISLATIVE
POSSIBLE PASSAGE NOW

OHIO
PENNSYLVANIA
NEVADA
MISSOURI
WISCONSIN
MINNESOTA

IOWA--HAS PASSED A LIVESTOCK
FEEDLOT NUISANCE LAW

STATES WITHOUT RIGHT-TO-FARM
OR NUISANCE LAWS

LOUISANA
KANSAS
NEBRASKA
ALASKA
HAWAII
WEST VIRGINIA
SOUTH DAKOTA
WYOMING

communities of the ... sion on the morning of ... been lost."

Movie-lease proposal draws bad reviews

By CHUCK KLEESCHULTE
THE JUNEAU EMPIRE

Arguing it will ultimately prove curtains for their businesses, a group of independent theater operators in Alaska was opposing legislation before lawmakers today that would set up a formal system for leasing feature-length films.

Independent owners argue the bill, introduced at the request of the new owner of the majority of movie houses in Anchorage and Fairbanks, would give the one chain more power than Darth Vader to buy up the rights to all blockbuster films, making the independents work harder than Indiana Jones to escape either a buyout or death in a temple filled with red ink.

"The independents believe from past experience in Washington State that this bill is intended solely to help one chain dominate, give it an advantage and eventually force all the independents out of business. Then one chain will have a monopoly in Alaska and then ticket and popcorn prices will really climb," said Bruce Gardiner, executive director of the Motion Picture Exhibitors of Washington, Alaska, and Northern Idaho.

Simon Barsky, vice president of the Motion Picture Association of America, in Juneau to oppose the bill, says it's a law that purports to solve problems that don't exist.

"People are characterizing this bill as one that will help the little theater operators be more competitive. All it will do is start a bidding war for the best films and in much of Alaska all that will do is drive the independents into bankruptcy. In the short term it would be good for the distributors who I represent, but over the long run it will be terrible for the film industry and the theater-going public," Barsky said.

The Senate Judiciary and House Labor and Commerce Committees this afternoon were to consider a bill (SB 362) that would make two key changes in how theaters currently obtain movies to play. Presently, most theaters either hire a booking agent in Seattle to screen films and make offers to distributors for what they can afford to pay to rent them or they book films "blind" without screenings.

Under the proposed bill, blind bookings would be illegal and all films would have to be bought to Anchorage for screenings – a cost that many smaller operators likely could not afford on a regular basis. After the screenings, theaters would by competitive bid buy exclusive distribution rights in the state. The highest bidder would win the rights.

Of the 52 movie screens now in operation statewide 23 are owned by the Moyer Theater Chain that last year bought out the Wometco-Lathrop Co. that for years dominated the Anchorage and Fairbanks markets. Recently Festival Enterprises opened two six-plex theaters in Anchorage and Eagle River, providing competition to Moyer.

Gross Alaska Theaters, which runs four screens in Juneau plus four more in Sitka and Ketchikan, is the third largest motion picture exhibitor in the state, followed by other independents.

Gardiner claims the new bill would do away with the established process where exhibitors send films to Alaska independents at lower royalties than might result from pure competitive bidding, because distributors understand the small populations of most of the state's communities. Currently theaters who don't meet proposed ticket sales on movies can negotiate after the fact for lower rental rates – a practice that would disappear under the new bill.

Proponents of the film bill argue that currently distributors have informal arrangements with rental agents that border on violations of anti-trust laws, preventing an open market for high-quality films. They argue pure competitive bidding would end such arrangements, making the industry more open to the public's benefit.

Tom Moyer, in town for this afternoon's hearing, was unavailable for comment this morning.

Dave Gross, owner of Juneau's 20th Century and Glacier Twin Theaters, says the new bill would allow Moyer to buy up the rights to all the good films, raise ticket prices to pay his higher rental bids and keep the films in Anchorage and Fairbanks until in some cases their theater release dates pass – shutting the films out of other Alaska towns like Juneau.

"Moyer every three months has been trying to buy me out and this bill would only make it easier for him to succeed. We've been an Alaska corporation for 89 years, but if this passes we won't stand a prayer," said Gross.

Walley says if he runs he int... to run a "bare-bones" campa... spending around $250,000, makin... for his lack of money by going d... to-door to win support. He says ... would hope to knock on 50,000 ... 70,000 doors by election day, if he ... cides to run – a decision likely w... in 10 days.

Walley's rumored run, unveile... a Fairbanks newspaper March 8, ... prompted a flood of rumors that ... race is being either encouraged ... incumbent Gov. Bill Sheffield a... means of taking votes away from ... low Fairbanks challenger Steve C... per, or being discouraged by Sh... field out of concern that it will h... his voting strength – should Sh... field announce for reelection.

ALEC's Juvenile Justice Reform Project To Reveal Model Code

By Benedict Koller, Esq.
Director, ALEC's Juvenile Justice Reform Project

ALEC is making plans to revolutionize America's juvenile justice system. Under a grant from the Office of Juvenile Justice and Delinquency Prevention and through a contract with the Rose Institute of Claremont McKenna College, ALEC will reveal its Model Juvenile Justice Code at the National Training Conference for State Legislators on April 28-29.

Among the national figures who will speak at the conference are U.S. Attorney General Edwin Meese III; U.S. Senator Strom Thurmond, Chairman of the Senate Judiciary Committee; Missouri Attorney General William Webster; Richard Daley, State's Attorney for Cook County, Illinois; Jerry Wasson, Director of the Juvenile Rehabilitation Division in Washington State; Dr. Barry Feld, professor at the University of Minnesota Law School; and John Walsh, founder of The Adam Walsh Resource Center for Missing Children.

The conference will examine the deficiencies in modern juvenile justice systems across the country, and explore alternatives in juvenile justice reform. ALEC will present its Model Code at the conference for comment from state legislators and juvenile justice professionals, in an effort to achieve a consensus on the most effective legislative remedy for juvenile justice reform.

Among the fundamental principles on which the ALEC Model Code is based are:

- Sanctions imposed on the juvenile should be in proportion to the seriousness of the offense committed, and not simply on the court's subjective view of the juvenile's needs;
- Such sanctions should be imposed for a determinate period rather than at the discretion of the correctional program director;
- Juvenile proceedings should be open to the public, and juvenile court should account for all actions taken in connection with a given juvenile;
- The juvenile should be represented by counsel at all critical stages of the proceeding when the juvenile risks being confined;
- The procedure for transferring a juvenile into adult court for trial should be carefully established and monitored; and
- Juveniles should be encouraged to participate in the proceedings.

U.S. Attorney General Edwin Meese III

U.S. Senator Strom Thurmond

Missouri Attorney General William Webster

Richard Daley, State's Attorney Illinois

The fundamental principles on which ALEC's Model Code is based concur with those used in five other recent national studies. They are nearly identical to those promulgated by the ABA's Juvenile Justice Standards Implementation Project, which sought to serve as a basis for complete revision of state juvenile justice codes.

Contours of the Model Code

The Model Code was drafted by picking and choosing "good ideas" in other juvenile codes around the country. For example, the Code's sentencing standards were borrowed from the Washington State code, the discovery provisions from the New York code, and the community arbitration procedures from the Florida code.

Detention

A significant feature of ALEC's Model Code is its policy on detention; that is, confining juveniles prior to trial. Under most state codes, a juvenile arrested for a serious crime cannot be held unless the prosecutor can show that the juvenile will commit another crime and run away if released or no parent is available to adequately supervise the child. Except in the most obvious of circumstances, there is nothing to prevent a serious offender from being 'back on the street' literally hours after being taken into custody.

The Model Code, however, requires that juveniles arrested for serious offenses, or with extensive offense histories be detained prior to trial upon showing at a detention hearing that there is probable cause the juvenile committed the offense. To accomodate this policy of detention, the Code expedites all trials for detained juveniles—a chief deterrent factor for recidivism.

Due Process

ALEC's Model Code is essentially based on notions of justice and fair play, providing the following due process rights: the rights to counsel, cross-examination and subpoena of witnesses, trial by jury (except in minor matters), introduction of evidence, speedy trial, proof beyond a reasonable doubt (in delinquency proceedings), appeal, and the right against self-incrimination.

The Code's departure from traditional rehabilitation policies is consistent with our underlying philosophy. Under current policy there is an increasing tendency to transfer more and more juvenile offenders to the adult criminal system; this would seem to be inconsistent with the system's stated goal of rehabilitation. ALEC's Model Code will transfer very few juveniles to the adult court—only those who are charged with capital crimes.

Sentencing Guidelines

The Code envisions the establishment of a state sentencing commission appointed by the governor to set forth mandatory and determinate sentencing provisions for juvenile offenders which account for the juvenile's age, offense history, seriousness of the offense, and other aggravating or mitigating factors. Such a system also departs from current juvenile sentencing policies, which vest the court with virtually complete discretion to decide what form of 'treatment' best suits the child.

Restitution and Victim's Rights

Another important factor in keeping with the underlying policy of holding ju-

Code, continued on page 6

REP TERRY MARTIN
STATE CAPITOL POUCH V
JUNEAU AK 99811

Getting Away With Murder: Why the Juvenile Justice System Needs an Overhaul

By Alfred S. Regnery
Administrator of the Office of Juvenile Justice and Delinquency Prevention

Children commit nearly one-third of the serious crimes in America. Our system of rendering justice for their crimes, however, is antiquated and largely incapable of dealing with the offenses they commit. Disliked by the public, by those who work in it, and even by many offenders, the juvenile justice system, which is supposed to act only in the "best interests of the child," serves neither the child, his victim, nor society.

Juvenile crime rates since the 1950s have tripled, yet the theories and policies we use to deal with such crime fail to hold offenders accountable and do not deter crime. At best they are outdated; at worst, they are a total failure, and may even abet the crimes they are supposed to prevent.

Some people still refuse to accept the fact that juveniles commit crimes. Prevailing social theory during much of the 20th century has been based on the belief that children under 18 do not have the mental capacity to distinguish between right and wrong, and thus should not be held accountable for their behavior, as are adults.

Despite these attempts to treat juvenile crimes as trivial indiscretions committed by misguided youth, the statistics suggest something different—a grave problem on a national scale. There are currently about 15 million Americans between 14 and 17, or about seven percent of the entire U.S. population; but about 30 percent of all people arrested for serious crimes are juveniles—a total of some 1.5 million arrests per year. (Police generally estimate that there are at least five offenses for each arrest.)

The violence and intensity of these crimes is staggering. Of those arrests, 2,000 were for murder, 4,000 were for rape, and 34,000 were for aggravated assault. Despite the beliefs of certain social theorists, juveniles do commit crimes at a rate significantly higher than the rest of the population. In fact, 16-year-old boys commit crimes at a higher rate than any other single age group. These are criminals who happen to be young, not children who happen to commit crimes.

The bulk of our crime—probably 75 percent of all serious offenses—is committed by chronic offenders. These people comprise fewer than 10 percent of the population (in the case of juveniles, probably closer to seven percent) yet because of the high rate at which they commit felonies, sometimes as many as 100 or more a year, they are responsible for a great proportion of robberies, burglaries, muggings and aggravated assaults, car thefts, rapes, and even a significant number of murders.

Chronic offenders pose the greatest threat to society and the greatest challenge to juvenile justice programs across the country.

Such children present problems to the juvenile justice system which evade all philosophical notions about crime. They present a problem which neither the social theorists, nor the police and prosecutors who would like to lock them up, can hope to alleviate more than temporarily. Chronic offenders pose the greatest threat to society and the greatest challenge to juvenile justice programs across the country.

Sadly, the juvenile justice system has shown little ability either to help such youngsters or to protect society from their crimes. In most of our major cities (where most serious juvenile crime exists), there is virtually no chance that juveniles who are first or second offenders will be punished. The lesson that the system provides to the offender is that he can continue to commit such acts because there is no penalty. The criminal's punishment is limited to listening to the psychobabble of social workers and therapists.

Rehabilitation has been the premise of the juvenile court system throughout the 20th century, but it has failed miserably. The late Robert Martinson reviewed the results of over 200 separate efforts to measure the effects of programs designed to rehabilitate convicted adult offenders. Martinson concluded, in what has become one of the most quoted phrases in modern criminology, that "with few and isolated exceptions, the rehabilitative efforts that have been reported so far had no appreciable effect on recidivism."

Martinson did his review in the late 1960s; since that time, rehabilitation has sunk further in esteem, both in the eyes of the public and the professionals. The criminal justice system has all but given up on the concept. Virtually no successful juvenile programs—those that reduce recidivism to an appreciable degree—rely on rehabilitation.

What can be done to ameliorate the problem of juvenile crime? First, the main focus of the justice system should be the deterrent approach, which views punishing the criminal as the best way to prevent future violations, protect the community and achieve justice. This does not mean that we should not continue to look for rehabilitation programs that actually work, even if the record does not give us grounds for optimism. It does mean that rehabilitation should not be a substitute for justice.

For the past 85 years, the courts have been making decisions about juveniles based almost exclusively on "what is in the best interests of the child." Ironically, the remedies proposed have not measurably helped children's interests. Our juvenile courts should continue to act for the benefit of children, but they should also seek justice and consider the rights of the victims of crime.

The juvenile justice system should abandon its practice of sealing the records of young criminals when they become adults. The rationale for this practice was the idea that these youths should have "learned their lesson" by the time they turned 18, and should be permitted to begin their new life as

System, continued on page 6

Code, continued from page 4

venile offenders accountable is the Model Code's insistence that offenders make restitution to victims. Curiously, most state codes have overlooked the fact that one purpose of a justice system is to restore the loss caused by the wrongful act of another.

The Model Code mandates as much as practical the restoration of that loss. Moreover, if the juvenile is unemployed, the probation department will assist him in finding a job so that the offender may make restitution. If the juvenile still cannot make restitution, the amount he owes will be statutorily converted to certain hours of community service work.

The Code looks out for the victim as well as for the rehabilitation of the juvenile. States are becoming increasingly aware of victim's rights but few states have legislated compensation for these victims.

Status Offenders

Modern juvenile courts have begun to remove certain juveniles from the juvenile justice system: runaways, habitual truants, youths beyond the control of their parents or school administrators, and drug and alcohol abusers. Known as 'status offenders,' these are minors who commit acts which would not be crimes if they were committed by adults.

While the Model Code does not remove these youths from its jurisdiction, it does not treat them like delinquents. Runaways, for example, are placed in short-term shelter homes until they can be reconciled with their families. If the juvenile runs away from the shelter home, he or she faces mandatory incarceration in a county juvenile facility under the contempt powers of the court. Habitual truants and other undisciplined youths face similar sanctions for failing to abide by court-imposed and officer-supervised community treatment plans.

Closely entwined with the problem of runaways is the problem of missing and abused children. While the Code does not touch the complex issue of abused children, it provides a plan for facilitating the reporting and finding of missing children. Computerized information is circulated within a national information center, and reports are standardized to aid handling. A toll-free hotline is established and fingerprinting services are made available for parents.

ALEC's Model Code takes a dim view of alcohol-related offenses. Alcohol offenders are required to undergo an alcohol and drug dependency evaluation, which may compel the juvenile to receive out-patient treatment. For drunk driving offenses, youths face an automatic revocation of driving privileges until they reach the age of 18. In addition, the judge is empowered to use such creative measures as requiring juveniles to attend alcohol education classes or visit the emergency room at a local hospital where drunk drivers and their victims are received.

Recommendations

As part of the national commitment to reduce costs and improve judicial expediency, ALEC's Model Code makes recommendations for implementation of such policies in the juvenile justice system. The Code encourages detention facilities to be run by private agencies, educational classes to be furnished by community-based programs, and community work supervision to be administered by local officials. It also seeks to establish a community arbitration system for juvenile offenders. Such features help transform the uniform characteristics of a model code into one that is unique to the particular state implementing it.

The Model Code will be fully revealed at the Juvenile Justice Conference for State Legislators on April 28-29, to be held at the Washington Marriott in Washington, D.C., after which interested parties may request copies of the draft Code. Two regional training conferences will be in early June. For more information regarding the Conference, contact Sharon Werning, Conference Coordinator, at (202) 547-4646. ■

System, continued from page 5

adults without previous errors being held against them.

However, statistics show that the most fertile age for crime is between 16 and 24. Thus many juvenile criminals are just getting started on a career of crime. To seal their records is to conceal from the police and prosecutors their previous actions, making crime prevention difficult. Not only does this make it tougher for the police to identify crime subjects, but juveniles enter adulthood under the illusion that they can get away with criminal behavior—get away with murder, so to speak. To their shock, many of them discover that this is not the case after age 18.

Another step that juvenile justice professionals should consider is reducing the traditional distinction between juveniles and adults. Criminals should be treated as criminals. Anyone familiar with the nature of juvenile crime will not make the argument that juvenile crimes differ in their magnitude or brutality than adult crimes; in many cases the reverse is true. So the current approach, which makes a radical distinction between criminals under 18 and those over 18, is often counterproductive.

Various states are experimenting with innovative approaches to controlling juvenile crime. Many large cities, for example, are beginning to focus their resources on chronic offenders, who commit most violent crime. Techniques include improved record keeping, specialized crime analysis techniques, and "vertical prosecution"—where one prosecutor sticks with a case from arrest through sentencing.

Another promising state initiative is restitution, a program in which property offenders are required to reimburse their victims. This has the advantage of giving the community back some of the goods it loses through theft and vandalism, and it also helps teach accountability and responsibilty to the offender.

The juvenile system also needs to rely more on the private sector, as well as on volunteer citizens to assist young offenders, instead of placing total reliance on government and professionals. A number of privately owned and operated correctional programs now exist, for example, usually at substantially lower costs than public institutions; these programs are often more innovative and responsive to the needs of both the offender and society than public programs.

The private sector is also increasing its role and influence in probation services, either by assisting public systems, or by actually running probation on a contract basis. These programs use parents and other volunteers to work with marginally delinquent youth. Yet officials within the system, and public employee unions, often do everything in their power to torpedo such services, usually out of fear that volunteers will displace their salaried positions.

Through the Office of Juvenile Justice and Delinquency Prevention, the federal government has been encouraging these initiatives. But the primary responsibility to tackle the problems of juvenile crime rests with state and local governments. The American Legislative Exchange Council's Juvenile Justice Re-

continued on page 8

Judicial Panel Reports Flaws In Alaska's Grand Jury System

by Joe LaRocca

"That which we call a rose,
By any other name would smell as sweet."
Shakespeare
Romeo and Juliet

Contrary to assertions by its critics and the Alaska news media, the draft report issued last week by the Alaska Judicial Council clearly indicted Alaska's grand jury system and process and, by implication, the state grand jury which recommended impeachment proceedings last summer against Gov. Bill Sheffield for his and an aide's role in the awarding of a $9 million sole source lease contract for a state office building in Fairbanks to a Fairbanks firm with political ties to the governor.

During last week's meeting between the Judicial Council and the legislature's joint Judiciary committees, at which the draft report was released, and afterwards, several legislators scolded the council and its ex officio chairman, State Supreme Court Justice Jay Rabinowitz, for its failure to include specific recommendations pinpointing the blame for what some believe to be misguided actions by the state prosecutor and the grand jury which precipitated the unwarranted and costly impeachment proceedings.

At the conclusion of the sensational impeachment hearings, which were televised live, statewide, and received widespread coverage by the national news media, the state Senate fully exonerated the governor of any wrongdoing, but asked the Judicial Council "to study the use of the power of the grand jury to investigate, and make recommendations to the supreme court and the legislature to assure effective and proper use of that power with effective safeguards to prevent abuse and assure basic fairness."

The legislature also asked the Judicial Council - which is charged by the state constitution with conducting studies "for the improvement of the administration of justice " - to consider "possible amendment to the State Constitution...concerning the need to strengthen the grand jury process..."

And while several legislators castigated the council for failing to fulfill their expectations, the conspicuous absence of explicit verbiage overtly labeled "recommendations" fails to disguise the fact that the council's draft report fairly bristles with implicit recommendations under other names which betray sweeping deficiencies in the state's grand jury process, susceptible to remedy by apt legislation without impinging upon the grand jury's constitutional power in Alaska "to investigate and make recommendations concerning the public welfare or safety..."

DUE PROCESS

The council's draft report says, for example, that "Even without constitutional amendment...a number of procedures could be adopted that could provide for:

- greater due process protection of individuals named or referred to in reports;

- judicial review of reports, and

- standards for publication and dissemination" of reports.

The draft report adds: "Basic fairness and constitutional due process may require that unindicted individuals named in grand jury reports be provided with certain protections not currently required by Alaska law." And it adds that "Unindicted individuals named in at least three Alaska grand jury investigative reports lacked a forum or mechanism through which to respond."

While the council's report does not specifically identify Gov. Sheffield's case as one of the three, there can be little question that he was an "unindicted individual" who "lacked a forum or mechanism through which to respond" (short of impeachment proceedings), and that he was thereby deprived of "basic fairness and constitutional due process."

The report points out that in many other jurisdictions, the governor would have been afforded, prior to publication, the right to:

- review the report;

- present further testimony to the grand jury;

- move to expunge certain portions of the report;

- a closed hearing or appeal;

- a fair trial (as opposd to a politically-charged impeachment not subject to the rules of evidence), and

- review the grand jury transcript.

JUDICIAL REVIEW

The Judicial Council's draft report also points out that while no guidelines or statutes exist in Alaska providing standards for judicial review of grand jury reports, guidelines for such review in other jurisdictions have been routinely developed which are designed to protect the due process rights of persons identified in grand jury reports.

For example, the draft report says, after reviewing a grand jury's report, courts in other jurisdictions have the authority to call for further testimony, refer the report back to the grand jury for amendment consistent with the court's findings, to expunge certain portions - or all - of the report, or to hold closed hearings.

The Judicial Council's report also asserts that "Policy decisions need to be made regarding publication and dissemination of reports and access to grand jury records on which reports are based." And its wide-ranging study of practices in other jurisdictions led to its conclusion that, as a general rule, and in the absence of statutes, "a grand jury has no right to file a report reflecting on the character or conduct of public officers or citizens unless the report is accompanied or followed by an indictment."

It also found that when the grand jury does not find evidence to warrant an indictment (as in the governor's case) "the practice...has been to issue a report to the court summarizing the findings and conclusions of the investigation." Says the council's draft report: "It has been held in most jurisdictions that the power to report is not co-extensive with the power to investigate. The chief criticism of grand jury reports,"it says, "is the potential violation of an individual's right not to be publicly condemned for wrongdoing without the due process established by law, including the right to be heard. When an individual indictment is issued," it adds, "an individual has the opportunity to present his or her case at trial. When a grand jury issues a report accusing an individual of wrongdoing, that individual has no guaranteed means for reponse."

The report quotes copiously from the minutes of the first state constitutional convention in 1956 pertaining to the drafting of the section on grand juries. One extensive quotation attributed to Delegate Seaborn J. Buckalew, Jr. fastens with uncanny accuracy and prophetic foresight upon the precise issues which were raised 30 years later in conjunction with the state grand jury's damning report on Gov. Sheffield.

It came during the discussion of a proposed amendment which would give grand juries sweeping powers to investigate and "make recommendations concerning the public health and welfare." In that context, Buckalew's comments deserve unabridged recitation. He said:

"From my first impression and my prime objection to this particular amendment is that I think and feel certain it will open the door, for example, the grand jury might have under investgation the conduct of some particular public office, for example the governor, or any public official, the local tax collector. They don't have enough evidence to return an indictment but this would give them the power to blast him good and hard, and I think it would lead to all kinds of trouble, and I think it is an unheard of provision.

"The recommendation of the Committee provided that the grand jury could investigate, they could return indictments, but it certainly did not give them the privilege more or less to defame somebody if they did not have quite enough action for a (true) bill. Under this they could discredit him completely, and he would have no way of answering.

"He might be able to come back and get the report of the grand jury stricken from the records of the court, but the damage would be done.
I think it is extremely dangerous because a citizen would not have any protection. Once it was published, the only thing he could do would be then

State Senator John Sackett criticizes the Judicial Council's report on the grand jury system for its failure to pinpoint blame in last year's impeachment proceedings.

(Continued on page 6) 10

Highway 'Slush Fund'

(Continued from page 6)

seems to stem from the lack of an updated HEWCF policies and procedures manual."

The audit report notes that as part of its operating function, the capital working fund has 36 maintenance shops and more than 60 fuel depots statewide to service the state fleet, which are regionalized.

Under the program, the working capital fund managers procure fleet vehicles for the state and charge the various agencies for their use, maintenance and eventual replacement. The legislature annually appropriates to the agencies monies they request in their budgets to pay the charges assessed by the capital working fund.

According to the audit report, "charges to other departments and agencies for services provided by such a Fund are normally intended to recoup the cost of services and are not generally designed to produce any significant profits or cash balances."

In their report, the auditors recommended that starting this fiscal year:

- the working capital fund's vehicle replacement function should be scrapped and all state agencies required to budget for their replacement vehicles as they would for any other needed item;

- state fleet maintenance would remain with the DOT-PF, but use of its maintenance shops would be at the option of the agency users, and

- the current cash balance of some $40 million should be transferred to the general fund where it would be available for appropriation for other essential purposes.

While Rep. Pignalberi, who has taken the lead in trying to reform the working capital fund, generally agrees with the auditors' findings, he thinks their recommendations go too far. So he is drafting proposed amendments to the two bills introduced by the Legislative Budget and Audit Committee which together would abolish the fund, and transfer the balance to the general fund.

He fears that requiring the agencies to fight for vehicular and equipment replacement in competition with other state programs and projects in the highly-charged political arena of the legislature could lead to political decisions that would gut those agencies or regions without political clout.

Pignalberi's amendments would shift the vehicle replacement function to the Department of Administration's Division of General Services and Supply, which he feels has the administrative expertise needed to handle it, at the same time stripping DOT-PF of its cumbersome new and spare parts inventory, and encouraging agencies to privatize vehicle repairs by using services which are commercially available, as many of them are already doing.

What, one might ask, does DOT-PF think of all this? Not much. While Commissioner Knapp concurs with some of the auditors' findings and conclusions, he takes strong exception to their recommendations, which he says are ill-advised. Knapp said in a letter responding to the audit report: "We strongly disagree with your main recommendation and, if implemented, we feel it will move this State backwards many years in the equipment field."

Knapp said his department has already made a number of improvements in the operation of the working capital fund, with others soon forthcoming. As for the fund's unseemly cash surplus, Knapp pointed out that the legislature has the power at any time to transfer any or all of it into the general fund for other uses, and has in the past done so.

But Pignalberi is not persuaded. While he concedes that Knapp has made some needed improvements, he's convinced that the capital working fund is beyond redemption in DOT-PF's hands, and needs a major overhaul.

Grand Jury Illegally Granted Immunity to Impeachment Witness

The Judicial Council report on The Investigative Grand Jury in Alaska reveals in an obscure footnote that the grand jury which recommended Impeachment proceedings against Gov. Bill Sheffield last year illegally granted what is known as "transactional immunity" to one of the key witnesses in the investigation, his chief of staff, John Shively.

Transactional immunity protects the immunized witness against prosecution for any of the transactions or occurences that are the subject of the compelled testimony. Alaska law, the report says, offers only what is known as "use immunity," which forbids later use against the witness of either the evidence he or she has been forced to give, or new evidence derived from it.

Under the grant of transactional immunity, Shively told the grand jury that he had destroyed a copy of lease documents bearing the governor's initials (thus suggesting that Sheffield had seen and would have been aware of them), and that he (Shively) had lied to investigators about his own knowledge of them.

According to the council report, use immunity is not as broad as transactional immunity, which is "argued by some to be the only workable approach. In practice," the report says, "transactional immunity has been granted to some witnesses in Alaska."

Flaws in Grand Jury System

(Continued from page 3)

Justice Jay Rabinowitz, ex officio chairman of the Alaska Judicial Council

come in and ask the court to strike portions of it. For that reason, I would object to it."

But Buckalew's objection was overridden in favor of the view of another delegate lacking his vision, who responded: "They do not necessarily have to defame any individual or mention him by name."

FEDERAL LAW

The council's report points out that even the federal Organized Crime Act of 1970 "provides an opportuity for named individuals to respond (to grand jury reports), requires that a report be served upon each person named in it and given 20 days to file and answer, and that the response shall become an appendix to the report.

Says the draft report: "Federal courts have carved out and continue to carve out exceptions to the grand jury's reporting power to protect basic fairness and the rights of individuals. Most federal courts have held that a grand jury has no authority to issue a report that accuses an unindicted individual of an indictable offense, with some exceptions made for reports criticizing federal public officials."

Here are more of the relevant findings contained in the Judicial Council's draft report which reflect due process protections found elsewhere, but not in Alaska's grand jury process:

- In California, a comment in a grand jury report which refers to an unindicted individual is not privileged, and such individuals have the right to sue grand juries for libel;

- In Georgia, an accused public official has the right to testify before the grand jury at the conclusion of the state's evidence, and is not subject to cross-examination. The accused and his or her counsel have the right to be present during the presentation of all evidence;

- A California court has held that although no state law specifically authorizes judicial review of grand jury reports, a limited review is implicit in the enactment of statutory limits on investigatory and reporting authority, and confirmed by a common law decision which recognizes the propriety of court review. It added that the court's "sole function in this realm lies in its power to prevent the filing of an illegal report."

At last Friday's Judicial Council meeting with the joint Judiciary Committees, State Sen. John Sackett, R-Ruby, asked members of the council and its staff why they had narrowed the scope of the study to cover only the grand jury's investigative and reporting functions, failed to examine the topic more broadly, and ignored the Senate's request for specific recommendations.

Francis Bremson, the council's executive director replied that time and budget constraints, along with the council's effort to submit it's report to the legislature during the current legislative session, led to its decision to issue a draft report as soon as possible. He said the council plans to circulate the draft report for comment before finalizing it.

Sackett said that the Senate had placed neither time nor budgetary restrictions on its request for the grand jury study, and he and other legislators asked whether specific recommendations would be forthcoming in the final report. Sackett was one of the senators who, during the special impeachment session last summer, were highly critical of the chief prosecutor's office, the judicial branch and the grand jury for their roles in recommending impeachment proceedings against the governor.

Both Bremson and Justice Rabinowitz, the council's ex officio chairman, said they felt the group might agree to expand the report and include specific recommendations in the final version, but that would take more time and money. Rabinowitz told Sackett, however, that he did not feel it was appropriate for the council to review and judge the prosecutor's and grand jury's performance in the governor's case.

The veteran justice later told the Capital Reporter that he met with Senate Judiciary Committee Chairman Pat Rodey, D- Anchorage, after the council meeting, and they agreed to ask the Senate for additional funds to complete the report - including concrete recommendations - before the end of the session in mid-May, and to expand it to include a study of the grand jury's important "charging" function, as well as the role of the state prosecutor and judges in the grand jury system. The second phase of the report, Rabinowitz said, would be completed and submitted to the legislature next year.

Vern's Version:
Sealaska's Bill Howe: The Long Way Around to Alaska

Commentary by Vern Metcalfe

William M. Howe is 42 years of age, was born in Brooklyn N.Y., is a graduate of St. John's University with an M.B.A from Seattle University, and is the new president of the largest regional corporation created by the Alaska Native Claims Settlement Act (ANCSA). He also has one of the more interesting backgrounds to be found in Alaska corporate circles, or for that matter just about anywhere.

Howe joined the Peace Corps after graduating from St. John's and went to India where he served in a small village as part of a community help program. "This was in a drought area and was quite a change, to say the least, from anything I'd experienced ... we got some agriculture and chicken farming going there," he recounted.

After serving in the Army, Howe joined the U. S. Aid program, and spent time in the Far East, with assignments in Malaysia, Borneo and the Philippines. His time in the Philippines was spent on the island of Mindanao, where he witnessed a conflict between the Moslems and Christians.

From religious conflicts Howe moved on to refugee programs in Asia, and the refugee work brought him to Cambodia where he got to know Sydney Schonberg, the Pulitzer Prize winning reporter. Howe got out of Cambodia two weeks before the government fell, and he commented, "of course the movie 'Killing Fields" came from Schonberg's book ... it was too accurate as a matter of fact."

Howe's next assignment was to have been another trouble spot, Bangladesh, but he decided he had to settle down and make a living. This decision came about because of his marriage "to a Chinese lady from Malaysia." Howe's wife Rosalind's grandparents emigrated to Malaysia from China and she was raised on a rubber plantation her father owned.

Howe's first year back in the state's found him working for Rainier Bank while he got his M.B.A. from Seattle U. After working "mainly with numbers" for six years, Howe wanted experience in the lending end of the business, and this led to his assignment with Rainier's Alaska Group. He got involved in loans with correspondent banks in Alaska and he did some lobbying for interstate banking. This led, in turn, to Rainier Bank entering the Alaska market place when they purchased Anchorage-based People's Bank.

It also led to a love affair with Alaska on the part of Howe. "I really got involved with ANCSA corporations during this time including Goldbelt, Inc. of Juneau plus five regional corporations." Howe said. He recounted how he was proud of his work in getting financing for Goldbelt Place, a three-story office building which Rainier Bank underwrote when other lending institutions turned the urban corporation down.

The experience with the bank's Alaska Group led, in due time, to Howe becoming well acquainted with Sealaska since the regional corporation gained a $60 million line of credit for their subsidiary, Ocean Beauty Seafoods, Inc. "I think that when they [Sealaska] were looking around for a chief financial officer they put a high priority on getting someone who could put together bank relationships due to the strains experienced by the 'recession' which hit them in 1982," Howe said.

The recession was triggered by a botulism incident in Europe which almost put Sealaska and Ocean Beauty to the financial wall. When the corporation was in the process of reorganizing following that year of multi-million dollar losses the need for such expertise became readily apparent. Howe was hired away from Rainier Bank in December of 1984 and he had by that time become vice-president of branch banking (over 100 branches) who were doing over $3 billion in business by that time.

"After I joined Sealaska, Byron Mallott and I worked out a deal with the Bank of Tokyo to be our lead bank, and they have been of great help to us throughout the Far East including China, and we still have our relationship with Rainier Bank," Howe said.

Howe became vice-president of finance, and a year later during a reorganization, became president and chief operating officer. "You can't be a banker without becoming conservative and my views of direction and risks are in concert with the board and management in general," Howe said, and added that he feels very comfortable in his position.

When asked what Sealaska has on the "front burner" Howe detailed four main points of concern. Sealaska is involved in timber, fisheries, construction, and to some degree real estate. It is also concerned with future mineral development in Southeast Alaska. Under the provisions of ANCSA Sealaska owns some 300,000 acres of prime land and also has sub-surface rights to a like amount of land owned by 12 Southeast village-urban corporations.

"Right now we have to develop a strategy to utilize the 2 billion board feet of timber we own in Southeast, less than half of which is exportable," Howe said. He is trying to pull together all of the corporations by reorganizing subsidiary Sealaska Timber Corp. into a purely marketing organization. Based in Ketchikan, STC has overseen the harvesting of timber owned by Sealaska and the plan is to form a "cartel" of sorts wherein the various corporations will present a united front in marketing their timber, rather than competing with each other, as is now the case.

Howe describe Sealaska as being a trading company, "we are actively trying to develop markets with other ANCSA corporations and, for that matter, with any other corporation. We are seeking, in due time, joint ventures with other companies well established names, to help us develop the mineral potential of our lands."

Howe outlined potential mineral development Sealaska is looking at, and said they have been in contact with the Noranda Mining company about their mine at Green's Creek on Admirality Island near Juneau. "We want to create and enhance a mining zone around their claims to allow it to be much larger ... within, of course, environmental concerns. ...we have the backing of the Noranda people, our Congressional delegation, and our Board for a land swap. ...There are others who aren't all that enthused," Howe said. He said that Sealaska shareholders are "the most concerned of all Alaskans about the environment. They don't want the streams trashed because for many, that is or has been their livelihood."

Howe is of course concerned with other business ventures of Sealaska including Ocean Beauty Seafoods and the Alaska Brick Group. He indicated that Ocean Beauty is facing a fact of life of the seafood processing industry, that it is now marginally profitable. "Whitney-Fidalgo and New England Fish Co. both went bankrupt in the past few years. Ocean Beauty has been eking out a very minor profit over the past few years since the disastrous year of 1982," Howe said. He also said there is an inherent conflict between a fish processing company and the fishermen who supply it, many of whom are Sealaska shareholders. He also added that Ocean Beauty is being severly impacted by imports, and the high cost of their operations, "In the past two years we have emphasized an increased marketing posture ... we are facing some very tough decisions about Ocean Beauty."

The same holds true of the Alaska Brick Group, based in Anchorage, which had been a major profit center for Sealaska in 1983 and 1984. Howe said the severe decline in construction in 1985 "has caused us to make some changes there, too."

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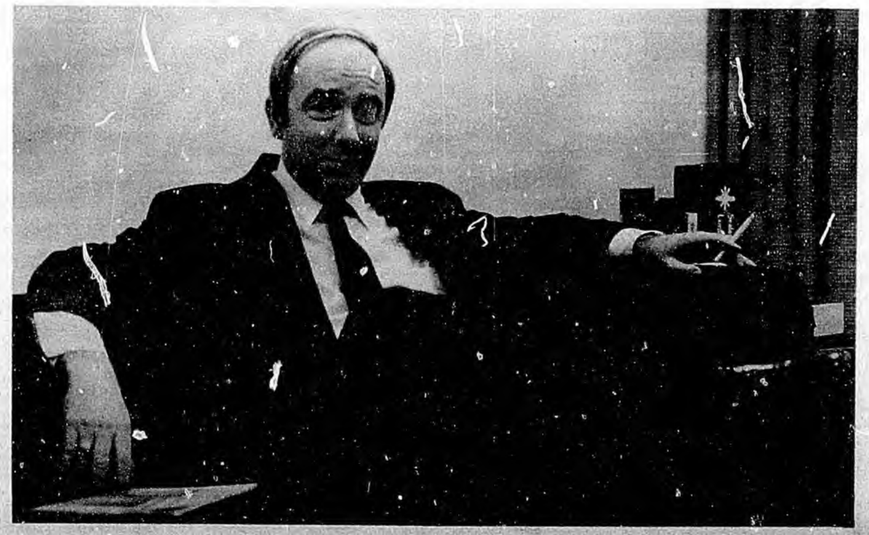


Sealaska's chief operating officer, Bill Howe.

Joe Hayes

in that, through the proper role of government, such as helping in marketing our resources. We're dealing with Pacific Rim countries for instance, we help in the market. We do such things as we're doing with the Alaska Seafood Marketing Institute.

Capital Reporter: What do you think about the state getting together with Cominco, the Red Dog project?

Hayes: I think that was a good relationship. I think that was a legitimate and proper role of government. Using government to assist industry and provide jobs in an economy in an area where there is high unemployment. We're doing that essentially by using the faith and credit of the state. The state's participation is well secured. I think the risk is minimal, the opportunities and the potential is tremendous.

Capital Reporter: What about projects - you were talking about agriculture. The state's run into a lot of trouble with the Delta project. What about state participation in projects like that - the way they went about that?

Hayes: I guess that project has been mismanaged and mishandled by the state. I believe a number of those farmers became involved based on unrealistic expectations. That project was based on competing in an international market. I don't think we knew as much about the climate as we know now. A number of things I think caused that project to be unsuccessful up to this point.

Capital Reporter: I wanted to touch on some Native issues that are important now, sovereignty, the 1991 package. Do you have a position on sovereignty?

Hayes: Yes. I do not support sovereignty. I have supported a number of Native issues, and a number of Native concerns in terms of protecting their land, and protecting their culture, and determining to the extent possible, their own destiny, but I do not support their present objective of sovereignty because I think it tends to be devisive. It creates a state within a state, and it's devisive at a time when we need to bring the state back together again, we need to be united, not divided. I think there are other ways to achieve their objectives - one of those you mentioned earlier, leading up to your question, the 1991 amendments to ANCSA. Making amendments - I think there are other ways to deal with the problems that are less devisive, to provide the security the rural people are looking for.

Capital Reporter: What about subsistence? It's another one of those issues that is explosive at times. If you were in the legislature now, do you think it would be a tough one to deal with?

Hayes: It's always a tough issue. Of course we dealt with that issue when I was in the legislature. I served on the special committee on subsistence back in the late 70's, and I have supported the subsistence preference for fish and game. However, I believe that it has to be fair and equitable for all people, and to the extent that it does not conflict with federal law, I believe that a subsistence preference or priority should be given to those people who need it for their survival, who do not have other alternative means of securing their protein needs for themselves or their family, and have traditionally and customarily depended on it.

Capital Reporter: Do you see it as a real Bush versus urban issue?

Hayes: I think that it has developed into a Bush versus urban issue, that it is a devisive issue, that it is going to difficult for the legislature to resolve it to most everyone's satisfaction.

Capital Reporter: What kind of ideas do you have in mind for dealing with the declining oil revenues, curbing spending?

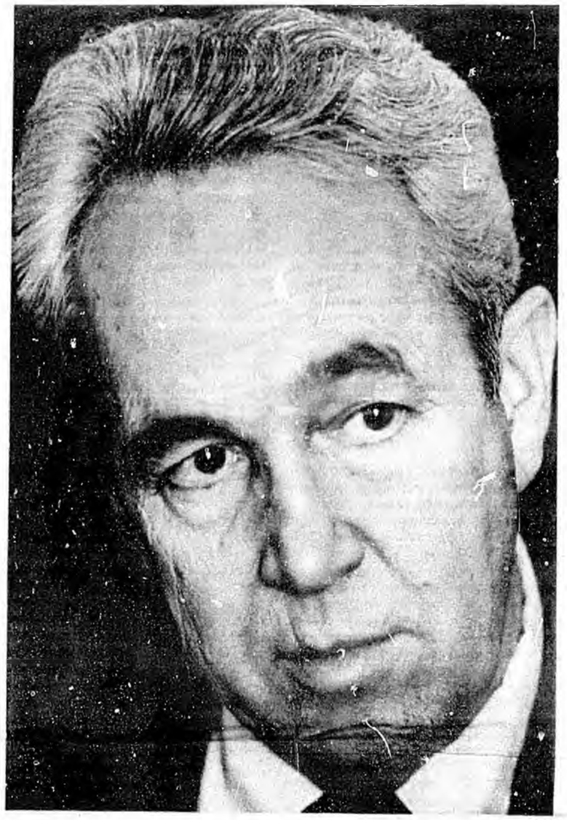
Hayes: As far as the budget is concerned, I think we should go back to zero-based budgeting. We should take the budget apart and rebuild it from the ground up. Every element of the budget - it's existence should be justified, and its level of funding should be justified and we should go through the public process of making those determinations. I think that in doing that we will be able to build in a lot of cost efficiencies in the budgeting process.

Capital Reporter: How is [your idea] different that how the budget process works right now. I know that people have a lot of input right now.

Hayes: What we've been working on for a long time is a budget that is the previous years budget with add-ons for inflation or population increases or demands, so that we have what tends to be a continually accellerating budget, or increasing budget. Without going into the details of whether or not that particular service is being duplicated, whether we can create efficiency through consolidation, whether in fact it's even a public necessity anymore or whether the public wants that when they have to choose between alternatives.

Capital Reporter: So would you send the choices back to the municipalities, the local governments and have them choose?

Hayes: Local governments are now making their choices known in terms of capital projects, and of course beyond that we're assisting them through municipal assistance revenue sharing. Those are block grants and they make their own determination on the local level as to how they're going to use that, which I think is the best way for government to operate, it works much better I believe on the lowest level. I'm talking about the budgeting process as it occurs in the legislature. We go back to those various programs, those various budget items that we have been funding and build them up from the ground. Look at them in terms of each request, have each division come in and justify its existence and its level of funding.



Joe Hayes

Capital Reporter: Education funding is another difficult area. The legislature can't come to terms of the foundation formula. Do you have any ideas on that?

Hayes: My position is that we need to continue to search for a foundation formula that is more equitable than what we do now. As you know, we're involved in studying the problem now. There's a report that's due shortly ... that makes recommendations for revising the existing foundation formula, and it needs to be more equitable, in my view. Beyond that, as far as education funding is concerned, we need to provide for a viable student loan program. I think that's another important part of our education program.

Capital Reporter: How do you think it needs to be more equitable?

Hayes: In terms of - I think we need to look at what it's costing us on a per-student basis statewide. There have been some statistics presented that indicate in some area that maybe five or six thousand per student, and in some other areas it may be eighteen or twenty thousand dollars per student, for instance. I think we need to look at look at that in terms of is it equitable - can we cut the costs of those extremely high cost educational areas. Can we increase efficiencies in some way and provide needs in other areas where the student population is greater. In doing so, can we cut the overall cost of education. There seems to be a disparity in costs, on the urban and rural levels, and that is primarily the charge the task force has, to look at equitable ways of dealing with that. That's not to say we should not have good educational quality throughout the state - that's our primary objective.

Capital Reporter: How's your campaign going, how does it look in terms of this crowded field that gets more crowded every day on the Republican side.

Hayes: Our campaign is going well - we have our campaign well under way. We have our statewide office now open and operational now in Anchorage. We have a statewide coordinator and we'll be opening an office in the next few days in Fairbanks. A lady by the name of Terry Steryl will be coordinating our effort in Fairbanks. We've opened an office in Ketchikan - we have a young man down there by the name of Jim Lotsfeldt who is our coordinator for that particular area of Alaska. We'll be opening offices soon in the Kenai area and the Matanuska-Susitna area. I think our campaign is going well - we have a hard working, well organized finance committee, as well as campaign committee. The finance

(Continued on page 11)