ALASKA LEGISLATURE COMMITTEE FILES 1983 - 1984 8672
2642 SLC SB 246 (FILE 2) - SB 251

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ALASKA STATE LEGISLATURE - SENATE

SENATOR RICHARD I. ELIASON

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M E M O R A N D U M

To: Senate Labor and Commerce Committee Members

From: Senator Dick Eliason,Chair
Senate Labor and Commerce Committee

Re: SB 246/HB 343

Date: January 16, 1984

A joint House/Senate Labor and Commerce Committee hearing has been scheduled for 8:30 a.m., Monday, January 23, 1984, in the House Labor and Commerce Committee Room in the Behrends Building. Senator Pat Rodey, appointed subcommittee chair, will conduct the hearing on SB 246/HB 343.

Senate Bill 246 would replace the Alaska Business Corporations Act with the Alaska Corporations Code (ACC). The proposed ACC sets minimum requirements that must be met for the privilege of doing business in the corporate form. Within limits it leaves to incorporators how to divide powers between shareholders and directors.

This senate bill seeks to clearly define in what circumstances it is permissible to pay a dividend. It also seeks to control misuse of the limited liability of officers and directors that the corporate form provides.

A transcript of the previous joint meeting held May 17, 1983, is attached.

SENATE LABOR & COMMERCE
STANDING COMMITTEE
May 17, 1983
3:00 p.m.

Members Present: Senator Pat Rodey

Members Absent: Senator Dick Eliason, Chairman
Senator Bob Mulcahy
Senator Don Bennett
Senator John Sackett

COMMITTEE CALENDAR

SB 246 Amended Title: An Act revising the corporations code; and providing for an effective date.

WITNESS REGISTER

Professor Dan Fessler, Consultant
Code Revision Commission
University of California, Davis, CA
Phone not provided
Position Statement: Outlined Corporate Code Revision.

Henry Lancaster, Aide
Senator Josephson's Office
Pouch V, Juneau, AK 99811
465-3787
Position Statement: Asked for points of clarification.

Jeff Berry, Aide
House Labor & Commerce Committee
Pouch V, Juneau, AK 99811
465-3892
Position Statement: Asked for points of clarification.

John Abbott, Chairman
Alaska Code Revision Commission
Address and phone not provided
Position Statement: Answered questions from the committee.

Willis Kirkpatrick, Director
Division of Banking, Securities and Corporations
Department of Commerce & Economic Development
Pouch D, Juneau, AK 99811
465-2521
Position Statement: Stated concern regarding the method of keeping the records.

PREVIOUS ACTION

SB 246--There is no previous action to report on this bill.

ACTION NARRATIVE

The meeting of the Senate Labor & Commerce Committee was called to order at 3:00 p.m., with Senator Rodey present. Senators Eliason Chair, Mulcahy, Bennett and Sackett were absent. This meeting was called for the purpose of receiving public testimony on SB 246. The following is a verbatim transcript of the proceedings from a cassette tape of the reel-to-reel tape of the meeting.

SENATOR RODEY: . . . This is a subcommittee meeting of the Labor & Commerce Committee. The task is to review the Code Commission's work on the corporation's statute. We have with us today the Chairman of the Code Revision Commission, Mr. John Abbott, attorney from Anchorage. With us also is Professor Daniel Fessler, who is the author of the corporations code, along with the Code Commission. John, did you have any questions, or rather any comments, you'd like to make? Perhaps the best thing you can do is . . . would be to give everybody here, we have mostly staff people and people from the administration here with us today who, they are the ones that do the real work. And, of course, the legislature . . . this is a complicated matter, the legislature really has to take the opinion of those people who have the time and expertise to work on it.

JOHN ABBOTT: Thank you, Senator Rodey. Just a few preliminary comments before I turn it over to Professor Fessler. The corporations code has been under advisement, so to speak, for about four years now. It has undergone a number of revisions, a lot of thought and a lot of man hours. It is a technical bill. It is the first time that the Alaska Corporations Code will have been substantially revised since its adoption in 1962, at which time it was probably not a very good code. And what the Code Commission has tried to do is to improve it, bring it to modern status as a corporation code governing the activities of people that have acquired a state charter and to fill in a number of voids in areas which the Legislature has not spoken to and which need to be spoken to since a corporate charter is, in effect, a set of directions to anyone wishing to incorporate as to how they are to act as a corporation in the legal diction. That is basically what the Code Commission has done and without further ado, I'll turn it over to Professor Fessler. He'll give you a run down on technical aspects of the code.

PROFESSOR FESSLER: And if it would be helpful, Senator, anytime either, particularly you or any members of the staff that are here have questions, please feel free to interrupt me. I should first begin by identifying myself. I am from the University of California at Davis. I am here in the capacity as a consultant to the Code Revision Commission. I was first retained in the fall of 1979 and asked to review the content of Alaska statutory law on for profit corporations, with a view toward advising the commission as to whether or not I thought that any kind of basic reform

PROFESSOR FESSLER (cont'd): was necessary. I concluded that it was, and I can briefly highlight for you what my thoughts were. When Alaska became a state, the legislature adopted with virtually no modification of what was then the current corporation law of the State of Oregon. The Oregon law in turn was a 1954 version of the model act. Now subsequent to Alaska's adoption of the Oregon act, there have been significant change both in the recommended content of the law. The model act, I should point out parenthetically, is an act which is recommended to the legislatures of the several states by a committee of the American Bar Association. Of necessity, it is a very general act. It pertains to the conditions and experience of no single jurisdiction and over the years it has become the basic act in numerous smaller states. It has never been successful in having much of an impact on the law of those states where any legislature sat down and decided to craft their own corporation's law. The Delaware, New York and California laws, which are the three major approaches to the organization and discipline of corporate activity in the United States, and have reflected very little influence on the model act. We have adopted the model act. Now the model act that was adopted in Oregon in 1954 was obviously not adopted with a view toward any interest that might be in Alaska or in legislatures not be given credit or presence in figuring out their law to become that of another state. Unlike the State of Oregon, which in 1954 had ninety years of common law decisions in the business field, and therefore when the legislature enacted a statute to regulate business activity in Oregon, it could take into account that the Oregon Supreme Court is speaking to these questions for nearly a century. The Alaskan act was brought into our state against a background of a near void of decisional law. And in the years that have intervened, our Supreme Court has had occasion to speak from time to time on business matters. But I think that not even the most optimistic leader of the Alaskan courts would feel that there is today a background of supplemental decisional law. So from a practitioner's vantage point or from a client's vantage point, the corporate law in Alaska starts off as being, bearing no rational relationship to the state. It is subsequent to being enacted here. It has been tinkered with from time to time. There have been some amendments. It has never been thoroughly restated. Amendments to the model act as they have been recommended have some been adopted in Alaska, but most have not. And there is virtually no common law in Alaska, pre-statehood and post-statehood, in this area. So that the biggest problem Alaskans face is that the law with regard to business associations in the state is very sparse, very difficult to determine, and therefore it threatens business with the one thing which business cannot deal with--uncertainty. When questions are raised and business people need legal advice, they need to be told yes or no. The answer maybe isn't very useful at all. For the answer that we may get this eventually decided by the Supreme Court is both an expensive and hideously time consuming period at which to try and predicate corporate decisions or corporate action. So what I have recommended, and over the years what the commission

has evolved, is an extremely comprehensive statute. The bill which is pending in the Senate is Senate Bill 246. It is probably the most elaborately stated corporation's code in the United States. If it has a rival, it would be the California act from the mid-1970's. The reason that this statute speaks on subjects that go considerably beyond the model act is because we are attempting to answer by legislative provision many questions which in other states are answered by well known common law decisions, which decisions we simply do not have in the State of Alaska. So in order to have a thoroughly conceptual and detailed statute, it was felt necessary to begin by looking at some basic philosophical choices. And when the commission looked beyond the State of Alaska it found that the attitude of state government toward corporations varies dramatically from state to state. The most impressive distinction would be between Delaware on the one hand and the State of California, where I come from, on the other. It is sort of surprising to people when they first get into this field that Delaware is the most important American jurisdiction for corporate purposes. If you look at the Fortune list of the 100 largest American corporations, 97 are incorporated in post office boxes in Dover, Delaware. And this is because over the years people in business, in management, have found in the Delaware legislature a very, very receptive and understanding body. Also, the State of Delaware has maintained chancery courts long after they were abolished in all other American jurisdictions with the result that you can get a matter litigated, tried and finally disposed of on appeal in the State of Delaware inside of a 100 days. Again, business cannot stand to be told maybe with regard to a question. Delaware's act is considered a management oriented statute. If there are value judgments to be made giving preference to the prerogatives of shareholders on the one hand, or those of the incumbent management, the officers and directors on the other hand. The Delaware act makes all those value calls in favor of incumbent management. In stark contrast, the State of California has the most pro-shareholder, anti-incumbent management corporations code in the United States. In California, Delaware, excuse me, California directors can serve only one year terms of office. It is illegal to attempt to give a director a longer term of office. The entire board must stand for election at a single meeting held every year. And beyond that, in California shareholders are given the mandatory right to cumulate their votes. The voting scheme designed to maximize the opportunity for minority share interest to gain board representation. Now when one looks at the management oriented Delaware act on the one hand, and the California approach which is to bend everything in favor of shareholders, a decision was made by the Code Revision Commission that we would craft a statute which had no inherent internal bias. Under this proposed bill, it would be possible for individuals desiring to form a corporation, to form a corporation that had all of the prerogatives which California insists upon for a California corporation. In other words, you could choose to have one year terms for directors. You could choose to have no classification of the boards, so that the entire board must stand for

annual elections. You can choose to have cumulative voting, but none of these choices are forced upon you by the state. Therefore, it would be possible under this statute to choose three year terms for directors, to classify the board so that only one-third of the board comes up for election every year, and to deny to the shareholders cumulative voting. What we have attempted to do is to allow people in this state the freedom to make their own business decisions and to make their own decision about what it is they want in terms of management and the rights and prerogatives of the beneficial owners, the shareholders. What we have sought by way of reform, however, is to insure that all of these basic decisions are taken within the context of the articles of incorporation so that there is a single document which shareholders or other interested parties can look to that will you a totally accurate picture of what basic decisions have been made with regard to this specific corporation. For that reason, you will notice that there is important language in the provisions of the act dealing with the articles of incorporation. Two sections, the section that speaks to the mandatory terms which must be covered by the articles and the succeeding section which refers to the optional terms. That has a very important caveat. All of the topics covered in that section are stated by the statute to be effective only if made the object of provision in the articles. Therefore, if you put them in bylaws, if you try to put them in shareholder agreements, statutorily they would be null and void. So that our attempt has been made to make the articles of incorporation and the process of incorporation of a new corporate entity is very much like a cookbook. The statute is a recipe of choices to be made. They are clearly presented. Both the counsel and client should find it very easy to go through the process of incorporation, giving to the clients the opportunity to make basic decisions about the corporation being formed. Thereafter any potential investors will find those decisions clearly reflected in terms of the articles of incorporation. So you have here a statute which is pretty much devoid of any internal bias, in favor of shareholders or in favor of management prerogatives, which has also sought to minimize the role of government. Certain states have recently been adopting acts which have attempted to intrude the government more and more into the area of corporate activity. There is concern about the social responsibility of corporate behavior. There is solicitude about the question as to whether corporate management, the people whom Louis Brandeis once referred to as managing other people's money, the degree to which they were truly, honestly and efficiently exercising their business judgment and what the state's interest ought to be. Our decision has been to recommend to the legislature adoption of a pact which renders certain reporting obligations which must be made to the Department of Commerce and Economic Development which standardizes the reporting obligations, both in terms of their content, their form and their title, so that there will be a habitual pattern of reporting to the state. But beyond that does not seek to give the state a very intrusive role to play in the

operation of for profit corporations. The old pro warranto provision brought by the Attorney General which has never enjoyed much use in the State of Alaska does not come in for much of an enhanced role in statute. Yes?

HENRY LANCASTER: Excuse me, but does your definition of state intrusiveness extend to fiduciary duties and . . . type of shareholders?

PROFESSOR FESSLER: No, when I am speaking now of a statement, I appreciate the opportunity to clarify. I am speaking now of the executive branch of government. I am not speaking now of attempting to minimize the role of the judiciary in the event litigation should take place, but rather to what extent would there be an investigative presence of the Attorney General looking into the operation of corporations. We have two provisions: There is a provision in this act which allows the Attorney General to commence a cause of action designed to seek the dissolution of a corporation. That's the old classical pro warranto procedure for very serious offenses against state law or public policy. There is also a provision for the administrative dissolution of corporations which are merely habitually ignoring the various reporting requirements and tax obligations which the state has created. And those enforcement procedures are placed in the hands of the Commissioner of Commerce and Economic Development. They are administrative procedures. There is a provision in the act which would allow a corporation who just had its charter suspended pursuant to this to appeal to the superior court for a trial de novo on the matter so that the state's role is certainly going to be vindicated in terms of tax obligations or reporting obligations. The prerogatives of the Attorney General of the Department of Law have been protected in this legislation. But basically what we have attempted to do is to force those who control the corporation, especially larger corporations having numerous shareholders, to make annual reports to shareholders. And we assume that the shareholders will be the best source of discipline over the stewardship of people who are managing corporate resources which the shareholders have the beneficial interest in protecting. So for the first time if this act were adopted, there would be mandatory reporting obligations every year on the part of the corporation to its shareholders, giving the shareholders a fairly facile means of gathering what the financial status of the corporation is. Also, you'll be interested in looking at the section on what are called transactions with interested directors and officers. These transactions are specifically defined in the statute, and every year corporate management must disclose to the shareholders the identities, dates and amounts of transactions falling within the statutory definition. The shareholders will have a much better opportunity to decide whether or not there have been abuses of fiduciary obligations. I should also point out the reference to the inquiry about fiduciary obligations, that this statute for the first time gives a clear definition of the duties of care

and loyalty which are owed by a director to the corporation. The statute also specifically delineates the rights of a director to rely on certain information supplied by corporate officers including the opinion of counsel or by committees on which that particular director does not happen to serve. Also for the first time in this statute, fiduciary duties are articulated on behalf of corporate officers. There is no statutory formulation of fiduciary of corporate officers in the State of Alaska today. They would be left intrusive to common law conjecture as to what they were and what the dimension might be. So those are the basic approaches which are taken to this very important question.

HENRY LANCASTER: Does it do anything to relieve the burden or reduce the cost of shareholder litigation in seeking to find that information?

PROFESSOR FESSLER: Well, first, the statute clearly defines the rights in which shareholders will have with regard to inspecting corporate books and records. A distinction is drawn, you'll notice in the provisions of this act, between a shareholder whose basic interest is examining the shareholder list and gaining knowledge of the identity of the other shareholders or even greater interest in trying to figure out how the shares are proportionately handled. We also have created a right of inspection with regard to corporate books and records. The statute specifically includes in that description the books and records of subsidiary corporate entities. Because one of the basic problems that has arisen in jurisdictions in recent times has been that corporations will frequently hide transactions that they know may be objectionable by having those transactions take place within the guise of subsidiary or other affiliated corporate entities. So shareholders are now given statutory rights of inspection, and they are given certain teeth. You'll be interested in the provisions that deal with the consequence to a corporate officer who denies to a shareholder what are that shareholder's statutory rights of inspection, including a $5,000 civil liability to that shareholder in addition to whatever actual damages the shareholder may be able to show by virtue of the denial. In the past, one could simply, in the jargon of the trade, tough it out or stumble when faced with shareholder demands. There were no statutory penalties. There was no legally defined downside risk for such a strategy. There was always the possibility that you might well be sued, but you could take a chance that you could resist any liability on the theory that the shareholder could not show that she had suffered any discreet, provable, ascertainable damages. Those matters have been thought out by the commission, debated at some length, and the commission's recommended positions on that are reflected in this bill. In addition to that, in other words, in addition to the prerogatives which a shareholder who suddenly makes it her business to want to look into these matters, there is as I stated a few moments ago the mandatory

reporting obligations which corporations have. They become more elaborate as the size of the corporation increases, and the inertia of shareholders is thought to require that the corporate management be forced to come to them with annual reports. Some are the twelve pay reports that are required by the Securities and Exchange Commission, so that shareholders would at least be alterted by the basic information imparted in those reports. And then might be well alerted to follow up by inquiries and take advantage of their rights of inspection. And in this regard, there is one other area of Alaska law that I think is shockingly deficient. Alaska is one of two jurisdictions in the United States that has no statutory regulation of the shareholder derivative cause of action. If there has been a reform which has had rough sledding in the United States since the 1940's, it has been the theory that the shareholders could be relied upon like Cincinnatus, at their own expense, to enter lists against those who are managing the corporation and sue using the corporation as the beneficial plaintiff for the litigation. The theory in the 1940's when this became a matter of great vogue in corporate literature was that in this manner corporate responsibility would be returned to corporate. . . The role of government was receding as corporations became more and more, there are more than eight thousand for profit corporations in Alaska already. And that number can only be expected to go up. If the Department of Law were to look into their affairs, they would have to be massively inspected. So the theory was, let the shareholders do it. The difficulty was, of course, the flaw in nature of humankind is nicely reflected in the cross section of individuals who are likely to be shareholders. Therefore, section 435 in the bill is addressed to the statutory regulation of shareholder derivative cause of action. However, it has been to attempt to ferret out the shareholder who was most likely to bring a meritorious cause of action and have the legal resources to stick with that cause of action through a process of prosecution and final adjudication. The basic abuses, of course, over the years have become shareholders would bring what are now . . . referred to as strike suits. The causes of action initiated against the corporation with full knowledge that the corporation could find the expense, both in time and treasury, the adverse publicity of the media picking up that a corporation has been sued for a hundred million dollars or a million dollars, alleging that all of the people who are running the corporation are crooks. And that any individuals who brought these types of action were frequently very interested in having incumbent management simply buy them off with non-judicially supervised, out of court settlements. It is not surprising that the fruits of these non-judicially supervised out of court settlements never went to the corporate treasury, which is a theory in a derivative cause of action, but went to the shareholder who was keeping his peace. All of these types of abuses I think have been prophylactically dealt with in section 435. You will notice that the statute defines standing on the part of

shareholders who will be allowed to bring the derivative cause of action. For the first time the statute clearly settles the issue of when such a shareholder is obliged to exhaust intracorporate remedies by making a demand for the action which the shareholder seeks to have effectuated on the incumbent directors, settles for the first time the question as to what the status of incumbent directors and their business judgment should be, recognizing that the question of whether it is in the best interests of XYZ corporation to engage in litigation for the next two years is not purely a question for lawyers to decide, but for businessmen and businesswomen to decide. And, therefore, unless the directors are themselves accused of being the wrongdoers or under the direct or indirect control of those who are alleged to be the wrondoers, the good faith, independent business judgment of disinterested directors is to be respected and will terminate the cause of action which is created by section 435(a).

HENRY LANCASTER: Yes, (a), I guess that leads me to my next question. I noticed you were expressing corporations for profit. What I am going to ask is what protections does that give public corporations in Alaska. The state oversees some of them against residents claiming themselves to be shareholders who want to take some kind of action.

PROFESSOR FESSLER: Nonprofit corporate entities?

HENRY LANCASTER: Well, AHFC, or any other public corporation.

SENATOR RODEY: This section, this bill we have before us doesn't deal with that question. It's just for profit corporations.

PROFESSOR FESSLER: They are not covered at all.

SENATOR RODEY: Mr. Lancaster is legal counsel with Senator Josephson.

PROFESSOR FESSLER: I see. Well, they are not covered at all. Any government created corporation, either by the state or federal government or any nonprofit corporate entity created, has fallen outside the purview of this particular act. Although the Code Revision Commission has prepared an extensive draft of a not for profit corporations bill which very shortly will be submitted by Chairman Abbott to the Legislative Council with the request that it be introduced.

SENATOR RODEY: Let me ask one question . . .

PROFESSOR FESSLER: Senator.

SENATOR RODEY: . . . particularly since we have the banking director here as well, what impact will this bill have on the banking code?

PROFESSOR FESSLER: Well, basically, you are asking me a question that I am afraid that I cannot answer.

SENATOR RODEY: I always wanted to ask a professor a question that he couldn't answer.

PROFESSOR FESSLER: This does not address banking and corporations.

HENRY LANCASTER: Sep[illegible]tles also.

SENATOR RODEY: Yes, I [illegible]at. Is there, which is the reason I asked, as you know, [illegible]d draft corporate articles now as a lawyer you say except [illegible]urance and banking in the State of Alaska is the magic words that you put in. But is there anything in the bill that would affect banking?

PROFESSOR FESSLER: Since banks cannot be formed under the terms of this act, I would say that there would be nothing in this act which would directly affect banking.

SENATOR RODEY: I wanted to put that on the record.

PROFESSOR FESSLER: Well, I think that would be my opinion. I was trying to remember, I think several years ago the commission decided to stick with the basic scheme which was that the current Alaska Corporations Code does not extend to banking. It is receiving discreet statutory treatment, and so it continues to do so.

SENATOR RODEY: That answers my question, and many, many bankers will probably rest easier.

PROFESSOR FESSLER: Well, I assume it will not be because of the enhanced fiduciary obligations that are defined in this code. The bankers will be resting easier, but they are not covered, merely because they would be superfluous . . .

SENATOR RODEY: They become nervous when anybody attempts to change the law.

PROFESSOR FESSLER: If I could generally in terms of suggesting that areas that you might wish to look into for various senators and representatives and committees of the legislature. Article 4 of this act deals with corporate finance. It brings about a suggested reform that I think will be most welcome in the state. One of the most difficult legal issues of the present time is to decide when it is licit for corporate management to make a distribution of corporate assets to the beneficial owners, most commonly in the form of payment of dividends. The difficulty has been that the legal profession in the 1920's began to intrude concepts which were apparently meaningful to lawyers, concepts such as earned surplus, reduction surplus, which had no meaning then or now to

accountants. They also had no meaning then or now to individuals who are in the business world. Consequently, we have the sort of Alice in Wonderland business of the law speaking one language venerating certain very ill defined value judgments with regard to this basic issue, and the accounting profession which was charged with obeying the law or keeping accounting clients within the law, and men and women of good faith desirous of obeying the law in an abysmal state of ignorance as to what exactly it was that the law wanted. Now, California in the 1970's spent a great deal of time and no little treasure attempting to solve this question. They came up with a scheme which is called the ratio/assets surplus test. And with very minor modifications, that is the basis of Article 4 of this proposed bill. It answers the very primitive question of when can a corporation make a licit distribution of assets with a very simple answer. Any time the assets of the corporation exceed its liabilities by a ratio of five dollars of assets to four dollars of liabilities. Any corporate assets beyond that ratio are free to make distributions to shareholders. So that if a corporation has five hundred thousand dollars in assets and four hundred thousand dollars in liabilities, it could make no distribution to shareholders at all. If it had six hundred thousand dollars in assets and four hundred thousand dollars in liabilities, it could make a distribution up to one hundred thousand dollars at which point its assets would have been brought into the statutory equilibrium of liabilities, and no further distribution would be licit. There is a further caveat. The statute does take into account that there is a big distinction between fixed and current assets. If a corporation which had most of its assets tied up in illiquid matters such as land or a factory and had in its liabilities recurrent, short-term money obligations, even though the total ratio of assets to liabilities might meet the so called ratio/assets surplus test, there is a requirement that giving a prospective effect of the proposed distribution that current assets, which is a term of art to accountants, equal current liabilities, another term of art to accountants. The basic scheme here with regard to all accounting concepts is to leave them to the evolved understanding of the accounting profession. You will notice here that the statute does not contain definitions of accounting concepts at all. It simply says that in reckoning the ratio/assets surplus test, that management is to be guided by the decisions or recommendations of members of the Certified Public Accounting field. So as they evolve their various understandings, our act will also beneficially evolve. We will never be wedded to a set of accounting principles which are constantly being eroded as they are being improved by the accounting profession. So that I think that reform will be very deducible in allowing people to be prudentially advised now or frequently to be able to get along without the needed advice, because it is a fairly easy test for accountants to apply. So that in Alaska at the present time, you have a statute which contains elements of two antiquated tests, the so called earned surplus test and

the balance sheet surplus test, are used by various jurisdictions that have a model act. In other words, if you look at our statutory language it doesn't define the test. If you then look at other states that have similar statutory language, you run into a sea of confusion. Since we have no decisional law interpreting our statute, an accountant or businesswoman in this state faces one of the most vexing of all dilemmas. A statute which we have not interpreted which faces divergent and frankly at war interpretations of other jurisdictions. That would all be swept aside and replaced now by fairly easily understood concepts.

SENATOR RODEY: Could you deal with the question of the secondary liability of directors. I think that's an important one. Obviously there are problems in this jurisdiction in that area, and it would probably be one of the more controversial aspects of the bill.

PROFESSOR FESSLER: Yes, one of the most difficult questions that I think the legislature may well wish to face is the idea of corporations being used in a manner which is very, very unlike the classical image of a corporation. Remember now I am talking about limited liability. The corporation is the only vehicle for the conduct of business which carries with it the presumption of limited liability for all participants. For both tort and contract claimants the theory is that the assets of the individual shareholders are not at risk beyond the assets which they have contributed by the way of capitalization of corporation in subscribing for stock. Limited liability was extended to corporations in the United States in the 19th Century on the assumption that this permitted individuals who were risked at first, but who had surplus assets to give those assets over to individuals who were without assets themselves, but who had management talents and were very interested in taking other people's money and developing them into businesses which would later on become manufacturers and employers. And, in other words, major economic entities for the benefit of everybody. Limited liability to those shareholders was thought to be essential because the shareholders almost by definition were going to play an extremely passive role in the corporation. Having large public issue corporations today, that is still generally true. I have inherited fifteen shares of stock in Western Union Corporation, an entity for whatever virtues it may have, I would state on the record has never produced large dividends for me and is an entity which has had some substantial difficulties. There is literally nothing which I as an owner of fifteen shares in Western Union can do to meaningfully influence the business decisions of those in management of Western Union. The notion that I should enjoy limited liability for the debts of Western Union or even the tort claims against Western Union is probably senseless. But since 1950, and there have been several books, if you ever fly on an airliner, you are aware that you see constantly ads in all the airline magazines, how to set up

your own corporation. So you've been bankrupt five times, so you don't have any assets, etc., you, too, can have a great tax dodge. You don't have to put up any money at all, and none of your personal assets are at risk here. The sad part about that forty-nine dollar trap is that it is pretty much true. And I think it became true not because any legislature in any state ever said that that should be what would happen. That I as a one single sole could incorporate myself, or that two or three people could incorporate, put up a few dollars in assets, conduct the business so long as it was to our interests. And when it was no longer to our self advantage to simply walk away from that business in this state and you are not at all unique. You have several thousand more corporations that you haven't heard from in months or years. They were never dissolved. They just went away. And they likely went away owing lots of relatively small people money that to those individuals meant a lot. There were employees who weren't paid, and then they found out that the owner of the business didn't owe them the money because business had been incorporated. There were materialmen and suppliers who were not paid because the business had been incorporated. The same enterpriser not infrequently goes on the start another business in another corporate personna and operate that business so long as it is convenient. In other words, what I am suggesting is that limited liability, just as the airline magazines now advertise, has become a very, very simple means of abusing one's creditors. You can only take bankruptcy once every six years, but you can walk away from a corporation once every six days, and there is nothing illegal about it. Banks aren't too interested in this problem. Insurance companies and other institutional lenders are not too concerned about this problem, because when an individual in a business goes to them and wants to borrow money they always ask for individual cosigners. They ask for the incursion of personal liability. The people who are the fall guys in this situation are the hundreds of small creditors who extend credit on open account. So, one of the questions which was debated at length in the Code Revision Commission was what could be done to make people running corporations have any greater sense of responsibility to creditors. In theory, of course, each of you who is a lawyer well knows, that limited liability has never been guaranteed, and there are numerous common law doctrines for quote piercing the corporate veil. Indeed, in California the idea that the business has been thinly capitalized, a term not well defined but at least well conceptualized, is a ground for a court to overturn the limited liability of some or all the shareholders. But if you are an individual who has a four or five thousand dollar claim against the business, you certainly do not have the assets to prosecute through the court system a suit designed to pierce the corporate veil and gain the personal liability of shareholders who have abusively conducted business in the corporate forum. The time and cost of litigation means this is a fairly availing strategy. Now New York, which was the first major American jurisdiction to

permit corporations to come into existence, has never granted total limited liability. This is not well known outside of New York, but it has been the content of New York statutory law from 1834 until this afternoon. And they appear to have no intention of changing it. In New York with regard to employee claims to compensation, wages owed, etc., the ten largest shareholders in the corporation have always been totally statutorily liable, jointly and severally, in their personal assets. Now the problem isn't limited just to employees, and we felt that putting the liability on the ten largest shareholders was not the best way to go. Most corporations doing business under the Alaska Corporations Code as it exists today would have fewer than ten shareholders. Some of those shareholders would be very active in the conduct of the business but others might be quite passive, either because they have retired, they are the surviving spouses of individuals who were active in the business, or they have inherited stock from parents who were active in the business, or because they never planned to be active in the business to begin with. Therefore, putting liability on those individuals seemed to be putting liability on individuals who have not made the decisions which created the liability to third party claimants. So, the act has come up with this notion of secondary liability of officers and directors. Those are the people who make the business decisions. They incur the liabilities to third parties. They are active. If the legislature were to adopt the Code Revision Commission's recommendations, directors and certain named officers of the corporation, or individuals who were discharging the functions of those offices even if they were given different titles. You can see that if the president of the corporation has statutory liability, you might try to create a corporation that had a great pooh-bah but no president on the theory that nobody would be behind the label to whom the statute can pin the liability. So the persons who would occupy and discharge the functions which were normally to be attributed to the president, vice president, etc., of the corporation are liable to creditors for an amount up to twenty-five thousand dollars. Now, that is per creditor. So there could be very significant liability under this statute. If you have ten creditors then there could be a quarter of a million dollars in total liability here. The liability is joint liability with the right of contribution. The liability extends in favor of a statutorily defined class of creditors. Those creditors include employees, materialmen and suppliers and others who extend credit to the corporation on open account. The liability is not mandatory. The statute specifically says, and some individuals who read this statute have either refused to recognize that this is the way it is written or they just simply don't wish to read it carefully. The statute plainly says that the liability which was created can be contracted away. In other words, in writing any individual who is made the beneficiary of this liability can release

any or all of the individuals who are incurring the liability. Therefore, if the corporation and its officers and directors desire to do business if you ran a restaurant in this town and you habitually bought fresh fish down on the wharves. Almost always that is presently sold to you on open account. You get a little bill at the end of the month. There is nothing in writing. At the present time if you closed the restaurant and walk away from it, the individual to whom you owe five thousand dollars or ten thousand or twelve thousand dollars for fish if you incorporate the business has no tactical recourse against you. He can't afford to get a lawyer, he can't afford to try to pierce the corporate veil, he just eats the loss. Now, you could go to that individual and say do you realize that my restaurant is a corporation, and I would like you to agree that in the event that this business fails, you will right here in writing state and you will not look to any of us for payment, but you will accept whatever payment the corporation is able to make. But unless the corporation takes the precaution to gain the written release of reduction of that liability, it is open to total contractual modification. This statute would create that secondary liability.

JEFF BERRY: Is that provision in the statute?

PROFESSOR FESSLER: It certainly is.

JEFF BERRY: So an employer could go to an employee and say it is a term or condition of your employment that you must release us from any liability if we strip the corporation.

PROFESSOR FESSLER: If we what?

JEFF BERRY: Strip the corporation. In other words, strip all the assets out along the way.

PROFESSOR FESSLER: Well, that would certainly be done in form, sir, but I mean whether or not that contract would stand up against an assault in could would be another question. And there are going to be some problems with allowing this contractual modification. You pose a very difficult one of the employer saying to somebody, I want your conscience, your conscious waiver of this right you have. Not on the theory that I am going to strip the corporation, but that I am not guaranteeing that this business will be successful. And, therefore, I want you to help share the risk with me if the business . . . [END OF FIRST SIDE OF TAPE] of the commission. I would find that this is probably a tolerable pattern of behavior.

JEFF BERRY: I think it would run afoul of some labor laws. The rights of employees cannot be waived of minimum wage, for instance, and that may run afoul to federal labor law statutes which guarantee certain rights to individuals that would be setting a term or condition of employment that cannot be waived . . .

JOHN ABBOTT: Okay, but you have to keep in mind that the present corporation law doesn't provide this cause of action or this liability against officers and directors.

PROFESSOR FESSLER: So they don't have that right today.

JOHN ABBOTT/SENATOR RODEY: They don't right now.

JOHN ABBOTT: We are not talking about doing away with some protection that employees presently have.

PROFESSOR FESSLER: You might want to look into, in terms of the Labor Committee, might wish to look into the question as to whether or not it thinks it's a good idea that employees could be put in a position to be asked to waive this secondary liability. But right now it's a right they don't have. So I doubt that any existing legislation would protect it.

JEFF BERRY: Well, if you put it in this form, it may be a right that they would never have. It would exist only on paper.

JOHN ABBOTT: No, no. You are assuming that there is some right there presently that there is not. There is . . .

JEFF BERRY: Well, we hopefully would be creating that right.

PROFESSOR FESSLER/JOHN ABBOTT: Sure.

PROFESSOR FESSLER: Yes, that's fine.

JEFF BERRY: For potential abuses or for, particular for potential abuses because that is really the only area that it would go into. If a person had started a corporation and it failed, they are not going to have anything anyway. And they are going to take everything that they have traditionally and attempt to satisfy the creditors. I think it is a pretty safe assumption that we could make. The question would be in those cases where they may have transferred the funds for whatever purposes elsewhere and walked away. . . then you may not be creating that right. Maybe as far as wages, certainly it's a different bargaining position, employer and employee as opposed to that. I am willing to open an account with you and everything. I think that there is a balancing effect that we could quite possibly look at as to say, can an employee actually bargain with the employer on an equal footing. And that basis would be really creating a right or a disservice, perhaps.

PROFESSOR FESSLER: Well, again, the section we are referring to, sir, that everyone can look at it later is section 488, which shows up at page 67 of SB 246. The group of individuals who are made liable are defined by section 488(a). They are the president, secretary and treasurer or individuals performing the functions of those offices. Notice that section 488 also extends to foreign

corporations doing business in Alaska. This is necessary if you are going to conclude an end run around whatever the legislature does by the simple expedience of foreign incorporation, and then coming back to Alaska to do business as a Delaware corporation, or as an Oregon corporation, or a Nevada corporation. So that this act is applied to foreign corporations doing business in the state. And then you'll notice that there is language here that says to the extent that the act as a corporate entity prove insufficient. In other words, the person seeking to be covered under section 488 would first have to exhaust the liability of the corporation. You couldn't come after a director just because that individual was a more obvious target as a defendant. Now, you'll notice that the liability is for contract indebtedness, whether formal or otherwise, for materials, supplies, inventory or services furnished, and that's what covers the employees. During the period of service, so if a director wants to know how long would I be liable and for what amount. Well, it would only be for those contract indebtedness claims arising during my period of service on the board. (b) is the point that I was making a few minutes ago. The terms of a written contract, not an oral understanding, but a written contract between a corporation and a third party may modify or preclude the liability. And then (c) is designed to keep a large creditor from dividing the claim and assigning twenty five thousand dollar portions of the claim to friends or family members, etc., in order to get more liability than the legislature intends here. Large creditors were perfectly willing to fend for themselves in dealing with corporations. It is the small person who we are interested in protecting here. And then you'll notice under (d) that a party against whom a claim is asserted under this section is entitled to a contribution from others under (a) so that there is a right of contribution that is created to spread the loss. Yes, sir.

JEFF BERRY: I have a tangential question, since you said the word foreign corporation. A question was asked from the insurance administrator. At the current time the Director of Insurance is the registered agent for all foreign corporations. And they are exempt from registering under the corporation statutes. How would this proposed legislation affect that? Would they then become subject to dual registration for the purpose of legally serving anyone who is an admitted insurer, whether it is excess or insurance for that state. I looked through and I really didn't see it and . . .

PROFESSOR FESSLER: The answer, sir, is clear in section 5, that a corporation may be organized under this chapter for any lawful purpose except for the purposes of banking and insurance. So insurance corporations are totally excluded from this legislation. They would face no dual reporting or . . .

JEFF BERRY: They weren't really too sure.

PROFESSOR FESSLER: Well, I mean, one of the problems which I certainly recognize is that a bill of this complexity which has evolved through drafts, repeated drafts, and hearings, most recently six months work with the Alaska Federation of Natives study subcomittee on this subject It is itself now, by the time it comes to the members of the House and Senate an extremely lengthy, and I think it does not betray the reality to say, a complex piece of legislation. And even I who find gardening thrilling in my pastoral existence in Davis, would not find this the most exciting reading in the world. But we have to the extent possible attempted to provide very extensive comments that are designed to explain, not only to members of the House and Senate and professional staff, but also to citizens, lawyers, and other interested persons in the greater world that lies outside this building, exactly what the intentions were. You will notice that one of the other things which the official comments seeks to do is to give Alaska an instant common law heritage by taking into account certain of the very major common law decisions in allied areas. And stating whether or not in the commission's view, hopefully in the legislature's view, adherence to those famous decisions in other jurisdictions would or would not be consistent with the rules and philosophies that are being framed legislatively here. This is very important where we have continued provisions of existing law, because they were model act provisions and we felt that they were adequate. But when you went outside of Alaska you found that they were the object of conflicting interpretation. The comments will tell you which line of common law interpretation are being approved and specifically which common law decisions are being disapproved. So that a lawyer now would be able to advise a client as to what the legislative history was and to be able to integrate it with the greater body of common law. Senator, do you have any other specific questions?

SENATOR RODEY: Not any specific questions, no.

PROFESSOR FESSLER: Fine. The other factor which I would commend to the general attention of the members is that the rights of members when a corporation is going through what is called an organic change where there is going to be a merger, corporation (A) merges into corporation (B), a consolidation. Corporations (A) and (B) emerge as new corporation (C), or a sale of all or substantially all corporate assets other than in the usual course of business where a corporation sells virtually all of its assets to (B) corporation which takes them over. These organic changes which are very ill defined in existing Alaska statutory law are now very clearly defined, and the rights of shareholders to be allowed to vote before such a plan is affected and not a fait accompli is guaranteed by this new statute. And also shareholders who vote no on the question of organic change are given the statutory rights which are called dissenter's rights which

is a right to have the new corporation buy the shares of the dissenting stockholders at a fair value which is to be determined on the day before the vote in favor of the organic change is taken. And as we always do, you'll notice consistently here when value comes up, the statute first gives to the shareholder and the corporation made liable to pay the dissenting shares the opportunity to fix the value by mutual agreement. If they are unable to do so, the statute provides that the court may appoint appraisers, and the decision of the appraisers as to the value of the stock is binding both on the dissenting shareholders all of them so no one is paid five dollars, and somebody else is paid three-fifty, and the corporation, and that this matter can be expeditiously settled within sixty days, because the last thing that the corporation which has just gone through an organic change needs is protracted uncertainty as to the dimension of its liabilities to any dissenting shareholders.

JEFF BERRY: What is the ratio of percentage of what a shareholder can buy into this new corporation that's in a sell-out situation. Corporation (C) sells out to a multinational corporation, what percentage do they automatically get to buy. The shareholder can't do that with a multinationational.

PROFESSOR FESSLER: The statute creates the general presumption that they are entitled, in other words, all shares must be treated equally. So that if any of the shares in the corporation are going to be given shares of stock in the multinational purchaser then all of the shareholders must be accorded similar rights. You cannot discriminate between shareholders of the same class of stock and say, we find it very convivial to bring in the family of the new corporation. All of the shareholders in this room, except Fessler, and we really don't want him as a participant in our new business, so we are going to give him a thousand dollars for his stock. That would be discriminatory treatment, and we either have to give everybody money or everybody stock.

JEFF BERRY: But what percentage of stock? What portion of the corporation?

PROFESSOR FESSLER: That would be framed by the boards of directors of the two corporations. In other words, if there is a merger the statute puts upon the board of directors of "X" corporation framing the terms of the merger and upon the board of "Y" corporation consent to those terms. That's done at the board level. Then each corporation is obliged to go to its respective shareholders and bring to those shareholders the terms of the proposed organic change. The statute grants a right to all shareholders to vote on this organic change even if they otherwise hold nonvoting classes of stock. And if the corporation has classified its stock, there is an obligation that before the organic change can be affected it must command a majority, not only of all the shares, but of each class of the shares. So we do not seek to build in any guaranteed

ratio of the shares, but we do seek to have it brought to the attention of the shareholders of the respective corporations. And then by giving everybody voting rights, we are trying to make certain that in their self-interest the shareholders will reject or accede to the request. And as I say, any shareholder who votes no on the organic change is given the right to have the successor corporation buy out those percentage shares at a value that was supposed to be the fair value not taking the organic change into account at all. So it is an elaborate balancing of values, but generally what we are doing is we are saying that we like the result that the Supreme Court of Delaware came up with in the Singer v. Magnavox case, and we don't care for the Panzer decision which came along ten months later. And you'll notice that the comments specifically confer a seal of approval on Singer and Magnavox, both as a result and its reasoning, and indicate that the legislature has adopted and framed this statute to carry into effect the Magnavox decision. And if the legislature would regard a judicial construction of this act in a manner that is consonant with the Panzer case as being contrary to the legislature's intention. So we tried to stay on top of the major decisions that have come along and influenced corporate law. Just as in the area of derivative suits, you will find that we are literally, thoroughly up to date. We know all about Flynn and Muldinaro cases; we know about Barr v. Wackman. And therefore, the commentaries to the provisions on derivative causes of action in section 435 specifically indicates to what extent we are willing to sanction the result and reasoning in Barr v. Wackman, on the opinion of disinterested directors, their business judgment and to what extent we are favoring the Muldinaro case decided by the Supreme Court of Delaware. We specifically indicate that our statute would be subverted by the interpretation of the Delaware law given by the federal district court in some of the instances . . . which said that the opinion of the board of directors that in their business judgment the litigation was not meritorious. This is one of the problems in Alaska, that in so many of these areas counsel just simply cannot advise clients because we don't know what the law is, and none of us has an interest in perpetuating that. And that's not good for business. You take in . . . comments, and that's antithetical to the economic evolution of this jurisdiction. Senator, I have no further observations other than to indicate that at any time I will be, if my schedule at the University permits it, be willing to answer questions in writing or by conference calls or by personal appearances for any of the committees of either house.

SENATOR RODEY: I am very unable to predict exactly the course of the legislation will be, and John is, of course, available to help out on it also. Essentially, the recommendation of staff is very important on this. That's why we have a number of staff people here today, because a complicated corporations code has

to be taken in part on faith because most of the legislators will be unfamiliar with the content. The fact that it has had a broad review in the state, has been signed off on by a variety of interested individuals, I think that speaks well for it. I am going to talk with Senator Ray who is Chair of the Judiciary Committee. I don't know what the Chairman of Labor and Commerce will wish to do with the bill. Hopefully, we will move it out in a very timely fashion so it can go to Judiciary again, having that staff and members look at it. There are a number of attorneys on the Judiciary Committee, which is helpful. I don't know whether we'll pass the corporations code this year, given the amount of time it takes for everybody to become familiar with it. It is a complicated piece of legislation, but a very important piece of legislation for the business community. Perhaps nothing else is as important as the structuring of corporate activity in the State of Alaska. And you very eloquently set forth some of the difficulties we have had in the State of Alaska or the lack of any real corporate history or law. And it, of course, was reflected in the statutes and other areas which is the reason for the code commission. The legislature simply doesn't have the tiem to redraft completely in many cases what is law generally taken from the State of Oregon wholesale at the time it was taken or slightly before. Perhaps the best course is for myself to talk with the Chairman of Labor and Commerce, and at that point talk with Chairman Abbott. We very much appreciate your efforts, and we probably will at some point in time call on you to answer questions or make comments. I think that the only way that the bill will really pass, at least pass comfortably, is with the broadest possible dissemination of information about the bill, and I will try to do that. Are there any other questions from anyone that is here today about the contents of the bill or anything that is attended to the bill? If there are no other comments then the subcommittee meeting is . . . Willis.

WILLIS KIRKPATRICK: I don't know whether I should bring it up now, would there be other hearings on this?

SENATOR RODEY: There probably will, but go ahead.

WILLIS KIRKPATRICK: Let me point out, for the record my name is Willis Kirkpatrick. I am Director of Banking, Securities, Small Loans and Corporations. On the corporation part there are three areas that have come to mind, and I have discussed it with the commission. One of them is that there is a requirement for foreign corporations to file their articles of incorporation with the State of Alaska. We have been in touch with other state jurisdictions, and this is a provision that has been deemed eliminated actively as far as foreign corporations are concerned in filings. We have done some research on it, and prepared a paper in that respect, but we feel that it would be for the amount of usage that it would be, that it would get as far as the

practicing attorney and find out what the articles are. This is probably more current and better obtained when they . . . regardless of whether they are . . . The other thing is that there is a requirement in the proposed act that the department file with the Superior Court some updated records weekly, and we would like to have the intent of the legislature if that is passed to make it a microfische copy acceptable for filing in the division. If we print weekly, the updates are going to be very expensive and very encumbering, a massive paper production. So we would request that microfische be considered as meeting the provisions of that section. The other section that we had some concern about is section 910 that gives the provisions for filing writings with the department, and we would like the writings to be specifically suitable for microfilming. Everything is microfilmed now, and we are totally dependent upon microfilming. So we don't want to be in a position where we have no statutory authority to turn down a filing because it is not legible for microfilming. Those are the only comments that we have at this time, Senator.

SENATOR RODEY: Thank you, Willis. Are there, Professor Fessler, Mr. Abbott, did you have any comments this?

JOHN ABBOTT: Well, the code commission is not opposed to any of those changes. And as to the last two, I don't think there is anything in the statute that precludes these microfilm and microfilming format, so I know of nothing in the act that would preclude the director from promulgating any regulations which would provide for microfische. . . district courts or in the districts or requiring documents be susceptible for microfilming. So we have no objection to the foreign corporation articles.

SENATOR RODEY: Actually it fits in with recordations ideas that the code has expressed in the past.

PROFESSOR FESSLER: I would point out, Senator, that I had hoped that we had accommodated this by the provisions of section 868 which say that the reports required by this chapter to be filed with the department by the commissioner shall be on forms prescribed and furnished by the commissioner.

JOHN ABBOTT: I was under the same opinion.

PROFESSOR FESSLER: We are trying to give you the broadest possible authority to prescribe the forms and say what scheme you want in. Your liability with regard to processing them under section 910 presupposes their conformity under section 890.

WILLIS KIRKPATRICK: We weren't quite sure whether actually under 910 weakened the other section.

PROFESSOR FESSLER: Well, if there is any concern circling what Chairman Abbott has stated, there is nothing in this draft that

was intended to do anything other than what you are now seeking to accomplish. And we didn't want to wed you to microfische if at some point in the future there was some other dazzling means of handling information and you were statutorily burdened with a statement that you had to come to the legislature and get it changed.

WILLIS KIRKPATRICK: We wrestled with the fact that we didn't specifically want you to name microfische in there.

PROFESSOR FESSLER: Oh.

SENATOR RODEY: If you could get the committee a memo on that and perhaps consider artful language that would allow you to do what you've stated, give you the authority to make the administrative decisions. I don't think they will have any difficulty with that. Are there any other questions? If not, the subcommittee meeting is adjourned.

ALASKA CODE REVISION COMMISSION

ALASKA STATE LEGISLATURE
POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
(907) 465-4878

MEMORANDUM

TO: Ken Johnson, Committee Assistant
House Labor & Commerce Committee

Sheila Peterson, Administrative Assistant
Senate Labor & Commerce Committee

FROM: Dick Regan, Research Director
Alaska Code Revision Commission

DATE: January 13, 1984

RE: Profit corporations--HB 343/SB 246

You may wish to include the following background information with materials for the Joint House/Senate Labor and Commerce Committee hearing at 8:30 a.m., Monday, January 23, 1984, in the House Labor and Commerce Committee Room in the Behrends Building.

HB 343/SB 246 would replace the Alaska Business Corporations Act, AS 10.05, with the Alaska Corporations Code (ACC). The bill was introduced in both houses on April 8, 1983, to facilitate joint committee work.

On May 17, 1983, a joint hearing was set up on the bill. However, last minute conflicts developed that prevented the House committee's participation and also prevented most of the Senate members attendance.

The meeting was held, however, as a Senate Labor and Commerce meeting, chaired by Senator Pat Rodey, subcommittee on the bill. Staff of some legislators and other interested persons attended. An overview of the bill was given by Professor Dan Fessler who drafted the bill with the code revision commission, and questions were asked and answered.

A transcript of that hearing is attached. It was retyped in the code revision commission office from a garbled original. The original is available in Senate Labor and Commerce and in the code revision commission office.

The hearing set for Monday, January 23, will be the first hearing on the bill for the House committee and the second hearing on the bill for the Senate committee. However, it is anticipated that the hearing will lead off again with an explanation of the bill by Professor Fessler as in the May 17, 1983 hearing.

A general overview of the bill is also contained in the transmittal letter at the start of a section commentary on the bill in House and Senate Joint Journal Supplement No. 11. That overview is followed by in-depth commentary on the bill.

Attached also is a miniature summary of the bill.

DR:chw

Attachments

ALASKA CODE REVISION COMMISSION

ALASKA STATE LEGISLATURE
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(907) 465-4878

MEMORANDUM

TO: Ken Johnson, Committee Assistant
House Labor & Commerce Committee

Sheila Peterson, Administrative Assistant
Senate Labor & Commerce Committee

FROM: Dick Regan, Research Director
Alaska Code Revision Commission

DATE: January 13, 1984

RE: Profit corporations--HB 343/SB 246

You ask who should be notified of the Monday, January 23, joint hearing on the profit corporations code.

There are some 12,000 business corporations, so individual notice to them is not practical.

I called the Alaska Bar office in Anchorage. I think its mailout date for a newsletter will just miss being practical for inclusion of notice of the joint committee hearing.

Enclosed is a draft letter to the Juneau Bar president.

Also enclosed is a note we sent to Willis Kirkpatrick, Director of the Division of Banking, Securities and Corporations.

We will notify members of an AFN subcommittee who worked on the bill and a couple of persons who have expressed an interest.

I have no grand plan for notice, though.

DR:chw

Enclosures

Draft

January 13, 1984

John Clough, President
Juneau Bar Association
801 W. 10th St., Suite 30
Juneau, Alaska 99801

Dear Mr. Clough:

Please inform persons attending the next Juneau Bar lunch:

Regarding HB 437/SB 313. On Friday, January 20, at 1:30 p.m., in Court Room A, Dan Fessler, a UC Davis law professor and consultant to the code revision commission on corporation law, will review the bill now in the legislature for a revision of law on nonprofit corporations. The attached notice which is going out to nonprofit corporations further explains the purpose of the session. It will be a teleconference.

Regarding HB 343/SB 246. On Monday, January 23, at 8:30 a.m., in the House Labor and Commerce Committee Room in the Behrends Building, a joint hearing of the House and Senate Labor and Commerce Committees will be held on the proposed revision of the business corporation law. Fessler will be on hand there, too, to explain the bill.

Persons interested in corporation law can attend these meetings, get an overview of the proposed codes, and offer testimony on good or bad features of the bills.

Very truly yours,

Dick Regan, Research Director
Alaska Code Revision Commission

DR:chw
Enclosure

ALASKA CODE REVISION COMMISSION

ALASKA STATE LEGISLATURE
POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
(907) 465-4878

MEMORANDUM

TO: Ken Johnson, Committee Assistant
House Labor & Commerce Committee

Sheila Peterson, Administrative Assistant
Senate Labor & Commerce Committee

FROM: Dick Regan, Research Director
Alaska Code Revision Commission

DATE: January 17, 1984

RE: Profit corporations [Alaska Corporations Code]--HB 343/SB 246

As further backup for the joint House/Senate Labor and Commerce Committee hearing on the referenced bill scheduled for 8:30 a.m., Monday, January 23:

Enclosed is a subject index for the ACC.

In the index the three-digit decimals are sections numbers of proposed AS 10.06.

The numbers marked with an asterisk are section numbers of the bill.

Since the index should be helpful in reviewing the bill, we sugggest you may wish to include the index with backup materials on the bill for your committee members.

DR:chw

Enclosure

INDEX TO THE ALASKA CORPORATIONS CODE

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NOTE: In this index, the three-digit decimals are section numbers of proposed AS 10.06. The numbers marked with an asterisk are section numbers of the bill.

ALASKA CODE REVISION COMMISSION

Sheila Information copy

ALASKA STATE LEGISLATURE
POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
(907) 465-4878

MEMORANDUM

TO: Willis Kirkpatrick, Director
Division of Banking, Securities & Corporations
Dept. of Commerce and Economic Development

FROM: Dick Regan, Research Director
Alaska Code Revision Commission

DATE: January 30, 1984

RE: Proposed amendments to HB 343/SB 246 on profit corporations

Attached is a memorandum from Dan Fessler enclosing proposed amendments to the ACC, HB 343/SB 246.

Also attached is our note to Sheila Peterson and Ken Johnson, aides to the Labor and Commerce Committees in the Senate and House, respectively.

We understand you will be preparing a fiscal note before the Senate Labor and Commerce Committee hearing February 2, 1984. If you wish anything from us, we will help in any way we can.

DR:chw

Attachments

ALASKA CODE REVISION COMMISSION

ALASKA STATE LEGISLATURE
POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
(907) 465-4878

MEMORANDUM

TO: ✓ Sheila Peterson, Researcher
Senate Labor and Commerce Committee

Ken Johnson, Committee Aide
House Labor and Commerce Committee

FROM: Dick Regan, Research Director
Alaska Code Revision Commission

DATE: January 30, 1984

RE: Proposed amendments to HB 343/SB 246

We have just received the attached proposed amendments to HB 343/SB 246.

Professor Fessler has agreed by a telephone conversation that another suggestion was made by Director Willis Kirkpatrick and was informally agreed upon when Kirkpatrick testified to the joint committee January 23rd. The additional change:

Page 138, line 28: Insert "Class A" before "misdemeanor".

Page 139, line 9: Insert "Class A" before "misdemeanor".

That change should be included, also. [Parenthetically, it is just a matter of drafting style, since AS 11.81.250(c) of existing law provides: ". . . A misdemeanor under Alaska law defined outside this title for which no penalty is provided is a Class A misdemeanor."]

All changes encompassed by the attached amendments were agreed to long ago by the code revision commission and the group proposing the amendment. It was understood that they would be proposed to the appropriate committee of the legislature when the bill was heard. This submittal following the January 23 hearing are in furtherance of that understanding.

Please note there is a word of explanation preceding each proposed amendment in the attachment.

Unless you advise otherwise, we will put the amendments into the appropriate form for the committee's consideration.

DR:chw

TO: MEMBERS OF THE CODE REVISION COMMISSION January 27, 1984

FROM: Professor Daniel Wm. Fessler

RE: Amendments to House Bill 343 / Senate Bill 246, "An Act Revising the Corporations Code and Providing for an Effective Date".

At testimony provided by Chairman Abbott and Professor Fessler before the Joint House and Senate Labor and Commerce Committees, the Commission affirmed its agreement to a series of minor amendments to the existing text of the above referenced bills. These amendments were initially suggested by the Department of Commerce and Economic Development, the Alaska Federation of Natives Subcommittee, and Alaska Airlines. This document will provide a draft of the changes which the Commission intends to seek and support as the ACC moves through the legislature toward enactment. In accordance with the understanding of all parties, a copy of this document will be circulated to Willis Kirkpatrick, Elizabeth Johnston, and Irv Bertram.

> [Where language is to be deleted it is struck over in this version. Additional language is indicated by being placed in upper case and underscored. Where the additional language supplants current text, the supplanted text is overstruck.]

I. AMENDMENT SUGGESTED BY THE DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT TO WHICH THE COMMISSION IS AGREEABLE AND SUPPORTIVE:

Scope of Amendment: The Department has suggested that the preservation of a zero fiscal note on the ACC is dependent upon

removal of a provision of existing Section 10.06.733 which relates to using the Department as a depository of the content of the articles and articles of amendment of foreign corporations which have sought a certificate of authority to transact business in Alaska.

The Department's testimony was to the effect that such a procedure is very cumbersome and is at variance with current Alaska practice as well as the usage in other states. The Commission has become convinced that the Department's position is sound and thus recommends that Section .733 of H.B. 343 [p. 127, lines 2-11] be amended as follows:

> Sec. 10.06.733. FILING OF APPLICATION FOR CERTIFICATE OF AUTHORITY. The application of the corporation for a certificate of authority shall be on forms prescribed and furnished by the commissioner. Duplicate originals of the application executed by its president or vice-president, and by its secretary or an assistant secretary, and verified by one of the officers signing the application, ~~together with a verified copy of its articles of incorporation and all amendments to the articles,~~ shall be delivered to the commissioner for processing according to AS 10.06.910 and for issuance of a certificate of authority.

II. AMENDMENTS SUGGESTED BY THE ALASKA FEDERATION OF NATIVES TO WHICH THE COMMISSION IS AGREEABLE AND SUPPORTIVE:

Scope of Amendments: The Subcommittee of the Alaska Federation of Natives has suggested a number of wording changes and deletions from the current text. The Commission is agreeable to and supportive of the following amendments to Sec. 10.06.960 of H.B. 343 [pp. 147-149].

Sec. 10.06.960. CORPORATIONS ORGANIZED UNDER

P.L. 92-203. (a) A corporation organized under the Alaska Native Claims Settlement Act (P.L. 92-203; 85 Stat. 688), ~~except a village corporation that may be incorporated under either this chapter or AS 10.20,~~ shall be incorporated under and is subject to this chapter except

(1) each corporation shall issue without further consideration the number of shares of common stock that may be necessary to comply with the requirements of the Alaska Native Claims Settlement Act and all stock so issued is considered fully paid and nonassessable when issued;

(2) unless otherwise provided in the articles of incorporation ~~approved by the United States Secretary of the Interior~~,

(A) the capital is considered the consideration for the initial issuance of shares; and

(B) the capital of a corporation organized under P.L. 92-203 includes

(i) the land or interests in it conveyed to the corporation by the United States under the federal Act, except that which is required to be conveyed under sec. 14(c)(1), (3), and (4) of that Act, entered at its fair value to the corporation upon receiving the conveyance of it; and

(ii) the money, when received under secs. 6, ~~7(i),~~ and 9 of that Act, that is retained by the corporation and that is not immediately distributed or required to be distributed under sec. 7(j) of that Act.

(b) Notwithstanding the provisions of AS 10.06.300---10.06.390, payment from the money of a corporation organized under P.L. 92-203 that is required by the language of P.L. 92-203 to be distributed to shareholders or to other corporations so organized ~~may not be considered to be a distribution in partial liquidation.~~ IS NOT A "DISTRIBUTION TO ITS SHAREHOLDERS" AS DEFINED BY AS 10.06.990(17).

(c) Notwithstanding the provisions of AS 10.06.546, a plan of merger, consolidation, or exchange in which each participating corporation either (1) was organized under the Alaska Native Claims Settlement Act (P.L. 92-203; 85 Stat. 688), within the same one of the 12 regions of Alaska established under the Alaska Native Claims Settlement Act, or (2) resulted from the prior merger, consolidation, or exchange of other similarly organized corporations within the same region, is approved if it receives the affirmative vote of the holders of at least a majority of the out-

standing shares of each corporation. If a class of shares of a corporation specified in this subsection is entitled to vote as a class, the plan of merger, consolidation, or exchange is approved if it receives the affirmative vote of the holders of at least a majority of the outstanding shares of each class of shares entitled to vote as a class and of the total outstanding shares. NOTWITHSTANDING THE PROVISONS OF AS 10.06.574---10.06.586, A PLAN OF MERGER, CONSOLIDATION, OR EXCHANGE QUALIFIED UNDER THIS SECTION SHALL NOT INCLUDE THE RIGHT OF SHAREHOLDERS TO DISSENT.

(d) Notwithstanding the provisions of AS 10.06.488, a director or officer of a corporation organized under the Alaska Native Claims Settlement Act ~~that is required by the language of the Act~~ is not personally liable to the contract creditors specified in AS 10.06.490 except as otherwise provided by law.

III. AMENDMENTS SUGGESTED BY ALASKA AIRLINES TO WHICH THE COMMISSION IS AGREEABLE AND SUPPORTIVE:

Scope of Amendments: The circulation of an exposure draft of the Commission's work came to the attention of Alaska Airlines with the result that useful suggestions were received which require amendments to two provisions of H.B. 343 and expansion or clarification of the Official Comments to three sections. The suggested amendments to the text of H.B. 343 are first listed following the modifications to the Official Comments.

The Code Revision Commission is agreeable to and supportive of the following amendments to H.B. 343:

*[p. 12, line 12 -- p.14]

Sec. 10.06.208. ARTICLES OF INCORPORATION. The articles of incorporation shall set out

(1) the name of the corporation;

(2) the purpose or purposes for which the corporation is organized that may be stated to be, or to include, the transaction of any or all lawful business for which corporations may be in-

corporated under this chapter;

(3) the address of its initial registered office if incorporation is after ~~March 29, 1957,~~ JANUARY 1, 1983, and the name of its initial registered agent ~~at that address~~;

(4) the name and address of each alien affiliate or a statement that there are no alien affiliates;

(5) if the corporation is authorized to issue only one class of shares, the total number of shares that the corporation is authorized to issue;

(6) if the corporation is authorized to issue more than one class of shares, or if a class of shares is to have two or more series,

(A) the total number of shares of each class the corporation is authorized to issue, and the total number of shares of each series that the corporation is authorized to issue or of which the board is authorized to fix the number of shares;

(B) the designation of each class, and the designation of each series or that the board may determine the designation of any series;

(C) the rights, preferences, privileges, and restrictions granted to or imposed on the respective classes or series of shares or the holders of the shares, or that the board, within any limits and restrictions stated, may determine or alter the rights, preferences, privileges, and restrictions granted to or imposed on a wholly unissued class of shares or a wholly unissued series of any class of shares; and

(D) if the number of shares of a series is authorized to be fixed by the board, the articles of incorporation may also authorize the board, within the limits and restrictions stated in the articles or stated in a resolution of the board originally fixing the number of shares constituting a series, to increase or decrease, but not below the number of shares of the series then outstanding, the number of a series after the issue of shares of that series; if the number of shares of a series are decreased, the shares constituting the decrease shall resume the status they had before the adoption of the resolution originally fixing the number of shares of the series.

*[p. 56, line 29]

Sec. 10.06.455. CLASSIFICATION OF DIRECTORS.

(a) If the board consists of nine or more members, the articles of incorporation may provide that instead of electing all the directors annually the directors be divided into either two or three classes, each class to be as nearly equal in number as possible, with the term of office of directors of the first class to expire at the first annual meeting of shareholders after their election, that of the second class to expire at the second annual meeting after their election, and that of the third class, if any, to expire at the third annual meeting after their election. At each annual meeting after the classification the number of directors equal to the number of the class whose term expires at the time of the meeting shall be elected to hold office until the second succeeding annual meeting if there are two classes, or until the third succeeding annual meeting if there are three classes. A classification of directors is not effective before the first annual meeting of shareholders.

(b) Unless cumulative voting rights have been eliminated by the articles of incorporation (AS 10.06.420(d)), an amendment of the articles that would establish or require classification of the board under (a) of this section may not be adopted if the votes cast against the amendment would be sufficient to elect a director if voted cumulatively at an election of the entire board.

(c) A PROVISION IN THE BYLAWS OF A CORPORATION WHICH, WERE IT A PROVISION OF THE ARTICLES OF INCORPORATION, WOULD ACCORD WITH (A) OF THIS SECTION SHALL BE VALID PROVIDED THAT IT WAS ADOPTED PRIOR TO JANUARY 1, 1971.

The Commission is agreeable to and supportive of the following changes to the text of the Commentary to Accompany Proposed Bill on the Alaska Corporations Code (ACC):

*[At page 89 of the House and Senate Joint Journal Supplement for April 8, 1983, the Official Comment to Section 388 should be amended to read]:

Official Comment to ACC Section 10.06.388. ACQUISITION OF CORPORATION'S OWN SHARES; REISSUANCE OR RETIREMENT.

SCOPE: ACC sec. 388 specifies the treatment to be given redeemed or repurchased shares. They revert to the status of authorized but unissued shares unless the articles of incorporation prohibit reissuance. If reissuance is prohibited, the article stating the number of authorized shares

must be amended to reflect the lowered number. Such an amendment of the articles must be filed with the commissioner. Shareholder approval of the required amendment is not necessary.

WHILE SEC. 388 ABOLISHED THE ANTIQUATED ACCOUNTING CONCEPT OF "TREASURY SHARES", NOTHING IN THIS SECTION IS INTENDED TO PREJUDICE THE PRESENT OR CONTINGENT CONTRACT RIGHTS WHICH PRE-ACC CORPORATIONS MAY HAVE CREATED IN REACQUIRED SHARES DESCRIBED AS "TREASURY SHARES."

CHANGE IN FORMER ALASKA LAW: ACC sec. 388 is taken from GCL Section 510. It continues prior Alaska law (former AS 10.05.312-345) in requiring a filing with the commissioner of an amendment to the articles. It departs from and simplifies prior law by the elimination of the concept of "treasury shares."

*[At page 123 of the house and Senate Joint Journal Supplement for April 8, 1983, the Official Comment to Section 455 should be amended to read]:

Official Comment to ACC Section 10.06.455. CLASSIFICATION OF DIRECTORS.

SCOPE: Sec. 455 provides for optional classification of a board consisting of a minimum membership while taking steps to preclude the adoption of such a scheme for a corporation which has not eliminated cumulative voting from adopting such a classification scheme by amendment if shares sufficient to elect one director under cumulative voting oppose such amendment. Sec. 455 replaces former AS 10.05.186.

CHANGE IN FORMER ALASKA LAW: Sec. 455(a) is an enactment of Model Act Section 37 and works an important change from former AS 10.05.186 respecting the election to classify the board. Under prior Alaska law this decision could be taken by a bylaw adopted by the board without shareholder participation. The danger to minority share representation in such circumstances led to subsection (a)'s requirement that the election be taken in the articles, which insures shareholder participation.

Subsection (b) is new. Continuing the concern for minority share representation on the board of a corporation which has not eliminated cumulative voting, sec. 455(b) precludes amendment of the articles to classify the board if the number of shares voting "no" on the amendment or refusing to consent in writing would be sufficient to elect one director if voted cumulatively at an election of

the entire board.

SUBSECTION (C) IS NEW. IT PERMITS BOARD CLASSIFICATION PURSUANT TO THE TERMS OF A PROVISION IN THE BYLAWS RATHER THAN THE ARTICLES OF INCORPORATION. IN ORDER TO CLASSIFY A BOARD UNDER SEC. 455(C) IT IS NECESSARY THAT THE BYLAW HAVE BEEN ADOPTED PRIOR TO JANUARY 1, 1971, WITH OR WITHOUT SHAREHOLDER PARTICIPATION, AND THAT IT CONTAINS NOTHING WHICH, WERE IT A PROVISION IN THE ARTICLES OF INCORPORATION, WOULD OFFEND SEC. 455(A). THUS, ALL OF THE RESTRICTIONS ON THE MINIMUM SIZE OF THE BOARD, THE MINIMUM NUMBER OF CLASSES, AND THE TERMS OF THE DIRECTOR OFFICE SET FORTH IN SEC. 455(A) LIMIT THE TERMS OF ANY BYLAW WHICH WOULD BE EFFECTIVE UNDER SEC. 455(C).

Daniel Wm. Fessler
THE CODE REVISION PROJECT
719 Second Street
Davis, California 95616

916-752-2896

Dick Regan, Esquire
Director of Research
Alaska Code Revision Commission
Pouch Y - State Capitol
Juneau, Alaska 99811

Dear Dick:

Enclosed please find a copy of the amendments to both the ACC (H.B. 343), and the Official Comments at they appeared in the House/Senate Joint Journal Supplement under date of April 8, 1983. In each instance I have fully produced the text of the provision as altered or amended. I believe that the procedure is self-evident.

I am sending an extra copy for Willis Kirkpatrick. A copy has also been sent, express mail, to Eliz Johnston and Irv Bertram. Each has been directed to telephone your office if there are any problems.

Thank you for your kindness during our recent adventure. I look forward to seeing both you and Katie on about a month.

Sincerely,

Daniel Wm. Fessler

Enclosures: (2)

ALASKA CODE REVISION COMMISSION

ALASKA STATE LEGISLATURE
POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
(907) 465-4878

MEMORANDUM

TO: Members and staff
House Judiciary Committee
House Labor & Commerce Committee
Senate Judiciary Committee
Senate Labor & Commerce Committee

FROM: Sen. Patrick M. Rodey P.M.R.

DATE: May 13, 1983

RE: SB 246/HB 343--Corporations

I have been appointed by Dick Eliason to chair a hearing Tuesday, May 17, 1983, at 3:00 p.m., in Room 504 of the Capitol on SB 246 for a general revision of the corporations code. Probably it will be a joint hearing with House Labor & Commerce covering the identical house bill, HB 343, as originally contemplated. In any event, the hearing will cover the content of the two identical bills.

Some last minute scheduling uncertainties kept the hearing off the calendars, but a hearing on SB 246 on shortened notice has been approved.

Professor Daniel Wm. Fessler, a recognized authority on corporations law, will explain the bill. He worked with the code revision commission and interested groups for over two years in developing the revised code.

The hearing is an opportunity for education on the corporate structure and information on the bill for as many legislators and staff as can attend it.

PMR:chw

alaska federation of natives, inc.

411 W. 4th Avenue, Suite 1A • Anchorage, Alaska 99501 • Phone 907-274-3611

April 8, 1983

Mr. John W. Abbott, Chairman
Alaska Code Revision Commission
Pouch Y
State Capitol
Juneau, Alaska 99811

Dear Mr. Abbott:

I would like to take this opportunity to thank the Commission for fully providing the AFN with the opportunity to review and comment on the proposed Alaska Corporations Code. The AFN now supports the passage of Senate Bill No. 246 and House Bill No. 343.

The proposed Corporations Code is a comprehensive and generally careful legislative scheme of good quality. Further, it is accompanied by a technical commentary which can serve to reduce Native corporations' extensive litigation costs. The finance section is an important reform, making possible some distributions from capital, but not jeopardizing creditors' security. If you need us to testify on behalf of the Bill, we will do so.

Sincerely,

Janie Leask

Janie Leask
President

cc: Honorable Joe L. Hayes
Honorable Jay M. Kerttula
Honorable Walter R. Furnace
Honorable Charlie Bussell
Honorable Richard I. Eliason
Honorable Bill Ray
Honorable Al Adams
Honorable Don Bennett
Honorable John C. Sackett

eklutna INC.
TELEPHONE (907) 276-5701
840 "K" STREET, SUITE 202
ANCHORAGE, ALASKA 99501

April 17, 1984

Senator Joe. Josephson
Judiciary Committee
Pouch V
Juneau, Alaska 99811

Dear Sen. Josephson;

I am writing regarding cs for Senate Bill 246 (L&C), the Corporation Code Revision Bill.

I am very concerned with the provision on page 2, line 1-3 authorizing loans to corporate officers and directors. I feel that this provision has potential for great abuse. I don't think that corporate officers and directors should vote on loans to themselves, this just isn't proper. No matter what kind of approval system is set up, the officers and directors have final approval over corporate matters. They would also have control over the repayment schedule. I feel this could lead to abuse.

I strongly oppose the inclusion of this provision in this bill. If this provision is retained, I think, at the very least any loans authorized under this provision should be listed in the corporation's annual report under the compensation section. If corporate officers and directors make loans to themselves of corporate assets that should be noted in the corporation's annual report.

Sincerely,

Dan Alex

Dan Alex
President

cc: Sen. Ray
Sen. Eliason
Sen. Ziegler
Sen. Petty John

SB 246 SIGN-IN SHEET Proposed Legislation SB246

Name (please print)	Address	Representing	Testify?? (YES or NO)	Phone Number
Willis F Kirkpatrick	Director Banking, Securities Corporations		yes	2521
~~Darlene Kelly~~	Licensing Admn. Commercial Fisheries Entry Comm	Pouch KB	~~yes~~	4081

SENATE LABOR AND COMMERCE COMMITTEE HEARING DATE 2/2/84

Revising Corporation Code

COMMITTEE REPORT

SENATE

FURTHER:

Date: _____

Mr. President:

The Committee on _____ has had _____

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[ ] replace with CS for _____ [ ] same title [ ] new title

and recommends _____

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

_____

_____

_____

_____

_____

_____

_____

_____

_____

MEMBERS HAVING
OTHER RECOMMENDATIONS:

_____

_____

_____

_____

_____

_____

_____

CHAIRMAN

COMMITTEE REPORT

SENATE

FURTHER: JUDICIARY

Date: _____

Mr. President:

The Committee on STATE AFFAIRS has had SB 240

Revising the Corporations code; eff. date.

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[ ] replace with CS for _____ [ ] same title [ ] new title

and recommends _____

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS:

_____

CHAIRMAN

HB 343 SB 246
on
Business Corporations

Summary

The bill provides for replacing the Alaska Business Corporation Act, AS 10.05, with the Alaska Corporation Code (ACC), a comprehensive revision.

The proposed ACC sets minimum requirements that must be met for the privilege of doing business in the corporate form.

Within limits it leaves to incorporators how to divide powers between shareholders and directors.

It standardizes reporting required to shareholders and the state.

It seeks to clearly define in what circumstances it is permissible to pay a dividend.

While maintaining the right of shareholders to sue corporate officers and directors in appropriate circumstances, it seeks to control the misuse of these "derivative suits".

It also seeks to control misuse of the limited liability of officers and directors that the corporate form provides.

In the covering letter at the start of the commentary that follows in this binder, there is an expanded summary of the bill. Following that is a section analysis which includes the background and basis for choices that have been made in drafting the bill.

Status

The bill is introduced in both houses for greater flexibility and for the possibility of joint hearings should that be the choice of the house and senate committees.

Status going into the Second Session of the Thirteenth Legislature: In House and Senate Labor and Commerce Committees, the first committees of reference. Second reference: House and Senate Judiciary Committees.

SB

251

#

FIRST AMERICAN
BAPTIST CHURCH

HOWARD H. BESS
MINISTER

1200 East 27th Avenue, Anchorage, Alaska 99504 (907) 278-3233

May 14, 1983

The Honorable Senator Richard I. Eliason
Chairman, Senate Labor and Commerce Committee
Alaska State Legislature
Pouch V (MS 3100)
Juneau, Alaska 99811

Dear Senator Eliason:

It is my understanding that the Senate Labor and Commerce Committee will be considering Senate Bills 251 and 252 in the near future. Both bills have been introduced by Senators Josephson and V. Fischer. SB 251 establishes a program for the building of low-income housing by municipalities or by tax exempt nonprofit corporations. SB 252 transfers money from Alaska Industrial Development Authority to the Department of Community and Regional Affairs to fund the program established by SB 251.

I am writing to you in support of both bills.

I am writing to you as the President of ALASKA HOUSING MINISTRIES, an Alaska tax exempt corporation specifically formed to build, own, and operate housing built under such a program as that established by SB 251. We have formed the corporation with the intent to operate across the entire state.

ALASKA HOUSING MINISTRIES is sponsored by the Catholic Archdiocese of Anchorage and the statewide organizations for American Baptists, Presbyterians, American Lutherans, Episcopalians, and Methodists. Thus we are operating from a very broad base of sponsorship.

Our use of funds under this program would be targeted to offer affordable rental housing to families with incomes under $20,000 per year. This particular group of people are under a very tight squeeze in the housing market. They do not qualify to purchase homes. Many find themselves spending as much as 50% of their income for housing.

This particular group of citizens represents a very needed part of the labor market. They typically work in service professions for relatively low wages. Their upward mobility in the job market is not particularly good. (I am not talking about the unemployed or indigent poor, rather regularly employed persons who work for low wages.) Their plight in the housing market has been documented by the recent housing study by C2M Hill, which was commissioned by the Housing Division of the Department of Community and Regional Affairs.

In any housing complexes which we would develop, a sizeable number of units specifically designed for handicapped persons would be included. The need for units for handicapped persons is also well documented.

We believe it is urgent that tax exempt nonprofit corporations such as ours be given a place in the provision and management of housing for low income families and handicapped persons.

Church based nonprofit corporations such as ALASKA HOUSING MINISTRIES have for many years played an important role in providing housing for low income people across the lower 48. (Before moving to Alaska 3 years ago, I served as the president of such a nonprofit corporation in California for 10 years.) In the past these nonprofit corporations operated under one or more of the federally sponsored housing programs. Today none of these programs are being funded and thus are not available to address our needs here in Alaska. This is the reason that it is urgent that SB 251 and 252 be passed and such programs be established here in Alaska.

Tax exempt nonprofit corporations are able to provide low rent housing using a combination of methods.

1) Removing profit from the operation of the housing.
2) Receiving grants and gifts from Churches and individuals.
3) Receiving grants and gifts from governmental bodies.

Naturally, we are both legally and morally committed to nondiscriminatory practices in both hiring and renting.

During the formation of ALASKA HOUSING MINISTRIES, we have been assisted by National Housing Ministries, a Church sponsored nonprofit corporation with nation wide experience and reputation. With their experienced judgment, we estimate that the money proposed by SB 252, when mixed with gifts and loan funds, would produce approximately 600 living units for low income families and handicapped persons.

This is a very significant step in addressing the housing needs of people who need the help desperately.

Please, allow me to point out one other reality. Mortgage interest subsidies, which allow middle and upper middle income people to buy homes, is regularly provided by State programs here in Alaska. The indigent and unemployed poor receive subsidies in many ways. Meanwhile, the hard working low income person finds no relief. Senate Bills 251 and 252 provide the needed relief.

Since I believe that it is important for you to know that a responsible tax exempt nonprofit corporations exists ready to use the program established by SB 251, I am listing the names of the members of the Board of Directors of ALASKA HOUSING MINISTRIES.

The Rev. Howard Bess, (American Baptist) President
The Rev. Allen Price, (Episcopalian) Vice-President
Mr. Joseph Henri, (Roman Catholic) Secretary-Treasurer
The Rev. Fredric Youra, (Lutheran) Member, Executive Committee
The Rev. Alonzo Patterson, (Baptist) Member
The Rev. Richard Madden, (Presbyterian) Member
The Rev. Steven Moore, (Roman Catholic) Member
The Rev. Chuck Eddy, (Episcopalian) Member
Mr. Frank Willis, (Methodist) Member

We stand ready to serve. We ask you, Honorable Senator and the Labor and Commerce Committee, to give SB 251 and 252 favorable consideration, so a very real need can be met.

I am enclosing a brochure describing National Housing Ministries, the group that has been so very helpful to us.

If I can be of any assistance to you and the committee, please call on me.

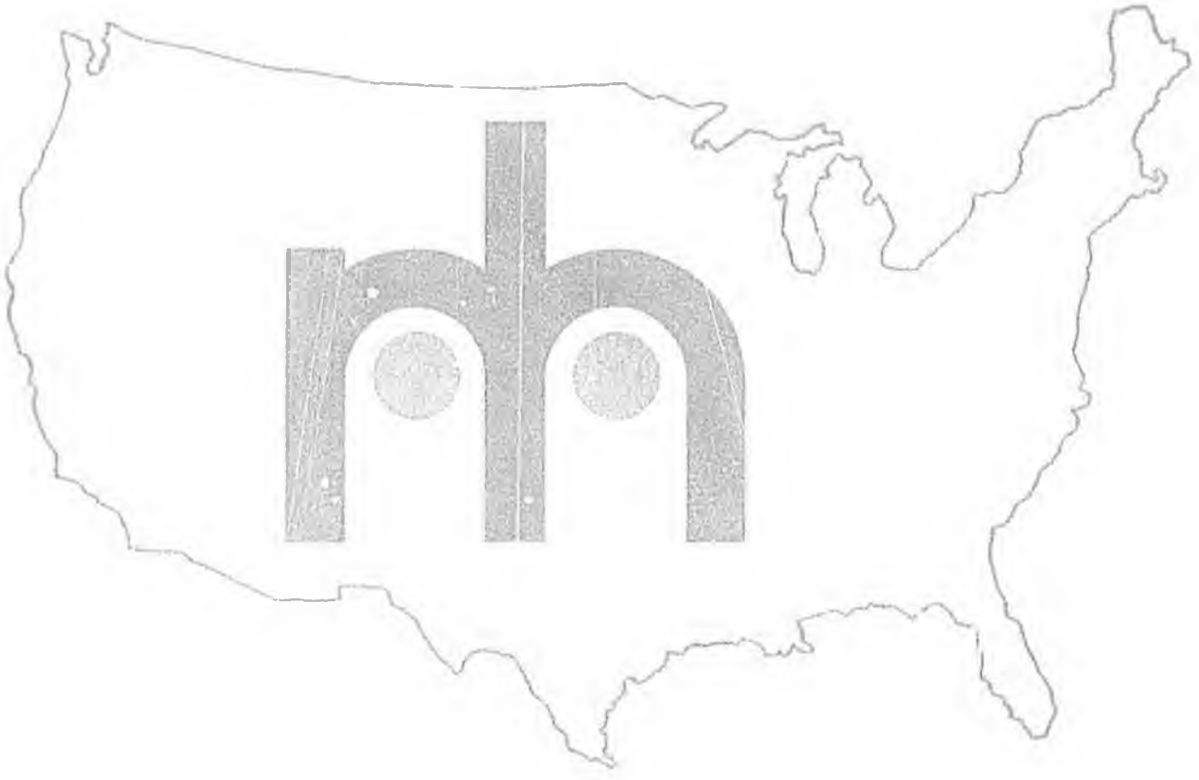
Sincerely,

Howard H. Bess

Howard H. Bess, President
ALASKA HOUSING MINISTRIES

cc Senator Mulcahy
Senator Bennett
Senator Rodey
Senator Sackett

NATIONAL HOUSING MINISTRIES



. . . THROUGH OUR PURPOSES—

Today, one out of every eleven people in the United States is 65 or over—a total of more than 18,800,000 people. Since 1900, the percentage of elderly persons in the population has more than doubled. According to current statistics, the number of people 65 or over will climb to approximately 25,600,000 in the next 20 years.

According to recent surveys by the Department of Health, Education and Welfare, only 25% of those couples, 35% of elderly men, and 41% of elderly women live with their children. The survey also disclosed that hardly anyone in his fifties today expects to live with his children in retirement. It becomes obvious that more housing is required and needs to be designed for persons over 65. This, in addition to family housing and other services, is one of our major purposes.

National Housing Ministries has come into existence because the church must minister to both the affluent and the poor. Rich or poor, all people have basic needs. These needs are inextricably linked to the church's missionary task.

Programs of housing and care constitute one area of human need. Like the Good Samaritan, we have seen this particular need and we have gone to work to do something about it. Christian justice, as a result of providing adequate housing and care for the elderly, the ill, the mentally retarded, and families with limited incomes, makes **National Housing Ministries** one of the church's most treasured assets.

The gospel must be demonstrated where people live. We do that by being there—sometimes by helping, or sometimes by suffering with them. That's why we translate abstract words about 'caring' into virile action through the development of projects for people in urgent need of adequate housing, and by managing that housing with efficiency and care.

National Housing Ministries operates out of a strong Biblical base. The idea of a church organization becoming involved in the development and management of projects of housing and care grows out of a Biblical concern for people first expressed by Isaiah who called his people to care for the homeless. Through our ministries in today's world, the church is in a position to exert a strong and effective influence on the entire field of housing and care.

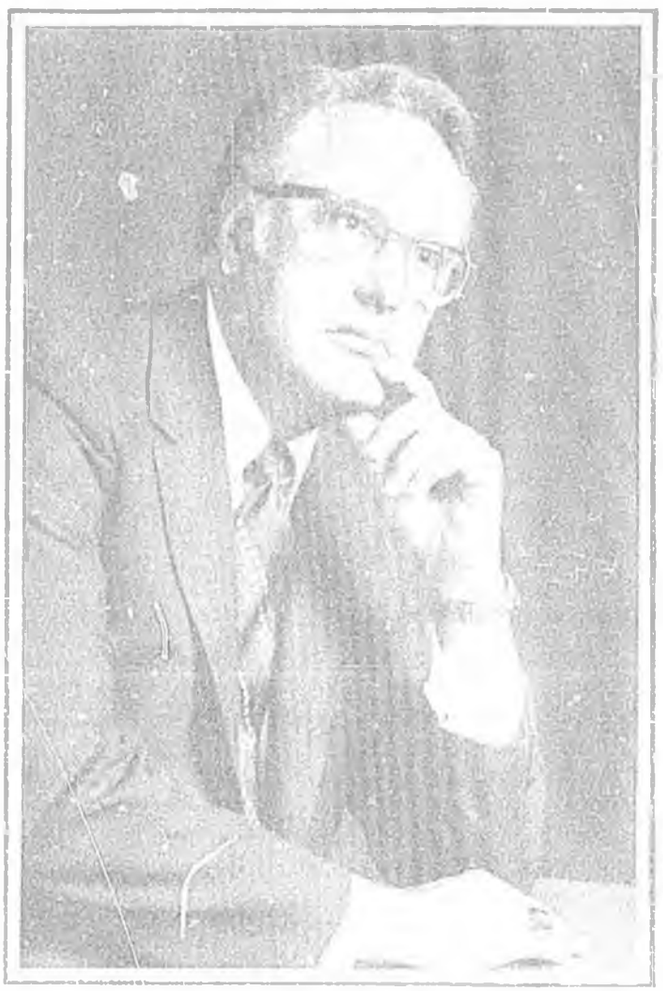
Housing in our nation is benefited by the participation of **National Housing Ministries**—particularly as Christian goals and concepts are defined and articulated. These goals serve as a guideline for growth and help us constantly highlight—not the bricks and mortar that generally come to mind—but people to whom we are sent as servants and ministers.

. . . . THROUGH OUR PEOPLE--

Over the past decade, the leadership of **National Housing Ministries** has demonstrated its competence and gained national recognition from governmental agencies, banking institutions, professional organizations, and the public news media.

Recognition of that wealth of experience is the result of years of ministry as satf members of The American Baptist Service Corporation and The American Baptist Management Corporation, agencies which were originally organized to do the work of the Board of National Ministries, American Baptist Churches USA. The new corporation, **National Housing Ministries,** has retained the staff of these previous agencies. **National Housing Ministries** will continue to serve American Baptists through a contract with the Board of National Ministries. It will also serve other denominations and the Interreligious Coalition for Housing (ICH) through individual contracts.

We proudly introduce you to our present staff of highly qualified people, beginning with our president, Dr. H. John **Vanderbeck.**



From his birth on an Indian mission station where his parents were field missionaries, to the present, Dr. Vanderbeck has been related to and involved in a deep commitment to the Christian church.

Dr. Vanderbeck has held successful pastorates in Illinois, Texas, Iowa, and California. While in the pastorate in California he also gained experience serving as the Western Representative for the Foundation for Specialized Group Housing, Washington, D.C., and later entered the housing field as an executive for Institutional Mortgage Company, Beverly Hills, California. Before coming to his present position he served American Baptists as Program Associate, Retirement Projects, for the Division of Health and Social Ministries of the Home Mission Societies, and as President of both The American Baptist Service Corporation and The American Baptist Management Corporation.

Under his leadership, approximately 250 million dollars worth of projects have been developed. Currently 18 projects are under management with a total value of approximately $36.5 million. He was featured in an August 28, 1971, column by Associated Press syndicated columnist, George Cornell. He and The American Baptist Service Corporation were given feature coverage on the NBC Nightly News Show, September 13, 1971, and in "You Shall Know The Truth: The Baptist Story," by Jessyca Russell Glaver in 1973. He is listed in "Outstanding Personalities of the West and Midwest," "Dictionary of International Biography," and "Who's Who in Religion."

Dr. Vanderbeck is a graduate of North American Baptist Seminary, St. Edward's University, Lewis Hotel Training School, and Harvard Graduate School of Business Administration. He has also been trained in mortgage banking. He received a Doctor of Divinity degree from Judson College and also holds the honorary degree of F.R.G.S. (Fellow Royal Geographical Society, London, England). He resides in Norristown, PA., with his wife and two children and is active in the First Baptist Church of Malvern.

GUY S. PAULTRE is the corporate Treasurer and has been a staff member of housing programs since 1966. As Treasurer, he not only guides the financial operations and audit, but also implements financial policy and keeps a constant check on all projects—in both development and management stages. He lives with his wife and two sons in Glenside, Pennsylvania, where they are active members of the First Baptist Church. He previously served as senior accountant for the Board of National Ministries, American Baptist Churches, USA, prior to joining the housing staff.

His educational and training background includes a degree in Accounting from the School of Commerce of Haiti, a Baccalaureate degree in Accounting from New York University, graduate work in specialized accounting at Temple University, and courses in Real Estate Management with the Institute of Real Estate Management.

RICHARD A. WHITE, a staff member since 1972 is Vice President of Operations and serves as direct liaison to the President. In this position he has direct contact with Regional Vice Presidents and field staff. Prior to 1972 Dick worked for three years at Valley Forge with National Ministries. With his wife and two children he lives in Wayne, Pennsylvania, where they actively participate in the activities of Central Baptist Church.

His educational background includes a Bachelor of Arts degree in Sociology from William Jewell College, a Bachelor of Divinity degree from Colgate Rochester Divinity School, and a Master of Social Work degree from the State University of New York at Buffalo. Dick is a Certified Social Worker and a member of the Academy of Certified Social Workers. His experience includes staff positions with a family service agency, a children's institution, and a public welfare agency. An ordained American Baptist minister, he has also served in Christian Center work and in the parish ministry.

RICHARD J. HANSON, as a staff member since 1969, has served as Vice President for Development. His ministerial career has included being senior minister of a major Baptist congregation, Development Vice President for Pre-Seminary of the West, and Director of Public Relations and Funding for the Salvation Army in New England and California. He also was in charge of the management of a wholly owned management and funding organization. He has recently accepted responsibility as our Western Regional Vice President.

His educational background includes McIntosh School of Business, Gordon College, Gordon Divinity School, Hartford Seminary, New York University, and Mount San Antonio School of Art. He has received a citation for outstanding work in an eleven hundred unit FHA development. He and his wife have recently moved to Morro Bay, California where they are attending the Calvary Baptist Church.

JOHN J. AUFFANT brought to us a wealth of experience when he joined the staff in 1969. As a real estate broker he had been a partner in a successful major New York City firm. His 27 years in the real estate profession in both sales and management adds to his strength as the new person assigned to implement the office of Eastern Regional Vice President. He is Vice President of the Board of Trustees of the First Baptist Church, Tarrytown, New York. He resides in Irvington on the Hudson, New York with his wife and three children.

His educational and training background includes New York University, Stanford University, Eastman School of Business, and the Institute of Real Estate Management. He is a Certified Property Manager, a MAI, a member of the Real Estate Board of New York, and a member of the New York Chapter of the Institute of Real Estate Management.

CARMEN PORCO has moved rapidly through training, into project management, and up to the level of Regional Director since joining the staff in 1972. As a young man he gained unique experience as part of the subculture of youth gangs. The trauma of the death of his closest friend turned him toward the calling to the ministry. He has never lost the ability to communicate with the people of the inner city. His early work in Community Centers paved the way for specialized ministry in housing and he and his wife reside in Madison, Wisconsin as he supervises our projects in Madison and Milwaukee.

Carmen has a Bacalaureate degree in Sociology from Alderson Broaddus College, a professional degree in Social Ethics, and a Master of Divinity degree from Andover Newton Theological School. He is also a Certified Property Manager.

RUTH M. GROCE, a member of the staff since 1968, is one of our capable Regional Directors (Western Region), a licensed Real Estate Broker, a member of the Institute of Real Estate Management, and an active participant in sales and management for the past 25 years. She is married, has three children, and is an active member of the First Baptist Church of Los Angeles, California. She has served as a Sunday School teacher, been active in church drama, a member of the choir, a Deaconess, and a Trustee. She has also been active in Girl Scouts, Job's Daughters, Eastern Star, and the Parent Teacher Association.

Her educational experience includes: real estate appraisal and finance, real estate tax, property management, maintenance, and accounting. She supervises the management of seven projects in California. Her outstanding Christian commitment to this field of human need has prompted the First Baptist Church of Los Angeles to appoint her as a church missionary.

JAMES V. MORRISON has been a staff member since 1966. Jim is a licensed Real Estate Broker and has managed a firm specializing in sales and development. He has taught "Principles of Real Estate" at Riverside City College and Loma Linda University. He is married, has two children, and is an active member of the First Baptist Church of Riverside, California, where at one time or another he has held every major office.

His educational experience includes: Business School with majors in accounting and administration, U.S. Armed Services Institute (Bachelor of Military Science), and the University of Maryland. His military service, where he specialized in logistics, purchasing, and contracting, prepared him well for this career ministry. He was decorated with a Bronze Star and Oak Leaf Cluster and has received the Bank of America award for the realtor giving "Outstanding Service to Community Affairs."

SHERRILL M. WHITAKER has been a staff member since 1970. Sherrill is an ordained American Baptist minister with experience in a rural church and as a Minister of Christian Education in an urban setting. He has also served as a manager for the American Baptist Publication Society as well as serving in the field of aging programs since 1965. He is experienced as a sales and admissions counselor, an Assistant Administrator, and Administrator of a full-care retirement facility.

His educational experience includes: Denver University, Berkeley Baptist Divinity School, and continuing education with a Certificate in Health Care Facility Administration from the University of Washington. He has participated in numerous conferences, workshops, and seminars. Sherrill is married and has four children. He is an active member of the First Baptist Church of Kent, Washington, where he serves on various boards and committees.

WILLIS J. GREGSON has been added to the professional services of National Housing Ministries as Administrator of our new retirement facility, Oak Cove, Clearwater, Florida, where he lives with his wife and five children. Willis held pastorates in Indiana and Colorado before becoming a retirement center administrator in 1966. He was the administrator of full care homes in Indiana and Michigan before serving as President of Michigan Baptist Homes, Inc., from which position he came to Oak Cove.

His educational experience includes: Washington University, Southern Theological Seminary, Certification in Clinical Training, and licensure as a Nursing Home Administrator. He has traveled extensively and has been a member of the Board of Directors of the Michigan Non-Profit Homes Association.

. . . . THROUGH OUR PROGRAMS—

MARKET STUDIES

Housing projects of many kinds are needed in many communities. Census projections indicate the need is growing. However, each community should thoroughly analyze its specific needs and potentials. This service is provided through a professional Market Study which is available through the resources of National Housing Ministries.

FEASIBILITY STUDIES

Should a market study confirm a project need through statistical analysis, it is essential for the local sponsoring organization to determine the precise cost of project development and to project an accurate budget for operations to be sure the proposed project is financially feasible. This report is of primary importance as a guide to subsequent action. If the report shows that a project is not financially feasible, the nominal fee for this service forestalls further expenditure of time, effort and money. At the same time it clarifies the basic essentials of project development.

CORPORATE PLANNING

The staff of National Housing Ministries will make its years of experience available to local sponsors with respect to the organization and operation of a qualified nonprofit corporation. This service is offered in cooperation with the local legal counsel selected by the sponsor. This service includes corporate organization, policies and practices, and personnel deployment.

LOAN PLACEMENT

There is a high degree of risk on the part of local sponsors in the development and management of housing projects. It is never possible to guarantee the development of a project. One of the major stages of risk is the placement of the Permanent and Construction financing. Although National Housing Ministries cannot guarantee loan funds, it will use its best efforts to assist local sponsors in such loan placement.

MANAGEMENT

National Housing Ministries is currently the management agent for 18 housing projects and will consider additional requests from nonprofit sponsors. A qualified local staff is developed, and central supervision supports that staff and the sponsor in achieving stated management goals.

PROJECT ANALYSIS

National Housing Ministries staff may be assigned to assist sponsors in the following areas of analysis: the development of an expansion program for an existing project, the reappraisal of programs, goals, and services after a number of years of operation, the recommendation of solutions to difficult board/staff relationships, the measurement of organizational effectiveness, the development of resident activity programs.

MANAGEMENT CONSULTATION

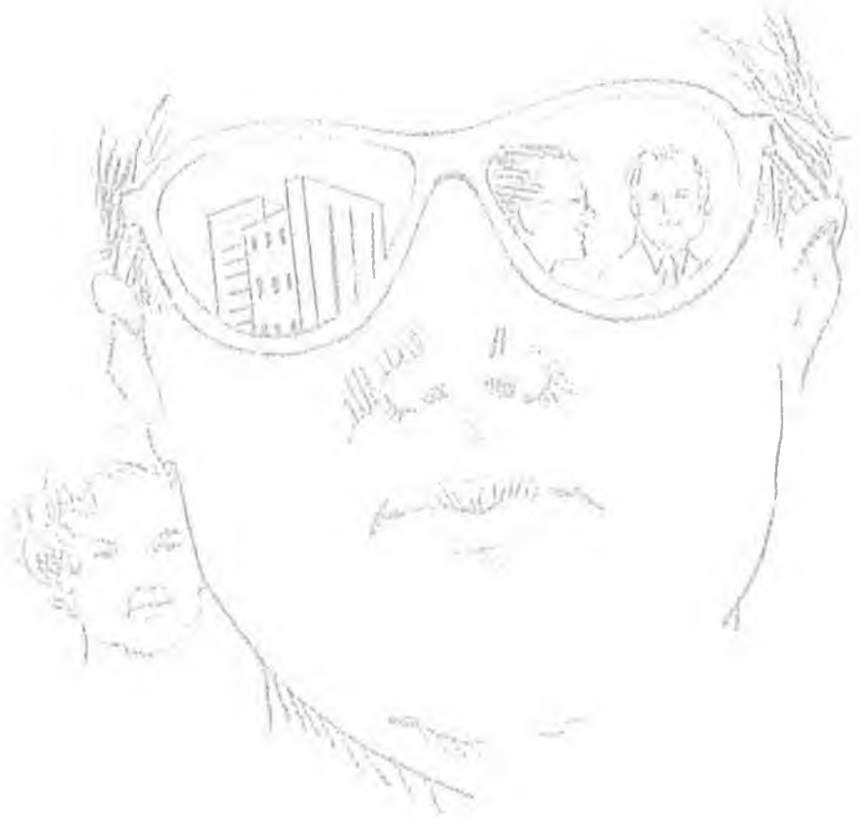
A major purpose of National Housing Ministries is to assist local sponsors in providing effective ministry. Therefore, we will provide individually tailored management consultant services on a negotiated arrangement as required to meet special needs. This service may include, but is not limited, to the following: growth planning, operational evaluation, finance, board/staff relationships, personnel evaluation, goal achievement, and maintenance.

BOARD AND STAFF TRAINING

Essential to clarity of purpose is an understanding of the roles of board and staff. How can operational unity be achieved? How can the talents of each be used for the common good? What are the legal obligations of the board? Staff of National Housing Ministries will be available to conduct seminars on these various issues.

SUMMARY

The need for specialized consultation in all areas of development and management is continually being highlighted. To fulfill its obligations to project residents and staff, boards of directors need help in all phases of service. To seek help is evidence of strength rather than weakness. National Housing Ministries exists to offer guidance in the exercise of sound and mature judgment and evaluation.



. . . THROUGH PROJECTS COMPLETED—

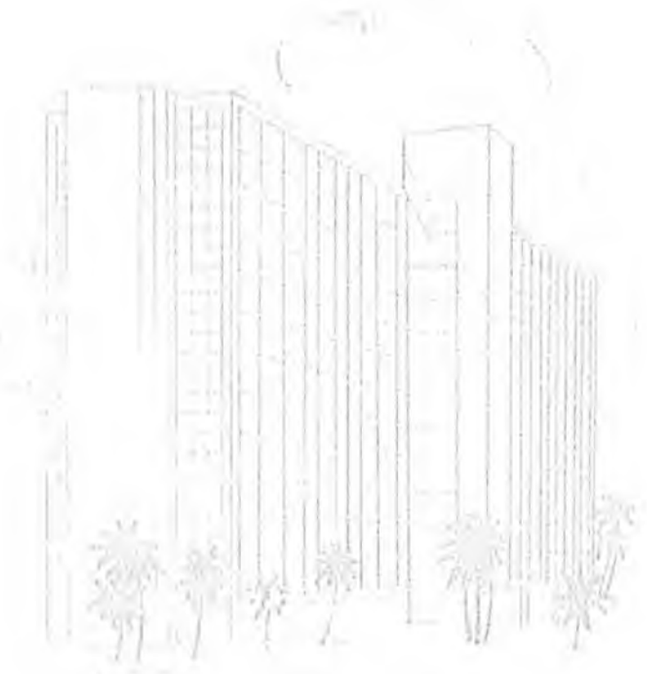
EUB Home	Burbank, CA	1975
Mt. Rubidoux Manor	Riverside, CA	1973
Griffith Gardens	Los Angeles, CA	1973
Piedmont Gardens	Oakland, CA	1975
Washington Heights	Bridgeport, CT	1973
Oak Cove	Clearwater, FL	1975
Palm Shores	St. Petersburg, FL	1971
Oakland Terrace	Jacksonville, FL	1974
Behe Manor	Alton, IL	1973
Prairie Homestead	Wichita, KS	1969
Oceanview Manor	Ocean Park, ME	1972
Baptist Home of Massachusetts	Kingston, MA	1973
Detroit Baptist Manor	Detroit, MI	1973
Homes for Berrien Co. Families	St. Joseph, MI	1972
Tabitha Home	Lincoln, NE	1972
Navesink House	Red Bank, NJ	1969
ABC Towers	Binghamton, NY	1974
Long Island Baptist Foundation	New York, NY	1972
Long Island Baptist Housing	New York, NY	1971
Allegheny Union Plaza	Pittsburgh, PA	1972
Campus Towers	Longview, WA	1971
Lilac Plaza	Longview, WA	1972
Harborview Manor	Tacoma, WA	1970
Garden Terrace	Wenatchee, WA	1971
Sun Tower	Yakima, WA	1969
Judson Park	Zenith, WA	1968

. . . THROUGH PROJECTS MANAGED—

Villa La Esperanza	Goleta, CA
Canoga Apartments	Los Angeles, CA
Good Shepherd Manor	Los Angeles, CA
Griffith Gardens	Los Angeles, CA
Pico Union	Los Angeles, CA
Simpson Apartments	Los Angeles, CA
Towne Apartment	Los Angeles, CA
Sycamore Place	Bridgeport, CT
Washington Heights	Bridgeport, CT
Oak Cove	Clearwater, FL
Bowdoin Apartments	Malden, MA
Northport Apartments	Madison, WI
Packer Apartments	Madison, WI
Cambridge Apartments	Milwaukee, WI
Green Tree Apartments	Milwaukee, WI
Plymouth Apartments	Milwaukee, WI
Teutonia Apartments	Milwaukee, WI

. . . THROUGH PROJECTS UNDER MANAGEMENT SUPERVISION

Valencia	Plantation, Florida
Four Seasons	Columbus, Indiana
Towne House	Ft. Wayne, Indiana
Hoosier Village	Zionsville, Indiana
Herschel Caldwell Mem. Ctr	Zenith, Washington
Judson Park	Zenith, Washington



. . . THROUGH OUR OBJECTIVES

We want to be good managers and stewards of those things committed to us. We also want to be sensitive to the needs of tenants while, at the same time, affirming that a strong financial position is essential. We believe these divergent poles can be brought together in harmony. That's why we have these objectives. . . .

To develop our own retirement centers, nursing homes, and housing units for people with moderate incomes.

To relate to local sponsors to help them develop their own capacity for providing shelter for people who urgently need special kinds of housing and care.

To manage, for ourselves and others, those housing programs which have been developed as a nonprofit ministry.

To train leadership for staff and board membership.

These objectives will be accomplished in this way. . . .

By using our best efforts to obtain funds to build and operate retirement centers and other housing and care projects for our corporation.

By using our best efforts to help local sponsors find financial resources to build, buy, or remodel retirement centers and other housing and care projects.

By sharing, most effectively, our experience and know-how. Thus we are consultants. Other people who want to know how to develop and manage housing use our services.

NATIONAL
HOUSING
MINISTRIES

H. John Vandenberg
President

[illegible]
Sidney Evans
[illegible]

Dear Friends:

We are pleased to be able to send you our latest brochure. It explains our history, our people, and our programs.

National Housing Ministries is committed to the proclamation of God's love through ministries of housing and care. We believe this is an exciting and rewarding frontier of missionary outreach.

I would like to highlight one aspect of our program which is project management. We are seeking new projects to manage. We have the ability, the staff, and the experience to offer quality management, which is resident centered, to sponsoring organizations. If you have a project which needs quality professional management services, please let us have one of our staff meet with you.

We appreciate your past concern and interest. We are here to serve. We are grateful for your continued support as we attempt to proclaim God's wonderful love through these channels of Christian service and witness.

Cordially,

H. John Vandenberg

Multiple Unit Housing Development

for

Low-to-Moderate-Income

Renters in Alaska

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PART I

BACKGROUND INFORMATION

A. Introduction

The Housing Assistance Division of Community and Regional Affairs has been asked to comment on multiple housing development for low-to-moderate-income renters in Alaska. This user group has traditionally been unattractive to private sector developers and managers seeking high profit return on rental unit construction. As more and more citizens fall into the non-homeowner category, however, a new review of rental unit housing development is important.

A basic assumption of this paper is that low-income renters have no more incidence of specific structural housing requirements, such as those which would have to be considered for elderly or developmentally disabled, than moderate or high-income renters. In any given project, some special units will be needed to meet a normal population of elderly or handicapped low-income resident demands. Family sizes may be slightly higher among low-income renters, but a normally mixed configuration of units for all family sizes is desired. Also, to avoid certain stigmas which are traditionally associated with 'welfare project' type development, modern low-income housing located in units of eight or less per building, blended into the surrounding neighborhood, is a goal of many project planners.

Another assumption of this paper is that the least expensive and highest quality construction and management plans for low-income housing projects are desirable. To achieve that goal, a varying blend of federal, state, local and private sector contributions is needed. Regulations and policies governing any level of contributions should not be so restrictive as to exclude other willing contributors from any sector, nor be strictly formulated on the basis of one project for applicability to all others. Each project should be reviewed within general guidelines as to development cost per unit, annual operation and maintenance

costs and annual subsidy contributions necessary. A complete project picture must be presented to attain successful public funding, whereas specific design criteria, management control and operating liability is best left with the local or private sectors.

B. Demand

Low-income housing demand has risen most dramatically in areas outside of Alaska in recent years, especially in those urban centers experiencing high rates of unemployment. Nonetheless, Alaska's low-income population continues to rise. A growth of the overall population brings a corresponding growth of a low-income population. This fact coupled with continuously rising home building costs, unemployment increases as oil revenues decline and lack of family infrastructures to support low-income citizens create significant demand for low-income housing units in Alaska.

1. Demand by Region

Currently in Alaska nearly 37% of all households are determined to fall into a low- or moderate-income category. Of that 37%, only 9% are being served by existing rental assistance or home purchase programs, leaving 28% unassisted. The distinct figures to separate low-income home users from moderate-income consumers are not readily available, however a weighting on the low-income end of the scale may be assumed. The distribution of 28% of unassisted home consumers is assumed to be nearly equal between renters and home-owners who do not qualify for any existing housing assistance. Concentrating on renters only, there is an identifiable 14% of the population statewide in need of immediate rental assistance. The proportion of unassisted low- to moderate-income renters within this 14% universe is identified as:

Anchorage	14.5%
Other Urban Areas	12.5%
Rural Areas	17.5%
Remote Areas	12.0%

When households unable to meet affordable housing standards are identified by region, however, the figures on affordable housing services needed are identified as:

Anchorage	17.5%
Other Urban Areas	9.0%
Rural Areas	10.0%
Remote Areas	2.0%

Demand by region may be identified by cross-referencing the above stated percentages.

(a) Anchorage ranks second in the proportionate number of individuals needing rental assistance, but first in number of rental households unassisted.

(b) Other urban areas rank third on both counts.

(c) Rural areas rank first in number of individuals needing rental assistance and second in number of households unassisted.

(c) The remote areas have the least number of unassisted individuals and a mere 2% of the households with a need which is presently unmet.

2. Demand by Income

Low- to moderate-income renters consistently pay an excessive proportion of their incomes for housing. Currently, 35% or less of total household earnings is considered a reasonable expenditure. Anchorage renters rate second to remote Alaskans

in paying excessive rents. Rural Alaskans are the next highest excessive rent payers with other urban Alaskans being fourth in this category. These figures are compared to excessive payments among homeowners in the table below.

Table 1

Low-to-Moderate Income Households
Paying Excessive Proportion
of Income for Housing

	Renters	Owners
Anchorage	30%	7%
Urban	24%	6%
Rural	27%	12%
Remote	39%	17%

When analyzing percentages of low-to-moderate income renter households paying excessive rents, Anchorage ranks first at 13%, other urban areas second at 10% and rural and remote areas both in third place at 9%. The relatively narrow range among the regions shows a statewide consistency in low-to-moderate income households paying excessive rent with almost insignificant variations.

3. Demand by Physically Inadequate Space Needs

Overcrowded households and demand for physically adequate spaces exist statewide, but are significantly weighted in rural Alaska. Remote site locations far exceed all other regions in this category with 49% of all households defined as being overcrowded. Statewide, this figure falls to 10%, with Anchorage experiencing the lowest incidence of overcrowding at 4%. Overcrowding is defined as more than 1.01 persons per room.

C. Cost Factors

Construction of public housing is consistently more expensive than exclusively private sector development. Costs for agency overhead, acquisition and development, compliance with standardized eligibility criteria, scheduled project maintenance and effective in-house management on large projects drive costs up 1/3 or more on a per unit basis. Subsidization needs are calculable only when all these factors are adequately considered.

The Housing Assistance Division within Community and Regional Affairs currently funds elderly housing new construction projects with a per unit maximum of $100,000. Given the special configurations and appurtenant facilities of elderly housing, this housing is assumed to be more expensive than conventional low-rent housing. The actual costs per unit for any such development can be analyzed on a project-by-project basis only. An upper limit should be applied on a per unit basis for any state supported low-income rental housing. Appurtenant facility development should be clearly stated to direct program administrators into creating reasonable criteria for common space area costs borne by each unit. A concrete guideline for allowable costs versus disallowed expenditures should be legislatively established for all types of project costs. Costs such as:

(1) Project planning;
(2) Site acquisition, preparation and development;
(3) Survey and engineering work;
(4) Infrastructure development for roads, sewer and water and electrical connections to a project site;
(5) Architectural design;
(6) Construction, construction bonding, construction project management;
(7) Landscaping;

(8) Interior design and furnishings;

(9) Common space development;

(10) Occupancy and eligibility management;

(11) Long term financing and project maintenance; and

(12) Final project audit of public funds,

need to be reviewed for applicability of public funding. As private sector contributions are desirable to reduce costs, hasten construction time and minimize red-tape, the private sector should be consulted before a final determination of specific fund use is made. It is the experience of the Housing Assistance Division that if funds are made available for any of the above listed categories, funds will be demanded and demonstrated to be needed in that category.

Competitive proposals emphasizing efficiencies in the construction and operation and maintenance areas are determined to be the most successful in reducing excessive project overhead. A competitive funding plan would call for a specific time frame in which all proposals for building low income rental housing statewide would be submitted to the reviewing/awarding agency. Agency review would occur in advance of the construction season and project awards would be made at the same time annually . Funds for any projects not begun within a specific period after project award could be relinquished to the general development fund and awarded to the next most eligible project on the list.

D. Program Options

Currently, the State of Alaska is not exclusively funding low-income rental housing unit construction. Projects are entered into with local governments who have managed to leverage federal operating subsidies on a project-by-project basis through a variety of State agencies. The regional housing authorities have been somewhat successful in management

of the construction of low-income housing for specific user groups such as the elderly or native Alaskans. Generally, however, federal guidelines limiting a person's income or a per unit rent maximum have had increasingly limited use for the Alaskan market.

Some 200 'Section 8' eligibility certificates have recently gone unused in Anchorage due to a lack of eligible units falling under rental maximums set by H.U.D. Should the State of Alaska enter the rental unit construction market for low-to-moderate-income renters, these unrealistic federal maximums could be adjusted. Policy makers need to consider that the federal government is putting less money into housing in Alaska with each year's federal budget. FY '83 Federal projections call for no further Indian Housing units coming through H.U.D. and no additional 'Section 8' Alaskan development. This decline in federal investments of construction funds is expected to be followed by a reduction in federally funded long-term operating commitments. The question remains, however, as to whether the State's priority for housing is sufficiently high to compensate for federal cutbacks in light of projected revenue declines. Additional State housing service delivery will surely mean concurrent budget cuts into other State supported services. These considerations must be thoroughly investigated before opening up existing programming to new levels of expectations on behalf of a growing user group of low-to-moderate income renters.

Program considerations for creating a rental unit construction program are:

(1) Identification of appropriate State agency to administer programs;
(2) Creation of specific authority for appropriate agency to administer program;
(3) Securing of capital and operating funds for parent agency to administer program;

(4) Review and approval of local control plan for both incorporated and unincorporated communities within the state and options for direct funding to non-profits;

(5) Outline of specific program guidelines (per unit maximums allowable expenditures, income maximums, project size, etc);

(6) Regional formulas to meet statewide demand;

(7) Source of operation and maintenance funds for newly constructed projects;

(8) Degree of liabilities to be assumed by State before, during and after construction (i.e. Title 36 considerations) for parent agency; and

(9) Long term ownership considerations such as condominium conversions, project resale or default consequences.

Additional specific information on any of the subjects listed above is available from the Housing Assistance Division upon request.

E. Alternatives to State Financing

The alternatives to State financing of low-income rental housing development are limited.

1. Federal: Federal Funds that are unavailable from H.U.D. may be available through such experimental economic development programs as the President's 'Enterprise Zone Proposal'. The criteria for such awards are very restrictive, would have limited funding and would most likely receive one-of-a-kind status if funded at all. Multiple applications within a single region are highly unlikely. Still, a limited Arctic prototype housing development plan may have some merit on the federal level if a sufficiently blighted economic area could be identified.

Other federal funds may be available for 'redevelopment' projects on a project-by-project basis through a variety of federal agencies. Mostly urban in concept, Alaska's smaller population frequently falls short of federal expectations for clients served by available funds. Projects are awarded on a competitive basis among the states and regions. Innovative activities among the states are monitored by such groups as the:

(1) Council of State Community Affairs Agencies (COSCAA)

Hall of the States
444 North Capitol Street
Washington, D.C. 20001
(202)393-6435

and

(2) National Association of Housing and Redevelopment Officials (NAHRO)
2600 Virginia Avenue, N.W.
Washington, D.C. 20037
(202)333-2020

These groups hold several meetings annually and have active subcommittees which follow and report on national housing activities. Endorsement of annual projects by these organizations may enhance federal financing for initial project development.

2. Local: Local funds for neighborhood projects may be available through neighborhood housing services and local governments. Clearly, these types of funds depend on individual municipal priorities and housing needs on the local level.

3. Private Sector: This area is the only area currently identified to have substantial growth potential for funding contributions. When the costs of supporting an increasing population of homeless citizens with private sector tax dollars are weighed against construction of adequate shelters for any homeless person, the private sector may be favorably disposed to contributions for such projects. A reeducation of the population of bankers, real estate developers, landlords and individual families in reasonable profit margins, community social consciousness and familial obligations may be expected to occur over the next decades of this century. As that reeducation begins, state policy makers seeking housing for low-to-moderate income citizens can offer forums and incentives to enhance private sector participation on both the corporate and individual levels.Examples of such incentives could include:

(a) subsidies to contractors and builders to reduce housing costs, or

(b) tax incentives to landlords participating in low-income rental programs.

Private sector donations can be very attractive to all concerned, so long as user criteria are equitably applied and available to all interested applicants.

F. Conclusions:

(1) Low income rental unit construction demands dependent upon State financing can be expected to increase.

(2) A mix of all available funding sources is optimum, unless restrictions from one source are so limiting as to make a project have unreasonable restrictions for the area and the clientele.

(3) Demand is now most acute in urban Alaska, with rural Alaska following in second place. Any new programs should address all areas of the State, however, as there is at least some demand in every community.

(4) Project awards should be made in advance of construction season at the same time each year. Projects should be competitive with one another and stress construction and operating cost efficiencies. Any awarded funds not utilized within a certain time frame after award date should go to the next most eligible project.

(5) All limitations on use of funds should be clearly identified in enabling legislation, including specific user eligibility guidelines.

(6) Eligible recipients of funds must be considered for both incorporated and unincorporated communities of the State.

(7) Experimental alternatives competing for federally funded projects could be considered for matching funds from the State.

(8) Liability issues and long term ownership considerations involving conflicts in State agency regulations or State and local regulations should be addressed and resolved.

(9) Loan or grant options may be demanded depending on project need. Both types of financing may be desirable. An increase in education of housing industry financiers, developers, marketers, consumers