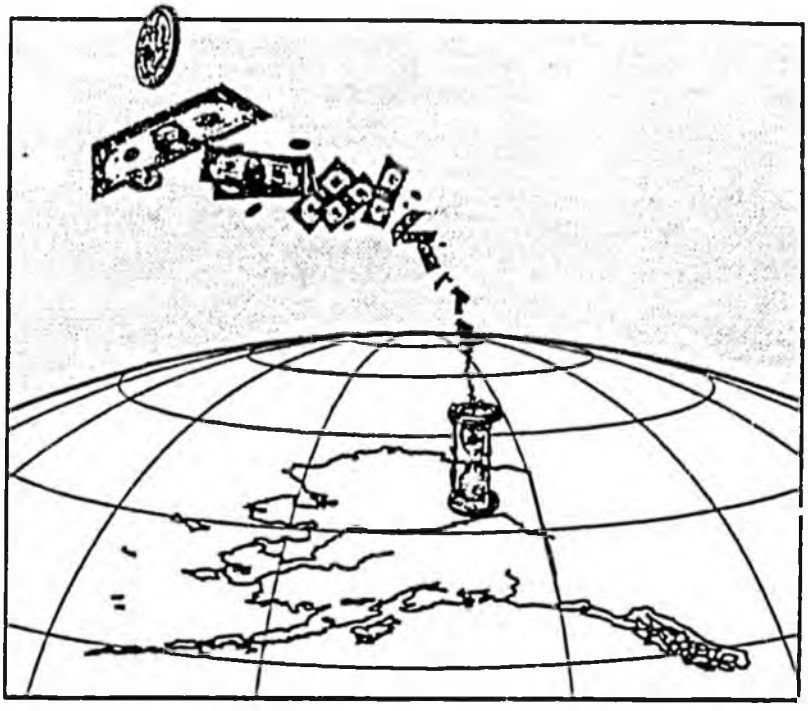
ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
5601 HOUSE COMMUNITY & REGIONAL AFFAIRS

5

Impacts of Declining Revenues On Alaska's Smaller Communities



February 1988

State of Alaska
Steve Cowper, Governor

Department of Community and Regional Affairs
David G. Hoffman, Commissioner

Municipal and Regional Assistance Division
Marty Rutherford, Director

P.O. Box BH
Juneau AK 99811
Phone (907) 465-4750

DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS
ASSISTING ALASKAN COMMUNITIES

Impacts of Declining Revenues On Alaska's Smaller Communities

Summary

The Department of Community and Regional Affairs surveyed 128 of the smaller cities and 44 unincorporated communities statewide to determine their financial condition. This survey indicated the downturn in the state's economy has resulted in reduced revenues and services in small cities and unincorporated communities. As the full impacts of the State's economic condition filter out to small cities there could be even more significant reductions in revenues and services in small communities.

Basic public health and safety services such as fire, police, health, water and sanitation have been reduced across the State in an effort to accommodate declining revenues. In addition 47 communities reported they did not provide water service and 82 communities did not provide sewer service. Every region of the state reports an increase in the number of cities and communities with residents who are having difficulty paying for municipal services. It appears that the gains made in public health and safety in rural Alaska may be in jeopardy if State funding to smaller communities continues to decline.

In FY86, almost 60% of the revenue for second class cities was derived from direct State funding of entitlement programs, capital project grants or contracts for services (see Chart 1.2, page 1.2). Entitlement programs such as Revenue Sharing and Municipal Assistance are of even greater importance as the small community's capital project grant revenues are reduced. If further reductions occur in entitlement programs it could result in even greater cuts to basic health and safety services since these funds often "subsidize" water, sewer and medical services.

Because of local economic conditions it is unlikely that most cities will be able to increase taxes or service charges to fully offset the decline in State funds. Unincorporated communities are even more dependent on State funds because they do not have the power of taxation. Many communities expect declines in health and public safety services if current levels and methods of State funding continue.

In order to cut costs, most communities have reduced positions, maintenance, operator training, and operating hours of facilities and equipment. Fifty seven of the cities surveyed reported they have no property loss insurance. These conditions indicate that the State investment in equipment and facilities may be in jeopardy, or at least that the useful life of facilities and equipment may be reduced if only local revenue is available to support these facilities and equipment.

Communities in the Yukon-Kuskokwim Delta, Bering Straits region, Northwest Arctic Borough and the Doyon region appear to be the most negatively impacted.

In the Appendix, eight community case studies are presented to illustrate the meaning of the survey results. Communities were selected as typical examples of small rural communities in their respective regions of the state.

Introduction

During October, 1987, the Department of Community and Regional Affairs, Division of Municipal and Regional Assistance, conducted a telephone survey of executive officials from 172 Alaskan municipalities and unincorporated communities. The survey was designed to gather information on the financial situation of communities outside of the major metropolitan areas. The survey concentrated on these communities because there was little information available on the economic impacts upon the smaller communities compared to information about urban areas.

The survey results are presented on a statewide basis, by regions of the state, and by community size. The intent of the survey was to focus upon the more profound and widespread financial issue confronting Alaska's smaller communities.

This Report is divided into five chapters:

Chapter One – Municipal Survey Results:

This chapter reviews the significant findings of the Economic Dislocation Survey as it relates to small rural cities. The survey data are examined in terms of regions, and city size. This chapter looks closely at the revenue situation and impacts upon service delivery.

Chapter Two – Unincorporated Community Survey Results

This chapter reviews the significant findings of the Economic Dislocation Survey as they related to the State's unincorporated communities

Chapter Three – Policy Issues

This chapter identifies and discusses some of the major policy implications for the State to be drawn from the survey results.

Appendix – City Case Studies

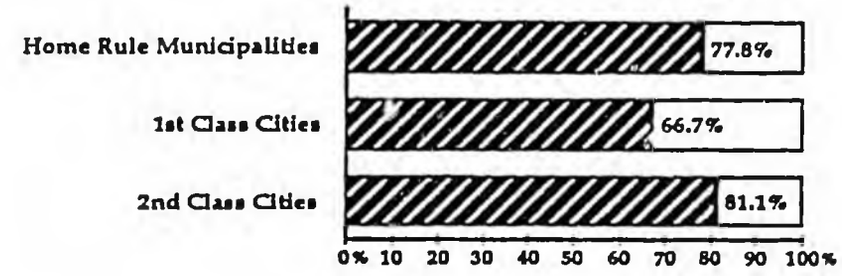
This chapter is an effort to bring the realities of the economic situation facing rural cities into a more focused perspective. Each case study presents a description of city revenues and expenditures as well as the level and type of services provided by the city. The pupose of the case studies is to review a "typical" city in each region and not look for worst case scenerios.

Chapter 1

Municipal Revenue Reductions

With the recent downturn in the state's economy there has been a reciprocal reduction in municipal revenues and expenditures. For the cities in the survey sample, it appears that an overwhelming majority have reduced budgets this fiscal year. The following chart identifies the percentage of cities statewide which experienced budget reductions this year:

Chart 1.1 Percentage of Surveyed Municipalities With Budgets Reduced From Last Year



The municipalities with budget reductions identified in the above chart are indicative of a trend that has been occuring for several years. The following Chart 1.2 reveals the trend in municipal budget reductions for second class cities occurring since FY84.

The entitlement programs identified in Chart 1.2 (Municipal Assistance and State Revenue Sharing have slightly declined in their proportion of municipal budgets as the amount of funding for entitlement programs has declined from FY84 to FY87.

Each year the State Revenue Sharing (SRS) and Municipal Assistance (MA) programs provide municipalities with essential operating revenues. The reduction in funding for each of these two programs from FY '86 to FY '88 amount to a little less than 32%. These reductions have an especially large impact on the second class cities as a significant portion of their budgets come from these program sources.

The entitlement funds are crucial to the operations of many small municipalities because these funds are the only source of discretionary funds. Such funds frequently cover municipal administrative costs, cover losses in services revenue, and help pay for services that generate little or no revenue.

Chart 1.2 also reveals that the overall contribution from State sources (Municipal Assiastance, Revenue Sharing and Government Revenues) has consistently made up over 50% of the operating revenues available to small municipalities until FY 87. As government revenues have been drastically reduced, the State contribution has dropped to 42.3% in Fy 87.

The following chart demonstrates how municipal budget reductions have varied by regions of the state.

Chart 1.3 Percentage of Surveyed Municipalities (By Region) With Budgets Reduced From Previous Year

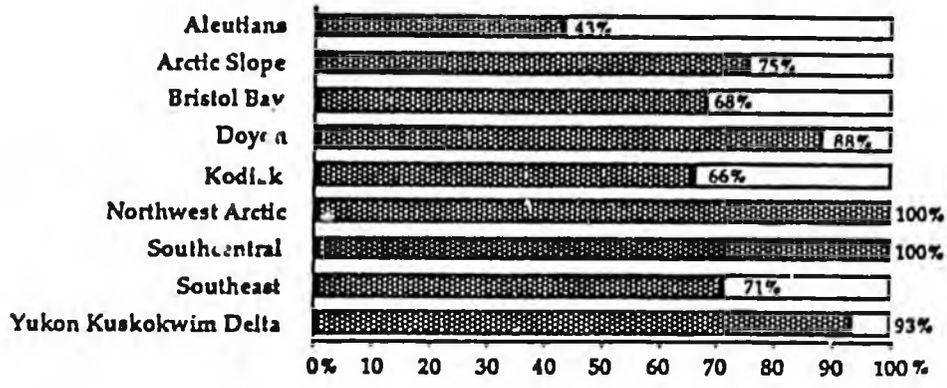
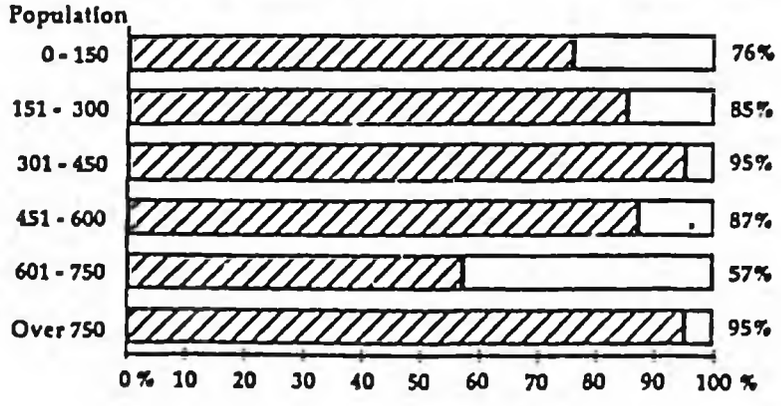


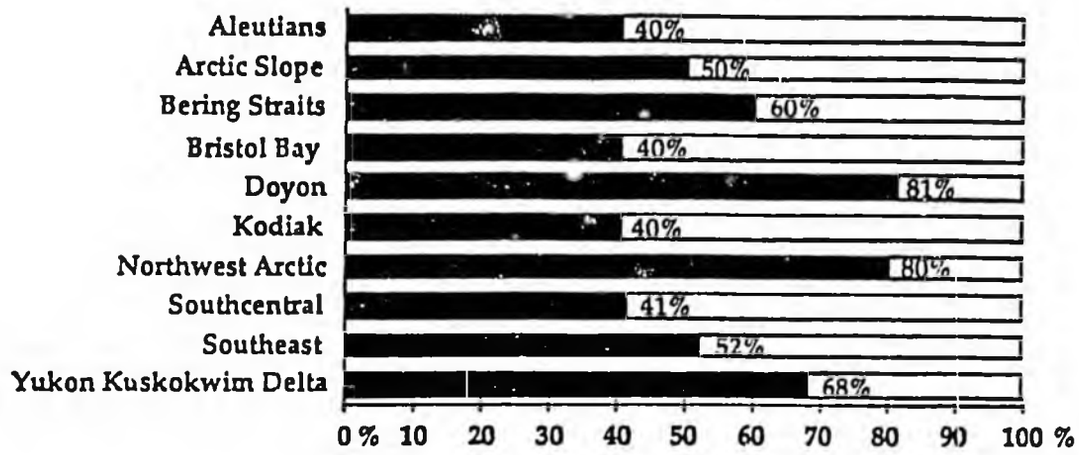
Chart 1.4 identifies by city size the effect of budget reductions. Note that over 90% of Alaska's second class cities have a population of 600 or less. It is clear from the chart that an overwhelming majority of the second class cities surveyed have experienced budget reductions.

Chart 1.4 Percentage of Surveyed Municipalities (By Community Size) With Budgets Reduced From Previous Year



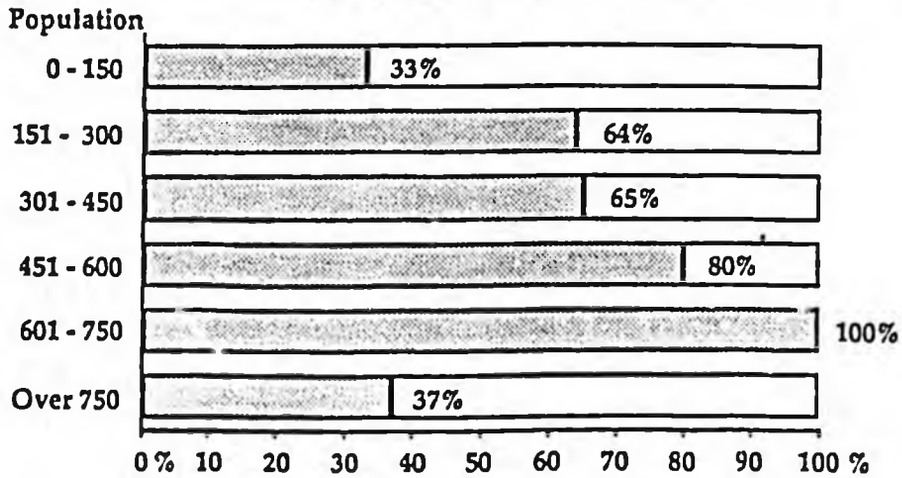
The reduced ability of families to pay municipal service charges compounds the problem of reduced city revenues. The following charts identify where the impacts of reduced ability to pay for municipal services are being experienced:

Chart 1.7 Percentage of Surveyed Municipalities (By Region) Reporting An Increased Number Of Families Experiencing Difficulty In Paying For Services



The following chart indicates that residents in many smaller cities are experiencing a reduced ability to pay for services.

Chart 1.8 Percentage of Surveyed Municipalities (By Community Size) Reporting An Increased Number Of Families Experiencing Difficulty In Paying For Services



According to the survey results, of the 128 cities questioned 55% (70 cities) provide police services. This fiscal year, thirty-eight (38) of the 70 cities providing this service have had to reduce police services. In addition, 17% (12 cities) of the cities providing police protection report that the service will be eliminated if local economic conditions continue next year.

The survey further indicates that the most common reductions are in the areas of staff positions; reduced hours; and, reduced salaries.

POLICY ISSUES: There are several factors that demand that rural cities have local public safety officials. As indicated in recent Anchorage Daily News articles, rural Alaska tends to have a high level of violent crime and death, much of which is alcohol related. The control of alcohol coming into communities is a difficult task but without the ability to enforce local alcohol control laws the task is impossible. In addition, most of these cities are remote and isolated from immediate assistance from the State Troopers. A forced reduction in rural public safety raises the questions of how important it is to the State to ensure the safety of rural residents and whether there is a basic level of protection all communities should enjoy.

HEALTH CLINICS

The majority of Alaska's small rural cities have a health clinic staffed by Village Health Aides. The Health Aides provide primary and health maintenance care. A majority of these clinics are funded, in part, by the U.S. Indian Health Service. In addition, there are 118 cities dedicating a portion of State Revenue Sharing funds to clinic operations. A city's contributions to the clinic normally covers building maintenance, operations costs, and the funding of alternative health aides.

According to the survey results, of the 128 cities questioned 72% (92 cities) provide funds for community health clinics. This fiscal year, 23 of the 92 cities providing this service have had to reduce the level of service. In addition, 12.5% (16 cities) of the cities funding health clinics report that the funding will be eliminated if current revenue conditions continue next year.

The survey further indicates that the most common reductions are in the areas of operations and maintenance costs; reduced hours; and, equipment not replaced.

The great distance many small rural cities are from fully staffed medical facilities necessitates the continuation of fully operational village health clinics. Since Statehood, Alaska has funded the construction and maintenance of health clinic facilities across the State. This effort, combined with annual allocations of federal dollars and the efforts of the regional Native health corporations, has resulted in greatly improved health services for rural residents.

prohibitive cost of drilling wells in rural Alaska and the presence of deep permafrost make the feasibility of individual wells unlikely in many communities. A more detailed description of the range of water services provided by rural cities can be found in the Appendix – Community Profiles.

Of the 128 cities questioned, 77% (99 cities) have a municipal managed water service. This fiscal year, 17 of the 99 cities providing this service have had to reduce the level of service. Service charges have been increased by 13 cities. In addition, 14% (14 cities) of the cities managing a water service report that the service will be eliminated if local economic conditions continue next year.

The survey further indicates that the most common reductions are in the areas of reduced hours of operation; reduced salaries; and, reduced operation and maintenance budgets.

POLICY ISSUES: Having an ample supply of safe drinking water is one of the most basic community needs. Does the State have a responsibility to ensure that each community has adequate water? What will happen to the State's investment in water systems if maintenance is neglected? Are there sufficient dollars available for the Village Safe Water Program? How much will the State save in future health care costs by assuring safe drinking water is, and continues to be, available?

SEWER SERVICE

Virtually every rural city has a means of sewage disposal though some are rudimentary by urban standards. Such systems can vary from individual septic tanks, to a honey bucket pickup system with an open sewage lagoon, to an outhouse, or a sophisticated secondary treatment plant. Many of the systems have been developed with a combination of Public Health Service and State funds but are managed by the municipalities.

According to the survey results, of the 128 cities questioned 55% (70 cities) have a municipal managed sewage disposal system. This fiscal year, 11 of the 70 cities providing this service have had to reduce the level of service this year. Service charges have been increased by 11 cities. In addition, 16% (11 cities) of the cities managing a sewage disposal system report that the service will be eliminated if local economic conditions continue next year.

The survey further indicates that the most common reductions are in the areas of reduced salaries; reduced positions; reduced hours; and, reduced operation and maintenance budgets.

POLICY ISSUES: The safe and sanitary disposal of sewage is essential for the maintenance of community health. If the existing rural systems are allowed to deteriorate there could a reciprocal decline in residents health. Again, is there a basic level of sanitation services that the State should guarantee each community in order to prevent higher health care costs in the future?

LAUNDRY FACILITIES

Many rural cities have city owned and operated laundry facilities. The city laundry frequently is the watering point for communities without distribution systems and also offers bathing facilities. The management of a laundry facility can also provide a city without a sewage system a means for disposing waste gray water. Many of these facilities have been constructed with funding from the State's Village Safe Water Program.

According to the survey results, of the 128 cities questioned 31% (40 cities) have a municipal managed laundry facility. twenty-two of the 40 cities providing this service have had to reduce the level of service this year. In addition, 20% (8 cities) of the cities managing a laundry facility report that the service will be eliminated if local economic conditions continue next year.

The survey further indicates that the most common reductions are in the areas of reduced staff positions; reduced hours of operation; and, reduced operation and maintenance budgets.

POLICY ISSUES: To urban residents, laundry facilities might seem like a strange service for a local government to provide. However, in rural Alaska when many homes do not have running water, the laundry facility provides two basic public health functions: a place for washing clothes and bathing. Often the laundry building houses the only water treatment plant. The potential loss of these public facilities and the question of maintaining a basic level of public health should be considered by the State.

CITY ADMINISTRATION

The administration of a city government is an essential function in the management of a municipality. Almost every city in the State has paid administrative staff. In the smaller cities, this frequently includes only the mayor and an administrator/city clerk. In addition, many of these cities have staff who are responsible for the direct delivery of municipal services (i.e., equipment operations for road and landfill maintenance, and electrical plant operators).

According to the survey results, of the 128 cities questioned 97% (124 cities) have city administrative staff. This fiscal year, 73 of the 124 cities providing this service have had to reduce administrative capacities. This reduction has resulted in the loss of 122 positions in city government employment which is often a major source of year-round jobs in small cities.

The survey further indicates that the most common reductions in administrative capacity are in the areas of reduced staff positions; reduced hours of operation; and, reduced salaries.

Municipal Services Reductions

The reductions in State Revenue Sharing (SRS) and Municipal Assistance (MA) combined with the downturn in capital construction funds have resulted in a reduction in the services provided by cities. Of the cities surveyed, 95% have had to reduce at least one service. The charts below indicate which services are provided by the surveyed cities and how these services have been reduced this year; statewide, and by region:

Chart 1.9 Number of Cities Surveyed Providing Municipal Services

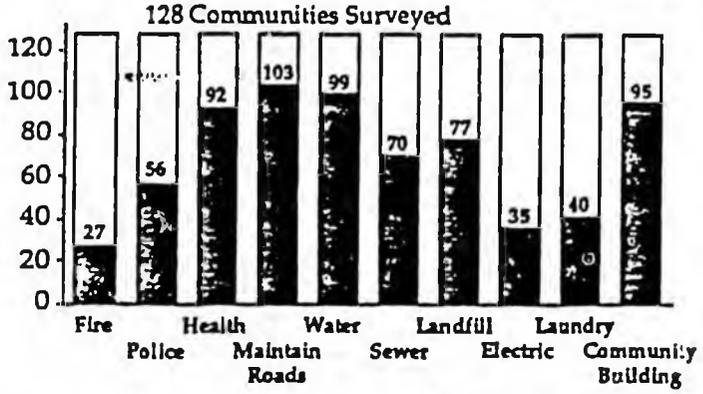


Chart 1.10 Percentage of Surveyed Municipalities Statewide Which Have Reduced Budgets This Year

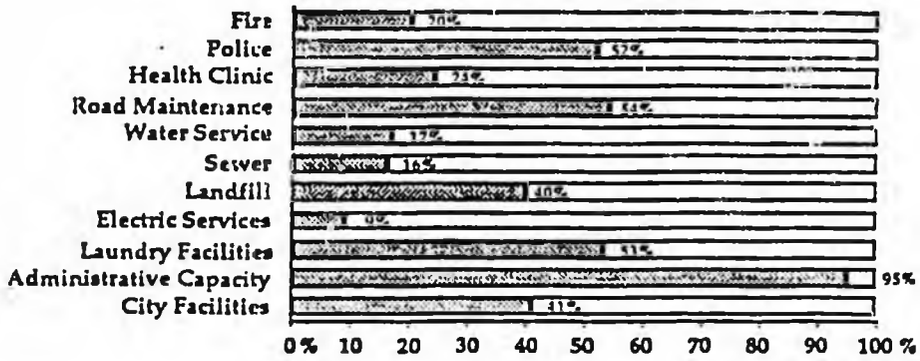


Chart 1.11 Percentage of Surveyed Municipalities (By Region) Which Have Reduced Essential Services

For each service, the three regions with the greatest percentages of reductions are highlighted

	Fire	Police	Health	Maintain Roads	Water	Sewer
Aleutians	-0-	40	17	40	17	-0-
Bering Straits	27	90	67	67	13	-0-
Bristol Bay	26	33	12	32	7	-0-
Doyon	21	20	23	37	24	11
Kodiak	33	-0-	25	67	17	20
Northwest Arctic	-0-	100	44	44	33	50
Southcentral	7	22	38	36	8	9
Southeast	16	58	28	47	17	29
Yukon Kuskokwim Delta	42	56	35	52	22	9

Note: The above percentages are based upon those cities providing services. Services for the Arctic Slope region are provided by the North Slope Borough and are not covered in this chart.

Insurance

Insurance is a large expense for many small cities. It is also a necessary expense to help ensure the continued delivery of municipal services. The survey results indicate that 45% of the surveyed communities do not have property insurance. This is significant because of the tremendous growth of public facilities in these communities during the past five years. The following charts depict the status of insurance coverage in rural Alaskan communities as identified by the survey.

Chart 1.14 Liability Insurance Coverage of Surveyed Communities

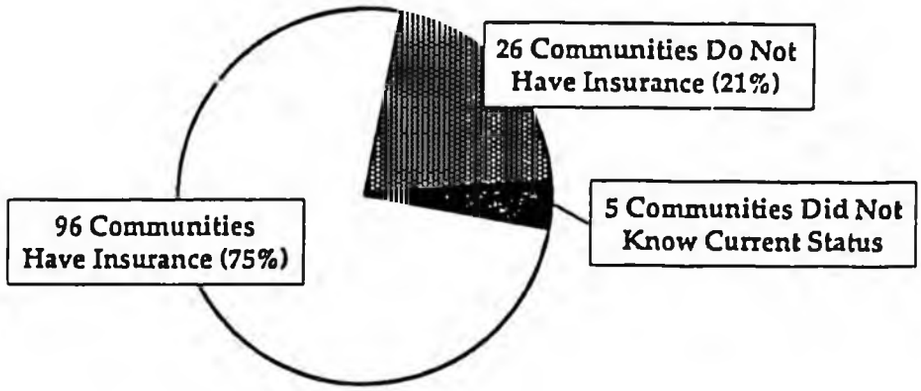
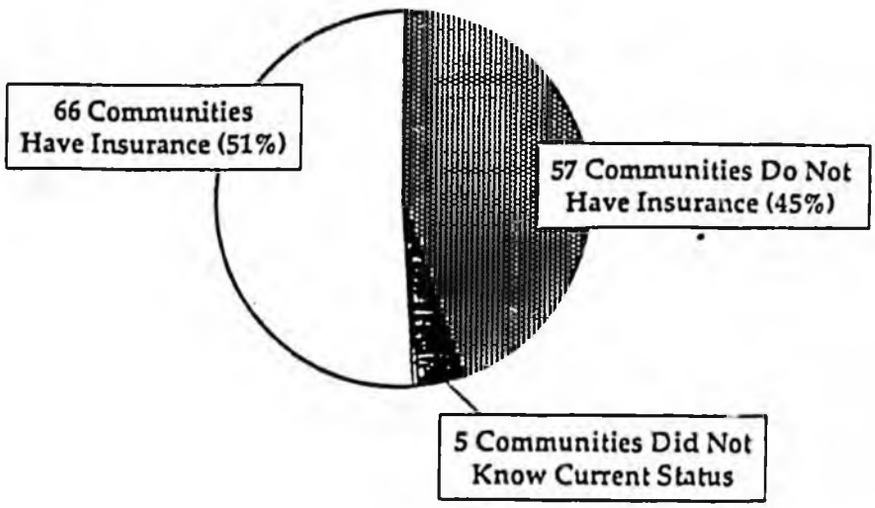
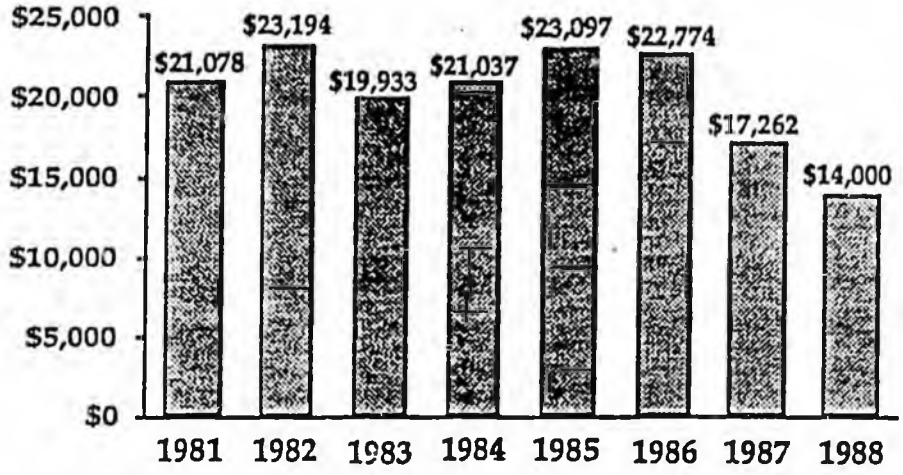


Chart 1.15 Property Loss Insurance Coverage of Surveyed Communities



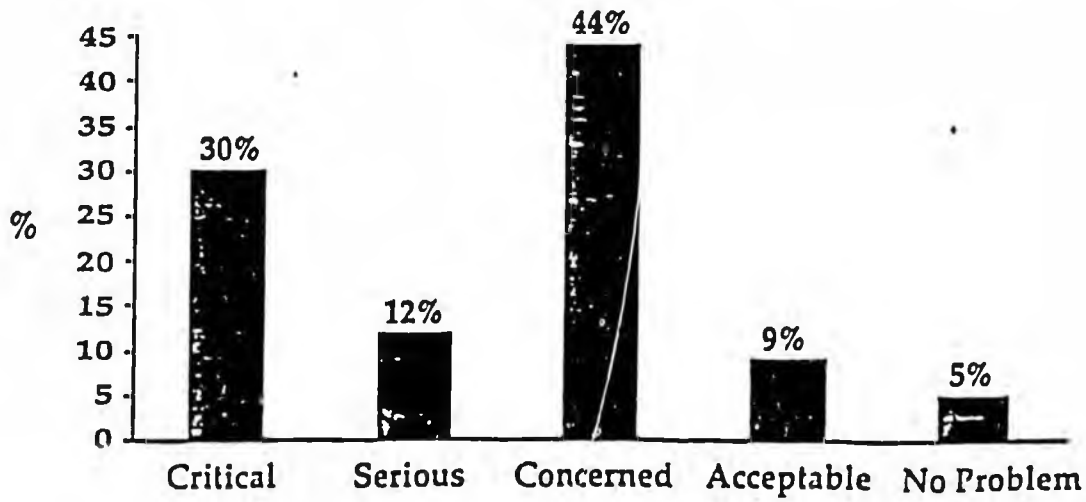
The reduction in State Revenue Sharing dollars has had a pronounced affect upon these communities. Since 1985 there has been almost a 40% reduction in these funds available to unincorporated communities. Table 4.6 profiles rise and fall of State Revenue Sharing funds distributed to these communities from 1981 to the present. The amount each unincorporated community receives is a flat amount and is not influenced by the type or level of services offered by a community.

Chart 4.2 **Revenue Sharing For Unincorporated Communities Since 1981**



The unincorporated communities are concerned with the current state of their local economies. All the communities surveyed were asked to think about the future of the community over the next couple of years and indicate how they saw their financial situation. The results show concern about the future. Table 4.2 indicates that 86% of the respondents view their situation from critical to concerned.

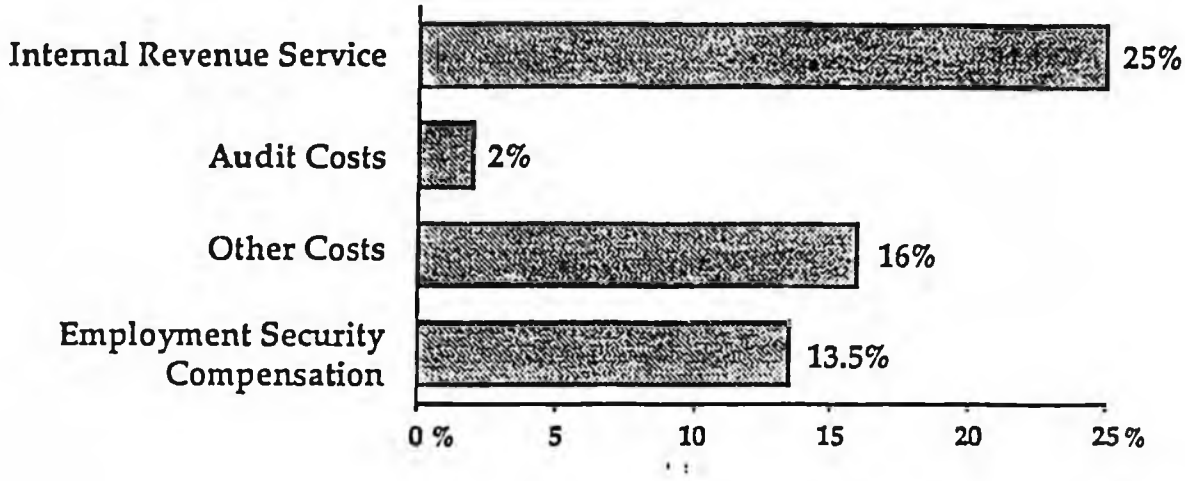
Chart 4.3
Unicorporated Communities Financial Situation
As Reported In Survey



UNINCORPORATED DEBTS

A significant number of the unincorporated communities have incurred additional debts this year, placing increased pressure on limited budgets. The following chart identifies what percentage of the unincorporated communities surveyed have encumbered what kinds of increased debts.

Chart 4.6 Percentages of Surveyed Unincorporated Communities With Significant Debts



Chapter 3
Policy Implications of the Economic Dislocation Survey Results

The results of the Economic Development Survey indicate that Alaska's economic downturn, and particularly the reduction in State funding of local government projects, has seriously affected the ability of rural communities to provide basic public services. The communities surveyed have reported increasing difficulty in meeting the costs of maintaining and operating the many public facilities constructed during Alaska's recent period of relative wealth. Indications are that the abilities of rural communities to provide services and maintain facilities will continue to deteriorate unless there is a significant turnaround in the state's general economic picture. At the same time, the ability of State government to assist local communities has been severely handicapped by the decline in State revenues.

This situation poses significant questions for decision makers. A number of such questions are listed below, followed by a discussion which expands upon these questions.

POLICY QUESTIONS

- **State Responsibility.** What is the State's responsibility or appropriate role in addressing the immediate problem of reduced services and reduced facilities maintenance?

- **Local Responsibility.** What is the "local" responsibility, and ability, to address this situation.

- **Definition of "Basic Needs."** Should standards and criteria for "basic needs" be established to serve as a framework for equitably determining the level of support for "essential" services? If so, should such standards include community size, or location, with respect to the relative efficiency of service provision and facilities maintenance? Should certain services and/or facilities be given priority status in State/local budget reduction considerations.

- **Local Government Problems.** Does the structure of local government formation in Alaska lead to the existence of local governments too small to meet the needed fiscal and service delivery requirements?

- **Mothballing Option.** Would the temporary mothballing of certain public facilities be a feasible measure?

A determination of local responsibility must be made in conjunction with a decision on the basic level of services to which all Alaskans are entitled. Once this decision is made, then costs of the basic level of services can be estimated. With this information in hand it is possible to address the question of local responsibility and ability to pay. (See discussion below on basic needs.)

There are a number of policy questions related to deciding local responsibility for providing services, and constructing and maintaining public facilities. Should an "appropriate" or "acceptable" level of local financial responsibility or "ability to pay" be determined? Would this be done on a statewide, regional, or community basis? Should standards and criteria be developed to serve as a framework for determining the allocation of financial responsibility between the State and local governments?

Regarding the "local ability to pay," there are two different kinds of measures that need to be considered. First, in considering the general feasibility of the public policy option of allocating certain costs between State and local governments (or other local entities), there is a need to estimate the level of financial burden which local governments (and residents) would potentially be able to bear. Secondly, if such an allocation policy was actually implemented, there would likely be a need to establish suitable criteria and standards for use in the formal determinations of an appropriate "local" share.

Determining "Basic" Needs

Many have argued for the establishment of a more rational capital project planning process and the establishment of standards which define in some way the level of services and facilities which would be considered as "basic" community needs. The few such standards that do exist are fragmented and often do not play any effective role in determining the actual course of community development.

The construction of particular public facilities in any given community is still largely the result of a fortunate encounter between available outside revenues, a "local" concept, and a specific political will at some level of government.

It is generally accepted in the U.S. that certain services are essential. Among these are education (mandated by law), public safety (police and fire protection) and health and sanitation (safe water, sewage disposal, solid waste disposal). However, given the relatively high cost of providing these services in many small Alaskan communities, and the fact that the State has limited resources, what can the State be reasonably expected to provide?

This question has several components:

- To what services is every Alaskan entitled regardless of his/her or the local government's ability to pay?

Communities do receive substantial financial support from the State through programs such as Power Cost Equalization, State Revenue Sharing and Municipal Assistance. However, State funds have been on the decline and the fixed costs of operating and maintaining facilities are typically so high that they consume all of the State assistance monies, and then some. Communities who received financial assistance often do not have the human and additional financial resources necessary to provide the services they been encouraged to provide. It is difficult, with a small population base, to find the managers and technicians necessary to financially and administratively manage services and maintain facilities in a proper state of repair. Because of this lack of human and financial resources, many rural city governments are often far in debt; collections for services are behind, or not made at all; and equipment often must be replaced prematurely because of poor maintenance. Policy makers need to address this issue by examining structural alternatives to service provision. This could include some form of public service management and maintenance services on a regional or sub-regional basis. The maintenance and management of public facilities and services associated with the REAAs might serve as a beginning point.

Mothballing Alternative

A program of "mothballing" certain public facilities is one interim measure for policy makers to consider. Many existing community facilities were constructed during periods when State funding was relatively plentiful. Now there is a shortage of financial resources to adequately maintain these facilities.

One basic assumption in any serious discussion of mothballing is that the financial situation will improve in the future to the point that funds will be available to reopen and maintain a mothballed facility. Mothballing is premised on the chance that sometime in the future the facility can be restarted. If this does not appear to be the case, salvage of the facility may make the most economic sense. However, even if there is only a small chance that the facility can be restarted, it may make sense to mothball the facility, if the costs of doing so are relatively minor. Boarding windows, locking doors, draining fluids on equipment, covering exterior equipment, draining water pipes may be all that is required to keep equipment in order for several years.

Questions about mothballing need not only be answered at the local level, in terms of specific facilities, but also at the State level in terms of community facilities in general. For example: Is the economic situation going to change regarding the future ability to maintain facilities? What types of facilities should be mothballed? What are the appropriate measures to take for each facility? What are the costs and benefits of alternative measures? How much technical and financial assistance to communities should the state provide?

HB

116

Alaska State Legislature

HOUSE OF REPRESENTATIVES

Official Business

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

HOUSE BILL 116

TABLE OF CONTENTS

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#1

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: HB 116
PUBLISH DATE:

FISCAL NOTE

REQUEST:

Revision Date:
Title: "An Act relating to immunity for treatment of intoxicated persons..."
Sponsor: MacLean & Swackhammer
Requestor: House C&RA

Agency Affected: Public Safety
BRU: Law Enforcement
Component: AST, FWP, VPSO

EXPENDITURES/REVENUES: (Thousands of Dollars) (Inflation not included)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
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	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

House Bill 116 would prevent lawsuits against the State, the Department, and its officers, employees, and agents for discretionary decisions regarding incapacitated (intoxicated) persons. Passage of this bill may eliminate future liability, but would have no fiscal impact on the Department's present budget.

Prepared by: Captain C. Roger McCoy, Special Assistant
Division: Office of the Commissioner
Phone: 465-4322
Date: 1/27/89

Approved by Commissioner: Arthur English
Agency: Department of Public Safety
Date: 1-30-89

#2

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: H.B. 116
PUBLISH DATE: 1-25-89

FISCAL NOTE

REQUEST:

Revision Date:
Title: "An Act relating to immunity for treatment of intoxicated persons."
Sponsor: Rep. MacLean & Swackhammer
Requestor:

Agency Affected: Department of Corrections
BRU:
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
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)

Susan E. Knighton

Prepared by: Susan E. Knighton, Director
Phone: 465-3376
Division: Administrative Services
Date: 1-30-89

Approved by Commissioner: Susan Humphrey-Barnett
Date: 1-30-89
Agency: Department of Corrections

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

imposes upon a municipality an actionable duty to take persons incapacitated by alcohol in a public place into protective custody. We determine that it does and thus reverse the judgment of the trial court and remand for further proceedings.

I

On May 1, 1980, Thomas Busby was walking about two feet into the traffic lane on East Fifth Avenue in Anchorage.[3] Officer Foster was on patrol and spotted Busby, stopped him, moved him off to the side of the road, talked with him, and determined that Busby was intoxicated. Officer Foster then ran a warrant check on Busby but did not place him into protective custody. Apparently finding no outstanding warrants, Officer Foster then reentered her vehicle and proceeded on her way. Shortly after Officer Foster left, Busby was struck by a car and suffered injuries as a result.

In his suit against the Municipality, Busby alleged that the Municipality was negligent and/or reckless in failing to take him into protective custody and that the Municipality's omission was the direct and proximate cause of his injuries. After hearing was held on Busby's and the Municipality's cross-motions for summary judgment, the trial court determined that the Municipality owed Busby no affirmative duty to take him into protective custody and that, therefore, the Municipality could not have been negligent in failing to do so. Accordingly, the trial court granted summary judgment in favor of the Municipality. This appeal followed.

II

#3

[1] In the recent case of *City of Kotzebue v. McLean*, 702 P.2d 1309 (Alaska 1985), we unequivocally reaffirmed our rejection of the so-called "public duty doctrine" as an unnecessary and unjustified expansion of the state's statutorily limited immunity. *Id.* at 1311-12; *see also Adams v. State*, 555 P.2d 235, 241-43 (Alaska 1976). In place of that doctrine, we indicated that the liability of a municipality for the negligent acts and omissions of its representatives will be governed by traditional tort principles. As we stated in *McLean*:

> In practice, the public duty doctrine is an injunction against imposing liability on a government without first deciding what the government's duty is. While the public duty doctrine does protect the state from becoming the insurer of all private activity and from undue interference with its ability to govern, we believe that these concerns are better addressed by the tort concept of duty, which limits the class of people which may seek to hold the state responsible for negligent action, and by AS 09.50.250.

702 P.2d at 1313 (citation and footnote omitted). Thus, our determination here must be made with recourse to the principles embodied by the tort concept of duty.

[2, 3] As we have noted, " '[d]uty' is not sacrosanct in itself but [is] only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." *Id.* (quoting W. Prosser, *Handbook of the Law of Torts* § 53, at 325 (4th ed. 1971)). Thus stated, the process of finding that a defendant owes a duty to a

ferred to another health facility, and has no funds, may be taken to the person's home, if any. If the person has no home, the approved public treatment facility shall assist the person in obtaining shelter.

....

(g) Peace officers or members of the emergency service patrol who comply with this section are acting in the course of their official duty and are not criminally or civilly liable for it.

....

(j) For purposes of (b) of this section, "incapacitated by alcohol" means a person who, as the result of consumption of alcohol, is rendered unconscious or has judgment or physical mobility so impaired that the person cannot readily recognize or escape conditions of apparent or imminent danger to personal health or safety. The definition in AS 47.37.270(8) applies to other portions of this chapter.

3. Because this appeal comes to us on summary judgment, our obligation is to draw all inferences of fact in favor of appellant Busby and against appellee Municipality. *See, e.g., Alaska Rent-a-Car v. Ford Motor Co.*, 526 P.2d 1136, 1139 (Alaska 1974).

plaintiff is on which involves a fine balancing of conflicting policies; it is in essence an attempt to determine whether it would be fair and equitable to require an individual to act, or to refrain from acting, in a specified manner so as to avoid undue risk of harm to third persons. *See generally* W. Keeton, D. Dobbs, R. Keeton, and G. Owen, *The Law of Torts* § 53, at 356–58 (5th ed. 1984) (hereinafter *Prosser*). Recognizing the difficulty of this task, we have delineated a number of factors which should be considered to provide greater predictability in the decision-making process. These factors include the foreseeability of harm to the plaintiff; the degree of certainty that the plaintiff suffered injury; the closeness of the connection between the defendant's conduct and the injury suffered; the moral blame attached to the defendant's conduct; the policy of preventing future harm; the extent of the burden to the defendant and consequences to the community in imposing a duty to exercise care with resulting liability for breach; and the availability, cost, and prevalence of insurance for the risk involved. *McLean*, 702 P.2d at 1314 (quoting *D.S.W. v. Fairbanks North Star Borough School District*, 628 P.2d 554, 555 (Alaska 1981)).

[4] These independent considerations, however, may sometimes be superseded by the legislature. For example, where the legislature has considered and resolved conflicting policies by clearly enunciating a duty in a statute, the relevant statute should be considered and, in a proper case, adopted as the appropriate standard of care. *See Metcalf v. Wilbur, Inc.*, 645 P.2d 163, 167–68 (Alaska 1982); *Bachner v. Rich*, 554 P.2d 430, 440–42 (Alaska 1976); *Breitkreutz v. Baker*, 514 P.2d 17, 20–21 (Alaska 1973); *Ferrell v. Baxter*, 484 P.2d 250, 263–65 (Alaska 1971); *see generally Prosser, supra* p. 6, § 36, at 220–29; Restatement (Second) of Torts § 285 (1965) (hereinafter Restatement). A statute enunciates the appropriate duty when it is found that (1) the plaintiff is within the class protected by the statute, (2) the harm/injury which occurred was of the type which the statute was intended to protect against, (3) the statute prescribes specific conduct rather than merely a general or abstract duty of care, (4) the defendant was a party charged with observing the statute, (5) the defendant can be fairly charged with being aware of the applicability of the statute, and (6) the statute is not so outdated or arbitrary as to make inequitable the statute's adoption as the standard of care. *E.g., State Mechanical v. Liquid Air*, 665 P.2d 15, 18–19 (Alaska 1983); *Grothe v. Olafson*, 659 P.2d 602, 607 (Alaska 1983); *see also* Restatement § 286.[4]

[5, 6] Busby argues that AS 47.37.170(b) articulates the appropriate duty in this case. We agree. As the statute explicitly states, and as the trial court itself noted, AS 47.37.170(b)[5] is intended to benefit and protect the health and well being of persons who are incapacitated by alcohol and imposes a mandatory duty upon law enforcement personnel to place such persons into protective custody. *Cf. Peter v. State*, 531 P.2d 1263, 1268 (Alaska 1975) (quoting House Concurrent Resolution No. 36 (1969) on treatment of problem drinkers and alcoholics); AS 47.37.010.[6] In addition, accepting as true Busby's assertions[7] that

4. Section 286 of the Restatement (Second) of Torts (1965) provides:

> The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part
>
> (a) to protect a class of persons which includes the one whose interest is invaded, and
>
> (b) to protect the particular interest which is invaded, and
>
> (c) to protect that interest against the kind of harm which has resulted, and
>
> (d) to protect that interest against the particular hazard from which the harm results.

5. *See supra* note 2.

6. AS 47.37.010 provides:

> It is the policy of the state that alcoholics and intoxicated persons should not be criminally prosecuted for their consumption of alcoholic beverages and that they should be afforded a continuum of treatment so they may lead normal lives as productive members of society.

7. *See supra* note 3.

he was a person incapacitated by alcohol in a public place, he was clearly a member of the protected class and his accident was of the type against which the statute was designed to protect. Finally, it cannot be doubted that the statute prescribes specific conduct rather than merely states some general or abstract duty of care; Officer Foster was within that class of persons charged with observing the statute; as a municipal police officer, she can fairly be charged with awareness that the statute applied; and the statute can hardly be considered so outdated or arbitrary as to make inequitable its application as the appropriate standard of care.

[7] The Municipality cites a number of cases which, it argues, mandate a different conclusion. Only two, however, require discussion. In *Stout v. City of Porterville*, 148 Cal.App.3d 937, 196 Cal.Rptr. 301 (1983), a California court refused to find that California Penal Code § 647(ff) set out an appropriate legislative standard of care in circumstances similar to those at issue here. *Id.* 196 Cal.Rptr. at 306–08. The statute in *Stout*, however, provided that an intoxicated person could only be taken to a voluntarily maintained public treatment facility. *Id.* The California court was therefore concerned that imposing a mandatory duty would cause counties participating in the voluntary treatment program to withdraw their support and thus cause the treatment program to collapse. *Id.* We have no similar concern in the present action.[8] In addition, Penal Code § 647, unlike AS 47.37.170(b), was not intended to minimize the dangers faced by the inebriate, but simply to end the "revolving door" policy of jail and street, street and jail. *Id.* We thus decline to adopt *Stout*'s analysis.

Marshall v. Ellison, 132 Ill.App.3d 732, 87 Ill.Dec. 704, 477 N.E.2d 830 (1985), also involves an analogous factual situation and statute.[9] Nevertheless, this case is also unpersuasive for at least two reasons. First, the court in *Marshall* apparently refused to find that the relevant statute imposed upon the state any mandatory duty on the basis of the state's sovereign immunity. *Id.* at 83. Relying upon *Rodriguez v. City of Cape Coral*, 451 So.2d 513 (Fla. App.1984), *affirmed*, 468 So.2d 963 (Fla. 1985), the *Marshall* court stated:

> Like the Florida statute [in *Rodriguez*], section 15(b) requires an officer to exercise his professional judgment in determining whether an individual appears to be incapacitated. We do not believe the public interest would be served by allowing a jury of laymen with the benefit of 20/20 hindsight to second-guess a policeman's decision.

87 Ill.Dec. at 709, 477 N.E.2d at 835. Second, we find the *Marshall* court's statutory analysis questionable. Despite the unambiguous mandatory language in the Illinois statute and without citation to legislative history or any other authority, the court simply concluded that the legislature did not intend to create a cause of action under the statute for failure to take a person into protective custody. *Id.* Whatever the merits of the *Marshall* court's conclusion with respect to interpretation of the Illinois statute, we decline to apply its reasoning here.

We conclude then that AS 47.37.170(b) articulates an appropriate standard of care and thus hold that the Municipality has an affirmative duty to take persons incapacitated by alcohol in a public place into protective custody and transport them to an appropriate treatment facility.[10]

III

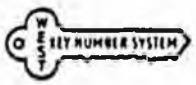
Busby's cross-motion and appeal seeking summary judgment in his favor are without merit. For the reasons discussed above, we REVERSE the judgment of the

8. *See* AS 47.37.170(b), (c), *supra* note 2.

9. *See* Ill.Ann.Stat. ch. 111½, ¶ 6315(b) (Smith-Hurd Supp.1986).

10. Our decision today is expressly limited to a discussion of duty. Because the trial court's judgment was based solely upon this issue, we need not, and do not, consider any question regarding alleged breach and express no opinion as to the factual merits of Busby's claim. Similarly, we express no opinion regarding any claims of municipal immunity under AS 09.65.070.

trial court and REMAND for further proceedings consistent with this opinion.



STATE of Alaska, Appellant,

v.

NORTHWESTERN CONSTRUCTION, INC., Appellee.

No. S-1141.

Supreme Court of Alaska.

Aug. 7, 1987.

Contractor which was required to do more work than indicated in its contract with State brought action to recover damages. The Superior Court, Third Judicial District, Anchorage, Brian C. Shortell, J., entered judgment in favor of contractor, and State appealed amount of damages. The Supreme Court, Compton, J., held that: (1) use of blue book rental rates for construction equipment to calculate damages was proper; (2) State's claim that blue book overtime equipment hours should have been reduced by 50 percent could not be considered for first time on appeal; (3) addition of 15 percent profit to blue book rates was not double recovery; (4) addition of ten percent to costs for overhead was reasonable; and (5) contractor should have allocated part of its grader time to less expensive grader in calculating damages.

Affirmed in part, reversed in part, and remanded.

Matthews, J., dissented and filed an opinion in which Rabinowitz, C.J., joined.

1. Damages ⇐189

Plaintiff in contract action need only prove its damages to "reasonable certainty."

2. Appeal and Error ⇐1008.1(5)

On appeal, Supreme Court will intervene only when convinced that trial court's findings of fact are clearly erroneous. Rules Civ.Proc., Rule 52(a).

3. States ⇐104

Use of construction equipment rental blue book rates to calculate damages was not clearly erroneous where state contract provided that payment for extra work would be calculated using blue book and blue book rates were commonly relied upon in state.

4. Appeal and Error ⇐169, 176

Issue raised for first time on appeal may be considered if issue is not dependent on any new or controverted facts, is closely related to appellant's trial court arguments, and could have been gleaned from pleadings, or if issue constitutes "plain error."

5. States ⇐214

State's argument that contractor's construction equipment rental blue book rate damages for extra work performed should have been reduced by 50 percent was dependent on new or controverted facts, was not closely related to State's trial court arguments, and could not have been gleaned from pleadings, and State was not entitled to argue that issue, which was raised for first time on appeal.

6. Appeal and Error ⇐169

Under "plain error" doctrine, issue not raised at trial may nonetheless be considered by Supreme Court if it appears that obvious mistake has been made which creates high likelihood that injustice has resulted.

See publication Words and Phrases for other judicial constructions and definitions.

7. States ⇐214

State was not allowed to raise for first time on appeal, under plain error doctrine, issue of whether contractor's damages, caused by extra work required and calculated using construction equipment rental rate blue book, should have been reduced by 50 percent, as there was no evidence that any state representative used 50 per-

#4

Alaska MUNICIPAL League

TELEPHONE
(907) 586-1325
FAX 463-5480

217 SECOND STREET, SUITE 200
JUNEAU, ALASKA 99801

TO: Representative Eileen Maclean, Chair
Members of House Community and Regional Affairs Committee

FROM: Scott A. Burgess, Executive Director

DATE: January 24, 1989

SUBJECT: HB 116 - Immunity for Treatment of Intoxicated Persons

The Alaska Municipal League supports HB 116. For the second year, relief from the implied liability created by the Supreme Court ruling in Busby v Municipality of Anchorage is a priority of the AML and the 123 municipalities the AML represents directly. The AML believes the Court misinterpreted the intent of the Legislature in AS 47.37.170(g) and the resulting implications of liability have created an unnecessary and unintentional burden on our law enforcement officials and our correctional facilities. HB 116, as introduced, provides legislative clarification for the courts and removes the threat of liability which is a deterrent to the protection of all our citizens.

I have attached a copy of the AML position on Busby which was contained in the AML's Municipal Platform which outlines the AML's legislative priorities for 1989 and which was provided to all legislators. HB 116 accomplishes the desired intent of the AML position on the Court's misinterpretation of AS 47.37. I have also attached copies of relevant AML resolutions passed by the AML membership at their annual conference in November.

Governor Cowper introduced HB 406 last year which would have provided immunity under AS 47.37 but unfortunately the bill did not get out of the House. Some believe that the immunity granted under AS 47.37.170(g) should be "qualified" by adding a legal test of "maliciousness". This is inappropriate and unnecessary. No problem or complaint existed before Busby. Our law enforcement officials are professionals and understand and carry out their duties under AS 47.37. Creating a civil liability for carrying out this duty may have the opposite effect of deterring the effective enforcement of AS 47.37.

The AML supports HB 116, appreciates the efforts of the sponsor to correct the problem it is causing in our communities, and urges the Committee to pass the bill out as introduced.

Attachments

Removal of Municipal Liability Imposed by Busby Decision

The Alaska Municipal League urges the Legislature to pass legislation reversing the implied liability of municipalities caused by the Busby decision regarding taking incapacitated persons into protective custody.

Background

The decision of the Alaska Supreme Court in Busby v. Municipality of Anchorage, which interpreted the intent of the Alaska Legislature in enacting AS 47.37.170(b), judicially created a duty to take incapacitated persons into custody that the Legislature did not intend to impose upon local communities.

The purpose of AS 47.37.170(b) is to provide for a compassionate local response to one aspect of the alcohol/drug crisis in local communities. However, to change that ability of local communities to help those in need into an affirmative duty to do so imposes on local communities obligations they are neither equipped nor fairly required to meet. The League supports a wide variety of measures to deal with the complicated issues of alcohol/drug abuse in Alaska. Nonetheless, the creation by the courts of a governmental obligation to take incapacitated persons into custody that took place without the discussion and study of the impacts of that obligation that would occur during the normal legislative process was not a good or fair way to address the problem.

The effect of this court decision has been that municipalities with police powers are now forced to pick up all persons who appear to be incapacitated and put them in a treatment facility, where possible, or in state or municipal correctional facility. The result has been great expense to the municipality or the State and an increased workload for peace officers, which comes at the expense of other duties, including investigation of violations of alcohol control laws.

Therefore, the League supports amending AS 47.37.170(b) by adding to it the following declaration: "This section shall not impose any affirmative duty upon municipalities or their agents to take persons incapacitated by alcohol into protective custody."

Resolution of the Alaska Municipal League

Resolution No. 89-7

A RESOLUTION URGING THE REVERSAL OF THE IMPLIED LIABILITY OF MUNICIPALITIES REGARDING TAKING INCAPACITATED PERSONS INTO PROTECTIVE CUSTODY

WHEREAS, the purpose of AS 47.37.170(b) Is to provide for a compassionate local response to one aspect of the alcohol/drug crisis in Alaska communities to help those in need, and

WHEREAS, the Alaska Supreme Court decision in *Busby v. Municipality of Anchorage* incorrectly interpreted the legislative intent behind AS 47.37.170(b) and judicially created an affirmative duty to take incapacitated persons into custody that was never intended to be imposed upon local communities, and

WHEREAS, the effect of this decision has been that municipalities with police powers are now forced to pick up all persons who appear to be incapacitated and put them in a treatment facility, where possible, or in state or municipal correctional facilities, and

WHEREAS, this obligation has resulted in a great deal of expense to municipalities or the State and an increased workload for peace officers, leaving them with inadequate time for other police duties, including investigation of violations of alcohol control laws, and

WHEREAS, this decision to burden local governments with an obligation that they are neither equipped nor fairly required to meet was arrived at judicially, without any communication with or consideration for the communities involved and the impact such an obligation would have;

NOW, THEREFORE, BE IT RESOLVED that the Alaska Municipal League urges the 16th Alaska Legislature to enact legislation which clarifies the municipalities' Good Samaritan role in assisting incapacitated individuals by adding to AS 47.37.170(b) the simple declaration:

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

Removal of Municipal Liability Imposed by Busby Decision

The Alaska Municipal League urges the Legislature to pass legislation reversing the implied liability of municipalities caused by the Busby decision regarding taking incapacitated persons into protective custody.

Background

The decision of the Alaska Supreme Court in Busby v. Municipality of Anchorage, which interpreted the intent of the Alaska Legislature in enacting AS 47.37.170(b), judicially created a duty to take incapacitated persons into custody that the Legislature did not intend to impose upon local communities.

The purpose of AS 47.37.170(b) is to provide for a compassionate local response to one aspect of the alcohol/drug crisis in local communities. However, to change that ability of local communities to help those in need into an affirmative duty to do so imposes on local communities obligations they are neither equipped nor fairly required to meet. The League supports a wide variety of measures to deal with the complicated issues of alcohol/drug abuse in Alaska. Nonetheless, the creation by the courts of a governmental obligation to take incapacitated persons into custody that took place without the discussion and study of the impacts of that obligation that would occur during the normal legislative process was not a good or fair way to address the problem.

The effect of this court decision has been that municipalities with police powers are now forced to pick up all persons who appear to be incapacitated and put them in a treatment facility, where possible, or in state or municipal correctional facility. The result has been great expense to the municipality or the State and an increased workload for peace officers, which comes at the expense of other duties, including investigation of violations of alcohol control laws.

Therefore, the League supports amending AS 47.37.170(b) by adding to it the following declaration: "This section shall not impose any affirmative duty upon municipalities or their agents to take persons incapacitated by alcohol into protective custody."

This is the narrowest possible legislative response to the Supreme Court's misinterpretation of legislative intent in the Busby case. Other programs and measures are needed to deal with the complex and difficult issues raised by alcohol/drug abuse in Alaska and it is appropriate for the Legislature to deal with those issues without "judicial legislation" by the courts.

Resolution of the Alaska Municipal League

Resolution No. 89-7

A RESOLUTION URGING THE REVERSAL OF THE IMPLIED LIABILITY OF MUNICIPALITIES REGARDING TAKING INCAPACITATED PERSONS INTO PROTECTIVE CUSTODY

WHEREAS, the purpose of AS 47.37.170(b) is to provide for a compassionate local response to one aspect of the alcohol/drug crisis in Alaska communities to help those in need, and

WHEREAS, the Alaska Supreme Court decision in *Busby v. Municipality of Anchorage* incorrectly interpreted the legislative intent behind AS 47.37.170(b) and judicially created an affirmative duty to take incapacitated persons into custody that was never intended to be imposed upon local communities, and

WHEREAS, the effect of this decision has been that municipalities with police powers are now forced to pick up all persons who appear to be incapacitated and put them in a treatment facility, where possible, or in state or municipal correction[illegible]ities, and

WHEREAS, this obligation has resulted in a great deal of expense to municipalities or the State and an increased workload for peace officers, leaving them with inadequate time for other police duties, including investigation of violations of alcohol control laws, and

WHEREAS, this decision to burden local governments with an obligation that they are neither equipped nor fairly required to meet was arrived at judicially, without any communication with or consideration for the communities involved and the impact such an obligation would have;

NOW, THEREFORE, BE IT RESOLVED that the Alaska Municipal League urges the 16th Alaska Legislature to enact legislation which clarifies the municipalities' Good Samaritan role in assisting incapacitated individuals by adding to AS 47.37.170(b) the simple declaration:

"This section shall not impose any affirmative duty upon local governments or their agents to take persons incapacitated by alcohol into protective custody."

Adopted this 18th day of November 1988 in Fairbanks, Alaska.

Heather Flynn, President

ATTEST:

Scott A. Burgess, Executive Director

Resolution No. 89-7

Resolution of the Alaska Municipal League

Resolution No. 89-8

A RESOLUTION SEEKING ALTERATIONS OF STATE STATUTES TO ALLOW MORE LOCAL AUTONOMY IN DEALING WITH THE PUBLIC INEBRIATE PROBLEM

WHEREAS, Alaska Statute 47.37.170(b) requires that a person appearing to be incapacitated by alcohol in a public place be taken into protective custody by a peace officer, and

WHEREAS, little latitude is available to local governments under this statute to deal with the problem, and

WHEREAS, AS 47 places local jurisdictions in undue risk of litigation, and

WHEREAS, compliance with AS 47 jeopardizes municipal financial ability to provide health and related social services to persons experiencing alcohol related problems;

NOW, THEREFORE, BE IT RESOLVED that the Alaska Municipal League urges the Legislature to alter AS 47.37.170 to permit greater local autonomy in dealing with public inebriates.

Adopted this 18th day of November 1988 in Fairbanks, Alaska.

Heather Flynn, President

ATTEST:

Scott A. Burgess, Executive Director

Resolution of the Alaska Municipal League

Resolution No. 89-9

A RESOLUTION URGING THE LEGISLATURE TO PROVIDE FUNDING TO MUNICIPALITIES TO OFFSET THE COST OF COMPLYING WITH THE PROVISIONS OF AS 47.37

WHEREAS, alcohol abuse is purported to be the number-one health problem in the State of Alaska, and

WHEREAS, the Alaska Supreme Court has held that municipalities have an affirmative duty to take persons incapacitated by alcohol in a public place into protective custody and transport them to an appropriate treatment facility, if one is available, and

WHEREAS, if a treatment facility is not available, the municipality must detain incapacitated persons in a state or municipal detention facility, and

WHEREAS, failure to provide protective custody to persons incapacitated by alcohol may result in liability for damages to the intoxicated person when injury results, and

WHEREAS, this increased responsibility and liability have been imposed on municipalities at a time when there are decreasing state revenues to fund municipal jail contracts, and

WHEREAS, treatment facilities and detention facilities have no real means to enforce the collection of fees from those who are taken into protective custody, and

WHEREAS, those taken into protective custody often do not have the resources to pay for medical treatment or detention, and

WHEREAS, local governments have been forced to assume the financial burden of providing medical examination, treatment, and protective custody detention as required by AS 47.37, and

WHEREAS, once an incapacitated person is taken into protective custody, the treatment facility or detention facility assumes further liability for the safety and welfare of that person while detained, and

WHEREAS, many standard municipal insurance policies specifically exclude "custodial care" from coverage, and

WHEREAS, a special alcohol tax would seem to make sense in that it would place the cost of the problem on the source of the problem, and

WHEREAS, AS 4.21.010 specifically prohibits municipalities from imposing such a tax, and

WHEREAS, barring this avenue for funding a State-mandated responsibility and liability, municipalities must look to the State for relief from the burden imposed on municipalities by AS 47.37 and the State Supreme Court;

NOW, THEREFORE, BE IT RESOLVED by the Alaska Municipal League that:

1. The Alaska State Legislature is hereby urged to provide direct funding to municipalities to offset the cost of complying with the provisions of AS 47.37; and

2. The Alaska State Legislature is further urged to amend AS 4.21.010 to allow local governments to impose a special tax on alcohol to fund mandated programs and procedures to deal with alcohol abuse within local communities and to fund substance abuse education.

Adopted this 18th day of November 1988 in Fairbanks, Alaska.

Heather Flynn, President

ATTEST:

Scott A. Burgess, Executive Director

Resolution No. 89-9

#5

Alaska Association Chiefs of Police

January 30, 1989

Representative Eileen MacLean
Alaska State House of Representatives
Pouch V
Juneau, Alaska 99811

Dear Representative MacLean,

On behalf of the Alaska Association of Chiefs of Police, I want to go on record as supporting House Bill 116, which would remove liability imposed by the Busby Decision. We join the Alaska Municipal League and the Alaska Peace Officers Association in an effort to mitigate the unfair burden that was placed upon Municipalities and its employees by the courts in the Busby Case.

The language in House Bill 116 is simple and clear. We urge that the Legislature pass this Bill into Law this session.

Sincerely,

Duane Udland

Duane Udland, Vice President
Alaska Association of Chiefs of Police

DU:vka

Testimony on HB 406 - Busby Bill - 1986

#6

H Jud.

Dillingham is not unlike many rural Alaskan communities in that it has it's share of alcohol abuse. A large portion of the visible abuse is that of the public inebriate. The Dillingham police have over the past 5 years has placed emphasis on the procetion of the public inebriate through protective custody detention. This has been accomplished through a cooperative program with the Bristol Bay Area Hospital.

The resources necessary for this have been borne soley by the community and region, without aid from the State office of Alcoholism and drug abuse.

The committee substitute for HB 406 is a reasonable aaddition to our current statute and provides some degree of protection to communities as a result of the ruling by the Alaska Supreme court in the BUSBY case.

If the law were to remain as it is in light of this recent ruling, we would be fostering an attitude within our police to turn their heads rather than extend a helping hand to these victims of alcoholism.

The enabling of alcoholics to shirk their responsibility by placing the liability on local communities will do more to detract from the efforts to treat the problem than help it. We need to once again renew our efforts in a positive way in dealing with this problem and to give our support to those who are out there on the streets dealing with this problem on a daily basis.

Our police throughout the state have hundreds of contacts daily with people in varying stages of intoxication, without this substitute the ability to effectively deal with them is greatly hampered. As the statute now stands police will be in a position to abuse

(1) emergency treatment provided by a facility affiliated with or part of the medical service of a general hospital;

(2) inpatient treatment;

(3) intermediate treatment; and

(4) outpatient and follow-up treatment.

(c) The office shall insure that adequate and appropriate treatment is provided to alcoholics and intoxicated persons admitted under AS 47.37.160 — 47.37.190 within the limits of available state and federal funds.

(d) The office shall maintain, supervise and control all facilities operated by it subject to the regulations of the department. The administrator of each facility shall make an annual report of its activities to the coordinator in the form and manner the coordinator specifies.

(e) If possible, the office shall coordinate the activities of the program with all appropriate public and private resources.

(f) The coordinator shall prepare, publish, and distribute annually a list of all approved public and private treatment facilities.

(g) The office may contract for the use of any facility as an approved public treatment facility if the coordinator, subject to the regulations of the department, considers this an effective and economical course to follow. Contracting under this subsection is governed by AS 36.30 (State Procurement Code). (§ 1 ch 207 SLA 1972; am § 5 ch 150 SLA 1980; am § 62 ch 106 SLA 1986)

Effect of amendments. — The 1986 amendment, effective January 1, 1988, added the last sentence in subsection (g).

Sec. 47.37.170. Treatment and services for intoxicated persons and persons incapacitated by alcohol. (a) An intoxicated person may come voluntarily to an approved public treatment facility for emergency treatment. A person who appears to be intoxicated in a public place and to be in need of help or a person who appears to be intoxicated in or upon a licensed premise where intoxicating liquors are sold or consumed who refuses to leave upon being requested to leave by the owner, an employee or a peace officer may be taken into protective custody and assisted by a peace officer or a member of the emergency service patrol to the person's home, an approved public treatment facility, an approved private treatment facility, or another appropriate health facility. If all of the preceding facilities, including the person's home, are determined to be unavailable, a person taken into protective custody and assisted under this subsection may be taken to a state or municipal detention facility in the area.

(b) A person who appears to be incapacitated by alcohol in a public place shall be taken into protective custody by a peace officer or a member of the emergency service patrol and immediately brought to

an approved public treatment facility, an approved private treatment facility, or another appropriate health facility or service for emergency medical treatment. If no treatment facility or emergency medical service is available, a person who appears to be incapacitated by alcohol in a public place shall be taken to a state or municipal detention facility in the area, if that appears necessary for the protection of the person's health or safety.

(c) A person who voluntarily appears or is brought to an approved public treatment facility shall be examined by a licensed physician as soon as possible. After the examination, the person may be admitted as a patient or referred to another health facility. The approved public treatment facility which refers the person shall arrange for transportation.

(d) A person who, after medical examination, is found to be incapacitated by alcohol at the time of admission or to have become incapacitated at any time after admission, may not be detained at a facility after the person is no longer incapacitated by alcohol. A person may not be detained at a facility if the person remains incapacitated by alcohol for more than 48 hours after admission as a patient, unless the person is committed under AS 47.37.180. A person may consent to remain in the facility as long as the physician in charge considers it appropriate.

(e) A person who is not admitted to an approved public treatment facility, is not referred to another health facility, and has no funds, may be taken to the person's home, if any. If the person has no home, the approved public treatment facility shall assist the person in obtaining shelter.

(f) If a patient is admitted to an approved public treatment facility, his family or next of kin shall be promptly notified. If an adult patient who is not incapacitated requests that there be no notification of next of kin, his request shall be granted.

(g) Peace officers or members of the emergency service patrol who comply with this section are acting in the course of their official duty and are not criminally or civilly liable for it.

(h) If the physician in charge of the approved public treatment facility determines it is for the patient's benefit, an attempt shall be made to encourage the patient to submit to further diagnosis and appropriate voluntary treatment.

(i) A person taken to a detention facility under (a) or (b) of this section may be detained only (1) until a treatment facility or emergency medical service is made available, or (2) until the person is no longer intoxicated or incapacitated by alcohol, or (3) for a maximum period of 12 hours, whichever occurs first. A detaining officer or a detention facility official may release a person who is detained under (a) or (b) of this section at any time to the custody of a responsible adult. A peace officer or a member of the emergency service patrol, in

detaining a person under (a) or (b) of this section and in taking the person to a treatment facility, an emergency medical service or a detention facility, is taking the person into protective custody and the officer or patrol member shall make reasonable efforts to provide for and protect the health and safety of the detainee. In taking a person into protective custody under (a) and (b) of this section, a detaining officer, a member of the emergency service patrol or a detention facility official may take reasonable steps for self-protection, including a full protective search of the person of a detainee. Protective custody under (a) and (b) of this section does not constitute an arrest and no entry or other record may be made to indicate that the person detained has been arrested or charged with a crime, except that a confidential record may be made which is necessary for the administrative purposes of the facility to which the person has been taken or which is necessary for statistical purposes where the person's name may not be disclosed.

(j) For purposes of (b) of this section, "incapacitated by alcohol" means a person who, as the result of consumption of alcohol, is rendered unconscious or has judgment or physical mobility so impaired that the person cannot readily recognize or escape conditions of apparent or imminent danger to personal health or safety. The definition in AS 47.37.270(9) applies to other portions of this chapter. (§ 1 ch 207 SLA 1972; am §§ 1-4 ch 101 SLA 1976)

Editor's notes. — This section is set out above to correct a minor error in subsection (j) in the main pamphlet.

Sec. 47.37.270. Definitions. In this chapter

(1) "alcoholic" means a person who habitually lacks self-control in using alcoholic beverages, or uses alcoholic beverages to the extent that the person's health is substantially impaired or endangered, or the person's social or economic function is substantially disrupted;

(2) "approved private treatment facility" or "private facility" means a private agency meeting the standards prescribed in AS 47.37.140(a) and approved under AS 47.37.140(c);

(3) "approved public treatment facility" or "public facility" means a treatment agency operating under the direction and control of the office or providing treatment under AS 47.37.010 — 47.37.270 through a contract with the office under AS 47.37.130(g) or through a grant awarded under AS 47.30.475, and meeting the standards prescribed in AS 47.37.140(a) and approved under AS 47.37.140(c);

(4) "board" means the Review Board on Alcoholism established under AS 47.37.060;

(5) "commissioner" means the commissioner of health and social services;

ted under Section 13. A person may consent to remain in the facility as long as the physician in charge believes appropriate.

(e) A person who is not admitted to an approved public treatment facility, is not referred to another health facility, and has no funds, may be taken to his home, if any. If he has no home, the approved public treatment facility shall assist him in obtaining shelter.

(f) If a patient is admitted to an approved public treatment facility, his family or next of kin shall be notified as promptly as possible. If an adult patient who is not incapacitated requests that there be no notification, his request shall be respected.

(g) The police or members of the emergency service patrol who act in compliance with this section are acting in the course of their official duty and are not criminally or civilly liable therefor.

(h) If the physician in charge of the approved public treatment facility determines it is for the patient's benefit, the patient shall be encouraged to agree to further diagnosis and appropriate voluntary treatment.

Commissioners' Note

A small minority of intoxicated persons are "incapacitated" in that they are unconscious or incoherent or similarly so impaired in judgment that they cannot make a rational decision with regard to their need for treatment. Section 12(b) authorizes the police or emergency service patrol to take such individuals into protective custody and to a public treatment facility for emergency care. This is intended to assure that those most seriously in need of care will get it.

Protective custody under (b) is similar to the way in which the police provide emergency assistance to other ill people, such as those in accidents or those who have sudden heart attacks. It is a civil procedure, and no arrest record or record which implies a criminal charge is to be made. Since the police officer may sometimes have to decide whether a man who refuses help appears to be incapacitated by alcohol or because of some other reason, Section 12(g) protects the policeman should his conclusion, made in good faith, be incorrect. It provides that he cannot be held criminally or civilly liable for false arrest or imprisonment as long as he is acting in compliance with this section. Willful malice or abuse, however, would not be considered to be in compliance with this section of the Act.

Section 12(d) provides that an incapacitated person can be held at a treatment facility without consent or further civil procedures for not longer than 48 hours. By the end of 48 hours

Removal of Municipal Liability Imposed by Busby Decision

The Alaska Municipal League urges the Legislature to pass legislation reversing the implied liability of municipalities caused by the Busby decision regarding taking incapacitated persons into protective custody.

BACKGROUND

The decision of the Alaska Supreme Court in Busby v. Municipality of Anchorage, which interpreted the intent of the Alaska Legislature in enacting AS 47.37.170(b), judicially created a duty to take incapacitated persons into custody that the Legislature did not intend to impose upon local communities.

The purpose of AS 47.37.170(b) is to provide for a compassionate local response to one aspect of the alcohol/drug crisis in local communities. However, to change that ability of local communities to help those in need into an affirmative duty to do so imposes on local communities obligations they are neither equipped nor fairly required to meet. The League supports a wide variety of measures to deal with the complicated issues of alcohol/drug abuse in Alaska. Nonetheless, the creation by the courts of a governmental obligation to take incapacitated persons into custody that took place without the discussion and study of the impacts of that obligation that would occur during the normal legislative process was not a good or fair way to address the problem.

The effect of this court decision has been that municipalities with police powers are now forced to pick up all persons who appear to be incapacitated and put them in a treatment facility, where possible, or in state or municipal correctional facility. The result has been great expense to the municipality or the State and an increased workload for peace officers, which comes at the expense of other duties, including investigation of violations of alcohol control laws.

Therefore, the League supports amending AS 47.37.170(b) by the addition of a simple declaration as follows:

> "This section shall not impose any affirmative duty upon municipalities or their agents to take persons incapacitated by alcohol into protective custody."

This is the narrowest possible legislative response to the Supreme Court's misinterpretation of legislative intent in the Busby case. Other programs and measures are needed to deal with the complex and difficult issues raised by alcohol/drug abuse in Alaska and it is appropriate for the Legislature to deal with those issues without "judicial legislation" by our courts.

POSITION PAPER/Department of Health & Social Services

Position Paper

HB 116

For An Act Entitled: " An Act Relating to immunity of treatment for intoxicated persons...

This legislation would provide that a person may not bring an action for damages against the state, a municipality (or officers, agents, or employees of the municipality or state), a peace officer or members of the emergency services patrol based on the performance or failure to perform a duty imposed under AS 47.37.170. AS 47.37.170 provides that (1) an individual who is intoxicated in public may be taken into protective custody by a peace officer or member of the emergency services patrol and (2) that an individual who is incapacitated by alcohol shall be taken into protective custody by a peace officer or member of the emergency services patrol.

In 1987, the Alaska Supreme Court in Busby v. Municipality of Anchorage, found that AS 47.37.170 creates an affirmative and mandatory duty for law enforcement personnel to place persons who are incapacitated into protective custody. According to the court, failure to take an incapacitated person into protective custody creates a cause for action for damages against a peace officer (or member of an emergency service patrol) who decides not to do so, for injuries that occur as a result. The Busby decision has increased municipalities fear of potential liability.

Department Position

The Department of Health and Social Services does not support the granting of absolute immunity to municipalities with regard to their actions under AS 47.37.170. Absolute immunity would shield all action, however improperly motivated, and would deny individuals traditional tort recourse.

The Department believes that conditional liability, based on the standard of gross negligence, would preserve the rights of individuals while at the same time protecting Municipalities from lawsuits.

POSITION PAPER/Department of Health & Social Services

Raising the standard of liability to gross negligence or reckless or intentional misconduct would strike an appropriate balance between the need to reduce the potential liability exposure of those involved in the protective custody process and the rights of intoxicated individuals to recover for injuries incurred because they are or are not taken into protective custody.

The Department suggests that the following changes be made to HB 116.

* Section 1. AS 47.37.170(g) is repealed and reenacted to read:

(g) A person may not bring a civil action for damages regarding the decision whether or not to take an intoxicated or incapacitated person into, or to release a person from, protective custody under this section, or for injuries incurred in protective custody. However, this subsection does not preclude liability for civil damages caused by gross negligence or reckless or intentional misconduct.

Approved by:

Myra M. Munson
Commissioner
Department of Health and Social Services

Date: February 24, 1987

"It is not the desire of the legislature that peace officers neglect their duty to provide protective custody to those that are incapacitated, but to prevent litigation that may arise from the inability to properly determine incapacitation."

Municipality of Anchorage

OFFICE OF THE MAYOR

P.O. BOX 196650
ANCHORAGE, ALASKA 99519-6650
(907) 343-4431

TOM FINK,
MAYOR

January 27, 1989

Representative Sam Cotten
P.O. Box 296
Eagle River 99577

Subject: Senate Bill 66/House Bill 116 - "Busby" Relief

Dear Representative Cotten:

I would like to take this opportunity to urge your support of Senate Bill 66 and House Bill 116 which offers local government's much needed relief from the "Busby" decision. I am sure you are aware of how the "Busby" decision has handicapped the day-to-day operations of our police and emergency services personnel, as well as the increased liability it imposes on state and local public safety agencies.

Sincerely,

Tom Fink
Mayor

HB

131

HOUSE COMMITTEE REPORT

(5)
Date Referred: February 1, 1989 FURTHER REFERRALS: JUDICIARY

Date of Committee Action: 3/16/89

The COMMUNITY & REGIONAL AFFAIRS Committee recommends that:

HOUSE BILL NO. 131 [LOCAL BOUNDARY COMMISSION HEARINGS/VOTES]
"An Act relating to the Local Boundary Commission."

[ ] be replaced with CS HB131 C+RA [✓] the same title [ ] a new title

[ ] have attached amendment(s)

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

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact
[ ] zero fiscal note
[✓] zero with analysis C+RA

APPROVES PREVIOUS:

[ ] fiscal note(s) published:

_____

[ ] zero fiscal notes(s) published:

_____

SIGNING DO PASS:

Bettye Cast
Richard Shirley
Eileen P. Macheen

SIGNING OTHER THAN DO PASS:
(Do Not Pass, No Recommendation, Amend)

no rec
no rec Cheryll Davis

Eileen P. Macheen
Chairman's signature

THE OPERATION OF COMMITTEE HEARINGS

I. CALL TO ORDER

1. The 9th meeting of the House Community and Regional Affairs Committee is now called to order.

II. ROLL CALL

1. I note for the record that there is a quorum present, consisting of members; _____ _____ _____ Absent from committee are/is _____ _____. (There are no members absent.

(A quorum of 3 members must be present for a C&RA committee meeting to be official.)

III. AGENDA

A. a. On the agenda before us is HB 131, HJR 26 & HB 101

B. You can give the order that the bills will be heard or leave it open.

1. HB 131 & HJR 26
2. HB 101
3.
4.

C. Introduce the bill before the committee.

1. The first bill before us is HB 131 & HJR 26. (Read introduction)

HB 131
SHULTZ

House Bill 131 HJR 26 which were introduced by Representative Shultz have been in a subcommittee consisting of myself, Representative C. Davis, Representative Cato, and Representative Foster. Representative Shultz and Jim Plasman from the Department of Community and Regional Affairs also participated extensively. The subcommittee also received assistance from the Alaska Municipal League, the Tanana Chiefs Conference and Senator Zharoff's staff.

The changes to HB 131 and HJR 26 are out lined in a memos from me which are in your back up package date 3/14/89. Before I explain the changes to HB 131 and HJR 26 I would like to adopt the committee substitutes for purposes of discussion.

(A Motion will be given)
Hearing NO OBJECTION, so moved.

I will not detail all the changes to these bills. However, I would like to discuss the most important changes.

Section 2. of CSHB 131 C&RA

Adds a new section which would require that annexations of areas which do not include year round residents would be prohibited unless the commission determines that:

(1) the area to be annexed requires one or more services at a level not provided by the state that the municipality would be able to provide; or (2) the health, welfare, or safety of

residents of the organized borough is endangered by conditions existing or developing in the territory and annexation will enable the organized borough to remove or relieve those conditions.

This would take effect on the effective date of a constitutional amendment proposed in CS HJR 26 C&RA. Constitutional authority is now given to the commission to review and recommend any proposed boundary change. Committee Substitute for HJR 26 C&RA would propose a constitutional amendment to the legislature to allow the legislature to establish standards to guide the commission in its review of boundary changes. The memo dated 3/3/89 from Richard Bradley, Legal Counsel further explains this.

Other changes to HB 131 would require that hearings be noticed on public radio and TV stations, the two hearings be noticed separately 30 days a part, the commission adopt regulations for conducting meetings, only one of the meetings be held by teleconfernce net work and that notice be given in both print media and by posting in a public place.

In addition to giving the legislature authority to set standards to guide the commission on boundary changes CS HJR 26 C&RA would change the effective date of the recommendation to occur 60 days after the recommendation is given to the legislature.

Is there anyone who wishes to testify on either of the committee substitutes for HB 131 or HJR 26?

Dan Beckhost is on teleconference to listen and answer questions

HB 131
SHULTZ

House Bill 131 was introduced by Representative Shultz. This legislation would amend existing statute by requiring that there be 30 instead of 15 day notifications, that there be two instead of one public hearing, that the hearing be held in the area effected, and that a majority of all members must vote infavor of a proposal.

The Local Boundary Commission was created in 1960. At that time there was only about 30 municipal governments in the state. The commission's responsibilities were limited to boundary changes involving only cities.

Since then the state's municipal governments have grown to 161. The commission's responsibilities have also grown to include incorporation of cities and boroughs; dissolutions of cities, boroughs and unified municipalities; annexations to and detachments from cities, boroughs and unified municipalities; and mergers and consolidations of cities, boroughs and unified municipalities.

As you can see the work load and importance of the commission has grown immensely. This growth necessitates that we take a good look at the statutes which address the procedures guiding and governing the Local Boundary Commission. As the Department of Community and Regional Affairs states in their position paper, some of the existing language is ambiguous. In other cases we have found that the public does not feel it is adequately being informed of matters of importance to them. We must take a look at our methods of notifying the public. I would like

to see the public telecommunications media included in the public notice requirements. Many of our rural areas rely largely on public radio and RATNET to keep them informed on important issues.

We also need to take a look at who should be informed of these procedures. It has become clear that these issues affect and are important to not only those within but those which are near or adjacent to areas proposed for annexations or incorporations.

Many people from all areas of our state have concerns about the process by which boroughs are formed or areas annexed. I therefore plan to place this bill into a subcommittee after taking testimony so that we can look at the many suggestions given to this committee and to allow time for more input from others. It is also important that the Local Boundary Commission be allowed to help us formulate these changes. Members who are interested in serving on this subcommittee should let me know of their desires during the testimony.

Hear to testify on the bill is Representative Shultz.

We are on teleconference.

Jim Plasman is hear to testify from Community and Regional Affairs.

ON TELECONFERENCE

1. To testify

Fairbanks - Tanana Chiefs (will testify)

Anchorage - Dan Bockhorst, C&RA staff for LBC (listen only unless there are questions Jim Plasman can't handle)

2. Listen Only (if you want them to testify or if there is time they will testify otherwise listen only)

Glenallen - Jack Goddard, Copper River Basin Citizens Group

Delta - Bob Packer Delta Citizens Group

The Local Boundary Commission Chair and Vice Chair are currently on vacation and will return 2/24/89

HOUSE BILL 131

TABLE OF CONTENTS

****

Alaska State Legislature #1

REPRESENTATIVE DICK SHULTZ

Member
Finance Committee

PO Box V
Juneau, Alaska 99811
(907) 465-4940
Home: PO Box 487
Tok, Alaska 99780

MEMORANDUM

TO: All Legislators

FROM: Rep. Dick Shultz DS

DATE: February 2, 1989

RE: House Bill 131

********** ********** **********

This legislation is designed to help bring about greater public participation in the affairs of the Local Bouundary Commission.

HB 131 amends existing statute by requiring:

1. That there be earlier notification of Commission hearings.
2. That at least two public hearings be held instead of just one.
3. That hearings be held in the area effected.
4. That a vote of three members out of five of the Commission, instead of two out of the five, be required in accepting or rejecting a proposal.

I am open to other suggestions which would strengthen public participation in the Commission process. Please feel free to give me your thoughts and ideas.

#2

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: HB 131
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: _____
Agency Affected: DCRA
Title: "An Act relating to the Local Boundary Commission"
BRU: Local Government Assistance
Sponsor: Representative Shultz
Components: Local Boundary Commission
Requestor: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL	8.0	8.0	8.0	8.0	8.0	8.0
CONTRACTUAL	1.5	1.5	1.5	1.5	1.5	1.5
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	9.5	9.5	9.5	9.5	9.5	9.5
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	9.5	9.5	9.5	9.5	9.5	9.5
FEDERAL FUNDS						
OTHER						
TOTAL	9.5	9.5	9.5	9.5	9.5	9.5

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

(See Attachment)

Prepared by: _____
Phone: 465-4750
Division: Municipal and Regional Assistance
Date: _____

Approved by Commissioner: Ward C. Hobbs
Date: 2-7-89
Agency: Community and Regional Affairs

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

FISCAL NOTE ATTACHMENT

RE: House Bill 131

SPONSOR: Representative Shultz

ANALYSIS

Assumptions:

1. The requirements of Section 3 of HB 131 apply only to petitions for legislative review annexations and detachments (AS 29.06.040(b), AS 44.47.567(b)(2) and Article X, Section 12 of the State Constitution).

2. Five petitions for legislative review annexations and detachments will be received each year.

3. In four of the five cases, the Commission will conduct the requisite second hearing required by Section 3 of HB 131 via teleconference or alternatively on the same day (but in a different location) as the first hearing. The additional expense will be minimal, consisting of 1 additional day of per diem for the 5 commission members and 1 staff plus an additional $400 in added travel or teleconference/notice fees for each hearing. [Per diem $1,920, travel/contractual $1,600 - total $3,520].

4. In the fifth case, the Commission will conduct two hearings at substantially separate times in the course of the proceeding. Because members of the Commission are appointed from each of the four judicial districts in the state and because the hearing locations are typically remote, the cost of travel is significant. [Per diem $960, travel $3,500, contractual (postage and printing of public notice) $500 - total $4,960].

5. The notice of each hearing will be published two additional times during the additional 15 day public notice period provided by Section 1 of HB 131. [Contractual (printing of public notice) $1,000].

David G. Hoffman, Commissioner

#3

STEVE COWPER, GOVERNOR

DEPT. OF COMMUNITY & REGIONAL AFFAIRS

OFFICE OF THE COMMISSIONER

P.O. BOX B
JUNEAU, ALASKA 99811-2100
PHONE: (907) 465-4700

949 E. 36TH AVENUE, SUITE 400
ANCHORAGE, ALASKA 99508-4302
PHONE: (907) 563-1073

February 8, 1989

POSITION PAPER

RE: House Bill 131

SPONSOR: Representative Shultz

Program Effects of Bill

This bill addresses certain procedures of the Local Boundary Commission. Section 1 would increase the length of time for notice of a hearing from 15 days prior to the hearing to 30 days. Section 2 would require a majority of the full membership to vote in favor of proposed action instead of a majority of the membership. Section 3 would require a minimum of two hearings to be held in the area affected by a local government boundary change rather than a single hearing.

Comments

In general, the Department supports provisions strengthening the ability of the public to participate in important policy decisions as long as the mechanism for such is fiscally responsible. The increase in the time required for notice is not unreasonable in light of the importance of the decisions being made by the Commission and some of the difficulties in communication in rural Alaska. The requirement that action on a boundary change be taken by a majority of the full membership of the Commission is consistent with existing procedures of the Commission. In a situation where three members have conflicts of interest on the boundary change before the Commission, this provision would seem to require participation of those members in order for the Commission to conduct its business. The increase in the number of hearings from one to two in the area affected by the change will have a potentially significant fiscal impact with the continuing increase in local boundary activity. Unless funding is provided to meet the expenses necessary to meet this requirement, the Department will be unable to support this provision.

Additionally, the Department notes that the provisions of law which are proposed for amendment by HB 131 have remained unchanged since their enactment in 1960. At the time the original law was passed, the responsibilities of the Local Boundary Commission were limited only to boundary changes involving cities.

Today, the Commission's responsibilities include incorporation of cities and boroughs; dissolutions of cities, boroughs and unified municipalities; annexations to and detachments from cities, boroughs and unified municipalities; and mergers and consolidations of cities, boroughs and unified municipalities. Further, in 1960 there were only about 30 municipal governments in the state. Today, there are 161 municipal governments in Alaska.

The substantial changes concerning the Local Boundary Commission which have occurred over the past three decades may warrant a more comprehensive approach to revisions of the laws governing the procedures of the Commission. For example, Section 3 of HB 131 would require an increase in the number of hearings on proposed boundary changes to be submitted to the legislature. However, the requirements for hearings on other important issues before the Commission (e.g. borough incorporations) would not be affected by the bill.

The Department also notes that certain language in the existing law is ambiguous. For example, AS 44.47.581 requires a hearing "in or in the near vicinity of the area affected by the change". Of course, it could be argued that many areas are "affected" by a boundary change (e.g. the territory proposed for annexation, the municipality to which the annexation is proposed and the area from which the annexation is proposed). The phrase in question has historically been interpreted to mean the area proposed to be annexed or detached. Section 3 of HB 131 would require two hearings in this area. In a number of cases the territory proposed to be annexed or detached is uninhabited or undeveloped. As such, it would seem best to retain the current language allowing the hearings to be held in the territory "or in the near vicinity".

Finally, it must be noted that the Local Boundary Commission (which is independent of the Department) has not had the opportunity to review or comment on HB 131. Provisions for such input should be made before the bill is passed out of the House Community and Regional Affairs Committee. The Commission is currently developing revisions to its existing procedures. In addition to the comments expressed above, the Department expects that the Commission would raise the issue of compensation for the Commission. The additional responsibilities imposed by this bill could potentially cause a substantial increase in the workload of the Commission. As noted earlier, the responsibilities of the Commission have grown significantly over the past 3 decades.

As a consequence, the Commission has been seeking compensation from the legislature for the past several years. A measure to provide compensation to the Commission was approved by the Senate last year and was also approved by the House Community and Regional Affairs Committee. The identical measure was introduced this year as SB 11.

David G. Hoffman, Commissioner

BRISTOL BAY NATIVE ASSOCIATION
P.O. Box 310
Dillingham, AK 99576
(907) 842-5257

January 31, 1989

Senator Fred Zharoff
Alaska State Legislature
P.O. Box V (MS 3100)
Juneau, Alaska 99811

Re: Comments on Local Boundary Commission Process

Dear Senator Zharoff:

As you know, Phil Kelly of your office asked B.B.N.A. to provide comments on the process used by the Local Boundary Commission to make borough decisions.

After observing the LBC process three times since 1987 we can only conclude it is fundamentally flawed. Considerable controversy has resulted from LBC actions in our region, and we believe that if changes aren't made more and more litigation and conflict between villages and between regions will occur.

The current statutory and regulatory framework for considering borough proposals was established before the political pressure to form boroughs began with the introduction of House Bill 1. It seems designed for the more populated and developed areas of the state and for dealing with slow incremental change, not for dividing vast, sparsely inhabited regions in a short time. If the political and economic realities are now such that all or most of the unorganized borough should incorporate, then the system has to be redesigned with that in mind.

Very Truly Yours,

Deborah Tennyson
Executive Director

COMMENTS ON LOCAL BOUNDARY COMMISSION PROCESS FOR CONSIDERING BOROUGH PROPOSALS

January 31, 1989

The following comments are based on the three borough proposals within the the Bristol Bay region in the last two years: the Aleutians East incorporation in 1987; the Lake and Peninsula incorporation which will go to public vote this spring, and the Kodiak annexation currently before the legislature.

The proposals have generated much controversy within the region and have highlighted serious flaws in the Local Boundary Commission (LBC) process. Indeed the process is so flawed as to almost guarantee arbitrary and short-sighted results. If large areas of the unorganized borough continue to be carved into jurisdictional units under existing LBC practice, a statewide planning disaster of monumental proportions is in the making.

Most of the problems fall into three broad categories: 1) lack of meaningful standards, 2) procedural, particularly relating to public notice and the ability to contest particular proposals, and 3) problems in substantive decision-making, which involve institutional or structural problems with the LBC and its inability to follow statutory and regulatory mandates.

Each of these areas of concern will be discussed below. However, these comments are not intended to be a thorough analysis of the LBC or its procedures but rather concern particular problems identified from its actions in Bristol Bay. And although examples will be used to illustrate the problems, the comments are not intended to address the merits of any pending proposal.

I. Standards

A. Incorporation

1. Statutory standards

The four statutory standards for incorporation of AS 29.05.031 would be adequate if they were evenly applied and properly construed. However, in practice they have given inadequate guidance for drawing territorial boundaries between widely separated population centers.

The first standard requires that "the population of the area [be] interrelated and integrated as to social, cultural and economic activities" and be large and stable enough for borough government.

The second requires that the borough boundaries "conform generally to natural geography and include all areas necessary for full development of municipal services." The third requires the economy of the area to include the human and financial resources necessary for municipal services, and lists a number of factors to be considered. The fourth speaks to transportation facilities.

Except for the requirement for following natural geography, all deal more with population characteristics and with developed areas rather than with the vast uninhabited areas in the unorganized borough.

The standards would be improved by clearly specifying that traditional use patterns and existing land planning units be followed in unpopulated areas.

2. Regulatory standards.

The regulatory standards of 19 AAC 10.160 also need improvement. 19 AAC 10.160(5) requires a new borough to include at least one entire REAA, and as interpreted it seems to create a bias in favor of following REAA lines. Yet as pointed out in the 1988 DCRA Regional Government study, following REAA boundaries for borough formation results in conflicts with other standards. Some REAAs have only one community or less than 1,000 people; some form enclaves within others, which may violate constitutional and statutory standards.

Worse, the external boundaries of REAAs often cut across natural geography and socio-economic use patterns, thereby violating the mandatory statutory standards for borough formation. REAAs should not be used to determine the external territorial boundaries of boroughs. The intent of 19 AAC 10.160(5) can be met by using REAAs merely as a guideline for deciding which community should go with which borough.

There is also a problem with the "transportation" standard of 19 AAC 10.160(2). This standard requires that communities within a new borough be connected by road or have transportation services "available at least once a week ... on a regularly scheduled or chartered basis." Chartered services are almost universally available and it is difficult to see how any two Alaskan communities could fail to meet this standard. Although the intent of the provision may be sound, standards that are always met are no standards at all, and this provision should either be rewritten or deleted.

B. Annexation.

There are no statutory standards for annexation. The LBC by regulation (19 AAC 10.190) has set up separate standards for the annexation of contiguous territory and of non-contiguous territory. The latter, for obvious reasons, is much more stringent.

1. Definition of "Contiguous."

The LBC recently approved the annexation of a large area on the Alaska Peninsula to the Kodiak Island Borough under its standards for annexation of contiguous territory. The annexed area is separated from the Kodiak Island Borough by Shelikoff Strait, the center of which for its entire course is federal water beyond the territorial limit of Alaska. The LBC rejected Lake and Pen's competing claim for the same territory.

Neither the LBC decision nor its staff report discuss the crucial preliminary issue of whether the annexed territory is contiguous to the original Kodiak Island Borough. Under a dictionary or common sense definition, it surely is not contiguous. However, contiguous is defined at 19 AAC 10.840(4) "as territory which is immediately adjacent to or which is separated only by natural or artificial barriers which do not disrupt or impede the supplying or receiving of municipal services."

The problem with that definition, as apparently construed by the LBC in the Kodiak decision, is that the exception swallows the rule. Boroughs provide very few municipal services in roadless, unpopulated areas, and those services they do provide (i.e., planning) are not hampered by geographic barriers. If the Alaska Peninsula is "contiguous" to Kodiak Island despite the jurisdictional barrier of federal waters, it is difficult to conceive of any roadless, sparsely populated area of the state that is not contiguous to any other area. An ocean, another borough, a mountain range, or 500 miles of land are just barriers which do not "disrupt or impede" borough services when those services are almost non-existent to begin with.

The definition of contiguous in 19 AAC 10.840(4) could be salvaged if the LBC were to construe it more closely to the dictionary definition. But following the Kodiak decision, there is no longer a distinction between contiguous and non-contiguous lands for purposes of borough annexations, and the whole framework of 19 AAC 10.190 is undermined.

2. Standards for contiguous annexations.

Eight standards are set forth in 19 AAC 10.190(a) for annexation of contiguous territory. Only one of these standards must be met for the annexation to be approved. In addition, the annexation must meet the four statutory standards for borough incorporation of AS 29.05.031.

Some of the eight standards of 10.190(a) are relatively straight-forward and easy to apply, i.e. whether the land is totally surrounded by the borough or wholly owned by the borough. Others, however, have been so watered down by the LBC that virtually any proposal will meet them. Such standards are meaningless.

The problem can best be illustrated by reference to an LBC decision. In the Kodiak decision the LBC found that three of the regulatory standards for annexation were met, those of 19 AAC 10.190(a)(3),(4) and (8).

(a) Application of 10.190(a)(3)

The LBC found that the Kodiak annexation met the third regulatory standard: "the territory is in need of municipal services which the organized borough can provide more efficiently than another municipality or the state." Specifically, the LBC found that the area was in need of "planning, economic development and solid waste collection and disposal which can best be provided by the Kodiak Island Borough."

This ruling is particularly suprising since earlier in the decision the LBC said: "The contested area is uninhabited. Therefore, the need for services in that area is greatly limited."

In regard to "planning," the area consists almost entirely of state and federal land (with some subsurface rights owned by a Native regional corporation). Coastal management and state and federal land use plans are already in place and could not easily be changed by a borough, nor did Kodiak indicate it would try to do so. The decision offered no explanation at all of how planning services would be improved; arguably planning services could suffer due to the dismemberment of the CRSA.

The "economic development" consisted of "salmon enhancement projects" which were never identified in the decision, the DCRA report, or testimony. Worse, there was no finding or evidence that salmon enhancement is actually needed, which would be necessary to meet the standard. Moreover, given exclusive federal jurisdiction on federal lands and ADF&G's authority over fish stocks, it is doubtful that any such borough-sponsered project is feasible. (The LBC decision did not discuss the legal obstacles to it.)

As for "solid waste collection and disposal," the opinion discussed fisheries-related waste disposal in the City of Kodiak and at the Borough's landfill on Kodiak Island. It did not find that such services were needed within the annexed area. Indeed, there was no discussion of such services within the annexed area and the Kodiak Borough did not indicate it would extend such services into the area.

Since there is no population to be served and since planning services are already in place, it is apparent that the LBC bent over backwards to find this standard met. It is quite difficult to conceive of any area in the state which would not meet it as applied.

(b) Application of 10.190(a)(4)

The LBC also found the fourth standard met, that "there is a reasonable likelihood that future growth and development will occur within the territory considered for annexation and that annexation of that territory will enable the borough to plan for and control that development."

The LBC cited testimony from Kodiak officials that "there is potential for development of mineral, oil and gas and fishing activities in the area considered for annexation." The specific examples cited were the federal oil and gas lease sale scheduled for 1990, "likely" growth in the number of offshore processors, and Kodiak's complaint it hadn't been consulted on federal land use plans.

One problem with this analysis is that both the federal lease sale and the growth of offshore processors apply only to the waters and not to the annexed territory on the Alaska Peninsula. Indeed, the federal lease sale will occur by definition outside of state and borough jurisdiction. Likewise, there was no discussion of how the borough could plan for and control the growth of offshore processors, a process that (if true) will likely occur outside the boundary of the state. The reference to federal land use plans is a non sequiter, irrelevent to the issue of whether there is a reasonable likelihood of growth and development.

There was no finding of fact and no evidence of any projected shoreside development in that part of the Alaska Peninsula. No land disposals, no mineral discoveries, no development of canneries or other fishery-related infrastructure were indicated. The LBC did not even look behind the federal lease sale to find if oil is actually expected to be discovered. (In fact, the Shelikoff Strait is not considered a good oil prospect and the lease sale has generated little interested by the oil industry.)

A better interpretation of this standard would apply it to areas experiencing specific, identifiable development that distinquishes them from the unorganized borough in general, or in which such development is planned. Examples would include rapid population growth or industrial or mineral development such as the Red Dog Mine. To extend the standard to areas such as the south side of the Alaska Peninsula, which at most is experiencing slow incremental development no different in scope from that in any other unpopulated area, is to render the standard meaningless.

(c) Application of 10.190(a)(8)

The LBC also concluded that the eighth standard was met, that "the annexation is otherwise necessary to accomplish a valid public purpose." The decision refers to the growth of offshore fish processors which are replacing shore-based processors, thereby diminishing local employment and depriving municipal governments of raw fish taxes. It concludes: "Annexation of the area in question would mitigate these negative effects."

This again is completely irrelevant as applied to the annexed land on the Alaska Peninsula. Even in regard to the waters it is difficult to see how annexation to the borough could curtail the growth of offshore processors, or confine them to the three-mile limit. Although the annexation may give Kodiak more raw fish tax revenues simply by increasing the area in which it collects them, if that is all the standard means then raising revenue alone becomes a "valid public purpose" sufficient to justify annexation.

I. Procedural Problems

A. Timeframe.

The timeframe used by the LBC to reach borough decisions precludes rational decision-making and may in itself violate constitutional standards of due process. The Aleutian's East process took just two months from the filing of the petition to the decisional meeting (May 7 - July 8, 1987). The Kodiak process took just over seven weeks (Oct. 14 - Dec. 4, 1988), and the Lake and Pen process lasted just three and one-half weeks (Nov. 10 - Dec. 4, 1988). It is inconceivable that all factors relevant in applying all the standards to all the boundaries can be adequately weighed in those time frames.

DCRA is under statutory duty to investigate borough proposals. AS 29.05.080. Some indication of the depth of investigation which should be required may be found in the

legislation which authorizes DCRA to contract for borough studies and allows up to three years for completion of the studies. AS 44.47.730. Nowhere near that depth of analysis was given to any of the Bristol Bay proposals.

It is equally impossible for an opponent of a borough proposal to adequately respond in the time allowed. The borough petitioners have months or years to prepare the proposal, and an adequate response would require considerable marshalling of facts, evidence and legal arguments. The LBC's own regulations call for "answering briefs" to be filed (19 AAC 10.390), but no time is provided to prepare them, especially considering that the governing bodies of cities and most other organizations are not in continuous session and need time to react.

Ironically, the LBC has no legal deadline for considering borough petitions. It rushes decisions only as a matter of policy. (Deadlines come into play only after the LBC's public hearing. And, in practice, the LBC doesn't take as long as those deadlines allow.)

B. Notice.

1. Outside the boundary.

One major flaw with the regulations governing notice and public hearings is that as interpreted they don't recognize the rights of those outside of proposed boundaries.

AAC 10.370(a) requires that the petition be served directly on "every municipality in or adjoining the territory." In the unorganized borough, of course, municipal boundaries rarely meet. The only interpretation of this regulation that makes sense in the unorganized borough is to apply it to communities in the adjoining geographical area. The regulation should also be expanded to include unincorporated communities.

The LBC, however, and its staff interpret it to require direct notice only to municipalities with a common legal boundary with the new borough. As a result, in the Lake and Pen process villages in the Nushagak drainage did not receive direct notice of the Lake and Pen proposal, and at the time the decision was made DCRA's mailing list did not include one village or village corporation on the western side of boundary. Nor did it include BBNA or the Southwest Region School District - even though the latter would lose one of its villages to the proposal.

Likewise, in the Aleutians East incorporation the villages of Ivanof Bay and Port Heiden were not "entitled" to direct notice even though the proposed boundary included an airstrip, a proposed new village site and Native corporation lands of Ivanof Bay and the traditional village site (Ilnik) and much of the subsistence territory of Port Heiden. (DCRA did put these villages on its mailing list, however.)

The LBC believes that publishing notice in the newspapers is sufficient protection for those outside proposed boundaries. But 19 AAC 10.380(a) only requires the petitioner to publish notice of the petition "in a newspaper of general circulation in the territory." Lake and Pen published this notice in the Borough Post, which is distributed only within the Lake and Pen school district and the Bristol Bay Borough, not in the Nushagak villages. This particular notice was the only one ever published containing critical information such as the place for inspecting the petition and brief and the right to file an answering brief.

In any event, few people even in urban areas read legal notices in the newspapers. And the Bristol Bay newspapers are mailed fourth class and are not reliably delivered or read in the villages. Anchorage newspapers rarely make it to most villages at all. Direct notice would be much more effective, and cheaper.

2. Noncompliance with regulations.

The LBC does not strictly follow its own regulations on notice and scheduling. For example, it is required to publish notice of its public hearing "at least 15 days before the date of the hearing, at least three times in a newspaper of general circulation in the territory ...." That was not followed for Lake and Pen, at least as publication rules are normally construed by the courts. The third publication was on November 25, a week before its public hearings began.

Regardless of technical procedural arguments, it is crystal clear from an overview of the regulations regarding incorporation petitions, 19 AAC 10.325-10.340, that the process is designed to take several months at a minimum and that the LBC bends over backwards to rush decisions. For example, the LBC decisional meeting on Lake and Pen was one day after its public hearings concluded, although 90 days is allowed. Another example is the speed with which the LBC scheduled the public hearings. The regulations provide that a petition isn't considered pending until proof of publication of the notice required by 19 AAC 10.380(a) is received. That publication did not occur until November 18. Yet the first notice of the LBC hearing was published November 11, and because of ad deadlines had to be placed several days before that. The petition wasn't even filed with DCRA until November 10, and it is clear the LBC scheduled action on the petition before it had it!

C. Hearings.

Current law requires very little in the way of public information and decisional hearings. By statute, DCRA is required to have one public informational meeting in the area and the LBC to have one public hearing. AS 29.05.080 and 090. (More may be held at the discretion of the LBC.) A decisional meeting must be held within 90 days of the LBC's public hearing. In recent practice, most of the LBC hearings have been teleconferenced rather than held in the area.

Again, there is no built-in practical mechanism for involvement of villages immediately outside the boundaries. Port Heiden or Ivanof Bay residents would have had to go to Cold Bay or False Pass in the middle of fishing season to participate in the Aleutians East hearings. Nushagak village residents would have had to go to Anchorage or the Iliamna Lake area to attend Lake and Pen's hearings. (The LBC later scheduled teleconference hearings in the Nushagak, but that was to consider a reconsideration request after the decision had already been made.)

The existing requirements or informational meetings and formal public hearings are clearly inadequate given the importance of the decision, the lack of general public knowledge about boroughs, and the vast territory involved.

Moreover, villages a few miles outside borough boundaries have as much at stake in determining where the line is drawn as communities within the boundary - which may be much farther away. The Aleutians East line was drawn far closer to Port Heiden and Ivanof Bay than to any populated area within the borough; Ekwok is only 12 miles from the new Lake and Pen boundary. To give such villages substantially less procedural protection than communities within the borough likely violates the constitutional standards of due process and equal protection.

III. Substantive Decision-Making

A. The Problems

The LBC Board is charged with a statutory and constitutional duty to consider proposed changes in the boundaries of local governments. Its duties have been elaborated by the legislature, which has also established specific standards for the LBC to apply in AS 29.05.031. Through its regulatory power the LBC has established further standards and established basic procedures.

Although the commissioners are not judges, they are

nonetheless charged with making quasi-judicial decisions, applying law to facts. Part of their duty is to serve a "watchdog" function, ensuring that boundary changes which do not meet the legal standards fail. Each of the statutory incorporation standards, for example, is mandatory as written and must by law be applied. While under normal rules of statutory construction the statutory standards can be balanced against each other, they must be evenly applied. The regulations must conform to them.

Although some of the statutory standards, such as the one dealing with socio-economic interrelationships, are difficult to apply, it is possible to do so if enough research is done. A great wealth of information on land and resource use patterns is available from agencies such as ADF&G, USF&W, CRSAs, and so forth. In Bristol Bay, massive resource inventories with much relevant data were compiled in the context of various management plans.

Particularly given DCRA's statutory duty to investigate borough proposals, one would think that this wealth of information and expertise on land use would be used to make rational boundary decisions. The process should be time-consuming but rather straight-forward

The actual practice is far different. Some of its worse characteristics follow:

1. The statutory standards are not applied. The requirement regarding natural geography, for example, was completely ignored for the northwestern boundary of Lake and Pen, and was brushed over in the decision on the eastern boundary of Aleutians East.

LBC decisions focus too much on borough finances. While this is important, the standards only require that a borough be able to support itself. In practice, the LBC has allowed expanded boundaries which violate the other standards in order to put the borough in an better financial posture. For example, the Aleutians East boundary was allowed to extend into the Bristol Bay region primarily so that the borough would not have to rely on a property tax, despite a finding that this was not necessary to ensure the borough's financial viability.

Subsistence and traditional land use patterns patterns are rarely considered despite their importance in determining the socio-economic unity of a region.

2. Similarly, the LBC treats the unorganized borough as a blank slate, ignoring and jeopardizing years of planning already in place. For example, the Bristol Bay CRSA - widely viewed a model program - has been dismembered into a minimum—

of four parts, assuming the current borough proposals go through. This makes no sense from a planning perspective.

3. The LBC renders conflicting decisions and applies "standards" not found in the law. For example, the LBC would not even consider Nushagak village arguments based on a borough's potential impact on natural resource management. Yet the identical argument was found a valid basis for the Kodiak annexation. The LBC's focus on commercial fishing districts to the exclusion of other economic activities is a "standard" not found in the law, as is the "maximizing fish tax revenues" rationale applied for Kodiak and Aleutians East.

4. LBC decisions are based primarily on the bare assertions of fact in the petition and unsworn "testimony" at public hearings. There is rarely any checking of facts or reliance on experts such as ADF&G or the CRSA. This factor, coupled with the failure to seriously follow the standards, results in the decisional process being little more than a shuffling of words on paper, divorced from reality.

5. The DCRA and the LBC will not consider any factor not raised by a party, despite DCRA's duty to investigate. While to a certain extent this is understandable, there is no excuse for not analyzing glaring problems such as the "contiguous" issue in Kodiak's annexation or the failure of a boundary to generally conform to natural geography.

B. Causes and Possible Remedies

Some of the these problems are due to the following "institutional" flaws:

1. The existing standards and regulations were promulgated before the political and economic climate changed dramatically in favor of boroughization. There is now an institutional bias in favor of boroughs which creates a tendency on the part of the LBC and its staff to neglect its "watch-dog" duty and ignore rules which "get in the way" of borough formation. This results in a standardless system, creating a land-grab mentality where anything goes, first-come first-served.

If circumstances are now so changed that it is desireable for all or most of the unorganized borough to incorporate, the rules should also be changed and meaningful standards established for drawing lines in unpopulated areas. It is imperative that regions be looked at as a whole.

2. The LBC and its staff seem to lack understanding of the basic rules of statutory construction and administrative analysis. Although they are laymen, they are nonetheless charged with a quasi-judicial duty. This flaw was exemplified by comments by commissioners at a recent reconsideration hearing on the Lake and Pen proposal.

One commissioner said that the Nushagak villages arguments relating to subsistence use had no merit because state and federal government have exclusive jurisdiction over their respective lands and the borough could have no impact them. Two things are wrong with that statement: 1) it ignores the fact that subsistence and other resource use is the primarily indicia of the socio-economic ties of the region, which by law is something the LBC has to consider; 2) it is an incorrect statement of law and actual practice in regard to state lands.

Other commissioners indicated that their decision to favor Kodiak's annexation at the expense of Lake and Pen made them unwilling to adjust Lake and Pen's western boundary. That shows remarkable willingless to disregard the LBC's statutory duty to impartially apply law to facts.

3. There seems to be an institutional confusion about the nature of the proceedings. Case law has made clear that they are legislative rather than adversarial in nature. In practice, they are treated as adversarial in many respects but without the procedural safeguards that normally exist in adversarial proceedings.

4. The same DCRA staff who investigate proposals and prepare recommendations for the LBC provide technical assistence to those putting together proposals. This creates a built-in bias in favor of the petition. These two functions should be separated, with the DCRA investigation and report and recommendations done by neutral parties after the petition is filed.

5. Neutral hearing officers, with legal training and preferably a land-use background, should conduct public hearings and make recommended decisions whenever contested issues arise. This would alleviate some of the problems discussed above.

Conclusion

Borough decisions are quite important and have long-range implications not fully understood even by the LBC and DCRA. This is particularly true in regard to land and —

resource management, local influence on which is one of the major incentives for forming boroughs. Judging from our region's experiences, the LBC process results in short-sighted and arbitrary decisions. It is absolutely astounding that any agency would think that it can rationally make decisions redrawing the map of southwestern Alaska in a process taking less than two months.

Moreover, the process and the implications of borough formation are poorly understood by the public in Bristol Bay. This factor, combined with procedural impediments imposed by the LBC, greatly diminishes the ability of the local populace to have a meaningful voice in the decisions. A great deal of unnecessary divisiveness has resulted.

This situation can only serve to harm the state in the long run.

#4B

February 7, 1989
Box 762
Dillingham, Ak 99576

Sen. Al Adams, Chairman
Senate Community and Regional Affairs Committee
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Rep. Eileen Maclean, Chairman
House Community and Regional Affairs Committee
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Re: Local Boundary Commission - HB-131, Kodiak Island Borough annexation, Lake and Peninsula incorporation

Dear Sen. Adams and Rep. Maclean:

I write to urge your committees to consider a major overhaul of the Local Boundary Commission process for considering borough incorporations and annexations. I also urge you to put borough decisions on hold in the meantime, and more particularly to veto the Kodiak Island Borough annexation and, if possible, to remand the Lake and Peninsula decision to the LBC for further consideration.

As a Dillingham city councilman, an attorney employed by a Native association, and a former newspaper writer in Bristol Bay I have closely scrutinized the above-referenced actions and also the 1987 Aleutians East incorporation. In terms of substantive analysis these three LBC decisions are probably the worst administrative decisions I have seen in ten years of legal practice.

While Rep. Shultz's bill is a good starting point, it does not go far enough. A major problem is that the statutory and regulatory standards, probably inadequate to begin with, have been so loosened in application that they no longer mean anything. The LBC simply substitutes its own judgement for the legally-promulgated standards whenever a contested issue arises, with the result that its decisions are arbitrary and inconsistent.

The process encourages land-grabs and results in further concentration of the tax base in the more politically sophisticated, urbanized communities at the expense of villages. It also results in boundaries that are irrational from a geographic and demographic perspective. You simply cannot carve up large regions of the state on a first-come

first-served basis, requiring only minimal compliance with weak standards, and hope to have a fair and rational result.

The Kodiak Island Borough annexation. This annexation should be vetoed because it is bad public policy and because the LBC threw its standards to the winds to allow it.

The Kodiak borough was allowed to annex a large uninhabited portion of the Alaska Peninsula and adjacent waters of the Shelikoff Strait that Lake and Pen also sought to incorporate. It should be borne in mind that Lake and Pen had only to meet the standards for incorporation, while Kodiak had to meet those standards and the regulatory standards for annexation.

The LBC's rationale for giving the area to Kodiak instead of Lake and Pen seems to have been that the Shelikoff Strait is fished primarily by Kodiak-based fishermen and that taxes from that fishery should, in fairness, go to Kodiak. While that may seem reasonable, no such standard is found in the statute or the regulations. This is a prime example of the LBC substituting its own judgement of what "ought" to happen for the legally-established rules.

The Kodiak annexation was granted under the LBC's regulations governing "contiguous" annexations, under which it had to meet one of eight regulatory standards. However, a preliminary issue not even discussed in the decision was whether the annexed territory is contiguous to the original borough. By any common sense definition it is not contiguous because it is separated from the original Kodiak Island Borough by federal waters beyond the territorial limit of Alaska and will be a separate enclave.

Likewise, the eight regulatory standards were not meaningfully applied. The LBC found that three of them were met, but not one of these findings withstands scrutiny. The LBC merely accepted the bare representations of the petitioners without independent analysis or research - despite DCRA's statutory duty to "investigate" proposals.

There was no evidence of likely development in the area which Kodiak could realistically plan for or control, no evidence that municipal services were needed and no evidence that the borough would provide any additional services in the area, which after all is uninhabited. In short, the only real reason for the annexation was to provide the Kodiak borough an additional revenue source, and that alone does not meet the legal standards. It should also be noted that most of the reasons the LBC cited for approving the annexation applied only to the waters of Shelikoff Strait and not to the Alaska Peninsula.

From a public policy perspective one has to question the wisdom of giving this revenue source to a borough with a relatively vibrant economy and healthy tax base at the expense of nearby chronically depressed villages with no tax base. Kodiak has numerous fisheries and is one of the communities directly benefitting from the "Americanization" of the North Pacific bottom fishery. It has year-round harbors and processing plants. The Lake Iliamna villages in contrast are almost solely dependent on the Bristol Bay salmon fishery, for which non-residents hold most permits. There are no processing plants. The typical village has only a few salmon permits and a handful of salaried jobs in the schools and local government. Unemployment is astronomical in the winter months.

One would think it in the state's interest that such villages have access to nearby fisheries, if only through taxation. And perhaps the new borough could develop programs enabling its people to more directly benefit from the Shelikoff Strait fisheries.

The LBC's decision itself found that the revenues from this territory would be much more important to Lake and Pen than to Kodiak, although not critical to either. Kodiak's benefit would be negligible.

Lake and Peninsula incorporation. This decision should be held open by whatever legal mechanism is available to do so. For one thing, a veto of the Kodiak annexation will not alone give Lake and Pen the additional territory it sought, and deserves.

For another, the borough's northwestern boundary was approved without adequate notice to neighboring communities in the Nushagak drainage. In my view, the procedures used effectively precluded any meaningful opportunity to be heard by residents of the adjacent area and thereby violated their constitutional rights of due process and equal protection.

Substantively, the northwestern boundary clearly violates the statutory standards by following longitudanal lines rather than natural geography and socio-economic use patterns. By slashing arbitrarily across the drainages, it divides historic (and logical) planning units and puts valuable spawning grounds for the Nushagak salmon fishery in the new borough. It also places subsistence hunting and fishing areas that Nushagak village residents say are traditionally "theirs" in the Lake and Pen Borough.

Depending on Lake and Pen's evidence, of course, the boundary might be moved in either direction if the legal standards were applied. But the northwestern boundary was not even addressed in the LBC decision, and the LBC refused to grant reconsideration of the decision so that it could be.

Another reason for overturning this decision is the speed with which it was made (24 days). This did not allow sufficient investigation and evaluation of the proposal by DCRA and the LBC, much less by the public. Many residents of the region believe one borough encompassing all of Bristol Bay would be a better choice. DCRA has been asked to study this possibility but has not done so.

In conclusion, the LBC process and the statutory standards for incorporation should be modified to ensure that boundaries are made on sound planning principles. Natural geography, traditional use patterns, and existing land-planning units should be emphasized in unpopulated areas. At the very least, if decisions are going to be made on the basis of "who should get the revenues," the legislature and not the LBC should establish the policies for making that choice. I would think the state would want to spread out the tax base as much as possible.

The standards and procedures should also be modified to give the interests of communities outside proposed boundaries equal consideration and to ensure that regions are looked at as whole.

The LBC's analysis would be improved if neutral hearing officers conducted the hearings and made recommended decisions, and if DCRA's investigative and technical assistance roles were clearly separated and performed by different people. DCRA's investigative duty should be more clearly spelled out so that decisions are based on facts and expertise rather than the superficial representations of those pushing a proposal. Right now, the whole petitioning process is little more than a word game.

Sincerely,

Bruce Baltar

Bruce B. Baltar

cc Sen. Zharoff
Sen. Binkley
Rep. Jacko
Rep. Hoffman
Rep. M. Davis
Rep. Schultz

#5

REPORT ON LOCAL BOUNDARY COMMISSION WORK SESSIONS
REGARDING PROCEDURES (January 30 - 31, 1989)

The following is a summary of the work sessions held by the Local Boundary Commission on January 30 and 31, 1989 to discuss procedures and rules to be used by the Commission. The Commission plans additional work sessions concerning this matter and intends to amend its existing regulations (19 AAC 10) to implement changes to its procedures.

Commission Members present:
C.B. Bettisworth, Chair
Shelley Dugan, Vice-Chair
Jo Anderson, Member
Ben Nageak, Member
Lamar Cotten, Member

DCRA Staff present
Jake Lestenkof (partial attendance)
Patrick Poland, Deputy Director, MRAD-Anchorage
Dan Bockhorst, Local Government Specialist

Others Present (partial attendance)
Phil Kelly, Aide to Senator Zharoff
Martha Stuart, Aide to Senate C&RA Committee
Louanne Christian, Aide to House C&RA Committee
Vern Roberts, Chignik City Administrator
Peter Froehlich, Assistant Attorney General
Marjorie Odland, Assistant Attorney General

I. PUBLIC NOTICE OF THE FILING OF A PETITION

A. FOR REGIONAL ACTIONS HAVING POTENTIAL FOR SUBSTANTIAL PUBLIC INTEREST (defined to include incorporations, dissolutions, legislative review annexations, step annexations, legislative review detachments and local action detachments which involve boroughs or unified municipalities).

1. All of the following parties located within the territory proposed for the change, and within each regional educational attendance area (REAA) and municipality adjoining the borough or unified municipality shall receive individual public notice of the filing of a petition:

   A. All municipalities (cities, boroughs, unified municipalities);
   B. The tribal council or recognized spokesperson of every unincorporated community having 25 or more residents;
   C. All ANCSA village corporations with core townships within the region or the adjoining regions;
   D. All ANCSA regional corporations organized for profit;
   E. All ANCSA regional non-profit corporations;
   F. Regional Educational Attendance Areas;
   G. Coastal Resource Service Areas;
   H. Regional Health providers;
   I. "Major property owners" (to the extent they are readily known).

2. All of the following additional parties shall receive individual notice of the petition:

   A. Legislators (at a minimum, all legislators serving the region and the adjoining regions should be notified; for issues of statewide importance all legislators should be notified);
   B. Media (newspapers, radio stations and television stations serving the areas in question);
   C. The petitioners' representative;
   D. The Local Boundary Commission;
   E. Appropriate State and federal agencies;
   F. Other parties which the Department believes would be interested in this matter (e.g. financial institutions in the event of a proposed dissolution).

3. Notice described in 1 and 2 above shall be mailed via first class mail (except for that processed through the State mail distribution system). Certified mailings will not be used. Staff will prepare an affidavit of mailing identifying the date of the mailing and the mailing address for each party.

4. Notice shall be published as display advertisements in newspapers of circulation in the regions specified. [Note: standards for publication (e.g. number of times, minimum size) to be developed at subsequent worksessions of LBC].

B. FOR COMMUNITY ACTIONS HAVING POTENTIAL FOR SUBSTANTIAL PUBLIC INTEREST (defined to include incorporations, dissolutions, legislative review annexations, step annexations, legislative review detachments and local action detachments which involve cities).

1. All of the following parties located within 10 miles from the perimeter boundary of the proposed change and/or existing boundary of the city, whichever is further, shall be provided with individual notice.

   A. All municipalities (cities, boroughs, unified municipalities);
   B. The tribal council or recognized spokesperson of every unincorporated community having 25 or more residents;
   C. All ANCSA village corporations with core townships within the defined area;
   D. All ANCSA regional corporations organized for profit;
   E. All ANCSA regional non-profit corporations;
   F. Regional Educational Attendance Areas;
   G. Coastal Resource Service Areas;
   H. Regional Health providers;
   I. "Major property owners" (to the extent they are readily known).

2. All of the following additional parties shall receive individual notice of the petition:

   A. Legislators (at a minimum, all legislators serving the territory defined should be notified; for issues of statewide importance all legislators should be notified);
   B. Media (newspapers, radio stations and television stations serving the areas in question);
   C. The petitioners' representative;
   D. The Local Boundary Commission;
   E. Appropriate State and federal agencies;
   F. Other parties which the Department believes would be interested in this matter (e.g. financial institutions in the event of a proposed dissolution).

3. Notice in 1 and 2 above shall be mailed via first class mail (except for that processed through the State mail distribution system). Certified mailings will not be used. Staff will prepare an affidavit of mailing identifying the date of the mailing and the mailing address for each party.

4. Notice shall be published as display advertisements in newspapers of circulation in the territory specified. [Note: standards for publication (e.g. number of times, minimum size) to be developed at subsequent worksessions of LBC].

C. FOR REGIONAL AND COMMUNITY ACTIONS HAVING LIMITED POTENTIAL PUBLIC INTEREST (defined to include mergers and consolidations involving boroughs, unified municipalities and cities, as well as local action annexations to boroughs, unified municipalities and cities).

Public notice of such types of actions will be much less than that described in I A and B. [Note: to be more clearly defined at subsequent worksessions of LBC]. Since mergers and consolidations involve a restructuring of existing governments, as opposed to a change in the boundaries of any government, notice will likely be limited to interested parties within the existing governments to be merged or consolidated.

With respect to local action annexations, there are three types of annexations. These are: annexations involving strictly municipally-owned property, those which have been requested by all of the property owners and resident voters in the territory proposed for annexation and those for which the annexation will be ultimately determined by an election of the voters within the territory. The overwhelming majority of these types of annexations are small in scale and are of little or no interest to the general public. In the event a local action proposal is

filed which has the potential for substantial public interest, appropriate notice will be given.

II. ADDITIONAL INFORMATION

Discussions were held by the LBC concerning the extent to which parties potentially interested in a particular proposal should be made responsible to ask for any information beyond that provided by the notice of the filing of the petition. These additional materials would include a copy of the petition, responsive briefs and written comments in favor or opposition to the petition, replies to the responsive materials from the petitioners' representative, correspondence from DCRA, DCRA draft reports, DCRA final reports, notice of meetings, hearings, et cetera. The Commission's discussion centered around the need to keep potentially interested parties informed, yet not incur undue costs of copying and mailing substantial materials to what would typically amount to 200 or more parties. The Commission was inclined limit the such information, UNLESS INDIVIDUALS SPECIFICALLY REQUESTED ADDITIONAL MATERIALS IN WRITING.

III. ADMINISTRATIVE PROCEDURES

Peter Froehlich, Assistant Attorney General, expressed the opinion that State Statutes [AS 29.05.100(b), 29.06.040(a), 29.06.130(b) and 29.06.500(b)] subject the Commission only to limited provisions of the Administrative Procedure Act. Specifically, these consist of AS 44.62.560 - 570 concerning a judicial appeal of a decision of the Commission.

Mr. Froehlich specifically indicated his belief that the provisions of AS 44.62.540 concerning reconsideration did not apply to the Commission. Mr. Froehlich suggested that the Commission adopt a regulation setting up a procedure for reconsideration based upon the process set out in the State court rules.

Mr. Froehlich recommended that the Commission adopt a regulation clearly establishing an effective date for its decisions.

The Commission discussed the need to formally adopt parliamentary rules. Assistant Attorneys General Marjorie Odland and Peter Froehlich recommended that the Commission adopt bylaws rather than a set of pre-establisned parliamentary rules. Ms. Odland indicated that she would provide the Commission with sample bylaws for consideration.

IV. SCHEDULE OF PROCEEDINGS

The Commission expressed the belief that a more moderate pace in future proceedings would likely accommodate nearly all of the concerns recently expressed regarding the procedures used by DCRA and the LBC.

It was agreed that the Commission should adopt a regulation allowing the Commission (or Chairman) to set a formal schedule for each proceeding. A typical schedule concerning DCRA and LBC activities leading to a decision concerning a legislative review boundary change, incorporation or dissolution was outlined as follows:

STEP 1. Form and content of petition reviewed for compliance with law by DCRA. If form and content is accepted, individual public notice of the filing of petition is given. Arrangements are also made for publication in appropriate newspaper at least once each week for four weeks. (see sample notice - petition for dissolution of City of Akiachak). These tasks would typically be accomplished within 2 weeks.

STEP 2. Chairman of the LBC sets the formal schedule for the proceedings. This would occur sometime around the 2nd or 3rd week of publication of the notice of the filing of the petition.

STEP 3. Deadline for receipt of responsive briefs and written comments in support of or in opposition to the petition. This would be determined in Step 2, but would typically be set for at least 7 weeks following the distribution and initial publication of the notice of the filing of the petition.

STEP 4. Deadline for receipt of answering brief from the petitioners' representative in reply to responsive briefs and written comments. This would be determined in Step 2, but would typically be set for 2 weeks following the deadline for responsive briefs.

STEP 5. Distribution of draft report and recommendation on the petition by DCRA. This would typically occur 4 weeks following the deadline for the answering brief.

STEP 6. Deadline for comment on DCRA draft report and recommendation. Possible public meeting(s) conducted on the petition by DCRA. These activities would typically occur 4 weeks following the distribution of the draft report.

STEP 7. Distribution of final report and recommendation on the petition by DCRA. This would typically occur 2 weeks following the deadline for comment on the draft report.

STEP 8. LBC conducts hearing(s) on petition. This would typically occur 3 weeks following the release of the final DCRA report. Note: additional public notice of the hearing would be given prior the hearing.

STEP 9. LBC makes decision on petition. This must occur within 90 days of the hearing(s), however, the Commission may make a decision immediately following the hearing.

QUESTIONS AND COMMENTS CONCERNING THE MATTERS OUTLINED IN THIS REPORT MAY BE DIRECTED TO:

Dan Bockhorst
Department of Community and Regional Affairs
949 East 36th Avenue, Room 405
Anchorage, Alaska 99508

telephone 561-8586