ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672
4742 HJUD HB 545 - HCR 41

314

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 545

Fiscal Analysis

	1st Dist	2nd Dist	3rd Dist	4th Dist	Total
Contractual (Expert Witness Fees)	6,000	10,000	18,000	14,000	48,000
Total	6,000	10,000	18,000	14,000	48,000

Costs beyond FY 89 have been increased 3% annually to reflect inflation.

HB

549

STATE OF ALASKA
THE LEGISLATURE

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

LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE REFERENCE LIBRARY

May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

H. JUD. 4-27-88 1:30p.m.

H. JUD. 4-25-88 1:30p.m.

HOUSE COMMITTEE REPORT

(7)

Date referred: 4/15/88 FURTHER REFERRALS:

DATE: April 27, 1988

The Judiciary Committee has considered HB 549

"An Act relating to notice requirements on the use of a deed of trust; and providing for an effective date."

RECOMMENDS:

[✓] replace with CS HB 549 (Jud) [ ] the same title

[ ] attached amendment(s) [✓] a new title

[✓] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] additional referral to the _____ Committee

ADOPTS: [ ] _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact

[ ] zero fiscal note

[ ] zero with analysis

[ ] same as previous fiscal note published _____

[✓] same as previous zero fiscal note published 4/15/88

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

Chairman's signature

5-2066P
Bradley
4/26/88

Original sponsor: Rules/House Members of the Joint Committee on Economic Recovery

Adopted

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 549 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to notice requirements in the use of a mortgage or a deed of trust."

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

* Section 1. AS 34.20 is amended by adding a new section to read:

Sec. 34.20.160. NOTICE OF OTHER REMEDIES. (a) When a lender uses a note as evidence of an obligation secured by a mortgage or deed of trust, the note must affirmatively advise the mortgagor or trustor and any other party bound by the note if the mortgagee or beneficiary wants the option to bring suit directly on the note to collect an amount owing under the note without first foreclosing the mortgage or deed of trust. This option must be stated in writing within the note or as a separate document. If a note executed after the effective date of this Act fails to contain the notice specified in this section, the debt secured by the mortgage or deed of trust may be foreclosed under AS 09.45.170 - 09.45.220 or AS 34.20.070 - 34.20.135.

(b) If the mortgagee or beneficiary wishes to collect an amount owing under the note without first foreclosing the mortgage or deed of trust, the following language is sufficient in the note:

> The mortgagor or trustor (borrower) is personally obligated and fully liable for the amount due under the note. The mortgagee or beneficiary (lender) has the right to sue on the note and obtain a personal judgment against the mortgagor or trustor for satisfaction of the amount due under the note either before or after a judicial foreclosure of

the mortgage or deed of trust under AS 09.45.170 - 09.45.-220.

5-2066P
Bradley
4/25/88

Original sponsor: Rules/House Members of the Joint Committee on Economic Recovery

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 549 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

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(b) If the mortgagee or beneficiary wishes to collect an amount owing under the note without first foreclosing the mortgage or deed of trust, the following language is sufficient in the note:

> The mortgagor or trustor is personally obligated and fully liable for the amount due under the note. The security available to the mortgagee or beneficiary is not limited to the property identified in the mortgage or deed of trust and the mortgagee or beneficiary has the right to sue on the note and obtain a personal judgment against the mortgagor

or trustor for satisfaction of the amount due under the note either before or after a judicial foreclosure of the mortgage or deed of trust under AS 09.45.170 - 09.45.220.

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: HB 549
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act relating to notice requirements on the use of a deed of trust..."
Sponsor: House Rules
Requestor: House Labor & Commerce

Agency Affected: Department of Law
BRU: Legal Services
Components: Operations

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Please see the attached analysis.

Richard L. Pegues

Prepared by: Richard I. Pegues, Director
Phone: 465-3672
Division: Administrative Services
Date: April 11, 1988

Richard L. Pegues /FOR/

Approved by Commissioner: Grace Berg Schaible, Atty. Gen.
Date: April 11, 1988
Agency: Department of Law

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 549

This bill amends AS 34.20 by adding a new section that provides that lenders must affirmatively advise borrowers, and any other person bound by a note, of the remedies available to lenders to collect secured loans without foreclosing on the deed of trust. This notification must be in writing within a note secured by a deed of trust. Most of these transactions are between private parties, except for the secured state loan programs administered by the Department of Commerce and Economic Development. In this latter case, the Department of Law will be required to draft new note forms; however, this work will not cause a fiscal impact.

No.

345

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSHB 549 (L&C)
PUBLISH DATE: HOUSE 4/15/88

FISCAL NOTE

REQUEST:

Revision Date: _____
Agency Affected: Commerce & Econ. Dev.
Title: An Act relating to notice requirements on use of a deed of trust
BRU: _____
Sponsor: Rules Committee
Components: Banking
Requester: _____

EXPENDITURES / REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

Prepared by: Lawrence P. Carroll, Acting Director
Phone: 465-2521
Division: Banking, Securities & Corporations
Date: 4/11/88

Approved by Commissioner: J. Anthony Smith
Date: 4/12/88
Agency: Department of Commerce & Economic Development

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

13860-1/041188a

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: HB 549
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: _____
Agency Affected: Commerce & Econ. Dev.
Title: An Act relating to notice requirements on use of a deed of trust
BRU: _____
Sponsor: Rules Committee
Components: Banking
Requester: _____

EXPENDITURES / REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

L P Carroll

Prepared by: Lawrence P. Carroll, Acting Director
Phone: 465-2521
Division: Banking, Securities & Corporations
Date: 4/11/88

Approved by Commissioner: J. Anthony Smith
Date: 4/12/88
Agency: Department of Commerce & Economic Development

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

1386D-1/041188a

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

REPLY TO:

☐ *1031 W 4th AVENUE*
SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 27[illegible]-3550

☐ *1st NATIONAL CENTER*
100 CUSHMAN ST.
SUITE 400
FAIRBANKS, ALASKA 99701-4679

☒ *P.O. BOX K—STATE CAPITOL*
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600

April 11, 1988

The Honorable Dave Donley
House of Representatives
State of Alaska
House Labor & Commerce Committee, Chairman
P.O. Box V
Juneau, AK 99811

Re: HB 549

Dear Representative Donley:

You have requested the Department's position on HB 549. The Department of Law has no position on the substantive portion of the bill. The effect of the bill requires lenders to change their forms if the forms do not already include the language required by the Act. The forms used by the Department of Commerce and Economic Development already include language that could be adopted by other agencies as necessary.

We do however, recommend an effective date of at least 90 days, if not longer. This period is necessary to allow lenders' notice of the new law, and time to get new forms printed and distributed.

If I may be of further assistance please let me know.

Sincerely,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: Joyce James
Joyce James
Assistant Attorney General

JJ:prm

State of Alaska

House Majority Leader

COMMITTEES

HOUSE HEALTH, EDUCATION AND SOCIAL SERVICES
HOUSE JUDICIARY
HOUSE RULES

Representative Max F. Gruenberg, Jr.
District 11
Spenard, Upper Midtown Anchorage

P.O. BOX V
JUNEAU, ALASKA 99811
(907) 465-3718
465-4968/4986

914 CLAY COURT
ANCHORAGE, ALASKA 99503
(907) 276-6844

MEMORANDUM

TO: REPRESENTATIVE JOHN SUND, CHAIR
HOUSE JUDICIARY COMMITTEE

FROM: MAX F. GRUENBERG, JR., HOUSE CHAIR
JOINT COMMITTEE ON ECONOMIC RECOVERY

DATE: APRIL 15, 1988

RE: JOINT COMMITTEE LEGISLATION

I would appreciate your consideration of the attached bill at your earliest convenience. HB 549, "An Act relating to notice requirements in the use of a deed of trust; and providing for an effective date", was developed by the Housing and Banking subcommittee of the House members of the Joint Committee on Economic Recovery. This bill was heard by the full committee and has undergone extensive testimony in the House Labor and Commerce Committee, which passed it out yesterday.

HB 549 would require banks to list on notes that are used as evidence of an obligation secured by a deed of trust, the actions and remedies available to the lender in the case of default. Representatives Kay Brown and Steve Rieger are the managers of this bill.

The Senate members of the Joint Committee on Economic Recovery have also endorsed the concept embodied in this legislation.

I hope you can speedily schedule this bill before your committee to enhance its chances of passage this session.

If you have any questions please give Tom Begich of my staff a call at 465-3718, or contact the managers of the bill directly.

Thanks.

attachment

Alaska State Legislature
House

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

TO: Members of the House Judiciary Committee

FROM: Representative Steve Rieger
Co-Chair, Subcommittee on Housing and Banking
for the House Joint Committee on Economic Recovery

DATE: April 19, 1988

RE: CSHB 549(L&C) - "An Act relating to notice requirements in the use of a deed of trust; and providing for an effective date."

* *

The purpose of CSHB 549(L&C) is to inform the borrower who has signed Note secured by the Deed of Trust that he is in fact personally liable for the total amount of the debt, regardless of the market value of the property. In short, it requires a disclosure statement to the borrower of the lender's available remedies, should foreclosure actions be deemed necessary.

If foreclosure is warranted, under current law the lender generally has three choices:

- Suit on the Note for fulfillment of the debt;
- Nonjudicial foreclosure on the Deed of Trust with no deficiency judgment, no right of redemption and no recourse as to the Note;
- Judicial foreclosure on the Deed of Trust with a possible deficiency judgment awarded by the court, and a one year right of redemption period to the borrower.

Under the current CS, if the lender fails to give sufficient notice to the borrower of the lender's foreclosure remedies, then the lender can only foreclose nonjudicially or judicially.

When a person wants to buy a piece of property and does not have sufficient cash for the total payment, he obtains a loan. The borrower agrees to pay the lender for a debt and the lender agrees to give the borrower the funds necessary to secure the property.

A typical loan in Alaska requires the borrower to understand and sign a volume of paperwork upon closing of the loan. A Deed of Trust to secure the property is used, and usually a Note is also signed as evidence of an obligation secured by the Deed of Trust.

Historically, property values had a tendency to increase over the life of a loan. If nonjudicial foreclosure was warranted, the lender simply foreclosed on the Deed of Trust, thereby extinguishing the debt owing, as the property was worth more than the loan and sufficient to cover the debt.

Recently, property values have dropped substantially, and the loan on the property can now exceed the actual market value of the property when purchased. When foreclosure action is taken, the suit alone on the Deed of Trust often will not cover the entire debt amount, (i.e. the property is "under water" or has "negative equity"). The lender has the option to foreclose judicially or nonjudicially; nonjudicial foreclosures are more typical than the judicial type, and definitely less costly.

The borrower's assumption in the past has often been that the lender could only sue on the Deed of Trust. However, the lender does have the option to sue on the Note through judicial means prior to foreclosing on the Deed of Trust (nonjudicially) in order to obtain payment of the debt, and two recent Alaska Supreme Court decisions are cases in point. (Moening v. Alaska Mutual Bank (2/26/88), Conrad v. Counsellors Investment Company (2/26/88).

At the time of closing, the borrower did indeed sign the Deed of Trust as security for the property and also signed the Note promising to pay the amount of the debt. Yet, because there is so much involved with closing a loan, the simple facts and understandings sometimes get lost in the paper shuffle. The problem lies in the fact that some borrowers were under the assumption that if they were foreclosed upon, they could just turn in the keys and walk away from the property, (thereby extinguishing the debt), and many more borrowers were under the assumption that the lender could not take any personal assets as payment of the debt unless the lender first pursued judicial foreclosure, (i.e. deficiency judgment and right of redemption period). Many borrowers today seem surprised that the lender does indeed have the option to sue on the Note prior to foreclosing on the Deed of Trust.

Attached are copies of the standard notes used by FNMA/FHLMC, AHFC, FHA, VA and a "generic" note one can purchase at a stationary store. You will note that the FNMA/FHLMC and AHFC notes contain language which advises the borrower that he is personally liable for the debt, should foreclosure be deemed necessary. The FHA, VA and generic notes are vague in this area. The Subcommittee on Housing and Banking of the House Joint Economic Recovery Committee has heard testimony from many individuals who felt that the lender had no recourse but to foreclose on the Deed of Trust, even though they did in fact sign a Note as evidence of the obligation secured by the Deed of Trust. CSHB 549 (L&C) would require that the ability of the lender to sue on the Note prior to foreclosing on the Deed of Trust, be stated explicitly; otherwise, that remedy is not available.

In practice, the lender usually forecloses on the Deed of Trust nonjudicially if no workout arrangement can be arranged between the borrower and lender, and in very few cases would the lender chose to look towards the Note prior to foreclosing on the Deed of Trust. Further, if private mortgage insurance (PMI) is in place, (required by the lender when the loan-to-value ratio is 80% or above), the PMI pays the lender for the percentage of the loan it originally covered, frequently with no recourse to the borrower. Therefore, in a foreclosure situation where there is negative equity, it is possible that the market value of the property and the private mortgage insurance would cover the entire debt.

Both FHLMC (Federal Home Loan Mortgage Corporation) and FNMA (Federal National Mortgage Association) have provided positive endorsement for the concept of the legislation. However, due to federal government requirements, they have requested that the "notice" information be contained outside the actual document of the Note, rather than within the body of the Note. FHLMC has also recommended that we consider requiring the explanation to be spelled out in law in order to avoid future "language" problems that would develop if each lender is allowed to write their own language.

Further, the Alaska Association of Realtors endorses the concept of the legislation with an amendment that the language be included as a "rider" to the Note to avoid redrafting of standard forms now used in the industry. Testimony from various Alaska banking institutions recommends the notice language be included as a rider to the Note.

Please be aware that the CS to HB 549 (L&C) provides a change only in the ability of a lender to sue on the Note directly, and even then only in the event that the remedy was not stated on the Note or as a rider to the Note. The original version stated that the only recourses available to the lender were the recourses stated in the Note. In other words, the original version of HB 549 would have required disclosure of the personal obligation of the borrower, and if not disclosed, both the direct suit on the Note remedy and the remedy of a deficiency judgment against personal assets by a court (judicial foreclosure) would not be available.

The lending community has strongly objected to that loss of the judicial foreclosure remedy, even though the remedy would not be available only if there was no disclosure.

JUDICIAL V. NONJUDICIAL FORECLOSURE PROVISIONS:

JUDICIAL FORECLOSURE -

In a judicial foreclosure, the court forecloses on the Deed of Trust, orders the property sold, and may give the lender a deficiency judgement for the difference of what they can sell the property for and what is actually owed on the property. This deficiency judgement is a personal obligation on the part of the borrower. The borrower is also given a "right of redemption" period (one year) to pay what is owed and regain possession to the property, (unless the property is sold to a bonafide purchaser and not subject to the right of redemption).

Judicial foreclosures can take a great deal of effort, are expensive, and time consuming as well.

NONJUDICIAL FORECLOSURE -

Foreclosure conducted outside the court system. No deficiency judgement or right of redemption period allowed. Lender has option to sue on the Note (by judicial means) prior to suing on the Deed of Trust, (AS 09.45.170).

The Alaska Supreme Court concluded in Moening v. Alaska Mutual Bank (2/26/88), a secured creditor may initially ignore the security, and sue on the note, absent an agreement to the contrary. Further, under Conrad v. Counsellors Investment Company (2/26/88), the Supreme Court concluded that the deed of trust does not expressly preclude a suit on the note. Under common law, (AS 34.20.100), a prior suit on the note does not preclude subsequent nonjudicial (or judicial foreclosure) of the security.

Up until recently, it was to the benefit of the lender to foreclose on the Deed of Trust, as the property was usually worth more than the amount owing; suit on the Note was unnecessary, as the lender received the full amount of the debt upon a foreclosure sale of the property. Within the past several years, many property values have dropped significantly, and the amount owing can be more than the actual market value of the property, hence the term "negative equity" or "under water".

The Alaska lending institutions have taken the following three approaches to foreclosure:

1. If the borrower has no significant assets, the lender forecloses on the Deed of Trust. However, if the borrower is making a good faith effort to remedy his defaulting loan status, then the lender usually works with him to bring the loan current before taking steps to foreclose. The lenders are not interested in managing foreclosed properties.

2. If the borrower has other assets to cover the debt, but is willing to work with the lender to alleviate the debt, then the lender does not take up a suit on the Note, but rather attempts to work out some arrangement for payment with the borrower.

3. If the borrower has other assets to cover the debt, but is unwilling to cooperate with the lender in working out some sort of payment arrangements, then the lender may take steps to sue on the Note prior to foreclosing on the Deed of Trust.

Only in Case #3 does the lender sue on the Note, and there have been very few instances where they have been forced to take this remedy p or to foreclosing on the Deed of trust.

The recent Alaska Supreme Court decisions have not altered the way the banks do business in Alaska, and it is "business as usual". What these two cases have pointed out is that the lender does indeed have the option to sue on the Note prior to foreclosing nonjudicially on the Deed of Trust, as per AS 34.20.070 - 34.20.135.

The lender does have the option to a judicial foreclosure, and will in some cases go this route if the lender feels that it is worth going after the holder of the deed of trust personally via a deficiency judgement issued by the courts. (In many cases, it is not worth the time, effort and expenditure to the lender to foreclose via the court system.)

* *

JUDICIAL FORECLOSURE	NONJUDICIAL FORECLOSURE
-Requires Court Action	-No court action required
-Deficiency judgment may be awarded	-No deficiency judgment -Suit on the Note is optional prior only to nonjudicial foreclosure on Deed of Trust
-Right of Redemption period allowed (one year)	-No Right of Redemption

* *

Mortgage -

A lien on property - does not create title or estate to secure the unpaid balance of the purchase price.

(Mortgages are rarely used in the State of Alaska.)

Foreclosure proceedings can only be conducted judicially, (through the court system) with a mortgage because there is nothing in place in the mortgage document for default remedies.

Deed of Trust

Instrument used by which legal title to real property is placed in one or more trustees to secure the repayment of a sum of money, (or the performance of some other condition). Differs in form from a mortgage as it is essentially a security.

The deed of trust document has prescribed foreclosure provisions, thereby allowing the lender to foreclose outside of court, i.e. nonjudicial foreclosure proceedings. Foreclosure proceedings can be accomplished by judicial or nonjudicial means. Deficiency judgements are prohibited in a nonjudicial foreclosure; however, the lender can sue on the Note prior to a nonjudicially foreclosing on the Deed of Trust. No suit is allowed on the Note if the lender choses to foreclose nonjudicially on the Deed of Trust first.

Note -

A unilateral instrument containing an express and absolute promise of signer to pay a specified person a definite sum of money at a specified time.

Right of Redemption - that period of time, (one year), as set by statute for the defaulting borrower to "redeem" himself and pay up on the mortgage, thereby regaining "custody" of his property. Generally, there is no right of redemption in a nonjudicial foreclosure.

1776 G Street NW
PO Box 37248
Washington, DC 20013
202/789-4700

Freddie Mac

Owned by America's Savings Institutions

April 9, 1988

Representative Steve Rieger
Co-Chair, Subcommittee on Housing and Banking
House Joint Economic Recovery Committee
Pouch V
State Capitol
Juneau, Alaska 99811
C/O Ann Ringstad

Dear Representative Rieger:

At Ann Ringstad's request, I am providing you with comments on H.B. 549, a bill requiring a notice on the mortgage note of the lender's remedies under Alaskan state law when a borrower defaults on a mortgage.

By way of background, the Federal Home Loan Mortgage Corporation, better known as Freddie Mac, was created by Congress in 1970 to increase the amount of funds available for mortgage lending. Freddie Mac accomplishes its mandate by purchasing residential mortgages from lenders, thereby replenishing their supply of funds to be lent to additional home buyers. Freddie Mac guarantees the payment of the mortgages and sells securities backed by the mortgages to institutional and private investors. In 1987, Freddie Mac purchased nearly $102 million in mortgages from Alaska lenders.

Freddie Mac certainly agrees with the concept of an informed consumer. This is not only good public policy, it is good business practice. We commend the Legislature for its concern that consumers be made aware of the lender's ability to utilize several remedies, including deficiency judgements, in default situations.

We are concerned about your method for informing the consumer. Adding more information to the note or deed may defeat your intent by making the document too complicated, wordy and intimidating. Also, making Alaska mortgage documents less uniform from notes in other states runs counter to the national trend toward uniform documents. As the mortgage finance industry becomes more reliant on the secondary mortgage market and its investors, uniform documents take on increasing importance.

We recommend that you consider requiring an explanation of lenders' remedies on a separate piece of paper which both borrower and lender would sign at closing time. The language of this explanation should be spelled out in the law in order to avoid a different explanation from each lender.

I hope this information is helpful to you and that you will call whenever you have questions on this or other issues of mutual interest.

Sincerely,

Mike Schwartz

Mike Schwartz
Legislative Director

MS:mcf

HB549

NOTICE: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE SUPREME COURT OF THE STATE OF ALASKA

HAROLD J. MOENING and COLLEEN M. MOENING, Appellants, v. ALASKA MUTUAL BANK, Appellee.	File No. S-1980 O P I N I O N [No. 3274 - February 26, 1988]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Milton M. Souter, Judge.

Appearances: Francis J. Nosek, Jr. and Kelly Fisher, Anchorage, for Appellants. Gordon F. Schadt and Milford H. Knutson, Anchorage, for Appellee.

Before: Matthews, Chief Justice, Rabinowitz, Compton, and Moore, Justices. [Burke, Justice, not participating.]

COMPTON, Justice.

This appeal presents three questions. The first question is whether a secured creditor initially may ignore the security and sue for a personal judgment on the underlying debt, absent an agreement to the contrary. The second is whether the creditor agreed to limit its remedy to foreclosure of the security. The third is whether the suit on the debt extinguishes the security as a matter of law.

I. FACTUAL AND PROCEDURAL BACKGROUND

Harold Moening and Ronald Rivard became business associates in 1983. Prior to their association, Rivard was the sole shareholder of Quest Enterprises, Inc. (Quest). Moening agreed to guarantee Quest's debts to Alaska Mutual Bank (AMB) in exchange for a 40% interest in the business.[1]

To effectuate the guarantee, Moening executed a $700,000 deed of trust note in favor of AMB.[2] The note was secured by a deed of trust on Moening's home, and on the property which originally secured the Quest obligations extinguished by the consolidation. Moening defaulted. Later Moening executed a secured promissory note for $33,000 to guarantee the debt for

---

1. Colleen Moening is a named defendant because she co-signed many of the obligations with her husband Harold Moening.

2. The principal was payable on demand in a single installment. Absent a demand, the note was due on May 7, 1985.

property purchased by Quest in Peters Creek.[3] Moening defaulted on this note as well.

AMB filed a complaint against Moening seeking a personal judgment on the notes. It did not foreclose the deeds of trust nor attempt to exercise the power of sale. The superior court entered summary judgment for AMB, concluding that AMB had the right initially to ignore its security and sue on the note. The court entered a money judgment for $733,000 in principal due on the notes, plus accrued interest, costs, and attorney's fees. In addition, the court ordered that the notes should be filed with the court, marked "Conditionally Cancelled" and, "if subsequent execution on the judgment does not satisfy it, the amount by which it is not satisfied may form the basis of judicial or non-judicial foreclosure of the collateral securing the promissory notes."

Moening appeals on the grounds that (1) as a matter of law, AMB must exhaust the security first; (2) AMB agreed to exhaust the security first; and (3) AMB waived its security by suing on the notes.[4] For the reasons hereinafter set forth, we affirm the judgment of the superior court.

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3. The note was secured by a deed of trust identical to that securing the $700,000 note. The trust deed is not part of the record.

4. Moening also argues that AMB failed to join indispensable parties (Rivard and Quest). Alaska R. Civ. P. 19(b). This is an action to collect a debt. Neither Rivard nor

(Footnote Continued)

II. THE RIGHTS OF A SECURED CREDITOR

Moening argues that a secured creditor may not ignore the security and sue on the underlying obligation; it must first exhaust the security. AMB contends that a secured creditor has the option to foreclose or sue on the note, and that it may pursue these remedies concurrently or consecutively.

Statutes provide a secured creditor with a variety of remedies when the debtor defaults. For example, the creditor may bring an action for judicial foreclosure. AS 09.45.170.[5] The creditor is then entitled to a deficiency judgment against the debtor. Id.; Smith v. Shortall, 732 P.2d 548, 549 (Alaska 1987); Suber v. Alaska State Bond Comm., 414 P.2d 546, 555-56 (Alaska

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(Footnote Continued)

Quest was a party to the note and neither has an interest in this lawsuit. Civil Rule 19(a)(2). Moreover, their absence does not preclude granting complete relief between Moening and AMB. Civil Rule 19(a)(1). The fact that Moening may have claims against Rivard arising from other agreements, or that Rivard and Quest may have interests of record in the security, does not render them indispensable to AMB's suit on the note.

5. AS 09.45.170 provides:

> A person having a lien upon real property, other than that of a judgment, whether created by mortgage or otherwise, to secure a debt or other obligation may bring an action to foreclose the lien. In the action, the court may direct the sale of the encumbered property or a portion of it and the application of the proceeds of the sale to the payment of costs, expenses of sale, and the amount due the plaintiff. The judgment shall also determine the personal liability of a defendant for the payment of the debt secured by the lien and be entered accordingly.

1966). The debtor has a statutory right of redemption for twelve months after the sale is confirmed. AS 09.45.190, 09.35.250.

The creditor may elect to conduct a nonjudicial foreclosure sale if the deed of trust provides for this remedy. Suber, 414 P.2d at 555-56; AS 34.20.070(a).[6] The creditor is not entitled to a deficiency judgment following a nonjudicial foreclosure. Smith, 732 P.2d at 549; AS 34.20.100.[7] The debtor is not entitled to redeem the property, unless the deed of trust provides otherwise. AS 34.20.090(a).

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6. AS 34.20.070(a) provides in part:

> If a deed of trust is executed conveying real property located in the state to a trustee as security for the payment of an indebtedness and the deed provides that in case of default or noncompliance with the terms of the trust, the trustee may sell the property for condition broken, the trustee, in addition to the right of foreclosure and sale, may execute the trust by sale of the property, upon the conditions and in the manner set forth in the deed of trust, without first securing a decree of foreclosure and order of sale from the court . . . .

(Emphasis added).

7. AS 34.20.100 provides:

> When a sale is made by a trustee under a deed of trust, as authorized by AS 34.20.070 -- 34.20.130, no other or further action or proceeding may be taken nor judgment entered against the maker or the surety or guarantor of the maker, on the obligation secured by the deed of trust for a deficiency.

Statutes also refer to an action on the underlying obligation. Alaska Statute 09.45.200 provides:

> During or after the pendency of an action for the recovery of a debt secured by a lien mentioned in AS 09.45.170, an action cannot be maintained for the foreclosure of the lien unless judgment is given in that action that the plaintiff recover the debt or a part of it, and an execution issued in the action against the property of the defendant is returned unsatisfied in whole or in part.

The clear implication of this section is that the creditor may sue directly on the note without first foreclosing the property. Moreover, if the creditor prevails in the legal action and cannot satisfy the judgmert against the debtor's personal property, it may then maintain an action for judicial foreclosure of the security.

The superior court order also permits AMB to foreclose nonjudicially if the judgment on the note is returned unsatisfied. Moening argues that, even if AMB initially may ignore the security, it may not foreclose nonjudicially after obtaining a judgment on the note.

The anti-deficiency statute prohibits a deficiency judgment following exercise of a power of sale; however, it does not preclude the exercise of a power of sale following a judgment on the note. AS 34.20.100, supra note 7. Under the common law, a prior suit on the note does not preclude subsequent judicial or nonjudicial foreclosure of the security. Foothills Holding Corp. v. Tulsa Rig, Reel & Mfg., 393 P.2d 749, 751 (Colo. 1964); Berg

v. Liberty Fed. Savings & Loan, 428 A.2d 347, 348-49 (Del. 1981); Klondike, Inc. v. Blair, 211 So. 2d 41, 42-43 (Fla. App. 1968). The doctrine of election of remedies does not apply, because foreclosure and a suit on the note are not inconsistent remedies. Klondike, 211 So. 2d at 42; Norwood Realty v. First Fed. Savings & Loan, 109 S.E. 2d 844 (Ga. App. 1954); Skach v. Lydon, 306 N.E. 2d 482, 485 (Ill. App. 1973). See also 55 Am. Jur. 2d Mortgages § 543, at 523 (1971).

We conclude that the statutes permit a secured creditor initially to ignore the security and sue on the note. Once the creditor obtains a personal judgment which is returned unsatisfied in whole or in part, the creditor may judicially or nonjudicially foreclose the security.[8]

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8. In Smith v. Shortali, 732 P.2d at 549, we held that a spouse who nonjudicially foreclosed a deed of trust securing her former husband's property division obligation was not entitled to a deficiency judgment under AS 34.20.100. In dicta we stated:

> The obligation was evidenced by a promissory note and secured by a deed of trust. When [Debtor] defaulted on the obligation, [Creditor] had several options. She could have waived the security of the deed of trust and sued on the note. Or, she could have brought an action to judicially foreclose the deed of trust, retaining the right to recover a deficiency judgment. AS 09.45.170; Suber v. Alaska State Bond Committee, 414 P.2d 546, 555 (Alaska 1966). Instead, [Creditor] elected the remedy of non-judicial foreclosure. By electing this remedy, [Creditor] lost her right to recover a deficiency judgment against [Debtor].

(Footnote Continued)

III. THE PARTIES' AGREEMENT

When a note is executed and secured by a deed of trust, the documents are read and construed together as one contract to ascertain the parties' intent. In re Sutton Inv., 266 S.E.2d 686, 689 (N.C. App. 1980), rev. denied, 301 N.C. 90 (1980); Herrington v. Murphy, 446 P.2d 595, 597 (Okla. 1968). The contract is interpreted to give effect to the reasonable expectations of the parties, looking to the language of the contract, the circumstances surrounding its adoption, and case law interpreting similar agreements. Craig Taylor Equip. v. Pettibone Corp., 659 P.2d 594, 597 (Alaska 1983). Ambiguities are construed in favor of the debtor. Patton v. First Fed. Sav. & Loan Ass'n, 578 P.2d 152, 156 (Ariz. 1978).

Any agreement between the parties that the creditor will not seek a deficiency judgment and will look only to the security is enforceable. Stern v. Itkin Bros., 385 N.Y.S.2d 753, 754 (N.Y. Sup. 1975).[9] Such an agreement is enforced even when the security is destroyed by foreclosure of a superior lien. The

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(Footnote Continued)

Id. We disapprove of this dicta insofar as it suggests that a suit on the note constitutes a legal waiver of the security.

9. A rider to the Stern mortgage provided in part:

> On default hereunder, no deficiency judgment shall be sought, rendered or entered against the mortgagor and mortgagees will look only to the mortgaged premises.

385 N.Y.S.2d at 754.

formerly secured inferior creditor is not entitled to sue on the note. Laclede Inv. Corp. v. Kaiser, 596 S.W.2d 36, 39 (Mo. App. 1980).[10]

The $700,000 obligation was evidenced by a "deed of trust note." By its terms, Moening expressly promised to pay principal and interest. The note also stated:

> [E]very party signing . . . this note hereby . . . binds himself thereon as a principal, . . . and promises, if this note is not timely paid and is placed in the hands of an attorney for collection, or suit is brought hereon, to pay all costs of collection, including reasonable attorney's fees.

(Emphasis added). The note constitutes a personal obligation of Moening. It does not preclude AMB from suing directly on the note.

The $33,000 debt is evidenced by a "single payment promissory note" in which Moening expressly promised to pay principal and interest. In case of default, Moening agreed to pay AMB's collection costs and attorney's fees. It does not limit AMB's ability to sue Moening.

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10. The Kaiser note contained the following provision:

> No personal liability shall be asserted or be enforceable against the maker, it being intended that the sole remedy of the holder hereof be by the foreclosure of the Deed of Trust and Security Agreement . . . .

596 S.W.2d at 39 n.1.

The deed of trust securing the loans contain a power of sale provision permitting nonjudicial foreclosure. The trust deeds also expressly allow judicial foreclosure.[11] They do not limit the creditor's right to ignore the security and sue on the note.

IV. CANCELLING THE NOTES AND TRUST DEEDS

When AMB submitted a proposed judgment on the notes, Moening objected because the judgment did not include an order cancelling the notes and deeds of trust under Civil Rule 78(d).[12] AMB submitted the original notes to the court, but did not submit the trust deeds. AMB requested that the notes not be cancelled in case the personal judgment was returned unsatisfied. The superior court ordered that the notes be marked "Conditionally

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11. The trust deed states in part:

> In the event that this Deed of Trust is foreclosed as a mortgage and said property sold as a foreclosure sale [the purchasers may make necessary repairs or alterations] . . .

12. Alaska R. Civ. P. 78(d) provides:

> In all cases in which a judgment upon a written instrument is entered, such instrument shall be filed with the court, and unless the court otherwise orders, it shall be cancelled by marks and writing upon its face. The clerk shall retain the same in the files unless otherwise directed by the court.

Cancelled." Moen[illegible] argues that the supe[illegible]or court erred by failing to unconditionally cancel the notes and trust deeds, entering the order without adequate briefing, and entering the order after the notice of appeal was filed.

When judgment is entered on a written instrument, the instrument shall be filed with the court and cancelled on its face, unless the court orders otherwise. Civil Rule 78(d). We perceive no reason why a secured note should not be subject to this general rule. The note merges with the judgment, and any further proceedings will be to enforce the judgment rather than the note.

In contrast, the deeds of trust should neither be filed with the court nor cancelled:

> [A] judgment recovered upon a debt <u>secured</u> by a mortgage does not merge the mortgage nor operate as a discharge, abandonment, or release of the mortgage security.
>
> . . . The mortgage continues to secure such debt and is not released, discharged, or satisfied by a judgment on the debt, note, or bond. Such judgment stands <u>subordinate</u> to the mortgage lien.

<u>Silver v. Williams</u>, 175 A.2d 673, 676 (N.J. Super. Ct. Ch. Div. 1961) (emphasis in original), <u>rev'd on other grounds</u>, 178 A.2d 649 (N.J. Super. Ct. App. Div. 1962). In essence, the creditor ends up with a secured judgment.

Although the superior court could have simply cancelled the notes, it had discretion under the rule to order otherwise.

The conditional cancellation order does not constitute an abuse of that discretion.[13]

AFFIRMED.

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13. The record does not support Moening's assertion that the conditional cancellation order was entered after Moening filed a notice of appeal. The order was entered on January 7. The notice of appeal contains an initial filing stamp of December 19; however, that stamp was cancelled and the notice shows a second stamped filing date of January 7.

THE SUPREME COURT OF THE STATE OF ALASKA

MARSHALL LEE CONRAD and COLLEEN M. CONRAD,

Appellants/Respondents,

v.

COUNSELLORS INVESTMENT CO., a partnership; BRIAN J. BRUNDIN; BILL LAWRENCE; MARCUS R. CLAPP; JERRY E. MELCHER; and JAMES M. POWELL,

Appellees/Petitioners.

File No. S-1996/2102

O P I N I O N

[No. 3275 - February 26, 1988]

Appeal in File No. S-1996 from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Gerald J. Van Hoomissen, Judge. Petition for Review in File No. S-2102 from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Jay Hodges, Judge.

Appearances: Barry Donnellan, Fairbanks, for Appellants/Respondents. Timothy R. Byrnes, James M. Gorski, Hughes, Thorsness, Gantz, Powell, and Brundin, Anchorage, for Appellees/ Petitioners.

Before: Matthews, Chief Justice, Rabinowitz, Compton, and Moore, Justices. [Burke, Justice, not participating.]

COMPTON, Justice.

This appeal presents two questions. The first question is whether secured creditors agreed to limit their remedy to nonjudicial foreclosure of their security. The second is whether the creditors' subsequent claim for judicial foreclosure of that security is precluded by the judgment in a prior suit on the note.

I. FACTUAL AND PROCEDURAL BACKGROUND

Counsellors Investment Co. (Counsellors)[1] purchased commercial property in Fairbanks from Marshall Lee Conrad and Colleen M. Conrad. In partial payment for the property, Counsellors gave the Conrads a note secured by a second deed of trust.

Counsellors eventually stopped making payments on the note and offered to reconvey the property to the Conrads in satisfaction of the debt. The Conrads declined the offer and sued Counsellors and its partners for a personal judgment on the note (Conrad I).

The superior court entered summary judgment for Counsellors on the ground that the Conrads' "remedy under their note and deed of trust is that provided in Paragraph B6 of the deed of trust and in AS 34.20.070-.135, and that [the Conrads] may not

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1. Counsellors is a general partnership. The partners are Brian Brundin, Bill Lawrence, Marcus Clapp, Jerry Melcher and James Powell.

maintain a suit on the promissory note alone;" in other words, the Conrads' remedy was limited to nonjudicial foreclosure of the security. Since the judgment form submitted by Counsellors was not consistent with some of the court's oral conclusions, the Conrads moved to amend the judgment to clarify whether they had the right to foreclose judicially. The court denied the motion and entered an order prohibiting the Conrads from exercising "any remedy inconsistent with the deed of trust." However, the court struck language in the proposed order which expressly precluded an action for judicial foreclosure.

The Conrads appealed the judgment in Conrad I and filed a complaint for judicial foreclosure and a deficiency judgment (Conrad II). Counsellors moved to dismiss the complaint, arguing that the Conrads' claim for judicial foreclosure was barred by the judgment in Conrad I. The superior court denied the motion to dismiss because "the question of judicial foreclosure was not before the court in the [prior] action" and "the right of the Conrads to maintain this action for judicial foreclosure of a deed of trust is granted by AS 09.45.170." Counsellors petitioned for review. We granted review and consolidated the cases for appeal.

II. CONRAD I: DID THE CREDITORS AGREE TO LIMIT THEIR REMEDY TO NONJUDICIAL FORECLOSURE OF THE SECURITY?

The Conrads argue that they have the right initially to ignore their security and sue on the note, or to file a complaint

for judicial foreclosure. Counsellors does not dispute that a secured creditor generally has that option; however, it contends that the deed of trust expressly limits the Conrads' remedy to nonjudicial foreclosure.

In Moening v. Alaska Mutual Bank, __ P.2d __, Op. No. 3274 at 6 (Alaska, February 26, 1988), we held that absent an agreement to the contrary, a secured creditor has the option whether to sue on the note or foreclose the security. If the creditor sues on the note and obtains a personal judgment which is returned unsatisfied, the creditor may then foreclose the security. Id.; AS 09.45.200.[2] In determining whether the parties agreed to limit the creditor's remedies, the note and trust deed are construed together and interpreted to carry out the reasonable expectations of the parties. __ P.2d at __, Op. No. 3274 at 7.

The deed of trust note here in issue states that Counsellors "promise(s) to pay" the Conrads the loan amount. In the event of default, the Conrads may at once declare the entire debt due and payable. The note does not indicate that

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2. AS 09.45.200 provides:

> During or after the pendency of an action for the recovery of a debt secured by a lien mentioned in AS 09.45.170, an action cannot be maintained for the foreclosure of the lien unless judgment is given in that action that the plaintiff recover the debt or a part of it, and an execution issued in the action against the property of the defendant is returned unsatisfied in whole or in part.

Counsellors is not liable for payment; therefore, the Conrads are entitled to sue on the note or foreclose judicially unless the deed of trust provides otherwise.

Counsellors argue that Paragraph B6 of the deed of trust limits the Conrads' remedy to nonjudicial foreclosure:

> Upon default by Trustor in payment of any indebtedness secured hereby or in performance of any agreement hereunder, all sums secured hereby shall immediately become due and payable at the option of the Beneficiary. In the event of default Beneficiary shall execute or cause the Trustee to execute a written notice of such default and of his election to cause to be sold the herein described property to satisfy the obligation hereof, and shall cause such notice to be recorded in the office of the recorder of each recording precinct wherein said real property of [sic] some part thereof is situated.

(Emphasis added). Counsellors reasons that the language "Beneficiary shall execute" must be construed as a limitation on the Conrads' right to do anything else.[3] However, we believe that the only logical interpretation of this language requires the Conrads to execute the notice only after they have "elected" the remedy of nonjudicial foreclosure. The Conrads are entitled to exercise any other remedies permitted by law.

We conclude that the deed of trust does not limit the Conrads to the remedy of nonjudicial foreclosure. The trust deed

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3. See Fowler v. City of Anchorage, 583 P.2d 817, 820 (Alaska 1978) ("Unless the context otherwise indicates, the use of the word 'shall' denotes a mandatory intent.")

does not expressly preclude a suit on the note. The fact that a creditor may foreclose nonjudicially does not imply that it may not foreclose judicially.[4] Because the Conrads' remedies were not expressly waived in the note or deed of trust, they had the right to sue on the note or foreclose the security. Therefore, the superior court erred as a matter of law when it entered summary judgment against the Conrads on their right to sue on the note.[5]

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4. AS 34.20.070(a) provides in part:

> If a deed of trust is executed conveying real property located in the state to a trustee as security for the payment of an indebtedness and the deed provides that in case of default or noncompliance with the terms of the trust, the trustee may sell the property for condition broken, the trustee, in addition to the right of foreclosure and sale, may execute the trust by sale of the property, upon the conditions and in the manner set forth in the deed of trust, without first securing a decree of foreclosure and order of sale from the court, . . .

(Emphasis added).

5. The superior court appeared concerned that the Conrads filed suit on the note without providing Counsellors any notice of default. Paragraph B6 of the deed of trust requires the Conrads to record a notice of default as one of the steps leading to nonjudicial foreclosure. However, no notice is required if the Conrads pursue one of the other remedies available to them as secured creditors. See Smith v. Certified Realty, 585 P.2d 293, 294 (Colo. App. 1978), aff'd, 575 P.2d 1043 (Colo. 1979) (debtor has no equitable right to cure default in an action brought solely on a promissory note).

III. CONRAD II: IS THE CREDITORS' CLAIM FOR JUDICIAL FORECLOSURE PRECLUDED BY THE PRIOR SUIT ON THE NOTE?

Counsellors argues that the Conrads' claim for judicial foreclosure is precluded by the judgment on the note. The Conrads contend that judicial foreclosure was not addressed in Conrad I.

We described the claim preclusive effect of a prior judgment in State v. Smith, 720 P.2d 40, 41 (Alaska 1986), as follows:

> Under the doctrine of res judicata (claim preclusion), a judgment on the merits of a controversy bars subsequent suits between the same parties asserting the same claim for relief when the matter raised was or could have been decided in the first suit. Pankratz v. State, Department of Highways, 652 P.2d 68, 74 (Alaska 1982); Calhoun v. Greening, 636 P.2d 69, 71-72 (Alaska 1981). The Restatement (Second) of Judgments § 24(a) (1982) states that the claim extinguished by the first judgment:
>
> > includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> A mere change in the legal theory asserted will not avoid the preclusive effect of the first judgment. Pankratz, 652 P.2d at 74.

Arguably, Conrad II is barred under this reasoning. Conrad I involved the same parties and resulted in a judgment on the merits. The Conrads could have joined a claim for judicial

foreclosure with their claim for judgment on the note. Thus, it is irrelevant whether the Conrad I court ruled on this issue.[6]

On the other hand, the common law permits a creditor to judicially foreclose a security following an action on the note. E.g., Foothills Holding Corp. v. Tulsa Rig, Reel & Mfg., 393 P.2d 749, 751 (Colo. 1964); Berg v. Liberty Fed. Sav. & Loan Ass'n, 428 A.2d 347, 348-49 (Del. 1981); Klondike, Inc. v. Blair, 211 So. 2d 41, 42-43 (Fla. App. 1968). Moreover, AS 09.45.200 permits an action for judicial foreclosure "after the pendency of an action for the recovery of a [secured] debt," provided that the creditor prevails in the prior action and its judgment remains unsatisfied in whole or in part.[7]

We believe that this situation is best viewed as an express statutory exception to general principles of res judicata. A creditor need not join its claim for judicial foreclosure in the suit for recovery on the note at the risk of losing its security. In one sense, the subsequent foreclosure may be considered a special form of execution on the prior

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6. To the extent that Counsellors argues that this issue is precluded by Conrad I, it is relevant whether the first court ruled on the judicial foreclosure question. We agree with the Conrads that the superior court did not rule that the Conrads are limited to nonjudicial foreclosure; despite Counsellors' best efforts to obtain a decision on this question, the court left it unresolved.

7. See AS 09.45.200, supra note 2.

judgment for the creditor. Under AS 09.45.( ), the creditor may bring these claims consecutively.[8]

The decision of the superior court in File No. S-1996 is REVERSED; the decision in File No. S-2102 is AFFIRMED. The cases are REMANDED to the superior court for further proceedings. The Conrads may elect whether to proceed with the suit on the note or the foreclosure.

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8. However, when the creditor resorts first to judicial foreclosure, failure to join its claim for a deficiency judgment may result in claim preclusion. See AS 09.45.170; see also Darnell v. Denton, 669 P.2d 981, 983 (Ariz. App. 1983); but see Perpetual Bldg. & Loan Ass'n v. Braun, 242 S.E.2d 407 (S.C. 1978).

JUDICIAL V. NONJUDICIAL FORECLOSURE PROVISIONS:

JUDICIAL FORECLOSURE -

In a judicial foreclosure, the court forecloses on the Deed of Trust, orders the property sold, and may give the lender a deficiency judgement for the difference of what they can sell the property for and what is actually owed on the property. This deficiency judgement is a personal obligation on the part of the borrower. The borrower is also given a "right of redemption" period (one year) to pay what is owed and regain possession to the property, (unless the property is sold to a bonafide purchaser and not subject to the right of redemption).

Judicial foreclosures can take a great deal of effort, are expensive, and time consuming as well.

NONJUDICIAL FORECLOSURE -

Foreclosure conducted outside the court system. No deficiency judgement or right of redemption period allowed. Lender has option to sue on the Note (by judicial means) prior to suing on the Deed of Trust, (AS 09.45.170).

The Alaska Supreme Court concluded in Moening v. Alaska Mutual Bank (2/26/88), a secured creditor may initially ignore the security, and sue on the note, absent an agreement to the contrary. Further, under Conrad v. Counsellors Investment Company (2/26/88), the Supreme Court concluded that the deed of trust does not expressly preclude a suit on the note. Under common law, (AS 34.20.100), a prior suit on the note does not preclude subsequent nonjudicial (or judicial foreclosure) of the security.

Up until recently, it was to the benefit of the lender to foreclose on the Deed of Trust, as the property was usually worth more than the amount owing; suit on the Note was unnecessary, as the lender received the full amount of the debt upon a foreclosure sale of the property. Within the past several years, many property values have dropped significantly, and the amount owing can be more than the actual market value of the property, hence the term "negative equity" or "under water".

The Alaska lending institutions have taken the following three approaches to foreclosure:

1. If the borrower has no significant assets, the lender forecloses on the Deed of Trust. However, if the borrower is making a good faith effort to remedy his defaulting loan status, then the lender usually works with him to bring the loan current before taking steps to foreclose. The lenders are not interested in managing foreclosed properties.

2. If the borrower has other assets to cover the debt, but is willing to work with the lender to alleviate the debt, then the lender does not take up a suit on the Note, but rather attempts to work out some arrangement for payment with the borrower.

3. If the borrower has other assets to cover the debt, but is unwilling to cooperate with the lender in working out some sort of payment arrangements, then the lender may take steps to sue on the Note prior to foreclosing on the Deed of Trust.

Only in Case #3 does the lender sue on the Note, and there have been very few instances where they have been forced to take this remedy prior to foreclosing on the Deed of trust.

The recent Alaska Supreme Court decisions have not altered the way the banks do business in Alaska, and it is "business as usual". What these two cases have pointed out is that the lender does indeed have the option to sue on the Note prior to foreclosing nonjudicially on the Deed of Trust, as per AS 34.20.070 - 34.20.135.

The lender does have the option to a judicial foreclosure, and will in some cases go this route if the lender feels that it is worth going after the holder of the deed of trust personally via a deficiency judgement issued by the courts. (In many cases, it is not worth the time, effort and expenditure to the lender to foreclose via the court system.)

* *

JUDICIAL FORECLOSURE	NONJUDICIAL FORECLOSURE
-Requires Court Action	-No court action required
-Deficiency judgment may be awarded	-No deficiency judgment -Suit on the Note is optional prior only to nonjudicial foreclosure on Deed of Trust
-Right of Redemption period allowed (one year)	-No Right of Redemption

* *

Mortgage -

A lien on property - does not create title or estate to secure the unpaid balance of the purchase price.

(Mortgages are rarely used in the State of Alaska.)

Foreclosure proceedings can only be conducted judicially, (through the court system) with a mortgage because there is nothing in place in the mortgage document for default remedies.

Deed of Trust

Instrument used by which legal title to real property is placed in one or more trustees to secure the repayment of a sum of money, (or the performance of some other condition). Differs in form from a mortgage as it is essentially a security.

The deed of trust document has prescribed foreclosure provisions, thereby allowing the lender to foreclose outside of court, i.e. nonjudicial foreclosure proceedings. Foreclosure proceedings can be accomplished by judicial or nonjudicial means. Deficiency judgements are prohibited in a nonjudicial foreclosure; however, the lender can sue on the Note prior to a nonjudicially foreclosing on the Deed of Trust. No suit is allowed on the Note if the lender choses to foreclose nonjudicially on the Deed of Trust first.

Note -

A unilateral instrument containing an express and absolute promise of signer to pay a specified person a definite sum of money at a specified time.

Right of Redemption - that period of time, (one year), as set by statute for the defaulting borrower to "redeem" himself and pay up on the mortgage, thereby regaining "custody" of his property. Generally, there is no right of redemption in a nonjudicial foreclosure.

REALTOR®

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Representative Steve Rieger
Alaska State Legislature
P.O. Box V (MS 3100)
Juneau, Alaska 99811

April 7, 1988

Dear Representative Rieger,

The Alaska Association of REALTORS®, after careful consideration, is supporting the passage of HB 549. The full disclosure to all parties involved in real estate transactions can only benefit the public. The Association would suggest however, that the disclosure be accomplished through a "rider" to other documents. This would serve the purpose without a complete redrafting of the standard forms.

We enthusiastically support passage of HB 549.

Sincerely,

Dea Turner

Dea Turner
Executive Vice President

NOTE

See #8 + 6(C)

..... 19..... ..... Alaska
(City)

.....
[Property Address; Add Borrower's Post Office Address, if Different]

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. $ ..... (this amount is called "principal"), plus interest, to the order of the Lender. The Lender is ..... I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

2. INTEREST

Interest will be charged on unpaid principal until the full amount of principal has been paid. I will pay interest at a yearly rate of .....%.

The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 6(B) of this Note.

3. PAYMENTS

(A) Time and Place of Payments

I will pay principal and interest by making payments every month.

I will make my monthly payments on the ..... day of each month beginning on ....., 19..... . I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. My monthly payments will be applied to interest before principal. If, on ....., I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "maturity date."

I will make my monthly payments at ..... or at a different place if required by the Note Holder.

(B) Amount of Monthly Payments

My monthly payment will be in the amount of U.S. $ .....

4. BORROWER'S RIGHT TO PREPAY

I have the right to make payments of principal at any time before they are due. A payment of principal only is known as a "prepayment." When I make a prepayment, I will tell the Note Holder in writing that I am doing so.

I may make a full prepayment or partial prepayments without paying any prepayment charge. The Note Holder will use all of my prepayments to reduce the amount of principal that I owe under this Note. If I make a partial prepayment, there will be no changes in the due date or in the amount of my monthly payment unless the Note Holder agrees in writing to those changes.

5. LOAN CHARGES

If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (i) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (ii) any sums already collected from me which exceeded permitted limits will be refunded to me. The Note Holder may choose to make this refund by reducing the principal I owe under this Note or by making a direct payment to me. If a refund reduces principal, the reduction will be treated as a partial prepayment.

6. BORROWER'S FAILURE TO PAY AS REQUIRED

(A) Late Charge for Overdue Payments

If the Note Holder has not received the full amount of any monthly payments by the end of ..... calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be .....% of my overdue payment of principal and interest. I will pay this late charge promptly but only once on each late payment.

(B) Default

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

(C) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is delivered or mailed to me.

(D) No Waiver By Note Holder

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

(E) Payment of Note Holder's Costs and Expenses

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

7. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address.

Any notice that must be given to the Note Holder under this Note will be given by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if I am given a notice of that different address.

8. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note.

9. WAIVERS

I and any other person who has obligations under this Note waive the rights of presentment and notice of dishonor. "Presentment" means the right to require the Note Holder to demand payment of amounts due. "Notice of dishonor" means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.

10. UNIFORM SECURED NOTE

This Note is a uniform instrument with limited variations in some jurisdictions. In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of those conditions are described as follows:

Transfer of the Property or a Beneficial Interest in Borrower. If all or any part of the Property or any interest in it is sold or transferred (or if a beneficial interest in Borrower is sold or transferred and Borrower is not a natural person) without Lender's prior written consent, Lender may, at its option, require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if exercise is prohibited by federal law as of the date of this Security Instrument.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is delivered or mailed within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED.

..... (Seal)
Borrower

..... (Seal)
Borrower

..... (Seal)
Borrower

[Sign Original Only]

$\_\_\_\_\_$ _____, Alaska, _____, 19____ No. _____

For value received, we jointly and severally promise to pay to the order of

DENALI STATE BANK at its office in _____, Alaska,

_____ DOLLARS

with interest from _____ at the rate of _____ per cent per annum until this note is fully paid.

Principal and interest payable $ _____ per month _____ on the _____ day of each month,

beginning _____, and continuing until this note is paid in full.

The amount of interest due on this note is to be paid at the same time the principal installments are paid. If any such installments of principal or interest is not paid when due, the whole sum of principal and interest shall at the option of the holder become immediately due and payable. Principal and interest are payable only in Legal Currency of the United States of America. For value received each and every party signing or endorsing this note hereby waives presentment, demand, protest, and notice of non-payment, any release or discharge arising from any extension of time, discharge of a prior party, or from any cause other than actual payment in full hereof, binds himself hereon as a principal, not as surety, and promises, if this note is not paid at maturity and is placed in the hands of an attorney for collection, or suit is brought hereon, to pay all costs of collection including reasonable attorney's fees.

Security _____ _____

Mailing Address _____ _____

Living Address _____ _____

DSB 217

FHA FORM NO. 9197A
Revised 1/71

This form is used in connection with deeds of trust insured under the one- to four-family provisions of the National Housing Act.

DEED OF TRUST NOTE

FHA CASE NO.

$, Alaska.
, 19 .

FOR VALUE RECEIVED, the undersigned promise(s) to pay to the order of

the principal sum of Dollars ($), with interest from date at the rate of per centum (%) per annum on the balance remaining from time to time unpaid. The principal and interest shall be payable at the office of in , or at such other place as the holder hereof may designate, in writing, in monthly installments of Dollars ($), commencing on the first day of , 19 , and on the first day of each month thereafter, until the principal and interest are fully paid except that the final payment of the entire indebtedness evidenced hereby, if not sooner paid, shall be due and payable on the first day of ,

If default be made in the payment of any installment under this note, and if such default is not made good prior to the due date of the next such installment, the entire principal sum and accrued interest shall at once become due and payable at the option of the holder of this note. Failure to exercise this option shall not constitute a waiver of the right to exercise the same in the event of any subsequent default. If any suit or action is instituted to collect this note or any part thereof the undersigned promise(s) and agree(s) to pay, in addition to the costs and disbursements provided by statute, a reasonable sum as attorney's fees in such suit or action.

The undersigned, whether principal, surety, guarantor, endorser, or other party hereto, agrees to be jointly and severally bound, severally hereby waive any homestead or exemption right against said debt, waive demand, protest and notice of demand, protest and nonpayment, and expressly agree that this note or any payment thereunder may be extended from time to time and consent to the acceptance of further security, including other types of security, all without in any way affecting the liability of such parties.

This note is secured by a Deed of Trust, of even date herewith, to as Trustee, on real estate situated in the Recording Precinct, State of Alaska, and this note is to be construed according to the laws of the State of Alaska.

_____ _____

_____ _____

_____

NOTICE: THIS LOAN IS NOT ASSUMABLE WITHOUT THE APPROVAL OF THE VETERANS ADMINISTRATION OR ITS AUTHORIZED AGENT.

, Alaska

$, 19 .

FOR VALUE RECEIVED, the undersigned jointly and severally, promise to pay to the order of

the principal sum of

Dollars

($), with interest from date at the rate of per centum (%) per annum on the unpaid balance until paid. The said principal and interest shall be payable at

or at such other place as the holder may designate in writing delivered or mailed to the debtor, in monthly installments of

Dollars

($), commencing on the day of , 19 , and continuing on the day of each month thereafter, until this note is fully paid, except that, if not sooner paid, the final payment of principal and interest shall be due and payable on the day of , .

Privilege is reserved to prepay at any time, without premium or fee, the entire indebtedness or any part thereof not less than the amount of one installment, or one hundred dollars ($100.00), whichever is less. Prepayment in full shall be credited on the date received. Partial prepayment, other than on an installment due date, need not be credited until the next following installment due date or thirty days after such prepayment, whichever is earlier.

If any deficiency in the payment of any installment under this note is not made good prior to the due date of the next such installment, or if there be failure to comply with any of the agreements contained in the Deed of Trust securing the Note, the entire principal sum and accrued interest shall at once become due and payable without notice at the option of the holder of this note. Failure to exercise this option shall not constitute a waiver of the right to exercise the same in the event of any subsequent default. In the event of default, the undersigned promise(s) and agree(s) to pay necessary expenses as may be incurred in collection, including reasonable attorney's fee.

This note is secured by a Deed of Trust of even date executed by the undersigned on certain property described therein and represents money actually used for the acquisition of said property or the improvements thereon.

The undersigned agree to be jointly and severally bound, severally hereby waive demand, protest and notice of demand, protest and nonpayment, and expressly agree that this note or any payment thereunder may be extended from time to time and consent to the acceptance of further security, including other types of security, all without in any way affecting the liability of such parties.

_____ _____

_____ _____

I HEREBY CERTIFY that this is the note described in and secured by a Deed of Trust of even date herewith and in the same principal amount as herein stated and secured by real estate in the Recording District, State of Alaska. Dated this day of , 19 .

My commission expires

_____

Notary Public in and for the State of Alaska

AHFC
ABE NOTE

NOTE

Loan No._____ _____, Alaska

_____, 19_____

_____
Property Address (Street and Borrower's Post Office Address, if different)

_____
City State Zip Code

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay _____ _____Dollars (U.S. $_____)(this amount will be called "principal"), plus interest, to the order of the Lender. The Lender is _____ _____. I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note will be called the "Note Holder".

2. INTEREST

I will pay simple interest at an annual rate of _____%.

Interest will be charged on that part of principal which has not been paid. Interest will be charged beginning on the date of this Note and continuing until the full amount of principal has been paid.

3. PAYMENTS

I will pay principal and interest by making payments each month of _____Dollars (U.S. $_____) on the _____ day of each month beginning _____, 19_____. Such monthly installments shall remain the same through the third (3rd) year and then shall increase according to the following schedule.

Beginning of Year

4 _____Dollars
(U.S. $_____) on the First day of _____, 19____

5 _____Dollars
(U.S. $_____) on the First day of _____, 19____

6 _____Dollars
(U.S. $_____) on the First day of _____, 19____

7 _____Dollars
(U.S. $_____) on the First day of _____, 19____

8 _____Dollars
(U.S. $_____) on the First day of _____, 19____

9 _____Dollars
(U.S. $_____) on the First day of _____, 19____

The monthly installment of _____ _____Dollars (U.S. $_____) shall continue until the entire indebtedness evidenced by this Note is fully paid, except that any remaining indebtedness, if not sooner paid, shall be due and payable on _____.

I will make my monthly payments at _____ _____, or at a different place if required by the Note Holder.

4. BORROWER'S FAILURE TO PAY AS REQUIRED

(A) Late Charges for Overdue Payments

If the Note Holder has not received the full amount of any of my monthly payments by the end of 15 calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 4% of my overdue payment. I will pay this late charge only once on any late payment.

(B) Default

If I do not pay the full amount of each monthly payment by the date stated in Section 3 above, I will be in default.

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described below, the Note Holder will still have the right to do so if I am in default at a later time.

(C) Notice from Note Holder

If I am in default by more than 30 days, the Note Holder may require me to pay immediately the full amount of principal which has not been paid and all the interest that I owe on that amount.

(D) Payment of Note Holder's Costs and Expenses

If the Note is in default, the Note Holder will have the right to be paid back for all of its costs and expenses in collection amounts due it to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorney's fees.

5. THIS NOTE SECURED BY A DEED OF TRUST

In addition to the protections given to the Note Holder under this Note, a Deed of Trust, dated _____ _____, 19____, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in this Note. The Deed of Trust may be made subject to any addendums attached to the Deed of Trust. If there is a conflict between the provisions of this Note and the provisions of any Addendum, the provisions of the Addendum shall control.

6. BORROWER'S PAYMENTS BEFORE THEY ARE DUE

I have the right to make payments of principal at any time before they are due. A payment of principal only is known as a "prepayment". When I make a prepayment, I will tell the Note Holder in a letter that I am doing so. A prepayment of all of the unpaid principal is known as a "full prepayment". A prepayment of only part of the unpaid principal is known as a "partial prepayment".

I will make a full prepayment or a partial prepayment without paying any penalty. The Note Holder will use all of my prepayments to reduce the amount of the principal that I owe under this Note. If I make a partial prepayment, there will be no delays in the due dates or changes in the amounts of my monthly payments unless the Note Holder agrees in writing to those delays or changes. I may make a full prepayment at any time. If I choose to make a partial prepayment, the Note Holder may require me to make the prepayment on the same day that one of my monthly payments is due. The Note Holder may also require that the amount of my partial prepayment be equal to the amount of principal that would have been part of my next one or more monthly payments.

7. BORROWER'S WAIVERS

I waive my rights to require the Note Holder to do certain things. Those things are: (a) to demand payments of amounts due (known as "presentment"); (b) to give notice that amounts due have not been paid (known as "notice of dishonor"); (c) to obtain an official certification of nonpayment (known as "protest"). Anyone else who agrees to keep the promises made in this Note, or who agrees to make payments to the Note Holder if I fail to keep my promises under this Note, or who signs this Note to transfer it to someone else also waives these rights. These persons are known as "guarantors, sureties, and endorsers".

8. GIVING OF NOTICES

Any notice of default that must be given to me under this Note will be given by delivering it or by mailing it by certified mail addressed to me at the Property Address above. A notice will be delivered or mailed to me at a different address if I give the Note Holder a notice of my different address.

Any notice that must be given to the Note Holder under this Note will be given by mailing it by certified mail to the Note Holder at the address stated in Section 3 above. A notice will be mailed to the Note Holder at a different address if I am given a notice of that different address.

9. RESPONSIBILITY OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each of us if fully and personally obligated to pay the full amount owed and to keep all of the promises made in this Note. Any guarantor, surety, or endorser of this Note (as described in Section 7 above) is also obligated to do these things. The Note Holder may enforce its rights under this Note against each of us individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note. Any person who takes over my rights or obligations under this Note will have all of my rights and must keep all of my promises made in this Note, but I will still remain liable unless released in writing by the "Note Holder". Any person who takes over the rights or obligations of a guarantor, surety, or endorser of this Note (as described in Section 7 above) is also obligated to keep all of the promises made in this Note.

_____	_____
Borrower	Borrower
_____	_____
Borrower	Borrower

HOUSE COMMITTEE REPORT

(7)

Date referred: 3/28/88 FURTHER REFERRALS: Judiciary

DATE: 4/14/88

The Labor & Commerce Committee has considered HB 549

"An Act relating to notice requirements on the use of a deed of trust; and providing for an effective date."

RECOMMENDS:

[X] replace with CS HB 549 (L+C) [ ] the same title
[ ] attached amendment(s) [X] a new title

[ ] do pass
[ ] do not pass
[ ] no recommendation
[X] individual recommendations
[ ] additional referral to the ______ Committee

ADOPTS: [ ] ______ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact
[X] zero fiscal note
[ ] zero with analysis

[ ] same as previous fiscal note published ______
[ ] same as previous zero fiscal note published ______

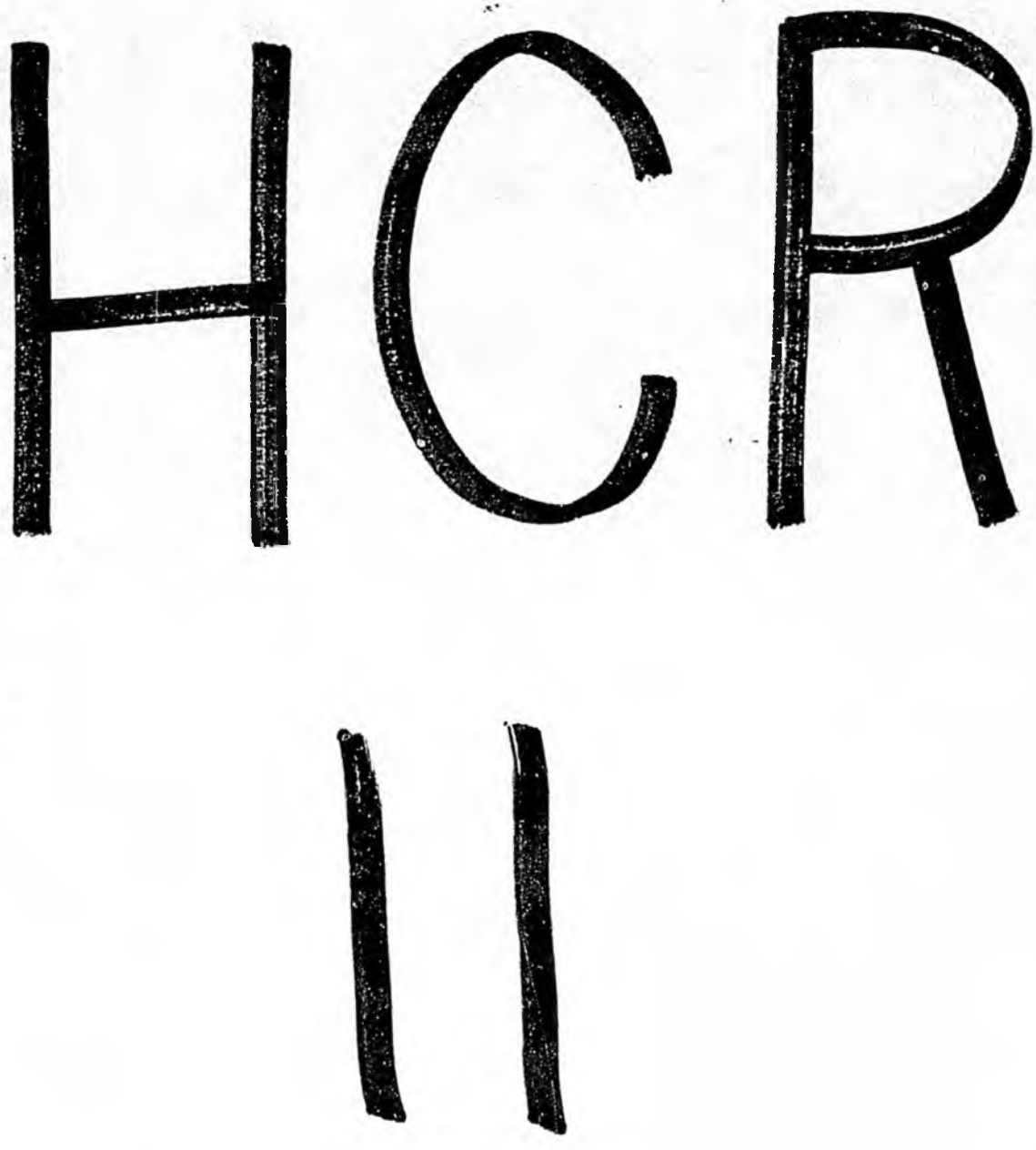
SIGNING DO PASS:

W Furnace
[signature]
O. C. Barkow

SIGNING OTHER RECOMMENDATIONS:

[signature] (No Rec)
[signature] Ellis (no rec)
[signature] no rec

Dave Donley
Chairman's signature



STATE OF ALASKA
THE LEGISLATURE

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

LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE REFERENCE LIBRARY

May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

H. JUD. 3-24-88 1:30p.m.

H. JUD. 2-24-88 1:30p.m.

5-0433X
Cook
2/22/88

Original sponsors: Brown, Ellis,
Cotten, et al.

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR SS FOR HOUSE CONCURRENT RESOLUTION NO. 11 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

Proposing an amendment to Rule 22 of the Alaska State Legislature relating to caucus and other informal meetings.

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

* Section 1. Rule 22(a) of the Uniform Rules of the Alaska State Legislature is amended to read:

(a) All meetings of a legislative body, including a committee or subcommittee, are open to all legislators, whether or not they are members of the particular legislative body that is meeting, and to the general public except as provided in (b) of this rule. A quorum of a legislative body may not engage in private and substantive deliberation on a matter within the jurisdiction of the body. Caucuses of the legislature may meet in private to consider matters of procedure, organization, or strategy.

A M E N D M E N T

Offered in the HOUSE By Taylor

TO: CSSSHCR 11 (Judiciary)

Page 1, line 5:

Delete "an amendment"

Insert "amendments"

Page 1, line 7:

Delete "caucus and other informal"

Page 1, lines 9 - 18:

Delete all material and insert:

"* Section 1. Rule 22(b) of the Uniform Rules of the Alaska State Legislature is amended to read:

(b) A legislative body may call an executive session at which members of the general public may be excluded for the following reasons:

(1) discussion of matters, the immediate knowledge of which would adversely affect the finances of a government unit;

(2) discussion of subjects that tend to prejudice the reputation and character of a person, provided the person may request a public discussion;

(3) discussion of a matter that [MAY,] by law is [, BE] required to be confidential.

* Sec. 2. Rule 22(c) of the Uniform Rules of the Alaska State Legislature is amended to read:

(c) When a legislative body desires to call an executive session in accordance with (b) of this rule, the body shall first convene as a public meeting and the question of holding an executive session shall be determined by a majority vote of the members present. Subjects may not be considered at the executive session except those mentioned in the motion calling for the executive session unless auxiliary to the main question. Action may not be taken at the executive session.

* Sec. 3. Rule 22 of the Uniform Rules of the Alaska State Legislature is amended by adding new subsections to read:

(e) Unless notice is given under Rule 23, reasonable public notice shall be given for each meeting required to be open under this rule. The notice must include the date, time, and place of the meeting.

(f) A vote taken contrary to this rule is void.

(g) This rule does not apply to a meeting of a subcommittee."

AMENDMENT

Offered in the HOUSE By Brown

TO: CS For HCR 11 (Judiciary)

Title Change: Proposing an amendment to Rule 22 of the Alaska State Legislature relating to open meetings [CAUCUS AND OTHER INFORMAL MEETINGS].

HOUSE COMMITTEE REPORT

(7)

Date referred: 3/30/87 FURTHER REFERRALS: Judiciary

DATE: 5-16-87

The State Affairs Committee has considered SSHCR 11

Proposing an amendment to Rule 22 of the Alaska State Legislature relating to caucus and other informal meetings.

RECOMMENDS:

[X] replace with CS ~~HC~~ SS HCR 11 (SA) [X] the same title

[ ] attached amendment(s) [ ] a new title

[X] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] additional referral to the _____ Committee

ADOPTS: [ ] _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact

[ ] zero fiscal note

[ ] zero with analysis

[ ] same as previous fiscal note published _____

[ ] same as previous zero fiscal note published _____

SIGNING DO PASS:

Robert Bailey

D.C. Foulkes

Cliff Davidson

Fran Ulmer

SIGNING OTHER RECOMMENDATIONS:

Ernie Hensley NO REC

Fran Ulmer

Chairman's signature

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST:

Bill Version: HCR 11
Publish Date: 2/20/87

Revision Date:
Title: Proposing an amendment to Rule 22 of the Uniform Rules. . .caucus and other meetings
Sponsor: Representative Kay Brown
Requestor: Representative Kay Brown

Agency Affected: Legislative Affairs Agency
BRU: Legislative Council

Components: Session Expenses

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES	-0-	-0-	-0-	-0-	-0-	-0-
TRAVEL	-0-	-0-	-0-	-0-	-0-	-0-
CONTRACTUAL	-0-	-0-	-0-	-0-	-0-	-0-
SUPPLIES	-0-	-0-	-0-	-0-	-0-	-0-
EQUIPMENT	-0-	-0-	-0-	-0-	-0-	-0-
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

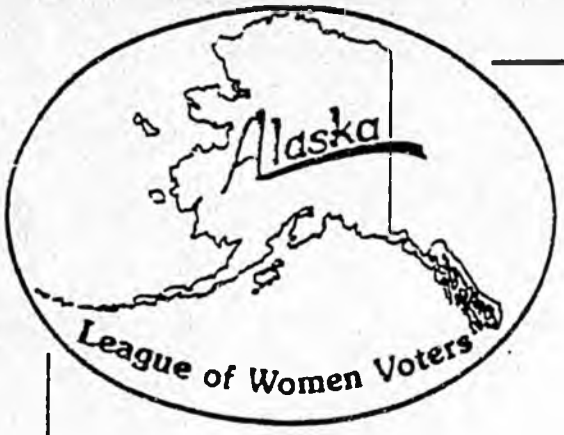
ANALYSIS: (Attach a separate page if necessary)

No fiscal impact anticipated.

Prepared by: Pamela A. Stoops, Manager (Pamela A. Stoops) Phone: 465-3850
Division: Administrative Services Date: 5/12/87

Approved by: Warren W. Endicott, Executive Director (Warren W. Endicott) Date: 5/12/87
Agency: Legislative Affairs Agency

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)
Senate Secretary



The League of Women Voters of Alaska is supportive of the concept of the Sponsor Substitute for House Concurrent Resolution 11.

We feel strongly that the public's business must be conducted in public.

It has been said, "In a democracy it is not sufficient to have a few trained persons who understand what it's all about; there must also be an alert citizenry to insist that knowledge, research, and action are properly integrated."

In electing representatives, citizens don't abrogate their rights to participate in the process of government.

The League feels it is not possible to have adequate citizen oversight of governmental actions, which is the bedrock our democracy was built on, unless substantive deliberations are conducted in public.

We urge swift passage of this resolution.

Rep. Ulmer

AKPIRG
ALASKA PUBLIC INTEREST RESEARCH GROUP
Post Office Box 1093 / Anchorage, Alaska 99510 / (907) 278-3661

Rep. Kay Brown
Box V
Juneau, AK 99811

7 April 1987

Dear Rep. Brown,

We would like to commend you and the co-sponsors of HCR 11 for the simple and meaningful clarification of the Uniform Rules that it represents in the area of open meetings. AKPIRG has been a principal voice in support of a more public, open legislative process.

Legislatively, one of the most serious shortcomings has been the tendency for the majority in one or the other house (or both) to meet "in caucus" and make substantive decisions about all manner of legislation. The interpretation of caucuses as not being subject to the rules meant that there was no way for the public to know how legislators were determining priorities, setting limits or anything else along these broad lines. In effect, that eliminated the public from affecting some of the most essential steps in lawmaking. Such disenfranchisement is never acceptable and is especially damaging in these times where painful decisions affecting basic services must be made in light of revenue shortfalls and revamped state priorities. Only the blind, the unthinking or the devious with ulterior motives would allow their right of access to the legislative process to be diminished in any way. And caucus meetings are a clear part of this process.

HCR 11 provides a clear definition, at a reasonable level, of what should be considered a caucus meeting or a meeting that could effectively constitute a meeting with binding impact on a majority in either house. If anything, it is still too liberal in defining the minimum as one quarter of either house. We would be happier to see a limit of 3 members in the Senate and 6 in the House. This is because it seems clear to us that the leadership of either chamber's ruling majority could be sufficient to make essentially binding, if not explicitly binding, decisions about legislation. The current version's one quarter means as much as nearly half of a narrow but firm majority and consequently seems well beyond the number needed to make meaningful commitments. Certainly in the Senate's history, the four most powerful majority leaders have "controlled" a full majority necessary to pass legislation.

In sum, we are very pleased at the approach taken by the

resolution. We would recommend a slight further reduction in the minimum levels triggering mandatory openness. And we would urge defining the term "Reasonable" on line 17 as it applies to notice. We realize this may be difficult since caucus meetings sometimes must be called on an immediate basis during full floor action, but we urge a conscientious effort to quantify it nonetheless.

Again, we commend you and the other sponsors for taking this enlightened and publicly responsive approach. We look forward to seeing it, or an improved version of it, adopted soon.

Sincerely,
On behalf of the Board of Directors,

Jeffrey R. Bohman
Executive Director

Kay Brown

Alaska State Legislature
House of Representatives

M E M O R A N D U M

TO: Rep. Fran Ulmer, Chair
State Affairs Committee

DATE: May 14, 1987

FROM: Rep. Kay Brown

RE: SS HCR 11, proposing amendments to Rule 22 of the Uniform Rules

SS HCR 11, which proposes amendments to Rule 22 of the Uniform Rules, has been referred to the House State Affairs Committee for consideration.

Thank you for scheduling a hearing on Friday, May 15 at 3:00 p.m. The resolution does not have a fiscal impact.

The Uniform Rules do not currently require all meetings involving substantive, legislative decision-making to be open to the public. Rule 22 states that "all meetings of a legislative body" must be open; however, the Legislature has interpreted this language to allow informal meetings, including caucus meetings, to occur behind closed doors.

Substantial legislative decision-making has, in the past, occurred in such closed meetings.

Excluding the public from the crucial phases of decision-making undermines the basic principles of open and democratic government. The public has a right to know how a decision was reached -- who supported the result, and why.

SS HCR 11 amends Rule 22 to make it clear that even informal meetings must be open to the public under certain circumstances. The intent of SS HCR 11 is to require a meeting to be open if "substantive decisions" could be made at the meeting which could effectively bind a majority of either house.

It was difficult to arrive at a workable definition of such a meeting. A numerical designation of the number of legislators

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attending a meeting appeared to be the most workable solution. I selected one-fourth of the membership of either house or a majority of a committee or a subcommittee.

SS HCR 11 makes it clear that informal meetings must be open to the public and reasonable notice given under three circumstances:

1. when one-fourth or more of the membership of either house attends a caucus or other informal meeting and deliberates on the substance of specific bills or resolutions;

2. when a majority of a committee meets and deliberates on the substance of bills or resolutions referred to the committee;,

and

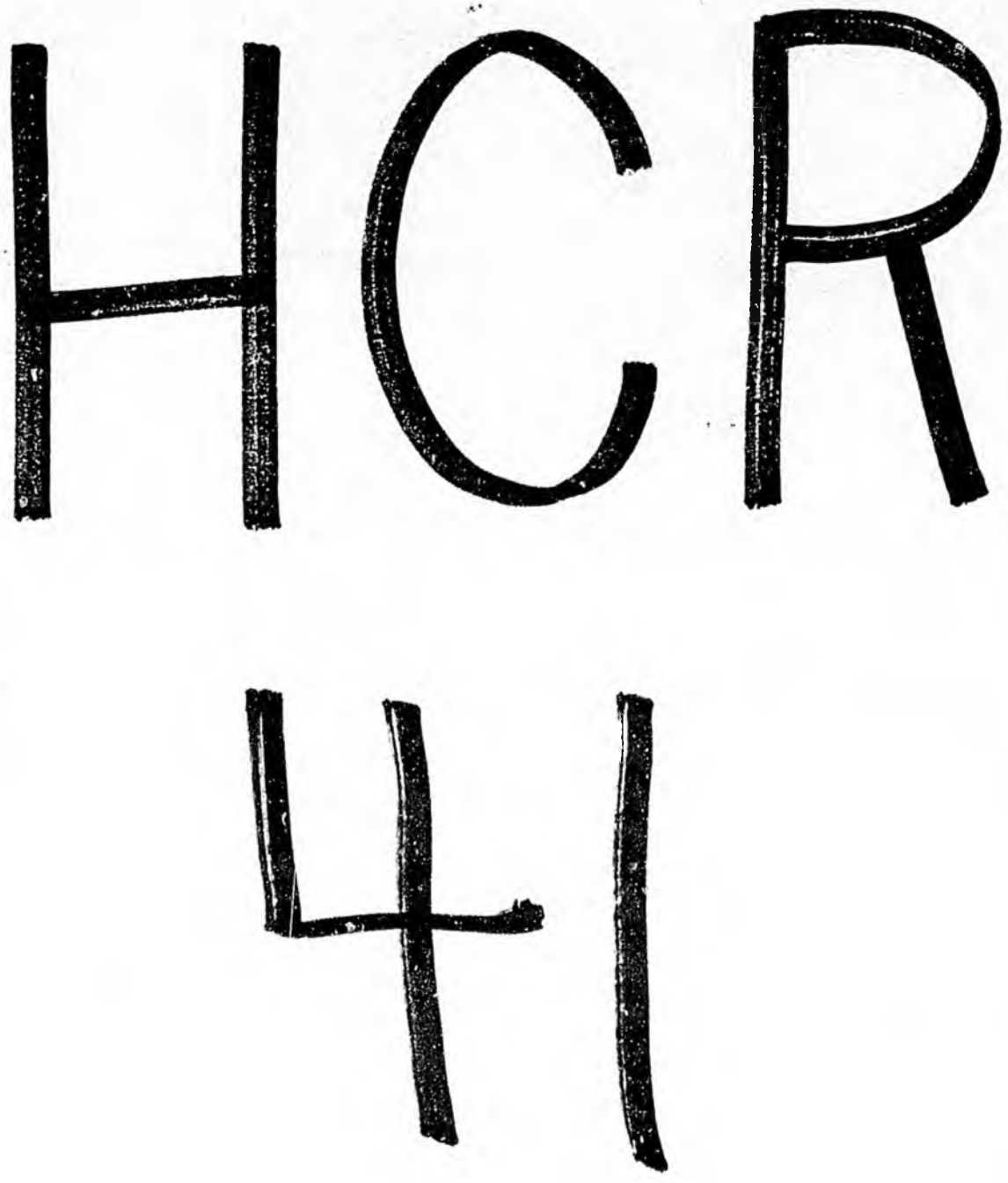
3. when a majority of a subcommittee meets and deliberates on the substance of bills or resolutions referred to the subcommittee.

Reasonable notice could consist of a note posted on a designated bulletin board. SS HCR 11 does not require compliance with the calendaring procedures, minutes and other formal requirements of Rule 23.

Attached are statements in support of SS HCR 11 from AKPIRG and the League of Women Voters.

I thank you for your courtesy in considering SS HCR 11 and request that the Committee move this resolution to the next committee of referral.

Attachments



STATE OF ALASKA
THE LEGISLATURE

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

LEGISLATIVE AFFAIRS AGENCY

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May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

H. JUD. 3-24-88 1:30p.m.

H. JUD 3-3-88 1:30p.m.

(7)

HOUSE COMMITTEE REPORT

Date referred: 2/3/88

FURTHER REFERRALS:

DATE: March 24, 1988

The Judiciary Committee has considered HCR 41

Proposing an amendment to the Uniform Rules of the Alaska State Legislature relating to deadlines for session work

RECOMMENDS:

[✓] replace with CS HCR 41 (Jud) [ ] the same title

[ ] a new title

[ ] attached amendment(s)

- [ ] do pass
- [ ] do not pass
- [ ] no recommendation
- [ ] individual recommendations
- [ ] additional referral to the _____ Committee

ADOPTS: [ ] _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

- [ ] fiscal impact
- [ ] zero fiscal note
- [ ] zero with analysis
- [ ] same as previous fiscal note published _____
- [ ] same as previous zero fiscal note published _____

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

Sam Cotten NR

Edwin J. Taylor (NO Rec)

Vice Chairman's signature

5-1528L
Cook
3/23/88

Adopted

Original sponsors: Ellis, Navarre, Ulmer, et al.

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE CONCURRENT RESOLUTION NO. 41 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

Proposing an amendment to the Uniform Rules of the Alaska State Legislature relating to deadlines for session work.

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

* Section 1. The Uniform Rules of the Alaska State Legislature are amended by adding a new rule to read:

RULE 56. SESSION SCHEDULE. (a) The following schedule applies during a first and second session to consideration of a bill:

(1) the house of origin may not calendar a bill for [first or] second reading after the 90th legislative day;

(2) a bill may not be transmitted by the house of origin to the second house after the 95th legislative day;

(3) the second house may not calendar a bill for [first or] second reading after the 114th legislative day;

(4) a bill may not be transmitted by the second house to the house of origin after the 117th legislative day;

(5) a report of a Conference Committee with limited powers of free conference may not be submitted after the 118th legislative day.

(b) A report of a Conference Committee with limited powers of free conference may not be voted on by a house until at least 24 hours after it is duplicated and delivered to the chief clerk or secretary of the house for distribution to each member. The chief clerk or secretary shall certify the time of delivery of the report for recording in the journal.

(c) This rule may be suspended by a concurrent resolution approved by majority vote in each house. This rule does not apply to resolutions.

Introduced: 2/3/88
Referred: Judiciary

5-1528B

BY ELLIS, NAVARRE, ULMER, BROWN, HANLEY, DAVIS, KOPONEN, COLLINS, ZAWACKI, DAVIDSON AND FRANK

IN THE HOUSE

HOUSE CONCURRENT RESOLUTION NO. 41

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

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(2) a bill may not be transmitted by the house of origin to the second house after the 100th legislative day;

(3) the second house may not calendar a bill for first or second reading after the 114th legislative day;

(4) a bill may not be transmitted by the second house to the house of origin after the 117th legislative day.

(b) This rule does not apply to resolutions.

Just moves deadlines forward

Original sponsors: Ellis, Navarre,
Ulmer, et al.

IN THE HOUSE BY THE JUDICIARY COMMITTEE

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WHILE IN SESSION
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ALASKA STATE HOUSE

OFFICE OF MAJORITY WHIP

CO-CHAIR
HEALTH, EDUCATION & SOCIAL SERVICES

LABOR & COMMERCE
SUBCOMMITTEE ON FOREIGN TRADE

REPRESENTATIVE JOHNNY ELLIS

MEMORANDUM

TO: To House Judiciary Committee Members

FROM: Rep. Johnny Ellis JE

RE: HCR 41 - "relating to deadlines for session work"

DATE: March 3, 1988

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Attached you will find materials to serve as backup for HCR 41 which proposes to amend the Uniform Rules to set deadlines for the passage of bills through the legislature. This resolution is sponsored by myself and has ten cosponsors.

Last session, 17% of the total legislation which passed the either the House or the Senate was debated on the floor, by either body, for the first time, during the last three days of the session. Thirty bills passed either the House or the Senate on the last day. The figures for the 1986 session are similar with first time floor consideration at 16% in the last three days and 33 bills passing on the last day. For the 1985 session the figures were 18% in the last three days and 24 bills on the last day.

Without belaboring the figures, we are all aware of the rush of legislation that is brought to the floor in the final days of the session and the public indignation that follows. Adequate consideration and debate of each bill is simply not possible during marathon floor sessions jammed with the most important and often complex legislation.

This resolution, in my view, does not place onerous or unnecessary restrictions on the movement of bills, but rather provides more breathing room for the adequate consideration of legislation at sessions' end. Such planned movement of bills is necessary now that we operate under a 120 day session limit.

In the Alaska Legislative Procedures Study, Final Report, submitted to The Joint Special Committee on Legislative Reform in May of 1983, the National Conference of State Legislatures recommended scheduling deadlines as a means to strengthen legislative operations. As the report states, "scheduling helps to avoid some of the last minute chaos, and assures important bills are not lost in the process". Many states have employed scheduling deadlines to help alleviate logjams.

When the voters passed the session limitation section to the State Constitution in 1984 they also approved language that, "the Legislature shall adopt as part of the uniform rules of procedure deadlines for scheduling session work not inconsistent with provisions controlling the length of the session," Article II, Section 8. In my view the Legislature has not lived up to this constitutional mandate.

Thank you for your consideration of HCR 41.

Introduced: 2/3/88
Referred: Judiciary

5-1528B

BY ELLIS, NAVARRE, ULMER, BROWN, HANLEY, DAVIS, KOPONEN, COLLINS, ZAWACKI, DAVIDSON AND FRANK

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(b) This rule does not apply to resolutions.

Constitution Article II

ing to, or returning from legislative sessions are not subject to civil process and are privileged from arrest except for felony or breach of the peace.

Salary and Expenses

SECTION 7. Legislators shall receive annual salaries. They may receive a per diem allowance for expenses while in session and are entitled to travel expenses going to and from sessions. Presiding officers may receive additional compensation.

Regular Sessions

SECTION 8. The legislature shall convene in regular session each year on the fourth Monday in January, but the month and day may be changed by law. The legislature shall adjourn from regular session no later than one hundred twenty consecutive calendar days from the date it convenes except that a regular session may be extended once for up to ten consecutive calendar days. An extension of the regular session requires the affirmative vote of at least two-thirds of the membership of each house of the legislature. The legislature shall adopt as part of the uniform rules of procedure deadlines for scheduling session work not inconsistent with provisions controlling the length of the session. [Amendment approved November 6, 1984]

Special Sessions

SECTION 9. Special sessions may be called by the governor or by vote of two-thirds of the legislators. The vote may be conducted by the legislative council or as prescribed by law. At special sessions called by the governor, legislation shall be limited to subjects designated in his proclamation calling the session, to subjects presented by him, and the reconsideration of bills vetoed by him after adjournment of the last regular session. Special sessions are limited to thirty days.

(The amendment of this section was approved by the voters of the state November 2, 1976 and became effective December 23, 1976. This amendment deleted "or" preceding "to subjects" in the third sentence and added "and the reconsideration of bills vetoed by him after adjournment of the last regular session.")

Adjournment

SECTION 10. Neither house may adjourn or recess for longer than three days unless the other concurs. If the two houses cannot agree on the time of adjournment and either house certifies the disagreement to the governor, he may adjourn the legislature.