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35. June, 1976 - Cost estimates were completed by Modern-Tri/Alaska. Exh. R-10; Prichard testimony.

37. June 12, 1976 - Coopers and Lybrand updated its feasibility study in draft form. Exh. R-8

38. July, 1976 - Modern stopped work on the project. Beirne testimony. Circumstantial evidence suggests the possibility of pressure from individuals associated with Providence Hospital. Starke, Forsythe depositions; Prichard testimony. Modern's Les Gundersen denied that there was any visit from Providence representatives. Gundersen deposition at 20-21.

39. September 17, 1976 - Modern's interest in the project was transferred to Tri/Alaska. Exh. P-26.

b. Status of LOCH site

40. May 30, 1976 - Beirne wrote Commissioner McAnerney stating that "Title to property has been transferred to facility sponsor" and "swear[ing] that all the above stated facts and figures are true to the best of my knowledge." Exh. P-38 at 5-6.

c. Beirne's salary arrangements/representations

41. May 30, 1976 - Beirne's communication to McAnerney identified the following salaries as part of total project costs:

Director - 50/50 time = 30g/yr x 6 yrs. . .180,000

Ass't Director - 50/50 time = 20g/yr x 6 yrs. . .- 120,000.

Exh. P-38 at 5.

d. Activities re. other Anchorage hospitals

42. June 7, 1976 - Providence applied to the state for an increase in licensed beds from 150 to 235. Exh. R-70.

43. July 1, 1976 - Providence was licensed for 228 beds through June 30, 1977. Exh. R-70.

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44. October, 1976 - Alaska Hospital completed construction and opened its doors with 200 beds. Beirne testimony; Exh. R-74.

45. November, 1976 - Providence completed its north tower. Exh. R-74.

46. November 26, 1976 - Providence was issued a new license for 268 beds. Exhs. R-70 and R-74.

e. Bed need projections

47. March 1, 1976 - The Alaska State Plan for hospital construction placed bed need at 350. Exh. P-33.

48. May 6, 1976 - After receiving requests for an update by Gilgan and Beirne, the state re-estimated bed need at 579. Exh. R-6; Beirne testimony.

49. July 20, 1976 - The state notified Beirne that Anchorage bed need projections had been revised again, this time to 413. Exh. R-7.

1977

a. LOCH activities

50. April 12, 1977 - Beirne wrote Frank Cox, District Director, Small Business Administration, stating that "in 1973 I borrowed $1.5 million on a one-year note to begin construction on this hospital that year." Exh. P-41.

51. April 14, 1977 - Nix wrote Beirne advising him as follows:

> If we borrow $17,250,000 the equity will be approximately 2%. This will be a major problem to overcome for a sophisticated investor unless we can convince him the state pays 25% of the construction cost, and he considers this equity.
>
> I am not including this information in my report but just want to pass on to you my thoughts.

Exh. P-45.

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52. June 21, 1977 - Beirne and associates on the project presented their proposal to the Anchorage Assembly for sponorship by the Assembly of tax-exempt bonds.

53. June 28, 1977 - The Assembly considered sponsorship again. Bonnie McGee from the Municipal Health Commission testified, requesting that the Assembly delay taking action until the Commission had an opportunity to review the project. Beirne opposed a three week postponement on the grounds that LOC would like the hospital to be under construction by September 1, 1977. George Shecter, LOC's consultant, testified at the hearing on this accusation that approximately 150 days would be required from the date of passage of such a resolution before construction could realistically be expected to commence. He indicated that a minimum of 90 days would be consumed in getting issuance of the bonds from such time as the underwriting documents were prepared, and another 60 days would be required to obtain the steel necessary to start construction. Contrary to Beirne's statement in Exh. P-44, no one from South Central testified in opposition to the resolution. The Assembly voted to approve the resolution sponsoring the tax exempt bonds. Exh. P-48.

54. July 1, 1977 - The state certificate of need law became effective.

55. July 5, 1977 - Mayor George Sullivan vetoed the Lake Otis Hospital resolution based on the overbedding in the community and the failure to have the project reviewed by the Municipal Health Commission. Sullivan indicated that his "primary concern" was the opposition voiced by the Commission. Exh. R-16B. Newspaper articles appeared in The Anchorage Times and The Anchorage Daily News reporting Municipal Health Commission support for the mayor's veto. Exh. R-15.

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56. July 15, 1977 - LOC obtained a foundation building permit for $7,500 from the City of Anchorage. Exh. P-44.

57. July 15, 1977 - South Central's Board president Paul Foutz wrote Assembly Chairman Ernest Brannon identifying "certain facts regarding the economics of health care," but not openly articulating a position on the LOC proposal. Exh. R-54.

58. July 19, 1977 - An attempt to override the mayor's veto failed. Exh. P-44; Beirne testimony.

59. July 27, 1977 - Acting Commissioner Lund granted LOC a certificate of need "to construct a 125 bed hospital in Anchorage, Alaska." Exh. R-11, Tab 1. The certificate was issued pursuant to SLA 1976, Ch. 275, Sec. 4 which provided:

> All health care facilities in existence or under construction before July 1, 1976 shall be issued a certificate of need.

Regulations defining "under construction" did not come into effect until January, 1978. Exh. R-11, Tab 10. The certificate provided:

> This certificate shall expire 18 months from the date of issue, unless an extension has been granted and shall be subject to revocation by the Department of Health and Social Services for failure to comply with the laws of Alaska or rules and regulations as provided under the Alaska Administrative Code.

Exh. R-11, Tab 1.

60. August 22, 1977 - A formal presentation was made to the Wasilla City Council. The Council approved a bond sponsorship resolution. Exh. R-17.

61. Mid - Fall, 1977 - Investment broker Don Cincotta and William Nix Associates worked on tax exempt financing for the project. Exh. P-44 at 4 and 5; Beirne testimony.

62. October 7, 1977 - An offer to construct the hospital was transmitted by Howard S. Lease Construction Co.

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& Associates. The contract was contingent upon LOC obtaining financing satisfactory to Lease Co.'s bank and surety. Exh. R-16A.

63. December 12, 1977 - The GHS foreclosure suit was dismissed after satisfaction of the debt to GHS. Exh. P-44 at 10; Beirne testimony. Beirne testified that the GHS loan ultimately cost him $1.5 million: $900,000 principal; $250,000 interest; $100,000 to Kingston Peters for assistance in the liquidation process; and $250,000 for attorney's and accountants' fees, real estate fees, and Beirne's own expenses.

b. Status of LOCH site

64. October 25, 1977 - General Hospital Services deeded the Lake Otis Hospital site property to Beirne. Exh. R-4.

c. Activities of health planning agencies re. LOCH and bed need projections

65. June 1977 - As noted Finding 53, supra, the Municipal Health Commission's chairman testified before the Anchorage Assembly in opposition to its proposed sponsorship of tax exempt bonds for LOCH.

66. July 15, 1977 - As noted in Finding 57, supra, South Central president Foutz wrote Assemblymembers drawing attention to various factors relevant to the Assembly's consideration of the LOC proposal.

67. September 14, 1977 - The Municipal Health Commission determined that Anchorage was over-bedded and adopted the following resolution:

> The Municipal Health Commission recommends to the regional health systems agency, Mayor Sullivan and the Municipal Assembly that there be a moratorium on the construction of civilian non-native acute care hospital beds within the Municipality of Anchorage for a 5 year period or until civilian population reaches 270,000, whichever is sooner.

Exh. R-55.

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68. Beirne testified that South Central endorsed the moratorium concept within a month. See also, Exh. P-44 at 5. Hammett's testimony and documentary evidence indicate that strict endorsement of the moratorium was not approved by South Central. However, at its September 23, 1977 meeting, petitioner's board of directors did adopt the folowing motion:

> Based upon statistical demonstration of the lack of clear and evident need as supported by the SCHPD, Inc., Health Systems Plan, the Health Systems Agency shall publicize its Plan contents with emphasis on the need for no additional civilian non-Native acute care beds for the Municipality of Anchorage. The Health Systems Agency shall oppose the irresponsible and possibly illegal Certificate of Need for Lake Otis Hospital and publicize these two efforts to Blue Cross, the State and others who have funding authority.

Exh. R-56 at 3.

69. September 29, 1977 - Letters containing the language of the South Central motion were sent by petitioner's president to Governor Hammond, Mayor Sullivan, and Armand Hoppel, president of Blue Cross of Washington and Alaska. Exh. R-57. A response from Hoppel indicating that Blue Cross would "support the intent of the motion" was sent to petitioner on October 5, 1977, and forwarded by South Central to Governor Hammond and Mayor Sullivan. Exh. R-58. An article appeared in The Anchorage Times based on information obtained from South Central and erroneously captioned: "Blue Cross Chief Says Insurance Won't Pay at Beirne's Hospital." Exh. R-58A. Petitioner did not seek to obtain a correction of this caption in a future issue of the paper. On December 15, 1977, Bonnie McGee, Chairman of the Municipal Health Commission wrote the Commissioner of Health and Social Services requesting that the Commission's moratorium resolution and South Central's motion be incorporated into the State Facilities Plan. Exh. R-68.

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d. Activities re. other Anchorage hospitals

70. March 30, 1977 - A meeting between Providence and Department representatives resulted in a tentative agreement to reduce Providence's bed capacity to 250. Exh. R-51A. (While this is hearsay, there was other testimony that such a meeting took place with this result. The 250 figure is corroborated by the existence of Exh. R-51A, and the July 1, 1977 license contained in R-70.)

71. April 27, 1977 - Hammett wrote the State Office of Planning and Research supporting Providence's request to license 250 beds with a waiver of square footage requirements for 44 beds. Bed need was not discussed though it was considered by South Central. Exhs. R-51 and R-52.

72. May 6, 1977 - The Department approved a waiver for Providence's utilization of 31 non-conforming beds. Exh. R-74.

73. May 20, 1977 - The Department corrected its waiver approval to reflect the existence of 44 non-conforming beds. Exh. R-74. The waiver was premised on the belief that remodeling costs to bring the rooms into conformity with legal standards would increase costs to patients while patient care would not suffer as a result of the non-conformity. Regional bed need was not addressed in consideration of the waiver. Exh. R-71.

74. July 1, 1977 - Providence was officially licensed for 250 beds, 44 non-complying. Exhs. R-70 & 74.

75. July 27, 1977 - Providence submitted a second application for the modernization funds awarded by the state in 1975. This revised application indicated that the 44 beds would remain out of compliance. R-71.

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76. August 15, 1977 - The Department approved Providence's July 27 revised application. Exh. R-71.

e. Revenue sharing litigation

77. November 1, 1977 - Beirne and the State each sued the other over revenue sharing funds.

1978

a. LOCH Activities

78. January, 1978 - George Shecter, health economist with the USC Medical School Center for Health Research, was hired as a consultant to LOC. The Nix Associates contract was extended to July, 1978. Exh. P-44, corroborated in substance by Beirne testimony.

79. April 14, 1978 - Beirne, Shecter and Cincotta met with various union representatives to elicit union support for the project. Exh. R-19.

80. April 27, 1978- A favorable ruling was received from the I.R.S. re. the Wasilla bonds. Exh. R-20.

81. May, 1978 - Shecter wrote letters to union representatives seeking patient days commitments and indicating that "Lake Otis Community Hospital is a reality and construction will start this summer. . . ." Exhs. P-11 and 12. No working drawings had been prepared at this time and no financing had been secured. Shecter testimony. See also, Finding 53. Realistically, construction could not have been expected to start in the summer of 1978, but in the Fall at the very earliest.

82. June 30, 1978 - LOC's last construction license expired. Regulations now required approval of working drawings prior to issuance of a construction license. Beirne was unwilling to incur the expense of obtaining completed working drawings until construction financing was secured. Beirne testimony.

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83. July 18, 1978 - U.S.C. feasibility study was completed. Exh. R-31.

84. August 9, 1978 - Beirne states that as of this date he anticipated final approval of financing details by the Wasilla City Council on August 28 with construction able to "begin again the next day." Exh. P-44 at 25.

85. August 12, 1978 - Beirne informed the state that as of this date, bond counsel Borge indicated his intent to withdraw because of a change in I.R.S. rules rendering funding mechanism on bonds subject to closer I.R.S. scrutiny. Exh. P-44 at 26.

86. August 28, 1978 - A Wasilla bond resolution affirming support for the project was passed by the City Council. Beirne testimony. Exh. R-28.

87. October 20, 1978 - Beirne requested an extension for the LOC C/N. See, Exh. R-11, Tab 2.

88. November 28, 1978 - A special election was held in Wasilla; continued sponsorship of the hospital was defeated. Exh. R-29; Beirne testimony.

89. November, 1978 - Beirne wrote to the Alaska Medical Facility Authority for information on funding. Beirne testimony.

90. December 27, 1978 - Beirne sent McGinnis a letter with documentation in support of LOC's request for an extension of its C/N. Beirne stated: "[y]ou must understand that the contractors are ready to begin this project tomorrow provided that financing is available." Exh. R-11, Tab 3, letter of 12/27/78 at 3.

91. December 29, 1978 - LOC's certificate of need was extended for a six month period to June 30, 1979. McGinnis found, first, "reasonable justification for not having accomplished 'substantial implementation'" because of Wasilla's with-

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drawal of bonding support and the delay in implementation of the Alaska Medical Facilities Authority legislation occasioned by the necessity of amending the statute to conform to I.R.S. requirements. McGinnis also ruled that LOC had "a reasonable likelihood of accomplishing that 'substantial implementation' within the terms of the requested extension." This determination was based on the likelihood of being able to process an application through AMFA within the extension period, and the possibility of financing being accomplished through a Native corporation during the same time frame. The Commission relied in part on documentary evidence submitted by LOC indicating a state of readiness to proceed immediately with construction once financing was obtained. Exh. R-11, Tab 4.

b. Activities of health planning agencies re. LOCH

92. May 16, 1978 - South Central Administrator Ron Hammett wrote Mayor Hjellen of Wasilla opposing Wasilla support of LOCH based on considerations of overbedding and other factors. Exh. R-21.

93. May 18, 1978 - Hammett wrote to Beirne seeking to schedule a public meeting at a time convenient to Beirne for the purpose of discussing bed need. Exh. P-56.

94. June 22, 1978 - Newspaper articles reflecting opposition to LOCH by South Central and the Municipal Health Commission appeared in local papers beginning this date and extending through the special election. Exh. R-29.

95. October 13, 1978 - Hammett wrote Anchorage mayor Sullivan indicating a desire to support the Municipality in taking "whatever appropriate legal action is necessary to prevent the development of the proposed Lake Otis Hospital." Exh. R-70.

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96. November 11, 1978 - Hammett and citizen Harold Pomeroy participated in a debate against Beirne and Bob Ogden sponsored by the Wasilla Chamber of Commerce. Exh. P-58.

c. Activities re. other Anchorage hospitals

97. February 2, 1978 - Beirne met with Department officials and OPR staff re. Providence's 219-bed limit. As a result of this conference, the Department requested an Attorney General's opinion. Exh P-44.

98. May 16, 1978 - An Attorney General's opinion was issued stating that unless need for the increase in beds from 219 to 250 could be demonstrated as of 1977, Providence would have to reduce bed capacity to 219 or forego previously approved revenue sharing funds. Exh. R-71.

99. July 31, 1978 - The Municipal Health Commission affirmed its support of 250 beds for Providence in a letter to the Commissioner. LOCH's projected beds were not referenced in any manner. Economies of scale were considered. Exh. R-65.

100. August 8, 1978 - Hammett wrote the Commissioner reaffirming South Central's support of Providence's request for 250 beds with a waiver of requirements for 44 of those beds. South Central did not include LOCH in its bed need calculations. Exh. R-52.

101. August 15, 1978 - The Office of Planning and Research included 43 beds approved but not licensed for Alaska Hospital and Lake Otis Hospital's 125 beds in assessing bed need. OPR recommended that the Department either (1) relicense Providence at 219 beds and investigate rescission of LOC's grandfathered C/N; or (2) investigate rescission of LOC's C/N without revising Providence's license. Exh. R-53.

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102. November 28, 1978 - The Office of Planning and Research revised its August 15, 1978 determination of bed need based on altered directives from federal authorities allowing the exclusion of grandfathered facilities for which progress had not been made. As a result of the revised calculations, OPR found that there was a demonstrated need for additional beds at the time of Providence's license application. OPR therefore supported Providence's request for 250 beds. Exh. R-73.

103. December 1, 1978 - The Department determined to continue its waiver approval for Providence's 44 non-conforming beds and its revenue sharing funding. Exh. R-74.

1979

a. LOCH Activities

104. January 4-5, 1979 - Beirne and Shecter exchanged correspondence suggesting solicitation of Native help in financing LOCH. Beirne reported that after conferring with McGinnis he believed there was "a reasonable opportunity" of obtaining funds through AMFA. Exhs. P-13 and 13A.

105. January 31, 1979 - Beirne filed LOC's application for tax exempt bond financing with the Alaska Medical Facility Authority. Documentation referenced in the application remained to be submitted. The application stated that engineering and architects' plans and specifications were completed and that "all outside funding sources [had] been approved." Beirne claimed as well that the project was eligible under AS 18.26.220, the provision which requires compliance with the certificate of need application and approval sections of AS 18.07.011-111. The application recited that "over a million and a half dollars was borrowed and invested in the project[.]" The narrative portion of the application concluded with the statement that

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As of this date, Lake Otis Clinic, Inc. is a fully licensed and certificated institution with plans, specs, and contracts completed, ready to resume construction immediately on securing adequate financing." Exh. R-33. Cf. Findings 108, 112, 123, 154. Beirne testified that the $1,000 application fee was not remitted to AMFA because Beirne knew that the application was unlikely to succeed in light of the certificate of need requirements of the legislation. Beirne testimony.

106. June 4, 1979 - Beirne wrote McGinnis requesting a second extension of LOC's certificate of need. Reporting on the present status of the project, Beirne referenced the AMFA application without indicating that it had never been completed nor accompanied by the requisite fee. Beirne noted that AMFA was still in the process of being restructured, following legislative amendments in April. Beirne went on to state:

> We have no reason to believe that our application to the Authority will not be approved. Numerous conferences with our consultants conclude that the merits of the project are such that the Board will have no reason to reject the application.
>
> However, in all candidness, it is obvious that with four health planners on the Board, our application may encounter difficulties that would be based not on merit but on political interests. We are prepared to file an anti-trust action to include the individual Board members if necessary.

Exh. R-11, Tab 5.

107. June 6, 1979 - McGinnis granted Beirne's request for a second extension, the certificate of need to be valid from July 1, 1979 to December 31, 1979. In a letter accompanying issuance of the C/N, McGinnis wrote that his decision was based

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CORRECTION

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on Beirne's representations set forth in his letter of June 4, 1979 regarding the status of the project.

108. June 6, 1979 - Architect Alexander Bertulis wrote Beirne, stating:

> I expect to expend about 400 man-hours during June in bringing the plans up to date. They will be far from complete but I think they will be comprehensive enough to submit to the State architect for review. It would be too much to expect of the State architect to approve these plans on the first go-around, even if the plans were 100% complete!

109. June 18, 1979 - A financial feasibility study summary was prepared by Shecter to support the AMFA application. The document states that "Lake Otis Community Hospital complies with the requirements of the Act and is clearly entitled to the issuance of these bonds by the Authority[.]" Exh. R-37 at 1.

110. June 19, 1979 - Assistant Attorney General Wyanne Bunyan issued an Attorney General's opinion holding that grandfathered institutions applying for AMFA funding had to comply with current substantive and procedural requirements of AS 18.07. Exh. R-11, Tab 26.

111. June 21, 1979 - An AMFA meeting was held at which time the LOC project was discussed and questions regarding the necessity of complying with the certificate of need requirements were raised. Exh. P-74. The application was merely "received," not acted upon. Beirne prepared a file memorandum on the meeting in which he stated that there is an "outside chance" that the project can comply with the 'substantive and procedural requirements' referenced by Assistant Attorney General Bunyan [without submitting to a certificate of need review]. Beirne relates:

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> I really never expected that we could overcome this legal hurdle, but we had to go through the process and be denied in order that I can appeal to the Legislature to remove this clause from the law.

Exh. P-72 at 2.

112. June 29, 1979 - Consulting engineer W.C. Koskinen wrote Beirne and Forsythe stressing that at least three pile load tests were "urgently need[ed]" in order to finalize the design. Exh. P-11. Beirne testified that these tests were never authorized as he was unwilling to expend more funds while financing was uncertain.

113. July 20, 1979 - Beirne submitted schematic plans and specifications to Walter Moyle, Department architect.

114. July 26, 1979 - Anchorage Municipal Health Commission filed suit against LOC challenging the issuance of LOC's initial "grandfathered" C/N as well as the two extensions of the C/N. Exh. R-38. Beirne testified that the lawsuit "stopped the project totally" because financing was unobtainable under the cloud of litigation. He did not indicate what, if any, financing efforts were under way other than the AMFA application.

115. July 30, 1979 - Moyle wrote Beirne identifying questions and revisions required in plans submitted on July 20, 1979. Moyle stated that his office's review was "continuing." Exh. P-19.

116. August 8, 1979 - Beirne wrote AMFA Chairman Tom Williams requesting that he temporarily set aside the LOC application pending resolution of the municipal lawsuit and determination of the certificate of need question. Exh. R-35.

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117. August 27, 1979 - Shecter responded to Moyle's letter stating "we are most anxious to cooperate with your office. . . . " Exh. P-20.

118. October 12, 1979 - Legal Assistant Theresa Hillhouse wrote an Attorney General's opinion stating that C/Ns are not transferable from one owner of a facility to another. Exh. R-47A.

119. November 12, 1979 - Funding of a private loan through the auspices of attorney John Frolich and intermidiary Charles Devlin was obtained, closing to be contingent, inter alia, on "[a]ny additional . . . items felt necessary by the Lender or its counsel which are not determinable." Exh. P-36A, Letter of October 26, 1979 from Frolich to Devlin and telegram of 11/12/79.

120. November 13, 1979 - The municipal lawsuit against LOC was dismissed for want of capacity of the Municipal Health Commission to bring the litigation. Exh. R-38.

121. November 15, 1979 - Lease/Crucher/Kissee, general contractors, submitted their offer to construct the hospital at a maximum cost of $14,016,233 contingent upon procurement of financing satisfactory to the contractors' bank and surety prior to December 31, 1979. Exh. R-39.

122. December 7, 1979 - Beirne wrote McGinnis requesting confirmation that LOCH is "substantially implemented" and thus possessed of a continous certificate of need. Beirne contended that as a matter of law, LOCH was "substantially implemented" because such was the requirement for issuance of the grandfathered certificate in July, 1977. Beirne also claimed that the hospital project satisfied the substantial implementation provisions of 7 AAC 08.090(e)(4) and (6). Exh. R-11, Tab 9.

123. December 12, 1979 - Shecter wrote Bertulis stressing the "critical" need of hiring a kitchen consultant. Exh. P-22.

124. December 14, 1979 - A contract was entered into with Arctic Steel to install the additional 79 pilings. Exh. R-40.

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125. December 17, 1979 - Frolich wrote Devlin saying the lenders were "raising 'hell'" because their funds had been tied up without receipt of the plans and specifications and the one percent loan application fee. Frohlich said; "You better see that Dr. Beirne gets his act together. . . . " Exh. P-36A.

126. December 31, 1979 - McGinnis wrote Beirne expressing a "conditional determination" that LOC's C/N would continue in effect after December 31, 1979 based on "the apparent fulfillment of the minimal requirements of 'substantial implementation. . . .'" Applying the criteria set forth in 7 AAC 07.090(e)(1)-(6) and (f) for evaluating questions of "substantial implementation," McGinnis found that contracts may have been signed meeting the requirement of subparagraph (4) and acquisition of the site satisfied subparagraph (f). Copies of the conditional determination were sent to affected parties. McGinnis disclosed that his final determination would be based in part on consultation with South Central. He noted that LOC's failure to show "continuing progress toward commencement of activities" or to "complete the activities authorized by the certificate" could lead to revocation of the C/N. Exh. R-11, Tab 10.

1980

a. LOCH activities

127. January 23, 1980 - Devlin wrote Beirne inquiring of LOC's intentions "in fulfilling your obligations under our contract[.]" Exh. P-36A.

128. February 11, 1980 - Beirne wrote McGinnis explaining the status of certain contracts which appeared to have expired. He advised of ongoing negotiations with Cincotta; stated that the "expired Lease Co. contract is still good" as Lease would continue to extend data as it had done in the past; and reported

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that although the contract with Devlin and Frolich actually expired on December 15, 1979, he was continuing to work with them. Exh. P-36. Beirne ultimately refused to consummate the Frolich/Devlin transaction. He testified that he was concerned about the absense of a concrete loan package and his lack of information regarding the identify of the lenders; the possibility of new terms being added to the contract; and the insufficient financial benefit he would derive from the arrangement.

129. March 10, 1980 - McGinnis issued a final determination of "substantial implementation" validating LOC's C/N. That determination was based on the same considerations outlined in the conditional determination letter. Exh. R-11, Tab 19.

130. March 24, 1980 - South Central and Providence each wrote McGinnis appealing the substantial implementation decision and requesting a hearing. Exh. R-11, Tabs 21 and 22. Robert J. Dickson, on behalf of Provicence, expressed that institution's desire to undertake further expansion, which plan could be thwarted as long as LOC's C/N was outstanding.

131. April 8, 1980 - Providence brought a civil action against the Department to void McGinnis' final determination of "substantial implementation." Exh. R-12.

132. April 30, 1980 - The revenue sharing litigation was concluded with a decision and order directing Beirne and LOC to repay to the state the funds granted to LOC plus interest. Exh. P-28. An appeal of that decision is presently pending in the Alaska Supreme Court.

133. June, 1980 - LOC entered into discussions with Alaska Pacific Bank for commercial financing of the hospital. See, Exh. P-24.

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134. July 1, 1980 - Liberalized revenue sharing provisions of AS 29.90.010 and 030(3) became effective, allowing

interest expenses to be included in computing "total project costs" for the first time. Both Shechter and Tom Behan of Alaska Pacific Bank testified that the availability of this source of financing made the project "attractive."

135. July 31, 1980 - McGinnis informed South Central and Providence that their requests for hearing would be denied based on an Attorney General's opinion holding that the appropriate procedure would be a petition for revocation of LOC's C/N rather than an appeal of McGinnis' decision. Exh. R-11, Tab 24.

136. August, 1980 - Alaska Pacific Bank financing was pursued by Cabot Jones on behalf of LOC; Beirne considered backup financing through tax-exempt bonding from Valdez or Houston. See, Exh. P-66.

137. August 8, 1980 - South Central filed its accusation in this case for revocation of LOC's C/N.

138. August 28, 1980 - Beirne wrote Chuck Considine, explaining the delay in proceeding with the project as follows:

> While we can cite many specific interferences by the health planning groups and the other hospital interests which have in one or another way prevented the completion of financing, the basic reason is that we have not had sufficient capital to fight the Sisters of Providence. . . . who have virtually unlimited resources, and are commited [sic] to preventing any completition [sic] from the Lake Otis Hospital....I have discovered what many thinly capitalized entrepreneurs have discovered: the absolute necessity of having sufficient capital in launching a project.

Exh. P-68.

139. September 3, 1980 - Stolte-Easley, Joint Venture, proposed to perform construction for a guaranteed maximum cost of $17,162,000, assuming financing satisfactory to the contractors' bank and surety was obtained prior to November 2, 1980. Exh. R-44.

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140. September 30, 1980 - Beirne conveyed an endeavor fee in the amount of $15,000 to Alaska Pacific Bank. Exh. R-41.

141. October, 1980 - Alaska Pacific Bank declined to proceed with the loan due in part to the litigation challenging LOC's C/N and the lack of commitment from a municipality to sponsor tax exempt bonds. Behan testimony.

142. November, 1980 - An update of financial data on LOCH was performed. Exh. R-42.

b. Status of LOCH site

143. February 11, 1980 - Beirne wrote McGinnis stating that "the ownership and control of the Hospital site is now and always has been in Lake Otis Clinic, Inc. and Mike F. Beirne." He further asserts:

> In 1973, the Hospital site was deeded to the Lake Otis Clinic, Inc. and it remained in that ownership until late 1977 at which time the title was transferred back to my personal name where it remains. During this latter time frame lawsuits required the recording of a deed of trust and even a warranty deed with a caveat.

Exh. P-61.

c. Activities re. other Anchorage hospitals

144. August, 1980 - Providence was issued a grandfathered C/N for 250 beds. AK Hosp ?

d. Activities of health planning agencies re LOCH

145. January 24, 1980 - The Municipal Health Commission sent McGinnis a letter in opposition to his conditional determination of substantial implementation. The Municipal Health Commission contended, inter alia, that 7 AAC 07.090(e)(4) must be interpreted to require signing of a contract for a substantial portion of the project construction in order to be consistent with the overall intent of the regulation. Exh. R-11, Tab 11.

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146. February 18, 1980 - South Central sent McGinnis a letter in response to his conditional determination of substantial implementation. South Central acknowledged that it had no evidence that the literal requirements of 7 AAC 07.090(e)(4) and (6) and (f) had not been met. Petitioner also forwarded its' attorney's preliminary conclusion that granting a continuous C/N to LOC would be improper. Petitioner recommended, finally, that any continuation of LOC's C/N be conditioned on a 180-day time period for presentation of secured financial commitments of at least 50 per cent of the total estimated construction costs. Exh. R-11, Tab 15.

147. March 24, 1980 - As set forth in Finding 130, supra, South Central notified McGinnis of its decision to "pursue an appeal and hearing under the procedures set forth in 7 AAC 07.080. Exh. R-11, Tab 21.

148. August 8, 1980 - As set forth in Finding 132, supra, South Central filed the accusation in this case for revocation of respondent's C/N.

149. September, 1980 - Representatives of Brookwood Medical Services, potential contractors to provide management services for LOCH, contacted petitioner's staff regarding the status of LOC's C/N. South Central staff informed Brookwood personnel that Anchorage was over-bedded and that revocation proceedings had been initiated. [illegible]

1981

a. LOCH activities

150. January, 1981 - Hospital Corporation of America ("HCA") contacted Beirne to discuss possible financing of the hospital project. Beirne testimony.

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151. Spring, 1981 - Contract negotiations were undertaken with Brookwood Health Services. Brookwood was ultimately taken over by "AMI" which company was not interested in operating in Alaska. Shecter testimony.

152. May 6, 1981 - LOC obtained summary judgment in the Providence litigation; an appeal is presently pending in the Alaska Supreme Court. Beirne testimony; Exh. P-69.

153. May 13, 1981 - Stolte-Easley, Joint Venture informed Beirne that construction, if started by August 14, 1981, would cost approximately $18,660,000. Exh. P-101. Beirne responded on May 15, 1981, stating, inter alia, that no contractual relationship currently existed between LOC and Stolte-Easley. Exh. P-102.

154. May 13, 1981 - Consulting engineer W.C. Koskinen informed Beirne that the structural engineering design and drawings were "20 percent from completion." Exh. P-70.

155. June 11, 1981 - Assistant Attorney General Elizabeth Shaw wrote an Attorney General's opinion which declared that "Although a certificate of need is 'non-transferable' by itself, it may be 'transferred' along with the health facility." Exh. 47B.

156. June 30, 1981 - LOC entered into an option agreement with HCA whereby HCA would purchase LOC's C/N and the hospital property and LOC's interest in the development of the hospital. Exh. R-46.

157. September 19, 1981 - Elizabeth Shaw wrote another Attorney General's opinion indicating that a C/N was not required for the purchase of a health care facility. Exh. P-77.

158. October, 1981 - HCA declined to proceed with the option agreement, according to Beirne, because of the uncertainty surrounding the transferability of the C/N and the pending litigation. Beirne testimony.

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159. November 5, 1981 - Beirne authorized Reynolds Construction to proceed with specified on-site electrical and fill work to maintain the City building permit. Exh. P-71; Beirne testimony.

<u>Present Status</u>

a. <u>LOCH activities</u>

160. Beirne anticipates no further expenditures on behalf of the hospital project until legal obstacles are cleared.

b. <u>Activities re. other Anchorage hospitals/bed need</u>

161. Providence is operating at near capacity at present, hoping to add 132 beds to be ready for occupancy in 1985. Alaska Hospital has a high occupancy rate for those beds it has placed in operation, but not for those licensed. Exh. R-77, Camosso testimony.

162. According to calculations performed by South Central and Providence, at least 30 new beds will be needed in the Anchorage area by 1985. Exhs. R-51A and R-76, respectively.

<u>ULTIMATE FINDINGS OF FACT</u>

1. Dr. Beirne was not a credible witness. Beirne demonstrated a willingness to mislead governmental authorities on matters including, but not necessarily limited to, the following: (a) the ownership of the hospital site (Findings of Fact 32, 40, 64, 143); (b) his salary entitlements (Findings of Fact 22, 23, 41); (c) the timetable for commencing construction on the project (Findings of Fact 53, 85, 90, 105, 100, 112, 123, 154); (d) the bona fide nature (or lack thereof) of LOC's filing with AMFA (Findings of Fact 105, 106, 111); and (e) the size and source of his and LOC's financial obligations (Findings of Fact 19, 50, 105.)

2. LOC's hospital project has been undercapitalized. Exhs. P-28 at 44 and P-68, Beirne testimony.

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3. Beirne has twice avoided review by planning agencies and thus effectively negated LOC's prospects for Anchorage bond sponsorship and AMFA funding, respectively. Beirne's refusal to submit to agency review was predicated on a realistic assessment that the agencies would not find bed need sufficient to support LOC's respective applications.

4. South Central and the Municipal Health Commission have opposed construction of the Lake Otis hospital since respondent attempted to obtain tax exempt bond sponsorship from the Municipality of Anchorage. The agencies' motivation was the promotion of quality patient care at a reasonable cost. No personal animus towards Dr. Beirne, nor any conspiracy with Providence or Alaska Hospitals was demonstrated. Findings of Fact 53, 57, 65-69, 92, 93, 95, 96, 114, 130, 137, 145-148. Hammett testimony. Hammett testified that when it appeared that Alaska Hospital would be sold to the federal government, he went to Beirne's office to inquire if LOC could replace the Alaska Hospital beds.

5. The Municipal Health Commission's opposition to the hospital played a substantial part in the mayor's subsequent veto of the Anchorage Assembly resolution supporting bond sponsorship. South Central's activities in regard to the Wasilla bond sponsorship also played some part in the defeat of the Wasilla resolution.

6. The state's revenue sharing litigation against Beirne affected Beirne's credibility and thus adversely affected his prospects for obtaining financing for LOCH.

7. LOC effectively "wasted" the period of time between September, 1978, when the Wasilla bond sponsorship ceased to be a viable option, and July, 1979, when the Municipal Health Commission action was filed, by making no bona fide effort during

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those months to obtain financing. The AMFA application was a sham. There were almost four more months after the Municipal lawsuit was dismissed and the time for appeal had expired, and before the Providence and South Central appeals were filed with the Department, when again no legitimate efforts to obtain financing were made. Even while the Municipal litigation was pending, Beirne apparently had the option of accepting the Devlin/Frolich financing. This latter possibility was either (a) never a realistic, feasible source, or (b) never seriously considered by Beirne because of lack of financial advantage to him.

8. The Municipal Health Commission litigation, and more clearly the Providence and South Central actions, interfered substantially with LOC's ability to obtain financing for the hospital.

9. LOC's efforts to obtain financing for, and construct, the hospital entailed the expenditure of substantial sums of money and substantial effort on the part of Dr. Beirne and various associates.

10. In March, 1977, prior to the effective date of the certificate of need legislation, Providence was licensed for 250 beds. At that time, before LOC's C/N was issued, and again, in 1978, after LOC received its grandfathered C/N, South Central recommended approval of the 250 figure based on bed need calculations as of early 1977. The 250 beds represented an increase of 22 beds over the 228 previously licensed in 1976, and 31 more beds than the 219 approved in 1974. LOC's proposed 125 beds were not included in petitioner's calculations of bed need.

11. The Alaska Hospital opened in 1976 with a bed capacity of 200; it was licensed for 154 beds. In December, 1978,

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Alaska Hospital was licensed for 45 more beds. There is no indication of any health planning agency involvement in that licensing decision.

CONCLUSIONS OF LAW

I. PETITIONER HAS NOT DEMONSTRATED GROUNDS FOR REVOCATION OF LOC'S CERTIFICATE OF NEED BASED ON AS 18.07.081(d)(1).

South Central has contended, first, that respondent's certificate of need should be revoked because of failure to comply with the requirements set forth in AS 18.07.081(d)(1). That section provides:

> (d) A certificate of need may be revoked if
>
> (1) the sponsor has not shown continuing progress toward commencement of the activities authorized under AS 18.07.041 after six months of issue.

"Commencement of activities," in turn, is defined as

> the visible commencement of actual operations on the ground for the construction of a building . . . which operations are readily recognizable as such and which operations are done with intent to continue the work until such activities are complete. . .

There is no question that there was "visible commencement of actual operations on the ground for the construction of a building" in 1973 and 1974 when the original site preparation and piling work was acomplished. The only issues, thus, are whether Sec. 81(d)(1) is even applicable to work accomplished prior to issuance of a grandfathered C/N and, if so, whether the work in this case was performed with "intent to continue . . . until such activities are complete."

Respondent's argument on the first point arises from the fact that LOC received a grandfathered certificate because, in the language of SLA 1976, Ch. 275, Sec. 4, the hospital was

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found to be "under construction before July 1, 1976." Respondent contends that since it has been determined that the project was "under construction" prior to issuance of its C/N, there could not logically be a finding now that Lake Otis has not made "continuing progress towards commencement. . . ." To the same end, respondent argues that AS 18.07.081(d)(1) is inapplicable, because it premises revocation on failure to commence activities authorized under AS 18.07.041, while Lake Otis was issued a grandfathered certificate pursuant to SLA 1976, Ch. 275, Sec. 4.

These arguments are well taken. It is conceivable that sponsors could place a facility "under construction" for purposes of the grandfathering le islation, and yet not possess the requisite intent to pursue construction through to completion under the revocation statute. This dichotomy, however, defies common sense. While the language in the two statutes is not identical, the basic import seems to be that a good faith start on hospital construction must be underway to authorize grandfathering, on the one hand, or to withstand revocation, on the other.

This conclusion is buttressed by the specific language of the revocation statute. As cited previously, AS 18.07.081(d) provides:

> A certificate of need may be revoked if
>
> . . . .

Subsections (2), (4) and (6) provide, respectively:

> (2) the applicant fails, without good cause, to complete activities authorized by the certificate;
>
> . . . .
>
> (4) the sponsor knowingly misrepresents a material fact in obtaining the certificate;
>
> . . . .

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(6) the sponsor fails to provide services authorized by the terms of the certificate.

(Emph. added.) Only subsection (1) refers to activities "authorized under AS 18.07.041," instead of activities authorized under "the certificate." It appears that the Legislature did intend to make a distinction between the first grounds for revocation and the others that follow. Revocation for failure to make "continuing progress toward the commencement of activities" was not designed to apply to certificates awarded under the grandfathering legislation.

Even if this conclusion is erroneous, however, LOC has demonstrated compliance with the terms of AS 18.07.081(d)(1). "Intent" is not defined in the statute. Black's Law Dictionary (Fifth Ed. 1979) states:

> Intent. Design, resolve, or determination with which person acts. [Citation.] Being a state of mind, is rarely susceptible of direct proof, but must ordinarily be inferred from the facts. . . .[Citation.] A mental attitude which can seldom be proved by direct evidence, but must ordinarily be proved by circumstances from which it may be inferred. [Citation.]

In this case, petitioner contends that the fact that respondent possessed only short-term financing for $900,000 through GHS and Peoples Bank at the time construction started indicates the absense of any intent on Beirne's part to pursue construction to completion. However, there is no evidence that Beirne harbored any ulterior motive in commencing the work in 1973. The state's certificate of need legislation was not in effect, so there is no basis for inferring a design to accomplish just enough construction to establish grandfather rights. Beirne testified, moreover, that the rise in interest rates in 1974 was an "anomaly." He reasonably expected the GHS financing plans to be consumated.

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While Beirne's judgment in proceeding with only a short-term commitment may be questioned, there is no basis for disputing his resolve to build the entire hospital. His attempts, after indemnifying GHS, to secure other financing further support LOC's position that construction was commenced with the intent to pursue the effort to completion.

II. PETITIONER HAS DEMONSTRATED GROUNDS FOR REVOCATION OF LOC'S CERTIFICATE OF NEED UNDER AS 18.07.081(d)(2).

South Central's second contention, to which most of the evidence at the hearing was directed, is predicated on respondent's failure to complete the hospital construction. AS 18.07.081-(d)(2) provides:

> (d) A certificate of need may be revoked if
>
> . . .
>
> (2) The applicant fails, without good cause, to complete activities authorized by the certificate.

Construction of the hospital certainly has not been completed. The question is whether "good cause" exists.

A. Definition of "Good Cause"

Analysis of respondent's claim of "good cause" requires definition of that term. Petitioner refers the Commissioner to cases resolving contract disputes by invoking the doctrines of "impossibility" or "frustration of purpose." Those authorities generally hold that a promissor must be held to his duty to perform unless he can demonstrate the intervention of events which were not foreseeable nor part of his calculated risk in making the initial agreement. Further, to excuse a contracting party from its obligations, the effect of such events must be to render performance impossible, vitally different from that anticipated, or unreasonably expensive to the point of extreme hardship. E.g., Glendale Fed. S.&L. Ass'n v. Marina View, Etc., 135 Cal. Rptr.

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802, 66 Cal. App. 3d 154 (1977); Natus Corporation v. United States, 371 F.2d 450 (Ct. Claims 1967); Foster v. Atlantic Refining Company, 329 F.2d 485 (5th Cir. 1964); Oosten v. Hay Haulers Dairy Employers and Helpers U., 291 P.2d 17 (Cal. 1956); Lloyd v. Murphy, 153 P.2d 47 (Cal. 1944).

Respondent, on the other hand, cites authority which suggests that permits once issued cannot be revoked absent a showing of "compelling public necessity" (O'Hagen v. Board of Zoning Adjustment. City of Santa Rosa, 96 Cal. Rptr. 484, 19 Cal. App. 3d 51 [1971]) and cases indicating that temporary impossibilities caused by litigation or other factors work to toll the time for performance, but do not excuse it. E.g., Colorado Coal Furnace Distributors v. Prill Mfg., 605 F.2d 499 (10th Cir. 1979).

Respondent's citations regarding the impact of litigation are relevant to those periods in LOC's history when it was subject to legal action. The "compelling public necessity" standard, however, is inapposite. In O'Hagen v. Board of Zoning Adjustment, City of Santa Rosa, supra, the court determined that a drive-in restaurant owner had a "vested interest" in his use permit. In light of this property right, the court held that only a "compelling public necessity" could justify revocation of the permit.

The concept of "vested interest," however, is not applicable in such a simplistic form to the certificate of need legislation. By its very terms, AS 18.07 contemplates the possibility of modification, suspension and revocation proceedings attendant upon specified occurrences or non-occurrences. The public interest in appropriate health planning and facilities construction colors the entire C/N process. The standard for revocation of certificates of need must, of necessity, give governing authorities more flex-

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ibility than is required in connection with use permits for drive-in restuarants.

Petitioner's authorities provide more appropriate guidance. The impossibility and frustration of purpose doctrines arise specifically from contractual relations. Courts in these cases are asked to determine which of two or more parties should bear the ill consequences of a particular turn of events. In the certificate of need context, a similar balance must be struck between the C/N holder's interest in protecting his financial and other investments and the public's interest in maintaining a legislatively mandated process for planning and implementation of adequate and cost-efficient health care.

Utilizing much of the reasoning found in the impossibility and frustration of purpose cases, thus, a finding of "good cause" should be made under AS 18.07.081(d)(2), when

> (1) Factors not present at the time the C/N was granted intervened thereafter; (2) through no fault of the certificate holder; (3) which factors were not foreseeable nor part of the calculated risk at the time of issuance of the C/N; and (4) which factors rendered performance under the C/N impossible or so unreasonably expensive as to impose extreme hardship on the certificate holder over an extended period of time.

This definition is admittedly a stringent one. It requires, essentially, that project sponsors not impact the planning process beyond a reasonable period of time unless they have the wherewithal and sound planning sufficient to fulfill the expectations they raise.

Application of this standard to grandfathered certificates is appropriate. The holders of such permits are already advantaged by acquiring initial authorization to construct without exposure to the review process. They should not, thereafter,

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receive extra privileges not accorded to those facilities undergoing routine scrutiny.

B. Analysis of Allegations of Good Cause *

Respondent advances two grounds to support a finding of good cause. First, LOC claims that it

> has demonstrated good cause on the basis of its efforts to advance the hospital project toward completion, particularly its efforts to obtain financing since 1977, and on the basis of the present feasibility of the project.

Respondent['s] Post-Hearing Memorandum at 15, Pleading Tab 33. Second, LOC contends that "improper interference" with the hospital project by South Central and others also constitutes good cause. Id. at 16. In light of the evidence introduced at the hearing, it seems appropriate to consider as distinct, although overlapping categories of potential "good cause," the failure of various financing options and the impact of litigation against respondent.

1. Respondent's efforts to arrange financing and current (alleged) feasibility of the project.

The fact that respondent has made substantial efforts to obtain financing is relevant to the determination of an appropriate remedy in this case. However, respondent's activities undertaken to pursue the project, while arguably evidence of "good faith" in attempting to construct the hospital, do not constitute

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*The parties acknowledge that petitioner has the burden of proving the claims contained in its accusation. Alaska Alcoholic Beverage Control Board v. Malcolm, Inc., 391 P.2d 441 (Alaska 1964). And there is further agreement that respondent has the burden of going forward with evidence supporting its allegations of "good cause" for failure to complete the authorized activities. Petitioner contends, however, and respondent disputes, that Lake Otis also has the burden of proof on the question of good cause. After considerable research and analysis, the hearing officer has determined that the burden should fall on LOC. However, no finding of fact or conclusion of law has been based on this allocation. As dictum, the analysis of the burden of proof issue has been excluded from this decision.

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evidence of "good cause" in failing to do so. Present feasibility is also outside the scope of an analysis of what has happened to date.

2. Failure to obtain financing

a. Collapse of the GHS arrangement.

Circumstances surrounding the contractual arrangements between LOC and GHS do not support a finding of good cause. First, this episode largely pre-dates enactment of the certificate of need legislation and issuance of respondent's C/N. While the Commissioner need not discount totally events which occurred prior to issuance of LOC's certificate, it would be inappropriate to predicate either failure to complete construction, or good cause for such failure, on such early developments. The holder of a grandfathered certificate is entitled to have its progress evaluated on the same basis as one who has been through the review process. Equity requires this, since prior to adoption of the C/N law in 1976, respondent had no reason to fear that failure to make progress with its construction could result in denial of the opportunity to proceed at all. Respondent's Exhibit R-82 appropriately depicts only events which transpired during the period 1977-1981.

However, even if GHS' withdrawal from the project is considered on its merits, good cause cannot be established. Dr. Beirne testified that the contract for long-term financing itself contemplated withdrawal by GHS if interest rates rose too high. Lake Otis certainly made no effort to contest GHS' right to cease its involvement with the project; LOC ultimately reimbursed GHS in full on its obligation to Peoples Bank. Thus, respondent assumed a risk which although not expected to materialize, was envisioned clearly enough to be contained within contract negotiations. See,

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Glendale Federal Savings and Loan Assn. v. Marina View, Etc., 135 Cal. Rptr. 802, 833, 66 Cal. App. 3d 85 (1977).

b. Failure to obtain Anchorage sponsorship of tax-exempt bonds.

The Anchorage Assembly considered sponsorship of the Lake Otis bonds on June 21, 1977 and again on June 28, 1977. At the latter meeting, the chairperson of the Municipal Health Commission opposed Assembly approval of the Lake Otis resolution and sought a delay for purposes of conducting a Commission review of the proposal. Beirne opposed any postponement, disingenuously asserting that any delay would interfere with his construction schedule. In reality, he knew that it was virtually certain that the Commission would find no need for the project. While the Assembly abided by Beirne's wishes and representations and approved the resolution, the mayor subsequently vetoed it in response to Municipal Health Commission data and LOC's circumvention of the Commission process. The Assembly could not override the veto. Findings of Fact 52, 53, 55, and 58. South Central also communicated with the Anchorage Assembly, although its message took the form of providing factors for Assembly consideration, rather than expressing specific opposition to the project. Finding of Fact 57. The mayor's veto did not indicate any reliance on petitioner's correspondence.

It is evident that the Municipal Health Commission's opposition played a pivotal role in the mayoral veto of the Anchorage resolution. Upon initial consideration, it appeared that equity required a finding of good cause in this instance. The resolution's defeat, after all, was premised on bed need projections. And bed need projections were eliminated by the Legislature when it determined to authorize grandfather certificates for facilities such as the Lake Otis Community Hospital.

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To hold respondent effectively accountable for a loss arising out of bed need calculations seemed, thus, to negate legislative intent.

The risk that particular financing options may not prove workable, however, is inherent in a venture of this sort. Most critically, respondent recognized from the outset of this enterprise that the project's feasibility -- and thus its ability to garner financial support -- was dependent upon a finding of need for the additional beds the hospital would provide. In its 1972 feasibility study, American Health Facilities, Inc. states:

> In the fall of 1971, it was not possible for the Anchorage comprehensive 'B' agency to make recommendations relative to certificate of need applications because it lacked adequate information and analysis on health care delivery in its area. Two reports, one completed and one being completed, should satisfy the requirement for area studies.

Exh. R-2, "Background." The bulk of the study consists of an analysis of service area needs and utilization estimates. Thus, years prior to enactment of the state certificate of need legislation, project sponsors were aware that bed need was an issue to be reckoned with and constituted, therefore, a risk then assumed. In light of this early awareness, loss of the Anchorage bond resolution cannot provide "good cause" for LOC's failure to complete construction.

c. Failure to obtain Wasilla bond sponsorship.

Wasilla constituted a more protracted replay of the Anchorage situation, with South Central rather than the Municipal Health Commission actively opposing the bond resolution. For the reasons stated previously, the Wasilla defeat cannot support a finding of "good cause." Beirne's own statements, moreover, indicate that financing through the Wasilla mechanism ceased to

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be a realistic option some months before the resolution was actually defeated at the polls.

On August 12, 1978, bond counsel Borge notified Beirne of his intent to withdraw from representation of LOC based on changes in I.R.S. rules which rendered the bond package less secure. According to Beirne, Borge's actual withdrawal took place no later than August 24, 1978. Exh. P-44, p. 28. Beirne's reflections on this event include the following statements:

> Unless Cincotta can find other legal counsel, the deal is off, and the project is postponed indefinitely. There appears to be no way at this time Cincotta says to finance the bonds by a simple straight forward bond sale of the 21.5 million. He needs this refunding mechanism in order to strengthen the bond issue. . . .

Id. And on October 9, 1978, Beirne wrote to Ed Gilgan:

> No, we don't have the Hospital package put together yet. We almost had it in August but it slipped through our fingers again. The little city of Wasilla, about 50 miles north of Anchorage sponsored our bonds so we were able to get tax exempt bonding, but we can't sell the bonds yet.. . . We have to find some way to strengthen the bonds.

Exh. P-59. The petition requesting a referendum on the Wasilla bond resolution was not certified by the clerk's office until September 22, 1978. Exh. R-28. And the election was almost two months later. Yet, as seen above, as of late August, Beirne knew that this source of financing was of little present benefit to Lake Otis.

Like the defeat at the polls, the change in I.R.S. rules and subsequent withdrawal of bond counsel cannot establish good cause. There is no vested right to rely on the continued existence of a particular piece of legislation or regulation. See, Arctic Structures, Inc. v. Wedmore, 605 P.2d 426, 436 (Alaska 1979);

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Lloyd v. Murphy, supra at 51. Legislative changes relating to desirable funding mechanisms constituted a foreseeable risk from the time the project was conceived. And loss of the refunding mechanism did not make the bond sale impossible, only less attractive. Beirne simply never generated the Native or union support which he judged necessary to strengthen the bonds. See Exhs. P-13 and P-13A.

d. Failure to obtain AMFA financing.

The AMFA application was never pursued in good faith. The relevant statute provided:

> AS 18.26.220. Facility compliance with health and safety laws and licensing requirements. . . . A medical facility issued a certificate of need under Sec. 4, ch. 275, SLA 1976 by virtue of being in existence or under construction before July 1, 1976, must nevertheless fully meet the requirements of AS 18.07.011 - 18.07.111 in order to be eligible for funding under [the AMFA legislation].

Exh. R-32. The referenced sections, AS 18.07.011-111, include those establishing the requirement for obtaining a certificate of need based, in part, on the availability and quality of existing health care resources. The AMFA legislation, thus, required LOC to undergo a standard C/N review process if it hoped to obtain funds through this agency. Beirne (a legislator), was aware of this fact. Finding of Fact 111. He was also aware that in all likelihood, LOC would not receive the blessings of the health planning agencies in light of their bed need projections at the time. So he filed the application, but not the supporting documentation and not the $1,000 filing fee. Ultimately, he informed AMFA to withhold consideration of LOC's application indefinitely in light of pending litigation. Finding of Fact 116. Good cause for failure to complete construction cannot be predicated in any part on LOC's non-processing of its incomplete and deceptive AMFA application.

e. Failure to obtain financing through either the Alaska Pacific Bank or Hospital Corporation of America.

On March 24, 1980, Providence and South Central both filed administrative appeals from Deputy Commissioner McGinnis' determination of substantial implementation. On April 8, 1980, Providence brought its civil action against the Department in superior court. And on August 8, 1980, South Central initiated these revocation proceedings. Findings of Fact 130, 131 and 137.

Petitioner has acknowledged that it is appropriate to consider respondent's failure to complete construction only up to the time this proceeding was commenced. As indicated previously, moreover, respondent's authorities indicate that time frames for completing activities under various governmental permits or licenses should be tolled when performance is rendered impossible or impracticable by virtue of adverse administrative or judicial proceedings. E.g., Smith v. Board of Appeals of Brooklyn, 316 N.E.2d 501 (Mass. 1974); Belfer v. Building Comm'n of Boston, 294 N.E.2d 847 (Mass. 1973). Common sense and principles of equity require no less.

In light of the fact that the bank and HCA financing sources were pursued, and failed, under the cloud of the Providence and South Central actions, good cause exists for failing to complete construction during this period.

3. Withdrawal of Modern Construction.

Modern Construction, in joint ventureship with Tri/Alaska Construction, agreed to perform design and estimating work on the hospital project in mid-March, 1976. In July, 1976, Modern declined to proceed with further work on the project. Finding of Fact 38. Regardless of the reasons for Modern's withdrawal, this incident cannot support respondent's effort to show "good cause." Modern's involvement predated issuance of the certificate

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of need. Modern's services moreover, were engaged at a time when new financing was not being actively pursued (with the possible, short-lived investigation into FHA financing) in light of the GHS debt liquidation process. Modern's work product, additionally, and interest in the joint venture, were transferred to Tri/Alaska which continued to contribute to the project. Other contractors were subsequently brought on board without any showing of material prejudice to respondent.

4. Interference by South Central, the Municipal Health Commission, and Providence.

Respondent focuses tremendous energy on, and attention to, the allegedly conspiratorial efforts by South Central, the Municipal Health Commission, and local hospitals, particularly Providence, to thwart LOC's construction plans. See, e.g., Findings of Fact 106, 138. These entitites certainly have voiced opposition to the Lake Otis Hospital. As indicated above, in the case of litigation filed against respondent, good cause does exist for LOC's failure to complete its authorized activities during the time periods involved. Other actions of these agencies and competitors, however, do not justify additional findings of "good cause."

The health planning agencies expressed their views openly, primarily through correspondence with and testimony before elected officials. The message was virtually the same throughout: existing bed need did not justify construction of the Lake Otis hospital. Other concerns raised, such as economies of scale, were of a similarly legitimate nature. No underhanded or devious tactics, no ad hominen attacks on Dr. Beirne or otherwise questionable grounds for opposing the project, were established at hearing. Even if respondent's version of the events

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surrounding Modern's withdrawal from the project were to be accepted, it is evident that this action by one contractor had no bearing on LOC's overriding problem: its inability to obtain financing.

Agency opposition materially impacted the project in 1977 and 1978, when first the Municipal Health Commission, and then South Central, were instrumental in achieving the defeat of the Anchorage and Wasilla bond resolutions, respectively. The agencies' actions however, should have come as no surprise to Beirne. Beirne had previously subjected the project to review by the forerunner of the Municipal Health Commission, the Comprehensive Health Planning Council. Findings of Fact 2, 11. By ordinance, the Commission was charged with advising the mayor and Assembly on issues affecting comprehensive health planning. See, GAAB OR-73-141; AMC 16.05.050. As discussed, infra at pp. 53-54, South Central was similarly directed to seek implementation of its health plan for the region. And as discussed, supra, at p. 43, respondent had long been aware that bed need was a critical factor in project feasibility. Beirne had reason, thus, to anticipate the concerns raised by these two agencies; respondent cannot predicate "good cause" on the fact that South Central and the Commission performed their legally mandated duties.

C. Opportunity to Complete Construction Prior to the Instigation of Litigation.

"Good cause" has been found for LOC's failure to secure financing from July 26, 1979 when the municipal litigation was filed, to the present time. An ultimate conclusion of "good cause" would be inappropriate, however, if respondent had the opportunity to make substantial progress on its project prior

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to this time. Respondent's own arguments suggest that it had such opportunity.

Respondent has represented that two years is an appropriate period of time in which it may be expected that a C/N holder can "acquire financing, . . . acquire the necessary construction licensure and . . . complete architectural and engineering drawings prior to commencement of construction of a hospital." Respondent's Post-Hearing Memorandum at 31, Pleading Tab 33. Respondent's source is Exh. R-76, the Brown Affidavit. Mr. Brown's only mention of a two-year period is in paragraph 12 of his affidavit, in which he estimates that two years could be required to "complete construction of a 125-bed acute-care hospital facility in Anchorage." Exh. R-76 at 4. Brown indicates that Providence anticipates the need for only seven months from the date of receipt of a certificate of need to the commencement of on-site construction activities. And LOC's 1977 C/N was granted for a period of 18 months, in keeping with the provisions of 7 AAC 07.090(d).

The two years after receipt of its C/N and prior to the filing of the first legal action against LOC would seem, thus, to have constituted a reasonable period of time to expect respondent at least to obtain financing and re-commence on-site work with the expectation of finishing construction this year at the latest. Because this time was available to LOC (quite apart from the earlier years of project initiation), it cannot be said to have demonstrated "good cause" for its failure to complete construction.

III. RESPONDENT'S CERTIFICATE OF NEED SHOULD BE REVOKED.

A. Commissioner's Discretion.

As 18.07.081(d)(2) provides that "a certificate of need may be revoked" (emphasis added) if the sponsor fails,

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without good cause, to complete construction. Respondent correctly observes that this language is not mandatory, allowing for consideration of matters of equity or public policy. See, Fields v. Kodiak City Council, 628 P.2d 927 (Alaska 1981); State v. Smith, 593 P.2d 625, 629 (Alaska 1979); Railroad Commission v. Brown Express, Inc., 399 S.W.3d 863 (Tex. 1966), rev'd on other grds, 415 S.W.2d 397 (Tex. 1967); Copper Co. v. Industrial Commission, 188 P.2d 1102 (Ariz. 1941). The Commissioner, however, cannot act in an arbitrary fashion; she is restrained by the doctrines of due process, equal protection, and excessive delegation of legislative authority from straying far afield from the criteria enumerated in the statute. See, e.g., Marks v. City of Anchorage, 500 P.2d 644 (Alaska 1972); Panama Refining Co. v. Ryan, 293 U.S. 388 (1939); Yick Wo. v. Hopkins, 118 U.S. 356 (1886).

B. Respondent's Defense of Unclean Hands.

1. Amendment of pleadings.

On January 20, 1982, five days prior to the commencement of the hearing in this case, respondent notified petitioner and the hearing officer by letter that it intended to raise the doctrines of laches and unclean hands at the hearing. The laches defense was subsequently withdrawn, but respondent sought to amend the pleadings to include its defense of unclean hands. It is LOC's position that South Central's previous opposition to, and alleged interference with, the development of the hospital project should preclude petitioner from now complaining of respondent's failure to complete this project.

Petitioner vigorously opposed this motion at the hearing. It was taken under advisement at that time, and the parties thereafter submitted memoranda addressing both the appropriateness

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of granting the motion to amend and the merits of the defense itself.

In opposing amendment of the pleadings, petitioner relies primarily upon the provisions of AS 44.62.390 which allow a respondent to request a hearing and present new matters by way of defense within 15 days after service upon him of an accusation. However, petitioner fails to direct the Commissioner's attention to that portion of AS 44.62.390(b) which states:

> Within the time specified [15 days] the respondent may file one or more notices of defense upon any or all of the grounds set out in (a) of this section but all of the notices shall be filed within that period unless the agency in its discretion authorizes the filing of a later notice.

(Emphasis added.) AS 44.62.400 allows the agency to file, or permit the filing of, an amended accusation "at any time before the matter is submitted for decision." Sections 44.62.390(b) and 44.62.400, taken together, suggest a policy akin to that found in Civil Rule 15(a) which authorizes amendments more than 20 days after service of an answer upon "leave by court." The rule further states: "[L]eave shall be freely given when justice so requires."

In Wright v. Vickaryous, 598 P.2d 490 (Alaska 1979), the court set forth guidelines for the exercise of discretion under Rule 15(a):

> The Supreme Court described in Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 277, 230, 9 L.Ed.2d 222, 226 (1962), the conditions under which denial of an amendment might be proper:
>
> > Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed. 1948), [Sections] 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent

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> or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should as the rules require, be "freely given.

This court has stated:

> Probably the most frequent reason for denying leave to amend is that it would be prejudicial to the opposing party. The prejudice can result from the opposing party being put to an added expense, a more burdensome and lengthy trial, or if the issues being raised in the amendment are remote from the scope of the original case.

Estate of Thompson v. Mercedes-Benz, Inc., 514 P.2d 1269, 1271 (Alaska 1973) (footnotes omitted).

The court noted that the plaintiffs' amended complaint only introduced a new theory, observing that "the Vickaryouses were still suing on the same conduct of Wright which was the subject of the initial complaint." Id.

The same situation prevails here. Petitioner did not claim that respondent's amendment would raise new factual issues. No showing of prejudice, no request for continuance or opportunity to supplement the record to respond to this defense was made. Petitioner's counsel was accompanied throughout the hearing by Ron Hammett, the individual responsible for allegedly improper actions on petitioner's behalf throughout much of LOC's history. Two other South Central staff members also testified at the hearing. Recognizing that the interests of justice are best served when all claims are reached on the merits, and finding no prejudice to petitioner, respondent's motion for leave to amend its pleadings to include the defense of unclean hands is granted.

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2. The doctrine of unclean hands applied to this case.

The clean hands doctrine has been stated as follows:

> 'The maxim and principle for which it stands signifies that a litigant may be denied relief by a court of equity on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy in issue.'

Cedar Mem. Park Cem. Ass'n v. Personnel Assoc., Inc., 178 N.W.2d 343 (Iowa 1970), citing, 22 Am. Jur. 2d, Equity, Sec. 136. The cases hold that the acts complained of must not only have been wrongful, but committed with wrongful intent. Regional Transp. Auth. v. Burlington Northern, 426 N.E.2d 1143, 1148 (Ill. App. 1981); Edmunds and Edmunds, 633 P.2d 4, 6 (Or. App. 1981). The party raising the defense of "unclean hands" must have been injured by the conduct in question. Arevalo v. Velvet Door, Inc., 508 S.W.2d 184, 186 (Tex. Civ. App. 1974); Jacobsen v. Pederson, 190 N.W.2d 1,4 (N.D. 1971). Finally, numerous cases acknowledge that notwithstanding the doctrine's seeming applicability to a given situation, it will not be enforced if to do so will do injury to the public interest. United States v. City of Milwaukee, 395 F. Supp. 725, 727 (E.D. Wis. 1975); United States v. Philadelphia Electric Co., 351 F. Supp. 1394, 1398 (E.D. Pa. 1972); Edar Memorial Park Cem. Ass'n v. Personnel Assoc., Inc., supra at 353; Travel House of Buffalo, Inc. v. Grzechowiak, 296 N.Y. 2d 689, 698 (App. Div. 1968). Applying these principles to the facts of South Central's prior involvement with LOC, it is evident that South Central has not violated the clean hands doctrine.

There is, first of all, no indication that petitioner performed a wrongful act. 42 U.S.C. 3001-2(a) provides that

> each health systems agency shall have as its primary responsibility the provision of effective health planning for its health service area and the promotion of the develop-

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ment within the area of health services, manpower, and facilities which meet identified needs, reduce documented inefficiencies, and implement the health plans of the agency.

(Emph. added.) 42 U.S.C. 3001-3(c)(1) requires that "The agency . . . seek, to the extent practicable, to implement its HSP and AIP with the assistance of individuals and public and private entities in its health services area." In subsection (d), HSAs are enjoined to "coordinate [their] activities with . . . (5) any other appropriate entity." Petitioner's actions in opposing hospital construction which would contravene its health plans were within the scope of its federal mandate. See, Bendix Corporation v. Adams, 610 P.2d 24 (Alaska 1980).

There is, furthermore, no indication of any wrongful intent on the part of petitioner's employees and board members. Nor, as previously discussed, were petitioner's actions the determining cause of respondent's inability to complete construction. Finally, it must be concluded that invocation of the doctrine of clean hands in this instance would serve to benefit only respondent, and would contravene the public interest in reaching a resolution of this case on merits.

There is an additional reason for rejecting the clean hands defense under the circumstances presented here. As discussed throughout this decision, respondent and its representatives have themselves engaged in unethical conduct. The maxim "he who seeks equity, must do equity" -- the doctrine of unclean hands -- would appear to apply more directly to respondent and Dr. Beirne than to petitioner.

C. Appropriateness of Revocation in Light of Other Equitable and Policy Considerations.

There are essentially two "equitable" grounds supporting maintenance of LOC's C/N notwithstanding the existence of grounds

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for revocation. There is, first, the fact of substantial sums expended on the project by Dr. Beirne. Second, there are the allowances made for Providence and Alaska Hospitals during the time of respondent's ongoing struggles.

It must be acknowledged that Beirne and his associates have invested great sums of money, time and energy in the hospital project. Ordinarily, this consideration would be entitled to significant weight. In this case, however, it represents something of a bootstrap argument. For respondent's approach to financing, perhaps because of LOC's admittedly thin capitalization, appears to have carried with it the seeds of the project's current downfall.

Evidence presented at the hearing suggests that from 1973 on, LOC actively pursued only one financing option during any given time frame. While "back up possibilities" were mentioned at the hearing, documentation of such efforts, exemplified by the purported interest of Native corporations, was never provided. Respondent's Exh. R-82, while perhaps intended as a simplification, corroborates the single-minded approach taken by Lake Otis, at least from 1977 forward.

In 1973, LOC undertook construction with only short-term financing at hand. It took three years thereafter to extricate the hospital and Beirne from the resultant indebtedness to GHS. In 1977, the Anchorage bond effort was pursued. When that failed, the next 15 months were devoted to virtually the same campaign in connection with another municipality 50 miles down the road subject to the same kinds of agency and political pressures. And of course, in 1979, no genuine effort was made to obtain financing. The Peoples Bank and HCA strategies in 1980 and 1981, respectively, appeared more straightforward. But again, they constituted single-

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focus attempts, this time undertaken under the shadow of litigation known to have an adverse impact on negotiations.

With the exception of the early GHS endeavor, moreover, respondent's efforts all seemed to hinge on the receipt of some advantageous, legislatively decreed financing mechanism, such as the federal refunding arrangement, municipal bonding, or state AMFA grants. LOC's success or failure, thus, has generally been dependent on the continued viability of governmental sponsorship of one kind or another and the desire of government to dispense its largesse in LOC's direction.

The public would seem to have no equitable obligation to extend special consideration to Dr. Beirne because of losses sustained, in substantial part, through his own lack of capitalization and limited financial tactics. Beirne's deceptiveness in connection with various funding attempts further detracts from any weight which might otherwise be given this factor.

There are, however, more significant questions of equity and policy surrounding increases in bed allocations afforded Providence and Alaska Hospitals during the time that LOC's construction was being assailed by health planning agencies and others as violative of current bed need projections. The record reveals the following sequence of events in regard to the existing hospitals:

	Providence	Alaska
1971-72	Licensed for 150 beds	Licensed for 85 beds
1973-74	150 beds in operation in the south tower, 58 non-conforming	Requested 80 additional beds, received 40 more beds on condition move hospital
	3.5 million in revenue sharing approved for north tower construction for a total bed capacity of 219	

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	Applied for revenue sharing funds to modernize south tower and eliminate non-conforming beds	
1975	Application to modernize south tower approved	
6/76	Application to increase licensed beds from 150 - 235.	
7/76	Licensed for 228 beds	
11/76	North tower completed; licensed for 268 beds	Alaska Hospital opens with 200 bed capacity, 154 licensed
3/77	License reduced to 250 beds	
8/77	Waiver for 44 non-conforming beds approved	
7-8/78	Review of waiver decision underway; South Central and Municipal Health Commission recommend approval of waiver based on bed need as of 1977 licensure. Neither agency includes LOCH beds in calculating bed need:	
12/78		45 more beds licensed
7/79	Department continues waiver and 250 bed licensure.	

The information contained in the above outline demonstrates that South Central and the Municipal Health Commission recommended approval of the 250 beds at Providence, and the waiver for 44 of those non-conforming beds, based in part on bed-need. These recommendations were made in 1977 and reiterated in 1978, the second time after Lake Otis' C/N had been issued, without taking into account respondent's 125 beds. Moreover, the agencies' opposition to respondent in its attempt to secure municipal bond sponsorship was predicated on the alleged absense of bed need

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at the same time the agencies were supporting the increase in Providence's bed capacity. Finally, while the record does not reveal how Alaska came to add on its ever-increasing number of beds, its licensed capacity certainly mushroomed during this period.

Petitioner's response to these realities appears to be that all the Alaska and Providence beds were either in existence or under construction at the time the certificate of need law became effective and the agencies' input was solicited. A dispassionate observer cannot help but conclude, however, that true bed need evaluations in regard to Providence in 1977 and 1978 would have required consideration of LOC's plans. That, after all, is the thrust of this entire proceeding: that with respondent's hospital on the drawing boards (at least partially), the health planners are obliged to consider LOC's 125 beds in projecting future needs.

The relative leniency afforded respondent's competitor and the role played in that process by the planning agencies are the primary factors mitigating in respondent's favor at this stage of the revocation analysis. Fundamental notions of fairness and equal protection are offended by the juxtaposition between past relaxation of governmental rules for Providence (and possibly Alaska) and prospective adherence to revocation standards as applied to Lake Otis.

The case, however, is not so simple. Certainly, respondent benefited as much as Providence from the grandfathering authorization of the certificate of need legislation. The Commissioner, furthermore, granted two extensions of LOC's C/N, somewhat analogous to the increases in bed licensure afforded respondent's

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competitors. And, finally, this revocation decision is in no way predicated on any lack of bed need, and is not, thus, building upon any inconsistencies that might be found in prior positions taken by petitioner or Department representatives.

There are, moreover, countervailing considerations of public policy which support revocation at this time. First, contrary to respondent's assertions, there is no assurance based on the record in this case that Lake Otis could secure financing for the hospital in the relatively near future. The record contains Beirne's prior representations to governmental officials that construction could begin virtually instantaneously if only this, that, or the other obstacle were removed. The current revenue sharing provisions in Title 29 are now propounded as the salvation for LOC's financial woes. Notwithstanding the apparently mandatory language of AS 29.90.010, however, it cannot be assumed that LOC will receive further state monies in light of the pending revenue sharing litigation. Nor would such appropriation be sufficient in and of itself to fund hospital construction. As of the November, 1980 "Update of Financial Data," respondent was once again predicating its financing plans on the procurement of a tax-exempt bond issue. Exh. R-42, p. 46. Yet no source for these bonds has been identified. Nor is it clear that, in the alternative, any private arrangement could be made that would satisfy Beirne's financial desires.

This lack of assurance that Beirne could be relied upon to "get his act together" (to invoke John Frolich's terminology) becomes critical when it is recognized that, ironically, all parties to this controversy now agree that more beds will be needed in Anchorage by 1985. Respondent has requested a two-year grace period following the conclusion of all litigation. Yet there is

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no reason to believe the litigation will be resolved even within one year. Regardless of what transpires in the Providence lawsuit, the hearing officer's decision in this case must be acted upon by the Commissioner; the Commissioner's decision could be subjected to motions for reconsideration; superior and supreme court appeals are clearly possible; and there is the potential for remands for further administrative action all along the way. If only one year is allotted for termination of litigation, another two years for securing financing and completing plans and licensing activities, and two additional years for construction, beds would not be available for occupancy before 1987, two years after it is anticipated that they will be needed. Finding of Fact 162. Construction costs will have further escalated during this period, potentially raising the cost of patient care as well.

On balance, thus, there do not appear to be sound reasons based on considerations of public policy and equity to refrain from taking the revocation action authorized by statute. Respondent's own responsibility for much of its predicament, as well as its past deceitful practices, reinforce this conclusion.

CONCLUSION

This case posed extremely close and difficult questions of fact and law in an area devoid of relevant precedent. Counsel for both sides competently researched and presented their parties' respective positions in written memoranda and at hearing.

Under the interpretation of "good cause" set forth in this decision, respondent was required to demonstrate that it had not assumed the risks which ultimately accounted for its failure to complete construction and that it was not itself responsible, in material part, for that failure. The equitable considerations applied in many of the conclusions of law were inherent

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in this "good cause" definition. The evidence introduced at hearing disclosed that LOC's approach to hospital financing was inadequate to the task and consisted largely of calculated risks which ultimately did not inure to respondent's benefit. "Good cause," therefore, was not established.

The hardship attendant upon so drastic an action as revocation of a certificate of need under the circumstances of this case cannot be overlooked. The options of retaining, modifying and revoking respondent's C/N were each considered. Painstaking evaluation of the facts, law, and applicable public policy, however, resulted in the conclusion that grounds for revocation exist, and that revocation, furthermore, constitutes the most appropriate remedy in this situation.

Recommended this 25th day of June, 1982.

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Hearing Officer

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Hospital expansion plans would inflate health costs

By Rep. DON CLOCKSIN

Do you want the cost of a day in the hospital to increase from $833 to $1,600 between 1982 and 1988? Do you want the State of Alaska to pay $46 million to help build a new hospital wing we don't need? Do you want your health insurance premiums to go up to pay for empty hospital beds and expensive, unused medical equipment?

I think not. I think the citizens of Anchorage want health care costs to be controlled while we continue to improve the quality of that care. However, if both Humana Hospital and Providence Hospital are allowed to build new buildings, we'll see this kind of skyrocketing costs and waste of money — yours and mine.

Both Humana and Providence have requested approval from the state to build new hospital wings — both will be five-story towers and both will expand the number of available hospital beds.

The two projects together are unnecessary. Providence proposes to add 150 beds; Humana proposes 93. If both projects are approved, Anchorage will have 692 hospital beds in 1990. That's 170 more than required, according to local health care projections. (The hospitals cannot criticize those projections; they helped prepare them.) And this excess bed capacity does not take into account the Lake Otis Hospital, which has approval to build another 125 beds. If Lake Otis Hospital is eventually built, Anchorage will have 295 beds more than it needs. More than one of every three hospital beds will be unnecessary!

Why does it make any difference?

First, both projects will be paid for largely by two sources — government health care funds and your own health insurance premiums. Humana admits that 30 percent of the revenues from their new structure will come from government programs — Medicaid, Medicare and the like. Providence, on the other hand, is eligible for $46 million in state revenue-sharing to help build its facility.

In the past three years, the state has paid out more than $153 million in both construction and operating assistance to hospitals and nursing homes. We must demand accountability in the spending of that amount of taxpayer money.

Second, an excess of hospital beds will cause unnecessary and wasteful health care expenditures. It is well documented in studies that the "demand" for health care expands to meet the supply available. In other words, patients that normally could be treated with outpatient facilities and simple procedures are instead given expensive, unnecessary hospital care. Doctors and hospitals will find ways to fill those empty beds, at an increased cost to you and me.

Some serious questions need to be asked of those who support approval of both hospital projects. Why did Providence raise its hospital rates 18 percent last year while its costs only went up 10 percent? (Although Providence is supposed to be a non-profit hospital, that type of rate increase has produced $55 million in accumulated "profits" in the last few years.) Why is the per-bed cost of building Providence's new addition *more than twice* that of Humana's project ($527,227 versus $232,039)? Why is Humana expanding when 30 percent of its existing licensed beds are empty? Why should we add this excess bed space when increased use of free-standing surgical centers, birthing centers and rehabilitation centers are reducing the demand for more expensive acute care hospital beds? Why are two hospitals less than three miles apart duplicating so many services — at our expense?

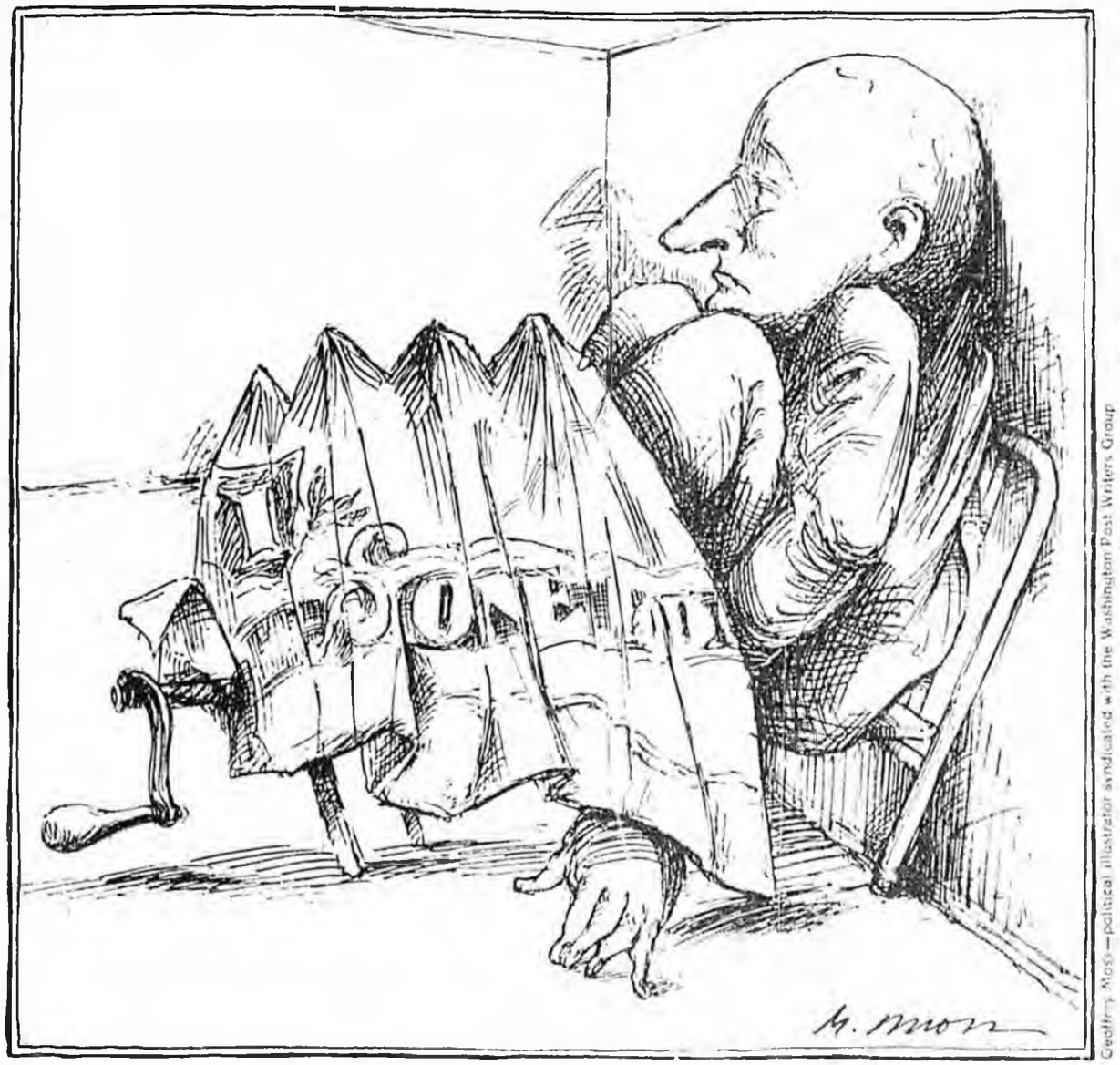
The only way we can get the answers to those questions and make sure our health care costs are not unnecessarily increased is the Certificate of Need Program. That program, established in Alaska in 1976, provides for review of proposals like the ones by Humana and Providence and requires approval by the Commissioner of the State Department of Health and Social Services before construction can begin.

The Certificate of Need Program was established to prevent hospital costs from rising unnecessarily because of frivolous spending or competition, and to aid health facilities in project planning and review. There is unassailable proof that the Certificate of Need Program holds down health costs. A recent study by Arthur P. Little, Inc. of Certificate of Need in six states found a definite reduction in costs.

In Alaska, the Certificate of Need Program has helped smaller health facilities in rural communities plan more economical improvements. In larger cities, like Anchorage, the Certificate of Need Program answers questions like those raised on the Humana and Providence proposals. In the past five yeras, $149 million in projects have been approved while $12.4 million have been rejected. In addition, numerous projects have been dropped or redesigned after Certificate of Need review, at a substantial savings.

Two bills — HB 19 and SB 85 — would repeal the Certificate of Need Program. I oppose those bills. The argument in favor of repeal is basically that the free, open competitive market will provide the best and cheapest medical care. That simply isn't true.

First, decisions on the use of medical services are almost always made by doctors and paid for by insurance companies or the government, so the patient often doesn't know or care what the cost of his or her treatment was. This "consumer indifference" means there is essentially no free market shopping for health care.



Geoffrey Moss—political illustrator syndicated with the Washington Post Writers Group

Second, since there is no competition on price, the only competition is based on services, amenities and conveniences — and that results in duplication and higher costs, not lower costs.

Third, the concept of "supply creating demand" — discussed earlier — means that excess supply will expand the demand for medical services — even though those services aren't necessary.

Fourth, a "free market" does not exist where one of the major sources of funds is the government.

I am not prepared to allow a hospital to expand willy-nilly, expecting me as a taxpayer to pay the costs of that expansion. Studies show that for every dollar spent to build or expand a health care facility, $1.84 is spent in the next five years in increased operating costs — paid largely by the taxpayer.

The repeal of Certificate of Need will permanently cripple any efforts to control health care costs. The approval of both the Humana and Providence hospital projects will increase the per day hospital rate by as much as 98 percent, increase your health insurance premiums to cover that increase, and continue to escalate the costs to taxpayers of public health care programs.

Don Clocksin represents downtown Anchorage in the Alaska House of Representatives. Natalie Hill assisted in the preparation of this article.

Hospital decision goes to state

by Cary Virtue
Times Writer

A health commission Saturday refused to take a stand on whether Anchorage needs two major multi-million dollar hospital expansions — and voted to dump the hot issue into the lap of the state health commissioner.

But at least one member of the state Health System Commission said she felt the committee was "copping out." She said they should have compared Providence's $97 million proposal to build 160 new hospital beds against Humana's $21.5 million package to add an additional 93 beds.

"To not have given the people a definitive decision was a cop out," said Health Systems Commission member Beth Taeschner. "And to (now) expect the health commissioner to make a decision is unfair to him and to the two hospital applicants."

It is now up to state Health and Social Service Commissioner Ron Smith to decide by April 4 — without any final local citizen recommendations — who gets to expand and by how much. Hospitals must obtain a certificate of need from the state to erect any building that costs more than $450,000.

If both hospitals receive certification to expand, Anchorage could wind up with 772 beds, more than the 606 beds that city and state health planners say is needed.

Hospital officials, however, have said Anchorage is growing fast enough to accommodate both projects. And they say both hospitals will fill their combined total bed capacity of 449 beds by 1985.

The 16-member state Health Systems Agency met for five hours Saturday at the Municipal Assembly building — and after voting some 21 times — decided to forward both projects to the state without comparing the projects.

"It was the only fair thing to do," said Rebecca Fain, chairman of committee. "We never did a comparative review of the two projects."

In fact, the committees which reviewed the hospital projects in February also did not compare the two proposals. And members of the Health Systems Agency, the last citizen committee to review the two projects, felt it was too late to change the process.

"It's too late to do a comparative review," he said Bill Orfitelli. "The joint project review committee opted out of its process and I think that was unfortunate."

In February, a joint subcommittee of the state Health Systems Agency and the Anchorage Muncipal Health Commission said that a comparative review wasn't necessary because Anchorage was growing so fast that both expansions were needed. The full Muncipial health commission agreed.

Both decisions were based on an "instinctive" and "gut" feeling that adopted city and state tables showing a total need of 606 beds for 1995 was too low.

But the Health System Agency disagreed Saturday, and voted as follows:

- That both Humana and Providence — if considered separately and without regard to the competing project — met the minumum requirements to qualify for a certificate of need. But the group declined to compare the projects, or draw any conclusions.
- The city's Muncipal Helath Plan showing a need for 606 beds by 1995 should not be inflated because of "gut" feelings that the city would grow by leaps and bounds.
- Urged the state health commissioner to decide whether or not to repeal Dr. Mike Beirne's certificate of need to build a 125-bed Lake Otis hospital. Beirne's project has been tied up in lawsuits involving Lake Otis, Providence and the state.

Humana wants to spend $21.5 million to create 93 new beds (for a total of 93 new beds) by building a 71,345-square foot, five-story hospital tower by 1985. Hospital staff estimated construction and remodeling to costs about $19.5 million, and financing and interest at about $2 million.

Providence proposes spending $97 milion to increase its bed capacity from 250 licensed beds to 410 beds. The project involves remodelling about 84,000 square feet, and building a five-story, 186,000-square-foot hospital tower by 1986.

Providence last June released estimates that pegged construction costs at $80 million, remodelling at $19 million , and financing and interest at about $1.7 million.

Each hospital expects to remodel most of its departments. For example, Providence plans to expand its new-born intensive care unit, and relocate the emergency rooms closer to radiology. Humana wants to build a morgue, a new electro-diagnostic unit and double the size of its radiology department.

Both hospitals also want to set aside 20 beds each for rehabilitation patients. Neither hospital has in-house beds for long-term therapy patients.

SB
93/94

CS FOR SB 93 (HESS) - BILL ANALYSIS

CHANGED TITLE TO ELIMINATE RESTRICTING THE ENDOWED CHAIR TO THE PHYSICAL SCIENCES AT THE U OF A AT FAIRBANKS.

SECTION 1 Establishes program of endowments at U of A to be funded through "appropriations for the purpose, gifts and other sources"

(b) Board of Regents may appoint persons from one or more disciplines(not limited to the Physical Sciences)

(b) (1) rearranged the need to read "teaching, study and research" and (2) advanced study.

Introduced: 1/31/83
Referred: Health, Education and Social Services and Finance

IN THE SENATE BY BENNETT

SENATE BILL NO. 93

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act establishing a program of endowments ~~for the physical sciences~~ at the University of Alaska; and providing for an effective date."

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

* Section 1. AS 14.40 is amended by adding a new section to read:

Sec. 14.40.282. ENDOWMENT FOR THE PHYSICAL SCIENCES. (a) The Board of Regents shall establish an endowment program within the limits of ~~for the physical sciences at the University of Alaska campus in Fairbanks~~ appropriated funds and other resources therefrom, gifts and other sources. The endowment shall be managed as a perpetual trust. The income of the endowment shall be used to pay the salary and related expenses of the person appointed under (b) of this section for research, teaching, ~~and~~ advanced studies and research ~~in one or more physical science disciplines~~.

(b) The Board of Regents shall appoint a person individuals or persons who ~~is distinguished in one or more physical science disciplines~~ to be paid from the endowment ~~for the physical sciences~~. The tenure and the duties of the appointee shall be established by the Board of Regents based on the need for

(1) teaching, research, ~~and studies~~ in physical sciences areas of special interest in the state; and studies and

(2) advancement of ~~scientific~~ study at the University of Alaska.

* Sec. 2. This Act takes effect July 1, 1983.

March 11, 1983

SB 93-94
(endowed chair UAF)

Joe, Peggy, Vic

Claus Naske - Assoc. Profess. UAF

U in Under 48 have had endowed chairs established by private industry.

UAF has never established in physical sciences, reason for proposal for that discipline. Would be up to Bd. of Regents to select person to sit in chair.

Vic Why not have chair open to other disciplines?

Geophysical Institute & Marine Sciences are well regarded nationally.

Vic Akasofu is already at the U. - has had minimal influence outside of the U. Not adequately Emphasized Teaching at U more than research.

Naske My suggestion, since Akasofu is only likely candidate for Nobel Laureate. Bd. of Regents would chose candidate Akasofu gets no state funds but from Nat'l Science Foundation. The staff are primarily researchers - $20 million in fed. funds.

Moss How many endowed chairs?

Claus None

Joe Is it customary to have legislatures

SB93-94
(2)

endow Chairs?

Claus No, usually a wealthy family or a private corporation. Usually the donor makes the choice of discipline. Would like to see many endowed chairs to bring new ideas/people to Alaska.

Vic Bill says Bd. of Regents will establish endowment at UAF.
What about lack of funds.
Say Bd. of Regents may est. endowments at University of Alaska
Broaden scope in Alaska for the enabling legislation

Vic will support if not restricted to phys. ed.

Introduced: 1/31/83
Referred: Health, Education and Social Services and Finance

IN THE SENATE BY BENNETT

SENATE BILL NO. 93

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - FIRST SESSION

A BILL

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

* Section 1. AS 14.40 is amended by adding a new section to read:

Sec. 14.40.282. ENDOWMENT FOR THE PHYSICAL SCIENCES. (a) The Board of Regents may establish a program for endowments to manage up to 5 gifts, trusts, grants, income & other gifts for the physical sciences at the University of Alaska ~~campus in Fairbanks~~. The endowment shall be managed as a perpetual trust. The income of the endowment shall be used to pay the salary and related expenses of the person appointed under (b) of this section for research, teaching, advanced studies and research in one or more ~~physical science~~ disciplines.

(b) The Board of Regents shall appoint a person who ~~is distinguished in one or more~~ physical science disciplines to be paid from the endowment for the physical sciences. The tenure and the duties of the appointee shall be established by the Board of Regents based on the need for

(1) teaching, adv. studies and research in physical sciences of special interest in the state; and

(2) advancement of scientific study at the University of Alaska.

* Sec. 2. This Act takes effect July 1, 1983.

A PROPOSAL TO ESTABLISH AN ENDOWED CHAIR FOR THE PHYSICAL SCIENCES AT THE UNIVERSITY OF ALASKA IN FAIRBANKS.

Submitted by Claus-M. Naske,
Assoc. Prof., History
Thomas Osterkamp
Professor, Physics

March, 1981

Background

Since medieval times, wealthy patrons, mercantile organizations, and governments have endowed chairs in Universities. The procedures were always very simple. A designated University received a lump sum of money which was then put into a trust fund and invested. The interest from the trust then was used to pay the salary and other emoluments of the chair's occupant. The principal was never touched.

Endowed chairs spanned the spectrum of academic and professional disciplines, from physics to the humanities, and from medicine to architecture and law. In most cases, Universities used endowed chairs to hold or attract top talent. The majority of American Universities have endowed chairs, although they are more numerous on the east than the west coast. The University of Alaska does not have an endowed chair. Now there is an opportunity for the Alaska Legislature to establish an endowed chair.

Cost

It is assumed that full costing for an endowed chair will be through the auspices of an endowment under which the principal of the fund would be invested in perpetuity and that earnings on the investment would be used to cover required annual costs. It is also assumed that, on the average, about 10% would be earned on the invested principal. In years when more than this was earned, additional earnings would be added to the principal to increase it so that earnings in subsequent years would increase with inflation. Under these assumptions, it would require a principal of $1.3 million to establish an endowed chair.

Annual earnings from the fund would be required as follows:

Annual salary	$75,000
Staff benefits (approximately 20% of salary requirement)	$15,000
Support services Secretarial/Assistant salaries plus staff benefits	$25,000
Support costs Travel, supplies & operating costs	$15,000
ANNUAL COST REQUIREMENT	$130,000

Justification

Specifically, there is one scientist at the University of Alaska, Fairbanks, who should be honored by an endowed chair. He might occupy the chair until his retirement. After that, other top scientists might be honored by being invited to occupy the chair for varying length of time.

Professor Syun-Ichi Akasofu has done more than any other scientist to build up and maintain the worldreknowned reputation of the Geophysical Institute as a center of research and scholarly excellence in the field of space science.

Professor Akasofu is preeminent in the field of auroral studies coupled with geomagnetism. He has authored or coauthored nearly 400 scientific articles, and authored or coauthored five books on solar terrestrial relations, the aurora, and geomagnetism, and edited another, and also written two definitive encyclopedic articles on the aurora.

His achievements have been justly recognized by the scientific community at large, and he has been the editor or on the editorial board of five well-

established journals dealing with geophysic and space sciences. He has been accorded several honors, given only to those whose contributions to geophysics and science in general have been outstanding. These are:

The Chapman Medal of the Royal Astronomical Society of England in 1976;

The Japan Academy Medal in 1977;

The Fleming Medal from the American Geophysical Union in 1979.

Professor Akasofu also was elected a Fellow of the American Geophysical Union and named Distinguished Alumnus of the University of Alaska, Fairbanks, where he received the Ph.D. in 1961.

Conclusion

An endowed chair would free Professor Akasofu from proposal writing and enable him to materially aid the efforts of his younger colleagues. It would also make it possible for him to become a highly effective spokesman for Alaska Science, and also make it possible for him to attract other, highly talented and dedicated scientists to the state. His activities already have brought great prestige to the State of Alaska and its University. In later years, other top scientists would occupy the endowed chair.

Sherman Carter
Executive Vice President

UNIVERSITY OF ALASKA
FAIRBANKS ALASKA 99701

February 13, 1981

MEMORANDUM FOR PROFESSOR CLAUS NASKE

FROM: Sherman Carter

SUBJECT: Cost of endowing an academic "chair"

This paper is to comply with your request that I indicate to you how much money it would cost to endow an academic "chair."

Various assumptions were made in preparing the cost estimates provided below. One of these was that the person selected would be a world-class scientist--cost, of course, would be less for other types of faculty positions. Secondly, it is assumed that full costing for filling the position would be by an endowment under which the principal of the fund would be invested in perpetuity and that earnings on the investment would be used to cover required annual costs. Thirdly, it is assumed that, on the average, about 10% would be earned on the invested principal. In years when more than this was earned, additional earnings would be added to the principal to increase it so that earnings in subsequent years would increase with inflation.

Initially, $1.3 million would be required for the endowment fund.

Annual earnings from the fund would be required approximately as follows:

Annual salary	$75,000
Staff benefits (approximately 20% of salary requirement)	15,000
Support services Secretarial/Assistant salaries plus staff benefits	25,000
Support costs Travel, supplies & operating costs	15,000
ANNUAL COST REQUIREMENT:	$130,000

SFC:sb

Note: 10/28/81 President Barton indicated that a substantially smaller appropriation would support the annual cost requirement.

April 2, 1981

Senator Bettye Fahrenkamp
Pouch V
Juneau, AK 99811

Dear Senator Fahrenkamp:

This letter is in support of a proposal to establish an endowed chair for physical sciences at the University of Alaska with Professor Akasofu as its first recipient. The reasons for establishing such a chair are numerous but include holding or attracting extremely talented persons, financial, and academic ones. An endowed chair makes it possiole for the recipient to concentrate on his research program and gives him ~~23~~ 2-3 months extra time to spend on research and on generating funds for support of other researchers. Professor Akasofu has obtained about $1,000,000 per year for 10 years. This can be compared to the cost of an endowed chair which is a one-time expenditure of ≈ $1.3 million.

The most compelling reason for creating an endowed chair is the tremendous boost it would give to the quality of the academic and research programs at the University of Alaska. It is a fact that "excellence promotes excellence". The people occupying an endowed chair can be expected to attract top-level co-workers and also to stimulate others already at the University of Alaska.

Anything you can do to help in this matter is deeply appreciated.

Sincerely,

T. E. Osterkamp
Professor of Physics & Geophysics

TEO/sgf

STATE OF ALASKA

ALASKA COMMISSION ON POSTSECONDARY EDUCATION

JAY S. HAMMOND, GOVERNOR

POUCH F—STATE OFFICE BUILDING
JUNEAU, ALASKA 99811
PHONE: (907) 465-2854

SB 488

ENDOWED CHAIRS

1. The earnings from an endowed chair usually provide an individual faculty member with the financial support and flexibility to explore new teaching methods, to formulate and test new theories and to disseminate his findings. By enhancing support for research and teaching, endowed chairs enable a university to attract and retain distinguished scholars.

2. The existence of an endowed chair in a particular discipline creates a nucleus for attracting other distinguished faculty and students, enhancing the quality of the department and, over time, the reputation of the university as a whole.

3. All of the great universities in the nation have endowed chairs. U.C.L.A. has 14 endowed chairs alone.

4. The endowed chairs can be in disciplines from which research will provide tangible benefits to the Alaskan citizenry (e.g., fisheries biology, geology, etc.)

5. An endowed chair usually provides the salary and benefits of the professor. Moreover, the income from an endowed chair may be used for the hiring of a secretary or assistant to handle routine matters (thereby freeing the professor to spend more time for students and research) or to provide research assistantships to students under the direct supervision of the professor.

PERSONAL DATA

NAME: Syun-Ichi Akasofu

DATE OF BIRTH: December 4, 1930

PLACE OF BIRTH: Nagano-ken, Japan

EDUCATION:

B.S. Geophysics, Tohoku University, Sendai, Japan, 1953.
M.S. Geophysics, Tohoku University, Sendai, Japan, 1957.
Ph.D. Geophysics, University of Alaska, Fairbanks, Alaska, 1961.

EXPERIENCE:

Senior Research Assistant, Nagasaki University, Nagasaki, Japan, 1953-1955.
Research Assistant in Geophysics, Geophysical Institute, University of Alaska, Fairbanks, Alaska 1958-1961.
Assistant Research Geophysicist, Geophysical Institute, 1961-1962.
Associate Professor of Geophysics, Geophysical Institute, 1962-1964.
Professor of Geophysics, Geophysical Institute, 1964-present.

Associate Editor, Journal of Geophysical Research, 1972-1974.
Associate Editor, Journal of Geomagnetism & Geoelectricity, 1972-present.
Editorial Advisory Board, Planetary Space Science, 1969-present.
Editorial Advisory Board, Space Science Reviews, 1967-1977.
Member, Editorial Committee, Space Science Reviews, 1977-present.

PROFESSIONAL ORGANIZATIONS:

American Geophysical Union
Society of Terrestrial Magnetism and Electricity of Japan
International Union of Geomagnetism and Aeronomy
Inter-Union Commission on Solar-Terrestrial Physics
Sigma Xi Society
American Association for the Advancement of Science

AWARDS AND HONORS:

The Chapman Medal from the Royal Astronomical Society of England, January 1976.
The Japan Academy Award, March 1977.
Fellow of the American Geophysical Union, 1977.
John Adam Fleming Medal, American Geophysical Union, 1979.
Distinguished Alumnus for 1980, University of Alaska.

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