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BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF LAW

CRIMINAL DIVISION

March 28, 1986

REPLY TO:

- ☒ CRIMINAL DIVISION CENTRAL OFFICE
POUCH KC
JUNEAU, ALASKA 99811
PHONE: (907) 485-3428
- ☐ OFFICE OF SPECIAL PROSECUTIONS
AND APPEALS
1031 WEST 4TH AVENUE, SUITE 318
ANCHORAGE, ALASKA 99501-5993
PHONE: (907) 279-7424

The Honorable John Binkley
Alaska State Legislature
P.O. Box V (MS 3100)
Juneau, Alaska 99811

Re: House Bill 700

Dear Representative Binkley:

This letter is in response to your request for an opinion by the Department of Law on the constitutionality of House Bill 700. You asked that we pay particular attention to the right of privacy under Art. I, sec. 22 of the Alaska Constitution.

House Bill 700 would create another "local option" whereby communities may vote to ban possession of intoxicating beverages. Possession of alcoholic beverages in the home (including homemade liquor) would be a violation of the ban, but possession of alcohol in the body would not. Violation of the ban would be made an infraction punishable by a maximum \$1,000 fine and the person would not be entitled to publicly-financed counsel or trial by a six or twelve-person jury.

The most obvious question raised by this proposal is whether banning possession of alcohol in the home violates the right to privacy under Art. I, sec. 22, of the Alaska Constitution. We believe that the answer is no, and the state is prepared to defend the validity of such a law when a court challenge is brought. A brief discussion follows.

Right to Privacy

Despite the minimal penalties provided by this bill (and the ability to "pay" a fine through community work service), there is no doubt that such a law will be challenged as an invasion of privacy under Art. I, sec. 22 and Ravin v. State, 537 P.2d 497 (Alaska 1975) (possession of small amounts of marijuana, by adults in their homes, is protected).

The many public hearings held by your committee throughout the state elicited hours of testimony from people from all walks of life on the problems created by alcohol in

rural Alaska and are summarized in your committee's detailed report. A Search For Control: The Effect Of Alcohol On Public Rights And Private Wrongs, Report to the Legislature, Joint Special Committee on Local Option Laws (March 1986) (hereafter Report). The problems created by alcohol are well known and beyond dispute (see Findings 1 through 9 and 11, Report at 108-09). There seems to be ample evidence, and it stands to reason, that in communities banning sale and importation of alcohol, much drinking takes place in private homes. (Finding 10, id.) Given the enormous economic and social costs of alcohol abuse, it is not surprising that communities would want to ban possession. (Finding 12, id.)

Giving communities this additional option (and allowing community work service to be administered through village councils) provides a greater measure of local control over a problem which, although it exists statewide, has its most severe impact at the local level. This bill represents the legitimate view that each community should be the sole judge of whether an expectation of privacy in the possession of alcohol is one that their localized society believes is reasonable and deserving of protection. In other words, the balance between one person's right to possess and consume alcohol and the public's right to safety and security should be made on a village by village basis by the voters in each locale.

One of the most important of the committee's findings is that present laws are not adequate to deal with problems created by possession of alcohol, including homebrew. (Finding 14, Report at 110.) Because present laws are inadequate, the legislature may devise different means to achieve its legitimate health and safety purposes. This is not to say that the legislature is free to devise draconian and irrational solutions to a problem once a less intrusive method has failed. For example, we understand that there are some who have advocated ideas that amount to a virtual suspension of search and seizure protections in order to completely eradicate all traces of alcohol from a village. This bill obviously does not go that far, and is consistent with state and federal law regarding searches and seizures. In the absence of a person's consent, or exigent circumstances, a search warrant issued by a judicial officer will still be required to gain entrance to a person's home. See Report at 107.

The means chosen by the committee to make alcohol laws more effective helps cure a problem created by current local option laws and by opinions such as Ravin v. State. As noted in Finding 14, Report at 110, Alaska law prohibits sale and importation of alcoholic beverages but permits possession. Similarly, the Ravin case left intact criminal prohibition of sale or public possession of marijuana, but legitimized home

possession. Laws such as these tend to create an incentive to do precisely what is prohibited, i.e., to acquire these controlled substances. The general populace knows very well that if you can get it to your house (or if you can make it yourself) you are literally home free. If possession is prohibited then it may very well lead to less importation and less manufacturing, which has always been a legitimate goal.

We have not reviewed the transcripts of the hearings, as a judge might do, nor have we perused the many reports and publications that are part of the committee record. Nonetheless, if the summary of the evidence contained in the committee's report is accurate, we believe that there is ample justification for the legislative findings contained in the report and for upholding the validity of the law. 1/ See, Harrison v. State, 687 P.2d 332 (Alaska App. 1984); State v. Erickson, 574 P.2d 1 (Alaska 1978).

If you have any questions, please contact me.

Very truly yours,

HAROLD M. BROWN
ATTORNEY GENERAL

By: Dean J. Guaneli

Dean J. Guaneli
Assistant Attorney General

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1/ Another obvious question is whether the potential monetary penalty or public opprobrium resulting from a violation is sufficiently indicative of criminality so as to require full criminal procedural rights such as court-appointed counsel or trial by jury. See Report at 103-06. We believe that the answer is no. There is some authority to suggest that the nature of the penalty should be determined based on "community" attitudes. See, Beran v. State, 705 P.2d 1280, 1284, n.4 (Alaska App. 1985). As we understand it, the testimony elicited during the hearings is that the villages want this local option as a preventive, rather than punitive, measure. The committee's findings in this regard (Findings 15-16, Report at 110) are entitled to deference by the courts and would probably be overturned only if they were irrational or without a basis. The figure of \$300 has long been accepted as permissible for infractions, and the present day value of that amount probably approaches \$1,000. However, in light of the fact that the actual fine will be set by bail schedule, and that community work service can be substituted as payment of the fine, this provision will probably not be struck down. Even if invalid, this is a severable part of the law, and the remainder will not be affected.