

ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672  
5319 SJUD SB 331 - SB 343

891

4. testing equipment used or intended for use in identifying or in analyzing the strength, effectiveness or purity of controlled substances except for use by or under the direction of law enforcement agencies or medical research or treatment facilities;
5. scales and balances used or intended for use in weighing or measuring controlled substances;
6. diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used or intended for use in cutting controlled substances;
7. separation gins and sifters used or intended for use in removing twigs and seeds from, or in otherwise cleaning or refining, marijuana;
8. blenders, bowls, containers, spoons and mixing devices used or intended for use in compounding controlled substances;
9. capsules, balloons, envelopes and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances;
10. containers and other objects used or intended for use in storing or concealing controlled substances;
11. hypodermic syringes, needles and other objects used or intended for use in parenterally injecting controlled substances into the human body;
12. objects used or intended for use in ingesting, inhaling or otherwise introducing marijuana, cocaine, hashish or hashish oil into the human body, such as:
  - a. metal, wooden, acrylic, glass, stone, plastic or ceramic pipes with or without screens, permanent screens, hashish heads or punctured metal bowls;
  - b. water pipes;
  - c. carburetion tubes and devices;
  - d. smoking and carburetion masks;
  - e. roach clips: meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;

- f. miniature cocaine spoons and cocaine vials;
- g. chamber pipes;
- h. carburetor pipes;
- i. electric pipes;
- j. air-driven pipes;
- k. chillums;
- l. bongs;
- m. ice pipes or chillers.

In determining whether an object is drug paraphernalia, a court or other authority should consider, in addition to all other logically relevant factors, the following:

1. statements by the manufacturer, owner or by anyone in control of the object concerning its use;
2. prior convictions, if any, of an owner, or of anyone in control of the object, under any state or federal law relating to any controlled substance;
3. the proximity of the object, in time and space, to a direct violation of AS 17.10 or AS 17.12;
4. the proximity of the object to controlled substances;
5. the existence of any residue of controlled substances on the object;
6. direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons who he knows, or should reasonably know, intend to use the object to facilitate a violation of AS 17.10 or AS 17.12; the innocence of an owner, or of anyone in control of the object, as to a direct violation of AS 17.10 or AS 17.12 shall not prevent a finding that the object is intended for use as drug paraphernalia;
7. instructions, oral or written, provided with the object concerning its use;
8. descriptive materials accompanying the object which explain or depict its use;

9. national and local advertising concerning its use;
10. the manner in which the object is displayed for sale;
11. whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;
12. direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;
13. the existence and scope of legitimate uses for the object in the community;
14. expert testimony concerning its use.

C. "Sell" or "sale" means the commercial transfer of ownership, possession or use of drug paraphernalia in the regular course of a wholesale or retail business for consideration of any type. (AO 81-219).

8.20.020 Sale of drug paraphernalia unlawful.

It is unlawful for any person to sell, or possess with intent to sell, drug paraphernalia, knowing that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance, except as specifically authorized and permitted under the provisions of AS Title 17 and by such rules and regulations as are adopted pursuant thereto. (AO 81-219).

8.20.025 Premises where drug paraphernalia sold--Minors prohibited.

In a store whose principal business is drug paraphernalia, it is unlawful for minors to purchase items or be on the premises. Legible signs will be posted on the premises stating that no minors are allowed. (AO 81-219).

8.20.030 Remedies.

A. Any person who violates any provision of this chapter shall be subject to a civil penalty of not less than \$50.00 nor more than \$1,000.00 for each offense or injunctive relief to restrain the person from continuing the violation or threat of violation, or both injunctive relief and a civil penalty. Upon application for injunctive relief and a finding that a person is violating or threatening to violate any provision of this chapter, the Superior Court shall grant injunctive relief to restrain the violation.

- B. Each day of violation of any provision of this chapter shall constitute a separate offense.
- C. Any item sold or possessed with the intent to sell by any person after a court has adjudicated such an item to constitute drug paraphernalia as defined by Section 8.20.010 shall be subject to forfeiture of the said paraphernalia to the municipality upon order of the court entered in any injunction proceedings instituted under the authority of this section or in a separate forfeiture action instituted by the municipality. (AO 81-219).

8.20.040 Severability.

If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the chapter which can be given effect without the invalid provisions of this chapter and such invalid provisions are severable. (AO 81-219).

FISCAL NOTE

REQUEST

Revision Date: \_\_\_\_\_  
Title: An Act relating to drug paraphernalia  
Sponsor: Sen. Fischer  
Requestor: Senate HESS

Agency Affected: Public Safety  
BRU: Alaska State Troopers  
Components: Criminal Investigations Bureau

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY88	FY89	FY90	FY91	FY92	FY93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL						
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REVENUE						
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FUNDING: (Thousands of Dollars)

GENERAL FUNDS						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

No increased enforcement level is anticipated to result from passage of this legislation.

Prepared by: Francis C. Allan  
Division: Alaska State Troopers

Phone: 269-5691  
Date: 1/26/88

Approved by Commissioner: Arthur E. English *Spicer for*  
Agency: Public Safety

Date: 1/26/88

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

# Alaska State Legislature

Senator Paul A. Fischer  
Senate District D  
Box 734  
Soldotna, Alaska 99669  
(907) 262-9420 W  
262-9269 H



While in Juneau  
Pouch V  
Juneau, Alaska 99811  
(907) 465-3791

## State Senate

BoFL  
FEB 10 1988

### MEMORANDUM

TO: Senator Jay Kerttula, Ch. *JK*  
Senate Judiciary Committee

FROM: Senator Paul Fischer *PF*

SUBJECT: Senate Bill 331  
(relating to drug paraphernalia)

DATE: February 10, 1988

I would appreciate your scheduling the above referenced bill before the Senate Judiciary Committee at your earliest possible convenience.

This legislation would make it a class A misdemeanor to use and possess, manufacture and deliver, or advertise drug paraphernalia. A person 18 years of age or over who delivers drug paraphernalia to a person under the age of 19 who is at least three years younger than the person delivering the paraphernalia would be guilty of a class C felony. Paraphernalia would be subject to seizure by the police upon issuance of a court order, and would be forfeited to the state upon conviction of a defendant or upon judgement of a court in a civil proceeding. This bill lists the types of paraphernalia, including roach clips and separation gins and sifters for cleaning marijuana, which were added in the Hess Committee Substitute. Additionally the HESS Committee substitute added a new section that would make paraphernalia used to ingest, inhale, or otherwise introduce marijuana into the human body a Class A misdemeanor (except for persons over 18 who deliver paraphernalia to persons under 18 who are at least three years younger, when it becomes a class C felony). This section would take effect when Section 1 of the bill (that criminalizes paraphernalia) takes effect, or on the effective date of a law making the possession of any amount of marijuana a crime, whichever is later.

PAF/sgn

FISCAL NOTE

REQUEST:

Revision Date: \_\_\_\_\_  
Title: "An Act relating to drug para-  
phernalia..."  
Sponsor: Sen. HESS  
Requestor: Senate Judiciary

Agency Affected: Department of Law  
BRU: Prosecution  
Components: All

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 attached analysis.

*Richard I. Pegues*

Prepared by: Richard I. Pegues, Director  
Division: Administrative Services

Phone: 465-3672  
Date: February 17, 1988

Approved by Commissioner: Grace Berg Schable, Atty. Gen.  
Agency: Department of Law

Date: February 17, 1988

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. CSSB 331 (HESS)

This bill adds a new chapter to Title 11 that outlaws the use, possession, manufacture, delivery, and advertisement of drug paraphernalia that are used or intended to be used with controlled substances in violation of AS 11.71 and AS 17.30. It is the department's view that most prosecution resulting from enactment of this bill will arise from other illegal drug activity that is already the subject of a criminal prosecution. Consequently, fiscal note funds are not being requested. There will, however, be some additional prosecution that would result from the discovery of drug paraphernalia during the investigation of non-drug related offenses, such as occurs during vehicular stops. It is not possible to accurately predict the extent of this latter category of workload, but it is not expected to be significant. However, it should be noted that because the prosecutor workload is at or near the saturation level in most of the state's district attorney offices, a significant number of independent drug paraphernalia complaints could result in diminished resources to handle more serious offenses, in deferred prosecution of drug paraphernalia complaints, or in a request for additional resources at a later time. Lastly, an initial legal review of the bill indicates that there may be a problem in proving some violations because many of the drug paraphernalia implements defined in the bill also have valid and necessary everyday uses in most households. Staff in the office of the Director of Criminal Prosecutions is available to discuss this issue.

POSITION PAPER  
ON  
SENATE BILL NO. 331

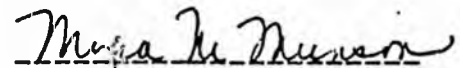
"An Act relating to drug paraphernalia; and providing for an effective date."

CS SB 331 provides for legal penalties for an individual who is found guilty of manufacturing, delivering or advertising for the sale of drug paraphernalia.

The Department of Health and Social Services is supportive of the intent of this legislation. The Department, through the State Office of Alcoholism and Drug Abuse, discourages the use of drugs of all kinds and promotes this position through its support of community education and treatment of individuals who use drugs. This bill complements these efforts by restricting the availability to the public of drug paraphernalia associated with drug use.

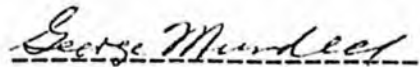
Problems related to alcohol and drug abuse have frequently been discussed during recent meetings of the Governor's Interim Commission on Children and Youth and the Senate Special Committee on Suicide Prevention. Specific strategies recommended to impact these problems included increasing the availability of youth outpatient counseling and additional school curriculum programs.

While supportive of CS for SB 331, the DHSS defers examination of the enforcement provisions of this bill to the Departments of Public Safety and Law.



Myra M. Munson  
Commissioner

2-17-88



For Matthew C. Felix  
Coordinator

**STATE OF ALASKA 1987 LEGISLATIVE SESSION  
FISCAL NOTE**

**REQUEST:** \_\_\_\_\_

Bill Version: Senate Bill 331  
Publish Date: \_\_\_\_\_

Revision Date: \_\_\_\_\_  
Title: "An Act relating to drug paraphernalia; and providing for an effective date."  
Sponsor: Fischer  
Requestor: N/A

Agency Affected: Health & Social Services  
BRU: Alcoholism & Drug Abuse  
Components: N/A

**EXPENDITURES/REVENUES: (Thousands of Dollars)**

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

<b>CAPITAL</b>	-0-	-0-	-0-	-0-	-0-	-0-
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<b>REVENUE</b>	-0-	-0-	-0-	-0-	-0-	-0-
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**FUNDING: (Thousands of Dollars)**

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>						

**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

**ANALYSIS :** (Attach a separate page if necessary)

Prepared by: Matthew Felix by George Mundell Phone: 586-6201  
Division: Alcoholism and Drug Abuse Date: 2/17/88

Approved by Commissioner: *Mike McManis* Date: 2-17-88  
Agency: *George Mundell*

**Distribution (by preparer):**

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

S B

3 3 8

29 March 1988

Senator Jay Kerttula,  
Chairman of Judiciary Committee

Senator Pat Rodey  
Member, Judiciary Subcommittee

*Bill file*

Re: SB 338, my proposed amend-  
ment of

Gentlemen:

By copy of the enclosed correspondence I would wish to appraise you of my interest in SB 338 and my proposal which I believe would add a substantial and measurable value to those splendid achievements SB 338 seeks to accomplish.

Trusting these issues to your own good hands, I remain,

Respectfully,

Robert Emmert Gray  
The East Quarter Condominium  
4109 Lynn Drive, Unit #203  
Anchorage, Alaska 99508  
Tel: (907) 338-5881

*Robert Emmert Gray*

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Robert Emmert Gray  
A Concerned Homeowner

Enclosures:

- (1) My letter to Senator Jan Faiks, dated 15 February 1988 with five (5) enclosures.
- (2) My letter to Senators Kelly and Halford, Representatives Furnace, Barnes, Cotton, and Randy Phillips copying them with my letter and enclosures to Senator Faiks.
- (3) Copy of Senator Faiks' response to my enclosure (1) above.
- (4) Copy of Senator Rick Halford's response to my enclosure (2) above.

15 February 1988

Senator Jan Faiks  
Alaska State Legislature  
Pouch V (MS 3100)  
Juneau, Alaska 99811

Re: SB 338

Dear Senator Faiks:

I first wish to advise that I support your effort to bring greater accountability into the arena of common interest ownership properties. One of the problems that presently prevails is an absence of just such elements. While the ultimate solution would encompass applying the Uniform Common Interest Ownership Act in its entirety to all common interest communities both prior and subsequent to the effective date of the UCIOA statute, AS 34.08, I most certainly do welcome your effort to add further appropriate sections of AS 34.08 to the original thirteen sections which apply to common interest communities created prior to the effective date of the ACT, 1 January 1986.

On release of this bill in Anchorage I obtained a copy, studied it, and addressed a letter to Senator Tim Kelly seeking his counsel as to how I, as a unit homeowner and member of the East Quarter Condominium Association, might offer commentary to both support and enhance the purposes of the bill. I subsequently attended a constituent meeting on 13 Feb 1988 and presented my interest. Senators Kelly and Halford, Representatives Cotton and Phillips were present. Since Senator Halford stated he had been instrumental in sponsoring the Uniform Common Interest Property Act, e.g.- AS 34.08, he suggested that I address correspondence to your office as prime sponsor of SB 338. That seemed to be the sense of each of the legislators present. I shall enclose a copy of my letter to Senator Tim Kelly as Enclosure (1).

I request that SB 338 (page 3, line 9 through 18) Sec. 6 AS <sup>34</sup>34.08.040 be further amended to also include AS 34.08.340 as an applicable section under the proposed amendment but excluding it from the exemption of applicability with respect to events and circumstances occurring prior the effective date of AS 34.08. In truth, make it apply retro-actively to AS 34.07, if this can properly be done.

A common interest community as represented by a non-profit association of homeowners is, in fact and reality, a corporate business entity. To be successful, it must be operated as a business entity. To accomplish this requires that the financial and historic records of its decisions and actions be recorded and exposed to commercial verification standards in order to assure its on-going integrity. This is of particular impact due to the probable frequency of change of its administrators. These requirements do not impede the administrative operation of an association. They provide for and assure it a healthy longevity.

*Enclosure (1)*

The average common interest community unit homeowner is not an experienced "business person". Such homeowner is more generally a lay person without single family home ownership in their background. In any event such person is more familiar with maintenance of a furnace than a "boiler", with a staircase rather than an "elevator", with a "deadbolt" rather than an "electronic security system involving exterior access doors, automatic smoke/fire alarms, automatic fire barrier internal hallway doors, CO sensor controlled automatic garage atmosphere ventilation fans, etc", hand operated rather than radio controlled garage doors, a garden hose rather than a heat sensor controlled full garage sprinkler systems, and ad infinitum.

I would suggest to you that the requirements annotated under AS 34.08.340 have rarely, if ever, been exercised in behalf of condominium associations in Alaska under the Horizontal Property Regimes Act, AS 34.07. It was not required under that Act. The elements contained in Section 340 are imperatives to the successful operation and administration of all associations without regard to when they were created. The need is so great that the elements addressed by Section 340 should be mandated for all associations, whenever they were created. With so many "shell" developers on the Alaskan contractor scene the absence of many of the requirements stated in Section 340 may never be able to be overcome. This, however, is not reason to allow associations for whom these elements do have very real moment to lose the benefits of acquiring all available records and histories of their non-profit corporate entities.

The acquisition of these records and histories could very well contribute to their future improvement, operational and administrative success.

I am a member of the Alaska Chapter, Community Associations Institute. The CAI, as it is more commonly referred to, is a non-profit organization: "Dedicated to the development and effective management of all forms of Homeowner Associations through research, education, guidance, and to provide a forum for informational exchange." The sorry state of the Alaskan private sector economy and particularly the realty industry suggests to me that the kind of leadership being offered through the CAI philosophy might very well find rich and rewarding application to the issues which Alaskans, in both public and private sectors, are presently engaging. A better informed public would perhaps become more responsible which in turn might provide a better foundation upon which and from which to initiate long term economic recovery.

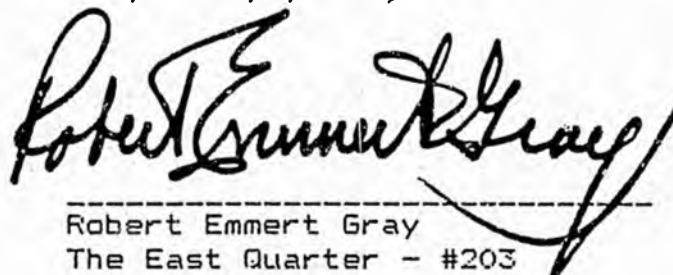
In support of my commentary above I shall enclose my letter, Enclosure (2) with its three enclosures, Enclosures (3), (4) and (5), to the Directors and Officers of my own Homeowner's Association for your perusal. This entire consideration appears to me to require that all the players, purchasers/sellers/managing agents/Association Directors & Officers, must acquire genuine knowledge about the process in which they are engaging themselves and the frequently single-sided view enunciated by sellers that common interest community living is responsibility free. Further, we must protect the owner occupied condominium unit homeowner from being treated as though such homeowner

is no more than a tenent, by the developer, or multi-unit owner/  
investor in any given community association.

The magnitude of this issue is so huge that I hesitate to burden you  
with unsolicited supporting documentation or testimony, either or both  
of which I would welcome to expand upon, given your request for  
specific or broad parameter support.

Trusting this matter to your good hands, I shall remain. . . . .

Very truly yours,



Robert Emmert Gray  
The East Quarter - #203  
4109 Lynn Drive  
Anchorage, Alaska 99508  
Tel: (907) 338-5881

Enclosures:

- (1) My letter dtd 16 Jan 1988 to Sen Tim Kelly - Subj: SB338, my recommended amendment of
- (2) My letter dtd 22 May 1986 to Directors/Officers of the East Quarter Condominium Association - Subj: Transition of Association Control from Developer to Homeowner - preparation, historical record turn over, actual assumption of operation & management
- (3) CAI Seminar Manual titled: Operations and Managment Of Community Associations, Section IV
- (4) CAI - GAP Report #3, Exhibit 2, titled: Association Transition Checklist
- (5) The Alaska Common Interest Ownership Manual derived from the Connecticut Common Interest Ownership Manual, supplemented by Attys Gurdon H. Buck and William L. McNall, and published by the Alaska Real Estate Commission, Section S, pages 58-60

20           Sec. 34.08.340. TRANSFER OF ASSOCIATION CONTROL. (a) Before or  
21 not more than 60 days after the termination of declarant control, the  
22 declarant shall relinquish control of the common interest community  
23 and the unit owners shall accept control. At the same time, the  
24 declarant shall deliver to the common interest community all property  
25 of the unit owners and of the common interest community held or  
26 controlled by the declarant including, but not limited to

27           (1) the original or a photocopy of the recorded declaration  
28 and each amendment to the declaration; if a photocopy is provided, it  
29 shall be certified by affidavit of the declarant, or an officer or

1 agent of the declarant, as being a complete copy of the actual record-  
2 ed declaration;

3 (2) a certified copy of the common interest community  
4 articles of incorporation, trust or partnership agreement;

5 (3) a copy of the bylaws;

6 (4) the minute books, including all minutes, and other  
7 books and records of the common interest community;

8 (5) any rules and regulations that have been adopted;

9 (6) resignations of officers and members of the executive  
10 board who are required to resign because the declarant is required to  
11 relinquish control of the common interest community;

12 (7) the financial records, including financial statements  
13 of the common interest community, and source documents since the  
14 incorporation of the common interest community through the date of  
15 turnover;

16 (8) common interest community funds or control of the funds  
17 of the common interest community;

18 (9) all tangible personal property that is property of the  
19 common interest community, represented by the declarant to be the  
20 property of the association or ostensibly the property of the  
21 association and an inventory of the property;

22 (10) a copy of the plans and specifications utilized in the  
23 construction or remodeling of improvements and the supplying of equip-  
24 ment to the common interest community and in the construction and  
25 installation of all mechanical components serving the improvements and  
26 the site, with a certificate in affidavit form of the declarant or an  
27 architect or engineer authorized to practice in the state that the  
28 plans and specifications represent, to the best of their knowledge and  
29 belief, the actual plans and specifications utilized in the

1 construction and improvement of the common interest community property  
2 and for the construction and installation of the mechanical components  
3 serving the improvements;

4 (11) insurance policies;

5 (12) copies of any certificates of occupancy that may have  
6 been issued for the common interest community property;

7 (13) any other permits issued by governmental bodies appli-  
8 cable to the common interest community property in force or issued  
9 within one year before the date the unit owners other than the de-  
10 clarant take control of the common interest community;

11 (14) all written warranties of the contractor, subcontractors,  
12 suppliers, and manufacturers, if any, that are still effective;

13 (15) a roster of unit owners and their addresses and tele-  
14 phone numbers, if known, as shown on the declarant's records;

15 (16) leases of the common elements and other leases to which  
16 the association is a party;

17 (17) employment contracts or service contracts in which the  
18 common interest community is one of the contracting parties or service  
19 contracts in which the common interest community or the unit owners  
20 have an obligation or responsibility, directly or indirectly, to pay  
21 some or all of the fee or charge of the person performing the service;

22 (18) all other contracts to which the common interest commu-  
23 nity is a party.

24 (b) The records shall be reviewed by an independent certified  
25 public accountant. The minimum report required shall be a review in  
26 accordance with generally accepted accounting standards as defined by  
27 regulation by the Board of Public Accountancy. The accountant per-  
28 forming the review shall examine to the extent necessary supporting  
29 documents and records, including the cash disbursements and related

1       paid invoices to determine if expenditures were for the common inter-  
2       est community purposes and the billings, cash receipts, and related  
3       records to determine that the declarant was charged and paid the  
4       proper amounts of assessments.

5               (c) Before the transfer of control from the declarant to the  
6       association, an inspection of the common areas and limited common  
7       areas subject to the association's control shall be completed by

8                       (1) an independent registered engineer, architect, or land  
9       surveyor;

10                      (2) an appraiser with the designation of Senior Residential  
11       Appraiser, Senior Real Property Appraiser or Senior Real Estate  
12       Analyst of the Society of Real Estate Appraisers;

13                      (3) a Residential Member or Member, Appraisal Institute, of  
14       the American Institute of Real Estate Appraisers; or

15                      (4) an individual with a designation established by  
16       regulation of the Alaska Housing Finance Corporation for fe.  
17       appraisers who certify the completion of construction.

18               (d) A report shall be prepared indicating the incomplete work  
19       and repairs needed and the method of completing the work and making  
20       the repairs. The transfer of control to the association shall be  
21       based upon the declarant's obligation to complete all repairs and  
22       finish all incomplete work within a reasonable time after transfer of  
23       control under representations in the public offering statement.

16 January 1988

Senator Tim Kelly  
Alaska State Legislature  
Pouch V (MS 3100)  
Juneau, Alaska 99811

Re: SB338, my recommended  
amendment of

Dear Senator Kelly:

I am a Homeowner in the East Quarter Condominium since purchasing a "unit" on 4 October 1985. I am, as well, a member of the East Quarter Condominium Association as of that date. Our Association was brought into being on 2 February 1984 under the auspices of the Horizontal Property Regimes Act, AS 34.07.

With the passage of AS 34.08 and its effective date of 1 January 1986, only thirteen Sections of AS 34.08 were cited under Sec. 34.08.040 to be applicable to pre-existing common interest communities, of which the East Quarter Condominium Association is one. For your information I shall list the Section numbers and titles of those applicable sections of the statute below:

1. 34.08.110: Construction and Validity of Declaration and bylaws
2. 34.08.120: Description of Units
3. 34.08.290: Merger or Consolodation of Common Interest Communities
4. 34.08.320: Powers of Unit Owner's Association (Certain sections only 1-6 and 11-16)
5. 34.08.420: Tort and Contract Liability
6. 34.08.470: Lien for Assessments
7. 34.08.490: Association Records
8. 34.08.590: Resales of Units
9. 34.08.670: Effect of Violations on Rights of Action
10. 34.08.720: Separate Titles and Taxation
11. 34.08.730: Applicability of Local Ordinances, Regulations and Building Codes
12. 34.08.740: Eminent Domain

13. 34.08.990: Definitions

My experience as a member of the East Quarter Condominium Association has occasioned me to learn that it takes a great deal of Homeowner motivation to make things work, including application of the appropriate statutes. Since entering the Association I have become an active member of the national Community Associations Institute (CAI) and through their resources the Alaska Chapter Community Associations Institute. I was privileged to attend the local seminar introducing the Uniform Common Interest Ownership Act (UCIOA) in February 1986.

I find that while the Horizontal Property Regimes Act as represented by AS 34.07 most certainly provided a level of protection in behalf of common interest communities the addition of AS 34.08 did not resolve some of the very real problems for which it purportedly was intended to resolve. One of these problems has become the purpose of my enclosed recommendation for your consideration.

**Recommendation:**

I request that SB 338 (page 3, line 9 through 18) Sec. 6 AS 34.08.040 be amended to also include AS 34.08.340 as an applicable section under that proposed amendment but excluding it from the exemption of applicability with respect to events and circumstances occurring prior the effective date of AS 34.08. In truth, make it apply retro-actively to AS 34.07.

You see, Senator Kelly, the transfer of control of our Association from the Developer to the Association was accomplished in a manner which permitted the Developer to continue to maintain effective control of the Homeowner Association even after it had purportedly been transferred from his administration.

In this case at hand his daughter and his sales representative, the first of whom owns one unit and the second of whom owns two units, occupied two of three positions as members on the Board of Directors and remained there from the date of transition, 1 November 1984 until our most recent annual meeting on 15 December 1987. On this occasion, the sales representative failed to be nominated for re-election by the Developer.

I believe this failure resulted by virtue of my having distributed a rather extensive examination of our Replacement Reserve Accounts and the AHFC Form 1073 which our managing agent had submitted to date. This examination, report and review suggested that there was ample reason for my call to have the Replacement Reserve Accounts receive an audit and to have them become a part of our annual auditing procedure. The Developer, however, did nominate his daughter and through his holding perhaps thirteen or fifteen unsold units assured her re-election once again as a member of the Board of Directors.

Sec. 34.08.340 establishes a list of events that are to take place upon the transition of administrative and operational control of the Association from the Developer to the Association. In the case of the transition of our Association, many of the events listed therein did not take place. I have made substantial effort in my attempts to attain exercise of these omissions, with very modest results. Lots of words but no action.

What with the controlling presence of persons as members of the Board of Directors, ie: the non-visible (to me as an active Homeowner member of the Association) participation of the Developer's daughter and the singular control exercised by the Developer's sales representative, I was unable to obtain any persuasive motivation to attain these goals even though I exerted a very considerable effort.

As a matter of fact, I was "appointed" as Secretary/Treasurer for 1986. I was advised by the Director who was the Developer's Sales Representative to look at the "books" once every month or so and that it would only take perhaps twenty minutes. I approached the hired managing agent with a request for copies of all the financial records provided monthly to the Board members and was refused. Of course, the By-Laws required the Secretary/Treasurer to exercise certain care of the finances of the Association. AS.34.08.330 (a) states that: "In the performance of their duties, the officers and members of the executive board are required to exercise the care of fiduciaries of the unit owners."

I resigned my position as Secretary/Treasurer immediately, because I recognized being denied an opportunity to exercise my fiduciary responsibilities, and wanted no further part in such an administration.

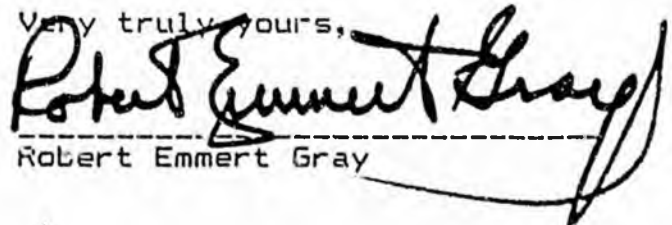
If AS 34.08 fails to permit Associations formed under AS 34.07 to require Developer performance of the obligations cited under Sec. AS 34.08.340 then such things as are endemic to the success of associations formed after the effective date of AS 34.08 will be denied to associations formed prior to the effective date of AS 34.08.

In all good conscience, the failure to include all pre-existing common interest communities, under the auspices of AS 34.08 in its entirety when it became effective, placed a very heavy burden upon those pre-existing common interest communities. My recommendation would serve to alleviate, in a very significant way, at least one of many remaining shortcomings residing in AS 34.07.

I would be pleased to offer further commentary and documentation were you to find it desirable.

Robert Emmert Gray  
The East Quarter - #203  
4109 Lynn Drive  
Anchorage, Alaska 99508  
Tel: 338-5881

Very truly yours,

  
Robert Emmert Gray

22 May 1986

Board of Directors and Officers of  
The East Quarter Condominium Association  
Director Dan Troxler  
Director Susan Crosson  
Director Sandy Pickthall  
President Jim Sava  
Vice President Diane Lempke

Re: Transition of Association  
Control from Developer to  
Homeowners - preparation,  
historical record turn  
over, actual assumption of  
operations & management

Directors and Officers:

The above referenced subject matter of this correspondence succinctly summarizes the entire process of transition. The scope of this issue, however, requires it being addressed in sufficient detail such that many of the vital events concerned with the process itself will not be lost from the layperson's conscious awareness and recognition of importance.

The texts of the quotations below are taken from both the Seminar Manual, titled: "Operations and Management of Community Associations", published by the Community Associations Institute; and from: "The Alaska Common Interest Ownership Manual", published by the Alaska Real Estate Commission. The quotation sources will be identified.

Perhaps the most important issues to keep in mind regarding the transition process is that the developer designed the Association to become a non-profit incorporated entity at the time of its becoming an institution under the statutes of the State of Alaska. This was the stature of the entity he subsequently turned over to the homeowners on the occasion of that 1 November 1984 meeting wherein he relinquished control to the homeowners' Association. A number of events should have taken place before, during, and perhaps even after this formal transition. Whether or not they actual took place is a matter of continuing interest and concern to all homeowners of record at that time and since.

I wish to bring to your attention that the transition process varies from Association to Association. Some of the matters concerned with this process carry greater importance or lesser importance depending upon the instances involved. However, when applied to the East Quarter Condominium Association, the fact that the recommended schedule was or was not followed does not prevent, prohibit, or diminish the need for a review of the events and engaging the necessary effort to correct inequities, fill in missing segments, expand upon inadequacies, develop record keeping facilities such that

a vastly improved capacity for future administrative and management functions could be accommodated. The issues contained in the "Exhibit: Association Transition Checklist" which will subsequently be discussed are significant examples of this need.

One thing we know for a certainty, the East Quarter Condominium Association, as of 22 May 1986, still has not reinstated its non-profit incorporated status which was involuntarily dissolved by the State of Alaska Commerce Department office of Banking, Securities, and Corporations on 14 February 1986 for the apparent failure of our Management Firm to submit the required Biennial Report correctly prepared and their further failure to resubmit a corrected report upon the return of the initial submission by the State Agency to whom it was submitted in the first place.

This matter was initially brought to the attention of the Board of Directors through my correspondence dated 11 April 1986. The matter was again discussed in my correspondence to the Board dated 5 May 1986. I provided a detailed review of the issues relating to the corporate status of the Association in correspondence dated 8 May 1986. The matter is one of continuing interest and concern. It could and should be promptly resolved, if indeed, it has not yet been done.

The following quotations are taken from the Seminar Manual titled: "Operations and Management of Community Associations", published by the Community Associations Institute.

"THE TRANSITION PROCESS"

". . . . achieve an understanding of the basic process of transition of Association control from the developer to the owners and . . . . to achieve successful transition."

". . . . Objectives:"

- "1. To define transition as a process for transfer of control rather than a single event.
3. To review the developer's and the homeowners' roles in successful transition.
4. To define and specify the tasks that must be accomplished upon completion of transition."

"Introduction:"

[My caps]

"TRANSITION OF ASSOCIATION CONTROL FROM THE DEVELOPER TO THE OWNERS IS CONSIDERED BY MOST PRACTITIONERS TO BE THE MOST CRITICAL PHASE IN THE ASSOCIATION'S EXISTENCE. DONE PROPERLY, THE OWNERS WILL BECOME GRADUALLY INDEPENDENT OF DEVELOPER SUPPORT AND CONTROL AND WILL MOVE TO SELF GOVERNANCE WITH THE KNOWLEDGE AND EXPERIENCE NEEDED TO MEET

THAT RESPONSIBILITY. IF DONE IMPROPERLY, THERE WILL BE GREAT DISSENT, SUSPICION, CONFLICT AND DISARRAY FOR THE ASSOCIATION."

[The apparent shortcomings being experienced by the present Association administration processes bear witness to the truth of the above statement. Subsequent quotations and reference material will expand upon the scope of difficulties which our Association has, is, and apparently will be brought to suffer.]

"What is Transition?"

"A. Transition is an orderly process for the transfer of Association control and responsibility from the developer to the unit owners."

- "1. Transition is not a single event, such as an election or turnover or acceptance of common property.
2. The transition process begins with the sale of the first unit and activation of the Association and concludes with the sale of the last unit and the departure of the developer.
3. The elements of a successful transition process include:
  - a. Well-drafted legal documents setting forth minimum legal requirements for transition.
  - b. Owner education by the developer regarding Association operations.
  - c. Gradual involvement and training of the owner leaders in the process of governance and administration.
  - d. Gradual reduction of direct developer involvement in Association decision making."

[My caps]

"e. PROVIDING THE HOMEOWNER LEADERS WITH NECESSARY HISTORICAL CONSTRUCTION AND FINANCIAL INFORMATION TO CARRY ON THEIR JOB."

"Developer's Role in Transition"

"The attitude and approach of the developer toward transition will substantially dictate success. Developer care and attention at the outset, thinking through the process, creating systems for owner education and involvement and attention to long-term information needs

- "A. Developer sets the premise and formal process at the outset:
1. Selects the legal steps and procedures (as outlined above) consistent with the statute.
  2. Sets the time frame within which formal transition occurs."
- "B. Establishes program of owner education and involvement.
1. Education
    - a. Sales personnel provide basic information to owners regarding association obligations, owner responsibilities, etc.
    - c. Periodic informational meetings. . . . .

2. Involvement

- a. Sales personal identify/recruit owners for involvement.
- b. Implement gradually and active/meaningful committee process . . . . .
- c. Identify leaders . . . . .
- d. Developer personnel gradually disengage at all levels (Committee and Board) as sales continue and owners demonstrate capacity to govern."

"C. Association Information Needs"

[My caps]

"FOR THE ASSOCIATION GOVERNED BY OWNERS TO FULLY CARRY ON AFTER THE DEVELOPER TRANSITION, A COMPLETE HISTORY AND RECORD OF ASSOCIATION AFFAIRS DURING DEVELOPER CONTROL MUST BE MAINTAINED AND AVAILABLE TO THE ASSOCIATION LEADERS AS THEY ASSUME THEIR RESPONSIBILITIES."

"1. Cause to be maintained full written records of association decisions during developer control.

- a. Mairtain Minutes of all Board and Committee Meetings.
- b. mainvain a Book of Resolutions of significant Board actions."

"2. Maintain financial records.

- a. Complete financial records, ledgers, reports, bank statements, etc.
- b. Budgats, budget materials and backup.
- c. Assesment records, documents, correspondence."

"3. Maintain legal and personnel records.

- a. Contracts, agreements and other legal obligations."

This foregoing concludes quotations from the text of the referenced manual. The following quotations are taken from an excerpt included in the referenced manual but originates as an enclosure to the CAI-GAP Report 3. This excerpt from the CAI-GAP Report 3 included in the Manual is titled: "Exhibit: Association Transition Checklist." I shall cite quotations from this "Exhibit." I enclose a copy of the full text of the "Exhibit" for your reference.

"The following information, documents and materials should to the fullest extent possible be provided to the owner-controlled Association Board by the developer. (Originally prepared for California Associatons but has been modified here for nationwide applicability)."

"Copies of the Articles of Incorporation:

- a. Copies of filing for incorporation and acceptance by the Secretary of State.

- b. Copies of annual state franchise tax filings (if applicable) since the date of incorporation.
- c. Copies of annual Federal Tax returns.
- d. Copies of any tax exempt election made by the developer's Board and filed with the State and Federal Government."

"A complete audit of the Association's books prior to transfer to the owner controlled Board:

- a. Provide a complete set of financial books, records and ledgers dating back to the first month of operations.
- b. Obtain an audit from a certified public accountant prior to acceptance.
- c. Provide an audit report to all owners with a copy of the current budget.
- d. Provide a complete set of all bills paid by the Association."

"A complete set of all Association Board Minutes and Resolutions. Special care should be taken to see that all mandated events as specified in the legal documents have been complied with. Adoption of rules concerning use restrictions should be reviewed to determine if the rules were adopted as the result of appropriate public notices and discussions with the affected owners. Failure to adopt rules by appropriate procedures may make the rules unenforceable."

"A complete list of all owners, name and address of mortgage companies along with the individual loan number of each owner. Require that all future sales be registered with the Association."

"A COMPLETE SET OF "AS-BUILT" DRAWINGS OF ALL BUILDINGS, FACILITIES, IRRIGATION, WATER AND SEWER SYSTEMS, ETC., THAT THE ASSOCIATION WILL BE RESPONSIBLE FOR MAINTAINING, IF AVAILABLE."

[The above information is vital in achieving efficient and economical maintenance, repair and restructuring (ie: improvements and replacements). Contractors would be able to bid on what they knew they "would" encounter rather than on what they could only "guess they might" encounter.]

"As many sets of tract maps as possible. These are a great help in planning and maintenance of the grounds."

"A complete set of landscape drawings and specifications showing all plants, lawns, etc."

"A schedule of useful expected life of materials and copies of bonds or warranties where applicable, including:

- a. Roofs
- b. Streets
- c. Paint
- d. Mechanical equipment, e.g. . . . . elevators, etc."

"A schedule of quantities, such as:

- a. Square feet of roof

- b. Square feet of private roadway
- c. Square feet of lawn surface, ground cover, number of trees
- d. Square feet of painted surface area"

"Inventories of all Association property.

Copies of warranties on all equipment owned or maintained by the Association."

"A list of manufacturers of paints, roofing materials, etc., used in common areas, with the specifications."

"A complete list of the construction sub-contractors and the principal men within each company, with the name of the foreman responsible for the installation and the names of all officers of the general contractor and th developer if they are different."

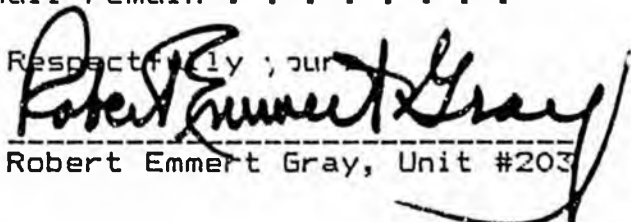
The last document is taken from the Alaska Uniform Common Interest Ownership Manual and is an example of a Proposed Agenda for a new Association's first meeting of the New Executive Board. Its application at this point lies in the enumeration of by and large all the elements which should be addressed by any Board of Directors on a continuing basis. One might say that they are the chronology of the Association's interests. I will not cite quotations from this last document believing it is most effective for you to review it directly. It brings all the issues discussed todate into a perspective from which any Board of Directors may vigorously engage each of the issues.

The foregoing most certainly confirms the importance of the trnsition process. Whether or not all the recommended processes were actually engaged is less important than that the appropriate events which relate to ouw own Association are, indeed, identified and undertaken to a successful conclusion. These can most easily be undertaken while the Association is in its formative years. When the events, persons, and materials are allowed to get too far removed, the recovery process can only become a far more sticky issue than if the issues were to be faced early on.

It appears to me that imposing a degree of foresight early on would be a most welcome quality to pass on to subsequent Directors and Officers of the Association. The probable impact of such a quality would be first noticed in surpressing subsequent maintenance and repair costs which inevitably will arise before the Board of Directors. Those who presently serve are shielded from this eventuality because of the newness of the structure. When it commences to age and deteriorate, the issues become more frequent and grow in scope and cost. Preparing now for those anticipated events in the future can be and is as much a FIDUCIARY REPSONSIBILITY of the present Board of Directors and Officers as of those who serve when the events herein referred occur.

Trusting this matter to your hands, I shall remain . . . . .

East Quarter Condo - #203  
4109 Lynn Drive  
Anchorage, Alaska 99508  
Tel: (907) 338-5881

Respectfully,  
  
Robert Emmert Gray, Unit #203

The Transition Process

Session Goal: To achieve an understanding of the basic process of transition of association control from the developer to the owners and alternative approaches to achieve successful transition.

Session Objectives:

1. To define transition as a process for transfer of control rather than a single event.
2. To review the legal basis for initiating and completing transition.
3. To review the developer's and the homeowners' roles in successful transition.
4. To define and specify the tasks that must be accomplished upon completion of transition.

Introduction:

Transition of association control from the developer to the owners is considered by most practitioners to be the most critical phase in the association's existence. Done properly, the owners will become gradually independent of developer support and control and will move to self governance with the knowledge and experience needed to meet that responsibility. If done improperly, there will be great dissent, suspicion, conflict and disarray for the association.

Section OutlineI. What is transition?

- A. Transition is an orderly process for the transfer of association control and responsibility from the developer to the unit owners.
  1. Transition is not a single event, such as an election or turnover or acceptance of common property.
  2. The transition process begins with the sale of the first unit and activation of the association and concludes with the sale of the last unit and the departure of the developer.
  3. The elements of a successful transition process include:
    - a) Well-drafted legal documents setting forth minimum legal requirements for transition.
    - b) Owner education by the developer regarding association operations.
    - c) Gradual involvement and training of the owner leaders in the process of governance and administration.
    - d) Gradual reduction of direct developer involvement in association decision making.
    - e) Providing the homeowner leaders with necessary historical construction and financial information to carry on their job.

## II. Legal Basis for Transition

### A. Statutory Considerations

1. The state condominium statute may set forth broad parameters or outside limits within which transition occurs.
  - a) If the statute deals with transition, it typically is based on a percentage of units sold, eg, "an election by owners occurs by 75% of sales, etc."
  - b) May permit the use of a time frame in conjunction with a limit based on percent of units settled.
  - c) Some state laws and the Uniform Condominium Act provide for gradual takeover of board---such as providing for 25% of board elected by owners for each 25% of sales, with the developer off the board by 75% of sales.
2. Few state statutes deal with transition of homeowner associations:
  - a) Those that do, such as California, follow patterns described above for condominium---sets broad parameters.
  - b) The new Uniform Common Ownership Interest Act, adopted by Connecticut and under consideration in a number of states, sets similar parameters for HOAs as for condos in the UCA.

### B. Association Legal Documents

The legal documents, within statutory parameters, if any, should define precisely the process for transition. There are five basic approaches to transition within the documents.

1. Gradual addition of owners to the association board at specified levels or percentages of sales.

The use of an "advisory board" or "interim board" of owners to work with the developer-controlled association board in making association-related operational decisions until an owner election is held.

3. The early transfer of board control to owners through an election with developer retaining a right to review and approve certain types of decisions which might affect the development process.
4. In HOA's, the use of a weighted voting system where the developer-owned units carry a weighted vote and as units are sold, the developer gradually loses voting power until complete majority shifts at some point, generally 75% of closings.
5. Some combination of one or more of the above, such as with the use of an "interim board" and weighted voting system.

III. Developer's Role in Transition

The attitude and approach of the developer toward transition will substantially dictate success. Developer care and attention at the outset, thinking through the process, creating systems for owner education and involvement and attention to long-term information needs at sales completion will assure that success.

A. Developer sets the premise and formal process at the outset:

1. Selects the legal steps and procedures (as outlined above) consistent with the statute.
2. Sets the time frame within which formal transition occurs.
3. Training, orientation of developer staff to style and approach.

B. Establishes program of owner education and involvement.

1. Education

- a) Sales personnel provide basic information to owners regarding association obligations, owner responsibilities, etc.
- b) Periodic newsletter on project progress and association activities.
- c) Periodic informational meetings/socials.

2. Involvement

- a) Sales personnel identify/recruit owners for involvement.
- b) Implement gradually an active/meaningful committee process with full committee changeover to owners by completion of transition of Board.
- c) Identify leaders and those who emerge from initial committee process, select to fill the "Advisory Board" or initial homeowner seats on Board, depending on approach utilized.
- d) Developer personnel gradually disengage at all levels (committee and Board) as sales continue and owners demonstrate capacity to govern.

C. Association Information Needs

For the association governed by owners to fully carry on after the developer transition, a complete history and record of association affairs during developer control must be maintained and available to the association leaders as they assume their responsibilities.

1. Cause to be maintained full written records of association decisions during developer control.
  - a) Maintain Minutes of all board and committee meetings.
  - b) Maintain a Book of Resolutions of significant board actions.
2. Maintain financial records.
  - a) Complete financial records, ledgers, reports, bank statements, etc.
  - b) Budgets, budget materials and backup.
  - c) Assessment records, documents, correspondence.
3. Maintain legal and personnel records.
  - a) Contracts, agreements and other legal obligations.
  - b) Personnel and employment records.

NOTE: Refer to CAI's GAP Report #3 - "Transition from Developer Control" for a detailed treatment of this subject and for suggested strategies, checklists, etc.

SUGGESTED READINGS:

GAP Case Study #1: Focus on Transition, published by CAI. 4 pp.

GAP Report #3: Transition from Developer Control, published by CAI. 16 pp.

Figure 2.

## Exhibit: Association Transition Checklist

The following information, documents and materials should to the fullest extent possible be provided to the owner-controlled association Board by the developer. (Originally prepared for California associations but has been modified here for nationwide applicability).

- Copies of the Articles of Incorporation:
  - a. Copies of filing for incorporation and acceptance by the Secretary of State.
  - b. Copies of annual state franchise tax filings (if applicable) since the date of incorporation.
  - c. Copies of annual Federal Tax returns.
  - d. Copies of any tax exempt election made by the developer's Board and filed with the State and Federal Government.
- Bylaws. Copies of the bylaws including all properly adopted amendments.
- Copies of the Declaration or Master Deed as recorded and filed as part of the deed restrictions on all lots or units and evidence that they have been provided to each owner.
- Copies of the budget for the association, including all backup worksheets.
- Copies of "public report," "offering statement," or other disclosure document, if any, required by law to be provided to purchasers. (Not all states or localities require such documents although in some cases appropriate HUD-required documents would be desirable.)
- A complete audit of the association's books prior to transfer to the owner-controlled Board:
  - a. Provide a complete set of financial books, records and ledgers dating back to the first month of operations.
  - b. Obtain an audit from a certified public accountant prior to acceptance.
  - c. Provide an audit report to all owners with a copy of the current budget.
  - d. Provide a complete set of all bills paid by the association.
- A complete set of all Association Board Minutes and Resolutions. Special care should be taken to see that all mandated events as specified in the legal documents have been complied with. Adoption of rules concerning use restrictions should be reviewed to determine if the rules were adopted as the result of appropriate public notices and discussions with the affected owners. Failure to adopt rules by appropriate procedures may make the rules unenforceable.
- A complete list of all owners, name and address of mortgage companies along with the individual loan number of each owner. Require that all future sales be registered with the association.
- A complete set of "As-Built" drawings of all buildings, facilities, irrigation, water and sewer systems, etc., that the association will be responsible for maintaining, if available.
- As many sets of tract maps as possible. These are a great help in planning and maintenance of the grounds.
- A statement that the street, traffic, safety and regulatory signs are installed in conformance with applicable state or local ordinances and with the association's legal documents.
- A complete set of landscape drawings and specifications showing all plants, lawns, etc.
- Confirmation from appropriate local authorities that the fire hydrants have been placed under the local government maintenance plan.
- Confirmation that the city or county emergency communications centers have mapped the association so that emergency vehicles can be dispatched. Special attention should be taken that the addresses on the private streets are visible to the emergency personnel.
- A statement of determination of public agency or utility responsibility for the maintenance of the street lights and sewer systems.
- A schedule of useful expected life of materials and copies of bonds or warranties where applicable, including:
  - a. Roofs
  - b. Streets
  - c. Paint
  - d. Mechanical equipment, e.g., [redacted] elevators, etc.
- A schedule of quantities, such as:
  - a. Square feet of roof
  - b. Square feet of private roadway
  - c. Square feet of lawn surface, ground cover, number of trees
  - d. Square feet of painted surface area
- Inventories of all Association property.
- Copies of warranties on all equipment owned or maintained by the association.
- A list of manufacturers of paints, roofing materials, etc., used in the common areas, with the specifications.
- A statement that appropriate public agencies have or have not released the completion bonds on the improvements.
- Original copies of all contracts signed by the developer's Board with contractors for service, including a complete list of sub-contractors employed by the association.
- A complete list of the construction sub-contractors and the principal men within each company, with the name of the foreman responsible for the installation and the names of all officers of the general contractor and the developer if they are different.

This checklist has been modified for this report from a "Checklist for New Associations" prepared by Douglas Christison, Jr. for the Executive Council of Homeowners, San Jose, California. Our thanks to Mr. Christison for permission to use this material.



- h. Books, records and ledgers
  - (i) Account for each Unit
  - (ii) Capital expenditure resolutions
  - (iii) Reserve fund account certificates
  - (iv) Current operating budget
  - (v) Opinion on judgments & claims
- i. Association check book, banking cards
- j. Personal property and inventory
- k. Complete set of drawings and plans
- l. Insurance policies
- m. Certificates of occupancy
- n. Governmental permits
  - wetlands
  - sewer & water
  - zoning
- o. Bonds and warranties for streets, roofs, paint, mechanical equipment, lawn mowers, etc.
- p. Statement of account for each owner
- q. Copies of notices from mortgager - names of "eligible mortgagee's"
- r. Account of balance in Reserves, name of trustee, transfer of control of beneficial interest
- s. Copies of all Public Offering Statements as amended from time to time
- t. Resale certificates issued by Association
- u. Employment contracts with Association contractors
- v. Unit owner's file
- w. Plans and floor plans referred to in the Public Offering Statement including plats
- x. All tax returns for fiscal years since Declaration
  - Federal §528 election form 1120H
  - State (if no election)
- y. Insurance trust - original
- z. Building and Grounds Punch List
- aa. Keys
- bb. Minutes of Old Steering Committee

10. Set up P.O. Box as Official Address of the Association

11. Discuss and accept drafts of proposed permanent resolutions:

- a. Ratification of Initial Rules
- b. Fines
- c. Failure to Pay Common Charges
- d. Architectural Review
- e. Access to Units
- f. Certificate of Payment of Assessments
- g. Complaints and Disputes
- h. Rulemaking
- i. Roll Book
- j. Accountant
- k. Agent for Service and Counsel
- l. Insurance Agent

- m. Fiscal Year
- n. Capital Reserve Trust
- p. Interim Management Agreement
- q. Service & Maintenance Policy

12. Set date for next meeting

13. Adjourn

17 February 1988

Senator Tim Kelly  
Senator Rick Halford  
Representative Walter Furnace  
Representative Ramona Barnes  
Representative Sam Cotton  
Representative Randy Phillips

Re: Constituent meeting  
13 Feb 88 Muldoon El-  
ementary School- re  
my remarks on SB 338

Ma'm and Gentlemen:

I wish to forward to each of you a copy of my letter to Senator Jan Faiks, prime sponsor of SB 338.

As I commented to Senator Faiks, the magnitude of the issue dealing with common interest communities would be best served by bringing all such properties under AS 34.08. However, in the absence of such an action I do, indeed, welcome efforts that support and are directed toward achieving that ultimate result.

One of the problems with multiple housing in general and in Alaska in particular lies with the State of Alaska effectively subsidizing market rates to such an extent that persons who were financially able only to rent were induced into entering the housing market as buyers. Now that market forces have caught up with the housing market another effort to subsidize those using the AHFC financing options has appeared in the form of HB 432. It is my strong belief that those interested in "swapping mortgages" with AHFC do not wish to alleviate their financial positions by "trading down" so much as to up grade their mortgage values by "trading up" at AHFC expense.

My primary interest is in salvaging that which we already have by virtue of placing into existing law the tools and motivation by which common interest community homeowners can strengthen their associations and engage the task as salvors of each of our particular association entities.

I do not believe that the State of Alaska can or even should be asked to rescue its citizenry from every action of poor judgement that such a citizenry makes. Market forces have done, can do and will again perform this kind of rendering to restore balance into our economy. It did it before our oil wealth. It will do it again if we just allow it to happen.

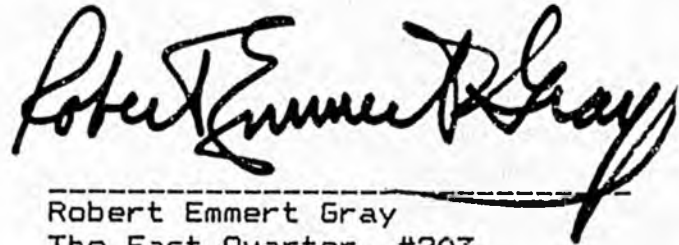
I welcome each opportunity to discuss these pressing matters of interest with each of you. I again reference my letter to Senator Faiks, in that I hesitate to burden each of you with additional unsolicited supporting documentation or testimony, either or both of

*Enclosure (2)*

which I would be pleased to expand upon, given your need and/or interest.

With kindest best wishes for each of your successful engagement of all those many difficult and distressing issues facing your respective legislative bodies, I shall remain. . . . .

Very truly yours,

A handwritten signature in cursive script that reads "Robert Emmert Gray". The signature is written in dark ink and is positioned above a horizontal dashed line.

Robert Emmert Gray  
The East Quarter, #203  
4109 Lynn Drive  
Anchorage, Alaska 99508  
Tel: (907) 338-5881

Alaska State Legislature

PRESIDENT

907-465-3755



JAN FAIKS  
POST OFFICE BOX V  
JUNEAU, ALASKA 99811

Senate

March 6, 1988

Robert Emmert Gray  
The East Quarter - #203  
4109 Lynn Drive  
Anchorage, Alaska 99508

Dear Mr. Gray:

Thank you for your letter regarding Senate Bill 338, along with the backup information. I read it with great interest.

SB 338 is currently undergoing review in the Senate Judiciary Committee, for purposes of soliciting public comment and making appropriate changes. Your comments at this time are therefore most welcome.

My office is working closely with attorney William McNall on the issues raised by this bill. As you know, Mr. McNall is the state's leading legal expert on common interest property, and he has done considerable work with CAI. Accordingly, I am forwarding your suggestions to him, for his thoughts on incorporating them into the bill.

Thanks again for your input. Please feel free to contact me anytime on this or any other matter of concern to you.

Sincerely,

A handwritten signature in black ink, appearing to be "Jan Faiks".

Jan Faiks  
Senator

JF:cc

OUT OF SESSION

3111 C STREET, SUITE 525 ANCHORAGE, ALASKA 99503 907-561-7610

Enclosure (3)

# Senator Rick Halford



Senate District 1  
Chugiak, Eagle River, East Anchorage, Fort Richardson

Senate Finance Committee  
Co-Chairman

March 19, 1988

Robert Emmert Gray  
The East Quarter, #203  
4109 Lynn Drive  
Anchorage, Alaska 99508

Dear Mr. Gray:

Thank you for your letter and informational packet regarding Senate Bill 338 as a follow-up to your comments at our February district meeting.

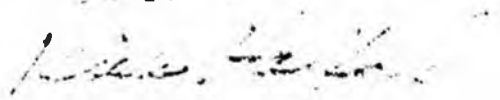
I believe that your interest in salvaging condominium associations by placing into existing law tools which would allow common interest community homeowners to strengthen their associations for the betterment of the individuals who live within them is certainly commendable. I am glad that you sent your comments to Senator Jan Faiks.

Senate Bill 338 is currently in the Senate Judiciary Committee. It has not been scheduled for a hearing to date, but I understand that it is being worked on in a subcommittee and will come before the full committee once that work is complete. There are two members of the subcommittee, Senator Jan Faiks and Senator Pat Rodey. I'm pleased to see you contacted Senator Faiks, and I encourage you to write Senator Rodey. I also encourage you to write Senator Kerttula, the Chairman of Judiciary, regarding your interest in the bill.

Senator Faiks informed me that your packet of material was forwarded to Bill McNall, an attorney who helped write the bill. He has done extensive work with the Community Association Institute.

I appreciate you contacting me on this issue. Please continue to keep in touch.

Sincerely,

  
Senator Rick Halford  
Co-Chairman  
Senate Finance Committee

ALASKA MORTGAGE BANKERS ASSOCIATION

P.O. BOX 9-2691 / ANCHORAGE, ALASKA 99509-2691

*copied  
Falks 6/5/88  
(by hrs)  
also  
Baldwin*

*Bett info*

February 17, 1988

FEB 20 1988

Senate Judiciary Committee  
Jalmar M. Kerttula, Chairman  
Arliss Sturgelewski, Vice Chairman  
Joe P. Josephson  
Rick Halford  
Patrick Rodey

Re: Senate Bill 338  
Uniform Common Interest Ownership Act

The Legislative Committee of Alaska Mortgage Bankers Association has reviewed Senate Bill 338 and requests the following comments be considered by the Legislature:

The bill contains two sections which would adversely affect ability to obtain financing on homes in a common interest community:

1. The right of Associations to evict tenants if the tenant, after due notice, does not pay dues to the Association in lieu of rent to the unit owner, and
2. Extension of the six month priority of delinquent Association dues to "each action to collect".

Attached is a letter from Mr. Paul Vergets, Regional Counsel for the Federal National Mortgage Association (FNMA) regarding the above items. It is the opinion of the Alaska Mortgage Bankers Association that other Investors and/or insurers will take a similar view.

The eviction of tenants clause also raises another issue. Assignments of rent have been activated in many instances, whereby the use of rental proceeds is no longer a matter of choice for the unit owner or the tenant, but that of a third party.

We strongly urge these sections be deleted from S.B. 338.

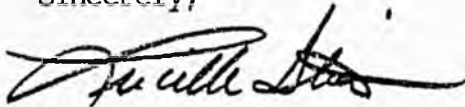
The bill also contains a section which legislates certain bookkeeping and audit procedures. We question the effectiveness of legislating such functions; we also question any action which increases the cost to Associations at a time when many are already having difficulty in meeting even basic expenses such as utilities.

Section 34.08.045 (b) and (c) should be changed to provide for approval of completed work by parties in addition to the Association, such as governing agencies, insurance companies and/or lenders, as applicable. We would also recommend a longer time period for payment to the contractor for wages as it may be physically impossible to obtain the necessary approvals and/or signatures within one business day.

Many of the changes which are included in the bill demonstrate a need for education of unit owners and Associations. A vehicle for education and guidance exists in CAI (Community Associations Institute). We urge continued education rather than legislation as a solution to the problems of Associations.

We appreciate the opportunity to comment. Members of the association are available to further discuss these issues at your convenience.

Sincerely,

A handwritten signature in cursive script, appearing to read "Lucille Stietz".

Lucille Stietz  
Chairman, Legislative Committee

January 7, 1988



Fannie Mae

VIA FEDERAL EXPRESS

Ms. Lucille Stietz  
Chairman, Legislative Committee  
Alaska Mortgage Bankers Association  
P.O. Box 9-2691  
Anchorage, AK 99509-2691

Re: Uniform Common Interest Ownership Act

Dear Ms. Stietz:

Thank you for your letter of December 9, 1987 asking for Fannie Mae's viewpoint on proposed amendments to the Alaska Common Interest Ownership Act.

As I read the proposed bill it would have two primary effects on mortgage lien priority. The first is that a tenant could be required by the HOA to pay its rental payments to the HOA to apply on delinquent HOA dues. If the tenant failed to do so, he or she could be evicted. Secondly, the six month priority rule has been amended to apparently create a series of successive six month periods, each of which would be commenced by a mere notice to the lender.

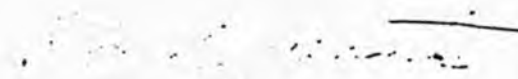
It is of course clear that each of these provisions would have the effect of substantially impairing the lien priority of lenders, beyond the one time six month priority which we have agreed to.

I have discussed this bill with our highest management and it has been decided by Fannie Mae that the adoption of either of these provisions, by any project, would render that project ineligible for Fannie Mae financing. If any project currently approved by Fannie Mae would adopt either of such provisions, Fannie Mae project approval would be terminated. The same policy would apply if the effect of this bill would be to impose such provisions upon a project as a matter of law, without further action by the project itself.

Ms. Lucille Stietz  
January 7, 1988  
Page 2

We appreciate your calling this matter to our attention. If I can be of further assistance to you, or to any member of the legislature, in explaining the reasons for our position, please do not hesitate to call me.

incerely,

  
Paul R. Vergets

PRV/cl

January 7, 1988

VIA FEDERAL EXPRESS



Ms. Lucille Stietz  
Chairman, Legislative Committee  
Alaska Mortgage Bankers Association  
P.O. Box 9-2691  
Anchorage, AK 99509-2691

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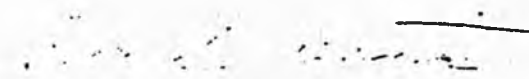
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Ms. Lucille Stietz  
January 7, 1988  
Page 2

We appreciate your calling this matter to our attention. If I can be of further assistance to you, or to any member of the legislature, in explaining the reasons for our position, please do not hesitate to call me.

Sincerely,

  
Paul R. Vergets

PRV/cl

STATE OF ALASKA  
THE LEGISLATURE

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

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

February 10, 1988

SUBJECT: Rights and responsibilities under Uniform  
Common Interest Ownership Act  
(SB 338)

TO: Senator Jay Kerttula

FROM: Richard A. Bradley  
Legislative Counsel

Beth Kerttula has requested a sectional analysis of the above described bill.

As a preliminary matter, note that a sectional analysis or summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

I. Amendments to AS 34.03, the Uniform Residential Landlord and Tenant Act.

Section 1 amends AS 34.03.070, SECURITY DEPOSITS AND PREPAID RENT. It requires a unit owner landlord within a common interest community to provide the tenant with specified documents relating to the community: "declaration, bylaws, and rules and regulations"; the goal is to permit the community to enforce those requirements that it could enforce against a unit owner against a tenant of a unit owner.

Section 2 amends AS 34.03.150, RULES AND REGULATIONS (OF A LANDLORD). This provision provides that the specified documents of the community are enforceable against a tenant. It requires the executive board of the community to provide a tenant with copies of any document that it wishes to have the tenant comply with. After receiving the documents, a tenant who fails to comply with the requirements may be evicted by the community.

Section 3 of the bill amends AS 34.03.220, NONCOMPLIANCE WITH RENTAL AGREEMENT:FAILURE TO PAY RENT. This section provides that the executive board of a community may evict a tenant (of a unit owner) for violation of the duties imposed on the tenant of a unit owner under AS 34.08.320 [POWERS OF UNIT OWNERS' ASSOCIATION).

Section 4 of the bill amends AS 34.03.310(a), RETALIATORY CONDUCT PROHIBITED. Retaliatory conduct by a landlord against a tenant for the tenant's having paid amounts due by the landlord (unit owner) to a community are prohibited.

II. Amendments to AS 34.08, the Uniform Common Interest Ownership Act.

Sections 5 and 6 of the bill amend AS 34.08.040. The section addresses the "applicability" of UCIOA and states a truism. It seems that each amendment to UCIOA will require an amendment to this section yet if AS 34.08.040 and all of its amendments were repealed, there would be no loss.

Section 7 of the bill amends AS 34.08.255(c), AMENDMENT OF A DECLARATION WHERE FEWER THAN 50 PERCENT OF UNIT OWNERS APPROVE. The amendment adds the phrase "in attendance at a properly noticed meeting" twice within the subsection. I understand that the purpose of the amendment is to clarify quorum requirements.

Section 8 of the bill amends AS 34.08.320(a), POWERS OF UNIT OWNERS' ASSOCIATION. This section, like several earlier sections, relates to the power of a community to evict a tenant of a unit owner for the failure of the tenant to comply with the basic documents of the community, usually because the unit owner has also failed to comply with the same documents. See paragraph (a)(15).

Section 9 of the bill adds a new Sec. 34.08.375, DUTIES OF THE EXECUTIVE BOARD. The provision added relates to the financial affairs of the community.

Section 10 of the bill amends AS 34.08.380, UPKEEP OF COMMON INTEREST COMMUNITY, by adding several subsections. Sec. 34.08.380(d) provides that a health and safety provision of the state or a municipality may not require an association to employ staff if the amenity addressed by the requirement is available only to unit owners or their guests. Sec. 34.08.380(e) provides that an association may

request the removal without notice of an improperly parked vehicle under AS 28.11, ABANDONED VEHICLES. Sec. 34.08.-380(f) - (h) authorize the association to remove a vehicle parked on common elements of the association, provides for the notice requirements involved, and addresses liability arising out of the removal of the vehicle.

Section 11 of the bill adds a new Sec. 34.08.405, VACANCIES IN THE EXECUTIVE BOARD. The section addresses the situation where there are vacancies in the executive board resulting the inability of the board to reach a quorum necessary to call an election and thus fill the vacancy. It requires notice to the board and on its failure to act, permits the appointment of a receiver to manage the affairs of the association until the vacancies are filled.

Section 12 amends AS 34.08.470(b), LIEN FOR ASSESSMENTS. The amendments are technical.

Section 13 amends the chapter by adding a new Sec. 34.08.485, CONTRACTOR AND MATERIALMAN LIENS. The section establishes procedures under which contractors' liens may arise, be established, and discharged. It also limits the situations under which AS 34.35 liens may be established.

### III. Amendments to AS 34.35, Liens.

Section 13 of the bill amends AS 34.35.050, LIEN FOR LABOR OR MATERIALS FURNISHED. Section 15 of the bill amends AS 34.35.435, LIEN FOR WAGES. Each amendment qualifies the general principles established in the section by the provisions of Sec. 34.08.485, a provision described above in bill section 13.

### IV. Effective date.

Section 16 of the bill establishes a January 1, 1989 effective date.

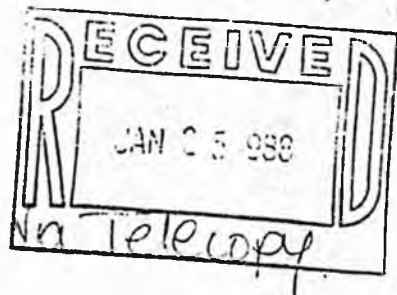
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sent Judic.  
Rec'd  
3/8/88  
[Signature]

FILE - Other  
(Vending)



STATE MAY 11 1987

(New Draft of H.P. 153, L.D. 204)  
(New Title)  
FIRST REGULAR SESSION

ONE HUNDRED AND THIRTEENTH LEGISLATURE

Legislative Document NO. 1391

H.P. 1033 House of Representatives, April 26, 1987  
Reported by Representative ALLEN from the Committee on  
Business Legislation and printed under Joint Rule 2.  
EDWIN H. PERT, Clerk  
Original bill sponsored by Representative POLDE of York.  
Cosponsored by Representative HILLOCK of Gorham.

STATE OF MAINE

IN THE YEAR OF OUR LORD  
NINETEEN HUNDRED AND EIGHTY-SEVEN

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2  
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10

AN ACT to Regulate the Location of Vending  
Machines Containing Cigarettes.

Be it enacted by the People of the State of Maine as  
follows:

22 MRS. c. 365-B is enacted to read:

CHAPTER 365-B

VENDING MACHINE SALES OF CIGARETTES

§162B. Vending machines sales of cigarettes limited  
to supervised areas





# Alaska State Legislature

SENATE

Office of the President

P.O. Box V  
State Capitol  
Juneau, Alaska 99811

MEMORANDUM

March 1, 1988

MAR 3 1988

TO: Senator Jay Kerttula, Chairman  
Senate Judiciary Committee

FROM: Senator Jan Faiks  
President of the Senate

SUBJECT: SB 339 "An Act relating to tobacco products."

Senate Bill 339 has been referred to your committee for consideration. The bill proposes changes to AS 11.76.100, relating to the offense of selling or giving tobacco to a minor.

Under current law, a person 19 years of age or older commits a violation if the person sells or gives cigars, cigarettes or tobacco to a person under 16 years of age.

There are several problems with current law. First, it only covers cigars, cigarettes and tobacco. It does not clearly prohibit adults from providing tobacco products such as snuff or certain other types of smokeless tobacco to underage individuals. As you know, these products are increasingly popular with our youth, and they pose clear health risks, such as cancer of the mouth, tongue and throat, as well as gum disease.

Second, while current law prohibits adults from providing tobacco to underage persons, it allows vending machines to dispense tobacco products. The predictable result of this is that most teenagers who smoke cigarettes obtain them from vending machines.

Third, current law allows the sale of tobacco to minors 16, 17 and 18 years of age.

SB 339 proposes to correct this situation. It repeals AS 11.76.100, and reenacts it as follows:

AS 11.76.100(a)(1): A person 19 years of age or older commits the offense of selling tobacco to a minor if the person knowingly sells, exchanges or gives a cigarette, a cigar, tobacco or a product containing tobacco to a person under 19 years of age.

AS 11.76.100(a)(2): A person 19 years of age or older commits the offense of selling tobacco to a minor if the person maintains a vending

machine that dispenses cigarettes, cigars, tobacco or tobacco products and that is accessible to persons under the age of 19.

AS 11.76.100(b): Selling or giving tobacco to a minor is a violation.

AS 11.76.100(c)(1): A person who maintains a vending machine is not in violation of this statute if only the person who owns or maintains the machine can operate the machine, either directly or through a remote control device that is inaccessible to the customer. As an example, vending machines behind the counter in a store or restaurant, or vending machines with a cut-off switch at the cash register would be allowed.

AS 11.76.100(c)(2): A person who maintains a vending machine is not in violation of this statute if the machine is located at a business establishment, place of employment or private club at which a person under the age of 19 is not employed and into which a person under 19 years of age is not allowed unless accompanied by a legal guardian 21 years of age or older. As an example, a machine in a bar would be deemed inaccessible to minors as a matter of law, as would a machine in a workplace where minors were not employed and which prohibited the entry of unaccompanied minors as a matter of company policy.

Please feel free to contact my office with questions or comments.

STATE OF ALASKA  
1988 LEGISLATIVE SESSION

BILL VERSION: SB 339  
PUBLISH DATE: (SENATE) 1/28/88

FISCAL NOTE

REQUEST:

Revision Date: \_\_\_\_\_  
Title: An Act relating to tobacco  
products.  
Sponsor: Faiks  
Requestor: \_\_\_\_\_

Agency Affected: Health & Social Services  
BRU: State Health Services  
Components: Public Health Adminis-  
tration

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						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

The enactment of SB 339 would have no direct fiscal impact on the Department of Health and Social Services.

Prepared by: Elizabeth Ward, Director *Elizabeth Ward* Phone: 465-3090  
Division: Public Health Date: 1-22-88

Approved by Commissioner: Mona Mc Munson *Mona Mc Munson* Date: Jan 25, 1988  
Agency: Department of Health & Social Services

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

REC'D  
3-8-88  
Sen Juddic-

SB. 339

1. The State of Alaska does not restrict employment of youths in an establishment which sells alcohol. But this bill would make this restriction if they had a cigarette machine. I.E. Any restaurant/lounge with busboys or dishwashers 18 years old or younger.
2. There are private sector businesses with controlled access which maintain a non public break/lunch room for employees.
3. Each cigarette vendor represents an investment of about \$1500. Our industry cannot afford to pull this much equipment and have it sit idle in our buildings.
4. As a member of NAMA and NAVA, we are doing our part by:
  - A. Maintaining "Minors are forbidden" decals on our equipment.
  - B. Worked with the location owners to prevent purchases by minors.
  - C. Removed equipment when supervision was not adequate.
5. My company has paid the State of Alaska \$60,000 in state tobacco tax in the past year.
6. This bill as written would cause termination of one bread winning employee from our ranks and the reduction in hours of one other.

1. We have no argument and in fact endorse the 19 year age limit.
2. I believe our industry has the ability to act responsibly without the burdens and financial hardships this bill would produce.
3. Alternatives to bill could read:
  - A. All tobacco vending machines must be under visual supervision of the responsible party.

OR:

1. Located in an establishment with controlled access not open to the public.
2. A location which into a person under 19 years of age is not allowed entry unless accompanied by a parent or spouse of the person who is 21 years of age or older.

*Tom Delo*

SERVICE AMERICAN CORP.  
1115 WHITNEY RD.  
ANCHORAGE AK. 99501

88/ 5B.339

MAY 8 1986

Chapter 162,  
Laws of New Hampshire

HB 125-FN

- 2 -

II. No person shall sell tobacco products or distribute promotional samples of any tobacco product to a person under 18 years of age. No person under 18 years of age shall purchase tobacco products.

III. The commissioner of revenue administration shall furnish, upon issuing or renewing a retailer's license under RSA 78:2, a sign reading "State law prohibits the sale of tobacco products to persons under age 18. Warning: Violators of this provision may be subject to fine." The sign shall be posted at any location where tobacco products are sold or distributed. The commissioner of revenue administration shall adopt rules under RSA 541-A relative to placement of these warning signs in areas where tobacco products are sold or distributed.

IV. Any person who violates paragraph II of this section shall be guilty of a violation and shall be punished by a fine of not more than \$25 for the first offense, and not more than \$50 for the second and subsequent offenses. No person 12 years of age or younger shall be prosecuted under this section.

V. The commissioner of revenue administration shall adopt rules under RSA 541-A relative to the enforcement and administration of this section.

78:12-c Person Misrepresenting Age. A person who falsely represents his age for the purpose of procuring tobacco products and who procures such tobacco products shall be guilty of a violation and subject to the fines set forth in RSA 78:12-b, IV.

(62:3 Effective Date. This act shall take effect January 1, 1987.

Approved May 28, 1986  
Effective January 1, 1987

REC'D 3/9/88 ~~AK~~

PAGE 1

FROM DAN THOMPSON  
VEND ALASKA

OFFICES: 1890 MARINA, FAIRBANKS, AK. 99709  
3008 RAMPART DRIVE, ANCHORAGE, AK. 99501

OUTLINE OF TESTIMONY BEFORE SENATE  
JUDICIARY COMMITTEE ON 3-8-88

OUR BUSINESS WOULD SUFFER SIGNIFICANTLY IF  
SB 339 PASSES IN ITS ORIGINAL FORM.

WE HAVE A SUBSTANTIAL INVESTMENT IN EQUIPMENT  
THAT CAN'T BE RECOVERED IF THIS BILL PASSES.  
WE ~~ARE~~ WILL LOSE 2 EMPLOYEES (ROUTE WORKERS)  
~~STAFF~~ AND WILL HAVE TO REDUCE SUPPORT STAFF AS  
WELL (REPAIRMEN, WAREHOUSE AND CLERICAL).

THE FOLLOWING ARE TYPES CUSTOMERS (LOCATIONS)  
THAT WOULD BE ADVERSELY AFFECTED AND THEIR PER  
CENTAGE OF <sup>OUR</sup> LOST SALES.

MILITARY - 66% - WE WERE RECENTLY AWARDED  
A 5 YEAR CONTRACT FOR VENDING SERVICE ON  
ELENDORF AFB AND FT. RICHARDSON AND HAVE ~~5~~  
4 YEARS LEFT ON A ~~GENERAL~~ LIKE CONTRACT  
ON FT. WILKINSON, EIELSON AFB AND FT. GREELY.  
COR BID WAS BIDD IN PART IN SALES OF CIGARETTES  
IN BARRACKS HOUSING. SALES THAT ARE LEGAL NOW  
BUT THE MACHINES WOULD BE OUTLAWED BY SB 339.

PRIVATE LOCATIONS - 8% - PRIVATE BUSINESSES

AND ORGANIZATIONS NOT NORMALLY OPEN TO THE PUBLIC, SUCH AS EMPLOYER BREAK ROOMS, WOULD BE TERMINATED BY SB 339. THEY REPRESENT AN IMPORTANT PART OF OUR OVERALL PRODUCT SALES MIX.

IN NEITHER OF THE ABOVE TYPES OF LOCATIONS CAN CHILDREN (MINOR) NORMALLY GAIN ACCESS.

PUBLIC LOCATIONS - 28% - THESE <sup>LOCATIONS</sup> INCLUDE HOTELS

RESTAURANTS AND DRINKING & DINING FACILITIES THAT ALTHOUGH THEY MAY SELL BEER, WINE OR HARD LIQUOR MAY NOT SELL CIGARETTES THROUGH OUR VENDING MACHINES UNDER SB 339 AS PROPOSED BECAUSE THEY HAVE EMPLOYEES WHO ARE UNDER 19 YEAR OF AGE AS THEY ARE PERMITTED UNDER ALASKA LIQUOR LAW REGULATIONS.

FOR EXAMPLE A CIGARETTE MACHINE ~~IS~~ WOULD BE PROHIBITED IN A HOTEL COCKTAIL LOUNGE IF THEY HAD AN 17 YEAR OLD DISHWASHER IN THE KITCHEN.

WE OPPOSE SALES OF CIGARETTES TO MINORS AND WOULD SUPPORT REASONABLE LEGISLATION WORKING TOWARD THAT END. HOWEVER, SB 339 WOULD ELIMINATE VENDING MACHINES THAT MINORS DON'T HAVE ACCESS TO OR <sup>EVEN THOSE</sup> THAT ARE SUPERVISED BY ADULTS.

THEREFORE WE SUGGEST THAT THE BILL BE CHANGED TO:

- ① MAKE IT ILLEGAL FOR POSSESSION OR PURCHASE OF CIGARETTES BY A MINOR.
- ② ELIMINATE THE PROVISION PROHIBITING VENDING MACHINE SALES OF CIGARETTES IN ESTABLISHMENTS WITH EMPLOYEES UNDER 19 YEARS.
- ③ EXEMPT MILITARY INSTALLATIONS AND PRIVATE BUSINESSES AND ORGANIZATIONS WHOSE VENDING MACHINES ARE NOT NORMALLY ACCESSIBLE TO THE GENERAL PUBLIC.
- ④ PROVIDE THAT PUBLIC LOCATIONS NEED ONLY HAVE VISUAL SUPERVISION BY AN ADULT EMPLOYEE OF THAT FACILITY.

⑤ PROVIDE THAT CIGARETTE VENDING MACHINES BE PROHIBITED ONLY IF LOCATED IN A PUBLIC UNSUPERVISED AREA

THESE ARE SEVERE ECONOMIC TIMES IN ALASKA AND SB 339 ~~WOULD~~ IN ITS ORIGINAL FORM WOULD HAVE A SERIOUS ~~IMPACT~~ NEGATIVE IMPACT ON OUR ~~SMOKE~~ <sup>VENDING</sup> INDUSTRY AND ON THE EMPLOYEES AND OWNERS THAT MAKE THEIR LIVING FROM VENDING. WE WILL LOSE 2 EMPLOYEES AND THE INDUSTRY <sup>OVERALL</sup> WILL LOSE 12-15 WORKERS. SUPPORT STAFF ~~STAFFS~~ WILL ALSO BE CUT. ONE SMALL VENDOR IN SITKA (~~MR.~~ MR. WITCHER) WOULD PROBABLY GO OUT OF BUSINESS.

WE HOPE THAT YOU CONSIDER OUR INPUT AND THAT SB 339 CAN BE AMENDED TO HELP CURTAIL SMOKE<sup>ING</sup> BY MINORS WITHOUT PUTTING ALASKANS OUT OF WORK.

THANK YOU FOR YOUR CONSIDERATION.

DAN THOMPSON

S B

3 4 3

STATE OF ALASKA  
THE LEGISLATURE

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


LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

February 22, 1988

SUBJECT: Liability of corporate directors  
(CSSB 343(Judiciary))

TO: Senator Arliss Sturgulewski

FROM: Richard A. Bradley  
Legislative Counsel 

You have requested a sectional analysis of the above described bill.

The main effect of the bill, apart from sec. 2, discussed below, is to address the liability relationship between the directors of the corporation and the corporation itself (or its stockholders or shareholders derivatively, if it has stockholders or shareholders).

The bill applies to the widely-used general types of corporations that may be established under state law: business corporations (AS 10.05), cooperative corporations (AS 10.15), and nonprofit corporations (AS 10.20). Corporations not included in the bill are electric and telephone cooperatives (AS 10.25), cemetery associations (AS 10.30), religious corporations (AS 10.40), and professional corporations (AS 10.45).

Section 1 of the bill amends AS 10.05.255, the section establishing the contents of the articles of incorporation for business corporations. It permits a corporation to add a provision "eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for the breach of fiduciary duty as a director."

The provisions of the section establish certain public policy areas where a corporation may not agree to waive liability. The section also provides that the elimination

or limitation of liability is only prospective from the time the amendment takes effect.

An existing business corporation may amend its articles under AS 10.05.270 and following.

Section 2 of the bill amends AS 10.05.276, a section establishing the "procedure to amend articles of incorporation." It provides that a corporation incorporated under AS 10.05.005 (regional Native corporations and those village corporations that incorporate as business corporations) may take advantage of the provisions of section 1 of the bill. The main purpose of sec. 2 of the bill is to permit the Native corporation to adopt the amendment by lower thresholds than the existing provisions of law provide.

Section 3 of the bill amends AS 10.15.350, the section establishing the contents of the articles of incorporation for cooperative corporations. It permits a corporation to add a provision "eliminating or limiting the personal liability of a director to the corporation or its members for monetary damages for the breach of fiduciary duty as a director."

The provisions of the section establish certain public policy areas where a corporation may not agree to waive liability. The section also provides that the elimination or limitation of liability is only prospective from the time the amendment takes effect.

An existing cooperative corporation may amend its articles under AS 10.15.365 and following.

Section 4 of the bill amends AS 10.20.151, the section establishing the contents of the articles of incorporation for nonprofit corporations. It permits a corporation to add a provision "eliminating or limiting the personal liability of a director to the corporation for monetary damages for the breach of fiduciary duty as a director." Nonprofit corporations have neither stockholders nor members.

The provisions of the section establish certain public policy areas where a corporation may not agree to waive liability. The section also provides that the elimination or limitation of liability is only prospective from the time the amendment takes effect.

Senator Arliss Sturgulewski  
Page 3  
February 22, 1988

An existing nonprofit corporation may amend its articles under AS 10.20.171 and following.

If I may be of further assistance, please advise.

RAB:bb  
wkb3/017

5-1437N  
Bradley  
2/22/88

*Page 2, line 16 is new:  
to cover co-opt.*

Original sponsors: Sturgulewski, Uehling,  
Fahrenkamp and Kelly

1 IN THE SENATE BY THE JUDICIARY COMMITTEE  
2 CS FOR SENATE BILL NO. 343 (Judiciary)  
3 IN THE LEGISLATURE OF THE STATE OF ALASKA  
4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the liability of directors of  
7 corporations."

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

9 \* Section 1. AS 10.05.255 is amended by adding new subsections to read:

10 (c) In addition to the matters required to be set out in the  
11 articles of incorporation by (a) of this section, the articles of  
12 incorporation may also contain a provision eliminating or limiting the  
13 personal liability of a director to the corporation or its stock-  
14 holders for monetary damages for the breach of fiduciary duty as a  
15 director. The articles of incorporation may not eliminate or limit  
16 the liability of a director for

17 (1) a breach of a director's duty of loyalty to the corpo-  
18 ration or its stockholders;

19 (2) acts or omissions not in good faith or that involve  
20 intentional misconduct or a knowing violation of law;

21 (3) wilful or negligent conduct involved in the payment of  
22 dividends or the repurchase of stock from other than lawfully avail-  
23 able funds; or

24 (4) a transaction from which the director derives an im-  
25 proper personal benefit.

26 (d) The provisions of (c) of this section do not eliminate or  
27 limit the liability of a director for an act or omission that occurs  
28 before the effective date of the articles of incorporation or of an  
29 amendment to the articles of incorporation authorized by (c) of this

1 section.

2 \* Sec. 2. AS 10.05.276 is amended by adding a new subsection to read:

3 (b) A corporation organized under 43 U.S.C. 1601 - 1628 (Alaska  
4 Native Claims Settlement Act) and incorporated under AS 10.05.005 may  
5 amend its articles of incorporation under (a) of this section to add a  
6 provision eliminating or limiting the personal liability of a director  
7 to the corporation or its stockholders for monetary damages under  
8 AS 10.05.255(c). Notwithstanding (a) of this section, the amendment  
9 authorized by this subsection may be adopted by the affirmative vote  
10 of a majority of the shareholders present at a regular or special  
11 meeting at which a quorum is present in person or by proxy.

12 \* Sec. 3. AS 10.15.350 is amended by adding new subsections to read:

13 (b) In addition to the matters required to be set out in the  
14 articles of incorporation by (a) of this section, the articles of  
15 incorporation may also contain a provision eliminating or limiting the  
16 personal liability of a director to the corporation or its members for  
17 monetary damages for the breach of fiduciary duty as a director. The  
18 articles of incorporation may not eliminate or limit the liability of  
19 a director for

20 (1) a breach of a director's duty of loyalty to the corpo-  
21 ration;

22 (2) acts or omissions not in good faith or that involve  
23 intentional misconduct or a knowing violation of law;

24 (3) wilful or negligent conduct involved in the payment of  
25 dividends or the redemption of stock from other than lawfully avail-  
26 able funds; or

27 (4) a transaction from which the director derives an im-  
28 proper personal benefit.

29 (c) The provisions of (b) of this section do not eliminate or

1 limit the liability of a director for an act or omission that occurs  
2 before the effective date of the articles of incorporation or of an  
3 amendment to the articles of incorporation authorized by (b) of this  
4 section.

5 \* Sec. 4. AS 10.20.151 is amended by adding new subsections to read:

6 (d) In addition to the matters required to be set out in the  
7 articles of incorporation by (a) of this section, the articles of  
8 incorporation may also contain a provision eliminating or limiting the  
9 personal liability of a director to the corporation for monetary  
10 damages for the breach of fiduciary duty as a director. The articles  
11 of incorporation may not eliminate or limit the liability of a direc-  
12 tor for

13 (1) a breach of a director's duty of loyalty to the corpo-  
14 ration;

15 (2) acts or omissions not in good faith or that involve  
16 intentional misconduct or a knowing violation of law; or

17 (3) a transaction from which the director derives an im-  
18 proper personal benefit.

19 (e) The provisions of (d) of this section do not eliminate or  
20 limit the liability of a director for an act or omission that occurs  
21 before the effective date of the articles of incorporation or of an  
22 amendment to the articles of incorporation authorized by (d) of this  
23 section.

**FISCAL NOTE**

REQUEST:

Revision Date: \_\_\_\_\_  
Title: Relating to the liability  
of directors of corporations  
Sponsor: Sturgulewski, Uehling,  
Requester: Fahrenkamp and Kelly

Agency Affected: Commerce & Econ. Dev.  
BRU: Banking, Securities & Corporations

Components: \_\_\_\_\_

EXPENDITURES / REVENUES : (Thousands of Dollars)

OPERATING	FY 83	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: Willis F. Kirkpatrick, Director  
Division: Banking, Securities and Corporations

Phone: 465-2521  
Date: \_\_\_\_\_

Approved by Commissioner: J. Anthony Smith, Commissioner  
Agency: Department of Commerce and Economic Development

Date: 1-26-88

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
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February 17, 1988

9864 4 1 634

FEB 17 1988

Senator Jalmar Kerttula  
P. O. Box V  
Juneau, Alaska 99811

Re: SB 343

Dear Senator Kerttula:

On Thursday, February 18, the Senate Judiciary Committee will revisit SB 343 -- a bill that would allow corporations, with shareholder approval, to limit their directors' liability for simple negligence. On behalf of Sealaska, I wanted to explain the purpose of an amendment to SB 343 that will be considered by the Committee in the form of a proposed Committee Substitute. That amendment would allow corporations formed under the Alaska Native Claims Settlement Act to amend their articles of incorporation with respect to directors' liability by a majority shareholders' vote, rather than the two-thirds vote otherwise required.

There are four sound public policy reasons for adopting the amendment. The proposal does not represent a "special deal" for Alaska Natives; rather, it recognizes that there are some fundamental differences between ANCSA corporations on the one hand, and general Alaska business corporations on the other, that must be addressed if the legislation is to achieve its intended goal. These considerations include:

1. Virtually all Alaska corporations have only a handful of shareholders. Indeed, in a typical situation the

only shareholders will be the directors themselves. As a result, obtaining a super-majority (or even unanimity) on this issue among shareholders would be an easy task. Typical of other regional corporations, however, Sealaska has 16,000 shareholders -- spread from southcentral Alaska to the lower 48. It is hard enough for corporations with such dispersed ownership to obtain a quorum; obtaining a two-thirds vote on any matter -- no matter how non-controversial -- is a virtual impossibility;

2. Normally, a corporation's directors hold large (and often controlling) blocks of shares in the company. As a result, they stand to realize substantial and direct profits from the corporation's business activities. This prospect of large personal gain compensates for the risk of liability that a director might suffer, and makes that potential for liability seem equitable. Native corporation directors, however, have no prospect of direct and substantial economic gain. They hold no more shares than any shareholder; and, as a result, directorship on a Native corporation is often viewed more as a form of community service than as an avenue of personal enrichment. The equitable symmetry of gain on the upside, and exposure on the downside, doesn't exist in the Native corporate context, and director liability legislation ought to recognize this substantial difference;

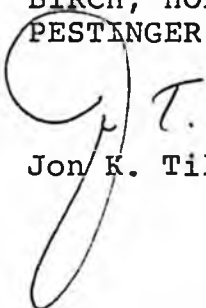
3. In the normal business setting, venturers voluntarily embark upon the corporate form in the expectation of gain. They voluntarily assume the risk, and they are usually familiar with the standard of care demanded of business men. Alaska's Natives, on the other hand, had the corporate form imposed upon them by Congress. They were told to administer their lands through a business organization with which -- particularly at the village level -- they were unfamiliar. Had the lands been administered through the Tribe, these same Native leaders would have performed essentially the same functions under the cloak of Tribal immunity. Moreover, they are not, by and large, familiar with the latest New York Court of Appeals cases defining permissible director conduct. It is perfectly proper for the state to be a bit sensitive in imposing personal liability for administering land entitlements through a form that is unfamiliar and, to a large extent, involuntarily; and

4. The purpose of the legislation is to encourage the formation of new corporations in Alaska. For new corporate ventures, a liability provision will be inserted in the initial articles of incorporation. Shareholders will, quite frankly, never read those articles. I will confess to never having reviewed the articles of incorporation of any company in which I have purchased stock. If, however, I receive a proxy solicitation from a company in which I own shares, asking me to accept limited director liability, I would probably give the matter some scrutiny. The point, of course, is that even majority shareholder approval for existing corporations will result in substantially broader scrutiny than that attendant the formation of new companies.

For these reasons, I believe the Judiciary Committee will be on firm footing in concluding that the sound philosophy behind SB 343 would be better served by acknowledging important differences between ANCSA and other business corporations. If I can be of any further assistance, or if you have any reservations about Sealaska's amendment, please do not hesitate to call.

Sincerely,

BIRCH, HORTON, BITTNER  
PESTINGER & ANDERSON

  
Jon K. Tillinghast

JKT/jrm

STATE OF ALASKA  
THE LEGISLATURE

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

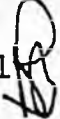
LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

January 22, 1988

SUBJECT: Liability of corporate directors  
(SB 343)

TO: Senator Arliss Sturgulewski

FROM: Richard A. Bradley  
Legislative Counsel 

Frank Homan has asked that I comment on the provisions of SB 343.

As you know, you asked for a bill that would limit the liability of directors of business (for profit) corporations in certain instances. The amendment tracks the provisions of a recent amendment to the Delaware Corporations Code: 8 Delaware Code Ann., sec. 102(b)(7).

The recent Delaware law did not address the liability of directors of cooperative corporations or of nonprofit corporations. Neither does SB 343.

I have noted before that neither the cooperative corporations law (AS 10.15), nor the nonprofit corporations law (AS 10.20), is at all as comprehensive as the general business corporations law, AS 10.05. I suspect that the gaps in AS 10.15 and AS 10.20 are dealt with by "borrowing" from the in AS 10.05 to the extent necessary. But if the legislature wishes to deal explicitly with the liability concepts of the directors of cooperative corporations or nonprofit corporations, it may do so.

If I may be of further assistance, please advise.

RAB:bb  
WKB1/089

NOVEMBER 11, 1987

MEMO

TO: CHUCK BUNDRANT  
BART EATON

FROM: JOE PLESHA

RE: LIMITATION OF DIRECTOR LIABILITY UNDER DELAWARE LAW

INTRODUCTION

On July 1, 1986, a new law became effective in Delaware which permits a Delaware corporation to include in its certificate of incorporation a provision which limits or eliminates a director's personal monetary liability to the corporation or its stockholders for breach of his or her fiduciary duty of care to the corporation.<sup>1</sup>

BACKGROUND

Delaware law has generally permitted a Delaware corporation to purchase insurance on behalf of its directors and officers against liability incurred in their corporate capacity, regardless of whether the corporation would have the power to indemnify the director against such liability under Delaware law.<sup>2</sup> The market for directors' and officers' liability insurance has, however, changed dramatically over the past several years. Despite the statutory authorization of Delaware corporations to purchase and maintain directors' liability insurance, many corporations have reportedly experienced difficulties in obtaining or maintaining sufficient coverage at a reasonable cost. As a result, many corporations have been forced to accept insurance with lower dollar limits of coverage, higher deductible amounts, and broader policy exclusions at a significantly higher cost.<sup>3</sup>

The insurance crisis for directors may be exacerbated by the courts increasing tendency to scrutinize the decisions of a director, even when the director acted in good faith and not out

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<sup>1</sup> Indemnification of directors and officers, and limitation or elimination of director liability as authorized by the new Delaware law, are separate and distinct concepts. Alaska law already provides that directors can be indemnified for actions under certain circumstances. Alaska Stat. § 10.05.101.

<sup>2</sup> Del. Code Ann. tit. 8, § 145(g) (Supp. 1986) (amended 1986) provides:

A corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent to the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against him incurred by him in any such capacity, or arising out of his status as such, *whether or not the corporation would have the power to indemnify him against such liability under this section.*

<sup>3</sup> See Hilder, *Liability insurance is Difficult to Find Now for Directors, Officers*. Wall St. J., July 10, 1985, at 1, col. 6.

of self interest. For example, the court in the case of *Smith v. Van Gorkom*<sup>4</sup> found that the board of directors of Trans Union Corporation breached their fiduciary duty of due care in approving a proposed cash merger and the court held members of the board personally liable for the resulting damages.

The expense of defending these lawsuits and the inevitable uncertainties with respect to application of the business judgment rule (the rule by which corporate directors actions are judged) may impact upon an individual's willingness to serve as director of a corporation. In addition, such uncertainty could cause directors to act defensively out of concern over costly litigation and potential personal liability, rather than acting to manage the business in the best interest of the corporation. For these reasons, Delaware adopted legislation in 1986 which would permit a corporation to limit or eliminate the director's personal monetary liability to the corporation or its stockholders for breach of his or her fiduciary duty of care to the corporation.

### ANALYSIS OF NEW DELAWARE LAW

Title 8, §102(b)(7) of the Delaware General Corporation Law enables a Delaware corporation to include in its articles of incorporation a provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of their fiduciary duty as a director. In addition, § 102(b)(7) states that no such provision can eliminate or limit a director's liability (i) for breach of the director's *duty of loyalty* to the corporation or its stockholders; (ii) for acts of omissions *not in good faith or involving intentional misconduct or a knowing violation of law*; (iii) for willful or negligent conduct *paying dividends or repurchasing stock out of other than lawfully available funds*; or, (iv) for any transaction from which the director derives an *improper personal benefit*.

Section 102(b)(7) is an enabling provision only. Amendment of the corporate articles of incorporation, therefore, is required to include the provision authorized by this section before it is an effective limitation of personal liability for a corporation's directors. The ultimate determination as to the propriety of limiting the opportunity of a corporation or its stockholders to seek monetary damages from the directors rest with the stockholders of the corporation who vote on any amendments to the articles of incorporation. As a practical note, it can be argued that a board which proposes an amendment pursuant to this law is an "interested party," since the individual directors of the board will benefit from the elimination of monetary liability which they otherwise may be required to pay. Obtaining the required stockholder approval after full disclosure of all material facts, however, eliminates any conflict of interest which might otherwise arise.

Section 102(b)(7) does not preclude or limit damages in actions instituted by third parties. In addition, it can be argued that §102(b)(7) permits limitation or elimination of monetary liability only for directors acting as directors. Actions taken by a majority stockholder in his capacity as such cannot be exempted from liability. Finally, §102(b)(7) does not permit limitation or elimination of liability arising under other laws or regulations. A director's potential liability under state and federal securities laws, for example, is unaffected by this section

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<sup>4</sup> 488 A.2d 858 (Del. 1985). The court found the board grossly negligent in that the directors had failed to fully inform themselves of "all material information reasonably available to them," and had acted hastily in approving the proposed merger, after two hours' consideration. *id.* at 872.

### Fiduciary Duty

Directors are charged with the fiduciary duty of *due care* and *loyalty* to the corporation. Loyalty basically requires that a director, in making a business decision, act in good faith and in the honest belief that the action taken is in the best interest of the corporation. Under the new Delaware law, a director can still be found to be personally liable for monetary damages where they violate the fiduciary duty of loyalty by acting in their own "self-interest," and not in the best interest of the corporation.<sup>5</sup> (For example, by usurping a corporate opportunity for their own personal benefit or competing with the corporation.)

The official legislative synopsis of §102(b)(7) notes that this provision permits a corporation to protect its directors from monetary liability only from liability for breach of the *fiduciary duty of due care*.<sup>6</sup> It is clear that if a director negligently or with gross negligence (want of even scant care, or failure to exercise even that care which a careless person would use) disregarded his fiduciary duty of due care, they could be protected from monetary liability under the new Delaware law.

It is not clear, however, whether §102(b)(7) exempts directors from liability for reckless (actions that fall somewhere between gross negligence and intentional wrongdoing) disregard for the fiduciary duty of due care. It could be argued that to the extent that the recklessness involves conscious disregard for a known risk, such conduct is not taken in good faith and therefore, would not be a liability subject to limitation under §102(b)(7)(ii). To the extent recklessness encompasses merely inattention to duty by the directors, however, I believe that such conduct should be labeled "gross negligence" and therefore any liability resulting from it would be subject to limitation.

§102(b)(7), however, does not *eliminate* a director's fiduciary duty to act with due care, it merely insulates directors from personal *monetary* liability for failure to satisfy that duty. A director's conduct would, therefore, still be subject to injunctive or rescissory relief. A stockholder can institute an action to enjoin completion of a board's action or to rescind a completed action if such action involves violations of the duty of care. This may be relevant in proxy contest, elections, resignations, etc.

In conclusion, Delaware's new law only allows for a corporation to limit or eliminate the monetary damages a corporation or its shareholders can receive from its directors for a breach of the director's fiduciary duty of due care. It does not limit damages that can be awarded for a director's breach of their fiduciary duty of loyalty, or violations of law, or any transaction from which a director derives an improper personal benefit. In addition, the corporation or shareholder can still seek equitable remedies, such as rescission or injunctive relief for a director's breach of their fiduciary duty of due care.

### WASHINGTON & ALASKA LAW

Like Delaware, Washington State and Alaska law provide that a corporation may purchase insurance on behalf of its directors and officers to protect against personal liability incurred

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<sup>5</sup> Del. Code Ann. tit. 8, § 102(b)(7)(i).

<sup>6</sup> The synopsis notes: "[t]his provision enables a corporation in its original certificate of incorporation or an amendment thereto validly approved by stockholders to eliminate or limit personal liability of members of its board of directors or governing body for violations of a director's fiduciary duty of care."

in their corporate capacity, regardless of whether the corporation would have the power to indemnify against such liability under the relevant state law.<sup>7</sup>

On Washington recently enacted legislation similar to Delaware's which would allow for a Washington corporation limit the monetary liability of directors for a breach of their fiduciary duty of due care to the corporation.<sup>8</sup> I am having a copy of the new provision sent to me. Alaska has not yet enacted such legislation.

I have attached the relevant portions of the Delaware, Alaska and Washington State law.

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<sup>7</sup> Nearly identically to Delaware law, Wash. Rev. Code § 23A.08.025(11) (1980) provides:

A corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent to the corporation, or is or was serving at the request of the corporation as a officer, employee or agent of another corporation, partnership, joint venture, trust or other employee benefit plan against any liability asserted against him incurred by him in any such capacity, or arising out of his status as such, *whether or not the corporation would have the power to indemnify him against such liability under this section.*

The Alaska Statutes §10.05.015(g) (1970) provide that:

A corporation may purchase and maintain insurance on behalf of a person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership joint venture, trust or other enterprise against any liability asserted against him and incurred by the person in such a capacity, or arising out of the person's status as such, *whether or not the corporation would have the power to indemnify the person against the liability under the provisions of this section.*

<sup>8</sup> S.B. 6048, effective July 26, 1987.

## TITLE 8

### Corporations

#### CHAPTER 1. GENERAL CORPORATION LAW

Subchapter I. Formation	Sec.
Sec. 102. Contents of certificate of incorporation.	230. Exception to requirements of notice.
Subchapter II. Powers	Subchapter X. Sale of Assets, Dissolution and Winding Up
122. Specific powers. 125. Conferring academic or honorary degrees.	271. Sale, lease or exchange of assets; consid- eration; procedure.
Subchapter IV. Directors and Officers	Subchapter XIV. Close Corporations; Special Provisions
141. Board of directors; powers; number, quali- fications, terms and quorum; commit- tees; classes of directors; nonprofit cor- porations; reliance upon books; action without meeting; removal. 145. Indemnification of officers, directors, em- ployees and agents; insurance.	349. Corporate action where a restriction on transfer of a security is held invalid.
Subchapter V. Stock and Dividends	Subchapter XV. Foreign Corporations
151. Classes and series of stock; rights. 165. Revocability of preincorporation subscrip- tions. 173. Declaration and payment of dividends.	380. Foreign corporation as fiduciary in this State.
Subchapter VII. Meetings, Elections, Voting and Notice	Subchapter XVI. Domestication and Transfer of Non-United States Corporations
221. Voting, inspection and other rights of bondholders and debenture holders. 225. Contested election of directors; proceed- ings to determine validity.	388. Domestication of non-United States cor- porations. 389. Temporary transfer of domicile into this State.
	Subchapter XVII. Miscellaneous Provisions
	391. Taxes and fees payable to Secretary of State upon filing certificate or other paper.

#### *Subchapter I. Formation*

#### § 102. Contents of certificate of incorporation.

(a) The certificate of incorporation shall set forth:

(4) If the corporation is to be authorized to issue only 1 class of stock, the total number of shares of stock which the corporation shall have authority to issue and the par value of each of such shares, or a statement that all such shares are to be without par value. If the corporation is to be authorized to issue more than 1 class of stock, the certificate of incorporation shall set forth the total number of shares of all classes of stock which the corporation shall have authority to issue and the number of shares of each class, and shall specify with respect to each class those shares that are to be without par value and those shares that are to have a par value and the par value of each share of each such class. The certificate of

incorporation shall also set forth a statement of the designations and the powers, preferences and rights, and the qualifications, limitations or restrictions thereof, which are permitted by § 151 of this title in respect of any class or classes of stock or any series of any class of stock of the corporation and the fixing of which by the certificate of incorporation is desired, and an express grant of such authority as it may then be desired to grant to the board of directors to fix by resolution or resolutions any thereof that may be desired but which shall not be fixed by the certificate of incorporation. Such grant of authority may include the power to specify the number of shares of any series. The foregoing provisions of this paragraph shall not apply to corporations which are not organized for profit and which are not to have authority to issue capital stock. In the case of such corporations, the fact that they are not to have authority to issue capital stock shall be stated in the certificate of incorporation. The conditions of membership of such corporations shall likewise be stated in the certificate of incorporation or the certificate may provide that the conditions of membership shall be stated in the bylaws;

(b) In addition to the matters required to be set forth in the certificate of incorporation by subsection (a) of this section, the certificate of incorporation may also contain any or all of the following matters:

(6) A provision imposing personal liability for the debts of the corporation on its stockholders or members to a specified extent and upon specified conditions; otherwise, the stockholders or members of a corporation shall not be personally liable for the payment of the corporation's debts except as they may be liable by reason of their own conduct or acts;

(7) A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit. No such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective. All references in this paragraph to a director shall also be deemed to refer to a member of the governing body of a corporation which is not authorized to issue capital stock.

(65 Del. Laws, c. 127, § 1; 65 Del. Laws, c. 289, §§ 1, 2.)

Revisor's note. — Section 13 of 65 Del. Laws, c. 127, provides: "All rights, privileges and immunities vested or accrued by and under any laws enacted prior to the adoption or amendment of this act, all suits pending, all rights of action conferred and all duties, restrictions, liabilities and penalties imposed or required by and under laws enacted prior to the adoption or amendment of this act shall not

be impaired, diminished or affected by this act."

Section 14 of 65 Del. Laws, c. 127, provides: "This act shall become effective on July 1, 1985. Without limiting the foregoing, § 7 of this act shall be effective only as to elections and votes of stockholders occurring on or after July 1, 1985 and § 8 of this act shall be effective as to all notices required to be given in

(b) A corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes, except as may otherwise be provided by the Constitution or other law of this State.

(c) Corporations for constructing, maintaining and operating public utilities, whether in or outside of this State, may be organized under this chapter, but corporations for constructing, maintaining and operating public utilities within this State shall be subject to, in addition to this chapter, the special provisions and requirements of Title 26 applicable to such corporations. (8 Del. C. 1953, § 101; 56 Del. Laws, c. 50.)

**Cross reference.** — As to number of incorporators of state banks and trust companies, see § 722 of Title 5.

**Corporation is artificial being created by law and acting under the authority of law for designated purposes and being artificial and the mere creature of the law, it can only act by its officers and agents.** *Joseph Greenspon's Sons Iron & Steel Co. v. Pecos Valley Gas Co.*, Del. Super., 156 A. 350 (1931).

**With same status as if created by special act.** — Corporations organized under the general corporation law have the same legal status as if they had been created by a special act of the General Assembly. *State ex rel. Cochran v. Penn-Beaver Oil Co.*, Del. Supr., 143 A. 257 (1926).

**And corporation is entity distinct from its stockholders.** *Bird v. Wilmington Soc'y of*

*Fine Arts*, Del. Supr., 43 A.2d 476 (1945).

**Even if there is only 1 stockholder.** — The fact that 1 person owns all of the stock of a corporation does not make him and the corporation 1 and the same person. *Martin v. D.B. Martin Co.*, Del. Ch., 88 A.2d 612 (1913).

**But this fiction should be ignored when used for fraudulent acts.** — The fiction of a legal corporate entity should be ignored when it has been used as a shield for fraudulent or other illegal acts. *Martin v. D.B. Martin Co.*, Del. Ch., 88 A. 612 (1913).

**Cemetery corporation operated for profit not forbidden.** — The public policy of this State does not forbid the operation of a cemetery corporation for private profit. *Wilmington Mem. Co. v. Silverbrook Cem. Co.*, Del. Ch., 287 A.2d 405, *aff'd*, Del. Supr., 297 A.2d 378 (1972).

## § 102. Contents of certificate of incorporation.

(a) The certificate of incorporation shall set forth:

(1) The name of the corporation which shall contain 1 of the words "association," "company," "corporation," "club," "foundation," "fund," "incorporated," "institute," "society," "union," "syndicate," or "limited," or 1 of the abbreviations ["co.," "corp.," "inc.," "ltd."], or words or abbreviations of like import in other languages (provided they are written in roman characters or letters), and which shall be such as to distinguish it upon the records in the office of the Division of Corporations in the Department of State from the names of other corporations organized, reserved or registered as a foreign corporation under the laws of this State;

(2) The address (which shall include the street, number, city and county) of the corporation's registered office in this State, and the name of its registered agent at such address;

(3) The nature of the business or purposes to be conducted or promoted. It shall be sufficient to state, either alone or with other businesses or purposes, that the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware, and by such statement all lawful acts and activities shall be within the purposes of the corporation, except for express limitations, if any;