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STATE OF ALASKA  
THE LEGISLATURE

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

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

April 19, 1988

SUBJECT: Municipal sales and use taxes (CSSB 282  
(C&RA))

TO: Representative John Sund, Chair  
House Judiciary Committee

FROM: Tamara Brandt Cook *TBC*  
Director  
Division of Legal Services

You have asked how CSSB 282 (C&RA) treats mechanics' and materialmen's liens. The relevant portion of the bill provides:

When recorded, the sales tax lien has priority over all other liens except (1) liens for property taxes and special assessments; and (2) liens that were perfected before the recording of the sales tax lien for amounts actually advanced before the recording of the sales tax lien.

It is not clear to me from the language whether mechanics' and materialmen's liens would be included within paragraph (2) and granted priority over sales tax liens or not. I recommend that the matter be made more clear. If it is the desire of the legislature that mechanics' and materialmen's liens not have priority over sales tax liens they should be specifically excluded under paragraph (2) so that it would read:

(2) liens, other than mechanics' and materialmen's liens, that were perfected before the recording of the sales tax lien for amounts actually advanced before the recording of the sales tax lien.

If it is the desire of the legislature that recorded mechanics' and materialmen's liens be given priority over sales tax liens a new paragraph (3) should be added to read:

(3) mechanics' and materialmen's liens for which claims of lien under AS 34.35.070 or notices of right to lien under AS 34.35.064 have been recorded before the recording of the sales tax lien.

TBC:gc  
WKG3:014

5-1116N  
Cook  
4/20/88

Original sponsor: Community and Regional  
Affairs Committee

1 IN THE SENATE

2 HOUSE CS FOR CS FOR SENATE BILL NO. 282 ( )

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to municipal sales and use taxes;  
7 and providing for an effective date

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

9 \* Section 1. AS 29.10.200(42) is amended to read:

10 (42) AS 29.45.650(c), (d), (e), and (f) (sales and use tax)

11 \* Sec. 2. AS 29.45.650(e) is amended to read:

12 (e) A borough may provide for the creation, recording, and  
13 notice of a lien on real or personal property to secure the payment of  
14 a sales and use tax, and the interest, penalties, and administration  
15 costs in the event of delinquency. When recorded, the sales tax lien  
16 has priority over all other liens except (1) liens for property taxes  
17 and special assessments; (2) liens that were perfected before the  
18 recording of the sales tax lien for amounts actually advanced before  
19 the recording of the sales tax lien; (3) mechanics' and materialmen's  
20 liens for which claims of lien under AS 34.35.070 or notices of right  
21 to lien under AS 34.35.064 have been recorded before the recording of  
22 the sales tax lien. This subsection applies to home rule and general  
23 law municipalities [WHEN RECORDED, A LIEN AUTHORIZED UNDER THIS  
24 SECTION HAS PRIORITY OVER OTHER LIENS EXCEPT THOSE FOR PROPERTY TAXES  
25 AND SPECIAL ASSESSMENTS].

26 \* Sec. 3. This Act takes effect July 1, 1988.

SENATE COMMITTEE REPORT

FURTHER:

5/16/87

DATE TURNED INTO OFFICE 2/

Mr. President:

C&RA

Committee considered

sb 282

municipal sales and use taxes

and recommended:

replace with CS FOR SB 282 )  same title  
 or adopt \_\_\_\_\_ CS FOR \_\_\_\_\_ )  new title

attached amendment(s) and

do pass

do not pass

no recommendation

individual recommendations

further referral to \_\_\_\_\_

letter of intent adopted \_\_\_\_\_

Committee  attached or  adopted fiscal note(s)

new  updated or  previous  
 zero  fiscal impact

MEMBERS SIGNING DO PASS

OTHER RECOMMENDATIONS

Tim Kelly  
Mike Spitzer  
Rick Hallford  
Paul G. Keefe

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Arturo Stangulinski DO Pass  
Chairman signature and recommendation

Committee Backup Attached

## ALASKA BANKERS ASSOCIATION

December 15, 1987

### Draft Position Paper For Amending Alaska Law Relating To Liens For Sales, Use And Personal Property Taxes.

#### Brief History of Municipal/Borough Priority Tax Lien Issue

Local government entities have experienced difficulty in collecting unpaid sales, use and personal property taxes for a number of years. During the 1970's various municipalities enacted laws to establish sales tax liens as a means of collecting unpaid taxes; however, in 1980 the Alaska State Supreme Court ruled that municipalities which levied sales and use taxes had no authority to assert a lien for unpaid taxes except through the normal judicial process. The Supreme Court said further that authorization of such liens "should be addressed by specific legislation rather than by municipal, or judicial fiat".

In 1983, legislation was proposed that would have given boroughs and municipalities a sales tax lien with the full force, priority and duration of a judgement lien; however, this legislation did not become law. When this legislation became law in 1985, the provision that the sales tax obtain an attachment lien was changed in the final draft to give the lien a priority; a priority over all other liens including mortgages, security interests, judgement liens, and the claims of anyone who claims an interest in either real or personal property. This change from the initial version of the 232 page Municipal Code Revision, and the full impact this change was not observed by the banks, the title companies, nor other affected parties. Only when some of the boroughs and municipalities began enforcing their new priority lien, was its significant impact realized.

#### No Other Tax Lien Has Such A Priority

Not even the State of Alaska, nor the Internal Revenue Service, have such a priority lien. Real property taxes have a clear priority over all other interests. But the real property tax is a charge against the property itself and real estate is immobile. All who deal with real estate know it is subject to annual taxation by a single authority. The lien amount can be readily determined and a reserve fund established to ensure its payment. This is not possible with a sales tax or a tax on personal property. It is patently unfair that, under present law, a lender can make a loan secured by real or personal property with all taxes or liens current and have a subsequent lien due to unpaid taxes at some future date preempt the position. There is no way for a lender to protect itself from this kind of action.

### Existing Law Is Not Specific Who Must Pay - It Is Aimed At Everybody

The priority lien provision A.S. 29.45.650(e) gives broad authority to municipalities/boroughs to exact payment from prior lienholders who had nothing to do with the transaction that gave rise to the tax and also to innocent buyers who pay the tax to a seller and then the seller fails to remit the proceeds to the municipality. The priority lien law goes further; it authorizes a municipality to assert a lien on any property of the buyer and it accords that lien a priority over any other lien.

Personal property is highly mobile and can be readily moved from district to district. There is no means of knowing that it is subject to a sales or use tax lien nor any way to determine the amount.

Does an individual now have to call local government to find out if a local auto dealer has remitted all sales tax collected and paid his personal property taxes? Under this law he does or he can lose the automobile, and the lienholder will also lose its lien. In effect, the priority tax lien requires an innocent third party to guaranty tax payments to a municipality or a borough.

A lender relies on the information available at the time a loan is made and then relies on its priority lien to protect it over the term of its loan. Permitting a higher priority lien long after a loan is made and over which a lender has no knowledge or control to erode its safety margin is unfair. It will also have an effect on secondary financing by outside investors and could eventually impact AHFC and AIDA programs as existence of the priority lien becomes known.

### Existing Law Is Unclear

It appears that this outcome is not what the drafters of the priority lien provision wanted. What is wanted is authority for a lien on the seller's property to secure the seller's obligation to remit the taxes collected, yet the only authority the present statute grants is for a lien to secure payment of the tax, a liability of the buyer. It is now clear that a revision is needed in this new law to better describe who has the tax obligation and what is a fair priority for a lien on a violator's property.

It is not contended that municipalities and boroughs with sales and use taxes should not have the authority to assert liens; however, that authority should be confined to asserting the lien against property of the violator and the lien's relative priority over other innocent claimants should be determined by the date notice of the lien is filed.

### Proposed Compromise Amendment

At a November 13, 1987 meeting between the Alaska Bankers Association and attorneys for the Alaska Municipal League, a compromise solution was recommended. The municipalities and boroughs would give up the 1985 priority lien position in exchange for a sales and use tax lien which is the equivalent of an attachment lien but without the need of first bringing suit. The municipalities and boroughs could also obtain a priority lien on the seller's business assets to secure the seller's obligation to collect and remit sales tax. A priority lien could be achieved on all additional or future advances but only after giving legal notice to senior lienholder(s) that sales and/or use taxes are due and unpaid. A simple lien search will reveal if a senior lienholder exists and its address. This priority lien on commercial financing of business assets (i.e. accounts receivable and inventory) is similar to the lien priority that can be obtained by the Internal Revenue Service and offers the senior lienholder(s) the option of either declining further advance requests or insuring that sales or use taxes are paid. It also elevates concern for remitting local tax payments to a much higher level for local businessmen. The Alaska Bankers Association finds this type of compromise acceptable.

### Summary

The 1985 statute authorizing a priority lien for municipal sales and use taxes, as it now exists, is an onerous law and goes beyond what is reasonable and fair. With a single last minute word change, local government gained the power to assert its lien on any property of any innocent buyer (a consumer who purchased in good faith and paid his tax) and it can place a secured creditor in a subordinated position without notice, without knowledge, and even though he had no part in the taxable transaction. Further, the municipalities and borough governments did not achieve a very good vehicle to collect from the real potential violator, the seller who fails to remit taxes collected.

The Alaska Bankers Association does not believe there should be no authority for sales and use tax liens. However, such a law should be worded carefully to restrict the lien to only property of the violator and lien priority to other innocent lienholders should be based on date notice is filed. This law should treat all parties in commerce equally and offer an opportunity to do business without a surprise. A provision that permits a priority lien against subsequent advances after direct notice to a secured party seems fair and should go far in solving the delinquent sales and use tax problems the boroughs and municipalities have experienced.

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John R. Beard  
David A. Lawer

Attention:

Wes Coyner  
586-1921

December 3, 1987

Thomas R. Boedeker 262-4441  
Borough Attorney  
Kenai Peninsula Borough  
Telefax 262-1892

Dear Mr. Boedeker:

I regret that I missed the meeting last month between members of the Alaska Bankers' Association's legislative committee and municipal attorneys, yourself included, respecting municipal tax liens. Members of the Association who attended the meeting felt that it was helpful and understood that the participants reached conceptual agreement on a satisfactory relationship between consensual security interests and municipal liens for sales and personal property taxes.

They have asked me to draft a bill that would achieve that result. I have prepared, and am transmitting such a draft. I want to be quite sure, however, (as does the Association) that it accomplishes the municipality's objectives.

As I understand it, the municipalities wanted the ability to obtain, by filing or recording notice and without need of first bringing suit, the equivalent of an attachment lien. The Association has no opposition to that except insofar as notice filing respecting personalty does not entail -- as attachment does -- taking possession away from the debtor. (In respect of personal property taxes, the municipalities' right to distrain solves that problem.) Without seizure or an awareness of a filing, a lender has no reason not to make further advances on the security of a perfected security interest: once an interest in personalty is perfected, the lender has, under the Uniform Commercial Code, no reason to check for subsequent filings when it makes further advances.

Thomas R. Boedeker  
December 3, 1987  
Page Two

The agreed solution, as I understand it, was for the municipality to give the secured party of record actual, direct notice of its filing so as to protect its lien against subsequent advances by the secured lender.

That is what is attempted -- and, in any case, intended -- by the accompanying draft.

I would be grateful for an opportunity to discuss the matter with you. If in any respect the draft fails to accomplish, or can be made to accomplish better, the lenders' and tax collectors' mutual objectives, it should be changed.

Thank you for your attention.

Very truly yours,

  
John R. Beard

JRB/11j  
Enclosure

cc: Jerry Weaver

For an Act entitled: "An act relating to the enforcement of municipal property, sales and use taxes."

\* Section 1. The title to A.S. 29.45.290-500 is amended to read as follows:

Article 2. Enforcement of Property Taxes [LIENS].

\* Sec. 2. A.S. 29.45.300 is repealed and reenacted to read:

Sec. 29.45.300. TAX LIABILITY. (a) There is no personal liability for the payment of property taxes except as follows:

(1) The owner of personal property on January 1 of the assessment year is personally liable for the tax levied on such property that year, together with any penalty and interest.

(2) The owner of business inventory assessed pursuant to A.S. 29.45.110(b) is personally liable for the tax levied on such inventory, together with penalty and interest.

(3) The owner on January 1 of the assessment year of property described in A.S. 29.45.070 or of a taxable interest in tax-exempt property is personally liable for a real property tax levied on such property or interest, together with penalty and interest, if the municipality waives its real property tax lien against the property or interest.

(b) If more than one person is an owner described at (a) of this section, each such person is jointly and severally liable for payment of the tax, penalty and interest.

(c) The liability of an owner under this section may be established in a personal action brought by the municipality. Such an action may be brought before or after enforcement of the lien granted the municipality by A.S. 29.45.305(b), in aid of such enforcement, or for the purpose of foreclosing such lien by judicial sale pursuant to execution on a judgment recovered against the owner.

\* Sec. 3. A.S. 29.45 is amended by adding a new section to read:

Sec. 29.45.305. PROPERTY TAX LIENS. (a) Real property taxes, together with penalty and interest, are a lien on the property assessed, and the lien is prior and paramount to all other liens or encumbrances against the property.

(b) If a tax for which an owner is personally liable under A.S. 29.45.300 is not paid when due, the tax, together with principal and interest, becomes a lien upon tangible personal property of the owner when

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property is seized pursuant to A.S. 29.45.310 or when written notice of the lien stating the name and address of the owner and the address of the owner and the amount of the unpaid tax and describing the property subject to the lien by item or type, is filed in the place specified by A.S. 45.09.401 for perfecting a security interest in the same property. From the time of seizure or filing the municipality has the rights accorded to a lien creditor by A.S. 45.09.301 in respect of property of the owner that is seized or property described by the notice that is owned by the identified owner at, or acquired by that owner subsequent to, the time of filing. For purposes of A.S. 45.09.301(d), seizure of property or receipt of written notice of filing impart knowledge of the lien to a person with a perfected security interest in the property. A lien obtained by filing notice may thereafter be enforced pursuant to A.S. 29.45.310 or by action and judicial sale, and any seizure of property described in the notice properly effected in the course of such enforcement shall relate back to the time of filing. Prior to such seizure, a buyer described in A.S. 45.09.307(a) takes free of the lien.

\* Sec. 4. A.S. 29.45.320 is repealed and reenacted to read:

Sec. 29.45.320. REAL PROPERTY TAX COLLECTION. Except as is otherwise authorized by A.S. 29.45.300 (a)(3), real property taxes shall be enforced by foreclosure of the lien granted by A.S. 29.45.305(a) in accordance with the provisions of A.S. 29.45.300-500. Unless otherwise provided by ordinance, real property tax liens shall be foreclosed annually.

\* Sec. 5. A.S. 29.45.650(e) is repealed.

\* Sec. 6. A.S. 29.45. is amended by adding a new section to read:

Sec. 29.45.<sup>VSS</sup>~~305~~. SALES AND USE TAX LIENS. (a) A borough may provide by ordinance for a lien upon

(1) property of a buyer who neglects or refuses to pay a sales or use tax, and

(2) property of a seller who neglects or refuses to collect or remit sales tax.

(b) A lien authorized by this section may be upon such real and tangible personal property as is prescribed by the ordinance and shall be in the amount of the tax or remittance determined by the borough to be delinquent, together with interest, penalties and

administration costs properly assessed. The borough shall prescribe by ordinance the procedures for determining such amount and the circumstances under which the lien may be asserted. The lien may not be asserted until written notice of the determination <sup>is made</sup> demand for payment <sup>has</sup> been given to the buyer or seller.

(c) A lien authorized by this section is asserted by a written notice of lien which states the name and address of the buyer or seller and the amount of delinquent tax or remittance and which describes the property, or the types of tangible personal property, subject to the lien. The lien attaches

(1) to real property when the notice is recorded in the office of the recorder for the recording district in which the property is located, and

(2) to tangible personal property when the notice is filed in the place specified by A.S. 45.09.401 for perfecting a security interest in the same property.

(d) A buyer described in A.S. 29.45.307(a) takes free of the lien. In all other respects the lien has, from the time it attaches, the same validity and relative priority as a lien obtained by an attachment

levied on the property including, with respect to a lien on real property as well as on personal property, the priority accorded by A.S. 45.09.301(d) to a lien creditor over subsequent advances made pursuant to a previously recorded or otherwise perfected security interest in the subject property. Receipt of written notice of the borough's recording or filing imparts knowledge of the lien to a person with a previously recorded or otherwise perfected security interest in the property. The lien shall be enforced by judicial sale pursuant to execution on a judgment recovered in an action by the borough against the buyer or seller for the tax, interest, penalty and costs, and the levy of such execution shall relate back to the time of recordation or filing of the notice of lien.

For an Act entitled: "An Act relating to liens for municipal property, sales and use taxes"

\* Section 1. A.S. 29.45.300(b) is amended to read:

(b) Real property taxes, together with penalty and interest, are a lien on the property assessed, and the lien is prior and paramount to all other liens and encumbrances against the property.

\* Section 2. A.S. 29.45.650(e) is repealed and reenacted to read:

(e) A borough may provide for the creation, recording, and notice of a lien

(1) on real or personal property of a buyer to secure payment of a sales or use tax and the interest, penalties and administration costs properly assessed, and

(2) on real or personal property of a seller to secure remittance of sales taxes collected by the seller, and the interest, penalties and administration costs properly assessed.

A lien imposed under this action is not valid against a mortgagee or other lien holder, pledgee, purchaser, or judgment creditor until notice of the lien is filed in the office of the recorder of the recording district where the property subject to the lien is situated.

For an Act entitled: "An act relating to the enforcement of municipal property, sales and use taxes."

\* Section 1. The title to A.S. 29.45.290-500 is amended to read as follows:

Article 2. Enforcement of Property Taxes [LIENS].

\* Sec. 2. A.S. 29.45.300 is repealed and reenacted to read:

Sec. 29.45.300. TAX LIABILITY. (a) There is no personal liability for the payment of property taxes except as follows:

(1) The owner of personal property on January 1 of the assessment year is personally liable for the tax levied on such property that year, together with any penalty and interest.

(2) The owner of business inventory assessed pursuant to A.S. 29.45.110(b) is personally liable for the tax levied on such inventory, together with penalty and interest.

(3) The owner on January 1 of the assessment year of property described in A.S. 29.45.070 or of a taxable interest in tax-exempt property is personally liable for a real property tax levied on such property or interest, together with penalty and interest, if the municipality waives its real property tax lien against the property or interest.

(b) If more than one person is an owner described at (a) of this section, each such person is jointly and severally liable for payment of the tax, penalty and interest.

(c) The liability of an owner under this section may be established in a personal action brought by the municipality. Such an action may be brought before or after enforcement of the lien granted the municipality by A.S. 29.45.305(b), in aid of such enforcement, or for the purpose of foreclosing such lien by judicial sale pursuant to execution on a judgment recovered against the owner.

\* Sec. 3. A.S. 29.45 is amended by adding a new section to read:

Sec. 29.45.305. PROPERTY TAX LIENS. (a) Real property taxes, together with penalty and interest, are a lien on the property assessed, and the lien is prior and paramount to all other liens or encumbrances against the property.

(b) If a tax for which an owner is personally liable under A.S. 29.45.300 is not paid when due, the tax, together with principal and interest, becomes a lien upon tangible personal property of the owner when

property is seized pursuant to A.S. 29.45.310 or when written notice of the lien stating the name and address of the owner and the address of the owner and the amount of the unpaid tax and describing the property subject to the lien by item or type, is filed in the place specified by A.S. 45.09.401 for perfecting a security interest in the same property. From the time of seizure or filing the municipality has the rights accorded to a lien creditor by A.S. 45.09.301 in respect of property of the owner that is seized or property described by the notice that is owned by the identified owner at, or acquired by that owner subsequent to, the time of filing. For purposes of A.S. 45.09.301(d), seizure of property or receipt of written notice of filing impart knowledge of the lien to a person with a perfected security interest in the property. A lien obtained by filing notice may thereafter be enforced pursuant to A.S. 29.45.310 or by action and judicial sale, and any seizure of property described in the notice properly effected in the course of such enforcement shall relate back to the time of filing. Prior to such seizure, a buyer described in A.S. 45.09.307(a) takes free of the lien.

\* Sec. 4. A.S. 29.45.320 is repealed and reenacted to read:

Sec. 29.45.320. REAL PROPERTY TAX COLLECTION. Except as is otherwise authorized by A.S. 29.45.300 (a)(3), real property taxes shall be enforced by foreclosure of the lien granted by A.S. 29.45.305(a) in accordance with the provisions of A.S. 29.45.300-500. Unless otherwise provided by ordinance, real property tax liens shall be foreclosed annually.

\* Sec. 5. A.S. 29.45.650(e) is repealed.

\* Sec. 6. A.S. 29.45. is amended by adding a new section to read:

Sec. 29.45.<sup>VSS</sup>~~305~~. SALES AND USE TAX LIENS. (a) A borough may provide by ordinance for a lien upon

(1) property of a buyer who neglects or refuses to pay a sales or use tax, and

(2) property of a seller who neglects or refuses to collect or remit sales tax.

(b) A lien authorized by this section may be upon such real and tangible personal property as is prescribed by the ordinance and shall be in the amount of the tax or remittance determined by the borough to be delinquent, together with interest, penalties and

administration costs properly assessed. The borough shall prescribe by ordinance the procedures for determining such amount and the circumstances under which the lien may be asserted. The lien may not be asserted until written notice of the determination demand for payment <sup>has</sup> been given to the buyer or seller.

(c) A lien authorized by this section is asserted by a written notice of lien which states the name and address of the buyer or seller and the amount of delinquent tax or remittance and which describes the property, or the types of tangible personal property, subject to the lien. The lien attaches

(1) to real property when the notice is recorded in the office of the recorder for the recording district in which the property is located, and

(2) to tangible personal property when the notice is filed in the place specified by A.S. 45.09.401 for perfecting a security interest in the same property.

(d) A buyer described in A.S. 29.45.307(a) takes free of the lien. In all other respects the lien has, from the time it attaches, the same validity and relative priority as a lien obtained by an attachment

levied on the property including, with respect to a lien on real property as well as on personal property, the priority accorded by A.S. 45.09.301(d) to a lien creditor over subsequent advances made pursuant to a previously recorded or otherwise perfected security interest in the subject property. Receipt of written notice of the borough's recording or filing imparts knowledge of the lien to a person with a previously recorded or otherwise perfected security interest in the property. The lien shall be enforced by judicial sale pursuant to execution on a judgment recovered in an action by the borough against the buyer or seller for the tax, interest, penalty and costs, and the levy of such execution shall relate back to the time of recordation or filing of the notice of lien.

Draft Position Paper Amending Statutes  
Respecting Liens for Sales, Use  
and Personal Property Taxes

Sales and Use Tax Liens

In 1980 the Supreme Court ruled that municipalities levying sales taxes had no authority to assert a lien for unpaid taxes except by judicial process in enforcing judgments recovered in suit for unpaid taxes. The court held that, because

public policy would be thwarted if individual municipalities were enabled to set up a number of different systems of sales tax liens, and the determination of lien priorities would be unduly complicated

the authorization of such liens was a matter "which should be addressed by specific legislation rather than by municipal, or judicial, fiat." Fairbanks North Star Borough v. Howard, 608 P.2d 32, 34 (Alas. 1980).

In 1985 the legislature enacted A.S. 29.45.650(e), which provides:

A borough may provide for the creation, recording, and notice of a lien on real or personal property to secure payment of a sales and use tax, and the interest, penalties and administration costs in the event of delinquency. When recorded, a lien authorized under this section has priority over other liens except those for property taxes and special assessments.

This section, while it provides statutory authority the court found lacking in 1980, does so by allowing precisely the multiplicity of local systems and complicated priority disputes the court feared.

Yet the proliferation of different local rules is the least of the considerable burdens the statute imposes on commerce. Far more chilling is the broad authority it gives municipalities to exact payment from (a) persons who had nothing at all to do with the transaction that gives rise to the tax, and (b) buyers who are innocent of wrongdoing.

Sales and uses taxes are levied on buyers. Sellers are required to collect the sales tax from the buyer and remit the proceeds to the seller, but the liability for

payment of the tax is on the buyer. The statute, which authorizes the municipality to "create" a lien "to secure payment of a sales and use tax", presumably authorizes a lien on property of the buyer.

(a) In the case of a use tax, or of a sales tax the buyer knows he has not paid, giving the municipality a lien on the buyer's property seems reasonable and fair. But the statute goes beyond what is reasonable or fair. It authorizes the municipality to assert a lien on any property of the buyer, and it accords that lien priority over any other lien. Thus

Cl, a seller or lender who in 1984 finances B's purchase of, say, a mobile home in a place where there is no sales tax, can find his security interest subordinated to the lien for M's use tax when, in 1987, B moves the mobile home (or any other item he bought outside M) to M;

• C2, a seller or lender who took a mortgage on B's real property -- whether the property is inside or outside M -- can find his mortgage subordinated to M's lien when, in 1987, B either buys in M, or brings into M, something on which he paid no sales or use tax; and

• C3, a seller or lender who in 1987 declines to take a security interest in B's property until he has assured himself that no sales or use tax levying jurisdiction has "recorded" any lien against B, can still find his security interest subordinated to M's subsequently recorded claim for a 1986 sales or use tax B had not paid.

Those results -- from transactions of B in which C did not participate, over which he had no control, and of which he had no notice -- will quickly teach C not to extend credit to anyone who might have been or might yet be liable

for any of the variety of sales and use taxes it might have been, or might yet be, levied by an Alaskan municipality.

(b) But the most typical enforcement problem -- the problem presented in the 1980 Fairbanks case -- arises when the seller collects the tax from the buyer but fails to remit the proceeds to the municipality. Charging the buyer's property with a lien in such a case is not reasonable or fair to the buyer, who has already paid the tax once; and, except in cases where it is especially unfair to the buyer (i.e., when the tax the buyer has already paid is high enough to make it worth a municipality's while to go after his property), it is not of any practical help to the municipality.

Yet that is the course the statute seems to require. While what is wanted is authority for a lien, on the seller's property, to secure the seller's obligation to remit, the only authority the statute grants is for a lien

to secure payment of the tax, a liability of the buyer. If that authority aids the municipality at all in the case of a seller's failure to remit, it apparently does so by considering -- or allowing the municipality to consider -- that the tax remains unpaid until it has been remitted to the seller. The buyer, having paid the tax to the seller as required by the tax law, now finds that it is his property to which the tax law subjects a lien because of the seller's infidelity.

It is not contended that there should be no authority for sales and use taxing municipalities to assert liens. It is submitted, though, that the authority should be confined to asserting the lien against property of the violator, and that the lien's relative priority over other innocent claimants to the property should be determined from the time notice of the lien is given. Priority based on notice is firmly grounded in our laws of real property

(A.S. 34.15.290) and personal property (A.S. 45.09.301-318) precisely because it treats all persons equally and allows commerce in property to proceed without surprise to the participants. A sales tax is, after all, dependent on a healthy commerce. Care should be taken that the powers given to enforce the tax against the relatively few who violate it not be so extraordinary as to impair the base on which the taxes revenues depend.

#### Personal Property Taxes

Our property tax law distinguishes between real property taxes and personal property taxes in the following respect:

(a) The tax on real property is not a personal obligation of anyone. The tax is a charge on the property itself and is enforced exclusively by strict foreclosure of the tax lien, which lien is given priority over all other interests.

(b) The tax on personal property is a personal obligation of the owner of the property. The owner's liability is enforceable by distraint (seizure) and sale of the owner's personal property -- first of the property taxed then, if necessary, of other personalty -- which may be in aid of or as an alternative to an action for judgment on the owner's tax liability.

The distinction, clearly set out at former A.S. 29.53.210-230, appreciates the fundamental differences between real and personal property. Realty is immobile. Persons who deal with realty do so with the knowledge that the property is subject to annual taxation by a single authority and, so, to the lien for taxes. Personalty, however, is highly mobile. As its taxability depends upon its location on January 1, persons who deal with such property at other times have no means of knowing whether it was subject to a property tax until the taxing authority, by

seizing the property, puts the world on notice of its tax claim.

In recodifying A.S. 29 in 1985, however, the legislature dropped the word "real" from former Section 29.53.210(b). Codified now as A.S. 29.45.300(b), the statute now provides

[Real] Property taxes, together with penalty and interest, are a lien upon the property assessed, and the lien is prior and paramount to all other liens against the property.

The law still provides that the owner of personal property is liable for the tax, and that enforcement may be by way of distraint. A.S. 29.45.300-320. But §300(b) appears now to accord a lien against taxable personalty, as of the first day of each year, that is superior to all other interests.

If such priority is accorded to a lien against personalty, how can a retail buyer confidently buy anything of appreciable value -- an automobile, for example -- from a

retailer who does business in a municipality that levies a personal property tax on inventory without proof that the tax has been paid? How can the retailer possibly provide such proof until the municipality has assessed the property and levied the tax, a process that may, and often does, take more than half a year? And, if the retailer does business in more than one municipality that taxes such property, how can the buyer know which of those municipalities taxed the item he wants to buy?

Stated more generally: The priority A.S. 29.45.300(b) appear to give to a lien for personal property taxes makes it imprudent for anyone to buy, or to extend credit on the security of, any personal property of appreciable value in the state without knowing facts which are difficult, if not impossible, of ascertainment. Where was the property on each preceding January 1? Was it subject to taxation in those places? Have those taxes been paid?

STATE OF ALASKA 1987 LEGISLATIVE SESSION  
FISCAL NOTE

REQUEST: \_\_\_\_\_

Bill Version: SB 282  
Publish Date: \_\_\_\_\_

Revision Date: \_\_\_\_\_  
Title: "An Act relating to municipal sales and use taxes."  
Sponsor: Senate C&RA Committee  
Requestor: \_\_\_\_\_

Agency Affected: Community & Regional Affairs  
BRU: State Assessor

Components: \_\_\_\_\_

EXPENDITURES/REVENUES: (Thousands of Dollars)

| OPERATING         | FY 87 | FY 88 | FY 89 | FY 90 | FY 91 | FY 92 |
|-------------------|-------|-------|-------|-------|-------|-------|
| PERSONAL SERVICES |       |       |       |       |       |       |
| TRAVEL            |       |       |       |       |       |       |
| CONTRACTUAL       |       |       |       |       |       |       |
| SUPPLIES          |       |       |       |       |       |       |
| EQUIPMENT         |       |       |       |       |       |       |
| LAND & STRUCTURES |       |       |       |       |       |       |
| GRANTS, CLAIMS    |       |       |       |       |       |       |
| MISCELLANEOUS     |       |       |       |       |       |       |
| TOTAL OPERATING   | -0-   | -0-   | -0-   | -0-   | -0-   | -0-   |

|         |  |  |  |  |  |  |
|---------|--|--|--|--|--|--|
| CAPITAL |  |  |  |  |  |  |
|---------|--|--|--|--|--|--|

|         |  |  |  |  |  |  |
|---------|--|--|--|--|--|--|
| REVENUE |  |  |  |  |  |  |
|---------|--|--|--|--|--|--|

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Mike Worley, State Assessor  
Division: Municipal & Regional Assistance

Phone: 465-4750  
Date: 5/6/87

Approved by Commissioner: Worley for D.K. Hoffman  
Agency: Community & Regional Affairs

Date: 5/6/87

- Distribution (by preparer):
- Legislative Finance
  - Legislative Sponsor
  - Requestor
  - Office of Management and Budget
  - Impacted Agency(ies)
  - Senate Secretary

For an Act entitled: "An act relating to the enforcement of municipal property, sales and use taxes."

\* Section 1. The title to A.S. 29.45.290-500 is amended to read as follows:

Article 2. Enforcement of Property Taxes [LIENS].

\* Sec. 2. A.S. 29.45.300 is repealed and reenacted to read:

~~Sec. 29.45.300. TAX LIABILITY. (a) There is no personal liability for the payment of property taxes except as follows:~~

~~(1) The owner of personal property on January 1 of the assessment year is personally liable for the tax levied on such property that year, together with any penalty and interest.~~

~~(2) The owner of business inventory assessed pursuant to A.S. 29.45.110(b) is personally liable for the tax levied on such inventory, together with penalty and interest.~~

~~(3) The owner on January 1 of the assessment year of property described in A.S. 29.45.070 or of a taxable interest in tax-exempt property is personally liable for a real property tax levied on such property or interest, together with penalty and interest, if the municipality waives its real property tax lien against the property or interest.~~

(b) If more than one person is an owner described at (a) of this section, each such person is jointly and severally liable for payment of the tax, penalty and interest.

(c) The liability of an owner under this section may be established in a personal action brought by the municipality. Such an action may be brought before or after enforcement of the lien granted the municipality by A.S. 29.45.305(b), in aid of such enforcement, or for the purpose of foreclosing such lien by judicial sale pursuant to execution on a judgment recovered against the owner.

\* Sec. 3. A.S. 29.45 is amended by adding a new section to read:

Sec. 29.45.305. PROPERTY TAX LIENS. (a) Real property taxes, together with penalty and interest, are a lien on the property assessed, and the lien is prior and paramount to all other liens or encumbrances against the property.

(b) If a tax for which an owner is personally liable under A.S. 29.45.300 is not paid when due, the tax, together with principal and interest, becomes a lien upon tangible personal property of the owner when

property is seized pursuant to A.S. 29.45.310 or when written notice of the lien stating the name and address of the owner and the address of the owner and the amount of the unpaid tax and describing the property subject to the lien by item or type, is filed in the place specified by A.S. 45.09.401 for perfecting a security interest in the same property. From the time of seizure or filing the municipality has the rights accorded to a lien creditor by A.S. 45.09.301 in respect of property of the owner that is seized or property described by the notice that is owned by the identified owner at, or acquired by that owner subsequent to, the time of filing. For purposes of A.S. 45.09.301(d), seizure of property or receipt of written notice of filing impart knowledge of the lien to a person with a perfected security interest in the property. A lien obtained by filing notice may thereafter be enforced pursuant to A.S. 29.45.310 or by action and judicial sale, and any seizure of property described in the notice properly effected in the course of such enforcement shall relate back to the time of filing. Prior to such seizure, a buyer described in A.S. 45.09.307(a) takes free of the lien.

\* Sec. 4. A.S. 29.45.320 is repealed and reenacted to read:

Sec. 29.45.320. REAL PROPERTY TAX COLLECTION. Except as is otherwise authorized by A.S. 29.45.300 (a)(3), real property taxes shall be enforced by foreclosure of the lien granted by A.S. 29.45.305(a) in accordance with the provisions of A.S. 29.45.300-500. Unless otherwise provided by ordinance, real property tax liens shall be foreclosed annually.

\* Sec. 5. A.S. 29.45.650(e) is repealed.

\* Sec. 6. A.S. 29.45. is amended by adding a new section to read:

Sec. 29.45.<sup>655</sup>~~305~~. SALES AND USE TAX LIENS. (a) A borough may provide by ordinance for a lien upon

(1) property of a buyer who neglects or refuses to pay a sales or use tax, and

(2) property of a seller who neglects or refuses to collect or remit sales tax.

(b) A lien authorized by this section may be upon such real and tangible personal property as is prescribed by the ordinance and shall be in the amount of the tax or remittance determined by the borough to be delinquent, together with interest, penalties and

administration costs properly assessed. The borough shall prescribe by ordinance the procedures for determining such amount and the circumstances under which the lien may be asserted. The lien may not be asserted until written notice of the determination <sup>HAVE</sup> AND demand for payment has been given to the buyer or seller.

(c) A lien authorized by this section is asserted by a written notice of lien which states the name and address of the buyer or seller and the amount of delinquent tax or remittance and which describes the property, or the types of tangible personal property, subject to the lien. The lien attaches

(1) to real property when the notice is recorded in the office of the recorder for the recording district in which the property is located, and

(2) to tangible personal property when the notice is filed in the place specified by A.S. 45.09.401 for perfecting a security interest in the same property.

(d) A buyer described in A.S. 29.45.307(a) takes free of the lien. In all other respects the lien has, from the time it attaches, the same validity and relative priority as a lien obtained by an attachment

levied on the property including, with respect to a lien on real property as well as on personal property, the priority accorded by A.S. 45.09.301(d) to a lien creditor over subsequent advances made pursuant to a previously recorded or otherwise perfected security interest in the subject property. Receipt of written notice of the borough's recording or filing imparts knowledge of the lien to a person with a previously recorded or otherwise perfected security interest in the property. The lien shall be enforced by judicial sale pursuant to execution on a judgment recovered in an action by the borough against the buyer or seller for the tax, interest, penalty and costs, and the levy of such execution shall relate back to the time of recordation or filing of the notice of lien.

5-1116B  
Bradley  
5/12/87

Original sponsor: Community and Regional  
Affairs Committee

1 IN THE SENATE

2 CS FOR SENATE BILL NO. 282 ( )  
3 IN THE LEGISLATURE OF THE STATE OF ALASKA  
4 FIFTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to municipal sales and use taxes."

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

8 \* Section 1. AS 29.45.650(e) is amended to read:

9 (e) A borough may provide for the creation, recording, and  
10 notice of a lien on real or personal property to secure the payment of  
11 a sales and use tax, and the interest, penalties, and administration  
12 costs in the event of delinquency. When recorded, a lien authorized  
13 under this section has priority over other liens except those for  
14 property taxes, [AND] special assessments, and prior recorded mort-  
15 gages, trust deeds, and land sale contracts. This subsection applies  
16 to home rule and general law municipalities.

17 \* Sec. 2. AS 29.10.200(42) is amended to read:

18 (42) AS 29.45.650(c), (d), (e), and (f) (sales and use tax)

It is submitted that the law granting the municipality a lien upon distraint avoids all of these problems without unfairly prejudicing the municipalities' enforcement rights. The municipality remains able to enforce the taxpayers personal liability by suit and judicial process and retains, as well, the right to distraint and sell personal property, even without judgment and including property that was not taxed. A.S. 29.45.300(b) should be amended to state, again, what was the law for decades prior to 1986.

# Alaska State Legislature

ARLISS STURGULEWSKI, Chairman  
 TIM KELLY, Vice Chairman  
 RICK HALFORD  
 MIKE SZYMANSKI  
 FRED ZHAROFF



P. O. BOX V  
 JUNEAU, ALASKA 99811  
 (907) 465-4989

## Senate Community and Regional Affairs Committee

TO: Senate C&RA Members

May 5, 1987

FROM: Senate C&RA Staff

A handwritten signature in dark ink, appearing to be "MEL".

RE: SB 262 - "An Act relating to municipal sales and use taxes."

Under existing law (29.45.650(e)] municipalities may place liens on real or personal property to secure payment of sales and use tax. This ability is new, added under the Title 29 revision two years ago.

The section was added to Title 29 in response to a Fairbanks court case in which the judge ruled that municipalities did not have the power to place such liens. The Title 29 technical committee at the time recommended that such liens have the force of judgement liens, however, also added at that time was a sentence that gave such liens priority over other liens, except for property taxes and special assessments.

This priority conflicts with 34.36.060 which gives labor liens first position and mortgages second position. According to representatives of the home mortgage industry, including AHFC,

this priority for sales tax liens could cause major disruptions in the home mortgage industry and raise interest rates.

SB 282 would delete the priority. Tam Cook of Legal Services has advised that being silent on priority has the same effect as giving the lien the priority of a judgement lien, which was suggested by the technical committee.

Representatives of AHFC, the banks, and the Municipal League will testify at today's meeting

5-1116B ✓

Bradley  
2/6/88

A

Original sponsor: Community and Regional  
Affairs Committee

BY THE COMMUNITY AND  
REGIONAL AFFAIRS COMMITTEE

1 IN THE SENATE

2 CS FOR SENATE BILL NO. 282 (C&RA)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to municipal sales and use taxes."

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

8 \* Section 1. AS 29.10.200(42) is amended to read:

9 (42) AS 29.45.650(c), (d), (e), and (f) (sales and use tax)

10 \* Sec. 2. AS 29.45.650(e) is amended to read:

11 (e) A borough may provide for the creation, recording, and  
12 notice of a lien on real or personal property to secure the payment of  
13 a sales and use tax, and the interest, penalties, and administration  
14 costs in the event of delinquency. When recorded, a lien authorized  
15 under this section has priority over other liens except those for  
16 property taxes, [AND] special assessments, and prior recorded mort-  
17 gages, trust deeds, and land sale contracts. This subsection applies  
18 to home rule and general law municipalities.  
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STATE OF ALASKA 1987 LEGISLATIVE SESSION  
FISCAL NOTE

REQUEST: \_\_\_\_\_  
 Revision Date: \_\_\_\_\_  
 Title: "An Act relating to municipal sales and use taxes."  
 Sponsor: Senate C&RA Committee  
 Requestor: \_\_\_\_\_

Bill Version: SB 282  
 Publish Date: \_\_\_\_\_

Agency Affected: Community & Regional Affairs  
 BRU: State Assessor

Components: \_\_\_\_\_

EXPENDITURES/REVENUES: (Thousands of Dollars)

| OPERATING         | FY 87 | FY 88 | FY 89 | FY 90 | FY 91 | FY 92 |
|-------------------|-------|-------|-------|-------|-------|-------|
| PERSONAL SERVICES |       |       |       |       |       |       |
| TRAVEL            |       |       |       |       |       |       |
| CONTRACTUAL       |       |       |       |       |       |       |
| SUPPLIES          |       |       |       |       |       |       |
| EQUIPMENT         |       |       |       |       |       |       |
| LAND & STRUCTURES |       |       |       |       |       |       |
| GRANTS, CLAIMS    |       |       |       |       |       |       |
| MISCELLANEOUS     |       |       |       |       |       |       |
| TOTAL OPERATING   | -0-   | -0-   | -0-   | -0-   | -0-   | -0-   |
| CAPITAL           |       |       |       |       |       |       |
| REVENUE           |       |       |       |       |       |       |

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

*MW*

Prepared by: Mike Worley, State Assessor  
 Division: Municipal & Regional Assistance  
 Approved by Commissioner: *M Worley for D. N. Hoffman*  
 Agency: Community & Regional Affairs

Phone: 465-4750  
 Date: 5/6/87  
 Date: 5/16/87

Distribution (by preparer):  
 Legislative Finance  
 Legislative Sponsor  
 Requestor  
 Office of Management and Budget  
 Impacted Agency(ies)  
 Senate Secretary

Original sponsor: Community and Regional Affairs Committee

*① potentially serious problem*  
*② no contact.*

1 IN THE SENATE

BY THE FINANCE COMMITTEE

2 CS FOR SENATE BILL NO. 282 (Finance)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to municipal sales and use taxes."

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

8 \* Section 1. AS 29.10.200(43) is amended to read:

9 (43) AS 29.45.700(d) [AS 29.45.700(a)] (power of levy)

10 \* Sec. 2. AS 29.45.650(f) is amended to read:

11 (f) A borough may not levy and collect a sales tax on

12 (1) a purchase made with food coupons, food stamps, or  
13 other type of certificate issued under 7 U.S.C. 2011 - 2025 (Food  
14 Stamp Act);

15 (2) a purchase of tickets, chances, bingo cards, or pull-  
16 tabs in a lottery, raffle, bingo game, pull-tab game, or other game of  
17 chance licensed under AS 05.15. [THIS SUBSECTION APPLIES TO HOME RULE  
18 AND GENERAL LAW MUNICIPALITIES.]

19 \* Sec. 3. AS 29.45.650 is amended by adding a new subsection to read:

20 (g) The provisions of (f) of this section apply to home rule and  
21 general law municipalities.

22 \* Sec. 4. AS 29.45.700(a) is amended to read:

23 (a) A city in a borough that levies and collects areawide sales  
24 and use taxes may levy sales and use taxes on all sources taxed by the  
25 borough in the manner provided for boroughs. [THE ASSEMBLY MAY BY  
26 ORDINANCE AUTHORIZE A CITY TO LEVY AND COLLECT SALES AND USE TAXES ON  
27 OTHER SOURCES EXCEPT PURCHASES MADE WITH FOOD COUPONS, FOOD STAMPS, OR  
28 OTHER TYPE OF CERTIFICATE ISSUED UNDER 7 U.S.C. 2011 - 2025 (FOOD  
29 STAMP ACT). THIS SUBSECTION APPLIES TO HOME RULE AND GENERAL LAW

1 MUNICIPALITIES.]

2 \* Sec. 5. AS 29.45.700 is amended by adding a new subsection to read:

3 (d) The assembly may by ordinance authorize a city to levy and  
4 collect sales and use taxes on other sources except purchases made  
5 with food coupons, food stamps, or other type of certificate issued  
6 under 7 U.S.C. 2011 - 2025 (Food Stamp Act) and purchases of tickets,  
7 chances, bingo cards, or pull-tabs in a lottery, raffle, bingo game,  
8 pull-tab game, or other game of chance licensed under AS 05.15. This  
9 subsection applies to home rule and general law municipalities.  
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Analysis of proposed bill for "an Act relating to the enforcement of municipal property, sales and use taxes"

Summary

The principal objective of the bill is to eliminate the apparent super-and-retroactive-priority current law accords to personal property, sales and use tax liens -- according such liens, instead, the status and relative priority of an attachment lien but without necessitating the municipality's bringing an action and having the property seized (as are necessary in the case of attachment) as a condition to acquiring and perfecting the liens. In place of the notice imparted by seizure of the property under attachment process, the bill allows notice to be given by the municipality's unilateral filing or recording of a notice. (In the case of personal property taxes, filing is made available as an alternative to the municipality's existing right also to seize the property unilaterally, and then to sell it, without any judicial proceeding, A.S. 29.45.310.)

Analysis

Section 1

A.S. 29.45.290-500 are classified as a separate Article of A.S. 29.45. Though the Article is now captioned

"Enforcement of Property Tax Liens", the sections it comprises are broader in scope, since they also address personal liability for property taxes. This section of the bill would change the title of the Article to disclose more accurately its scope: "Enforcement of Property Taxes".

Section 2

A.S. 29.45.300, though captioned "Tax Liability", currently address speaks to tax liens [Subsec.(b)] as well as liability [Subsec.(a)]. This section of the bill would amend §300 to confine it to the subject of tax liability, leaving to a new section of the code (A.S. 29.45.305 -- Section 3 of the bill) the subject of the lien security for tax obligations.

A.S. 29.45.300(a) currently provides that "the owner of assessed personal property is personally liable for the amount of taxes assessed against the property." Except in the case of business inventories, property's taxable status is determined as of January 1 of each year. [A.S. 29.45.110(a) and (b).] It is not clear whether the "owner" who is liable for payment under current §300(a) is A (who owns the property when it became taxable), B (who bought the property from A subsequently), or both. The amendment makes it clear that A, not B, is personally liable [§300(a)(1) and (2)]; and that if A is more than one person, all As are jointly and severally liable for payment [§300(b)].

The amendment [§300(a)(3)] also states forthrightly the current, but obliquely stated rule that there is no personal liability for the payment of real property taxes except as to those on mobile homes and certain limited interests in realty [current §320]. As to those exceptions, the amendment provides that it is the owner on January 1 (i.e., "A") who is personally liable, and that the municipality may elect either to enforce the owner's liability or its preferred real property tax lien, but may not elect to do both.

The amendment provides [§300(c)] that an owner's liability may be established by action; that the municipality may enforce its lien (by distraint) without bringing such an action, may bring such an action without losing its distraint remedy or in aid of its distraint remedy, and/or may bring the action for the further purpose of foreclosing (other than by distraint and sale) its tax lien.

### Section 3

As noted, this section of the bill would enact a new code section, A.S. 29.45.305, to create and define the lien for property taxes. The new §305 would replace -- and as to personal property tax liens, would substantially amend -- current §300(b).

The new §305(a) would leave unchanged current law respecting the existence and priority of real property tax liens.

The new §305(b) would grant the municipality a lien for unpaid personal property taxes which attaches when, and has priority over interests others may acquire in the subject property after, the municipality has given notice of its claim to the property.

Notice can be given by the municipality in either of two ways: by having the property seized pursuant to its right of distraint [A.S. 29.45.310], or by filing notice of its claim. A lien obtained first by filing notice can be enforced without action -- by subsequent distraint and sale of the described property -- or pursuant to action, as the municipality may choose.

The effect of the amendment, then, is to repeal current law insofar as it appears to give the municipality's lien for personal property taxes priority over persons who acquired interests without notice that there was any lien (or unpaid tax); but to give the municipality a means of asserting and perfecting a lien, without having to distraint, by filing notice. It integrates the tax lien with the law governing consensual security interests (Article 9 of the Uniform Commercial Code, A.S. 45.09).

#### Section 4

This section would amend A.S. 29.45.320 to make its provisions conform to the new §§300 and 305.

Sections 5 and 6

These sections would amend current law respecting sales and use tax liens by repealing the current statutory authority for such liens [A.S. 29.45.650(e)], stating that authority in a new and expanded §29.45.655.

New §655(a) would give a municipality clear authority -- as current law does not -- to assert a lien against property of a seller who does not collect or remit a sales tax. The law currently allows a municipality to provide for a lien "to secure payment of a sales and use tax". As such taxes are typically imposed on buyers, it is questionable whether the current law is of any help to the municipality in enforcing the obligations of sellers to collect and remit the tax. The amendment redresses that problem.

New §655(b) would allow the municipality to decide what property -- realty, tangible personalty, both -- to subject to the lien and the procedures by which it is to determine when to assert the lien.

New §655(c) would provide that the sales-use tax lien, like the personal property tax lien under new §305(b), attaches when notice of the municipality's claim is given. Since distraint is not available in respect of sales or use taxes, notice of the sales-use tax lien is given by filing (or in the case of real property, recording) written notice.

New §655(d) would provide the lien the same relative priority as the lien for personal property taxes, a priority determined by the time the lien arises by virtue of the notice filed (or recorded). It also provides (as current law does not) how the lien is enforced. Again because distraint and sale are not available in respect of sales and use taxes, enforcement is by judicial foreclosure -- sale of the property pursuant to a judgment establishing the liability of the buyer or seller.

# Alaska State Legislature

ARLISS STURGULEWSKI, Chairman  
TIM KELLY, Vice Chairman  
RICK HALFORD  
MIKE SZYMANSKI  
FRED ZHAROFF



P. O. BOX V  
JUNEAU, ALASKA 99811  
(907) 465-4989

## Senate Community and Regional Affairs Committee

TO: SENATE C&RA MEMBERS

FEB 9, 1988

FROM: SENATE C&RA STAFF

A handwritten signature in dark ink, appearing to be "MEL".

RE: CSSB 282 (C&RA) - "AN ACT RELATING TO MUNICIPAL SALES AND USE TAXES."

UNDER EXISTING LAW (29.45.650(e)) MUNICIPALITIES MAY PLACE LIENS ON REAL OR PERSONAL PROPERTY TO SECURE PAYMENT OF SALES AND USE TAX. THIS ABILITY IS NEW, ADDED UNDER THE TITLE 29 REVISION TWO YEARS AGO.

THE SECTION WAS ADDED TO TITLE 29 IN RESPONSE TO A FAIRBANKS COURT CASE IN WHICH THE JUDGE RULED THAT MUNICIPALITIES DID NOT HAVE THE POWER TO PLACE SUCH LIENS. THE TITLE 29 TECHNICAL COMMITTEE AT THE TIME RECOMMENDED THAT SUCH LIENS HAVE THE FORCE OF JUDGEMENT LIENS, HOWEVER, ALSO ADDED AT THAT TIME WAS A SENTENCE THAT GAVE SUCH LIENS PRIORITY OVER OTHER LIENS, EXCEPT FOR PROPERTY TAXES AND SPECIAL ASSESSMENTS.

THIS PRIORITY CONFLICTS WITH 34.36.060 WHICH GIVES LABOR LIENS FIRST POSITION AND MORTGAGES SECOND POSITION. ACCORDING TO REPRESENTATIVES OF THE HOME MORTGAGE INDUSTRY, INCLUDING AHFC,

THIS PRIORITY FOR SALES TAX LIENS COULD CAUSE MAJOR DISRUPTIONS IN THE HOME MORTGAGE INDUSTRY AND RAISE INTEREST RATES.

SB 282 WOULD ALTER THIS PRIORITY. THE PROPOSED CS GIVES SALES TAX LIENS PRIORITY OVER ALL OTHER LIENS EXCEPT (1) LIENS FOR PROPERTY TAXES AND SPECIAL ASSESSMENTS; AND (2) LIENS THAT WERE PERFECTED BEFORE THE RECORDING OF THE SALES TAX LIEN FOR AMOUNTS ACTUALLY ADVANCED BEFORE THE RECORDING OF THE SALES TAX LIEN.

THIS DRAFT WAS DEVELOPED WITH THE ASSISTANCE OF TOM BOEDEKER, MUNICIPAL ATTORNEY FOR THE KENAI BOROUGH, AND WES COYNER, LOBBYIST FOR THE BANKING INDUSTRY. MR. BOEDEKER, WHO HAS TAKEN THE LEAD FOR THE MUNICIPALITIES ON THIS ISSUE, WOULD PREFER TO LIMIT THE PRIORITY TO PROPERTY TAXES, SPECIAL ASSESSMENTS, AND PRIOR RECORDED MORTGAGES, TRUST DEEDS, AND LAND SALE CONTRACTS; BUT HE BELIEVES THE PROPOSED CS IS REASONABLE AND TECHNICALLY CORRECT.

BOTH GENTLEMEN WILL BE AT THE COMMITTEE TO TESTIFY. THE CS HAS A ZERO FISCAL NOTE FROM THE DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS.

STATE OF ALASKA  
1988 LEGISLATIVE SESSION

BILL VERSION: CS for SB 282 (C&R)  
PUBLISH DATE: \_\_\_\_\_

FISCAL NOTE

REQUEST:

Revision Date: \_\_\_\_\_  
Title: "An Act relating to municipal sales and use taxes."  
Sponsor: Senate C&R Committee  
Requestor: \_\_\_\_\_

Agency Affected: Community & Regional Affairs  
BRU: Municipal & Regional Assistance  
Components: State Assessor

EXPENDITURES/REVENUES: (Thousands of Dollars)

| OPERATING         | FY 88 | FY 89 | FY 90 | FY 91 | FY 92 | FY 93 |
|-------------------|-------|-------|-------|-------|-------|-------|
| PERSONAL SERVICES |       |       |       |       |       |       |
| TRAVEL            |       |       |       |       |       |       |
| CONTRACTUAL       |       |       |       |       |       |       |
| SUPPLIES          |       |       |       |       |       |       |
| EQUIPMENT         |       |       |       |       |       |       |
| LAND & STRUCTURES |       |       |       |       |       |       |
| GRANTS, CLAIMS    |       |       |       |       |       |       |
| MISCELLANEOUS     |       |       |       |       |       |       |
| TOTAL OPERATING   | -0-   | -0-   | -0-   | -0-   | -0-   | -0-   |

|         |  |  |  |  |  |  |
|---------|--|--|--|--|--|--|
| CAPITAL |  |  |  |  |  |  |
|---------|--|--|--|--|--|--|

|         |  |  |  |  |  |  |
|---------|--|--|--|--|--|--|
| REVENUE |  |  |  |  |  |  |
|---------|--|--|--|--|--|--|

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Jim Plasman, Deputy Director  
Division: Municipal & Regional Assistance

Phone: 465-4750  
Date: 1-19-88

Approved by Commissioner: [Signature]  
Agency: Community & Regional Affairs

Date: 1-19-88

Distribution (by preparer):

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

## ALASKA BANKERS ASSOCIATION

December 15, 1987

### Draft Position Paper For Amending Alaska Law Relating To Liens For Sales, Use And Personal Property Taxes.

#### Brief History of Municipal/Borough Priority Tax Lien Issue

Local government entities have experienced difficulty in collecting unpaid sales, use and personal property taxes for a number of years. During the 1970's various municipalities enacted laws to establish sales tax liens as a means of collecting unpaid taxes; however, in 1980 the Alaska State Supreme Court ruled that municipalities which levied sales and use taxes had no authority to assert a lien for unpaid taxes except through the normal judicial process. The Supreme Court said further that authorization of such liens "should be addressed by specific legislation rather than by municipal, or judicial fiat".

In 1983, legislation was proposed that would have given boroughs and municipalities a sales tax lien with the full force, priority and duration of a judgement lien; however, this legislation did not become law. When this legislation became law in 1985, the provision that the sales tax obtain an attachment lien was changed in the final draft to give the lien a priority; a priority over all other liens including mortgages, security interests, judgement liens, and the claims of anyone who claims an interest in either real or personal property. This change from the initial version of the 232 page Municipal Code Revision, and the full impact this change was not observed by the banks, the title companies, nor other affected parties. Only when some of the boroughs and municipalities began enforcing their new priority lien, was its significant impact realized.

#### No Other Tax Lien Has Such A Priority

Not even the State of Alaska, nor the Internal Revenue Service, have such a priority lien. Real property taxes have a clear priority over all other interests. But the real property tax is a charge against the property itself and real estate is immobile. All who deal with real estate know it is subject to annual taxation by a single authority. The lien amount can be readily determined and a reserve fund established to ensure its payment. This is not possible with a sales tax or a tax on personal property. It is patently unfair that, under present law, a lender can make a loan secured by real or personal property with all taxes or liens current and have a subsequent lien due to unpaid taxes at some future date preempt the position. There is no way for a lender to protect itself from this kind of action.

Existing Law Is Not Specific Who Must Pay - It Is Aimed At Everybody

The priority lien provision A.S. 29.45.650(e) gives broad authority to municipalities/boroughs to exact payment from prior lienholders who had nothing to do with the transaction that gave rise to the tax and also to innocent buyers who pay the tax to a seller and then the seller fails to remit the proceeds to the municipality. The priority lien law goes further; it authorizes a municipality to assert a lien on any property of the buyer and it accords that lien a priority over any other lien.

Personal property is highly mobile and can be readily moved from district to district. There is no means of knowing that it is subject to a sales or use tax lien nor any way to determine the amount.

Does an individual now have to call local government to find out if a local auto dealer has remitted all sales tax collected and paid his personal property taxes? Under this law he does or he can lose the automobile, and the lienholder will also lose its lien. In effect, the priority tax lien requires an innocent third party to guaranty tax payments to a municipality or a borough.

A lender relies on the information available at the time a loan is made and then relies on its priority lien to protect it over the term of its loan. Permitting a higher priority lien long after a loan is made and over which a lender has no knowledge or control to erode its safety margin is unfair. It will also have an effect on secondary financing by outside investors and could eventually impact AHFC and AIDA programs as existence of the priority lien becomes known.

Existing Law Is Unclear

It appears that this outcome is not what the drafters of the priority lien provision wanted. What is wanted is authority for a lien on the seller's property to secure the seller's obligation to remit the taxes collected, yet the only authority the present statute grants is for a lien to secure payment of the tax, a liability of the buyer. It is now clear that a revision is needed in this new law to better describe who has the tax obligation and what is a fair priority for a lien on a violator's property.

It is not contended that municipalities and boroughs with sales and use taxes should not have the authority to assert liens; however, that authority should be confined to asserting the lien against property of the violator and the lien's relative priority over other innocent claimants should be determined by the date notice of the lien is filed.

Proposed Compromise Amendment

At a November 13, 1987 meeting between the Alaska Bankers Association and attorneys for the Alaska Municipal League, a compromise solution was recommended. The municipalities and boroughs would give up the 1985 priority lien position in exchange for a sales and use tax lien which is the equivalent of an attachment lien but without the need of first bringing suit. The municipalities and boroughs could also obtain a priority lien on the seller's business assets to secure the seller's obligation to collect and remit sales tax. A priority lien could be achieved on all additional or future advances but only after giving legal notice to senior lienholder(s) that sales and/or use taxes are due and unpaid. A simple lien search will reveal if a senior lienholder exists and its address. This priority lien on commercial financing of business assets (i.e. accounts receivable and inventory) is similar to the lien priority that can be obtained by the Internal Revenue Service and offers the senior lienholder(s) the option of either declining further advance requests or insuring that sales or use taxes are paid. It also elevates concern for remitting local tax payments to a much higher level for local businessmen. The Alaska Bankers Association finds this type of compromise acceptable.

Summary

The 1985 statute authorizing a priority lien for municipal sales and use taxes, as it now exists, is an onerous law and goes beyond what is reasonable and fair. With a single last minute word change, local government gained the power to assert its lien on any property of any innocent buyer (a consumer who purchased in good faith and paid his tax) and it can place a secured creditor in a subordinated position without notice, without knowledge, and even though he had no part in the taxable transaction. Further, the municipalities and borough governments did not achieve a very good vehicle to collect from the real potential violator, the seller who fails to remit taxes collected.

The Alaska Bankers Association does not believe there should be no authority for sales and use tax liens. However, such a law should be worded carefully to restrict the lien to only property of the violator and lien priority to other innocent lienholders should be based on date notice is filed. This law should treat all parties in commerce equally and offer an opportunity to do business without a surprise. A provision that permits a priority lien against subsequent advances after direct notice to a secured party seems fair and should go far in solving the delinquent sales and use tax problems the boroughs and municipalities have experienced.

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Sec. 29.45.570. SALES AND USE TAX. (a) A borough may levy and collect a sales tax not exceeding six percent on sales, rents, and on services made within the borough. The sales tax may apply to any or all of these sources. Exemptions may be granted by ordinance.

(b) No change.

(c) No change.

(d) If the assembly of a home rule or general law borough charges interest on sales taxes not paid when due, the rate of interest may not exceed 15 percent a year upon the delinquent taxes and shall be charged from the due date until paid in full.

*new* (e) A borough may provide for the creation, recording, and notice of a lien on real or personal property to secure the payment of a sales or use tax, and for interest, penalties and administration costs in the event of delinquencies. A lien established under this section has the force, priority and duration of a judgment lien.

EXPLANATION: (a) changed to make it clear that tax can be levied on sales and rents, not just one or the other. (d) interest rate raised from eight to 15 percent. (e) added to allow liens for the collection of sales and use taxes.

TITLE 29 TECHNICAL COMM.

new  
APPRO  
REC'D

furnished and labor was done "in connection with the work done upon the claims" does not comply with the statute. *Goldstein v. Noble*, 6 Alaska 282 (1920).

A lien on a building for materials furnished cannot include another structure against which a lien is not filed, and into the construction, alteration, and repairs of which some or all of the materials were employed or used. *Burr v. House*, 3 Alaska 641 (1909).

The general rule is that a lessee cannot impose any charge upon the reversion or estate of the lessor thereof. *Morris v. Marsh*, 3 Alaska 140 (1906).

Nor does the fact that the lessor acquiesces in the improvement by the lessee subject his reversion to the mechanics' liens therefor. *Morris v. Marsh*, 3 Alaska 140 (1906).

Unless lessor fails to give notice of nonresponsibility or his agent causes improvement. — This section, AS 34.35.050 and AS 34.35.065, construed together, mean that the person in charge of the work shall prima facie be deemed to be the agent of the owner, and the property of the latter shall be charged with the lien under the express provisions of AS 34.35.050; that, if the person in charge is not in fact such agent, the interest of the owner shall, nevertheless, be liable for the improvement if it is constructed with his knowledge, and he fails to post the required notice disclaiming responsibility; and that, if the work is done for a lessee of the property, liability is confined to the

leasehold estate, if the owner had no knowledge of the construction of the improvement, or if, having such knowledge, he gave notice that he would not be responsible. *Cascaden v. Wimbish*, 161 F. 211 (9th Cir. 1908). See AS 34.35.115.

To determine whether or not modular units are sufficiently attached to the land on which they are situated, the supreme court will look to the following elements: (1) physical annexation, (2) adaption to use with real property, (3) intention to annex to realty, (4) relationship of the claiming parties, (5) the relative difficulty of removal, (6) the nature of the article annexed, and (7) whether the fact of the annexation is open and apparent. *Dannemiller v. AMFAC Distribution Corp.*, Sup. Ct. Op. No. 1452 (File No. 2895), 56G P.2d 645 (1977).

Applied in *Torkko-Korman/Engineers v. Penland Ventures*, Sup. Ct. Op. No. 2757 (File No. 6489), 673 P.2d 769 (1983).

Quoted in *Jorgensen Co. v. Sheldon*, 2 Alaska 607 (1905).

Stated in *Brand v. First Fed. Sav. & Loan Ass'n*, Sup. Ct. Op. No. 658 (File Nos. 1119, 1154), 478 P.2d 829 (1970).

Collateral references. — 53 Am. Jur. 2d, Mechanics' Liens, §§ 28-48.

Public property as subject to lien. 26 ALR 326.

Vendor's interest as subject to mechanic's lien. 58 ALR 911; 102 ALR 233.

Quantity or area of land around improvement which may be subject to lien. 84 ALR 123.

**Sec. 34.35.060. Priorities.** (a) Except as provided in (c) of this section, an encumbrance which is properly recorded shall be preferred to a lien created under AS 34.35.050 — 34.35.120 unless the claim of lien under AS 34.35.070 or notice of right to lien under AS 34.35.064 has been recorded before the encumbrance. The preference granted for a prior mortgage or deed of trust under this section applies without regard to when the sums are disbursed or whether the disbursements are required under the terms of a loan agreement.

(b) [Repealed, § 19 ch 175 SLA 1978.]

(c) A lien created by AS 34.35.050 — 34.35.120 in favor of an individual actually performing labor upon a building or other improvement in its original construction or of a trustee of an employee benefit trust for those individuals is preferred to a prior encumbrance upon the land on which the building or other improvement is constructed.

(d) In enforcing the lien, the building or other improvement may be sold separately from the land. When sold separately, the purchaser may remove the building or other improvement within a reasonable time after the sale, not to exceed 30 days, upon the payment to the owner of the land of a reasonable rent for its use from the date of its purchase to the time of removal. If removal is prevented by legal proceedings, the 30 days does not begin to run until the final determination of the proceedings in the court of first resort, or in the appellate court if appeal is taken. (§ 26-1-3 ACLA 1949; am § 1 ch 111 SLA 1953; am § 1 ch 7 SLA 1955; am §§ 2, 3, 19 ch 175 SLA 1978)

#### NOTES TO DECISIONS

**Editor's notes.** — The cases annotated below were decided under this section as it existed prior to the 1978 amendment, which, among other things, rewrote subsection (a) and repealed subsection (b), which provided when a lien created by AS 34.35.050 — 34.35.120 was preferred to a lien, mortgage, or other encumbrance which is unrecorded.

**Legislative intent.** — The legislative intent is to limit the priority granted generally to situations where the construction preceded all other construction in and upon a given area of vacant or cleared land. *Lynch v. McCann*, Sup. Ct. Op. No. 659 (File No. 1142), 478 P.2d 835 (1970).

In the case of "original construction," the legislature intended to subordinate to some extent the principle of first in time, first in right, to a social interest in securing mechanics' lienors. *Brand v. First Fed. Sav. & Loan Ass'n*, Sup. Ct. Op. No. 658 (File Nos. 1119, 1154), 478 P.2d 829 (1970).

For purposes of this section, a deed of trust and a mortgage are not differentiated. *Thorpe Constr. Co. v. Irvin & Co.*, 367 F. Supp. 87 (D. Alaska 1973).

This section protects the security of a mortgagee or beneficiary of a deed of trust against mechanics' liens so long as his encumbrance attaches and is recorded before the mechanics' lienor commences his labor or furnishes materials, except where "original construction" is performed. *Brand v. First Fed. Sav. & Loan Ass'n*, Sup. Ct. Op. No. 658 (File Nos. 1119, 1154), 478 P.2d 829 (1970).

A beneficiary of a deed of trust whose interest attaches and who records before

any alteration or repair begins or materials are furnished has priority over a mechanics' lienor, except in the case of original construction under this section. *Brand v. First Fed. Sav. & Loan Ass'n*, Sup. Ct. Op. No. 658 (File Nos. 1119, 1154), 478 P.2d 829 (1970).

**Scheme of priorities not overcome by posting notices of nonresponsibility.** — Mortgagees and beneficiaries of deeds of trust need not post notice of nonresponsibility, and if they do, the notices do not overcome the scheme of priorities established in this section. *Brand v. First Fed. Sav. & Loan Ass'n*, Sup. Ct. Op. No. 658 (File Nos. 1119, 1154), 478 P.2d 829 (1970).

A mechanics' lienor has priority over the beneficiary of a deed of trust in the case of original construction under subsection (c), regardless of whether the beneficiary of the deed of trust posts a notice of nonresponsibility. *Brand v. First Fed. Sav. & Loan Ass'n*, Sup. Ct. Op. No. 655 (File Nos. 1119, 1154), 478 P.2d 829 (1970).

The legislature, in subsection (c), provided that mechanics' lienors performing original construction should have priority over earlier security interests. The scheme of priorities ordered by the legislature in the circumstances of original construction would be defeated if beneficiaries of deeds of trust could attain priority over mechanics' lienors by posting notices of nonresponsibility. *Brand v. First Fed. Sav. & Loan Ass'n*, Sup. Ct. Op. No. 659 (File Nos. 1119, 1154), 478 P.2d 829 (1970).

Construction lenders can protect themselves from mechanics' liens in

5-1116B  
Bradley  
5/12/87

Original sponsor: Community and Regional  
Affairs Committee

1 IN THE SENATE

2 CS FOR SENATE BILL NO. 282 ( )  
3 IN THE LEGISLATURE OF THE STATE OF ALASKA  
4 FIFTEENTH LEGISLATURE - FIRST SESSION  
5 A BILL

6 For an Act entitled: "An Act relating to municipal sales and use taxes."  
7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

8 \* Section 1. AS 29.45.650(e) is amended to read:

9 (e) A borough may provide for the creation, recording, and  
10 notice of a lien on real or personal property to secure the payment of  
11 a sales and use tax, and the interest, penalties, and administration  
12 costs in the event of delinquency. When recorded, a lien authorized  
13 under this section has priority over other liens except those for  
14 property taxes, [AND] special assessments, and prior recorded mort-  
15 gages, trust deeds, and land sale contracts. This subsection applies  
16 to home rule and general law municipalities.

17 \* Sec. 2. AS 29.10.200(42) is amended to read:

18 (42) AS 29.45.650(c), (d), (e), and (f) (sales and use tax)  
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27  
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29

STATE OF ALASKA  
THE LEGISLATURE

POUCH Y STATE CAPITOL  
JUNEAU, ALASKA 99811  
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

May 11, 1987

SUBJECT: State sales and use tax  
TO: Senator Sturgulewski  
FROM: Michael F. Ford *M.F.*  
Legislative Counsel

You have asked if there are any states that provide by statute that a tax on sales or use has a lien priority over a prior recorded mortgage. After examining the statutes of all fifty states I have concluded that no state has established such a priority. While it is not uncommon for a tax lien to have priority over subsequently recorded mortgages, a prior recorded mortgage would take priority over a subsequent tax lien.

Please contact me if you have further question.

MFF:csh  
c8/029



# Alaska State Legislature

ARLISS STURGULEWSKI, Chairman  
 TIM KELLY, Vice Chairman  
 RICK HALFORD  
 MIKE SZYMANSKI  
 FRED ZHAROFF



P. O. BOX V  
 JUNEAU, ALASKA 99811  
 (907) 455-4989

## Senate Community and Regional Affairs Committee

TO: Senate C&RA Members

May 5, 1987

FROM: Senate C&RA Staff

A handwritten signature in dark ink, appearing to be "MVA".

RE: SB 282 - "An Act relating to municipal sales and use taxes."

Under existing law (29.45.650(e)) municipalities may place liens on real or personal property to secure payment of sales and use tax. This ability is new, added under the Title 29 revision two years ago.

The section was added to Title 29 in response to a Fairbanks court case in which the judge ruled that municipalities did not have the power to place such liens. The Title 29 technical committee at the time recommended that such liens have the force of judgement liens, however, also added at that time was a sentence that gave such liens priority over other liens, except for property taxes and special assessments.

This priority conflicts with 34.36.060 which gives labor liens first position and mortgages second position. According to representatives of the home mortgage industry, including AHFC,

this priority for sales tax liens could cause major disruptions in the home mortgage industry and raise interest rates.

SB 282 would delete the priority. Tam Cook of Legal Services has advised that being silent on priority has the same effect as giving the lien the priority of a judgement lien, which was suggested by the technical committee.

Representatives of AHFC, the banks, and the Municipal League will testify at today's meeting

STATE OF ALASKA  
1988 LEGISLATIVE SESSION

BILL VERSION: CS for SB 282 (C&RA)  
PUBLISH DATE: \_\_\_\_\_

FISCAL NOTE

REQUEST:

Revision Date: \_\_\_\_\_  
Title: "An Act relating to municipal sales and use taxes."  
Sponsor: Senate C&RA Committee  
Requestor: \_\_\_\_\_

Agency Affected: Community & Regional Affairs  
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Components: State Assessor

EXPENDITURES/REVENUES: (Thousands of Dollars)

| OPERATING         | FY 88 | FY 89 | FY 90 | FY 91 | FY 92 | FY 93 |
|-------------------|-------|-------|-------|-------|-------|-------|
| PERSONAL SERVICES |       |       |       |       |       |       |
| TRAVEL            |       |       |       |       |       |       |
| CONTRACTUAL       |       |       |       |       |       |       |
| SUPPLIES          |       |       |       |       |       |       |
| EQUIPMENT         |       |       |       |       |       |       |
| LAND & STRUCTURES |       |       |       |       |       |       |
| GRANTS, CLAIMS    |       |       |       |       |       |       |
| MISCELLANEOUS     |       |       |       |       |       |       |
| TOTAL OPERATING   | -0-   | -0-   | -0-   | -0-   | -0-   | -0-   |

|         |  |  |  |  |  |  |
|---------|--|--|--|--|--|--|
| CAPITAL |  |  |  |  |  |  |
|---------|--|--|--|--|--|--|

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|---------|--|--|--|--|--|--|
| REVENUE |  |  |  |  |  |  |
|---------|--|--|--|--|--|--|

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Jim Plasman, Deputy Director  
Division: Municipal & Regional Assistance  
Approved by Commissioner: [Signature]  
Agency: Community & Regional Affairs

Phone: 465-4750  
Date: 1-19-88  
Date: 1-19-88

Distribution (by preparer):  
Legislative Finance  
Legislative Sponsor  
Requestor  
Office of Management and Budget  
Impacted Agency(ies)

## ALASKA BANKERS ASSOCIATION

December 15, 1987

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In 1983, legislation was proposed that would have given boroughs and municipalities a sales tax lien with the full force, priority and duration of a judgement lien; however, this legislation did not become law. When this legislation became law in 1985, the provision that the sales tax obtain an attachment lien was changed in the final draft to give the lien a priority; a priority over all other liens including mortgages, security interests, judgement liens, and the claims of anyone who claims an interest in either real or personal property. This change from the initial version of the 232 page Municipal Code Revision, and the full impact this change was not observed by the banks, the title companies, nor other affected parties. Only when some of the boroughs and municipalities began enforcing their new priority lien, was its significant impact realized.

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A lender relies on the information available at the time a loan is made and then relies on its priority lien to protect it over the term of its loan. Permitting a higher priority lien long after a loan is made and over which a lender has no knowledge or control to erode its safety margin is unfair. It will also have an effect on secondary financing by outside investors and could eventually impact AHFC and AIDA programs as existence of the priority lien becomes known.

Existing Law Is Unclear

It appears that this outcome is not what the drafters of the priority lien provision wanted. What is wanted is authority for a lien on the seller's property to secure the seller's obligation to remit the taxes collected, yet the only authority the present statute grants is for a lien to secure payment of the tax, a liability of the buyer. It is now clear that a revision is needed in this new law to better describe who has the tax obligation and what is a fair priority for a lien on a violator's property.

It is not contended that municipalities and boroughs with sales and use taxes should not have the authority to assert liens; however, that authority should be confined to asserting the lien against property of the violator and the lien's relative priority over other innocent claimants should be determined by the date notice of the lien is filed.

Proposed Compromise Amendment

At a November 13, 1987 meeting between the Alaska Bankers Association and attorneys for the Alaska Municipal League, a compromise solution was recommended. The municipalities and boroughs would give up the 1985 priority lien position in exchange for a sales and use tax lien which is the equivalent of an attachment lien but without the need of first bringing suit. The municipalities and boroughs could also obtain a priority lien on the seller's business assets to secure the seller's obligation to collect and remit sales tax. A priority lien could be achieved on all additional or future advances but only after giving legal notice to senior lienholder(s) that sales and/or use taxes are due and unpaid. A simple lien search will reveal if a senior lienholder exists and its address. This priority lien on commercial financing of business assets (i.e. accounts receivable and inventory) is similar to the lien priority that can be obtained by the Internal Revenue Service and offers the senior lienholder(s) the option of either declining further advance requests or insuring that sales or use taxes are paid. It also elevates concern for remitting local tax payments to a much higher level for local businessmen. The Alaska Bankers Association finds this type of compromise acceptable.

Summary

The 1985 statute authorizing a priority lien for municipal sales and use taxes, as it now exists, is an onerous law and goes beyond what is reasonable and fair. With a single last minute word change, local government gained the power to assert its lien on any property of any innocent buyer (a consumer who purchased in good faith and paid his tax) and it can place a secured creditor in a subordinated position without notice, without knowledge, and even though he had no part in the taxable transaction. Further, the municipalities and borough governments did not achieve a very good vehicle to collect from the real potential violator, the seller who fails to remit taxes collected.

The Alaska Bankers Association does not believe there should be no authority for sales and use tax liens. However, such a law should be worded carefully to restrict the lien to only property of the violator and lien priority to other innocent lienholders should be based on date notice is filed. This law should treat all parties in commerce equally and offer an opportunity to do business without a surprise. A provision that permits a priority lien against subsequent advances after direct notice to a secured party seems fair and should go far in solving the delinquent sales and use tax problems the boroughs and municipalities have experienced.

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Sec. 29.45.570. SALES AND USE TAX. (a) A borough may levy and collect a sales tax not exceeding six percent on sales, rents, and on services made within the borough. The sales tax may apply to any or all of these sources. Exemptions may be granted by ordinance.

(b) No change.

(c) No change.

(d) If the assembly of a home rule or general law borough charges interest on sales taxes not paid when due, the rate of interest may not exceed 15 percent a year upon the delinquent taxes and shall be charged from the due date until paid in full.

*new* (e) A borough may provide for the creation, recording, and notice of a lien on real or personal property to secure the payment of a sales or use tax, and for interest, penalties and administration costs in the event of delinquencies. A lien established under this section has the force, priority and duration of a judgment lien.

EXPLANATION: (a) changed to make it clear that tax can be levied on sales and rents, not just one or the other. (d) interest rate raised from eight to 15 percent. (e) added to allow liens for the collection of sales and use taxes.

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furnished and labor was done "in connection with the work done upon the claim" does not comply with the statute. *Ginsberg v. Noble*, 6 Alaska 282 (1920).

A lien on a building for materials furnished cannot include another structure against which a lien is not filed, and into the construction, alteration, and repairs of which some or all of the materials were employed or used. *Burr v. House*, 3 Alaska 611 (1909).

The general rule is that a lessee cannot impose any charge upon the reversion or estate of the lessor thereof. *Norris v. Marsh*, 3 Alaska 140 (1906).

Nor does the fact that the lessor acquiesces in the improvement by the lessee subject his reversion to the mechanics' liens therefor. *Norris v. Marsh*, 3 Alaska 140 (1906).

Unless lessor fails to give notice of nonresponsibility or his agent causes improvement. — This section, AS 34.35.050 and AS 34.35.065, construed together, mean that the person in charge of the work shall prima facie be deemed to be the agent of the owner, and the property of the latter shall be charged with the lien under the express provisions of AS 34.35.050; that, if the person in charge is not in fact such agent, the interest of the owner shall, nevertheless, be liable for the improvement if it is constructed with his knowledge, and he fails to post the required notice disclaiming responsibility; and that, if the work is done for a lessee of the property, liability is confined to the

household estate, if the owner had no knowledge of the construction of the improvement, or if, having such knowledge, he gave notice that he would not be responsible. *Cascaden v. Wimlich*, 161 F. 241 (9th Cir. 1908). See AS 34.35.115.

To determine whether or not modular units are sufficiently attached to the land on which they are situated, the supreme court will look to the following elements: (1) physical annexation, (2) adaption to use with real property, (3) intention to annex to realty, (4) relationship of the claiming parties, (5) the relative difficulty of removal, (6) the nature of the article annexed, and (7) whether the fact of the annexation is open and apparent. *Dannemiller v. AMFAC Distribution Corp.*, Sup. Ct. Op. No. 1452 (File No. 2895), 566 P.2d 645 (1977).

Applied in *Torkko/Korman/Engineers v. Penland Ventures*, Sup. Ct. Op. No. 2757 (File No. 6489), 673 P.2d 769 (1983).

Quoted in *Jorgensen Co. v. Sheldon*, 2 Alaska 607 (1905).

Stated in *Brand v. First Fed. Sav. & Loan Ass'n*, Sup. Ct. Op. No. 658 (File Nos. 1119, 1154), 478 P.2d 829 (1970).

Collateral references. — 53 Am. Jur. 2d, *Mechanics' Liens*, §§ 28-48.

Public property as subject to lien. 26 ALR 326.

Vendor's interest as subject to mechanic's lien. 58 ALR 911; 102 ALR 233.

Quantity or area of land around improvement which may be subject to lien. 84 ALR 123.

**Sec. 34.35.060. Priorities.** (a) Except as provided in (c) of this section, an encumbrance which is properly recorded shall be preferred to a lien created under AS 34.35.050 — 34.35.120 unless the claim of lien under AS 34.35.070 or notice of right to lien under AS 34.35.064 has been recorded before the encumbrance. The preference granted for a prior mortgage or deed of trust under this section applies without regard to when the sums are disbursed or whether the disbursements are required under the terms of a loan agreement.

(b) [Repealed, § 19 ch 175 SLA 1978.]

(c) A lien created by AS 34.35.050 — 34.35.120 in favor of an individual actually performing labor upon a building or other improvement in its original construction or of a trustee of an employee benefit trust for those individuals is preferred to a prior encumbrance upon the land on which the building or other improvement is constructed.

(d) In enforcing the lien, the building or other improvement may be sold separately from the land. When sold separately, the purchaser may remove the building or other improvement within a reasonable time after the sale, not to exceed 30 days, upon the payment to the owner of the land of a reasonable rent for its use from the date of its purchase to the time of removal. If removal is prevented by legal proceedings, the 30 days does not begin to run until the final determination of the proceedings in the court of first resort, or in the appellate court if appeal is taken. (S 26-1-3 ACLA 1949; am § 1 ch 111 SLA 1953; am § 1 ch 7 SLA 1955; am §§ 2, 3, 19 ch 175 SLA 1978)

#### NOTES TO DECISIONS

**Editor's notes.** — The cases annotated below were decided under this section as it existed prior to the 1978 amendment, which, among other things, rewrote subsection (a) and repealed subsection (b), which provided when a lien created by AS 34.35.050 — 34.35.120 was preferred to a lien, mortgage, or other encumbrance which is unrecorded.

**Legislative Intent.** — The legislative intent is to limit the priority granted generally to situations where the construction preceded all other construction in and upon a given area of vacant or cleared land. *Lynch v. McCann*, Sup. Ct. Op. No. 659 (File No. 1142), 478 P.2d 835 (1970).

In the case of "original construction," the legislature intended to subordinate to some extent the principle of first in time, first in right, to a social interest in securing mechanics' lienors. *Brand v. First Fed. Sav. & Loan Ass'n*, Sup. Ct. Op. No. 658 (File Nos. 1119, 1154), 478 P.2d 829 (1970).

For purposes of this section, a deed of trust and a mortgage are not differentiated. *Thorpe Constr. Co. v. Irvin & Co.*, 367 F. Supp. 87 (D. Alaska 1973).

This section protects the security of a mortgagee or beneficiary of a deed of trust against mechanics' liens so long as his encumbrance attaches and is recorded before the mechanics' lienor commences his labor or furnishes materials, except where "original construction" is performed. *Brand v. First Fed. Sav. & Loan Ass'n*, Sup. Ct. Op. No. 658 (File Nos. 1119, 1154), 478 P.2d 829 (1970).

A beneficiary of a deed of trust whose interest attaches and who records before

any alteration or repair begins or materials are furnished has priority over a mechanics' lienor, except in the case of original construction under this section. *Brand v. First Fed. Sav. & Loan Ass'n*, Sup. Ct. Op. No. 658 (File Nos. 1119, 1154), 478 P.2d 829 (1970).

Scheme of priorities not overcome by posting notices of nonresponsibility. — Mortgagees and beneficiaries of deeds of trust need not post notice of nonresponsibility, and if they do, the notices do not overcome the scheme of priorities established in this section. *Brand v. First Fed. Sav. & Loan Ass'n*, Sup. Ct. Op. No. 658 (File Nos. 1119, 1154), 478 P.2d 829 (1970).

A mechanics' lienor has priority over the beneficiary of a deed of trust in the case of original construction under subsection (c), regardless of whether the beneficiary of the deed of trust posts a notice of nonresponsibility. *Brand v. First Fed. Sav. & Loan Ass'n*, Sup. Ct. Op. No. 658 (File Nos. 1119, 1154), 478 P.2d 829 (1970).

The legislature, in subsection (c), provided that mechanics' lienors performing original construction should have priority over earlier security interests. The scheme of priorities ordered by the legislature in the circumstances of original construction would be defeated if beneficiaries of deeds of trust could attain priority over mechanics' lienors by posting notices of nonresponsibility. *Brand v. First Fed. Sav. & Loan Ass'n*, Sup. Ct. Op. No. 658 (File Nos. 1119, 1154), 478 P.2d 829 (1970).

Construction lenders can protect themselves from mechanics' liens in