

SB

8

FISCAL NOTE

No. 1

Bill Version: SB8

(S) Publish Date: 1/29/97

STATE OF ALASKA
1997 LEGISLATIVE SESSION

Revision Date: 1/28/97
Title: "An Act relating to the noise levels of airports and sport shooting facilities."
Sponsor: Senator Halford
Requester: Senate Transportation

Dept. Affected: Department of Law
BRU: Civil Division
Component: General Legal Services

COMPONENT SERIAL NO. 2087

Expenditures/Revenues

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY97) cost: \$ 0.0

POSITIONS

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

SB 8 will have no fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson
Division: Administrative Services Division
Approved by Commissioner: Bruce M. Botelho, Attorney General
Agency: Department of Law

Phone: 465-5370
Date: 1/28/97
Date: 1/28/97

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE
For further distribution information, call the Governor's Legislative Office

BILL: SB 8 SHORT TITLE: AIRPORT/SHOOTING FACILITY NOISE LEVELS
BILL VERSION:
SPONSOR(S): SENATOR(S) HALFORD,Pearce,Green

CURRENT STATUS: (S) RLS

STATUS DATE: 02/06/97

TITLE: "An Act relating to the noise levels of airports and sport shooting facilities."

01/03/97	16	(S)	PREFILE RELEASED 1/3/97
01/13/97	16	(S)	READ THE FIRST TIME - REFERRAL(S)
01/13/97	16	(S)	TRA, RES
01/29/97	159	(S)	TRA RPT 4DP 1NR
01/29/97	159	(S)	DP:WARD,HALFORD,WILKEN,GREEN; NR:LINCOLN
01/29/97	159	(S)	ZERO FISCAL NOTE (LAW)
01/29/97	163	(S)	COSPONSOR(S): GREEN
02/06/97	247	(S)	RES RPT 6DP 1NR
02/06/97	247	(S)	DP: HALFORD, TAYLOR, SHARP, GREEN,
02/06/97	247	(S)	LEMAN, TORGERSON; NR: LINCOLN
02/06/97	247	(S)	PREVIOUS ZERO FN (LAW)
02/06/97	247	(S)	REFERRED TO RULES



Official Business

Alaska State Legislature

Senate

**RICK
HALFORD**

State Capitol
Juneau, Alaska
99801-1182
Phone (907) 465-4958

P.O. Box 670190
Chugiak, Alaska 99567
Phone (907) 694-4958

600 E. Railroad Avenue
Wasilla, Alaska 99654
Phone (907) 376-4958

Senate Bill 8 Sponsor Statement

Noise at Airports and Sport Shooting Ranges

Airports and sport shooting ranges offer a public service as well as recreational opportunities and have become increasingly under attack in the lower forty-eight states. Since populations are tending to shift from urban to rural areas, new groups of citizens are moving into areas with existing airports and ranges. This encroachment has resulted in hundreds of lawsuits and complaints against airport and range owners and operators due to the noise level.

Senate Bill 8 was introduced to provide private airports and sport shooting ranges in Alaska protection from lawsuits if the action arises out of the noise level from normal operation or its uses; provided the facility was established before the person acquired the property or prior to any noise control ordinance or law.

Without the passage of SB 8 private airports and sport shooting ranges within Alaska will remain vulnerable to legal sanctions jeopardizing the opportunities they provide through their ongoing and traditional uses.

This issue was addressed by the 19th Legislature with Senate Bill 274. SB 274 passed the Senate by a vote of 17-1, and the House by a margin of 33-5, before being vetoed by the governor.

This piece of legislation is endorsed by the National Rifle Association, Alaska Air Carriers Association, the Alaska Outdoor Council, Alaska Boating Association and the Alaska Airmen's Association.

Thank you for your consideration.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO:

1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 269-5100
FAX: (907) 276-3697

KEY BANK BUILDING
100 CUSHMAN ST., SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 451-2811
FAX: (907) 451-2846

February 13, 1997

P.O. BOX 110300-DIMOND COURT HOUSE
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 465-6735

The Honorable Tim Kelly
Chair
Senate Rules Committee
State Capitol
Juneau, AK 99801-1182

Re: Department of Law Concerns
with Senate Bill 8

Dear Senator Kelly:

The Department of Law, on behalf of the executive branch, has four specific concerns with Senate Bill 8, "An Act relating to the noise levels of airports and sport shooting facilities." Because the bill was moved out of the Senate Resources Committee while we were in the middle of our presentation, these concerns have not yet been noted on the record. However, I have personally discussed Concern #4 with Brett Hubber of Senator Halford's staff and he will entertain amendments from us to assuage that concern. The purpose of this letter is to ensure that all of our concerns are noted before this bill moves out of the Senate.

The four concerns are:

1. As law, the bill will reduce fluidity of land use.
2. The bill is a legislative endorsement of unreasonable actions.
3. Noise is a local, not a statewide, issue.
4. Either the bill violates the Alaska Constitution or fails to clearly state what it means.

The Honorable Tim Kelly
Chair, Senate Rules Committee

February 13, 1997

Each of these is discussed in detail throughout the remainder of this letter.

Concern 1: THE BILL REDUCES FLUIDITY OF LAND USE AND INHIBITS GROWTH OF AN AREA BECAUSE IT COMPLETELY BARS NEW ARRIVALS FROM COMPLAINING ABOUT NOISE.

Explanation:

The bill completely bars a person from challenging noisemakers in court if that person acquired land in the vicinity of the noisemaker after the noisemaker started making noise. See, Proposed Section 34.75.010(a), (c); Page 1 lines 9-11, and page 2 lines 7-9. This doctrine -- that a person may complain about another only if the complainant was there first -- is known as "coming to the nuisance." As a complete bar to complaints, the doctrine was first recognized in England in 1838 but was abandoned there in 1878. It has never received widespread acceptance in American courts. On the contrary, it is generally repudiated by our judiciary. 5 Powell, Real Property (1995), ¶ 704[3] at 64-48.

In America, "coming to the nuisance" is one factor the courts consider when a person challenges a noisemaker but it is not a complete bar to the litigation. The reason for this has been explained in the Restatement of Torts, a compilation of America's common laws:

If people were barred from court because they came to the nuisance, those who settled in an area would acquire complete control over the future of adjoining and nearby land. This would inhibit and impair the fluidity of land use. Yet, fluidity of land use is a basic aspect of the American economy.

4 Restatement of Law 2d, Torts (1979), § 840D, comment b, (paraphrased, not quoted).

This same concern was stated differently in a treatise on American Real Property law (Powell, *supra*):

The Honorable Tim Kelly
Chair, Senate Rules Committee

February 13, 1997

If new landowners were barred from court because they came to the nuisance, an existing landowner could, by setting up an activity or a condition that results in a nuisance, condemn all the land in his vicinity to a servitude without paying any compensation and so could arrogate to himself a good deal of the value of adjoining land.

(paraphrased, not quoted). We think it important that the legislature recognize it is embracing a doctrine that has been rather widely rejected by others because the doctrine inhibits logical growth of a community and reasoned development of realty.

Concern #2: THE BILL PREVENTS A LANDOWNER FROM ABATING ANOTHER PERSON'S ACTIVITIES EVEN WHERE THOSE ACTIVITIES UNREASONABLY INTERFERE WITH THE LANDOWNER'S USE AND ENJOYMENT OF HIS OWN PROPERTY.

Explanation:

A "nuisance" is, by definition, one person's unreasonable interference with a landowner's use and enjoyment of the landowner's property. 4 Restatement of Law 2d, Torts (1979), §§ 821B and 822. The key word is UNREASONABLE. We do not comprehend any rational basis for mandating that one landowner suffer unreasonable interference from another.

Moreover, in a nuisance action a landowner is protecting his own property. *Id.* at § 821D. Under common law, a landowner does not have a noise-based nuisance action against another unless the other's activities create noises that cross over to the landowner's property. *Id.* at § 821E. Thus, a nuisance case is not a situation where one person gets to tell another how the other should use his own land; it is a situation where one person gets to tell another that the other cannot also "use" the first person's land. We must wonder aloud why this legislature deems it appropriate to divest some landowners of the right to quietude that normally accompanies property ownership.

Nor do we understand why the bill fails to acknowledge that "reasonableness" changes over time. Had this legislature

The Honorable Tim Kelly
Chair, Senate Rules Committee

February 13, 1997

convened in Juneau when the old stamp mills were running, the legislators would have had to yell to be heard in their chambers. It was reasonable, at that time, for the local mining activity to be so noisy. Now, we think it fair to say that few legislators would accept such noise during the entirety of the session. Common law recognizes the evolution of reason. *Id.* at § 821F, comments c - f and § 826, comments b - c. We see no legitimate state interest in an act that fails to recognize that evolution but instead locks citizens into a status quo that may well become atavistic and anachronistic.

Concern #3: NOISE IS A LOCAL CONCERN.

Explanation:

No single noise travels throughout the state. For this reason courts deal with noise issues on a very local, site specific basis. E.g., Krueger v. Mitchell, 332 N.W.2d 733 (Wis. 1983) (airport noise); Gray v. Barnhart, 601 A.2d 924 (Pa. 1992) (shooting range noise), Soja v. Factoryville Sportsmen's Club, 610 A.2d 491 (Pa. 1992) (shooting range noise). While it is true that some control of aircraft noise has been taken over by the federal government, the only aircraft noise issues left to the control of other governments are peculiarly local. Cf., City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) with Krueger, supra. We doubt there is any legitimate state interest in such local issues that justifies usurpation of control from the people most directly affected by the noise.

Concern #4: THE BILL IS AMBIGUOUS AND MAY VIOLATE THE CONSTITUTION.

Explanation:

Article I, Section 15 of the Alaska Constitution prohibits any law that irrevocably grants a special privilege or immunity. The proposed Section 34.75.010(a) grants a special privilege to operators of certain airports and shooting ranges: they may make lots of noise. That privilege is special because it is not given to public airports or shooting ranges; it is not given

The Honorable Tim Kelly
Chair, Senate Rules Committee

February 13, 1997

to noisy types of activities other than airports or shooting ranges; it is not given to private airports and shooting ranges that start up in an already established, quiet community.

The proposed Section 34.75.010(a) also immunizes certain facilities from suit and the proposed Section 34.75.030 immunizes them from regulation.

If these privileges and immunities are irrevocable, they are unconstitutional. These privileges and immunities are irrevocable if they are not limited or lost following a substantial change in the use of the facility. Are these privileges and immunities lost following a substantial change in use? The bill is ambiguous.

On the one hand, the proposed 34.75.010(b) [Page 2, lines 1 - 5] purports to list all instances where the privileges and immunities do not apply. Since that section does not reference "a substantial change in use of the facility," one could infer that the privileges and immunities are retained even after a substantial change. If that is true, the bill is probably unconstitutional, violating Article I Section 15.

On the other hand, the proposed 34.75.010(c) seems to grant some rights to certain persons if the facility substantially changes its use. [Page 2, lines 9 - 10.] Similarly, proposed 34.75.020 purports to establish a statute of limitations for bringing actions following a substantial change in use. [Page 2, line 15.] These two sections make no sense unless we infer that a cause of action following substantial changes is implied, notwithstanding the silence of 34.75.010(b). While a court might make that inference to avoid the unconstitutionality and the nonsense, to do so it would have to read into the bill language that is not actually there.

We think it necessary and appropriate for the legislature to ensure that it's bill is sensible and constitutional. Toward that end we embrace the amendments previously offered by the Alaska Municipal League and under consideration by Senator Halford.

The Honorable Tim Kelly
Chair, Senate Rules Committee

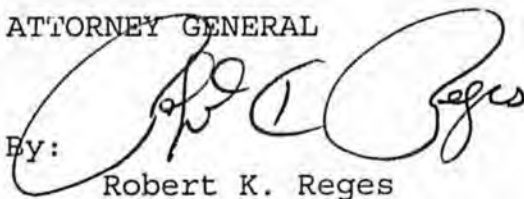
February 13, 1997

Thank you for this opportunity to express our views on
this bill.

Sincerely yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By:



Robert K. Reges
Assistant Attorney General

RKR:prm

STATE OF ALASKA

DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS

OFFICE OF THE COMMISSIONER

TONY KNOWLES, GOVERNOR

P.O. BOX 112100
JUNEAU, ALASKA 99811-2100
PHONE: (907) 465-4700
FAX: (907) 465-2948

333 W. 4TH AVENUE, SUITE 220
ANCHORAGE, ALASKA 99501-2341
PHONE: (907) 269-4500
FAX: (907) 269-4520

February 13, 1997

Senator Tim Kelly, Chair
Senate Rules Committee
State Capitol Room 101
Juneau, Alaska 99811

Dear Senator Kelly:

The Department of Community and Regional Affairs has concerns regarding Senate Bill 8, now in possession of the Senate Rules Committee. The bill would prohibit municipalities from applying new regulations or noise control laws to the outdoor level of noise at certain existing airports and sports shooting facilities. The noise levels produced in conjunction with operating these existing facilities would be "grandfathered in," and would not be subject to subsequently implemented municipal regulations or noise control laws.

The Department is concerned about the public policy implications of state involvement in an area of law traditionally overseen by local government. Under Senate Bill 8, the state would dictate to local communities certain activities that can or cannot take place within their boundaries. We believe that local land use decisions should be made by the affected local government, as Title 29 now authorizes.

It is our understanding that the Department of Law is working with Senator Halford's staff on amendments that would alleviate our concerns. We urge the Rules Committee to consider adopting amendments put forward by Senator Halford's staff.

Sincerely,


Lamar Cotten
Deputy Commissioner

cc: Senator Rick Halford
Pat Pourchot, Governor's Office