

SB

337

1/13/93

CURRENT ALASKA STATUTORY LAW RE
CORPORATE CUMULATIVE VOTING

AS 10.06.420(d) provides that each shareholder entitled to vote at an election of directors has a right to vote by cumulative voting, unless the articles of incorporation provide otherwise.

AS 10.06.460(a)(2) provides that a director may not be removed by the shareholders if the votes cast against removal would be sufficient to elect a director by cumulative voting, unless the articles of incorporation have eliminated cumulative voting.

AS 10.06.455(b) provides that an amendment of the articles of incorporation that would establish classification of the board may not be adopted by the shareholders if the votes cast against the amendment would be sufficient to elect a director by cumulative voting, unless the articles of incorporation have eliminated cumulative voting.

AS 10.06.504 -- 10.06.508, dealing with amendments of the articles, require approval by both the board and the outstanding shares, and imply that a simple majority is sufficient. (AS 10.06.508 speaks of the articles requiring a larger majority.) Former AS 10.05.276 required an amendment of the articles to be initiated by the board and approved by the two-thirds vote of the shares entitled to vote on the question.

AS 10.06.228 and 10.06.230, dealing with the adoption and amendment of bylaws, require approval by either the board or the

outstanding shares, and imply that a simple majority is sufficient (with certain exceptions).

Section 7, ch. 166, SLA 1988 sets a generally applicable effective date of July 1, 1989 for the new Corporations Code (AS 10.06), "[e]xcept as otherwise expressly provided." This section makes the new code generally applicable to corporations, including Alaska Native Claims Settlement Act corporations, existing on July 1, 1989.

Section 9, ch. 166, SLA 1988 provides that AS 10.06.208 and 10.06.210, pertaining to the contents of the articles of incorporation, do not apply to corporations existing on July 1, 1989 until either (a) the corporation adopts an amendment of its articles stating that the corporation elects to be governed by all provisions of AS 10.06, or (b) July 1, 1994, whichever occurs first.

Section 10(a), ch. 166, SLA 1988 provides that former AS 10.05.276's requirement of a two-thirds majority for an amendment of the articles remains in effect for corporations existing before July 1, 1989. Subsection (b) allows such a corporation to elect to be governed by the new statutes on amending the articles. Subsection (c) (added by sec. 57, ch. 50, SLA 1989) states an exception dealing with director liability in ANCSA corporations.

Section 58, ch. 82, SLA 1989 provides that, if a corporation organized under former AS 10.05 has a bvlaw (existing immediately before July 1, 1989) that prohibits cumulative voting, the corporation may continue to operate without cumulative voting until July 1, 1994.

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January 13, 1993

The Honorable Jim Duncan
Alaska State Senate
State Capitol, Room 119
Juneau, Alaska 99801-1182

Re: Your draft bill regarding voting of shares in Native corporations

Dear Jim:

Your assistant, Dale Staley, has asked Tom Findley and me to review your November 2, 1992 draft bill entitled "An Act relating to the voting of shares in Native corporations." We have done so, and our comments follow.

Dale mentioned that your basic purpose is to keep things as flexible as possible with regard to cumulative voting. The bill appears to do that, although the second part of your first section leaves open a couple of important (but easily answered) questions.

While non-cumulative voting more closely tracks the "one man, one vote" concept, cumulative voting helps assure that a minority of shareholders will have some representation on a board of directors. The current law preserves both options. Your draft bill makes the non-cumulative-voting option easier.

The three sections of your bill deal with two aspects of corporate voting: (1) cumulative voting, and (2) voting by a government agency. The latter point, addressed in your sec. 1's proposed AS 10.06.960(k), appears to be the simplest, and we will address it first.

Voting By Government Agency

Proposed AS 10.06.960(k) appears to be aimed at situations where a government agency, such as the Department of Health and Social Services in connection with the A.K. v. Ahtna, Inc. case, becomes a trustee or other holder of shares. Also, under existing

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LETTER OF REVIEW

The Honorable Jim Duncan

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Re: Draft bill on voting in Native corporations

AS 10.06.210(1)(H), a corporation's articles of incorporation may include a provision conferring upon the "holder of an evidence of indebtedness" of the corporation the right to vote in an election of directors and on any other matters on which shareholders may vote. A state agency could be a "holder of an evidence of indebtedness."

Whatever the reason the state has come to hold ANCSA corporation shares, your amendment would appear to succeed in prohibiting the voting of those shares. Your amendment, however, leaves open the two questions of whether those shares may be counted to establish a quorum (see AS 10.06.415) and whether the government agency may grant a proxy to another person (i.e., an ANCSA corporation shareholder) for voting purposes. I express no opinion on those issues, although AS 10.06.418(a) suggests that the answer to this second question is no. Your new subsec. (k) could easily address these two points and remove any doubt. Presumably, you would want to state that the answer is no to both questions.

Cumulative Voting

The cumulative voting provisions of the current law are more complex. A brief outline of them is attached. Essentially, the 1989 revision of Alaska's corporation law (the new Corporations Code [AS 10.06]) changed the prior law with regard to cumulative voting by providing that, instead of the corporate bvlaws eliminating cumulative voting, such a limitation must be in the articles of incorporation. Under the current law, a corporation, including an ANCSA corporation, may eliminate the statutorily provided cumulative voting by stating that elimination in its articles.

Section 58, ch. 82, SLA 1989 provides that, if a corporation organized under former AS 10.05 has a pre-July 1, 1989 bvlaw that eliminates cumulative voting, the corporation may continue to operate without cumulative voting until July 1, 1994. By your sec. 1's proposed AS 10.06.960(j), a corporation organized under the former law, with a bylaw provision eliminating cumulative voting, may permanently retain that bylaw and continue to operate without cumulative voting. In other words, your amendment would simply remove the July 1, 1994 deadline for relocating such a bylaw provision to the articles of incorporation.

The significance of the difference, of course, lies in the difference between the method for amending bylaws as opposed to the method for amending the articles of incorporation. Amending bylaws

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Re: Draft bill on voting in Native corporations

is easier, because it may be done by either a majority of the board of directors or a majority of the outstanding shares. On the other hand, an amendment of the articles must be approved by a majority of the board and a majority of the outstanding shares. Please see the attached summary of the current statutes.

If it is your intent simply to achieve a greater ease of adoption and amendment in connection with the provision on cumulative voting, then it appears that your sec. 1 accomplishes your intent. If your concern was simply the preservation of the non-cumulative-voting option, then the amendment is not necessary.

Your sec. 2, adding a subsec. (d) to sec. 10, ch. 166, SLA 1988, provides another facilitating feature. Under that subsection, an ANCSA corporation that was incorporated under former AS 10.05 may amend its articles of incorporation to prohibit cumulative voting, by the affirmative vote of a majority of the shares represented at a regular or special meeting at which a quorum is present. Currently, AS 10.06.504(a)(2) requires that an amendment of the articles of incorporation be approved by the board of directors and the outstanding shares. Section 2 removes the requirement of board approval, and changes the base for determining the majority. Thus, with your amendments, an ANCSA corporation could fairly easily put the non-cumulative-voting provision in either its bylaws or its articles.

Your sec. 3 appears to be simply a compatibility amendment, to assure that existing sec. 58, ch. 82, SLA 1989 is not in conflict with your proposed AS 10.06.960(j) (in sec. 1 of the bill). I detect no problem with it.

Having reviewed AS 10.06, and the relevant provisions of temporary or special law in ch. 166, SLA 1988, ch. 50, SLA 1989, and ch. 82, SLA 1989, I spot no other provisions that would need amendment in order to achieve what I understand to be your purpose.

The second paragraph of the sheet that Dale gave us regarding your bill that was introduced in the last legislature (which we have not reviewed) contains an error. The concluding clause of its second paragraph, "at which time all corporations will be required to utilize cumulative voting," is not correct. The new Corporations Code provides for cumulative voting and allows its elimination, but merely says that such an eliminating provision must be in the articles of incorporation rather than in the bylaws (as under the former law).

The Honorable Jim Duncan
January 13, 1993
Re: Draft bill on voting in Native corporations

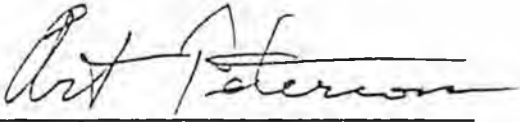
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We hope that these comments are helpful to you. If you are planning to prepare an explanation sheet, such as the one for your bill in the last legislature, we would be happy to review it.

Yours truly,

Dillon & Findley

By:



Arthur H. Peterson

AHP/sh
Enclosure

The new Alaska Corporation Code was adopted in 1988. AS 10.06.420 (d) provided that shareholders would have the right to vote for the election of directors by the cumulative voting method. (If three directors were to be elected the shareholder would be entitled to cast the number of shares owned times three in any manner the shareholder desired- i.e. 100,100, or 100; 150 or 150 or 300- by voting for three, two or one director.)

Section 58, Ch. 82, SLA 1989 provides that notwithstanding AS 10.06.420 (d) and AS 10.06.460(a)(2) if a corporation provided for non-cumulative voting in conformance with prior statutory provisions the corporation could continue non-cumulative voting until July 1, 1994 at which time all corporation would be required to utilize cumulative voting.

There are some native corporations that utilize non-cumulative voting as provided by their corporate documents and wish to continue using this method of voting.

The proposed legislation applies only to Alaska Native Corporations-ANSCA corporations and is written so that corporations have the option as to whether they elect cumulative or non-cumulative voting.

The non-cumulative method of voting represents a true form of one man one vote. The cumulative method allows a shareholder to vote all cumulated votes to only one director or to divide the number of votes in any manner the voter so elects among the candidates. The cumulative voting method thereby allows a few people to accumulate votes in a manner that does not really represent the one man one vote method.

The proposed amendment as written allows each native corporation the opportunity to consider which form of voting they want to use and secondly to clarify Section 58, Ch. 82, SLA 1989 as to the application of cumulative and non-cumulative voting for corporation after 1994..

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February 14, 1994

Senator Tim Kelly
The Capitol Building, Room 101
Juneau, Alaska 99801

Re: Proposed Technical Amendment to the Corporations Code
Our File No. 0001-020

Dear Senator Kelly:

I thank you for taking the time to meet with me this afternoon concerning a proposed technical amendment to the Alaska Corporations Code.

I represent Huna Totem Corporation, which is an Alaska Native Claims Settlement Act corporation located in Hoonah, Alaska.

Before the Alaska Legislature adopted the new Alaska Corporations Code in 1988, Huna Totem Corporation amended its bylaws with shareholder approval to provide for noncumulative voting. The new Corporations Code provides that a corporation using noncumulative voting by its shareholders may continue to operate without cumulative voting only until July 1, 1994.

Huna Totem Corporation wishes to continue to use the noncumulative method of voting by its shareholders. The corporation believes that this form of corporate shareholder voting truly is representative of the one-person-one-vote system, and does not provide management with any inherent advantages. During Huna Totem Corporation's past annual shareholder meeting, independent candidates were able to defeat all three of the management slate by the noncumulative voting method.

The second technical amendment included in the proposed legislation is the provision that a governmental agency or entity may not exercise the voting privileges of the stock of a corporation organized under the Act.

The proposed legislation is supported by AFN, the Aleut Corporation, Sealaska Corporation, Huna Totem Corporation and numerous other village corporations which currently use the noncumulative method of shareholder voting.

Senator Tim Kelly
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Your assistance in introducing this proposed legislation is very much appreciated. If I can provide any assistance to you concerning this proposed legislation, please give me a call. Thank you.

Very truly yours,

BAXTER, BRUCE & BRAND

- Fred J. Baxter

FJB/pc

cc: George D. Cooper, CEO
Huna Totem Corporation
Mr. Larry Kimball, AFN



January 25, 1993

Honorable Bill Williams, Representative
Alaska State Capitol
Room 128
Juneau, Alaska 99801

Dear Bill:

At a recent board meeting, I reported on our proposed bill to allow non-cumulative voting rights to survive the sunset provision now written into statutes, as an option for those ANCSA corporations that have non-cumulative provisions in their Articles of Incorporation and Bylaws.

Senator Jim Duncan has worked with us in the past, and has a proposed bill for submittal to this legislature - copy attached.

As I recall from the last legislature, Senator Fred Zharoff also strongly supports this issue.

The board members of HTC suggested I contact you, as a member of the House Majority Caucus, to see if you would assist us in presenting the proposed bill, or similar, to accomplish our goal.

If you or your staff would like to discuss this issue further, I can be reached by telephone at 206-387-1553, or contact Fred Baxter, our counsel who has worked with Senator Duncan on this amendment, at Juneau 789-3166.

Thanks Bill, and good luck at this session.

Respectfully Submitted,

HUNA TOTEM CORPORATION

George D. Cooper / s.d.

George D. Cooper
Chief Executive Officer

Enclosure

cc: HTC Board of Directors
Fred Baxter
Senator Jim Duncan ✓

HUNA TOTEM CORPORATION