

384 SCRA

SCR 14

384

June 30, 1975

Dr. Michael Beirne
P.O. Box 4-1539
Anchorage, Alaska 99509

Dear Dr. Beirne:

The First Session of the Ninth Alaska Legislature adopted a statement of Intent applicable to construction of the Lake Otis Hospital. The statement reads:

It is the Intent of the Legislature that an amount not to exceed \$100,000 (the amount to be determined by eligibility standards established in law/regulations for payment of construction grants to hospitals) be paid as a grant to the Lake Otis Hospital facility from the FY-75 Municipal Service Revenue sharing account. This grant shall be considered applicable to the FY-74 entitlement for Municipal Service Revenue sharing. FLINAC

The quoted statement was added to the FY-76 appropriation Free Conference Committee Report on the motion of Representative Keith Specking, a member of the second Free Conference Committee on that act, following my letter to you of June 5 and an explanation offered by Jay Hogan, Director of Legislative Finance, during the Committee's deliberations.

Subsequent review has led to a determination that no portion of the amount intended by the legislative statement for the Lake Otis Hospital facilities for FY-74 from the balance of the appropriation for the FY-75 Municipal Service Revenue Sharing program shall be paid.

The legislative statement sets an upper limit of \$100,000 on the amount to be allocated adding, parenthetically, that the actual amount payable is "to be determined by eligibility standards established in law/regulations for payment of construction grants to hospital." You will well recall our discussions during the spring of 1974 when, in March, you transmitted a letter application requesting payment for the FY-74 appropriation for the Lake Otis Hospital. At that time, I advised that your application could not be honored for payment because (1) it was filed after the date established in Department-adopted regulations for timely filing of applications and (2) at the time your application was submitted, the FY-74 appropriation had been expended or encumbered to meet valid claims. At that time

June 30, 1975

(early spring of 1974), if memory serves, you indicated that construction of the facility had not been initiated by July 1, 1973, the first day of FY-74 and the index or benchmark date for all FY-74 applications. Because the legislative statement directs that the Department determine the amount payable, to the maximum limit of \$100,000, with reference to applicable law and regulations, I find that the amount properly payable, applying 19 AAC 30.030, "Date for Determination," is \$0.

A provision of state law relating to public finance appears to preclude payment of an FY-74 entitlement from the balance of the FY-75 appropriation. By AS 37.25.010(b)

An indebtedness arising from a prior year for which the appropriation has lapsed shall be paid from the current year's appropriations, if (1) the expenditure does not exceed the balance lapsed and (2) the original obligation date is not more than two years from the regular date of disbursement.

Regrettably, the amount projected to be paid--a maximum of \$100,000--exceeds the amount lapsed in FY-74--\$3,700. The quoted statutory provision takes precedent over the statement of intent and no entitlement is, therefore, payable.

Though the construction project is to be denied the grant intended by the Legislature, please understand that, assuming no change of the current statute, AS 43.18.010(j) and continued construction of the facility over the anticipated time frame, the Lake Otis Hospital may reasonably expect to receive its share of funds appropriated for construction to the limit established in the general law provision. Our decision to override the statement of legislative assistant in the payment of FY-74 payment of construction support is, in one sense, not so much a denial of payment as it is a postponement.

Please advise if further information concerning disposition of the matter by the Department is required.

Sincerely,

Lee McAnerney
Commissioner

by: _____
John B. Chenoweth, Director

LMcA:JBC:ds

bcc: Bill Gordon
Andrew Warwick
Kent Dawson
Jay Hogan
David Freer

Free Conference Committee on the Budget
Intent, Municipal Services Revenue Sharing

It is the intent of the Legislature that an amount not to exceed \$300,000 (the amount to be determined by eligibility standards established in law/regulations for payment of construction grants to hospitals) be paid as a grant to the Anchorage Community Hospital from the FY 75 Municipal Services Revenue Sharing Account. It is the intent of the Legislature that an amount not to exceed \$100,000 (the amount to be determined by eligibility standards established in law/regulations for payment of construction grants to hospitals) be paid as a grant to the Lake Otis Hospital facility from the FY 75 Municipal Services Revenue Sharing account. This grant shall be considered applicable to the FY 1974 entitlement for Municipal Services Revenue Sharing.

Senator Sackett moved to add intent to General Relief Medical that hospitals will absorb 20% of unpaid services as charity care. No objection, so ordered.

Leg. Intent

Referring to a May 28, 1975 memo to Rep. Haughton from Jay Hogan, Representative Specking called attention to the fact that there is \$400,000 in hospital construction revenue sharing money that will lapse unless otherwise appropriated. He explained that \$300,000 of the FY 75 Municipal Services Revenue Sharing account was earmarked for the Anchorage Community Hospital; however, Anchorage failed to file an application for their share since they thought the grant would automatically be paid. Representative Specking moved to adopt legislative intent that an amount not to exceed \$300.0 be paid as a grant to the Anchorage Community Hospital, and the remaining \$100.0 be appropriated to the Lake Otis Hospital facility.

Leg. Intent

Representative Bowman objected.. He asked if there are other hospitals that are available to receive these funds. Senator Kerttula remarked that he knows that GAAP has two facilities; however, they are fully funded. Jay Hogan explained that in the past it was the intent of the Legislature to include a sum of money for Lake Otis for reimbursement for construction costs, but this never took place; and last year it was the same thing for the community hospital in Anchorage--it never took place. This is an attempt to take money that will lapse and pay off these two past legislative intents.

Representative Bowman then removed his objection to the motion, and it was adopted.

Referring to the General Government category, Department of Law, Natural Gas FCC Representation, Senator Croft proposed that the following legislative intent be added to the existing intent which appears on page 122 of the computer run (The department shall not retain any legal firm where there appears to exist a conflict-of-interest situation. Information developed by the contract firm shall be made readily available to the legislative pipeline impact committee).

Legislative Intent: The department shall coordinate its activities in this regard with and cooperate with the legislative committee created by HB 258.

Leg. Intent

No objection, this intent was adopted.

Referring to University of Alaska, Statewide Administration, Senator Croft stated that \$300.0 was added by the previous FCC for management systems development. Senator Croft moved that prior to entering into a contract with the University, the firm that will be doing the work be approved by the Legislative Budget & Audit Committee.

6/6/75

PROGRAM CATEGORY: DEVELOPMENT
 AGENCY: DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS

PROGRAM: REVENUE SHARING
 SUB-PROGRAM:

REQUESTS FOR NEW POSITIONS

FOOT- NO. P	POSITION TITLE	NO.	PRIORITY	LOCATION	SAL & BENEF COST	TOTAL POSN COST	GENRL FUNDS	FED & OTHER FUNDS	GOV BUDGET	HOUSE BUDGET	SENATE BUDGET	F.C.C. BUDGET
	LOCAL GOVT SPECIALIST IV	01	001	JUNEAU	22.8	27.0	27.0					
TOTALS:					22.8	27.0	27.0					

(1) GOVERNOR RECOMMENDS TRANSFER LOCAL GOV'T SPEC IV FROM PLI DISCRETIONARY GRANT BRU. SAL & BEN 23.2; TOTAL COST 28.1

ANALYSIS OF GOVERNORS BUDGET

OBJECT GROUP	OBJECT GROUP DESCRIPTION	GOV - \$ DIFFERENCE	FY75 AUTH % DIFFERENCE	DESCRIPTION OF DIFFERENCES
100	PERSONAL SERVICES	34.8		TRANSFER IN CLERK IV 11.6; GOV'S TRANSFER IN LGSIV, 23.2
200	TRAVEL	3.0		GOV NEW POSITION 3.0
300	CONTRACTUAL SERVICES	9.0		GOV NEW POSITION 1.7; OTHER 7.3
400	COMMODITIES	0.5		GOV NEW POSITIONS .5
700	GRANTS, CLAIMS, SHARED REVENUE	1,110.3	8.5	INCREASED COST OF GRANTS 1,110.3

ANALYSIS OF FREE CONFERENCE COMMITTEE BUDGET

DENY REQUESTED NEW POSITION; ALLOW TRANSFER-IN LOCAL GOVERNMENT SPECIALIST IV FROM PLI DISCRETIONARY GRANTS BRU; ALLOW INCREASE IN CODE 700.

LEGISLATIVE INTENT: IT IS THE INTENT OF THE LEGISLATURE THAT AN AMOUNT NOT TO EXCEED \$300,000 (THE AMOUNT TO BE DETERMINED BY ELIGIBILITY STANDARDS ESTABLISHED IN LAW/REGULATIONS FOR PAYMENT OF CONSTRUCTION GRANTS TO HOSPITALS) BE PAID AS A GRANT TO THE ANCHORAGE COMMUNITY HOSPITAL FROM THE FY75 MUNICIPAL SERVICES REVENUE SHARING ACCOUNT.

IT IS THE INTENT OF THE LEGISLATURE THAT AN AMOUNT NOT TO EXCEED \$100,000 (THE AMOUNT TO BE DETERMINED BY ELIGIBILITY STANDARDS ESTABLISHED IN LAW/REGULATIONS FOR PAYMENT OF CONSTRUCTION GRANTS TO HOSPITALS) BE PAID AS A GRANT TO THE LAKE OTIS HOSPITAL FACILITY FROM THE FY75 MUNICIPAL SERVICES REVENUE SHARING ACCOUNT. THIS GRANT SHALL BE CONSIDERED APPLICABLE TO THE FY74 ENTITLEMENT FOR MUNICIPAL SERVICES REVENUE SHARING.

Due to a revised request to increase the grants to provide funds for additional beds at Anchorage Community Hospital, the Free Conference Committee increased Line Item 700 by \$163,100.

See Appendix for Municipal Services Revenue Sharing Table.

Hill-Burton Allowable and Non-Allowable Cost

Acquisition of Site	<u>Non-Allowable</u> *
Site Clearance	<u>Allowable</u>
Relocation of Utilities	<u>Non-Allowable</u>
Sidewalks	<u>Allowable</u>
Driveways	<u>Allowable</u>
Parking Areas	<u>Allowable</u>
Landscaping	<u>Allowable</u>
Underground Sprinkler System	<u>Allowable</u>
Connection to Utilities	<u>Allowable</u>
Off-Site Improvements	<u>Non-Allowable</u>
Advertising	<u>Allowable</u>
Insurance Coverage	<u>Allowable</u>
Architects' Fees	<u>Allowable</u>
Consultant Fees	<u>Allowable</u> *
Inspection	<u>Allowable</u>
Equipment	<u>Allowable</u> *
Surplus Property	<u>Allowable</u>
Donated Land, Equipment, Services	<u>Non-Allowable</u> *
Bonus Payments to Contractor	<u>Non-Allowable</u>

*(exceptions)

Hill-Burton Allowable and Non-Allowable Cost (2)

Damage Judgments Against Sponsor	<u>Non-Allowable</u>
Maintenance of Records	<u>Allowable</u>
Sales Tax	<u>Allowable</u>
Space for the Private Practice of Medicine	<u>Non-Allowable</u>
Space to be Leased to Radiologist or Pathologist	<u>Allowable</u>
Space for Revenue Purposes	<u>Non-Allowable</u>
Space and Equipment for Religious Activities	<u>Allowable</u>
Fund Raising Expenses--- Memorial Plaques	<u>Non-Allowable</u>
Public Health Facilities in Private Nonprofit Hospitals	<u>Non-Allowable</u>
Legal Council's Fees	<u>Non-Allowable</u>
Gift Shops Flower Shops Snack Bars	<u>Allowable</u>
Unfinished Space	<u>Non-Allowable</u>

*(exceptions)

Hill-Burton Allowable and Non-Allowable Cost (3)

Books	<u>Allowable</u> *
Television	<u>Allowable</u>
Short-term Care Facilities	<u>May Be Allowed</u>
Long-term Care Facilities	<u>May Be Allowed</u>
Nurses' Dormitory	<u>May Be Allowed</u>
Fallout Protection	<u>Allowable</u>
Housing Staff for Nursing Home	<u>Non-Allowable</u> *
Pictures and Murals	<u>Non-Allowable</u> *
Floor Finish Materials	<u>Allowable</u> *
Quarters for Residents and Interns	<u>Allowable</u> *
Costs Allowable and Not Allowable in Guaranteed Loan and Direct Loan Projects	<u>Non-Allowable</u> *

*(exceptions)

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2. Letter from Bill Berrier, LAA, RE: SCR 13
3. CRA Regulations (October 1974)
4. Letter to Senator Orsini from CRA RE: Denial of FY 75 Redirected Revenue Sharing grant in the amount of \$110,000 for Lake Otis Hospital.
5. Letter from Department of Law discussing the legal force of a statement of "legislative intent" and the gravity of this "intent" on the Departments.

Handwritten note:
CY 146
10/1/74

REGULATIONS
GOVERNING
STATE AID TO LOCAL GOVERNMENTS
MUNICIPAL SERVICES REVENUE SHARING PROGRAM

COMMUNITY AND REGIONAL AFFAIRS

PART 2. MUNICIPAL SERVICES REVENUE SHARING PROGRAM

CHAPTER 30. STATE AID TO LOCAL GOVERNMENTS

Section

- 10. Scope of regulations
- 20. Eligibility
- 30. Date for determination
- 40. Application
- 50. Appeal
- 60. Population data
- 70. Audit or statement of income and expenditures
- 80. Failure to comply with requirements
- 90. Prepayments
- 100. Boundary adjustments
- 110. Incorporation or dissolution of units of local government
- 120. Overpayment and adjustment
- 130. Violation of statute governing employment preference
- 140. Unified municipalities
- 150. Definition of terms in AS 43.18.010
- 160. Definitions

19 AAC 30.010. SCOPE OF REGULATIONS. The regulations in this chapter are prescribed for implementing, interpreting, and making specific the act providing state aid to local governments, AS 43.18.010 - 43.18.050. (Eff. 7/8/73, Register 47)

Authority: AS 43.18.040
44.47.050(14)
44.47.160

19 AAC 30.020. ELIGIBILITY. Eligibility for receipt of state aid to local governments provided by AS 43.18.010 - 43.18.050 shall be predicated upon the possession and exercise of a power set out in those statutory provisions by a unit of local government or volunteer fire department located in the unorganized borough. (Eff. 7/8/73, Register 47)

Authority: AS 43.18.040
44.47.050(14)
44.47.160

19 AAC 30.030. DATE FOR DETERMINATION. For the first entitlement period, determination of eligibility for receipt of state aid to local governments provided by AS 43.18.010 - 43.18.050 is July 1, 1973.

In subsequent entitlement periods, the annual date for determination of eligibility is July 1. (Eff. 7/8/73, Register 47)

Authority: AS 43.18.040
44.47.050(14)
44.47.160

19 AAC 30.040. APPLICATION. (a) Application for state aid to local governments under AS 43.18.010 - 43.18.050 shall be made on forms prescribed by the commissioner.

(b) Not later than July 10 of the entitlement period the department will forward application forms to each unit of local government and volunteer fire department located in the unorganized borough that received state aid to local governments in the previous entitlement period and to every other unit of local government incorporated before July 1 of the entitlement period.

(c) As a condition to participation in the program of state aid to local governments, applications for state aid to local governments under AS 43.18.010 - 43.18.050 shall be returned to the department postmarked not later than October 15 of the entitlement period. Based on information contained in the application submitted, the commissioner will prepare a determination of entitlements not later than the following November 30 and will mail notice of the amount of entitlement to each unit of local government and volunteer fire department located in the unorganized borough. (Eff. 7/8/73, Register 47; am 8/7/74, Register 51)

Authority: AS 43.18.040
44.47.050(14)
44.47.160

19 AAC 30.050. APPEAL. (a) Within 20 days of the date of mailing of notice of entitlement by the department, a unit of local government or volunteer fire department located in the unorganized borough may appeal a determination of final entitlement to the commissioner. The appeal shall be in writing and shall identify the particular category or categories for which application for state aid to local governments has been submitted, the determination of entitlement to which the unit of local government takes exception, and the reasons for its exception. The appeal shall include all relevant supporting evidence.

(b) The commissioner will review the record of appeal and enter the final determination of entitlement. The commissioner may affirm or modify the determination of entitlement previously entered, and will notify the unit of local government or volunteer fire department located in the unorganized borough of his decision.

(c) If the unit of local government or volunteer fire department located in the unorganized borough fails to file an exception within the

time set forth in subsection (a) of this section, the determination of entitlement entered pursuant to section 040(c) constitutes the final determination of the department.

(d) The manner of computation of population may not be made the subject of an appeal. (Eff. 7/8/73, Register 47)

Authority: AS 43.18.040
44.47.050(14)
44.47.160

19 AAC 30.060. POPULATION DATA. (a) The population data used in determination of allocations of state aid to local governments and adjustments to those allocations will be the official report of the United States Bureau of the Census. However, a unit of local government may substitute for the official report of the United States Bureau of the Census:

(1) an enumeration, certified as true and correct by the governing body of the unit of local government or chief administrative officer of a volunteer fire department located in the unorganized borough, specifying the names of residents of the unit of local government, service area, or area served by a fire department, prepared according to criteria established by the department;

(2) an estimate of population based upon other reliable data such as public school enrollment figures, public utility connection, registered voters, and certified employment payrolls; or

(3) the latest available population estimate prepared by the division of employment security, Alaska Department of Labor.

(b) The commissioner may require each unit of local government or volunteer fire department located in the unorganized borough which offers an estimate of its population to submit such evidence as may be necessary to review computation of the population estimate. He may notify the unit of local government or volunteer fire department located in the unorganized borough that if it fails to take action in response to the request within 30 days of the date of receipt of his notification, the estimate may be rejected and allocations will be made on the best data available to the department.

(c) Repealed, August 7, 1974. (Eff. 7/8/73, Register 47; am 8/7/74, Register 51)

Authority: AS 43.18.010(c)
43.18.040
44.47.050(14)
44.47.160

EXPENDITURES. (a) Each unified municipality, organized borough, home rule city, or city of the first class shall submit one copy of its annual audit prepared pursuant to AS 29.48.220 for the fiscal year preceding the entitlement period. Preparation of the audit shall be by a public accountant licensed under the provisions of AS 08.04.270 - 08.04.320.

(b) Each city of the second class shall submit an audit or statement of income and expenditures of the accounts and financial transactions of the second class city for the fiscal year of the second class city preceding the entitlement period on a form approved by the commissioner.

(c) Payment of the final entitlement of a unit of local government will not be made until an audit or statement of income and expenditures is filed with the department. (Eff. 7/8/73, Register 47; am 8/7/74, Register 51)

Authority: AS 43.18.010(c)
43.18.040
44.47.050(14)
44.47.160

19 AAC 30.080. FAILURE TO COMPLY WITH REQUIREMENTS. If the commissioner determines that a unit of local government or volunteer fire department located in the unorganized borough has failed to comply substantially with a provision of this chapter, after giving reasonable notice to the chief executive officer or chief administrative officer of the unit of local government or volunteer fire department located in the unorganized borough, he will notify the unit of local government or volunteer fire department located in the unorganized borough that if it fails to take action in response to the request within 30 days of the date of receipt of notification, further payments will be withheld for the entitlement period until the request for further information is fully complied with. (Eff. 7/8/73, Register 47)

Authority: AS 43.18.040
44.47.050(14)
44.47.160

19 AAC 30.090. PREPAYMENTS. (a) The commissioner may provide for prepayment to a unit of local government or volunteer fire department located in the unorganized borough of a sum not to exceed 50 percent of the entitlement computed without regard to any proration for the previous entitlement period.

(b) Prepayments will be allowed to a unit of local government or volunteer fire department located in the unorganized borough upon receipt by the department of a completed application.

(c) Repealed, August 7, 1974.

(d) Prepayments shall be deducted from the entitlement prior to transmittal of the balance of the entitlement due to a unit of local government or vol-

unteer fire department located in the unorganized borough determined to be eligible for receipt of state aid to local governments. (Eff. 7/8/73, Register 47; am 8/7/74, Register 51)

Authority: AS 43.18.040
44.47.050(14)
44.47.160

19 AAC 30.100. BOUNDARY ADJUSTMENTS. A unit of local government effecting a boundary change under AS 44.19.260 or through the local action process provided by 19 AAC 15 during the preceding entitlement period shall return with its application the following information:

- (1) one copy of an ordinance or resolution effecting the boundary change;
- (2) a map clearly showing areas annexed to or detached from the unit of local government submitting the application; and,
- (3) an estimate of the population residing within the area annexed or detached and a detailed statement indicating the method used in determining the estimate. (Eff. 7/8/73, Register 47)

Authority: AS 43.18.040
44.47.050(14)
44.47.160

19 AAC 30.110. INCORPORATION OR DISSOLUTION OF UNITS OF LOCAL GOVERNMENT. (a) A unit of local government which is incorporated pursuant to AS 29.18.010 - 29.18.120 during the entitlement period is not eligible to receive state aid to local governments for the entitlement period during which it was incorporated.

(b) The department will pay to a unit of local government established by unification pursuant to AS 29.68.390 an entitlement prorated over the number of days in the entitlement period following the date of unification.

(c) The department will pay to a unit of local government established by consolidation pursuant to AS 29.68.090 an entitlement prorated over the number of days in the entitlement period following the date of consolidation.

(d) The department will pay to a unit of local government into which a city or borough is merged pursuant to AS 29.68.090 an entitlement prorated over the number of days in the entitlement period following the date of the merger.

(e) A unit of local government which is to be dissolved pursuant to AS 29.68.500 during the entitlement period will receive an entitlement payment prorated over the number of days in the entitlement period during which it has been in existence if that unit of local government has authority to expend

revenues. (Eff. 7/8/73, Register 47)

Authority: AS 43.18.040

44.47.050(14)

44.47.160

19 AAC 30.120. OVERPAYMENT AND ADJUSTMENT. (a) After mailing of prepayments, if the commissioner determines that the prepayment mailed to a unit of local government or volunteer fire department located in the unorganized borough exceeds the entitlement payable to a unit of local government or volunteer fire department located in the unorganized borough during the entitlement period, he may

(1) demand that the difference between the amount of prepayment and the proper entitlement be repaid to the department; or

(2) reduce, in the next entitlement period, the entitlement to the unit of local government or volunteer fire department located in the unorganized borough by the difference between the amount of prepayment and the proper entitlement.

(b) After mailing of the balance of the entitlement due to a unit of local government or a volunteer fire department located in the unorganized borough, if the commissioner determines that the sum of the prepayment and final payment exceeds the entitlement payable to the unit of local government or volunteer fire department located in the unorganized borough during an entitlement period, he may

(1) demand that the difference between the sum of the payments and the proper entitlement be repaid to the department; or

(2) reduce, in the next entitlement period, the entitlement to the unit of local government or volunteer fire department located in the unorganized borough by the difference between the sum of the payments and the proper entitlement. (Eff. 7/8/73, Register 47)

Authority: AS 43.18.040

44.47.050(14)

44.47.160

19 AAC 30.130. VIOLATION OF STATUTE GOVERNING EMPLOYMENT PREFERENCE. (a) Notwithstanding other provisions of this chapter, when there has been a finding of a violation by a unit of local government of the provisions of AS 36.10, the unit of local government may be denied state aid to local governments for a period not to exceed one year following the date of the final determination.

(b) Where denial of state aid to local governments under subsection (a) of this section is for less than one entitlement period, the entitlement will be prorated for the period during which the unit of local government is other-

wise qualified. (Eff. 7/8/73, Register 47)

Authority: AS 36.10.090(b)
43.18.040
44.47.050(14)
44.47.160

19 AAC 30.140. UNIFIED MUNICIPALITIES. For purposes of administration of the act providing state aid to local governments, a unified municipality shall be treated as an organized borough. (Eff. 7/8/73, Register 47)

Authority: AS 43.18.040
44.47.050(14)
44.47.160

19 AAC 30.150. DEFINITIONS OF TERMS IN AS 43.18.010. Unless the context indicates otherwise, in AS 43.18.010

(1) "airport" means a facility operated by a unit of local government at which aircraft arrive and depart on a regular basis; airports maintained exclusively by an agency of the state or federal government or by a private party, airports maintained by a unit of local government under agreement or contract with the Alaska Division of Aviation, airports maintained on a seasonal basis, heliports, sea dromes, and beach landing strips are excluded;

(2) "financial support" means

(A) a transfer of funds from a city, borough or unified municipality to a fire department;

(B) providing in-kind services, including but not necessarily limited to providing a building or other facility for the use of the fire department; utilities, including electricity, heat, water; labor to construct or maintain facilities or other equipment used by the fire department; or other services provided by the unit of local government for the fire department at no cost or at a reduced rate; and,

(C) the full faith and credit pledge of the unit of local government for bonded indebtedness incurred for the purpose of providing funds for the fire department;

(3) "parks and recreation" means a park or recreational facility owned and maintained by a unit of local government or recreation program operated and financially supported by a unit of local government; facilities and programs must be available to the general public;

(4) "port" means a permanent facility operated by a unit of local government which has the capability of receiving cargo from and discharging cargo to commercial vessels;

(5) "road" means a right-of-way across the land dedicated to public use and constructed and maintained for the use of automotive equipment; specifically excluded are

(A) roads maintained within a unit of local government by an agency of the federal or state governments or maintained by the unit of local government pursuant to an agreement with a federal or state agency;

(B) public ways on the surface of a river, lake or other body of water; and,

(C) trails;

(6) "small boat harbor" means a permanent facility operated by a unit of local government which provides deep water shelter, either natural or artificial, on the coast of a sea, lake or other body of water;

(7) "staff planner" means a full-time employee of a unit of local government whose primary responsibility is land use planning and plan implementation;

(8) "transit system" means the transportation of people over regular routes at specified times in accordance with fixed tariffs; the term is limited to transportation by rail and monorail or buses, specifically designed and constructed to accommodate the general public; and,

(9) "work program outline" shall include but is not necessarily limited to

(A) the name and address of the planning firm with which the unit of local government has an annual contract;

(B) a copy of the annual contract; and,

(C) an explanation of the planning tasks presently being undertaken.

(10) "police protection" means provision of police protection services made available by a unit of local government during the previous entitlement year with one or more police officers on duty or on call daily. (Eff. 7/8/73, Register 47; am 8/7/74, Register 51)

Authority: AS 43.18.040

44.47.050(14)

44.47.160

19 AAC 30.160. DEFINITIONS. Unless the context indicates otherwise, in this chapter

(1) "chief administrative officer or chief executive officer" means the official who has primary responsibility for the conduct of the governmental or financial affairs of the unit of local government or volunteer fire department;

(2) "commissioner" means the Commissioner of the Department of Community and Regional Affairs;

(3) "department" means the Department of Community and Regional Affairs;

(4) "entitlement" means the amount of payment of state aid to local governments to which a unit of local government is entitled as determined by the commissioner pursuant to the allocation specified in AS 43.18.010 - 43.18.050 providing state aid to local governments or established by these regulations;

(5) "entitlement period" means the calendar period beginning July 1 and ending June 30 of the following year;

(6) "facility" means a permanent improvement constructed, operated or maintained for the convenience of the public;

(7) "unit of local government" means a city, organized borough, or unified municipality incorporated under the laws of the State of Alaska. (Eff. 7/8/73, Register 47)

Authority: AS 43.18.040
44.47.050(14)
44.47.160

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

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

MEMORANDUM

March 14, 1977

SUBJECT: SCR 13

TO: Senate Community and Regional Affairs Committee

FROM: Billy G. Berrier *BGB*
Director
Division of Legal Services

You have asked whether the regulation adopted by the Department of Community and Regional Affairs as 19 AAC 30.020(9)(c) to determine project cost for hospital construction aid under AS 43.18.010(j) is a legally proper exercise of the power granted to the department to adopt regulations necessary to carry out the purposes of the program. In my opinion the regulation is legally proper.

AS 43.18.010(j) provides:

"(j) If construction of a facility began after January 1968 and state matching aid for construction approved for payment to the local government or other facility sponsor constitutes less than 25 per cent of the total project cost, the state shall pay to the local government or other facility sponsor each fiscal year a sum equal to \$2,500 a bed for the maximum number of beds provided for in the construction design of the facility. State aid provided for in this subsection shall continue until the local government or other facility sponsor has received an amount which, combined with state matching money for construction of the facility, equals 25 per cent of the total project cost. No funds received for construction shall be used for any other purpose."

The regulation under consideration, 19 AAC 30.020(a)(c) provides:

"(C) project or construction costs shall be those contracted costs that are eligible for financial participation under the Hill-Burton Construction Program for construction of new buildings, including, but not limited

to, the expansion, replacement and modernization of existing buildings and initial equipment of any such buildings; including architect and consultant fees, but not including the cost of land acquisition and off-site improvements;"

In this statute the term "total project cost" is very significant. A determination of the total project cost is necessary to initially determine eligibility for aid and to determine the total amount of aid to be given. The term is not free from ambiguity. Implementing regulations are therefore proper. Of course the regulations must in themselves be reasonable and must be in accord with the legislative intent since the power to adopt regulations confers only an authority or discretion as to execution of a law to be exercised under and in pursuance of the law. (Cincinnati v. Clinton Co. 10 Ohio 77 at 88, 1852, which has been followed with approval in numerous cases).

The Hill-Burton program, (Title VI of the Public Health Service Act as amended, 42 USC 291 et seq.) is the program providing federal aid for hospital construction. This program has been used in Alaska and the state agency required under that program has been established under AS 18.25. It is reasonable to assume that in 1971 when the legislature enacted CSSB 42 am H which as Ch. 127 SLA 1971 became the law under consideration here, both the legislature and the executive branch were aware of the Hill-Burton Act and the fact that state matching aid for hospital construction was being granted as a partial match for Hill-Burton funds.

The Hill-Burton program had been functioning for many years and had dealt extensively with the question of what project costs were allowable. With no specific direction in the statute as to how the term "project cost" was to be defined, it was not unreasonable for the department to use a well-recognized definition in a directly parallel program

There is no evidence of legislative intent to use either this or another definition. The use of the term "total" as a modifier of project cost may evidence an intent that the term project cost be used broadly but a somewhat more persuasive case can be made that the intent of the modifier "total" was to establish that the project cost referred to was not to be construed as referring only to the non-federal share of the costs. It would not appear reasonable to assume the intent of the phrase "total project cost" was to allow any cost attributed to the project by the sponsor regardless of the remoteness of the connection or the propriety of the cost.

Senate Community and Regional Affairs
March 14, 1977
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Since discretion was left to the department and the department exercised that discretion in a reasonable manner apparently consistent with legislative intent, in my opinion the regulation is legally proper.

Unlike a court, the legislature in its determination of whether to annul a regulation may consider the wisdom as well as the legality of the regulation. The question of whether a regulation is desirable or wise is not a legal question and is not addressed in this memorandum.

BGB:hjd

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South Central Health Planning and Development, Inc.

1135 West Eighth Avenue Suite 1 Anchorage, Alaska 99501

(907) 278-3631



March 14, 1977

Joseph L. Orsini, Chairman
Community and Regional Affairs
Pouch V
Juneau, Alaska 99811
Mail Stop 3100

Dear Mr. Orsini:

The Executive Committee of South Central Health Planning and Development Inc reviewed SCR 13 and SCR 14 at their regular meeting on March 11, 1977. It was their position that the regulations requiring application through municipalities and restricting matching are appropriate. They therefore wish to inform the committee that they reaffirm their position supporting such regulations and therefore recommend against annulment.

Sincerely,

A handwritten signature in cursive script that reads "Ron Hammett".

Ron Hammett
Administrator

RH/lis

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K - STATE CAPITOL
JUNEAU 99811

JAY S. HAMMOND, GOVERNOR

January 27, 1976

Catherine M. Lloyd
Deputy Commissioner
Department of Health &
Social Services

Dear Ms. Lloyd:

You have requested an opinion from the Department of Law concerning the following fact situation:

1. By Chapter 209, SLA 1975, the legislature appropriated from the general fund the sum of \$3,210,400 to the General Relief Medical Program (GR-Meu) administered by the Department of Health and Social Services (DHSS).

2. Section 16(a) of the above appropriation bill states in part:

. . . The expenditure of funds appropriated/allocated by this Act shall be in accordance with the conditions and intent set out in the "Free Conference Committee Report, FY 76, Operating and Capitol Budget" as published by the legislative finance division.

3. At page 114 of the "Free Conference Committee Report, FY '76, Health Operating Budget," the following statement is found:

Legislative Intent: Hospitals will absorb 20% of unpaid services as charity care.

With respect to the facts presented above, the question you have asked may be stated as follows:

1. Does the language quoted above of the Free Conference Committee Report have the effect of legally limiting the manner by which reimbursement can be made by DHSS to hospitals

providing medical assistance covered by the GR-Med program?

2. If a limitation has not been established, how can DHSS implement the quoted legislative intent statement?

The short answers to these questions are: (1) the statement of legislative intent in the Free Conference Committee Report does not have the force of law in limiting payments to hospitals; (2) DHSS must adopt regulations pursuant to the Administrative Procedure Act in order to give legal effect to the statement of legislative intent in question.

I. FACTUAL BACKGROUND

The statutory authority for the GR-Med program is found in AS 47.25.120 et seq.

The mechanics of the program are quite simple. A person seeking GR-Med assistance completes an application provided by DHSS. If the applicant is found eligible for GR-Med assistance, the applicant is issued a coupon card. If that person should thereafter require hospital care, he/she need only present this card upon admission. The hospital then completes a medical invoice showing the services provided to the patient and sends the invoice and a copy of the person's GR-Med card to DHSS for payment.

To finance the GR-Med program in FY '76, DHSS, Division of Medical Assistance, initially submitted to the Department of Administration, Division of Budget and Management (DBM), a budget request for FY '76 in the amount of \$3,533,200. Indications at the time were that this amount would be necessary to maintain the 1975 level of GR-Med care in 1976. DBM then suggested that DHSS reconsider its budget request. After doing so, DHSS raised its request to \$3.6 million and resubmitted it to DBM. In the interim, DBM had reduced the original budget request to \$3,210,400.

In response to that reduction, the Division of Medical Assistance sent a memorandum to DBM explaining and documenting the necessity for funding GR-Med at the \$3.6 million figure. DBM concurred with the contents of the memorandum and agreed to the \$3.6 million figure. However, prior to the receipt and consideration of these memoranda, the Governor's official budget document was printed and sent to the legislature, showing the \$3,210,400 figure.

By letter of April 8, 1975 to Representative Malone, Chairman of the House Finance Committee, Commissioner Andrew Warwick, Chairman of the Governor's Budget Review Committee, requested, inter alia, that the proposed GR-Med budget figure be changed to read \$3,640,400.

On May 22, 1975, Governor Hammond sent a letter to both Senator Ray, Chairman of the Senate Finance Committee, and Representative Malone, Chairman of the House Finance Committee. Attached to this letter was another request by DHSS that the \$3.6 million budget figure requested for the GR-Med program be substituted for the \$3,210,400 figure.

Following the adoption by the Senate and House of their respective finance committee reports, each containing the \$3,210,400 figure, a free conference committee was appointed. At its meeting of May 25, 1975, the first Free Conference Committee (FCC) on the budget adopted the House and Senate figure of \$3,210,400 for the GR-Med program. (Page 38, First Free Conference Committee Minutes, 1975). At the same time, on the motion of Representative Malone, the statement of legislative intent in question was also adopted. (Page 38, First Free Conference Committee Minutes, 1975).

When the first FCC was unable to resolve differences between the Senate and House versions of the budget bill, the committee disbanded and a second FCC was appointed. This committee, upon the explanation and motion of Senator Sackett, chose to adopt the same statement of legislative intent. (Pages 143-144, Second Free Conference Committee Minutes, 1975). In addition, in "an attempt to formalize the legislative intent that the FCC adopts," the second FCC adopted what is now section 16(a) of the general budget bill for 1975. (Page 140, Second Free Conference Committee Minutes, 1975). This section reads in part:

. . . [T]he expenditure of funds appropriated/ allocated by this Act shall be in accordance with the conditions and intent set out in the "Free Conference Committee Report, FY '76, Operating and Capitol Budget" as published by the legislative finance division. (Chapter 209, SLA 1975, sec. 16(a)).

Shortly after the second FCC completed its business Lawrence Sullivan, Director of the Division of Medical Assistance,

DHSS, verbally requested of the Legislative Finance Division a clarification of the meaning of the intent statement incorporated by reference into the appropriation for the GR-Med program.

The answer to Mr. Sullivan's inquiry stated that the "legislative intent" statement in question "means that the Division's reimbursement to hospitals is to be reduced 20% from the level that would otherwise prevail." (Letter of 6/16/75 from Milton Barker, Fiscal Analyst, to Larry Sullivan). This answer further stated that "the Intent (sic) was stated to signal a change in [the legislature's] policy."

Upon receipt of this clarification, DHSS proceeded to carry out the stated intent of the second FCC. Hospitals were notified by DHSS that, henceforth, reimbursement for GR-Med services would be at the rate of 80%. The response of the hospitals was predictable. Objections were voiced, discussions ensued and finally litigation against DHSS was threatened. In response to this threat, DHSS requested this opinion from the Department of Law.

II. LEGAL ANALYSIS

A. "Legislative Intent"

The statement which has given rise to this opinion is labeled "Legislative Intent" in the second FCC's report on the budget. In fact, this statement is not one of "legislative intent", but rather a statement of a condition attached to the GR-Med appropriation.

"Legislative intent" is a term of art in law. It refers to the meaning of a statute as intended by the legislature and is discerned by an examination of the statute's terms and the context within which it was enacted, i.e., committee reports, studies, and debates, collectively referred to as the legislative history, involving the questioned legislation. The examination of the context becomes a factor, however, only when the meaning of a statute cannot be discovered by an examination of the statute's terms and the application of intrinsic interpretation aids. The general rule is that when a statute is found to be clear and unambiguous by an examination of its contents, resort will not be had to extrinsic evidence of the legislature's intent. United States v. Donruss Co., 393 U.S. 297 (1969). Though the circumstances of a case may lead to a different result, United States v. Kelley, 328 F.2d 227 (CA 6th, 1964); Willmeth v. Harris, 195 Kan. 322, 403 P.2d 973 (1965), it is the general rule that when the terms of a statute are clear,

its meaning must be derived therefrom, notwithstanding that the meaning therein conflicts with the purpose of the statute as set forth in committee reports. Helvering v. City Bank Farmers Trust Co., 296 U.S. 85 (1935).

With regard to the Health-Operating budget (Ch 209, SLA 1975), the specificity of its terms makes it inconceivable that an ambiguity in its provisions could be argued to exist. The provision of that budget to which the statement at issue applies reads:

General Relief Medical 3,210,400 3,210,400

The first figure refers to the amount appropriated to the GR-Med program, and the second figure refers to the amount of the appropriation which is to be taken from the General Fund. It would be quite difficult to conjure up a more unambiguous provision. Therefore, if the free conference committee report was wholly separate from the budget bill, the absence of any ambiguity in the GR-Med provision of the bill would probably preclude giving any legal effect to the "legislative intent" statement in question. 1/

In the present case, however, we are not actually faced with a "legislative intent" problem, as that phrase is used in law. The reason we are not is that in section 16(a) of the budget bill, the legislature made the free conference committee report "intent" statements a part of the law by incorporating them by reference into the budget bill. As a result, these statements are not "legislative intent" at all, but would, if valid, be conditions on or additional terms of, the particular appropriations to which they apply. The question then is may the legislature attach these conditions or terms to appropriations by incorporating them by reference into the budget bill.

1/ Were an ambiguity to be found in the GR-Med provision of the budget bill, the "legislative intent" statements in the final second FCC report prepared by the Legislative Finance Division would still be of no legal effect.

The documents to which a court may refer for legal legislative intent are those which can reasonably be presumed to contain or indicate the legislature's understanding of a particular provision of a statute at the time the vote on its passage was taken. Statements clarified, edited, and even added, by non-legislators and contained in a document prepared subsequent to the passage of an ambiguous statute do not conform to this requirement. They therefore would not be a part of the legal legislative history to which a court would turn for interpretive assistance.

B. Ambiguous Conditions

An initial difficulty with the "legislative intent" statement in question is its inherent ambiguity. It is phrased in terms of a directive to hospitals to absorb 20% of unpaid services rather than as a limitation on DHSS's rate of reimbursement to hospitals under GR-Med. Clearly, the legislature cannot mandate action on the part of hospitals in a bill appropriating funds for the operation of state government. Alaska Const., art II, §13.

In defense of the "intent" statement, one might argue that its meaning is that DHSS is to reimburse hospitals for GR-Med assistance at the rate of 80% of costs incurred. This interpretation does not, however, logically follow from the language used. "Unpaid services" would include not only services rendered to GR-Med enrollees, but also services rendered to anyone unable or unwilling to pay. As a result, it is conceivable that hospitals could absorb 20% of "unpaid services" and yet leave 100% of GR-Med costs to be reimbursed by DHSS.

We view this problem of ambiguity as being of a serious and substantial nature. However, because of the existence of factors permitting a more conclusive answer to the question presented here, we assume for purposes of this opinion only that the statement in question means DHSS is to reimburse hospitals providing GR-Med assistance at the rate of 80% of costs incurred in providing such assistance. We turn now to the three factors we consider decisive of the question presented.

C. Incorporation by Reference

The statement of "legislative intent" in question did not appear in the budget bill passed by the legislature. Instead, the legislature chose to incorporate by reference the "intent" statement of the second FCC report into the budget bill. (Sec. 16(a), Ch. 209, SLA 1975, quoted supra.)

Research into the question of whether an incorporation by reference of non-statutory material into a budget bill is legally permissible indicates that it may be. Courts have held that state statutes may incorporate by reference federal law "now in effect," Alaska S.S. Co. v. Mullaney, 180 F.2d 805 (9th Cir. 1950); prior statutes of that jurisdiction, Young v. United States, 178 F.2d 78 (9th Cir. 1950); existing statutes, rules or regulations of another state, and publications of United States boards and commissions, People v. International Steel Corp. et al., 226 P.2d 587, 590 (Cal. App. 1951) and cases cited

Catherine M. Lloyd
Deputy Commissioner

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therein; existing ordinances of that or another state and provisions of a treaty, Palermo v. Stockton Theaters, 172 P.2d 103 (Cal. 1946), subs opinion 195 P.2d 1, 32 Cal. 2d 55 (1948); existing federal rules or regulations, People v. Urban, 206 N.W.2d 511, 45 Mich. App. 255 (1973); and future statutes of the incorporating jurisdiction, Robertson v. Langford, 273 P. 150 (Cal. App. 1928).

The paramount consideration in the area of incorporation by reference appears to be not so much what the document to be incorporated is, but rather whether it is in existence at the time the incorporating act is passed. In re Forsstrum et ux., 38 P.2d 878 (Ariz. 1934). As shown by the following facts, we are faced here with a situation in which the material to be incorporated by reference was not in existence at the time the incorporating act was passed.

Shortly after the start of the 1975 legislative session, a computer printout of the Governor's proposed budget for fiscal year 1976 was prepared. This document did not contain "legislative intent" statements and was used as a workbook by the finance committees and the legislature as a whole.

Upon the completion of its review of the Governor's proposed budget, the House Finance Committee prepared a second computer printout of the proposed budget, containing the "intent" statements of that committee. A limited number of copies of this report were placed in the offices of key members of the House for use by them and other interested members. Approximately two weeks after this "distribution", the House voted to adopt the finance committee's report and "intent" statements and the finance committee's substitute for House Bill No. 70 (budget bill). (1975 H. Jour., p. 1227)

During the time, or shortly thereafter, that the Governor's proposed budget was moving through the House, the same procedure was taking place in the Senate. When both the House and Senate had voted to adopt the report of their respective finance committees, a free conference committee was appointed to resolve the differences between them. A second free conference committee was appointed when the first FCC was unable to reach a compromise.

The report of the second FCC was adopted by the Senate on June 6, 1975, (1975 S. Jour., p. 1518). However, we have been informed by the Director of the Legislative Finance Division

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that the second FCC met for the final time at noon on June 7, the last day of the 1975 legislative session. This meeting resulted in the addition of a number of statements of "legislative intent" which had not appeared in prior computer printouts. As a result of computer breakdowns and the normal exigencies that existed as the end of the session approached, these later statements of "intent", along with those inadvertently omitted from prior computer printouts, were typed onto the most recent printout then available. Apparently, one copy of this final report was then sent to each house sometime during the late afternoon of the final day of the session. (Neither the Department of Law nor the Legislative Finance Division have located either copy of this report.) A few hours after the arrival of this final report in the House, the House adopted the second FCC substitute for the Governor's original budget bill. (1975 H. Jour., p. 1688) It appears that the Senate never voted to adopt the statements of "intent" that were added during the last day of the session in as much as the Senate Journal indicates the Senate adopted the second FCC report on June 6, 1975, and the last meeting of the second FCC, at which "intent" statements were added to the report, occurred on June 7, 1975.

Following the adjournment of the legislature on June 7, the legislature's support staff began editing and clarifying the "intent" statements of the second FCC report. This process was completed in mid-June. During the week of June 23, a portion of the final version of the second FCC report was prepared by the Legislative Finance Division and sent to each legislator. This first portion contained the DHSS Health-Operating budget. On June 30, the remainder of the final report was sent. (Memo of 6/30/75 from Jay Hogan to Members of the Legislature) Some parts of this final report were the same as the report that emerged from the second FCC. Other portions did not appear in any version of the report but the final one. (See for example, "intent" statements at p. 169 of final FCC report, FY '76, Education-Operating Budget.)

It is these "intent" statements -- statements that were contained in some printouts and omitted from others, statements in documents containing hundreds of pages and available for perusal by legislators for but a matter of hours prior to voting thereon, statements that were subject to editing and clarification by staff members subsequent to the adjournment of the legislature, statements that apparently were not a part of the report passed by the Senate -- that are purported to have the force of law.

The document containing the intent statements which the legislature incorporated by reference into Chapter 209 is described in Section 16(a) of the law as ". . . the 'Free Conference Committee Report, FY '76, Operating and Capitol Budget' as published by the legislative finance division". Since there were a number of different FCC reports on the budget bill, the contents of which were not uniform, we must first ascertain to which report the quoted language refers.

The term "published" means to make known to people in general, to place in general circulation or to distribute or make available to the general public. Planned Parenthood Committee of Phoenix, Inc. v. Maricopa County, 375 P.2d 719, 722 (Ariz. 1962). It has been held to have the same significance as "circulate", State v. Elder, 143 P. 482 (N.M. 1914), and to possess connotations of wider distribution than that implied by words such as "communicate", "make known", or "divulge". U.S. v. Baltimore Post Co., 2 F.2d 761, 764 (D.C. Md. 1924).

It seems likely that the legislature did not have reference to the "final" report which was limited to a single copy for each house and furnished to them during the closing hours of the session. While this "final" report was prepared by the Legislative Finance Division, it was not, in fact, the final report which was subsequently published, after editing and clarification, and widely distributed. This latter report is what is generally known as and understood to be, the ". . . 'Free Conference Committee Report, FY '76, Operating and Capitol Budget' . . ." This interpretation of the legislature's reference is consistent both with apparent legislative intent and also with common understanding. Whether this incorporation by reference of future non-statutory material is lawful is the subject of the next section of this opinion.

D. Delegation of Legislative Powers

The primary legal question concerning the incorporation by reference of future non-statutory materials into present law is whether such a procedure constitutes an unlawful delegation of a legislative power.

Because of the complexity of the issues a legislature must address, the delegation of legislative powers has become a common tool for the implementation of the legislature's will. Probably the most common type of delegation is that which occurs

Catherine M. Lloyd
Deputy Commissioner

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when the legislature authorizes the promulgation of rules and regulations by an agency charged with the administration of a law. (See for example, AS 16.43.110, a section of Alaska's Limited Entry Act.) Courts have had little difficulty in upholding such delegations, so long as the legislature provides adequate standards for the agency's exercise of the delegated authority. See generally, Cooper, State Administration Law, vol. 1 ch. III, sec. 3.

A second common type of legislative delegation is a delegation of the authority to determine when a fact exists which is necessary to bring a law into effect. Some courts have approved such a delegation. Field v. Clark, 143 U.S. 649, 12 S. Ct. 495 (1891) (delegation by Congress to the President of power to determine when it is in the public interest to suspend provisions of law allowing free imports); Natural Milk Producer's Assn. v. City and County of San Francisco, 124 P.2d 25 (Cal. 1942) (standards for certified milk to be set by national and local dairy assoc's); Ex Parte Gerino, 77 P. 166 (Cal. 1904) (state medical school standards to be those set by an association of Medical colleges). Foeller v. Housing Authority of Portland, 256 P.2d 752 (Oregon, 1953) (authority to determine what areas are "blighted" given to housing authority). Other courts have not been so inclined. Agnew v. City of Culver, 304 P.2d 788 (Cal. App. 1957) (incorporation by reference of National Electrical Code held to be unlawful delegation); State v. Crawford, 177 P 360 (Kan. 1919) (to same effect). The only meaningful difference between the cases upholding this type of delegation and those in which the delegation was declared unlawful appears to be in the philosophy of the courts rendering the decisions.

A third type of lawful delegation by the legislature is a delegation of the authority to carry out activities ancillary to the legislative function, such as the ascertainment of facts and the making of recommendations to the legislature. Vita-Pharmacals, Inc. v. Board of Pharmacy, 243 P.2d 890 (Cal. App. 1952).

The drawing of a distinction between lawful and unlawful delegation of authority by the legislature is not always an easy task. The most-often-quoted statement of the distinction is found in Field v. Clark, supra, in which the United States Supreme Court, quoting the Supreme Court of Ohio, stated:

The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made. Id. at 693, 694.

Subsequent cases have reaffirmed the proposition that a legislature may not delegate its constitutional power to legislate i.e., the power to determine what the law shall be. Peters v. Frye, 223 P.2d 176 (Ariz. 1950); Tillotson v. Frohmler, 271 P. 867 (Ariz. 1928); Dixon v. Zick, 500 P.2d 130 (Colo. 1972); Smithberger v. Banning, 262 N.W. 493 (Neb. 1935); State v. Davis, 296 P.2d 240 (Oregon, 1956); Foeller v. Housing Authority of Portland, 256 P.2d 752 (Oregon, 1953); State ex rel O'Connell v. Yelle, 320 P.2d 1086 (Wash. 1958).

In the present case, the legislature passed a bill which provides that all "intent" statements that may appear in the final second FCC report on the budget are to be a part of the law. (Ch. 209, sec. 16(a), SLA 1975). The legislature then adjourned, leaving to its support staff the task of preparing these statements with no subsequent review by the legislature. This procedure amounts to the legislature passing a law stating "contents to follow", and then turning over to its staff, without legislative review, the function of preparing the contents.

It is our opinion that this procedure for giving legal effect to "legislative intent" statements constitutes a delegation of the legislature's power to legislate in violation of Alaska Const., art. II, sec. 1.

As a further indication of the invalidity of the legislature's action here, the following very real possibility is presented. The final budget bill was sent to the Governor on June 12, 1975 (1975 H. Jour., p. 1690). The Governor then had 20 days within which to veto the bill or it would become law without his signature. (Alaska Const., art. II, §17) Yet, there was no assurance that the FCC report containing a part of that bill would be completed prior to the end of the 20 day period. The Governor's alternatives could well have been: (1) allow to become law or sign into law a bill, some of the contents of which were unknown to him; or (2) veto the entire appropriation for state government to avoid the risk.

In fact, the Legislative Finance Division's report was not sent out until June 30, the day the Governor chose to sign the bill and only two days before the bill would have become law without his signature. (1975 H. Jour., p. 1707) The Governor's constitutional powers are hollow indeed if he is to be expected to sign or veto laws before their contents are presented to him.

E. Amendment of Existing Law

To this point, this opinion has addressed the legality of the procedure by which the legislature attempted to give legal effect to statements of "legislative intent". Assuming, however, that the legislature had proceeded (or were to proceed) in the manner required to incorporate by reference, the result would still be the same, because whether or not there was a proper incorporation by reference, the legislature still may not use an appropriations bill to make or amend substantive law.

AS 47.25.130 and AS 47.25.170 provide that DHSS is to determine the amount of assistance to be granted eligible persons under the GR-Med program. This statutory authority necessarily requires that DHSS make the determination of reimbursement rates for hospitals providing GR-Med care.

The legislative intent statement in question is in conflict with the provisions of AS 47.25.130 and AS 47.25.170 insofar as it purports to affect the power to determine rates which it had delegated by statute to DHSS. By the standard canons of statutory construction, this later expression of the will of the legislature, were it valid, would constitute an implied repeal of the above statutory provisions to the extent that they conflict with the "legislative intent" statement in question.

The question that arises is, can the legislature amend statutory law by incorporating into the general appropriations bill an as yet unpublished committee report containing the amending language?

There is no doubt that the legislature could amend the two statutory provisions cited above, either in accordance with the amending rules of the Uniform Rules of the Alaska State Legislature or by enacting legislation containing the terms of the intent statement and thereby amend by implication. The legislature cannot, however, amend substantive law by an appropriations bill.

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Article II, section 13 of the Alaska Constitution provides that appropriation bills "shall be confined to appropriations". The Alaska Supreme Court has never addressed the question of what elements constitute "appropriations". Courts of other jurisdictions having similar constitutional provisions have held that certain conditions or limitations may properly be attached to appropriations in a budget bill. State ex rel. Sego v. Kirkpatrick, 524 P.2d 975 (N.M. 1974); State ex rel. Holmes v. State Board of Finance, 367 P.2d 925 (N.M. 1961); State ex rel. Lucero v. Marron, 128 P. 480 (N.M., 1912). The holding of each of these cases is that such conditions or limitations are acceptable so long as they are germane to the appropriation to which they are attached. There is, however, a limit to such conditions. Faced with an appropriation bill containing a condition fixing salaries, the Missouri Supreme Court stated:

An appropriation bill is just what the terminology imports, and no more. Its sole purpose is to set aside moneys for specified purposes, and the lawmaker is not directed to expect or look for anything else in an appropriation bill except appropriations. As to these he is charged by the Constitution to look and watch for two things: (a) The various subjects of the bill; and (b) the account or accounts for which the payment of the State's moneys are being set apart . . . Here we have an appropriation act which not only appropriates money for the various subjects embraced therein, but which attempts to fix and regulate all salaries affected by the act which either have not been fixed by any statute, or not definitely fixed, which would include all salaries where the maximum alone was named. That the legislature has the right by general statute to fix salaries is beyond question, but has it the right to do so by means of an appropriation act? We think not. State ex rel. Hueller v. Thompson, 289 S.W. 338, 340-41 (Mo., 1926).

Article 4, section 25 of the Missouri Constitution is substantially the same as article II, section 13 of the Alaska Constitution, quoted supra, in that it limits appropriation bills to appropriations. The reason for such a provision was succinctly addressed by the Thompson court:

As has been observed in well-reasoned cases, if the practice of incorporating legislation of general character in an appropriation bill should be allowed, then all sorts of ill conceived, questionable, if not viscious, legislation could be proposed with the threat, too, that, if not assented to and passed, the appropriations would be defeated. Id., at 341.

A second factor, present in the instant case but not in Thompson, lends additional support to the result reached by the Missouri Supreme Court. By incorporating the "intent" statement of the FCC report into the budget bill, the legislature has in effect amended AS 47.25.130 and AS 47.25.170, and changed DHSS policy of 100% reimbursement to hospitals, without any notice to the institutions which are affected by such a change. In the absence of such notice, required as to subject in the title to each bill, Alaska Const., art II, §13, hospitals were given no opportunity to express their position or to present to their representatives in the legislature their views as to the wisdom of such legislation. This notice, both to members and the affected public, is, of course, the very purpose of the requirement contained in article II, section 13, of the Alaska Constitution. United States v. Hardcastle, 10 Alaska 254 (1942); Industrial Development Authority of Pinal County v. Nelson, 509 P.2d 705 (Ariz. 1973); Bensakey Tp. School Dist. v. County Com'rs of Bucks County, 303 A.2d 258 (Pa. 1973).

F. Effect on Governor's Veto Powers

We believe that the above more than suffices to answer the question you have presented. Should any doubts remain, we raise an additional problem engendered by the legislature's action in this matter.

Article II, section 15 of the Alaska Constitution provides:

The governor may veto bills passed by the legislature. He may, by veto, strike or reduce items in appropriation bills. He shall return any vetoed bill, with a statement of his objections, to the house of origin.

Prior case law has established that the Governor cannot veto conditions attached to an appropriation and leave only

the appropriation standing. Weldon et al. v. Ray et al., Op. No. 202-57321 (Iowa, May 12, 1975); State ex rel. Seago v. Kirkpatrick, supra at 981. In the normal situation, the Governor must decide whether the conditions attached to a particular appropriation are so onerous as to necessitate a veto of the entire appropriation. Given such a situation, the Governor is most apt to allow an appropriation to stand, notwithstanding attached conditions with which he disagrees, in order to assure the funding of the subject of the appropriation. The situation in the present case is somewhat different.

The Governor is here presented with two alternatives: (1) veto the appropriation and thereby jeopardize the existence of the GR-Med program; or (2) allow existing law to be amended by a provision which, were it in a separate bill, he would veto. This presents the very situation which the single-subject rule, Alaska Const. art. II, §13, was intended to prevent, that is, where a legislator or governor is compelled to accept a provision he does not favor in order to get one that he does favor. It is also, unquestionably, one of the reasons for the rule that an appropriations bill may include only appropriations. Alaska Const., art. II, §13. See, Suber v. Alaska State Bond Comm., 414 P.2d 548 (Alaska, 1966); Washington State School Director's Ass'n v. Department of Labor and Industries, 510 P.2d 818 (Wash. 1973).

We are, therefore, of the opinion that the "legislative intent" statement in question, as well as all other such statements of the second FCC report on the budget bill, do not possess any legal force or effect. The court's statement in State v. Culver, supra, involving the attempted incorporation by reference of the National Electrical Code, is equally applicable to the incorporation by reference of "legislative intent" statements.

. . . If the Legislature desires to adopt a rule of the National Electrical Code as a law of this state, it should copy that rule, and give it a title and an enacting clause, and pass it through the Senate and the House of Representatives by a constitutional majority, and give the Governor a chance to approve or veto it, and then hand it over to the secretary of state for publication. Id. at 361.

The purpose of this opinion has been to examine the legal force of a statement of "legislative intent" and thereby

Catherine M. Lloyd
Deputy Commissioner

January 27, 1976

- 16 -

assist your department in assessing the strength of its position in the face of a threatened law suit. Though it is our opinion that the statement in question has no legal force, we do not mean to imply, nor should it be inferred, that your department should not comply with it. Because the "legislative intent" statement is not legally cognizable as an expression of the legislature's will, it does not mean that the statement is not in fact an expression of that will.

Should you choose to implement a policy of 80% reimbursement to hospitals providing GR-Med assistance, you must adopt a regulation to that effect pursuant to the Administrative Procedure Act. You may also wish to resolve the matter by asking the legislature to set the policy by amending the basic GR-Med statute. We will be pleased to have such legislation drafted and introduced if that is your wish.

Sincerely,

AVRUM M. GROSS
ATTORNEY GENERAL

By:

Richard M. Burnham
Assistant Attorney General

RMB:jf

LAKE OTIS CLINIC, INC.
POST OFFICE BOX 4-1539
ANCHORAGE, ALASKA 99509
907 - 277-6219

June 28, 1976

Mr. Palmer McCarter
Director
Department of Community & Regional Affairs
Division of Local Government Assistance
State of Alaska
Pouch B
Juneau, Alaska 99811

Re: Revenue Sharing Regulations

Dear Mr. McCarter:

The material you forwarded to me concerning the Revenue Sharing regulations proposed was received on June 24, and I thank you for it.

Comments concerning the regulations are as follows:

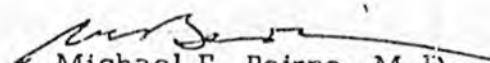
(9) HOSPITAL CONSTRUCTION AID:

(9) - (C) : The law calls for total project costs, but this regulation (C) would change that to some project costs. I don't think this is the legislative intent, nor would it appear from reading the statute that the Department was authorized to change the law. We would of course appreciate attention to this point.

(9) - (D) : On reading the statute, there certainly is no lack of clarity that the Revenue Sharing funds could flow directly to a facility sponsor whether in municipality or outside a municipality. The statute appears to very clearly permit a choice. The regulation proposed would eliminate that choice and require all revenue sharing funds to go to the municipality. That would not appear to be legislative intent.

It would please me a great deal if the Department would take these observations into consideration prior to adopting the regulations.

Sincerely,


Michael F. Beirne, M.D.
President

mfb:bp

RECEIVED
JUL 2 1976

DEPT. OF COMMUNITY
& REGIONAL AFFAIRS

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ORSINI

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2. SCR 14
3. AS 43.18.010(h)
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6. 19 AAC 30.140(3)
7. AG's letter to Dept of HESS, 8/28/72, approving HESS's use of Hill-Burton Regs. as a guideline in determining "total project costs" re: AS43.18.010(j)
8. AS 43.18.100
9. AS 43.18.300
10. AS 46.03.030
11. Hill-Burton Regulations
12. Memo to Chairman, Senate C&RA from AA, Senate C&RA plus attachments 1-14

ATTACHMENTS

- # 1 SB 42
- # 2 CSSB 42 (Local Government)
- # 3 CSSB 42 (HEW)
- # 4 CSSB 42 (Finance)
- # 5 HCS CSSB 42
- # 6 CSSB 42 (Finance) am H
- # 7 HCSSB 383 am H, p.10, line 26, Ch 71, SLA 72
- # 8 HB 42, p.2, line 14
- # 9 CSHB 42, p.2, line 11
- #10 CSHB 42 (HESS) p.2, line 13
- #11 CSHB 42 (Finance) p.2, line 8
- #12 CSHB 42 (Finance) am S, p.2, line 11, Ch 87, SLA 73
- #13 Ch 127, SLA 1974
- #14 Ch 265, SLA 1976

Hill-Burton Allowable and Non-Allowable Cost

Acquisition of Site	<u>Non-Allowable</u> *
Site Clearance	<u>Allowable</u>
Relocation of Utilities	<u>Non-Allowable</u>
Sidewalks	<u>Allowable</u>
Driveways	<u>Allowable</u>
Parking Areas	<u>Allowable</u>
Landscaping	<u>Allowable</u>
Underground Sprinkler System	<u>Allowable</u>
Connection to Utilities	<u>Allowable</u>
Off-Site Improvements	<u>Non-Allowable</u>
Advertising	<u>Allowable</u>
Insurance Coverage	<u>Allowable</u>
Architects' Fees	<u>Allowable</u>
Consultant Fees	<u>Allowable</u> *
Inspection	<u>Allowable</u>
Equipment	<u>Allowable</u> *
Surplus Property	<u>Allowable</u>
Donated Land, Equipment, Services	<u>Non-Allowable</u> *
Bonus Payments to Contractor	<u>Non-Allowable</u>

*(exceptions)

Hill-Burton Allowable and Non-Allowable Cost (2)

Damage Judgments Against Sponsor	<u>Non-Allowable</u>
Maintenance of Records	<u>Allowable</u>
Sales Tax	<u>Allowable</u>
Space for the Private Practice of Medicine	<u>Non-Allowable</u>
Space to be Leased to Radiologist or Pathologist	<u>Allowable</u>
Space for Revenue Purposes	<u>Non-Allowable</u>
Space and Equipment for Religious Activities	<u>Allowable</u>
Fund Raising Expenses--- Memorial Plaques	<u>Non-Allowable</u>
Public Health Facilities in Private Nonprofit Hospitals	<u>Non-Allowable</u>
Legal Council's Fees	<u>Non-Allowable</u>
Gift Shops Flower Shops Snack Bars	<u>Allowable</u>
Unfinished Space	<u>Non-Allowable</u>

*(exceptions)

Hill-Burton Allowable and Non-Allowable Cost (3)

Books	<u>Allowable</u> *
Television	<u>Allowable</u>
Short-term Care Facilities	<u>May Be Allowed</u>
Long-term Care Facilities	<u>May Be Allowed</u>
Nurses' Dormitory	<u>May Be Allowed</u>
Fallout Protection	<u>Allowable</u>
Housing Staff for Nursing Home	<u>Non-Allowable</u> *
Pictures and Murals	<u>Non-Allowable</u> *
Floor Finish Materials	<u>Allowable</u> *
Quarters for Residents and Interns	<u>Allowable</u> *
Costs Allowable and Not Allowable in Guaranteed Loan and Direct Loan Projects	<u>Non-Allowable</u> *

*(exceptions)

HOSPITAL CONSTRUCTION AID at \$2500 per bed

Applicant Approved	Grant Entitlement	Cost of Services	Total Entitlement	Prorated Entitlement
<u>Fiscal Year 1977</u>				
Municipality of Anchorage	810,000	-0-	810,000	775,477
City of Fairbanks	70,000	10,500	80,500	77,069
<u>Fiscal Year 1976</u>				
Greater Anchorage Area Borough before unification	194,685	-0-	194,685	194,685
Municipality of Anchorage after unification	740,315	-0-	740,315	740,315
Petersburg	4,116	-0-	4,116	4,116
<u>Fiscal Year 1975</u>				
Greater Anchorage Area Borough	319,596	-0-	319,596	319,596
Lake Otis Clinic	312,500	-0-	312,500	312,500
Kenai Peninsula Borough	29,243	3,071	32,314	32,314
City & Borough of Juneau	545	41	586	586
Fairbanks North Star Borough	12,328	925	13,253	13,253
<u>Fiscal Year 1974</u>				
City & Borough of Juneau	6,751	-0-	6,751	6,206
Fairbanks North Star Borough	152,708	-0-	152,708	142,380
Greater Anchorage Area Borough	343,446	-0-	343,446	315,719
Kenai Peninsula Borough	52,921	-0-	52,921	48,649

HOSPITAL CONSTRUCTION AID at \$2500 per bed

Applicants Approved	Grant Entitlement	Cost of Services	Total Entitlement	Prorated Entitlement
<u>Fiscal Year 1973</u>				
City & Borough of Juneau	86,994	-0-	86,994	80,243
Fairbanks North Star Borough	290,000	-0-	290,000	267,496
Greater Anchorage Area Borough	100,000	-0-	100,000	92,240
Kenai Peninsula Borough	75,000	-0-	75,000	69,180
<u>Fiscal Year 1972</u>				
Fairbanks North Star Borough	290,000	-0-	290,000	289,796
Kenai Peninsula Borough	79,175	-0-	79,175	79,119
City & Borough of Juneau	167,500	-0-	167,500	167,382

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K — STATE CAPITOL
JUNEAU 99801

August 28, 1972

WILLIAM A. EGAN, GOVERNOR

DATE	ROUTE TO:	✓
	JF	✓
	FILE	

The Honorable Frederick McGinnis
 Commissioner
 Department of Health and Social
 Services
 Juneau, Alaska 99801

Office of the
Commissioner

SEP 1 1972

DEPARTMENT OF LAW

Dear Commissioner McGinnis:

You have asked our opinion of whether your present method of determining "total project costs" of eligible medical construction by relying on promulgations of the Department of Health, Education and Welfare pursuant to Title VI of the Public Health Services Act as amended, meets the requirements of AS 43.18.010(j). It is our opinion that the use of these promulgations is within the scope of your discretion in the administration of this program.

AS 43.18.010(j) states as follows:

If construction of a facility began after January 1, 1968 and state matching aid for construction approved for payment to the local government or other facility sponsor constitutes less than 25 per cent of the total project cost, the state shall pay to the local government or other facility sponsor each fiscal year a sum equal to \$2,500 a bed for the maximum number of beds provided for in the construction design of the facility. State aid provided for in this subsection shall continue until the local government or other facility sponsor has received an amount which, combined with state matching money for construction of the facility, equals 25 per cent of the total project cost. No funds received for construction shall be used for any other purpose. (Emphasis added)

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SEP 1 1972

Comprehensive Health
Planning Office

As AS 43.18.010(j) is the state counterpart of Title VI of the Public Health Services Act, 42 USCA 201 et seq., it is appropriate that you may follow standards promulgated in interpretation of that Act. To read the term "total project costs"

as used in AS 43.18.010(j) literally would mean allowing all costs even if lavish, wasteful or illegal. Since clearly that could not have been what was intended when the legislature enacted this section, your department has the implied duty to allow only those costs which are in line with the statutory purpose of this section. In this case, since no statutory guidelines are set out, you have broad discretion to define the meaning of such terms in accordance with the statutory purpose. Naturally then, these rules of the Department of Health, Education and Welfare, interpreting 42 USCA 201 et seq., may be used to assist you in defining the meaning of these statutory terms. In this case, however even more evidence of the legislature's intention in passing AS 43.18.010(j) can be seen by looking at similar state grants for other purposes.

AS 43.18.100 granting aid for school construction goes into great detail to specifically provide for the meaning of "costs of school construction." AS 43.18.100(f)(2). Since no mention of these items is made in AS 43.18.010(j) it is reasonable to assume that they were not intended to be included in the computation of "total cost" under that section and this is the general effect of following the Federal regulations.

Similarly in AS 43.18.300 providing grants for the construction of Community Facilities, express allowance is made for the cost of "feasibility studies". This term is unnecessary if "cost of construction" were to be read literally. Again, since no similar language is included in AS 43.18.010(j) it can be assumed that these costs were also not to be included.

Finally, in AS 46.03.030(b) providing funds for the cost of water systems, it is provided that the amount received is computed on the basis of those costs "not borne by the federal government". In this case, the regulations you are relying on in effect specifies those costs which will not be borne by the federal government. If it were the legislature's intention in passing AS 43.18.010(j) to pick up those costs not borne by the federal government, it would have added a similar phrase to that in AS 46.03.030(b), particularly as these two sections were before the legislature during the same session and were passed within a few days of one another.

In conclusion, it is within the scope of your administrative discretion to utilize the guidelines promulgated by the Department of Health, Education and Welfare in defining the term "total project cost" of eligible medical facilities under the provisions of AS 43.18.010(j).

Very truly yours,

JOHN E. HAVELOCK
ATTORNEY GENERAL

By: 

Peter A. Michalski
Assistant Attorney General

(11)

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
Public Health Service
Rockville, Maryland 20852

August 12, 1971

HEALTH GRANTS MANUAL NOTICE
S-110 FOR TITLE 2, CONSTRUCTION AND MODERNIZATION
OF HOSPITALS AND MEDICAL FACILITIES

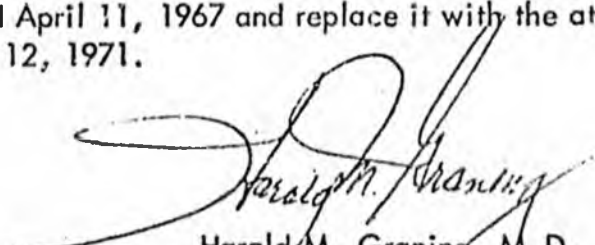
To: Department of Health, Education, and Welfare Regional
Offices and State Agencies Concerned with the Administration
of Title VI of the Public Health Service Act, as amended

Subject: Transmittal of Part 24-2, Project Costs in Which the Federal
Government Can and Cannot Participate

Attached is Part 24-2 of the Health Grants Manual. This revision supersedes
Part 24-2 dated April 11, 1967.

Filing Suggestion

Remove Part 24-2 dated April 11, 1967 and replace it with the attached
Part 24-2 dated August 12, 1971.


Harald M. Graning, M.D.
Assistant Surgeon General
Director, Health Care
Facilities Service

- 24-2.1 Purpose
- 24-2.2 Definitions
- 24-2.3 Costs Allowable and Nonallowable for Federal Participation
- 24-2.4 Costs Allowable and Nonallowable in Guaranteed Loan and Direct Loan Projects

24-2.1
Purpose

The purpose of this Part is to define necessary costs and establish principles for determining costs which are and are not allowable for Federal participation or which may or may not be included in guaranteed loans or direct loans in the construction and modernization of projects under Title VI of the Public Health Service Act, as amended. This Part does not treat other factors which affect the approvability of applications.

24-2.2
Definitions

Necessary
Costs

A. Only costs which are determined to be necessary costs of construction or modernization can be approved for Federal participation. Costs resulting from construction or modernization which are excessive, elaborate, or not appropriate to the specific needs of the facility are not allowable.

Pick-up
Projects

B. For pick-up projects, Federal participation is limited to the cost of completing the facility. (Phased construction does not connote a pick-up project). The uncompleted portion consists of the following:

1. Actual construction work to be completed which includes building materials and fixed equipment delivered to the site but not yet incorporated in the building;

24-2.2 Definitions (cont'd)

Pick-up Projects (cont'd)

2. Movable equipment to be delivered;
3. Services to be rendered in connection with the uncompleted construction and equipping of the project.

Incurrence
of Costs

4. Project construction costs have been incurred when there is an unconditional obligation to pay for work which has been performed or services rendered. An unconditional obligation to pay arises when work has been performed or services have been rendered in accordance with the terms of the contract. In the case of equipment costs, fixed equipment costs are incurred when such equipment has been installed, and movable equipment costs are incurred when such equipment has been delivered to the possession and control of the applicant.

24-2.3

Costs Allowable
and Not Allowable
for Federal
Participation

The following are project costs in which Federal participation may and may not be allowed. This list is not exhaustive but includes costs which will be most frequently encountered:

Definition
of Site

- A. Site is the tract or plot of land on which the facility is or will be located and which is required for the construction and operation of the facility and which is defined in the approved application.

24-2.3 Costs Allowable and Not Allowable for Federal Participation (cont'd)

* Acquisition
of Site

- B. The cost of the site, including acquisition costs such as title search, title clearance and settlement fees, is not allowable, except that the portion of the site on which a public health center is located is allowable. (The cost of the site survey and soil investigation for a public health center or other project is allowable).

Site
Clearance

- C. It will not be necessary to clear the site of encumbrances, such as easements and rights-of-way, provided they do not interfere with the building or its appurtenances. If the site is to be cleared of existing buildings and improvements, such as overhead power transmission lines and underground water, gas or sewerage lines, the cost is allowable, provided an allowance for salvage is reflected in the bid of the contractor who performs the work.

Relocation
of Utilities

- D. The cost of relocating utilities and services including acquiring rights-of-way, easements or other interest in land at either the new or old location of the utilities is not allowable.

Sidewalks

- E. The cost of sidewalks necessary for the use and operation of the facility and those necessary to connect sidewalks on the site with adjacent public facilities, such as roads and sidewalks, is allowable even though such connecting links extend beyond the site line.

Driveways

- F. The cost of driveways located on the site and those necessary to connect with public roads which are contiguous to the site is allowable. (See "J" below)

24-2.3 Costs Allowable and Not Allowable for Federal Participation (cont'd)

Parking Areas

- G. The cost of constructing parking areas on the site, including multistory and subterranean parking which is essential to the operation of the facility, is allowable. In the case of multistory and subterranean parking, the sponsor must clearly indicate in the application (1) that the size and the nature of the area are necessary to serve the project under construction, and (2) that other suitable parking areas are not available or that the cost of acquiring such areas is prohibitive.

Landscaping

- H. The cost of landscaping, including architectural service, seeding, sprigging or sodding of the site and the planting of trees and shrubs is allowable to the extent that the cost is reasonable. The cost of such service is to be reviewed on an individual basis.

Underground
Sprinkler System

- I. The cost of installing an underground lawn sprinkler system is allowable.

Connections
to Utilities

- J. The cost of connecting to utilities is allowable, provided such utilities are located in streets, roads, or alleys contiguous to the site. If the building site is distantly located with respect to public roads or streets so that excessively long utility and driveway connections are required between the building site and the public road, the cost of the excessive utility and driveway connections will not be allowable for Federal participation.

24-2.3 Costs Allowable and Not Allowable for Federal Participation (cont'd)

Off-Site
Improvements

- K. The cost of off-site improvements such as roads, sidewalks, and utilities including sewer lines extending beyond the public streets immediately adjacent to the project, is not allowable.

Advertising

- L. Advertising costs incurred in obtaining competitive bids are allowable.

Insurance
Coverage

- M. The cost to the project sponsor of insurance coverage during construction is allowable.

Allowable insurance costs include the following:

1. The cost of the sponsor's liability insurance.
2. The cost of insurance covering construction in the event the insurance is carried by the sponsor rather than the contractor.
3. The cost of insurance carried by the sponsor to protect equipment purchased by the sponsor against loss or damage.

Architects'
Fees

- N. The cost of architectural services rendered in connection with the project as approved is allowable. This includes the cost of plans and specifications prepared by State or political subdivisions in cases where such agencies are the sponsors of approved projects.

The architect's fee may be based on a contract between the architect and the sponsor setting forth the services to be provided and the manner in

24-2.3 Costs Allowable and Not Allowable for Federal Participation (cont'd)

Architects' Fees (cont'd)

which the total fee will be determined. The architect may also be engaged on a payroll basis. In those cases where plans and specifications are prepared by a public agency, the cost may be established by fee or by computation of actual cost to the agency concerned.

Regardless of the manner in which the fee is determined, Federal participation is limited to an amount which is commensurate with accepted fees within the area.

Payments to the architect for work which is not a part of the approved project, abandoned work, or work not put under contract and any payment to the architect which is not provided for in the architectural contract are not allowable.

Consultant
Fees

- O. Consultant fees are allowable for financial feasibility studies and to the extent that they relate to the construction or equipping of the project. The cost of conducting feasibility studies to determine need for construction or modernization of a facility is not allowable.

Any portion of a consultant's fee which involves services performed in developing operational procedures, staffing the facility, or other functions not related to the construction and equipping of the facility is not allowable.

24-2.3 Costs Allowable and Not Allowable for Federal Participation (cont'd)

Inspection

- P. The cost of supervision and inspection provided by the architect or an employee of the applicant at the site to insure that the completed work conforms with approved plans and specifications is allowable.

In those cases where the State or political subdivision is the approved applicant and supervision and inspection services are performed by such State or political subdivision, reasonable costs of such services are allowable.

Equipment

- Q. The actual cost of all essential initial equipment, and equipment for the purpose of providing a service not previously provided in the community, purchased (delivered to the control of the applicant) for the approved project after the filing of the initial part of the application with the regional office is allowable. Such costs include the cost of transportation, storage and placement of equipment. The cost of reconditioning equipment which will be used in the project is allowable. The cost of donated equipment is not allowable.

24-2.3 Costs Allowable and Not Allowable for Federal Participation (cont'd)

Equipment (cont'd)

Essential initial equipment may include equipment made necessary by the expansion, remodeling, alteration, and modernization of an existing building, even though the equipment may not be located in expanded, remodeled, altered or modernized areas, except that equipment may not be located in areas that do not comply with the safety requirements of Appendix A of the Regulations.

The cost of equipment which is being purchased through a conditional sales contract is not allowable. If the hospital can demonstrate that the contract has been completed and title transferred to the applicant, the cost of the equipment is allowable. Purchases under other installment sales contracts where the applicant is owner of the equipment including those in which there is a chattel mortgage are allowable. The determining factor is whether the applicant owns the equipment or whether the vendor owns the equipment.

Surplus
Property

- R. Costs incurred by the sponsor in packing, handling, and transporting Federal surplus equipment are allowable.

24-2.3 Costs Allowable and Not Allowable for Federal Participation (cont'd)

- | | |
|---|--|
| Donated Land,
Equipment,
Services | S. The value of donated land, material, equipment, or services including donated labor <u>is not allowable</u> . If a rebate or refund is received from a firm or individual from whom the material, equipment, land or service was purchased, only the net cost to the sponsor <u>may be allowed</u> . This does not mean that <u>individuals, business firms, or other organizations</u> from whom a sponsor makes purchases may not make a donation to the building fund. However, such a donation may not be related to the sale or rendering of a service if the sponsor claims such costs for Federal participation. |
| Bonus Payments
to Contractor | T. Bonus payments made by the sponsor to the contractor for completing work in advance of a specified time <u>are not allowable</u> . |
| Liquidated
Damages | U. Any amounts collected by sponsors on bid bonds of defaulting bidders or as liquidated damages for failure of a contractor to complete the work on time shall be disregarded in determining the cost of construction for the purpose of calculating the Federal share. |
| Damage
Judgments
Against
Sponsor | V. Expenses incurred as damages arising out of the construction or equipping of the project, whether established by judicial determination, arbitration, negotiation, or otherwise, <u>are not allowable</u> . |

24-2.3 Costs Allowable and Not Allowable for Federal Participation (cont'd)

- | | |
|--|--|
| Maintenance of Records | W. Costs incurred by the project sponsor in the preparation and maintenance of administrative, technical, fiscal and accounting records in connection with the approved project <u>are allowable</u> . |
| Sales Tax | X. The nonrefundable sales tax and Federal excise tax which a project sponsor pays in connection with constructing and equipping an approved project <u>are allowable</u> . |
| Space for the Private Practice of Medicine | Y. The cost of office space intended solely for the conduct of the private practice of medicine or dentistry <u>is not allowable</u> . |
| Space to be Leased to Radiologist or Pathologist | Z. The cost of space to house the radiology and pathology services of the hospital and the equipment therein which is to be leased for operation to a radiologist or pathologist <u>is allowable</u> provided the hospital retains authority to control the purposes for which the space is utilized in order to insure that services to be provided in such space are consistent with the needs and requirements of the hospital and the community which it serves. |
| Space for Revenue Purposes | AA. Costs for office and other space constructed solely for revenue purposes or for the convenience of the occupants as contrasted with the operation of the facility <u>are not allowable</u> . |
| Space and Equipment for Religious Activities | BB. The cost of space and equipment for the provision of spiritual or religious services to patients and staff in eligible medical facilities <u>is allowable</u> where appropriate to the type of facility involved and reasonable in amount. |

24-2.3 Costs Allowable and Not Allowable for Federal Participation (cont'd)

Space and Equipment for Religious Activities (cont'd)

Costs of any distinctly sectarian or denominational features of construction or the cost of equipment characteristic of, or peculiar to, any sect or denomination are not allowable.

Fund Raising
Expenses --
Memorial
Plaques

CC. Costs incurred by the sponsor in raising the non-Federal share of the cost of the project are not allowable. This includes memorial plaques inscribed with the names of persons, business firms or other organizations, or book of remembrances used to give recognition to contributors.

Public Health
Facilities in
Private
Nonprofit
Hospitals

DD. The cost of constructing and equipping facilities in a private nonprofit hospital which are intended for the provision of public health services by State or local health departments is not allowable. (Comptroller General's opinion).

Legal
Counsel's
Fees

EE. Costs of legal services are not allowable other than those incidental to the acquisition of sites for public health centers. (See 24-2.3B).

Gift Shops
Flower Shops
Snack Bars

FF. The cost of space and equipment providing gift shop, flower shop, and snack bar services is allowable. The need for and size of such space is to be reviewed in the light of patient needs and operation of the facility.

Unfinished
Space

GG. The cost of any unfinished or partially finished space is not allowable. This does not include space in a basement, unfinished or partially finished, resulting from excavation work necessary for the construction of the building in conformance with the approved plans and specifications.

24-2.3 Costs Allowable and Not Allowable for Federal Participation (cont'd)

- Books HH. The cost of reference books to be used by the professional and technical staff is allowable. Purchase of these books is restricted to those which are essential and necessary to the need and operation of the facility. The cost of other books, periodicals and subscriptions to journals and magazines for either patients or staff is not allowable.
- Television II The cost of purchasing and installing television systems, including the antenna system, is allowable. A closed television system is allowable where the program of the facility justifies such a system.
- Short-term
Care Facilities 1. Federal participation may be allowed in the cost of television sets for day rooms and patient rooms.
- Long-term
Care Facilities 2. Federal participation may be allowed in the cost of television sets for day rooms and patient rooms.
- Nurses'
Dormitory 3. Federal participation may be allowed in the cost of a television set for the main lounge.
- Fallout
Protection JJ. Costs in providing reasonable radiation fallout protection including the cost of space necessary to the establishment of a radiation monitoring station are allowable.
- Housing
Staff for
Nursing Home KK. The cost of quarters to house staff of a nursing home is not allowable. The cost of limited quarters for a nurse on 24-hour duty may be allowed in an approved project.

24-2.3 Costs Allowable and Not Allowable for Federal Participation (cont'd)

Pictures
and Murals

LL. The cost of the painting of murals is not allowable. The cost of pictures is allowable to the extent that the number and cost are reasonable.

Floor
Finish
Materials

MM. The cost of only one type of floor finish material is allowable in any room or area. Thus the cost of carpeting installed on a bare concrete slab is allowable while the cost of carpeting installed on a resilient tile surface is not allowable. Decorative rugs of less than room size are exempted from this requirement. (Soft flooring material such as carpeting and resilient tile must have a flame spread rating as required by Public Health Service publication No. 930A-7).

Quarters
for Residents
and Interns

NN. The cost of quarters for residents and interns whether located in the hospital building or in a separate building is allowable. The cost of quarters to house families of residents and interns is not allowable. (Housing for the nursing staff of a hospital is also allowable. See Part 24-1).

24-2.4
Costs
Allowable
and Not
Allowable in
Guaranteed
Loan and
Direct Loan
Projects

- A. The guidelines set forth in 24-2.1 through 24-2.3 of this Part apply to projects involving guaranteed loans or direct loans.
- B. Costs incident to the loan such as legal fees, financing fees, or interest during construction are not allowable.
- C. Loans guaranteed by HEW or direct loans made by HEW cannot be used to refinance an existing indebtedness.

24-2.4 Costs Allowable and Not Allowable in Guaranteed Loan and
Direct Loan Projects (cont'd)

NOTE:

Applicants who seek guaranteed loans or direct loans must arrange for financing during construction (short term financing including interest). While a commitment will be made by HEW upon initial approval of an application to guarantee a loan or to make a direct loan, as the case may be, the actual guarantee or purchase of bonds with payment of interest subsidy will not be effected until construction of the project is completed.

Title 42—PUBLIC HEALTH

Chapter I—Public Health Service, Department of Health, Education, and Welfare

SUBCHAPTER D—GRANTS

PART 53—GRANTS, LOANS AND LOAN GUARANTEES FOR CONSTRUCTION AND MODERNIZATION OF HOSPITALS AND MEDICAL FACILITIES

On July 29, 1971, a notice of proposed rule making was published in the FEDERAL REGISTER (36 F.R. 14016) proposing a revision of 42 CFR Part 53, relating to grants, loans and loan guarantees for the construction and modernization of hospitals and medical facilities under Title VI of the Public Health Service Act (42 U.S.C. 291 et seq.).

Interested persons were invited to submit, within 30 days, written comments, suggestions or objections regarding the proposed regulations.

A number of responses were received. The substance of these comments, and the Department's response thereto, is summarized below.

Changes have been made in the final regulations as a result of the following comments on the proposal:

1. *Allotment of direct loan and loan guarantee funds.* It was pointed out that the proposed formula for allotment of loan and loan guarantee funds to States did not include the element "need for construction", which is required by statute (sec. 622(a), Public Health Service Act).

The omission of the element "need for construction" was inadvertent. It has now been included in the formula (§ 53.92).

2. *Size criteria for mental and tuberculosis hospitals.* It was suggested that the 3,000-bed maximum size for mental hospital projects is contrary to the Federal policy of encouraging a trend away from large State or municipal "warehouses" for the mentally ill; and that the 100-bed minimum size for tuberculosis hospitals is contrary to the policy of the program to include necessary TB beds as units of general hospitals, rather than as separate entities.

The size criteria for both mental health and TB hospitals (§§ 53.102 and 53.103 of the proposal) have been deleted.

3. *Review of State plans by areawide health planning agencies.* It was suggested that, in addition to the review of individual projects by areawide health planning agencies required by statute, the State plan itself should be submitted in draft form to such agencies for review and comment.

Although this suggested addition has been program policy since January 1971, it constitutes a step in the plan review process which should more logically be included in the regulations. Accordingly, a provision has been added (§ 53.121(b)) requiring that the State Hill-Burton agency submit the State plan and any modifications thereof in final draft, be-

fore submission to the Secretary, to each agency which has developed an areawide health plan pursuant to section 314(b) of the Public Health Service Act with respect to an area in the State and, with respect to any area in which there is no such agency, to the agency administering the State plan under section 314(a) of the Act.

4. *Assurance of reasonable volume of services to persons unable to pay therefor.* Several comments related to the assurance which has been authorized by statute (section 603(e) (2), PHS Act) and required by regulation since the program's inception, and which was restated in § 53.111(b) of the proposal, with respect to the provision of a reasonable volume of services for persons unable to pay therefor.

That assurance is currently the subject of litigation in a number of suits in which the Secretary has been named or joined as a defendant. A new regulation designed to define the scope of the assurance more clearly and to govern its enforcement is under preparation in the Department and will be published separately in the near future as a notice of proposed rule making with invitation for public comment. In the interim, the assurance of a reasonable volume of services for persons unable to pay therefor has been revised so as to restate the statutory language, and has been placed in a separate section (§ 53.111). In addition, the provisions relating to community service (§ 53.111(a) of the proposal), nondiscrimination on account of creed (§ 53.111(c)), Title VI of the Civil Rights Act of 1964 (§ 53.112), and nondiscrimination in construction contracts (§ 53.113) have been placed in a new § 53.112, as paragraphs (a)(1), (a)(2), (c), and (b), respectively.

5. *Use of 1960 data in determining poverty areas.* Objection was raised to the fact that "the latest available published data from the Bureau of the Census", which State agencies are required to use in determining rural and urban poverty areas under § 53.129 of the proposal, is currently the data from the 1960 census—1970 census data will not be available until at least February 1972.

To alleviate this problem, a paragraph has been added providing that if States can demonstrate to the satisfaction of the Secretary that the income levels of families in particular areas have changed sufficiently since the date of the latest available census data to justify changes in the ranking of such areas, they may qualify as rural or urban poverty areas.

In addition, the following comments were received:

6. *Fifty-year title requirement.* Objection was raised to the requirement that an applicant provide assurance that he has or will have a fee simple or other interest in the construction site sufficient to assure undisturbed use of the facility for a period of 50 years (§ 53.128(a) of the proposal).

The 50-year title requirement is statutory (see section 15(1), PHS Act).

7. *Services in outpatient facilities.* It was suggested that a more specific list of minimum services to be provided in out-

patient facilities be developed (§ 53.1(j) of the proposal).

It is the Department's judgment that no inclusion of specific types of outpatient services is necessary, since the emphasis is on the comprehensiveness of such facilities. Policy guidelines specify that single purpose outpatient facilities such as alcoholic or narcotic addiction centers are eligible where they serve one or more general hospitals within the same service area under formal written agreements. This same arrangement has been made for other types of single purpose facilities eligible in the past, such as laboratory or laundry facilities to be used by a number of general hospitals. Maintaining this concept strengthens the emphasis on shared services and reduction of duplication of functions.

8. *"Comprehensive health care".* It was suggested that the term "comprehensive" as used in § 53.81(a) of the proposal is too general, and that a list of basic minimum services should be included by way of definition.

"Comprehensive health care" is deliberately left undefined, since it is to be construed in relation to the need of a community/service area. To spell out a list of services invites duplication of those services by applicants in order to qualify for assistance. Priority judgment will be applied in favor of the applicant who presents the best program to meet the largest share of the defined needs.

In addition to the changes described in paragraphs 1-5 above, a number of editorial and technical changes have been included.

After consideration of all the comments and suggestions received, the revision as proposed is hereby adopted, subject to the following changes:

1. The first sentence of § 53.42 is revised to read as set forth below.

2. Paragraph (c) of § 53.84 is changed by inserting ")" immediately after the word "section".

3. Subparagraph (2) of § 53.92(a) is revised to read as set forth below.

4. Paragraph (b) of § 53.94 is revised to read as set forth below.

5. Sections 53.102 and 53.103 are deleted, and § 53.104 is renumbered as § 53.102.

6. Subpart L is revised to read as set forth below.

7. Section 53.121 is revised to read as set forth below.

8. Subdivision (1) of § 53.128(1) (2) is revised to read as set forth below.

9. Paragraph (c) of § 53.129 is redesignated as paragraph (d) of such section, and a new paragraph (c) is inserted.

Effective date. These regulations shall be effective upon publication in the FEDERAL REGISTER (1-6-72).

Dated: December 6, 1971.

VERNON E. WILSON,
Administrator, Health Services
and Mental Health Administration.

Approved: December 30, 1971.

ELLIOT L. RICHARDSON,
Secretary.

- Subpart A—Definitions**
- Sec.**
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- Subpart B—Distribution of Beds for Acute and Long-Term Illness (Excluding Mental and Tuberculosis)**
- 53.11** State need (standards of adequacy).
53.12 Service areas.
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- Subpart C—Distribution of Tuberculosis Hospital Beds**
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53.22 Distribution.
53.23 Existing tuberculosis hospital beds.
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- 53.31** Mental health services principally for persons residing in the community.
53.32 Mental health services not principally for persons residing in the community.
53.33 Distribution.
53.34 Existing mental hospital beds.
- Subpart E—Distribution of Public Health Centers**
- 53.41** State need (standards of adequacy).
53.42 Distribution.
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- Subpart F—Distribution of Outpatient Facilities**
- 53.51** State need (standards of adequacy).
53.52 Distribution (service areas).
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- Subpart G—Distribution of Rehabilitation Facilities**
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- 53.81** General.
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53.83 Facilities for long-term care (new construction).
53.84 Outpatient facilities (new construction and modernization).
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53.86 Public health centers (new construction).
53.87 Modernization.
- Subpart J—Allotments for Modernization Grants and for Loans and Loan Guarantees, and Transfer of State Allotments**
- 53.91** Allotments for modernization grants.
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- Subpart K—General Standards of Construction and Equipment**
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- Subpart L—Services for Persons Unable to Pay; Community Service; Nondiscrimination**
- 53.111** Services for persons unable to pay.
53.112 Community service; nondiscrimination.

- Subpart M—Methods of Administration of the State Plan**
- Sec.**
53.121 General; review and comment by area-wide health planning agencies.
53.122 Construction program.
53.123 Personnel administration.
53.124 Fair hearings.
53.125 Construction standards.
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53.153 Loan closing.
53.154 Waiver of right of recovery.

AUTHORITY: The provisions of this Part 53 issued under secs. 215, 603, 623(b), Public Health Service Act as amended, 58 Stat. 690, 78 Stat. 451, 84 Stat. 340; 42 U.S.C. 210, 2010, 2011-3(b).

- Subpart A—Definitions**
- § 53.1** Definitions.
- All terms not defined herein shall have the same meanings as given them in the Act. As used in this part:
- (a) "Act" means title VI of the Public Health Service Act, as amended (42 U.S.C. 291 et seq.).
- (b) "Secretary" means the Secretary of Health, Education, and Welfare and any other officer or employee of the Department of Health, Education, and Welfare to whom the authority involved has been delegated.
- (c) "State agency" means the agency designated by a State pursuant to section 804(a) (1) of the Act.
- (d) "Service area" means the geographic territory from which patients come or are expected to come to existing or proposed hospitals or existing or proposed public health centers, or existing or proposed medical facilities (i.e., facilities for long-term care, outpatient facilities, rehabilitation facilities), the delineation of which is based on such factors as population distribution, natural geographic boundaries, and transportation and trade patterns, and all parts of which are reasonably accessible to existing or proposed hospitals, public health centers, or medical facilities. When appropriate, interstate areas may

be formed with the mutual agreement of the States concerned.

(e) "Hospital" means general, tuberculosis, mental, and other types of hospitals, and related facilities such as laboratories, outpatient departments, nurses' home facilities, extended care facilities, facilities related to programs for home health services, self-care units, education or training facilities for health professions personnel operated as an integral part of a hospital, and central service facilities operated in connection with hospitals, but does not include any hospital providing primarily domiciliary care.

(f) "General hospital" means any hospital for short-term inpatient medical or surgical care of illness or injury, which may include obstetrical care.

(g) "Mental hospital" means a hospital (including long-term care, intensive care, or both) for the diagnosis and treatment of mental illness.

(h) "Tuberculosis hospital" means a hospital for the diagnosis and treatment of tuberculosis.

(i) "Facility for long-term care" means a facility (including an extended care facility) providing community service for inpatient care for convalescent or chronic disease patients who require skilled nursing care and related medical services

(1) Which is a hospital (other than a hospital primarily for the care and treatment of mentally ill or tuberculosis patients) or is operated in connection with a hospital, or

(2) In which such nursing care and medical services are prescribed by, or are performed under the general direction of, persons licensed to practice medicine or surgery in the State. Institutions furnishing primarily domiciliary care are not included.

"Chronic disease hospitals" and "nursing homes" as used in the document "General Standards of Construction and Equipment for Hospital and Medical Facilities," incorporated by reference in § 53.101(a), constitute "facilities for long-term care."

(j) "Outpatient facility" means a facility, located in or apart from a hospital, providing community service for the diagnosis or diagnosis and treatment of ambulatory patients (including ambulatory inpatients) in need of physical and/or mental care

(1) Which is operated in connection with a hospital; or

(2) In which patient care is under the professional supervision of persons licensed to practice medicine or surgery in the State or, in the case of dental diagnosis or treatment, under the professional supervision of persons licensed to practice dentistry in the State; or

(3) Which offers to patients not requiring hospitalization the services of licensed physicians in various medical specialties, and which makes provision for its patients to receive a reasonably full range of diagnostic and treatment services.

(k) "Rehabilitation facility" means a facility providing community service which is operated for the primary purpose of assisting in the rehabilitation of disabled persons through an integrated program under competent professional supervision of: Medical evaluation and services; and psychological, social, or vocational evaluation and services. The major portion of the required evaluation and services must be furnished within the facility; and the facility must be operated either in connection with a hospital or as a facility in which all medical and related health services are prescribed by, or are under the general direction of, persons licensed to practice medicine or surgery in the State. For purposes of this paragraph:

(1) An integrated program brings together as a team specialized personnel from the (1) medical, and (2) psychological, social, or vocational areas for the purpose of pooling information, interpretations and opinions for the development of a rehabilitation plan of services in which the disabled individual is viewed as a whole. When members of the team contribute to the diagnosis and treatment of illness, their contributions must be coordinated under medical responsibility.

(2) A disabled person is an individual who has a physical or mental condition which, to a material degree, limits, contributes to limiting, or if not corrected, will probably result in limiting, the individual's performance or activities to the extent of constituting a substantial physical, mental, or vocational handicap.

(3) Medical service, in the case of a rehabilitation facility operated in connection with a hospital, means a service under the direct personal supervision of a medical director, varied and extensive availability of specialized consultants, physical and occupational therapy department and occupation therapy services, and medical evaluation.

(4) Medical service, in the case of a rehabilitation facility not operated in connection with a hospital, means medical supervision, availability by agreement of medical consultants, and evaluation and services suitable to the needs of the disabled persons to be served.

(5) Social service means evaluation and services by a qualified social worker in amounts and variety appropriate to the rehabilitation needs of the disabled persons to be served.

(6) Psychological service means evaluation and services by a qualified psychologist in amounts and variety appropriate to the rehabilitation needs of the disabled persons to be served.

(7) Vocational service, in the case of a rehabilitation facility operated in connection with a hospital, means evaluation and services by a qualified vocational rehabilitation counselor in amounts and variety appropriate to the rehabilitation needs of the disabled persons to be served.

(8) Vocational service, in the case of a rehabilitation facility not operated in connection with a hospital, means those

vocational services required in hospitals, plus a variety of vocational services appropriate to the program and the persons to be served, such as prevocational exploration, work evaluation and vocational training.

(l) "Public health center" means a publicly owned facility utilized by a local health unit for the provision of public health services, including related publicly owned facilities such as laboratories, clinics, and administrative offices operated in connection with public health centers.

(m) "Local health unit" means a single county, city, county-city, or local district health unit, as well as a State health district unit where the primary function of the State district unit is the direct provision of public health services to the population under its jurisdiction.

(n) "Public health services" means services provided through organized community effort in the endeavor to prevent disease, prolong life, and maintain a high degree of physical and mental efficiency.

(o) "Hospital bed" means a bed for an adult or child patient. Bassinets for the newborn in a maternity unit nursery, beds in labor rooms, recovery rooms, and other beds used exclusively for emergency purposes are not included in this definition.

(p) "Population", with respect to any State or any area thereof, means the latest figures of civilian population certified by the U.S. Department of Commerce.

(q) "Projected population" means the projected State population estimates obtained from the U.S. Department of Commerce and provided to the State agency by the Secretary. The State agency shall distribute such population among the various areas, provided that the sum of the projected populations distributed among the various areas shall not exceed the figures provided by the Secretary.

(r) "Nonprofit hospital," "nonprofit outpatient facility," "nonprofit rehabilitation facility," and "nonprofit facility for long-term care" means any hospital, outpatient facility, rehabilitation facility, or facility for long-term care, as the case may be, owned and operated by one or more nonprofit corporations or associations, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

(s) "Community service", when applied to any facility, means that (1) the services furnished are available to the general public, or (2) admission is limited only on the basis of age, medical indigency, or type or kind of medical or mental disability, or (3) the facility constitutes a medical or nursing care unit of a home or other institution which home or other institution is available in accordance with subparagraph (1) or (2) of this paragraph.

(t) "Modernization" includes alteration, major repair, remodeling, replacement, and renovation of existing build-

ings (including initial equipment thereof), and replacement of obsolete, built-in equipment of existing buildings. It does not include the replacement of a facility or a portion of a facility to an inpatient capacity greater than the capacity of the existing facility.

(u) "Equipment" includes those items which are necessary for the functioning of the facility but does not include items of current operating expense such as food, fuel, drugs, dressings, paper, printed forms, and soap.

(v) "Built-in equipment" means that equipment which is affixed to the facility, and usually included in the construction contract.

(w) "Major repair" means those repairs to an existing building excluding routine maintenance which restore the building to a sound state, the cost of which is no less than \$100,000.

(x) "State" means the 50 States, Puerto Rico, Guam, the Virgin Islands, American Samoa, the District of Columbia, and the Trust Territories of the Pacific Islands.

Subpart B—Distribution of Beds for Acute and Long-Term Illness (Excluding Mental and Tuberculosis)

§ 53.11 State need (standards of adequacy).

The total number of beds for acute and long-term illness required to provide adequate service to the people residing in any State shall be the total of such beds required for individual service areas within the State. The number of beds required for each service area shall be determined by the State agency as follows:

(a) For general hospitals,

(1) Step (i): Multiply the current area use rate (area patient days per 1,000 current area population per year) by the projected area population (in thousands) and divide by 365 to obtain a projected area average daily census; Step (ii): Divide the projected area average daily census by 0.85 (occupancy factor) and add 10 to obtain the number of beds needed in the area, or

(2) By a different method which shall (i) incorporate, as a minimum, area utilization experience, projected area population and a desirable occupancy factor, and (ii) be submitted to the Secretary for approval prior to its use in the State plan.

(3) State agencies may adjust the bed need, as determined by one of the above methods, for specific areas with unusual circumstances or conditions; any such adjustment must be fully explained and justified in the State plan.

(b) For facilities for long-term care,

(1) Step (i): Multiply the current area use rate (area patient days per 1,000 current area population per year) by the projected area population (in thousands) and divide by 365 to obtain a projected area average daily census; Step (ii) Divide the projected area average daily census by 0.90 (occupancy factor) and add 10 to obtain the number of beds needed in the area, or

(2) By a different method which shall (i) incorporate, as a minimum, area utilization experience, projected area population and a desirable occupancy factor, and (ii) be submitted to the Secretary for approval prior to its use in the State plan.

(3) State agencies shall take into consideration (i) adjustment of bed need, as determined by one of the above methods, for areas in which a change in use rate is anticipated, and (ii) the use of area population age 65 and over, where appropriate, in place of total area population in determining bed need for long-term care.

§ 53.12 Service areas.

(a) The same service areas shall be used for planning general hospital facilities and facilities for long-term care, except that State agencies may use different areas for planning facilities for long-term care when this is consistent with effective relationships between the location of facilities and the need for services.

(b) Each service area shall have sufficient population that it may have general hospital or long-term care services appropriately planned in one or more facilities.

(c) The State agency shall describe in the State plan the population characteristics of each service area and outline a program for the distribution of beds and facilities for general hospital and long-term care.

§ 53.13 Existing general hospital beds and long-term care beds.

(a) The count of existing general hospital beds shall include the beds in the hospitals of this category as defined in Subpart A, which are not included in the count of beds for any other category under this part, and beds in any mental hospital, tuberculosis hospital or facility for long-term care which are specifically assigned for general hospital care, provided the beds so assigned in any such facility number 10 or more.

(b) The count of existing beds in facilities for long-term care shall include the beds in the facilities of this category as defined in Subpart A, which are not included in the count of beds in any other category under this part, and beds in any general, mental or tuberculosis hospital which are specifically assigned to long-term care other than mental or tuberculosis, provided the beds so assigned to any such facility number 10 or more.

(c) The count of existing beds described in paragraphs (a) and (b) of this section shall: (1) Include beds in all nursing units, including those currently closed or assigned to easily convertible nonpatient use, and bed space under construction, and (2) exclude beds in labor rooms, recovery rooms, emergency rooms, beds used intermittently for diagnosis or treatment, beds set up for temporary use, bassinets in new-born nurseries in maternity units, and unfinished bed space not under construction.

(d) The number of existing facilities in each category referred to in this subpart shall be counted.

(e) Existing beds described in paragraphs (a) and (b) of this section shall be classified as conforming or nonconforming according to specific standards of plant evaluation. Such standards shall include:

- (1) Fire-resistivity of each building;
- (2) Fire and other safety factors of each building;
- (3) Design and structural factors affecting the function of nursing units;
- (4) Design and structural factors affecting the function of service departments.

Subpart C—Distribution of Tuberculosis Hospital Beds

§ 53.21 State need (standards of adequacy).

The number of beds required to provide adequate hospital services for tuberculosis patients in any State or service area shall be determined by the following method: Divide the current average daily census of each hospital by 0.90 (occupancy factor).

§ 53.22 Distribution.

Tuberculosis hospitals receiving grants under the Act shall be built in centers of population, in proximity to general hospitals, with a view to developing community based inpatient and outpatient programs rather than isolated inpatient programs.

§ 53.23 Existing tuberculosis hospital beds.

(a) The count of existing tuberculosis hospital beds shall include the beds in tuberculosis hospitals, which are not included in the count of beds for any other category, and also beds in any general hospital which are specifically assigned for the care of patients with tuberculosis, provided the beds so assigned in any such general hospital number 10 or more.

(b) Existing tuberculosis hospital beds shall be classified as conforming or nonconforming according to plant evaluation standards as set forth in Subpart B of this part.

Subpart D—Eligibility, Distribution and Priority of Beds for the Mentally Ill

§ 53.31 Mental health services principally for persons residing in the community.

(a) For the purpose of determining need and priority, the State plan approved or approvable under the Community Mental Health Centers Act (42 U.S.C. 2081 et seq.) shall constitute that portion of the plan under the Act for construction of facilities for providing services principally for persons residing in a particular community or communities in or near which the facility is situated for the prevention or diagnosis of mental illness, or care and treatment of mentally ill patients, or rehabilitation of such persons.

(b) Special consideration shall be given to those projects for which the applicant sets forth in his application a

reasonable and feasible proposal for the development, within a reasonable period of time, of a program for the provision of those essential elements of comprehensive mental health services prescribed in § 54.212 of this chapter relating to community mental health centers.

(c) An application for the construction of facilities specified in paragraph (a) of this section may be approved under this part only if the Secretary determines that funds are not available under the Community Mental Health Centers construction grant program (Part 54, Subpart C, of this chapter).

§ 53.32 Mental health services not principally for persons residing in the community.

(a) With respect to facilities for the mentally ill which do not provide services principally for persons residing in a particular community in or near which the facility is situated, special consideration shall be given to those projects for remodeling or replacing services and facilities which do not increase bed capacity, or if services are being expanded, the applicant demonstrates that no alternative plan for provision of such expanded services is feasible.

(b) An application for construction of facilities specified in paragraph (a) of this section may be approved only if it conforms with the State plan approved under the Act.

§ 53.33 Distribution.

Mental hospitals receiving grants under the Act shall be built in centers of population, as a part of or in proximity to general hospitals, with a view to developing community based inpatient and outpatient programs rather than isolated inpatient programs.

§ 53.34 Existing mental hospital beds.

(a) The count of existing mental hospital beds shall include the beds in mental hospitals, which are not included in the count of beds in any other category, and also beds in any general hospital which are specifically assigned for the comprehensive inpatient care of patients with mental illness.

(b) Existing mental hospital beds shall be classified as conforming or nonconforming according to plant evaluation standards as set forth in Subpart B of this part.

Subpart E—Distribution of Public Health Centers

§ 53.41 State need (standards of adequacy).

(a) The number of public health centers to be planned in a State shall be adequate to meet the needs of the people of that State.

(b) The need shall be determined after consultation with the State health authority (where the State agency is not the State health authority) and with local health departments where such departments are independent operating units.

§ 53.42 Distribution.

The general method of distribution of public health centers throughout the State shall conform to the plan of organization of local health units within the State. In instances where the State agency is not the State health authority, the method of distribution shall be determined after consultation with the State health authority.

§ 53.43 Existing public health centers.

(a) Where the State agency is not the State health authority, the number of existing public health centers shall be determined after consultation with the State health authority.

(b) Existing public health centers shall be classified as conforming or nonconforming according to plant evaluation standards, which shall include:

- (1) Fire-resistivity of each building;
- (2) Fire and other safety factors of each building;
- (3) Design and structural factors affecting the function of the center.

Subpart F—Distribution of Outpatient Facilities**§ 53.51 State need (standards of adequacy).**

Outpatient facilities shall be planned in sufficient number to make at least the basic minimum services readily available to all persons in the State. Provision of the basic minimum services requires facilities for examination of patients by a physician or a dentist, and the provision of clinical laboratory and diagnostic X-ray services.

§ 53.52 Distribution (service areas).

In determining the need for additional outpatient facilities in an area as a basis for distribution of such facilities, special consideration shall be given to areas in which there is a shortage of services provided by private physicians and dentists. Outpatient facilities should be planned in the same service areas used for planning hospitals except that more than one outpatient facility service area may be planned in such hospital service area, resulting in a subdivision of the hospital service area into a number of outpatient facility service areas.

§ 53.53 Existing outpatient facilities.

(a) The count of existing outpatient facilities shall exclude:

- (1) Offices of private physicians and dentists, whether for individual or group practice;
- (2) Industrial clinics for employees only, first aid clinics, and similar facilities not furnishing a community service.

(b) Existing outpatient facilities shall be classified as conforming or nonconforming according to plant evaluation standards as set forth in Subpart E of this part.

Subpart G—Distribution of Rehabilitation Facilities**§ 53.61 State need (standards of adequacy).**

Rehabilitation facilities shall be planned by each State so that all per-

sons in the State shall have access to integrated rehabilitation services for all types of disabilities. The facility or facilities may be programmed in the State or by joint planning with one or more other States to serve the residents of such States. In determining the number of rehabilitation facilities and services needed, the State shall consider such factors as the particular needs of the population to be served and the scope and nature of service of the existing and proposed facilities.

§ 53.62 Distribution.

In determining the need for additional rehabilitation services as a basis for distribution of rehabilitation facilities, consideration shall be given to (a) rehabilitation services provided in existing facilities, avoiding duplication and overlapping of services; and (b) availability of rehabilitation services to people in all geographical areas.

§ 53.63 Existing rehabilitation facilities.

The count of existing rehabilitation facilities shall include existing beds in such facilities. Such beds shall be classified in accordance with the procedures set forth in Subpart B of this part.

Subpart H—Distribution of Modernization Projects for All Categories of Facilities**§ 53.71 Determination of need.**

(a) The need for modernization shall be determined for each category of facilities by evaluation of existing facilities and with initial consideration being given to the most densely populated areas of the State. The evaluation shall be based on specific standards of plant evaluation, which shall include:

- (1) Fire-resistivity of each building;
- (2) Fire and other safety factors of each building;
- (3) Design and structural factors affecting the function of the facility.

(b) Based on the evaluation, beds or facilities shall be classified as conforming or nonconforming. Those beds or facilities which are classified as nonconforming shall represent the beds and facilities in need of modernization.

(c) In the event that a service area has a total of existing conforming beds or facilities and existing nonconforming beds or facilities needing modernization which exceeds the total need for the service area, the number of beds or facilities to be modernized shall be reduced accordingly. At no time shall the beds or facilities to be modernized, when added to the existing conforming beds or facilities, be greater than the total beds or facilities needed in any one category.

§ 53.72 Distribution.

Modernization shall be planned for general hospitals, facilities for long-term care, and outpatient facilities in the service areas used for planning new construction. For other categories of facilities, modernization may be planned on a statewide basis.

Subpart I—Priority of Projects**§ 53.81 General.**

The general manner in which the State agency shall determine the priority of projects included in the State construction program shall be based on the relative need of different service areas lacking adequate facilities and shall conform to the principles set out in this subpart. In addition to the specific considerations set forth in this subpart with respect to particular types of projects, special consideration shall be given.

(a) To facilities which, alone or in conjunction with other facilities, will provide comprehensive health care, including outpatient and preventive care as well as hospitalization;

(b) To facilities which will provide training in health or allied health professions; and

(c) To facilities which will provide to a significant extent for the treatment of alcoholism.

§ 53.82 Hospitals (new construction).

In determining the priority of projects for new construction of hospitals, special consideration shall be given to hospitals serving areas with relatively small financial resources and, at the option of each State, to hospitals serving rural communities. Relative need for new construction of hospitals shall be expressed in terms of the ratio of existing beds to total beds needed in the service area.

§ 53.83 Facilities for long-term care (new construction).

Priority shall be determined on the basis of the relative need for beds in facilities for long-term care in the area to be served by the project taking into account the utilization of existing beds and giving special consideration to projects operated by or affiliated with hospitals. Relative need for new construction shall be expressed in terms of the ratio of existing beds to total beds needed in each service area.

§ 53.84 Outpatient facilities (new construction and modernization).

(a) In determining the priority of projects for construction or modernization of outpatient facilities, special consideration shall be given to any outpatient facility that will be located in, and provide services for residents of, an area determined by the Secretary pursuant to § 53.120 to be a rural or urban poverty area.

(b) Subject to the provisions of paragraph (a) of this section priority of projects for new construction of outpatient facilities shall be determined on the basis of the relative need for additional outpatient facilities in the area to be served by the facility, taking into account existing services available and their utilization.

(c) In determining the priority of projects for modernization of outpatient facilities, special consideration shall be given (in addition to that specified in paragraph (a) of this section) to facilities serving areas of high population density.

§ 53.85 Rehabilitation facilities (new construction).

Priority shall be given to rehabilitation facility projects in the order of importance as given below, taking into consideration existing rehabilitation services in the community and the need for additional services in the community.

(a) Facilities operated in connection with a university teaching hospital which will provide an integrated program of medical, psychological, social, and vocational evaluation and services under competent supervision.

(b) Facilities offering rehabilitation services for multiple disabilities in hospitals and medical facilities capable of sustaining an organized department of physical medicine and rehabilitation.

(c) All other rehabilitation facilities.

§ 53.86 Public health centers (new construction).

Highest priority in this category shall be given to the provision of facilities for local health units serving rural communities and communities with relatively small financial resources. Where the State agency is not the State health authority, the State agency shall determine the relative priorities to be established after consultation with the State health authority.

§ 53.87 Modernization.

In determining the priority of projects for modernization, special consideration shall be given to facilities serving areas of high population density. With respect to each category, relative need shall be expressed

(a) For facilities for inpatient care, in terms of the ratio of existing conforming beds in each service area to (1) total existing beds in such area or (2) total beds needed in such area, whichever is less; and

(b) For facilities for outpatient care, in terms of the ratio of existing conforming facilities for outpatient care in each service area to (1) total existing facilities for outpatient care in such area or (2) total facilities for outpatient care needed in such area, whichever is less.

Subpart J—Allotments for Modernization Grants and for Loans and Loan Guarantees, and Transfer of State Allotments

§ 53.91 Allotments for modernization grants.

The allotments to the several States under section 602(a)(2) of the Act for grants for modernization shall be computed as follows:

(a) 33½ percent will be allotted to each State on the basis of population weighted by per capita income; and

(b) 66½ percent will be allotted to each State on the basis of the extent of the need for modernization of the facilities.

§ 53.92 Allotments for direct loans and loan guarantees.

(a) *Allotment formula.* The total of the amount of principal of loans to non-

profit private agencies which may be guaranteed and loans to public agencies which may be directly made under Part B of the Act with respect to any fiscal year shall be allotted among the several States as follows:

(1) A portion of such total which bears the same ratio to such total as the number of general hospital beds which the Secretary determines will be modernized in all States bears to the sum of the general hospital beds in all States which the Secretary determines will be modernized and added through new construction will be allotted to the States on the basis of the formula set forth in § 53.91 for allotments for modernization grants. The Secretary's determinations under this paragraph will be made on the basis of State plans for the latest year for which all States desiring to participate under Part B of the Act have submitted approved State plans.

(2) The remainder of such total will be allotted to the States on the basis of each State's relative population weighted by (i) the square of such State's allotment percentage, as determined in accordance with sec. 602(c) of the Act, and (ii) the relative need of such State for construction of general hospital beds.

(b) *Period of availability.* Subject to the provisions of § 53.93(b) (relating to transfers of allotments to another State), any amount allotted under paragraph (a) of this section to a State for a fiscal year ending before July 1, 1973, and remaining unobligated at the end of such fiscal year shall remain available to such State, for the purpose for which made, for the next 2 fiscal years, and any such amount shall be in addition to the amounts allotted to such State for such purpose for each of such next 2 fiscal years.

§ 53.93 Transfer of allotments to another State.

(a) With respect to allotments under Part A of the Act, a State may submit a request in writing to the Secretary that a specified portion of its allotment for the construction of hospitals and public health centers, facilities for long-term care, outpatient facilities, rehabilitation facilities, or for modernization, be added to the corresponding allotment of another State for the purpose of meeting a portion of the Federal share of the cost of a project for the construction or modernization of a facility of the type authorized under the allotments in such other State. In determining whether the facility with respect to which the request is made will meet the needs of the State making the request and that use of the specified portion of such State's allotment as requested by it will assist in carrying out the purposes of the Act, the Secretary shall consider the accessibility of the facility and the extent to which services will be made available to the residents of the State making the request for the transfer.

(b) With respect to allotments under Part B of the Act, any such allotment to a State for a fiscal year ending before July 1, 1973, and remaining unobligated

at the end of such year may, with the consent of such State, be reallocated by the Secretary to other States which the Secretary determines have need therefor. Such reallocation shall be on such basis as the Secretary finds consistent with the purposes of Part B of the Act, and any amount so reallocated to another State shall be available for the purposes for which made until the close of the second fiscal year after the fiscal year for which such funds were initially allotted and shall be in addition to the amount allotted and available to such State for the same period.

§ 53.94 Transfer of grant allotments to another category within a State.

(a) For the purpose of transfer of allotments as authorized by section 602(e)(2) of the Act, the State agency shall, together with the certification required by that subsection, set forth the method by which a reasonable opportunity has been afforded applicants to submit applications for projects from the portion of the allotment to be transferred.

(b) A determination under section 602(e)(3) of the Act that the need for new public or other nonprofit hospitals and public health centers is substantially greater than the need for modernization projects shall be made only after completion of the determination of the State's need for modernization projects pursuant to Subpart H of this part and in accordance with the approved State plan.

Subpart K—General Standards of Construction and Equipment

§ 53.101 General.

(a) Plans and specifications for each project submitted to the Secretary for approval shall be prepared in accordance with "General Standards of Construction and Equipment for Hospital and Medical Facilities" (PHS No. 930-A-7), and any amendments or revisions thereof, which document is hereby incorporated by reference and deemed published herein. Said document will be provided to all applicants for assistance under this part, and is available to any interested person, whether or not affected by the provisions of this part, upon request to the Health Care Facilities Service,¹ Health Services and Mental Health Administration, Department of Health, Education, and Welfare, or to the Health Services and Mental Health Information Center or Regional Office Information Center as listed in 45 CFR 5.31. The Secretary may approve plans and specifications which contain deviations from the requirements prescribed if he is satisfied that the purposes of such requirements have been fulfilled.

(b) The design and construction covered by the plans and specifications must conform with the applicable State and local laws, codes, and ordinances and with the approved State plan. The plans

¹ The Health Care Facilities Service also maintains an official historic file of PHS No. 930-A-7.

and specifications must be complete and adequate for contract purposes and have the approval and recommendation of the State agency.

(c) Equipment shall be provided in the kind and to the extent necessary for the proper functioning of the facility as planned.

§ 53.102 Size of facilities for long-term care.

No application shall be approved for construction of a facility for long-term care, not an addition to a hospital, with a capacity of less than 10 beds.

Subpart L—Services for Persons Unable To Pay; Community Service; Nondiscrimination

§ 53.111 Services for persons unable to pay.

Before an application under this part is recommended by a State agency to the Secretary for approval, the State agency shall obtain an assurance from the applicant that there will be made available in the facility or portion thereof to be constructed or modernized a reasonable volume of services to persons unable to pay therefor. The requirement of an assurance from an applicant shall be waived if the applicant demonstrates to the satisfaction of the State agency, subject to subsequent approval by the Secretary, that such a requirement is not feasible from a financial viewpoint.

§ 53.112 Community service; nondiscrimination.

(a) Before an application under this part is recommended by a State agency to the Secretary for approval, the State agency shall obtain assurances from the applicant that:

(1) The facility will furnish a community service; and

(2) All portions and services of the entire facility for the construction or modernization of which, or in connection with which, aid under the Act is sought will be made available without discrimination on account of creed, and no professionally qualified person will be discriminated against on account of creed with respect to the privilege of professional practice in the facility.

(b) Each construction contract is subject to the condition that the applicant shall comply with the requirements of Executive Order 11246, September 24, 1965 (30 F.R. 12319), relating to nondiscrimination in construction contract employment, and the applicable rules, regulations, and procedures prescribed pursuant thereto.

(c) Attention is called to the requirement of title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d; 78 Stat. 252) which provides that no person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. A regulation implementing such title VI, applicable to

assistance under this part for construction and modernization of hospitals and medical facilities, has been issued by the Secretary of Health, Education, and Welfare with the approval of the President (45 CFR Part 80).

§ 53.121 General; review and comment by areawide health planning agencies.

(a) The State plan shall provide for general methods of administration which are in accord with the principles set out in this subpart.

(b) Prior to submission of the State plan or any modifications thereof to the Secretary, the State agency shall submit such plan or modifications for review and comment to each agency or organization which has developed an areawide health plan pursuant to section 314(b) of the Public Health Service Act with respect to any area in such State for which there is no such agency or organization, to the State agency administering or supervising the administration of the State plan approved under section 314(a) of the Public Health Service Act. Comments from any such agency received by the State agency within 30 days after such submission shall be considered by the State agency prior to submission of the State plan to the Secretary.

Subpart M—Methods of Administration of the State Plan

§ 53.122 Construction program.

The State programs for hospitals, facilities for long-term care, outpatient facilities, rehabilitation facilities, public health centers, and modernization shall be developed in the following manner:

(a) The State agency shall determine the need for additional hospital facilities of all types, facilities for long-term care, outpatient facilities, rehabilitation facilities, public health centers, and for modernization of such facilities in accordance with the provisions of Subpart B through Subpart H.

(b) The State agency shall determine through field investigation, and otherwise, the approximate locations in each area in which the various types of health facilities identified in paragraph (a) of this section should most appropriately be built and the locations at which modernization projects are needed.

(c) After having determined the hospital, long-term care facilities, outpatient facility, rehabilitation facilities, public health center and modernization needs, the State agency shall establish an overall construction program. This program shall set forth all such needs in accordance with the standards specified in Subpart B through Subpart H and shall show the relative need for each project included, irrespective of the availability of funds for construction and for maintenance and operation of such project.

(d) The State agency shall from time to time as necessary, but not less often than annually, review the State plan, including the overall program for the construction of hospitals, long-term care facilities, outpatient facilities, rehabili-

tation facilities, public health centers and for modernization, and shall submit to the Secretary any modifications of the plan and the construction program as the State agency considers necessary to administer the plan and the annual allotment.

(e) At least 30 days prior to the submission of the State plan or any modification thereof to the Secretary, the State agency shall publish in newspapers having general circulation throughout the State a general description of the proposed plan, or any such modification, and the State plan shall be available for examination and comment by interested persons prior to submission to the Secretary.

(f) The State agency shall establish a separate construction schedule on such forms and for such periods as the Secretary may prescribe. Insofar as funds are available for construction and for maintenance and operation, construction shall be scheduled in the order of relative need.

§ 53.123 Personnel administration.

(a) *Merit system.* The State plan shall provide for the establishment and maintenance of personnel standards on a merit basis for persons employed in the administration of the State plan. Conformity with the Standards for a Merit System of Personnel Administration, 45 CFR Part 70, including any amendments thereto, and any standards prescribed by the U.S. Civil Service Commission pursuant to section 208 of the Intergovernmental Personnel Act of 1970 (Public Law 91-648; 84 Stat. 1915) modifying or superseding such Standards, will be deemed to meet this requirement as determined by said Commission.

(b) *Conflict of interest.* No full-time officer or employee of the State agency, or any firm, organization, corporation, or partnership which such officer or employee owns, controls, or directs, shall receive funds from the applicant, directly or indirectly, in payment for services provided in connection with the planning, design, construction or equipping of the project.

§ 53.124 Fair hearings.

The State agency shall establish such rules and regulations as will provide an opportunity for an appeal to and a fair hearing before the State agency to every applicant for a construction project who is dissatisfied with any action of the State agency regarding its application.

§ 53.125 Construction standards.

The State agency shall adopt general standards of construction and equipment for the various types of hospitals, facilities for long-term care, outpatient facilities, rehabilitation facilities, and public health centers assisted under this program. The standards adopted shall not be less than the general standards prescribed by the Public Health Service and set forth in the document "General Standards of Construction and Equipment for Hospital and Medical Facilities", as incorporated by reference in § 53.101(a).

§ 53.126 Minimum standards of maintenance and operation.

The State plan shall provide for minimum standards of maintenance and operation of facilities providing inpatient care which receive aid under the Act, and shall provide for enforcement of such standards.

§ 53.127 Application; submittal; amendment; processing.

(a) *Submittal of application.* Applications for grants, loan guarantees, and direct loans under the Act, including both detailed narrative descriptions and detailed estimates of the cost of the respective projects, shall be submitted to the Secretary through the State agency in such form as the Secretary may prescribe.

(b) *Amendment to application.* An amendment to any application approved by the Secretary shall be processed in the same manner as an original application, except that the original application's conformity with the priority regulations shall suffice for an amendment which does not modify the factors on which the priority was granted.

(c) *Processing of application.* The State agency shall approve, recommend, and forward applications received in the order of priority, except that the State agency may approve, recommend, and forward to the Secretary applications out of the order of priority if:

(1) The State agency has afforded reasonable opportunity for development and presentation of projects in the order of priority; and

(2) The State agency certifies to the Secretary that financial resources for the construction, maintenance, and operation of projects of higher priority are not then available.

§ 53.128 Assurances from applicant.

In addition to any other requirements imposed by law, each construction grant, loan guarantee, and direct loan shall be subject to the condition that the applicant will furnish and comply with the following assurances. The Secretary may at any time approve exceptions to those conditions and assurances where he finds that such exceptions are not inconsistent with the Act and the purposes of the program:

(a) That the applicant (or other public or nonprofit agency which is to operate the facility) has or will have a fee simple or such other estate or interest in the site, including necessary easements and rights-of-way, sufficient to assure for a period of not less than 50 years undisturbed use and possession for the purpose of the construction and operation of the facility;

(b) That the Secretary's approval of the final working drawings and specifications, which conform to the general standards of construction and equipment, will be obtained before the project is advertised or placed on the market for bidding;

(c) That applicant will perform actual construction work by the lump sum (fixed price) contract method; employ

adequate methods of obtaining competitive bidding prior to awarding the construction contract, either by public advertising or circularizing three or more bidders, and award the contract to the responsible bidder submitting the lowest acceptable bid; and will purchase all fixed equipment by adequate methods of competitive bidding (including such fixed equipment as is not purchased through the construction contract) and award the contract to the responsible bidder submitting the lowest acceptable bid, except that competitive bidding procedures need not be employed for the purchase of specific fixed equipment items which are not included in the construction contract where such action is found by the State agency and the Secretary, upon written justification by the applicant, to be required by the needs of the program;

(d) That applicant will enter into no construction contract or contracts for the project or a part thereof, the cost of which is in excess of the estimated cost approved in the application for that portion of the work covered by the plans and specifications, without the prior approval of the Secretary;

(e) That applicant will submit to the Secretary for prior approval changes that substantially alter the scope of work, function, utilities, or safety of the facility;

(f) That applicant will construct the project, or cause it to be constructed, to final completion in accordance with the application and approved plans and specifications;

(g) That applicant will maintain adequate and separate accounting and fiscal records and accounts for all funds provided from any source to pay the cost of the project, and permit audit of such records and accounts at any reasonable times. All records shall be retained for 3 years after the close of the fiscal year in which construction is completed. Such records may be destroyed at the end of such 3-year period if the applicant has been notified of the completion of the Federal audit by such time. If the applicant has not been so notified by the end of such 3-year period, such records shall be retained (1) for 5 years after the close of the fiscal year in which construction is completed or (2) until the grantee is notified of the completion of the Federal audit, whichever comes first. In all cases where audit questions have arisen before the expiration of such 5-year period, records shall be retained until resolution of all such questions;

(h) That applicant will furnish progress reports and such other information as the Secretary may require;

(i) That applicant will provide and maintain competent and adequate architectural or engineering supervision and inspection at the construction site to insure that the completed work conforms with the approved plans and specifications;

(j) That sufficient funds will be available to meet the non-Federal share of the cost constructing the facility;

(k) That sufficient funds will be available when construction is completed for effective use of the facility for the purposes for which it is being constructed;

(1) (1) That any laborer or mechanic employed by any contractor or subcontractor in the performance of work on the construction of the facility will be paid wages at rates not less than those prevailing on similar construction in the locality as determined under the Davis-Bacon Act (40 U.S.C. 276 et seq.) and will receive compensation at a rate not less than one and one-half times his basic rate of pay for all hours worked in any workweek in excess of 8 hours in any calendar day or 40 hours in the workweek (40 U.S.C. 327-332); and

(2) That the following conditions and provisions will be included in all construction contracts:

(i) The provisions set forth in "DHEW Requirements for Federally Assisted Construction Contracts Regarding Labor Standards and Equal Employment Opportunities," Form DHEW 514 (April 1969) (issued by the Office of Grants Administration Policy, U.S. Department of Health, Education, and Welfare) pertaining to the Davis-Bacon Act, the Contract Work Hours Standards Act, and the Copeland Act (Anti-Kickback) Regulations, except in the case of contracts in the amount of \$2,000 or less; and pertaining to Executive Order 11246, September 24, 1965 (30 F.R. 12319), relating to nondiscrimination in construction contract employment, except in the case of contracts in the amount of \$10,000 or less;

(ii) The contractor shall furnish performance and payment bonds, each of which shall be in the full amount of the contract price, and shall maintain, during the life of the contract, adequate fire, workmen's compensation, public liability and property damage insurance;

(iii) Representatives of the Secretary and State agency will have access at all reasonable times to work wherever it is in preparation or progress, and the contractor shall provide proper facilities for such access and inspection;

(m) That a facility providing inpatient care will be operated and maintained in accordance with minimum standards prescribed by the State agency for the maintenance and operation of such facilities;

(n) (1) That, in the case of any project for construction or modernization of a general hospital, there will be adequate provision for extended care services to patients of such hospital when such services are medically appropriate for them. Subject to the provisions of subparagraph (2) of this paragraph, such services must be provided in facilities which—

(i) Are structurally part of, physically connected with, or in immediate proximity to, such hospital; and

(ii) Either are under the supervision of the professional staff of such hospital or have organized medical staffs and have in effect written transfer agreements with such hospital which provide for:

(a) The transfer of patients between the hospital and the long-term care facility(s) whenever such transfer is determined to be medically appropriate;

(b) The exchange between the facilities of appropriate medical and other information relating to the care and treatment of patients;

(c) Prompt initiation of transfer of the patient to the hospital for acute care should there be a reversal in the patient's medical condition requiring more intensive medical and nursing care;

(d) The amount and types of services offered in the long-term care facility(s) which correspond to those specified for reimbursement eligibility for the skilled nursing home care category under titles XVIII and XIX of the Social Security Act, as amended; and

(e) The general availability of the medical, diagnostic, and rehabilitative services of the hospital to any patient of the long-term care facility(s) who requires them.

(2) The Secretary may, at the request of the State agency, waive compliance with the requirements of subparagraph (1) (i) or (ii), or both of this paragraph, in the case of any project if the State agency has determined that compliance with such subsection or subsections would be inadvisable;

(c) That, in the case of any project for construction or modernization of an outpatient facility, the services of a general hospital will be available to patients of such outpatient facility who are in need of hospital care. Such assurance may be provided by a written transfer agreement with one or more general hospitals which provides for

(1) The transfer of patients from the outpatient facility to the general hospital where such transfer is determined to be medically appropriate;

(2) The exchange of appropriate medical and other information relating to the care and treatment of patients between the facilities; and

(3) The amount and types of services offered in the general hospital which correspond to those specified for reimbursement eligibility under Titles XVIII and XIX of the Social Security Act, as amended;

(p) That, in the case of any project solely for the purpose of the acquisition of equipment, other than initial equipment for new buildings or for existing buildings which are expanded, remodeled or altered, such project will help to provide a service not previously provided in the community. For purposes of this paragraph, "community" shall mean a geographic area encompassing one or more neighborhoods having a population and geographic size sufficiently large as normally to be served by and support the particular service to be provided;

(q) That the applicant will file at least annually with the State agency a statement, in such form and containing such

information as the Secretary may require to show (1) the financial operations of the facility, and (2) the costs to the facility of providing health services in the facility and the charges made by the facility for providing such services during the period with respect to which the statement is filed;

(r) That the applicant will conform to all the applicable requirements of the State plan and the regulations of this part.

§ 53.129 Determination of rural or urban poverty areas.

For purposes of determining the priority of projects for construction or modernization of outpatient facilities pursuant to section 603(a) (4) of the Act and of establishing a Federal share of any project (not to exceed 90 per centum of the cost of construction) pursuant to section 645(b) (4) of the Act, the State plan shall include a designation of areas in the State which are proposed by the State agency, in accordance with this section, to be rural or urban poverty areas. For purposes of this section, "area" means a service area (or the nearest approximation thereto for which current census data are available, based on geographic boundaries such as counties or census tracts) or a subservice area which is designated in the State plan as providing the basis for the provision of outpatient services.

(a) The Secretary will determine to be a rural or urban poverty area any area which has been found by the State agency, on the basis of the latest available published data from the Bureau of the Census, to be an area in which the median annual family income ranks in or below the 20th percentile of the median family incomes for all areas in the State.

(b) The Secretary may determine to be a rural or urban poverty area any area which

(1) has been found by the State agency to be an area in which the median family income ranks above the 20th percentile of the median family incomes for all areas in the State but in or below the 30th percentile of the median family incomes for all areas in the State;

(2) has been designated by the State agency as a rural or urban poverty area, and

(3) has been determined by the Secretary, on the basis of information set forth in the State plan, to have special characteristics related to poverty which are not adequately reflected in its median family income percentile rank, such as (i) subareas of extreme poverty or (ii) high costs of obtaining hospital services when compared to other areas in the State.

(c) The Secretary may also determine to be a rural or urban poverty area any area in which, on the basis of the latest available published data from the Bureau

of the Census, the median family income ranks above the 30th percentile of median family incomes for all areas in the State but with respect to which the State agency demonstrates to the satisfaction of the Secretary that the income level of families in such area has changed sufficiently since the date of such latest available published data to justify classification of the area as a rural or urban poverty area under the criteria set forth in paragraph (a) or (b) of this section.

(d) The State agency shall reevaluate its designation of proposed rural or urban poverty areas every 2 years, and will make such revisions in such designation as it finds necessary in accordance with the provisions of this section.

§ 53.130 Certification to the Secretary.

After the State agency has approved an application for a construction grant, it shall recommend it to the Secretary for approval and shall certify:

(a) That the application contains reasonable assurance as to the availability of funds for the cost of construction and the entire cost of maintenance and operation when completed:

(1) Availability of funds for the non-Federal share of construction costs shall mean (i) funds immediately available, placed in escrow, or acceptably pledged, or (ii) funds or fund sources specifically earmarked in a sum sufficient for that purpose, or (iii) other assurances acceptable to the Secretary;

(2) To assure the availability of funds for maintenance and operation the application for the construction of a new project must include a proposed operating budget, on a form prescribed by the Secretary, for the 2-year period immediately following its completion. In the case of an addition to an existing facility, the application must include a statement showing that funds are or will be available to meet any excess of proposed expenditures over anticipated income from the operation of the constructed addition for the 2-year period immediately following its completion.

(b) That the application is in conformity with and contains the assurances required by the State plan and these regulations.

§ 53.131 Requests for construction payments for grants.

(a) *Certification by State agency.* The State agency shall certify to the Secretary the amount of payments due an applicant for a construction grant under Part A of the Act for the cost of work performed and materials and equipment furnished.

(b) *Inspection by State agency.* As a basis for certification by the State agency in accordance with paragraph (a) of this section that payment of an installment is due an applicant, the State agency shall make adequate inspections to determine that the work has been performed upon a project, or purchases

have been made, in accordance with the approved plans and specifications.

§ 53.132 Fiscal and accounting requirements.

(a) *Construction allotments.* (1) The State agency shall be responsible for establishing and maintaining accounts and fiscal controls of all Federal and State funds allotted for construction projects. Federal and State funds shall be separately identified by maintaining separate fund accounts for this purpose.

(2) The fiscal records shall be so designed as to show at any given time the Federal funds allotted, encumbered, and unencumbered balances. If State contributions are made for construction, separate accounts, reflecting similar information, shall be maintained for State funds.

(b) *Construction payments.* (1) Where the State may receive Federal funds for applicants for construction project grants, or the State itself is an applicant, adequate records of account and fiscal controls shall be established and maintained by the State to assure proper accounting of all funds received and disbursed. Similar suitable accounts shall be maintained to show the receipt and disbursement of State, local or other funds used for matching purposes.

(2) The State agency shall require that applicants receiving Federal funds establish and maintain adequate accounting and fiscal records to reflect the receipt and expenditure of funds allotted and paid for construction projects.

(3) The States which by law are authorized to make payments to applicants shall promptly pay such applicants funds certified for payment by the Secretary for approved construction projects.

§ 53.133 Access by Comptroller General.

The State plan shall provide that the Comptroller General of the United States or his duly authorized representatives will have access for purposes of audit and examination to such records of the State agency as are required to be maintained by the Secretary.

§ 53.134 Notice of change of status of facility.

The State agency shall promptly notify the Secretary in writing if, at any time within 20 years after completion of construction, any facility which received funds under the Act is transferred to any person, agency or organization, not qualified to file an application under the Federal Act or not approved as a transferee by the State agency; or ceases to be a public health center or a public or other nonprofit hospital, outpatient facility, facility for long-term care or rehabilitation facility, as defined in the Federal Act.

§ 53.135 Good cause for other use of facility.

If within 20 years after completion of any construction for which a construction grant has been made the facility

shall cease to be a public health center or a public or other nonprofit hospital, outpatient facility, facility for long-term care, or rehabilitation facility the Secretary, in determining whether there is good cause for releasing the applicant or other owner of the facility from its obligation shall take into consideration the extent to which:

(a) The facility will be devoted by the applicant or other owner to use for another public or nonprofit purpose which will promote the purpose of the Act;

(b) There are reasonable assurances that for the remainder of the 20-year period other public or nonprofit facilities not previously utilized for the purpose for which the facility was constructed will be so utilized and are substantially equivalent in nature and extent for such purposes; or

(c) The facility has been acquired from an agency of the United States (e.g., the Federal Housing Administration under its mortgage insurance commitment program) which has made a reasonable effort to dispose of it for operation as a public or nonprofit facility.

Subpart N—Loan Guarantees and Direct Loans

§ 53.141 Applicability.

In addition to the other provisions of this part, the following provisions of this Subpart N are also applicable to loans to public agencies and loan guarantees to nonprofit private agencies under part B of the Act.

§ 53.142 Definitions.

(a) All terms used in this subpart and defined in the Act or in § 53.1 shall have the same meaning as there given them.

(b) When used in this subpart, the term "public agency" shall include any private organization the income from whose bonds or other obligations issued as security for a loan with respect to a project under part B of the Act is exempt from Federal income taxation.

§ 53.143 Eligibility for loan guarantees and direct loans.

(a) *Loan guarantees.* The Secretary may, in accordance with part B of the Act and these regulations, guarantee to non-Federal lenders payment of principal of and interest on loans made to nonprofit private agencies to carry out projects for the construction or modernization of nonprofit private hospitals, facilities for long-term care, outpatient facilities and rehabilitation facilities.

(b) *Direct loans.* The Secretary may, in accordance with Part B of the Act and these regulations, make direct loans to public agencies to carry out projects for the construction or modernization of public health centers and public hospitals, facilities for long-term care, outpatient facilities, and rehabilitation facilities.

§ 53.144 Approval of applications.

(a) *Applications for loan guarantees.* An application for a loan guarantee submitted through the State agency and in

accordance with the requirements of § 53.127 may be approved by the Secretary only if he makes each of the findings required pursuant to section 623(b) of the Act, and determines:

(1) That the applicant will have sufficient financial resources to enable him to comply with the terms and conditions of the loan with respect to which the guarantee is sought;

(2) That the applicant has the necessary legal authority to finance, construct, and maintain the proposed project, to apply for and receive the loan with respect to which the guarantee is sought, and to pledge or mortgage any assets or revenues to be given as security for such loan or against other satisfactory security specified in § 53.147;

(3) That the loan with respect to which the guarantee is sought will be secured by a first lien against the facility to be constructed or against other security satisfactory to the Secretary specified in § 53.147.

(4) That the loan with respect to which the guarantee is sought will be made only with respect to the initial permanent financing of the project;

(5) That the rate of interest on the loan with respect to which a guarantee is sought does not exceed such per centum per annum as the Secretary determines to be reasonable, taking into account the range of interest rates prevailing in the private market for similar loans and the risks assumed by the United States; and

(6) Such additional determinations as the Secretary finds necessary with respect to particular applications in order to protect the financial interests of the United States.

(b) *Applications for direct loans.* An application for a direct loan submitted through the State agency and in accordance with the requirements of § 53.127 may be approved by the Secretary only if he makes each of the applicable findings required pursuant to sections 623(b) and 627(a)(2) of the Act, and determines:

(1) That the applicant will have sufficient financial resources to enable him to comply with the terms and conditions of the direct loan;

(2) That the applicant has the necessary legal authority to finance, construct, and maintain the proposed project, to apply for and receive the direct loan, and to pledge or mortgage any assets or reserves to be given as security for such direct loan;

(3) That the direct loan will be secured by a first lien against the facility to be constructed or against other security satisfactory to the Secretary specified in § 53.147;

(4) That the direct loan will be made only with respect to the initial permanent financing of the project; and

(5) Such additional determinations as the Secretary finds necessary with respect to the particular application in order to protect the financial interests of the United States.

§ 53.145 Maximum amount of direct loan or guaranteed loan.

No direct loan or loan with respect to which a guarantee is made for any project under Part B of the Act may be in an amount which, when added to the amount of any grant or loan under Part A of the Act with respect to such project, exceeds 90 per centum of the cost of such project: *Provided*, That, in determining the actual cost of the construction of the project, there shall be excluded from such cost all fees, interest, and other charges relating or attributable to the financing of the project.

§ 53.146 Forms of evidence of indebtedness.

The evidence of indebtedness with respect to direct loans with respect to which a guarantee is made shall be in such form as may be acceptable to the Secretary.

§ 53.147 Security for loans.

All direct loans and loans with respect to which a guarantee is made shall be secured in a manner which the Secretary finds reasonably sufficient to insure repayment. The security may be one or a combination of the following:

(a) A first mortgage on the facility and site thereof.

(b) Negotiable stocks or bonds of a quality and value acceptable to the Secretary.

(c) A pledge of unrestricted and unencumbered income from an endowment or other trust funds acceptable to the Secretary.

(d) A pledge of a specified portion of annual general or special revenues of the applicant, acceptable to the Secretary.

(e) Full faith and credit (tax supported) obligations of a State or local public body.

(f) Such other security as the Secretary may find acceptable in specific instances.

§ 53.148 Opinion of legal counsel.

At appropriate stages in the application and approval procedure for direct loans and loan guarantees, the applicant shall furnish to the Secretary a memorandum or opinion of legal counsel with respect to the legality of any proposed bond or note issue, the legal authority of the applicant to offer the issue and secure it by the proposed collateral, and the legality of the issue upon delivery. "Legal counsel" means either a law firm or individual lawyer, thoroughly experienced in the long-term financing of construction projects, and whose approving opinions have previously been accepted by lenders or lending institutions. In addition, in the case of a direct loan to a public agency, the legal counsel shall be a recognized bond counsel in the municipal field. The legal memorandum or opinion to be provided by legal counsel in each case shall be as follows:

(a) A memorandum, submitted with the application for a direct loan or loan guarantee, stating that there is or will be authority to finance, construct and

maintain the project, and to issue the proposed obligations and to pledge or mortgage the assets and/or revenues offered to secure the direct loan or the loan with respect to which a guarantee is sought, as the case may be, citing the basis for such authority; and

(b) A final approving opinion, delivered to the Secretary at the same time as the delivery of the bonds to the Secretary (in the case of a direct loan) or to the lender (in the case of a loan guarantee), stating that the indebtedness of the applicant is duly authorized, sold, and delivered, and that such indebtedness is valid, binding and payable in accordance with the terms on which the direct loan or loan guarantee was approved by the Secretary.

§ 53.149 Length and maturity of loans.

The repayment period for direct loans and loans with respect to which a guarantee is made shall be limited to 25 years: *Provided*, That—

(a) The Secretary may, in particular cases where he determines that a repayment period of less than 25 years is more appropriate to an applicant's total financial plan, approve such shorter repayment period; and

(b) In no case shall a loan repayment period exceed the estimated useful life of the facility to be constructed with the assistance of the loan.

§ 53.150 Interest on direct loans.

Each direct loan shall require the borrower to pay to the Secretary, or as directed by him, interest thereon at a rate determined by the Secretary to be comparable to the current rate of interest prevailing with respect to loans to non-profit private agencies which are guaranteed under part B of the Act, for the modernization or construction of similar facilities in the same or similar areas, minus 3 per centum per annum.

§ 53.151 Repayment.

Unless otherwise specifically authorized by the Secretary, each direct loan and loan with respect to which a guarantee is made shall be repayable in substantially level total annual installments of principal and interest, sufficient to amortize the loan through the final year of the life of the loan.

§ 53.152 Loan Guarantee Agreement and Direct Loan Agreement.

(a) *Loan Guarantee Agreement.* (1) For each application for a loan guarantee which is approved by the Secretary, an offer of a loan guarantee will be sent to the applicant, setting forth the pertinent terms and conditions for the loan guarantee, and will be conditioned upon the fulfillment of those terms and conditions. The accepted loan guarantee offer will constitute the Loan Guarantee Agreement between the Secretary and the applicant.

(2) Each Loan Guarantee Agreement shall include the following provisions:

(i) That the loan guarantee evidenced by the Agreement shall be incontestable (a) in the hands of the applicant

or whose behalf such loan guarantee is made except for fraud or misrepresentation on the part of such applicant, and (b) as to any person who makes or contracts to make a loan to such applicant in reliance on such loan guarantee, except for fraud or misrepresentation on the part of such other person.

(ii) That if the applicant shall default in making payment, when due, of the principal and interest on the loan with respect to which the guarantee is made, and such default is not cured within 90 days after the happening thereof, the holder of such loan shall have the right to make demand in writing upon the Secretary for the purchase by the Secretary of such loan.

(iii) That each holder of a loan to an applicant on whose behalf the loan guarantee evidenced by such Agreement is made shall have a contractual right to receive from the United States interest payments in an amount sufficient to reduce by 3 per centum per annum the net effective interest rate determined by the Secretary to be otherwise payable on the loan with respect to which such guarantee is made.

(iv) That payments of interest pursuant to subdivision (iii) of this subparagraph will be made by the Secretary, in accordance with the terms of the loan with respect to which the guarantee is made, directly to the holder of such loan or to a trustee or agent designated in writing to the Secretary by such holder until such time as the Secretary is notified in writing by the holder that such loan has been transferred. Pursuant to such written notification of transfer, the Secretary will make such interest payments directly to the new holder (transferee) of the loan.

(v) That the applicant shall be permitted to prepay up to 15 per centum of the original principal amount of such loan in any calendar year without additional charge.

(vi) Such other provisions as the Secretary finds necessary in order to protect the financial interests of the United States.

(b) *Direct Loan Agreement.* (1) For each application for a direct loan which is approved by the Secretary, an offer of a direct loan will be sent to the applicant, setting forth the pertinent terms and conditions for the direct loan, and will be conditioned upon the fulfillment of those terms and conditions. The accepted direct loan offer will constitute the Direct Loan Agreement between the Secretary and the applicant.

(2) Each Direct Loan Agreement shall include such provisions as the Secretary finds necessary in order to protect the financial interests of the United States.

§ 53.153 Loan closing.

(a) *Loan guarantees.* Closing for any loan with respect to which a guarantee is made shall be accomplished at such time

as may be agreed upon by the parties to such loan and found acceptable by the Secretary.

(b) *Direct loans.* Closing for any direct loan shall be accomplished at such time as may be determined by the Secretary.

§ 53.154 Waiver of right of recovery.

In determining whether there is good cause for waiver of any right of recovery which he may have against a nonprofit private agency by reason of any payments made pursuant to a loan guar-

antee, or against a public agency by reason of the failure of such agency to make payments of principal and interest on a direct loan to such agency, the Secretary shall take into consideration the extent to which:

(a) The facility with respect to which the loan guarantee or direct loan was made will continue to be devoted by the applicant or other owner to use for the purpose for which it was constructed or another public or nonprofit purpose which will promote the purposes of the Act;

(b) There are reasonable assurances that for the remainder of the repayment period of the loan other public or nonprofit facilities not previously utilized for the purpose for which the facility was constructed will be so utilized and are substantially equivalent in nature and extent for such purposes; and

(c) Such recovery would seriously curtail the provision of medical services to persons in need of such services in the area.

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RE: JCP 13+14

The Pioneer

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State May File Civil Suit Against Anchorage Legislator

\$97,039 Overpaid Revenue-Sharing Funds Sought

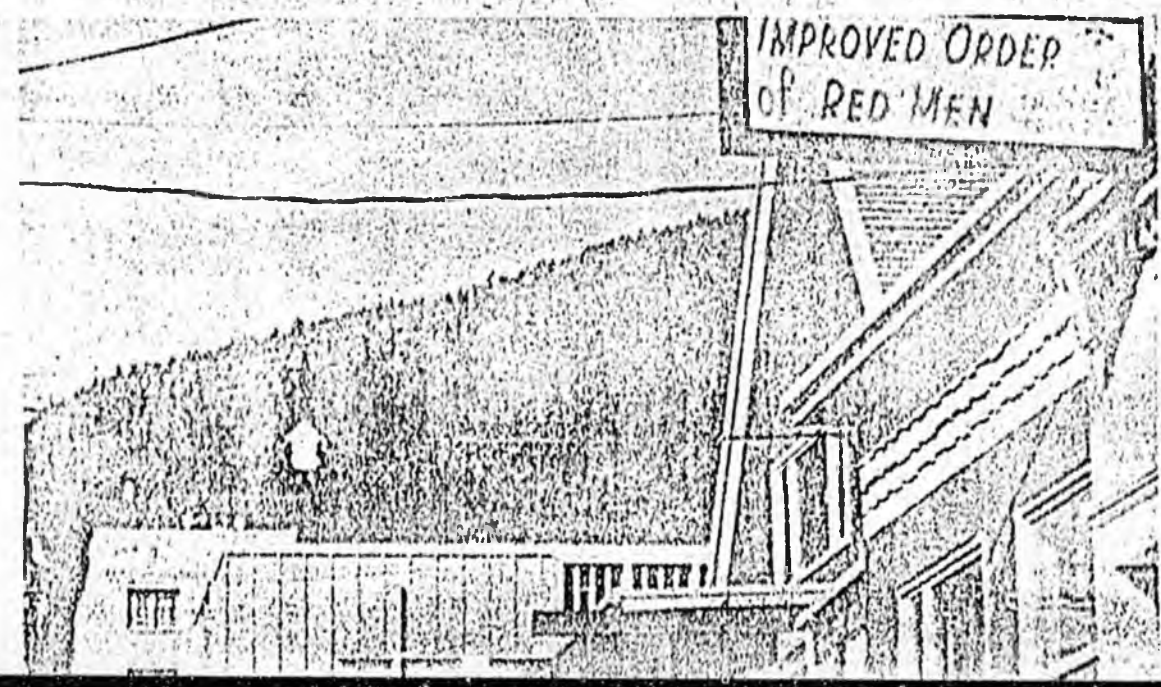
Audit Focuses On Rep. Beirne, Lake Otis Clinic

By Brian Rogers

The State of Alaska may go to court against an Anchorage legislator to recover almost \$100,000 in state revenue-sharing funds allegedly overpaid to the legislator's hospital corporation.

Assistant Attorney General Rodger Pegues said Friday that his office would go to court against Representative Michael F. Beirne (R-Anch.) and the Lake Otis Clinic, Inc. (LOC) unless Beirne repays \$97,039 he was overpaid in 1975.

The funds in question are a part of \$312,000 given by the state Department of Community and Regional Affairs (C&RA) to LOC in February 1975. LOC is a non-profit corporation, headed by Beirne, which is involved in the construction of an Anchorage acute-care hospital. Other directors of LOC are Corinne A. Beirne and Beverley L. Beirne.



In July of this year a state audit of the funds was made



At the 60th Session Grand Igloo, Pioneers of Alaska, ladies are seen leaving the attractive Tlingit Tribe No. 4 Hall in Ketchikan bound for a business session. More photos on page 13.

-Alaska Linck Photo

Gov. Hammond Announces Sale of State Royalty Gas

By Joe LaRocca

Andy Warwick of Fairbanks, a newly-appointed member of the state's Royalty Oil and Gas Development Advisory Board told the All-Alaska Weekly Wednesday he hasn't had an opportunity to study the governor's recently announced proposal to sell the state's Prudhoe Bay royalty gas in depth yet, but said that at first blush it looks "very attractive."

Warwick said State Commissioner of Natural Resources

Guy Martin, who negotiated the proposed agreements with three prospective purchasers, came to Fairbanks late Tuesday to brief him on their provisions.

Martin is also chairman of the five member Royalty Board which must approve the sale before it's submitted to the legislature for consideration.

Warwick said he'll want to take a closer look at the proposed agreements to determine what adverse effects, if any, the state might suffer if the

agreements are finalized, and whether the advantages would outweigh them.

SUCCESSFUL BIDDERS

The governor's announcement of the agreements late last week climaxed months of negotiations with four major gas transmission companies, one of which - United Gas Transmission - was eliminated in the final stages.

The successful bidders are

-Continued on page 15

by State Internal Auditor George Elgee. The audit showed that of more than \$3.1 million in costs claimed by LOC, almost \$2.3 million were not allowable under applicable revenue-sharing standards, leaving only \$861,843.89 in allowable costs. The state share, 25 per cent of the costs, came to only \$ 15,460.97, leaving \$97,039 unaccounted for.

The audit raised serious questions about several of the expenditures claimed by LOC. The report said "many costs were paid for by companies not directly related to the construction of the hospital. It would appear that at present these expenses are being claimed by both LOC and the facility that actually paid the expense."

"In every instance these other entities are tied closely to M.F. Beirne, Director of LOC," the report says. These corporations include:

-Kelly Supply Inc., Michael F. Beirne, Corinne Beirne and Beverley Beirne, directors.

-Raypath, Inc., Michael F. Beirne, Corinne Beirne and Beverley Beirne, directors.

-SPADA Feed and Seed Store, Inc., Michael F. Beirne, Corinne Beirne and Georgina Perritt, directors.

-Alaska Medical Laboratories, a professional corporation. Directors are Micheal F. Beirne and L.W. Mauman.

According to the audit report, "it appears that the expenses being claimed have been used for tax purposes by these corporations and are now being used to justify state revenue sharing funds."

'CAN'T WAIT FOREVER'

Pegues said Beirne was contesting the method of accounting done in the audit and was "trying to get more of the work accountable."

The audit was done using one of three currently acceptable standards of revenue sharing funds. Pegues said "there isn't any standard for those items to be accountable expenditures."

He said he had been expecting Beirne or Beirne's attorney, Miles Schlossberg, to contact

-Continued on page 3

NUGGETTEER



ALL WEEK LONG OUR PHONES HAVE REALLY BEEN BUZZING - It appears that the local Borough Assembly has a heated controversy on its hands - over a new zoning ordinance that comes up for public hearing and final passage on Thursday evening shortly after our issue comes off the press.

Homesteaders and property owners outside the city in the borough are hopping mad about the ordinance which they say would have catastrophic consequences should it pass. They say the ordinance would impose such untenable restriction on the land they have worked and slaved and struggled so hard to hold onto, that they

-Continued on page 2

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FAIRBANKS NORTH STAR BOROUGH REQUEST FOR PROPOSAL PUBLIC TRANSIT SYSTEM

Notice is hereby given that the Fairbanks North Star Borough will receive bid proposals for a contractor to operate the Borough Public Transit System.

The proposed contract requires the contractor to provide all supervisory, clerical, operating, and maintenance personnel necessary for the proper and efficient operation of the public transit system.

The Borough intends to provide to the contractor all necessary properties and facilities of such a system, including (a) passenger and service vehicles, (b) gasoline, diesel, and other fuels, oils and lubricants, (c) tires and tubes, (d) repair and replacement parts and materials, (e) other

State May File Suit . . .

-Continued from page 1

him, since Schlossberg had asked him to delay filing the suit until they could meet on the case. He said Schlossberg was supposed to call him last Wednesday, but had not called as of Friday afternoon.

"You can't wait forever," Pegues noted, "we'll just start preparing the case." He added, "Beirne obviously won't leave the state."

According to Pegues, his office is planning a civil action only, since "you have to show criminal intent for a fraud conviction."

The audit disallowed \$537,111 due to lack of supporting documentation and \$1,752,432 in costs not allowable under federal guidelines for revenue sharing, but the auditor "accepted \$251,951 of expenditures supported by incomplete data . . . which reasonably appeared valid."

COSTS DISALLOWED

Expenditures disallowed by the state included:

-\$722,500 claimed for land and land taxes, which the auditor said were not allowable under the guidelines. Though these costs were claimed by LOC, the 1975 annual report of LOC showed no land owned by the corporation. A statement filed by Beirne in May, 1976 said "title to property has been

transferred to facility sponsor", but no record of the transfer was found in state files.

-\$693,788.90 claimed for "interest on collateralized property - plus - salary of coordinator," which the auditor said was not allowable under the guidelines. The salary for the project director was \$30,000 per year for a half-time position, while the assistant project director received a salary of \$20,000 per year for a half-time position. Beirne claims the costs were "paid in part by M.F. Beirne, et al, and LOC/FHC" for a six-year period.

-\$270,173 claimed for financing and interest fees,

which are not allowable under the guidelines.

-\$354,000 claimed for salaries and wages disallowed due to "lack of supporting documentation." Elgee said Monday "the expenditures that he was claiming appeared to be SPADA payroll, for people working for SPADA." He said the SPADA books showed no accounts receivable from LOC, which would indicate an apparent double-billing. According to the State Department of Commerce, SPADA was not incorporated until June 22, 1976, just eight days before the end of the audit period.

-Continued on page 11

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