ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672

5619 HOUSE COMMUNITY & REGIONAL AFFAIRS

23

The Supreme Court went on to state that it must be assumed that the Constitutional Convention delegates were aware of obstacles faced by Alaska cities in attempting to annex territory. The Court referred specifically to a related Territorial District Court case heard just prior to the convening of the Constitutional Convention. In the referenced case the judge remarked:

> Every impediment and dilatory tactic has been employed by the opponents of annexation, except the homesteaders, to obstruct and harass the city in every move in connection with its efforts to extend its boundaries in the traditional manner to include the adjacent areas. Such opposition does not appear to be in the public interest or in good faith.

The Supreme Court went on to conclude that the Constitutional Convention delegates were sensitive to the inadequacies inherent in a system where needed municipal expansion could be frustrated if the electors in a single urban area outside of municipal boundaries did not agree to annexation.

The procedure proposed by House Joint Resolution No. 26 would be subject to the very problems the constitutional founders attempted to avoid in creating the existing legal structure. While there is opportunity for public input, the final decision appropriately lies with the legislature. Currently, residents of an area proposed for annexation are permitted to express their position on proposed boundary changes by testifying at hearings conducted by the Commission. Further, decisions of the Local Boundary Commission concerning boundary changes initiated under Article X, Section 12 of the Constitution are subject to legislative veto. Since its inception, the Local Boundary Commission has submitted more than 90 recommendations for municipal boundary changes to the legislature. The department is aware of only eight instances where Commission recommendations were rejected by the legislature. In some of these eight cases, the legislature later approved an identical or substantially similar recommended annexation.

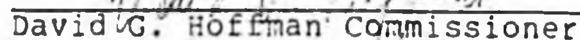
By requiring local approval in the local boundary determination process as provided by this amendment, the process would revert to one dominated by local politics which does not give a proper role to statewide concerns.

The department additionally has a number of technical concerns with the wording of the proposed amendment. These are as follows:

A. The provisions of the proposed amendment would apply "if the land is not within a relatively integrated socioeconomic unit of the municipality." While it is believed that the intent of the sponsor is that this language should be interpreted as though it reads "if the land is not within a relatively integrated socioeconomic unit of which the municipality is a part", the language used raises a possibility of misinterpretation. Because the existing language refers to the unit "of the municipality," there may be a danger of interpreting this to mean the unit must be within the municipality. Since any area proposed for annexation must be outside the municipality, under this interpretation, the resident approval requirement would be applied to every annexation to be submitted to the legislature.

B. Typically, the will of the people in important measures such as these is represented by the voters. The proposed amendment would require "approval of a majority of the residents of the area to be annexed." While it is believed that the intent of the sponsor is that an election be the mechanism used, it may be possible to interpret this language to require a broader mechanism of determination of resident, rather than voter, approval.

C. The term "land" is used twice in the proposed amendment. While it is assumed that the term is intended to apply to areas of water (submerged lands) and tidelands, this may require some clarification.



David G. Hoffman Commissioner

M E M O R A N D U M   February 21, 1989

SUBJECT: Powers of the Local Boundary Commission; HJR 26

TO: Representative Eileen P. MacLean
Chair, House Community and Regional Affairs Committee

FROM: Richard A. Bradley
Legislative Counsel

Louanne Christian has asked that I comment on certain technical matters relating to HJR 26. These are matters contained within Commissioner Hoffman's comments on the resolution.

I agree that the resolution would be improved by the addition of each of the suggestions made by Commissioner Hoffman.

I suggest that the material added to Section 12 of Art. X read as follows:

> The commission may recommend the annexation of an area to a municipality only with the approval of a majority of the votes cast at an election called in the area to be annexed if the area is not within a relatively integrated socioeconomic unit of which the municipality is a part.

If I may be of further assistance, please advise.

RAB:mi
wkmi3/085

DRAFT

#6

DRAFT

IMPORTANT NOTICE
FILING FOR DISSOLUTION OF THE CITY OF AKIACHAK

Voters of the community of Akiachak (located approximately 20 miles northeast of Bethel) have petitioned the State of Alaska to dissolve their city government. A copy of the petition and supporting materials is available for review at the Akiachak Native Community Office in Akiachak and at the Department of Community and Regional Affairs (DCRA) in Bethel and Anchorage.

BOUNDARIES. The boundaries of the city proposed for dissolution encompass approximately 12 square miles in and around the community of Akiachak.

WRITTEN COMMENT PERIOD. Individuals may file briefs or written comments in support of or opposition to this petition. To ensure consideration, such materials must be submitted in accordance with the schedule set by the Chairman of the Local Boundary Commission (LBC) as outlined below.

SCHEDULE. The Chairman of the LBC will formally set the schedule for action by the LBC concerning this matter on February 27, 1989. The following is the *tentative* schedule of the proceedings.

- **03/13/89** - Deadline for filing briefs and/or written comments in support of or opposition to the proposed dissolution.
- **03/27/89** - Deadline for submission of answering briefs by petitioners' representative.
- **04/24/89** - DCRA releases (for public review) draft report and recommendation to the LBC concerning the proposed dissolution.
- **05/22/89** - Deadline for receipt of comments on draft report and recommendation from DCRA.
- **06/05/89** - DCRA releases final report and recommendation.
- **06/26/89** - LBC conducts hearing in Akiachak.
- **11/07/89** - State conducts election on dissolution (assuming LBC approves petition - actual election date will be set by Director of Division of Elections).

SPECIAL NOTICE TO CREDITORS AND OTHERS WITH A FINANCIAL INTEREST. Any party to whom a debt is owed by the City of Akiachak or who holds assets of the City of Akiachak is asked to notify (INSERT NAME, ADDRESS AND TELEPHONE NUMBER OF AUDITOR).

FURTHER INFORMATION. Questions and requests for a copy of the petition for dissolution, DCRA's reports, briefs, correspondence and/or other materials concerning this matter should be directed to Dan Bockhorst, Department of Community and Regional Affairs, 949 East 36th Avenue, Suite 405, Anchorage, AK 99508 (telephone: 561-8586).

STANDARDS ESTABLISHED BY THE LOCAL BOUNDARY COMMISSION CONCERNING THE ETHICAL CONDUCT OF COMMISSION MEMBERS PROHIBIT INDIVIDUAL MEMBERS OF THE COMMISSION FROM DISCUSSING ANY ASPECT OF THIS MATTER, OTHER THAN PROCEDURES TO BE USED.

IN THE HOUSE BY SHULTZ

HOUSE JOINT RESOLUTION NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

Proposing an amendment to the Constitution of the State of Alaska relating to powers of the local boundary commission.

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

* Section 1. Article X, sec. 12, Constitution of the State of Alaska, is amended to read:

SECTION 12. BOUNDARIES. A local boundary commission [OR BOARD] shall be established by law in the executive branch of the State government. The commission [OR BOARD] may consider any proposed local government boundary change. The commission may recommend the annexation of land to a municipality only with the approval of a majority of the residents of the area to be annexed if the land is not within a relatively integrated socioeconomic unit of the municipality. The commission [IT] may present proposed changes to the legislature during the first ten days of any regular session. The change shall become effective forty-five days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house. The commission [OR BOARD], subject to law, may establish procedures whereby boundaries may be adjusted by local action.

* Sec. 2. The amendment proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

Original sponsors: Shultz and Foster

IN THE HOUSE

BY THE COMMUNITY AND
REGIONAL AFFAIRS COMMITTEE

CS FOR HOUSE JOINT RESOLUTION NO. 26 (C&RA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

Proposing an amendment to the Constitution of the State of Alaska relating to the local boundary commission.

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

* Section 1. Article X, sec. 12, Constitution of the State of Alaska, is amended to read:

SECTION 12. BOUNDARIES. A local boundary commission [OR BOARD] shall be established by law in the executive branch of the State government. The commission [OR BOARD] may consider any proposed local government boundary change. The legislature may establish standards to guide the commission in its review of a local government boundary change. The commission [IT] may present proposed changes to the legislature during the first ten days of any regular session. The change shall become effective sixty [FORTY-FIVE] days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house. The commission [OR BOARD], subject to law, may establish procedures whereby boundaries may be adjusted by local action.

* Sec. 2. The amendment proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

HJR

38

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

March 30, 1989

POSITION PAPER

RE: House Joint Resolution 38

SPONSOR: Representative Hoffman

Program Effects of Resolution

There would be no major effects on the Department of Community and Regional Affairs from this Resolution.

Comments

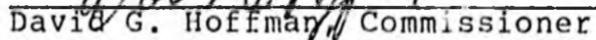
The Department strongly supports this Resolution. The federal funding sought by this resolution are important to residents throughout rural Alaska.

The level of funding requested by the Resolution is a 1988 maintenance level allocation of federal funding by the U.S. Department of Housing and Urban Development to the regional housing authorities for construction of decent, safe and sanitary housing for Alaska's rural residents.

The effects of not having federal HUD funding for housing construction by the regional housing authorities would be devastating. There is no other program available for low-income housing to rural residents such as provided by the HUD funding to regional housing authorities. The number of people living in substandard housing throughout rural Alaska would increase through deterioration of existing housing and population increase.

A 1988 rural housing study completed by the Department of Community and Regional Affairs documented a current need for 6,740 units of new housing for rural Alaska. The U.S. Department of HUD will use the results of this survey in determining the funding allocations to Alaska. The State of Alaska has continued its commitment to reduce the number of families living in substandard, overcrowded, unsanitary housing by providing funding for water and sewer, roads, and electrical distribution facilities to the majority of houses constructed by HUD funding even during times of reduced state revenues.

The Department of Community and Regional Affairs has been very active in rural housing issues and will continue cooperative efforts with federal agencies in encouraging legislation to improve the living standards of Alaska's rural residents.



David G. Hoffman, Commissioner

ASSOCIATION OF ALASKA HOUSING AUTHORITIES

April 4, 1989

House DCRA Committee

RE: Joint Resolution #38 Testimony

The Joint Resolution before your committee is very important to the Low Income needs of the STATE OF ALASKA.

Presently in the Federal budget no funding is provided for the Indian Housing program. This program is most prevalent in Rural Alaska and in normal funding cycles brings some 25 to 50 million dollars into the State in the form of moneys for New Construction and Rehabilitation funds.

The importance of the State of Alaska sending such a message as contained in the resolution to Washington D.C. on this issue cannot be over emphasized.

The State of Alaska has participated in Leveraging these federal funds in past and this philosophy is very consistent with the present administrations philosophy.

The State also has initiated and created the Rural needs assessment study showing a need for over 6,700 units in the Remote Rural areas of our State. The study was created at the States own expense to enhance these federal efforts. We believe it's appropriate and necessary given this past State involvement that the 1989 Legislature follow with the reminder of its commitment and inform the Federal Government of its continued concern regarding this program.

Sincerely,

Mike Shuler
President

MS:bln

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION : HJR 38
PUBLISH DATE :

FISCAL NOTE

REQUEST:

Revision Date:
Title : "Relating to housing programs of US Dept HUD"
Sponsor : Rep Hoffman
Requestor :

Agency Affected : Community & Regional Affairs
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						
REVENUE						

FUNDING: (Thousands of Dollars)

	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Jim Plasman

Prepared by : Jim Plasman, Deputy Director
Phone : 465-4750
Division : Municipal & Regional Assistance
Date : 3-27-89

Approved by Commissioner : David G. Hoffman
Date : 3-27-89
Agency : Community & Regional Affairs

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

THE FOLLOWING DOCUMENT HAS NOT BEEN FILMED BUT IS AVAILABLE IN THE ORIGINAL FILE

HJR

80

HOUSE COMMITTEE REPORT

(5)
Date Referred: February 12, 1990 FURTHER REFERRALS:

Date of Committee Action: 2/20/90

The COMMUNITY & REGIONAL AFFAIRS Committee considered: HJR 80

HOUSE JOINT RES. NO. 80 HUD FUNDS FOR RURAL HOUSING

Urging revision of housing requirements of the United States Department of Housing and Urban Development to ensure construction of energy efficient homes in rural Alaska.

RECOMMENDATIONS:

[ ] be replaced with ______________ [X] the same title / [ ] a new title

[ ] have attached amendment(s)

[X] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] additional referral to the ______________ Committee

ADOPTS: ______________ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal impact ______

[ ] zero fiscal note X

[ ] zero with analysis ______

APPROVES PREVIOUS: (Date/Dept)

[ ] fiscal note(s) ______

[ ] zero fiscal note(s) ______

[ ] zero fn/analysis ______

SIGNING DO PASS:

Eileen P. MacLean
Cheri Davis
Eugene R. Kubina
Richard Foster

SIGNING: (Check approp. column)

	Do Not Pass	No Rec	Amend

Eileen P. MacLean
Chairman's Signature

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION : HJR 80
PUBLISH DATE :

FISCAL NOTE

REQUEST:

Revision Date:
Title : Urging revision of housing requirements of US HUD
Sponsor : Reps MacLean, Ulmer etc
Requestor :

Agency Affected : Community & Regional Affairs
BRU :
Components :

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	[illegible]	-0-	-0-

POSITIONS:

	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

There is no fiscal effect for FY 90.

Prepared by : [signature]
Phone : 465-4750
Division : Municipal & Regional Assistance
Date :

For Approved by Commissioner : [signature]
Date : 20 Feb 90
Agency : Community & Regional Affairs

Distribution (by preparer) :
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- Impacted Agency(ies)

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

02-576(2/77)

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION : HJR 80
PUBLISH DATE :

FISCAL NOTE

REQUEST:

Revision Date:
Title : Urging revision of housing requirements of US HUD
Sponsor : Reps MacLean, Ulmer etc
Requestor :

Agency Affected : Community & Regional Affairs
BRU :
Components :

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

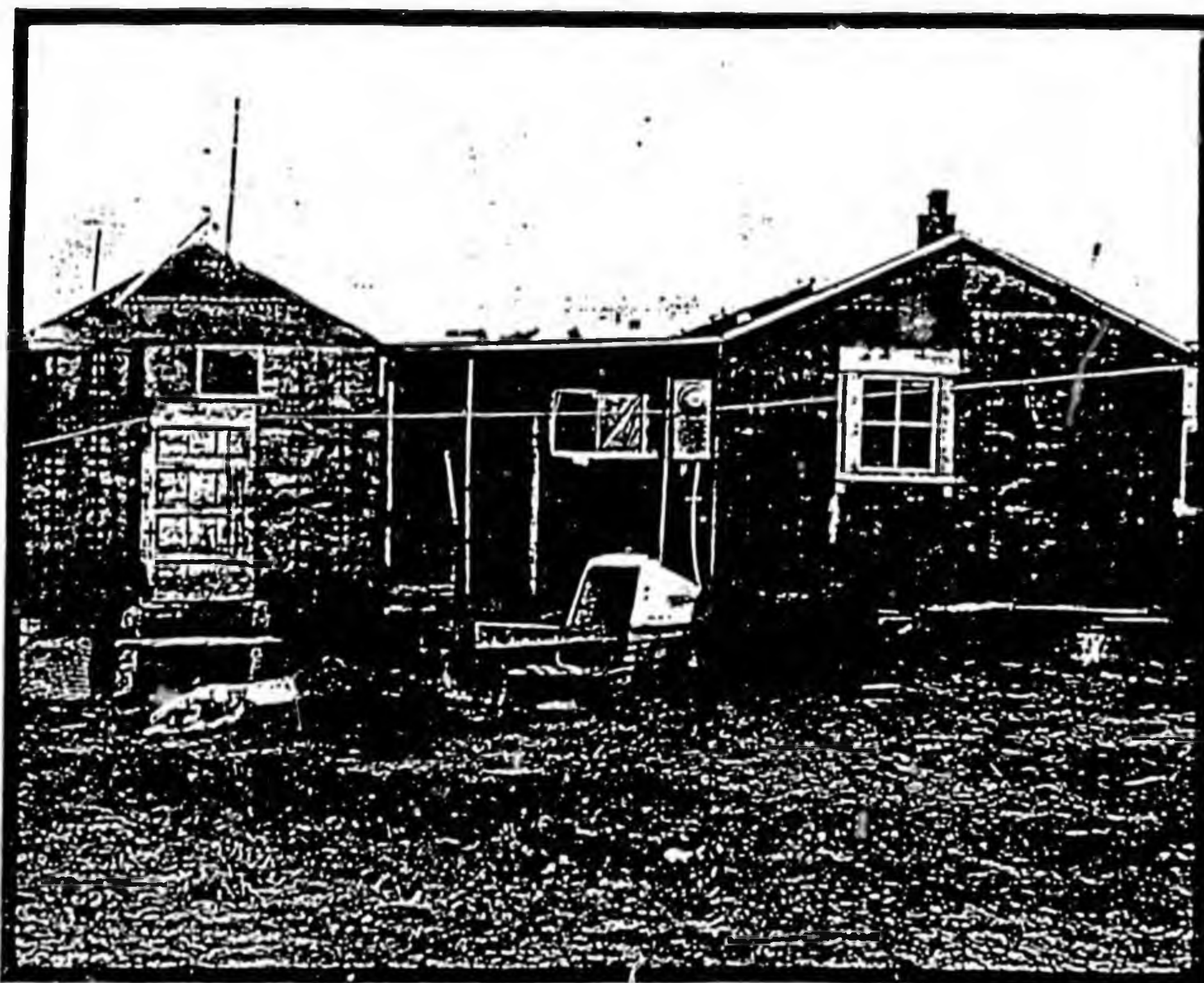
ANALYSIS : (Attach a separate page if necessary)

There is no fiscal effect for FY 90.

Prepared by : [signature]
Phone : 465-4750
Division : Municipal & Regional Assistance
Date :
For Approved by Commissioner : [signature]
Date : 20 Feb 90
Agency : Community & Regional Affairs

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

1988 Rural Housing Needs Assessment Study



DOYON Region - Photo by Rob Stapleton, Jr.

State of Alaska
Steve Cowper, Governor

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

Submitted in fulfillment under contract 88-0137 to the
Alaska Department of Community and Regional Affairs

by

Rural Alaska Community Action Program (RurAL CAP)
ASK* Marketing Information Search
Alaska Public Interest Research Group (AKPIRG)

March 1988

HOUSING PHYSICAL CONDITION BASED ON INSULATION

In the following table, percentages of houses with attics and walls of different R-values are listed by region. R-values refer to the level of insulation. One inch of batt insulation is approximately equal to R-3. For example, R-38 is equivalent to 12 inches of batt, and R-19 is equivalent to 6 inches of batting.

Insulation Levels in Percentages:

	Attic					Walls		Can't Maint
	R<R11	R<R19	R<R22	R<R30	R<R38	R<R11	R<R19	70 deg F
Ahtna	15%	51%	78%	80%	96%	22%	69%	56%
Aleut	23%	36%	50%	65%	76%	23%	45%	16%
Arctic Slope	0%	6%	19%	36%	56%	1%	18%	37%
Bering Sts	14%	29%	89%	94%	97%	11%	41%	67%
Bristol Bay	14%	39%	76%	78%	90%	19%	52%	22%
Calista	3%	34%	68%	77%	77%	11%	78%	41%
Chugach	16%	26%	47%	56%	71%	20%	52%	15%
Cook Inlet	7%	22%	52%	71%	77%	10%	62%	12%
Doyon	4%	18%	47%	74%	79%	11%	65%	40%
Koriag	2%	11%	17%	18%	20%	3%	63%	27%
NANA	25%	25%	50%	50%	50%	1%	26%	72%
Sealaska	12%	55%	93%	95%	97%	15%	81%	41%
TOTAL	9%	29%	58%	69%	76%	12%	57%	36%

According to the <u>1986 Energy Conservation Standard For New Residential Buildings</u> published by the State DCRA Office of Energy Programs, the minimum prescribed insulation requirement for ceilings is R-38, except in Arctic Slope where the ceiling requirement is R-52. The minimum prescribed insulation requirements for walls are R-21 in Sealaska; R-18 in Aleut, Chugach, Cook Inlet, and Koniag; R-25 in Ahtna, Bristol Bay, Calista, and Doyon; R-30 in Bering Straits and NANA; and R-35 in Arctic Slope.

Houses with attic R-values less than R-38 range from 71% to 97% in nine of the regions, and more than half of the houses in two more regions. Houses with wall R-values less than R-19 range from 41% to 81% in all but two region.

Anchorage Daily News
Thursday, September 14, 1989

Report says federal housing for Alaska Natives is a mess

By GEORGE FROST
Daily News reporter

A federal housing program for Alaska Natives is riddled with waste, and many of the homes built since 1975 are unsafe, substandard and ill-suited to harsh arctic conditions, according to a study released Tuesday by a federal housing inspector.

The program, administered by the Department of Housing and Urban Development, is so poorly run that it must be considered a failure, said Rich Nygaard, regional inspector general for the Department of Housing and Urban Development.

"Despite more than 14 years experience, HUD has not provided Alaska Natives with decent, safe or affordable housing. Design and construction defects, deferred maintenance and poor housekeeping continues to create safety and health hazards for Alaska families," he said.

Local HUD officials disagreed strenuously with many of the audit findings.

"We feel the audit report is completely flawed and does not cover what they said they were covering," said Arlene Patten, acting HUD manager of the Anchorage office. "It is based on a false premise and a misunderstanding of the program."

Patten said the audit focused on projects built in the late 1970s and early 1980s startup phase of the program and "does not show the substantial improvements."

"Since then, most of these things have been corrected and the homes are no longer substandard," she said.

"I think the program is trying to meet the need of the regional Bush people of Alaska, and without that program there would be no housing out there for them."

More than $300 million has been spent to build 3,290 single-family homes under the Alaska Mutual Help Home Own-rship Program.

Please see Back Page, HOMES

Continued from Page A-1

The Alaska program, part of a nationwide Indian housing system, gives low-income Native families an opportunity to purchase their own homes. They pay whatever they can afford, and HUD makes the remainder of the loan payments.

Of all the homes built since 1975, more than six of every 10 have been either the subject of a lawsuit because of poor construction or have required extra HUD funding to correct those problems, according to the detailed, 141-page report.

An inspection of 207 of the 714 newer homes built since 1984 showed that almost all had serious problems. All 207 had defective foundations. Many of the homes rest on primitive pads that are unsuited for the fragile tundra, subject to summertime floods and fierce winter storms.

Fifty-seven had broken or deficient furnaces, stoves and other mechanical systems.

"In some projects, home and basic sanitary maintenance was quite limited and others nonexistent," the study said.

A series of inspections in villages throughout the Bush turned up numerous safety hazards: broken stairs and porches, tottering foundations, and electrical hazards from improperly installed lighting fixtures, the audit said.

Some families use Coleman camping stoves to cook their meals because their regular stoves are broken or they can't afford propane cylinders that fuel them. Others burn creosote-soaked driftwood for heating, another potential hazard.

Nine of 50 homeowners in one village reported that cracks in the flooring of their homes allowed winds to "enter with such force that it raises the vinyl flooring off the floor, creating an effect like walking on pillows."

And in wintertime, interior walls are sheathed in up to 4 inches of ice, the audit found.

HUD contracts with 13 different Indian Housing Authorities, most of them subdivisions of local government or Native corporations and agencies, to run the program.

William Nishamura, regional HUD administrator for Alaska, disagreed that a majority of homes are substandard. The audit ignored the complexities of building in the Arctic, he said. Building standards and materials are not yet perfected for Alaska.

Nishamura laid blame for many of the problems at the door of the Native housing agencies. Building sites are chosen by the Native agencies, which also provide the soils engineers, architects, planners and builders, he said.

A majority of problems cited in the report are caused by poor maintenance, not poor design or construction. And it is the responsibility of Native housing agencies to train homebuyers how to maintain their furnaces, stoves and foundations, not HUD's, he said.

John Guinn, executive director of a Bethel-based housing agency run by the Association of Village Council Presidents, agreed with many criticisms in the audit but said the program was not a failure.

"I disagree that it's not working. It's been very effective in providing housing for the needy. The program just needs somebody at HUD who is willing to stand up for what we need."

Guinn said the housing program operated at a furious pace in the early 1980s, and mistakes were made.

"A lot of it was finding a contractor who knew how to build in rural Alaska," he said. "And a lot of (housing) directors didn't have construction experience. We were playing catchup. I think our housing authorities built over 400 in one year.

"We were building so fast there would have been problems in construction and in HUD oversight."

In the early years of the program, homes were built to Lower 48 standards, he said. "There were not adequate furnaces, not adequately insulated. They (HUD) don't realize that when it's 30 below and blowing 100 outside you have got quite a wind-chill factor."

The Native housing agencies are repairing many of the problems and training families in basic maintenance, he said.

"They are all being repaired. We will a[illegible]orize $25,000 or more [illegible] house for new furnaces, [illegible] insulation."

A problem that all concerned agreed on was a shortage of money for the program, and an unrealistic "cap" of $92,200 that can be spent for any one home.

That money must stretch to pay for "planning, architecture, a soils engineer, shipping, construction, everything," Guinn said. "In many cases in remote villages it is not enough to do the job, so at some point you have to cut corners."

"When you get out to some of these remote tundra villages, gravel is like gold," he said. "You can't afford to fly it in. A couple years down the road the house starts moving."

Guinn said that HUD signs off on every home that is built, and "someplace along the line I think somebody in the HUD system should have had the intestinal fortitude to say, 'this foundation won't work or this heating system isn't adequate."

Sunday Business E

Anchorage Daily News Sunday, February 1, 1987

Living in the mistakes of the past

Houses are slums after only 10 years

By HAL BERNTON
Daily News reporter

ST. MICHAEL — When the west winds bring a blast of chill Siberian air to the island village of St. Michael, Leo Kobuk huddles indoors and tries to keep his family warm. He tacks a blanket across the back door, puts an electric heater in his bedroom and turns his fuel-oil stove up full blast.

In the worst of the winter cold snaps, when the outside temperature may dip below minus 30, Kobuk still can't muster enough heat to keep his house comfortable. Frost forms along the living room wall, ice coats electrical sockets and water may freeze when spilled on the kitchen floor.

In warmer weather, Kobuk has other problems to contend with.

Snow that drifts into the eaves melts and trickles down through walls and the kitchen ceiling. As summer approaches, the permafrost beneath his house begins to thaw, the wood foundation heaves and his floor begins to move in strange ways. Kobuk used to level the house by jacking it up and adjusting the wooden support blocking. But the jacks never did the job. They raised the middle of the house, but left the sides sagging.

Kobuk's three-bedroom box house is one of 500 housing units financed 10 years ago by the federal government in 19 Bush villages. Designed by architects of the federal Bureau of Indian Affairs, each house was identical to the next — rectangular red, yellow and green-painted boxes of siding, plywood flooring and metal roofs.

A decade after their completion, many of the houses are falling apart. Floors are rotting, joists separating and some houses are in danger of sliding off their foundations. Kobuk can shove a knife blade through the cracks along the base of his living room wall.

"When they were building

See Page E-2, ALASKA 500

Andrew and Esther Otten stand in front of their old house, left, and their new home.

Designers slowly learn how to build housing in the Bush

By HAL BERNTON
Daily News reporter

ST. MICHAEL — From the outside, the house looks quite ordinary — boxcar shape, stilt-like foundation and metal roof. Only a fresh coat of yellow paint distinguishes it from much of the other Native housing built in this western Alaska village.

But step inside on a sub-zero, mid-winter day. With the aid of a small fuel-oil furnace, the house stays warm. No ice on bedroom walls. No frost inside the windows. No huge heating bills. To St. Michael villagers, this house — just completed in December — seems like a major step up.

"Everybody in town, they look at this and say, 'where were these houses 12 years ago?'" said Albert Washington, St. Michael's mayor.

The St. Michael house is an example of a new wave of federal housing in the Bush — better designed and better insulated than predecessors built in the 1970s. Although not without problems, the

Daily News map

new dwellings are helping improve the tattered reputation of federal Native housing projects in rural Alaska. These projects offer villagers the chance eventually to take title to the houses through monthly payments. The size of the payments is pegged to their income.

A decade ago, many of the Native houses built in Alaska proved better-suited for milder Lower 48 climes. Nearly a thousand dwellings — low-budget affairs put together with the aid of of villagers who often lacked construction skills — went up throughout western and interior Alaska. Housing materials were of poor quality. Foundations ill-designed. Hundreds of the homes now seemed destined for early obsolescence.

Today, the permafrost and intense cold of the far north still pose formidable construction challenges. But in a long and sometimes painful learning process, designers are figuring out ways to build better Bush housing.

The St. Michael house, a prototype developed by Phil Kaluza, a Nome builder, features a double outer wall stuffed fat with insulation. Triple-pane windows — made by a Fairbanks manufacturer — help keep warm air trapped inside. When the air gets stale, a heat exchanger sends the air outside and draws in fresh air. The furnace, controlled by a computer sensor, is nearly twice as energy-efficient as old-style systems installed in many of the neighboring houses.

Design Lab Inc., an Anchorage-based architectural firm, also has worked to improve the quality of Bush projects. During the past decade, it has designed about 1,300 houses for regional housing authorities funded by the federal Department of Housing and Urban Development. In the Interior, it has created Indian homes of log. In the Yukon-Kuskokwim Delta, houses feature 10-inch-thick walls and heavily insulated floors and ceilings. In Southwest, the firm has experimented with a double-walled structure.

Foundation systems also have changed. A decade ago, house sites often were flat spots bulldozed out of the tundra. With the protective insulation of the vegetative layer stripped away, these sites turned to bogs in warm weather. Houses built on these sites tended to lean on their pads as the wooden support system sank into the softened ground.

Since then, two different tacks have been taken to deal with the permafrost. Some designs call for metal pilings to be driven through the permafrost layer and into solid ground. Others designs leave the tundra intact, then insulate with special synthetic pads and gravel wherever possible. The wood foundations are built on top of this cover. Each year, as the ground settles, they are leveled with jacks.

Federal officials who fund the housing projects view the new designs with cautious optimism. Many of the cold problems that plagued the '70s-vintage houses have been vanquished. But in the process of curing old problems, new ones have arisen.

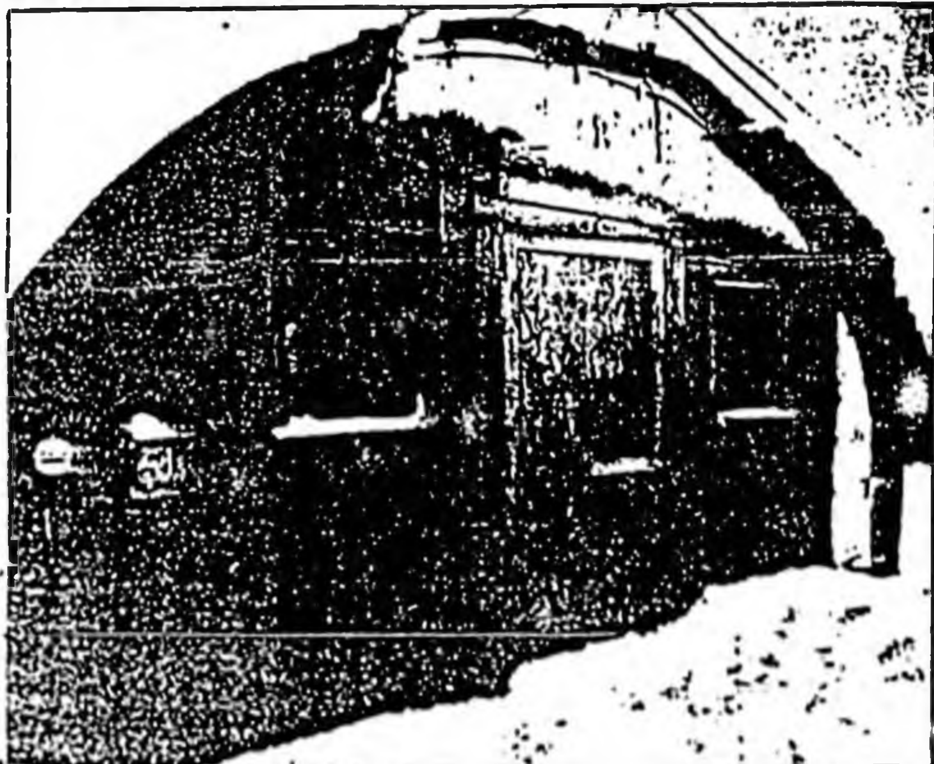
About 800 of the more than 3,000 late-model project houses have major design problems the federal government is spending 14.6 million to repair, said Miller Lutton, director of HUD's Alaska housing program. These houses are scattered about more than 40 Alaska villages.

"If you counted the number of innovative houses that have been tried in Alaska, you could count over 100," Lutton said. "Many appear to be successful. But you got to put them out there for a while."

Almost all of the new hous-

See Page E-3, LESSONS

LESSONS: Designers slowly figure out how to build houses in the Bush



An ... building in the ... area of Bethel

Continued from Page E-1

es are perched up off the ground on wooden stilts. To keep cold air from blowing up underneath the house, some weatherization teams and home buyers have put particle board skirting around the stilts. The skirting not only keeps out the cold air, it holds in the warm. In some soils, that may cause the permafrost to melt. Once that happens, some foundations have begun to sag and self-destruct, Amaya said.

Even when design problems are overcome, houses still may not meet early expectations. Most of the houses now are built by contractors, and housing authorities are finding they need tough quality control to make sure the jobs get done correctly.

In a recently completed housing project in Scammon Bay, for example, Felix Grant, a villager who worked on the project, says construction crews rushed through the job. They didn't nail down all the walls and left some wood supports out from under some floors.

When Grant moved into his new house, he found the vinyl floor unraveling and soaked with fuel oil. "There are lots of problems," Grant said. "The whole plywood floor should come out where it's soaked with fuel oil."

John Gwian, director of the Association of Village Council Presidents, the Bethel-based housing authority that developed the Scammon Bay project, ...

> "If you counted the number of innovative houses that have been tried in Alaska, you could count over 100."
> — Miller Lutton

problems with new houses. The contractor has been asked to go back and fix them, he says.

Gwian also has been working to get village home buyers to take care of more of their routine maintenance. In theory, when a toilet plugs up, a window breaks or the house needs a fresh coat of paint, the home buyer is to be responsible for repairs.

But home buyers often lack the inclination or the skills to do such work. And their villages often have no hardware stores to supply parts. Many look at the housing authorities as landlords, whose staff should fix whatever goes wrong.

Since the late '70s, Gwian says his Bethel housing authority has built more than new 400 houses in Kuskokwim-Yukon Delta villages. But the program still has fallen far short of meeting all the needs in his region for low-income housing. "There are 56 villages in the area, and there are a lot left that haven't had any housing."

More than 10,000 houses are needed in the Bush, Amaya said.

ALASKA 500: 10-year-old federally financed houses now falling apart

Continued from Page E-1

these houses, they were thinking of the Lower 48," says Kobuk's wife, Katherine. "They are not built for Alaska."

Andrew and Esther Otten, the Kobuks' neighbors, have caulked up most of the cracks in their inside walls. But on a blustery day, the wind still freezes the moisture in the living room paneling.

The Ottens hung up a tapestry in the house proclaiming "Home Sweet Home." But Andrew Otten said he sometimes has second thoughts about the federally financed housing.

"My old house used to be warmer. It had two rooms and it didn't use that much oil."

The Alaska "500 homes" now hold an infamous niche in the history of a gargantuan federal effort to bring modern housing to Alaska's villages. The federal Department of Housing and Urban Development — working largely through regional housing authorities — has spent more than $500 million to build more than 4,500 houses in rural Alaska.

The program has sought to improve the living conditions of Alaska Natives by moving them out of overcrowded shacks and cabins and into more spacious, better-built housing. Wherever possible, the houses were hooked up to new sewer and water systems developed by the Public Health Service. Villagers then became home buyers, obligated to make modest monthly payments that eventually allow them to take title to their houses.

Today, the program is nearly 20 years old and has replaced much of the ramshackle old housing in the Bush. By many yardsticks, it can be measured as a success.

In recent years, architects have adapted innovative insulation systems, foundation designs and construction techniques to create a new generation of public housing. Some of these homes suffer from design defects, but most are better able to withstand the rigors of Alaska's permafrost and sub-zero cold than the early housing of the 1970s.

As overcrowding has decreased, the incidence of tuberculosis, once a major killer, has declined. And life expectancies have increased. Better housing has helped slow the rural migration to cities. In many villages, populations have stabilized or begun to increase, said Miller Lutton, director of the federal housing program in Anchorage.

But the program has a mixed legacy. In learning how to build good housing, the government has financed a lot of bad. And many people are still living in the mistakes of the past, saddled with sagging foundations and fuel bills they can ill afford to pay.

Kobuk says he uses more than $250 a month worth of fuel — three-and-a-half 55-gallon drums of oil — during the worst of the winter cold. Federal assistance pays only part of the bill.

Rafael Afran, an aging carpenter living in another federally financed house in St. Marys, a Yukon River village, says his fuel bill leaves him with little money for groceries. "Sometimes, it's a question of paying for heat or paying for food."

All told, the problem houses include about a 1,000 houses built between the late '60s and the late '70s representing about a fifth of the total federal project units. These houses are riddled with design and construction flaws. Some have been abandoned or razed to make way for replacements; the rest still are inhabited.

Some of the worst housing is in St. Michael and seven other western Alaska villages. Here, more than 40 percent of the housing is of the Alaska 500 vintage. Many of the houses "are in danger of collapse or self-destruction," wrote Dan Harrelson, executive director of the Bering Straits Housing Authority, in a 1984 report to federal officials.

Harrelson listed faulty wiring, foundations sliding off their earthern pads, deficient insulation, mildew and rot among the houses' many problems.

Villagers, disappointed with the quality of the homes, joined with other Alaska 500 homeowners in a class action suit against HUD for failure to deliver on its promise of a "decent home in a suitable living environment."

In a recent out-of-court settlement, the agency offered to try to repair most of the design and construction defects of the Alaska 500 homes. As an alternative, a villager could simply take title to his home, as is.

Most villagers chose to take the house and forget about the costly fix-up job. "I decided it would take years to get any of the repairs done," Kobuk said.

The federal housing program in the Bush was launched in the mid-'60s as national efforts to attack poverty in America reached a fever pitch. East Coast journalists trekked to Appalachia, the Midwestern ghettos and the Southern farm belt to profile the plight of the poor. Then, in the summer of 1966, Homer Bigart, a New York Times reporter, reached Alaska, and proclaimed the Kuskokwim-Yukon Delta the poorest place in the nation.

"The worst slums in the United States are not in racially turbulent quarters of New York, Cleveland, Chicago or Los Angeles," Bigart wrote. "By all available indices of poverty, they are sparsely strewn, like garbage on an ice floe, along the nation's desolate sea frontier with the Soviet Union."

The Eskimos that Bigart encountered had largely abandoned traditional homes of sod, driftwood and whale bone in favor of small log cabins and shacks of plywood, tarpaper and tin. Subsistence foods, not measured in standard poverty indices, helped make up for a lack of cash to buy groceries. But diet alone could do little to combat the diseases that ran rampant in the cramped, overcrowded housing.

In Kuskokwim Delta villages, 12 out of every 100 babies died before age 1. Tuberculosis, introduced decades earlier by whites, was a major killer of Eskimo and Indian adults. The Natives had a life expectancy one-half that of the average American.

Two years after Bigart's report, a Senate subcommittee led by Sen. Ted Kennedy, D-Mass., arrived in Bethel to tour a dilapidated section of riverside property known as Lousetown. The area was such a mess that several senators didn't even want to get off the bus, recalls Gene Pamplona, a Bethel resident who accompanied the senators. Kennedy, followed closely by Sen. Walter Mondale, D-Minn., disembarked, gingerly walked up to a garbage dump and discovered a dead dog, frozen to the ground.

Finishing his tour, Kennedy vowed to build new housing in Bethel. Within months of his return to Washington, the money was in the pipeline.

The first federal funds flowed to the Alaska State Housing Authority, which quickly launched a series of village housing programs. In many cases, these houses "began to deteriorate within moments of the last nails being driven," wrote one ASHA official in a memorandum forwarded to Alaska Sen. Ted Stevens. "The common complaints ... consist of ceiling tiles coming apart; frost accumulating six feet high on the walls; cabinets coming off the walls; sagging, buckling ...

Instead of winning Bush support for its housing programs, ASHA was hit with class action lawsuits filed by Alaska Legal Services lawyers. ASHA ended up giving away 200 of the houses to homeowners. Another 300 homeowners, in a settlement funded by the federal government, obtained new houses.

These fiascos convinced ASHA that it wanted no part of any new Bush housing projects. "It has been said that even if ASHA could walk on water, it would nonetheless drown in the Bush areas. ..." the ASHA official wrote. "... The animosity of the purchasers towards ASHA ... as a result of these programs is immense. These people feel that they have been lied to and that representations have been made that were not kept."

Despite ASHA's withdrawal from the Bush, the federal pipeline of housing dollars kept flowing. In 1973, it reached north to St. Michael. Back then, many St. Michael villagers lived in cabins and shacks left over from the boom days of the Gold Rush. During the early 1900s, St. Michael was a town of more than 10,000 people, the major port of entry for goods bound to the gold fields of the upper Yukon.

After the Gold Rush, most of the whites left. By the time the federal housing project began, St. Michael's population had dwindled to less than 400, mostly Eskimos. For lodging, some lived into the old log dwellings left behind by the Army; others had pieced together plywood and tarpaper shacks.

The St. Michael project was an attempt at self-help housing; home buyers themselves would build the houses and would be paid for at least part of their labor. To ensure quality housing, the Bureau of Indian Affairs was appointed to develop designs and supervise construction. Regional housing authorities were created to administer the program.

The program, which encompassed 500 houses in 19 villages, may have looked good on paper, but it unfolded in a chaotic series of events. Most of the houses, pre-cut into piece-together packages by an Oregon manufacturer, were barged north in the summer of 1972. One of the barges sank in the Bering Sea. The rest of the homes arrived safely in the villages.

In the frenzied months of construction, there proved to be scant time for quality control. The villagers proved largely unskilled in home building. And in some regions, feuds between the BIA and regional housing authorities prevented inspectors from ever setting foot in the villages.

At many sites, the fragile layer of tundra that helps keep the permafrost cool was stripped away to prepare for the wood foundation pad. That meant the permafrost would melt, turning into a soggy bog when the temperature warmed. Insulation and plywood were soaked by the rain, then slapped into the homes. The wet insulation lacked heat-retention value, and the plywood gradually rotted.

Poor-quality materials and design problems compounded the errors of faulty construction. The windows, for example, even if installed properly, let in lots of cold air. The fiber board cabinets were made cheaply. Even when nailed firmly to the walls, they tended to self-destruct. Tops fell off drawers and doors off shelves.

Still, when the homes finally were finished, people were eager to move in, recalled Albert Washington, mayor of St. Michael. "First cold weather we got, everyone was excited. They thought they were going to be warm. Then they found out how cold the homes were. The kitchen stoves couldn't even begin to heat the homes."

One hundred miles to the south, along the bluffs overlooking the Andreafsky River, 20 St. Marys villagers were moving their families into new homes. Today, those homes are in much the same battered shape as those in St. Michael.

Therese Mike, mother to 11 children, lives in a house where the interior walls have separated from the roof. The gap between the two is wide enough to stick a fist through. Her kitchen pipes leak, so most of the time she keeps the water turned off. Her hot water heater broke down years ago, so none of the kids ever takes baths in the tub. The house's foundation needs to be shored up.

Mike is a big woman who wears a long dress and floral apron. She prefers to speak in her native Yupik, but will switch to English for a visitor.

She says her husband is in jail, so she is raising her family alone.

In December, she heard news of the new settlement reached by home buyers with the federal government. Since then, she's been mulling over her options. Should she get the house fixed by the government and continue her $70-a-month payments? Or should she opt for no renovation, but title free and clear to the house?

It would be nice to get the house fixed up, she says. But she isn't sure she can afford that option. At times, she hasn't been able to come up with the monthly payments and has been threatened with eviction.

Perhaps it's best to take title to the house, she says. Repairs can await another day.

To date, all but a handful of the Alaska 500 homeowners have chosen to settle the suit by foregoing repairs and taking title to the houses.

"That causes troubles," Andrew Paukan, mayor of St. Marys. He doesn't see much hope for the Alaska 500 to last long without a lot of work. "If they keep shifting, they won't withstand another 10 years. We'll have to tear them down and rebuild."

Andrew and Esther Otten in their home in St. Michael

Daily News photos by Bob Hallinen

The cabinets in Therese Mike's home in St. Marys are coming apart.

An above-ground utility system connects newer houses in Bethel.

HOUSE AMENDMENT 1

TO: HJR 80 BY: Leman, MacLean

(1) Page 1 Line 7,8

Delete "ensure construction of energy efficient"

Replace with "improve design, construction and maintenance of"

(2) p1, line 17

Replace "healthy" with "comfortable"

(3) p. 2, lines 6,7

Delete "construction of ... structurally strong"

Replace with "design and construction of the residence and instruction in maintenance techniques to improve its energy efficiency and structural integrity"

(4) p. 1, line 16

Replace "28" with "36"

Submit original amendment to the Chief Clerk.
It will then be numbered and duplicated.

SB

11

HOUSE COMMITTEE REPORT

(5)
Date Referred: April 9, 1990

Date of Committee Action: 4/27/90

FURTHER REFERRALS:

FINANCE

The COMMUNITY & REGIONAL AFFAIRS Committee considered: CSSB 11(FIN)

CS SB NO. 11 (Fin) BOUNDARY COMMISSION COMPENSATION

"An Act authorizing compensation for members of the state Local Boundary Commission; and providing for an effective date."

RECOMMENDATIONS:

[ ] be replaced with ____________ [ ] the same title / [ ] a new title

[ ] have attached amendme)

[X] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] additional referral to the ____________ Committee

ADOPTS: ____________ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

fiscal impact ______

[ ] zero fiscal note ______

[ ] zero with analysis ______

APPROVES PREVIOUS: (Date/Dept)

[X] fiscal note(s) C&RA

[ ] zero fiscal note(s) ______

[ ] zero fn/analysis ______

SIGNING DO PASS:

Richard Foster

C. Kent Davis C. DAVIS

Eugene Kubina Kubina

SIGNING: (Check approp. column)

	Do Not Pass	No Rec	Amend
Eileen P. MacLean MACLEAN			

Eileen P. MacLean

Chairman's Signature

FISCAL NOTE

REQUEST:

Revision Date:
Title: "An Act..compensation for members of the State Boundary Commission..."
Sponsor: Senator Sturgulewski
Requestor:

Agency Affected: Community & Regional Affairs
BRU:
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	18.75	18.75	18.75	18.75	18.75	18.75
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	18.75	18.75	18.75	18.75	18.75	18.75
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
GENERAL FUND	18.75	18.75	18.75	18.75	18.75	18.75
FEDERAL FUNDS						
OTHER						
TOTAL	18.75	18.75	18.75	18.75	18.75	18.75

POSITIONS:

	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary) No fiscal impact in FY 90.
This fiscal note assumes 25 days of meeting per year with compensation at $150 per day.

Prepared by: Jim Plasman, Deputy Director
Division: Municipal & Regional Assistance
Phone: 465-4750
Date: March 7, 1990

Approved by Commissioner: [signature]
Date: 3-7-90
Agency: Department of Community & Regional Affairs

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

Changes in CSSB 11 (Fin) have no fiscal impact. This fiscal note is appropriate. 3/29/90

page ___ of ___

April 26, 1990

Testimony of Charles Bettisworth, Chairman
Local Boundary Commission

To: House Standing Committee on Community and
Regional Affairs
Chairman Eileen MacLean

I'd like to first thank you for the opportunity to provide my comments regarding Senate Bill 11 "An Act Authorizing Compensation for Members of the Local Boundary Commission".

The Commission supports this legislation for the following reasons:

The duties and responsibilities of the Commission have increased since the creation of the Local Boundary Commission 33 years ago. At that time, there were only 30 Municipal governments in the State and today there are 163 Boroughs and Cities.

The Commission, at the time of its creation, met a few times a year. Presently, we meet 15-20 times a year - often in remote communities under hazardous weather conditions.

The additional number of meetings do not account for the additional demands placed upon the Commission. Procedures which were simple years ago have become increasingly complex. With revisions adopted last year, Local Boundary Commission regulations make up more than 50 pages of the State code. Actions which used to be processed in 60 days, now may take as long as 9 months.

All of this means that substantially more time is required for Local Boundary Commission members to appropriately act on issues before it.

As an example of the increased workload which the Commission is currently enduring, we have recently completed evaluations of the various petitions for incorporation of the region north of Matanuska-Susitna and south of Fairbanks North Star Borough (Matanuska-Susitna Borough Annexation petition, Denali Borough Incorporation Petition, and the Valley's Borough Incorporation Petition). The Commission reviewed over 700 pages of documents. These documents included the original petitions, the Departmental reports and draft reports and hearing supplements. Additionally, the Commission held 6 sets of hearings in 6 communities over the period of four days. Finally, on a separate weekend, conducted a decisional meeting in Healy. We are looking at similar levels of activity for petitions submitted by the Fairbanks North Star Borough and the City and Borough of Juneau, all of which require action this year.

Post-it™ brand fax transmittal memo 7671 | # of pages ▸ 2

To Rena	From CB Bettisworth
Co.	Co. LBC
Dept.	Phone # 279 5574
Fax # 465-2718	Fax # 278 7102

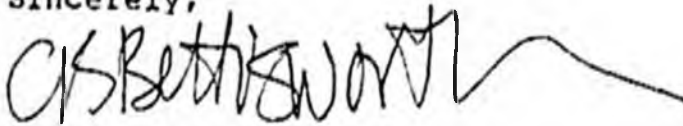
The Local Boundary Commission is a quasi-judicial commission. The issues before it are often controversial, over the years the decisions of the Commission have been challenged in court. As an example, the Alaska Supreme Court has rendered 9 decisions regarding the actions of the Commission. It is incumbent upon the Commission to act with care and thoroughness.

The Local Boundary Commission, along with the University of Alaska Board of Regents, is the only constitutionally-mandated State commission. Our duties and responsibilities are commensurate with those of many of the other State boards and commission which are compensated. It seems only appropriate that the Local Boundary Commission be compensated.

Finally, the impact of this bill is minimal. The current fiscal note attached provides for $150/day per member for an estimated 25 meetings a year, equaling $18,750 annual appropriation.

We very stronly urge you to approve Senate Bill 11 and we thank you for your consideration.

Sincerely,



Charles Bettisworth
Chairman

CBB.emk

SB

85

Alaska State Legislature

House of Representatives
Community & Regional Affairs

AGENDA

Tuesday, March 21, 1989, 1:30 p.m.

SB 85 — "An Act relating to the issuance of private activity bonds; and providing for an effective date." - GOVERNOR

SB 153 — "An Act making a supplemental appropriation to the Department of Revenue for reimbursement to municipalities under the fisheries tax refund program and the aviation fuel revenue sharing; and providing for an effective date." - ZHAROFF

Room 128, Capitol Building, P.O. Box V, Juneau, Alaska 99811 (907) 465-3882 or 465-18?

Alaska State Legislature

House of Representatives
Community & Regional Affairs

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SENATE BILL 85

****

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ITEM 2: 0 Fiscal Note - Department of Revenue

ITEM 3: Governor's Transmittal Letter

ITEM 4: Tax Cap Chart

ITEM 5: Statutes

ITEM 6: SB 85

No. 3

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: SB 85 (a)
PUBLISH DATE: 1/9/89

#1

FISCAL NOTE

REQUEST:

Revision Date:
Title: "An act..issuance of private activity bonds.."
Sponsor: Rules Committee
Requestor: Governor

Agency Affected: Community & Regional Affairs
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						
REVENUE						

FUNDING: (Thousands of Dollars)

	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Jim Plasman, Deputy Director
Phone: 465-4750
Division: Municipal & Regional Assistance
Date: 11-15-88

Approved by Commissioner:
Date: 15 NOV 88
Agency: Community & Regional Affairs

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

#2

STATE OF ALASKA
1988 LEGISLATIVE SESSION

Bill Version: SB 85 (b)
Publish Date: 1/9/89

FISCAL NOTE

REQUEST:

Revision Date:
Title: Issuance of Private Activity Bonds
Sponsor: Rules
Requestor: Governor

Agency Affected: Department of Revenue
B/U: Treasury
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LANDS & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
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)

	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
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 for analysis.

Prepared By: Milt Barker MB
Phone: 465-2350
Division: Treasury
Date: November 1, 1988

Approved by Commissioner: [signature]
Date: 11/7/88
Agency: Department of Revenue

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

STEVE COWPER
GOVERNOR

#3

85

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 9, 1989

The Honorable Tim Kelly
President of the Senate
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Senator Kelly:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to the issuance of private activity bonds.

The bill provides permanent authority for the state bond committee to allocate the private activity bond volume limit for Alaska. The bond committee was assigned this responsibility by ch. 81, SLA 1987. However, sec. 3 of ch. 81 repeals the committee's authority as of January 1, 1990. The attached bill would place, in statute, the temporary language that was enacted in sec. 1, ch. 81, SLA 1987.

The private activity bond limit for Alaska under current federal law is $150,000,000 each year. This limit on the amount of certain types of debt that can be issued as tax-exempt applies to Alaska Student Loan Corporation bonds, Alaska Housing Finance Corporation's first-time home buyer bonds, bonds for most Alaska Power Authority projects, and possibly certain bonds that would be issued by the Alaska Industrial Development and Export Authority or municipalities.

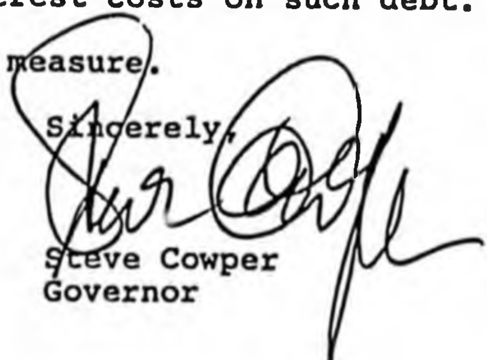
Legislation needs to be enacted in 1989 to avoid any hiatus in the authority of the State to allocate the volume limit. Failure to do so would cause the allocation to revert to

Letter from the Governor

federal law. Federal law mandates a fixed percentage allocation to municipalities. It is unlikely that municipalities would use all or even a significant portion of their limit. They have used none of the limit so far. Thus, an absence of legislation could cause significant amounts of state debt to be issued without tax exemption. This would increase needlessly the interest costs on such debt.

I urge your support of this measure.

Sincerely,



Steve Cowper
Governor

SB 85

ALASKA PRIVATE ACTIVITY BOND VOLUME CAP

ALLOCATIONS, USE AND CARRYFORWARDS FROM INCEPTION

CALENDAR YEAR	TOTAL CAP	ALLOCATION	USE	CARRYFORWARD [1]
1986	$250,000,000	$125,000,000 TO AHFC $125,000,000 TO ALL OTHER USERS	$14,780,000 BY AIDEA	$125,000,000 FOR AHFC [2] $110,220,000 FOR STUDENT LOAN BONDS
1987	$250,000,000	$0	$50,000,000 BY AHFC	$185,590,000 TO AHFC [2] $64,410,000 TO APA FOR POWER PROJECTS
1988	$150,000,000	$0	$0 $83,795,000 BY ASLC	$80,000,000 TO APA FOR SNETTISHAM $70,000,000 FOR STUDENT LOAN BONDS
1989 (to date)	$150,000,000	$0	$0	---
TOTAL	$800,000,000	$250,000,000	$148,575,000	$635,220,000

UNUSED CARRYFORWARDS

AHFC	$260,590,000	
APA	$144,410,000	(FOR SPECIFICALLY NAMED PROJECTS)
ASLC	$96,425,000	
TOTAL	$501,425,000	

SPECIAL NOTE

An IRS ruling concerning of the 1986 carryforward for student loan bonds is pending. An unfavorable ruling could cause the 1986 carryforward to become unuseable. In that case a 1988 bond issue of the Alaska Student Loan Corporation ("ASLC") would use $83,795,000 of the 1988 cap, leaving $66,205,000 to carry forward for APA to purchase Snettisham. A ruling which did that would reduce unused carryforwards to the following amounts:

AHFC	$260,590,000
APA	$130,615,000
ASLC	$0
TOTAL	$391,205,000

NOTES

1. Carryforwards expire after three calendar years.
2. Under current Federal law AHFC will not be able to issue tax-exempt bonds for first time home-buyers after December 31, 1989.
3. No entity other than those identified in the tables has ever applied for an allocation of the private activity bond cap.

From DOR 2-1-89

from DOR 2-1-89

Amendments

P.L. 100-647, § 5053(a):

Act Sec. 5053(a) amended Code Sec. 145 by redesignating subsection (d) as subsection (e).

For a special effective date, see Act Sec. 5053(c), below.

Act Sec. 5053(c) provides:

(c) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by this section shall apply to obligations issued after October 21, 1988.

(2) EXCEPTION FOR CONSTRUCTION OR BINDING AGREEMENT.—

(A) The amendments made by this section shall not apply to bonds (other than refunding bonds) with respect to a facility—

(i)(I) the original use of which begins with the taxpayer, and the construction, reconstruction, or rehabilitation of which began before July 14, 1988, and was completed on or after such date, or

(II) the original use of which begins with the taxpayer and with respect to which a binding contract to incur significant expenditures for construction, reconstruction, or rehabilitation was entered into before July 14, 1988, and some of such expenditures are incurred on or after such date, and

(ii) described in an inducement resolution or other comparable preliminary approval adopted by an issuing authority (or by a voter referendum) before July 14, 1988.

For purposes of the preceding sentence, the term "significant expenditures" means expenditures greater than 10 percent of the reasonably anticipated cost of the construction, reconstruction, or rehabilitation of the facility involved.

(B) Subparagraph (A) shall not apply to any bond issued after December 31, 1989, and shall not apply unless it is reasonably expected (at the time of issuance of the bond) that the facility will be placed in service before January 1, 1990.

(3) REFUNDINGS.—The amendments made by this section shall not apply to any bond issued to refund (or which is part of a series of bonds issued to refund) a bond issued before July 15, 1988, if—

(A) the average maturity date of the issue of which the refunding bond is a part is not later than the average maturity date of the bonds to be refunded by such issue,

(B) the amount of the refunding bond does not exceed the outstanding amount of the refunded bond, and

(C) the proceeds of the refunding bond are used to redeem the refunded bond not later than 90 days after the date of the issuance of the refunding bond.

For purposes of subparagraph (A), average maturity shall be determined in accordance with section 147(b) of the 1986 Code.

P.L. 99-514, § 1301(b):

Act Sec. 1301(b) amended Part IV of subchapter B of chapter 1 by adding Code Sec. 145 to read as above.

For text of Part IV of subchapter B of chapter 1 prior to amendment see the amendment notes for Code Sec. 141.

The above amendment applies generally to bonds issued after August 15, 1986. However, for transitional rules, see Act Secs. 1312-1318 following Code Sec. 103.

[Sec. 146]

SEC. 146. VOLUME CAP.

[Section 146(a)]

(a) GENERAL RULE.—A private activity bond issued as part of an issue meets the requirements of this section if the aggregate face amount of the private activity bonds issued pursuant to such issue, when added to the aggregate face amount of tax-exempt private activity bonds previously issued by the issuing authority during the calendar year, does not exceed such authority's volume cap for such calendar year.

[Sec. 146(b)]

(b) VOLUME CAP FOR STATE AGENCIES.—For purposes of this section—

(1) IN GENERAL.—The volume cap for any agency of the State authorized to issue tax-exempt private activity bonds for any calendar year shall be 50 percent of the State ceiling for such calendar year.

(2) SPECIAL RULE WHERE STATE HAS MORE THAN 1 AGENCY.—If more than 1 agency of the State is authorized to issue tax-exempt private activity bonds, all such agencies shall be treated as a single agency.

[Sec. 146(c)]

(c) VOLUME CAP FOR OTHER ISSUERS.—For purposes of this section—

(1) IN GENERAL.—The volume cap for any issuing authority (other than a State agency) for any calendar year shall be an amount which bears the same ratio to 50 percent of the State ceiling for such calendar year as—

(A) the population of the jurisdiction of such issuing authority, bears to

(B) the population of the entire State.

(2) OVERLAPPING JURISDICTIONS.—For purposes of paragraph (1)(A), if an area is within the jurisdiction of 2 or more governmental units, such area shall be treated as only within the jurisdiction of the unit having jurisdiction over the smallest geographical area unless such unit agrees to surrender all or part of such jurisdiction for such calendar year to the unit with overlapping jurisdiction which has the next smallest geographical area.

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[Sec. 146(d)]

(d) STATE CEILING.—For purposes of this section—

(1) IN GENERAL.—The State ceiling applicable to any State for any calendar year shall be the greater of—

(A) an amount equal to $75 multiplied by the State population, or

(B) $250,000,000.

Subparagraph (B) shall not apply to any possession of the United States.

(2) ADJUSTMENT AFTER 1987.—In the case of calendar years after 1987, paragraph (1) shall be applied by substituting—

(A) "$50" for "$75", and

(B) "$150,000,000" for "$250,000,000".

(3) SPECIAL RULE FOR STATES WITH CONSTITUTIONAL HOME RULE CITIES.—For purposes of this section—

(A) IN GENERAL.—The volume cap for any constitutional home rule city for any calendar year shall be determined under paragraph (1) of subsection (c) by substituting "100 percent" for "50 percent".

(B) COORDINATION WITH OTHER ALLOCATIONS.—In the case of any State which contains 1 or more constitutional home rule cities, for purposes of applying subsection (b) and (c) with respect to issuing authorities in such State other than constitutional home rule cities, the State ceiling for any calendar year shall be reduced by the aggregate volume caps determined for such year for all constitutional home rule cities in such State.

(C) CONSTITUTIONAL HOME RULE CITY.—For purposes of this section, the term "constitutional home rule city" means, with respect to any calendar year, any political subdivision of a State which, under a State constitution which was adopted in 1970 and effective on July 1, 1971, had home rule powers on the 1st day of the calendar year.

(4) SPECIAL RULE FOR POSSESSIONS WITH POPULATIONS OF LESS THAN THE POPULATION OF THE LEAST POPULOUS STATE.—

(A) IN GENERAL.—If the population of any possession of the United States for any calendar year is less than the population of the least populous State (other than a possession) for such calendar year, the limitation under paragraph (1)(A) shall not be less than the amount determined under subparagraph (B) for such calendar year.

(B) LIMITATION.—The limitation determined under this subparagraph, with respect to a possession, for any calendar year is an amount equal to the product of—

(i) the fraction—

(I) the numerator of which is the amount applicable under paragraph (1)(B) for such calendar year, and

(II) the denominator of which is the State population of the least populous State (other than a possession) for such calendar year, and

(ii) the population of such possession for such calendar year.

Amendments

P.L. 100-647, § 1013(a)(40):

Act Sec. 1013(a)(40) amended Code Sec. 146(d)(4)(B) by striking out "with respect a possession" and inserting in lieu thereof "with respect to a possession".

The above amendment is effective as if included in the provision of the Tax Reform Act of 1986 (P.L. 99-514) to which it relates.

[Sec. 146(e)]

(e) STATE MAY PROVIDE FOR DIFFERENT ALLOCATION.—For purposes of this section—

(1) IN GENERAL.—Except as provided in paragraph (3), a State may, by law provide a different formula for allocating the State ceiling among the governmental units (or other authorities) in such State having authority to issue tax-exempt private activity bonds.

(2) INTERIM AUTHORITY FOR GOVERNOR.—

(A) IN GENERAL.—Except as otherwise provided in paragraph (3), the Governor of any State may proclaim a different formula for allocating the State ceiling among the governmental units (or other authorities) in such State having authority to issue private activity bonds.

(B) TERMINATION OF AUTHORITY.—The authority provided in subparagraph (A) shall not apply to bonds issued after the earlier of—

(i) the last day of the 1st calendar year after 1986 during which the legislature of the State met in regular session, or

(ii) the effective date of any State legislation with respect to the allocation of the State ceiling.

(3) STATE MAY NOT ALTER ALLOCATION TO CONSTITUTIONAL HOME RULE CITIES.—Except as otherwise provided in a State constitutional amendment (or law changing the home rule provision adopted in the manner provided by the State constitution), the authority provided in this subsection shall not apply to that portion of the State ceiling which is allocated to any constitutional home rule city in the State unless such city agrees to such different allocation.

[Sec. 146(f)]

(f) ELECTIVE CARRYFORWARD OF UNUSED LIMITATION FOR SPECIFIED PURPOSE.—

(1) IN GENERAL.—If—

(A) an issuing authority's volume cap for any calendar year after 1985, exceeds

(B) the aggregate amount of tax-exempt private activity bonds issued during such calendar year by such authority,

such authority may elect to treat all (or any portion) of such excess as a carryforward for 1 or more carryforward purposes.

(2) ELECTION MUST IDENTIFY PURPOSE.—In any election under paragraph (1), the issuing authority shall—

(A) identify the purpose for which the carryforward is elected, and

(B) specify the portion of the excess described in paragraph (1) which is to be a carryforward for each such purpose.

(3) USE OF CARRYFORWARD.—

(A) IN GENERAL.—If any issuing authority elects a carryforward under paragraph (1) with respect to any carryforward purpose, any private activity bonds issued by such authority with respect to such purpose during the 3 calendar years following the calendar year in which the carryforward arose shall not be taken into account under subsection (a) to the extent the amount of such bonds does not exceed the amount of the carryforward elected for such purpose.

(B) ORDER IN WHICH CARRYFORWARD USED.—Carryforwards elected with respect to any purpose shall be used in the order of the calendar years in which they arose.

(4) ELECTION.—Any election under this paragraph (and any identification or specification contained therein), once made, shall be irrevocable.

(5) CARRYFORWARD PURPOSE.—The term "carryforward purpose" means—

(A) the purpose of issuing exempt facility bonds described in 1 of the paragraphs of section 142(a),

(B) the purpose of issuing qualified mortgage bonds or mortgage credit certificates,

(C) the purpose of issuing qualified student loan bonds, and

(D) the purpose of issuing qualified redevelopment bonds.

Amendments

P.L. 100-647, § 1013(a)(9):

Act Sec. 1013(a)(9) amended Code Sec. 146(f)(5)(A) to read as above. Prior to amendment, Code Sec. 146(f)(5)(A) read as follows:

(A) the purpose of the issuing exempt facility bonds described in 1 of the paragraphs of section 142(a),

The above amendment is effective as if included in the provision of the Tax Reform Act of 1986 (P.L. 99-514) to which it relates.

P.L. 100-203, § 10631(b):

Act Sec. 10631(b) amended Code Sec. 146(f)(5)(A) to read as above. Prior to amendment, Code Sec. 146(f)(5)(A) read as follows:

(A) the purpose of issuing bonds referred to in one of the clauses of section 141(d)(1)(A),

For the effective date of the above amendment, see Act Sec. 10631(c), below.

P.L. 100-203, § 10631(c):

Act Sec. 10631(c) provides:

(c) EFFECTIVE DATE.—

(1) IN GENERAL.—Except as otherwise provided in this subsection, the amendments made by this section shall apply to bonds issued after October 13, 1987 (other than bonds issued to refund bonds issued on or before such date).

(2) BINDING AGREEMENTS.—The amendments made by this section shall not apply to bonds (other than advance refunding bonds) with respect to a facility acquired after

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HOUSE COMMITTEE REPORT

(7)

Date Referred: March 8, 1989 FURTHER REFERRALS: STATE AFFAIRS
FINANCE

Date of Committee Action: ________

The COMMUNITY & REGIONAL AFFAIRS Committee considered: SB 85

SENATE BILL NO. 85 [PRIVATE ACTIVITY BONDS]
"An Act relating to the issuance of private activity bonds; and providing for an effective date."

RECOMMENDATIONS:

[ ] be replaced with ______________ [ ] 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): (Dept)

[ ] fiscal impact ________

[ ] zero fiscal note ________

[ ] zero with analysis ________

APPROVES PREVIOUS: (Date/Dept)

[ ] fiscal note(s) ________

[ ] zero fiscal note(s) ________

[ ] zero fn/analysis ________

SIGNING DO PASS:

Cheri Davis

Eileen P MacLean

SIGNING:
(Check approp. column)

	Do Not Pass	No Rec	Amend
[signature]		X	
[signature]		X	

Eileen P. MacLean

Chairman's signature

SB

95

SENATE BILL 95

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ITEM 5: Statutes

ITEM 6: Lake and Peninsula School District vs LBC, Aleutians East

ITEM 7: Lake and Peninsula School District vs LBC

STEVE COWPER
GOVERNOR

#1

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 9, 1989

The Honorable Tim Kelly
President of the Senate
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Senator Kelly:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to the combining of a sales and use tax proposition with the incorporation of a borough.

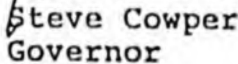
Current law does not provide express authority for a petition and an election ballot for incorporation of a borough to include, at the same time, a sales and use tax proposition. AS 29 provides only for the combining of a sales and use tax proposition with incorporation of a second class city. *See* AS 29.45.710. The purpose of this bill is to ensure the financial viability of a new borough at the time of incorporation, and to simplify incorporation procedures similar to those governing the incorporation of second class cities. The Local Boundary Commission anticipates that several new boroughs might seek incorporation over the next few years. Many of the proposed boroughs might not be levying property taxes due to the fact that a substantial portion of the property to be included in boroughs is exempt from property taxes (e.g., undeveloped ANCSA land and federal and state land). Therefore, sales and use taxes might constitute the sole tax base for a number of the boroughs to be incorporated.

Section 1 of the bill adds a new section, AS 29.45.680, to authorize a petition for incorporation of a borough (of any class) to request that a sales and use tax proposition be placed on the same ballot with the incorporation question. The petition must state the proposed tax rate. The petition may request that incorporation of the borough be dependent on the passage of the tax proposition. This section does not require a tax proposition to be on the same ballot as the incorporation question. Proposed AS 29.45.680 is identical in procedure and effect to AS 29.45.710 (combining sales and use tax propositions with incorporation of second class cities).

Section 2 of the bill proposes a retroactive date of January 1, 1987 for AS 29.45.680. This is necessitated by the fact that the recently incorporated Aleutians East Borough, a second class borough, included a sales and use tax proposition with the incorporation question in its incorporation petition and on the election ballot in 1987. While the incorporation of the borough was not dependent on the passage of the sales tax proposition (which passed), the borough's sales tax is under legal challenge, and the issue is part of the appeal in Lake and Peninsula School District, et al. v. Alaska Local Boundary Commission, Case Nos. 3AN 87-8005 and 3AN 87-9217 (Consolidated). A retroactive date of January 1, 1987 will render the question moot as to the Aleutians East Borough, and for other proposed boroughs, presently in the incorporation process, that desire to include a sales and use tax proposition at the time of the incorporation election.

I strongly urge your support of this bill.

Sincerely,



Steve Cowper
Governor

No.

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION : Sb 95 #2
PUBLISH DATE : 1/9/89

FISCAL NOTE

REQUEST:

Revision Date:
Title: "An Act authorizing the combining of a sales and use tax with incorp. of Borough
Sponsor : Rules Committee
Requestor : Governor

Agency Affected : Community & Regional Affairs
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						
REVENUE						

FUNDING: (Thousands of Dollars)

	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by : [signature]
Phone : 465-4750
Division : Municipal & Regional Assistance
Date : [illegible]
Approved by Commissioner : Dep Comm [signature]
Date : 20 Dec 88
Agency : Community & Regional Affairs

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

page 1 of 1

#3

No.

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: SB 95
PUBLISH DATE: 1/2/89

FISCAL NOTE

REQUEST:

Revision Date:
Title: Authorizing combining of sales and use tax proposition
Sponsor: Rules Committee
Requestor: Request of the Governor

Agency Affected: Office of the Governor
BRU: Division of Elections
Components: I - Elections

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						
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Linda Edgeworth
Division: Division of Elections
Phone: 465-4611
Date: 12/20/88

Approved by Commissioner: [signature]
Agency: Divison of Electons/Office of the Lt. Governor
Date: 12/20/88

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

page 1 of 1

#4

sive evaluation of formulas for State aid to municipalities and related matters is warranted.

- It is likely that there are unincorporated regions of the state which are presently able to support borough government. A restructuring of funding programs could likely extend financial viability for borough formation to all regions of the state.

- The concept of home rule boroughs seems to offer the greatest opportunity for residents of a region to tailor the form of government to best meet their needs. Under home rule, residents of each new borough would adopt a charter (constitution) establishing the powers and duties of the borough. State law requires only that a home rule borough provide areawide education and planning (as well as tax assessment and collection, if necessary).

- Few regions of the state are likely to seek formation of boroughs through the local initiative process.

- There is a need to re-examine existing borough boundaries.

Therefore, the LBC recommends that the legislature carefully consider the circumstances discussed in this statement and examine alternative means to deal with the issues raised. Although there may be several others, the following alternatives would seem appropriate for consideration: 1) identifying and eliminating disincentives for the formation of boroughs, 2) revising State laws and programs to provide greater equity in the distribution of financial aid to municipalities, 3) providing for the incorporation of boroughs only in those areas which are presently financially viable and which otherwise meet the standards for borough formation and 4) providing for the formation of boroughs in all parts of the state, coupled with a mechanism to ensure that all boroughs created in this fashion are financially viable.

These recommendations of the LBC have not been made lightly. It is recognized that any proposal to change the status quo is certain to generate intense opposition. Further, it is recognized that the issues and problems identified in this statement will not be resolved overnight and will require the commitment of substantial resources. Nonetheless, this statement is issued as a good faith attempt to carry out the constitutional and statutory duties of the LBC and to seek improvements in the delivery of regional services throughout the state.

While this statement has focused largely on problems concerning the current structure, readers are encouraged to consider the positive aspects of the issue. The creation of boroughs throughout the state would provide residents with a meaningful responsibility and interest in the development of each region. Boroughs offer effective tools to deal with a number of the social problems affecting many parts of Alaska (e.g. alcohol control and mental health).

Further, by improving economies of scale, a borough may be able to offer vast improvements in the delivery of services within a region. Improvements to the structure of service delivery will become even more critical as State funds available for public services continue to shrink.

FOOTNOTES

1 As used in this statement, the term "borough" means organized boroughs and unified municipalities.

2 Victor Fischer, Alaska's Constitutional Convention (Fairbanks: University of Alaska Press, 1975) p. 119.

3 Ibid, p. 120.

4 Ronald C. Cease and Jerome R. Saroff, The Metropolitan Experiment in Alaska - A study of Borough Government (New York: Frederick A. Praeger, Publisher, 1968) p. 32.

5 Department of Education, Alaska Public School Foundation Funding Program (March 21, 1988), p. 1.

FROM: STATEMENT ON BOROUGH GOVERNMENT IN ALASKA - LOCAL BOUNDARY COMMISSION

Article 5. City Sales and Use Taxes.

Section
700. Power of levy

Section
710. Combining sales and use tax with incorporation of a second class city

Effective date of article. — Section 90, ch. 74, SLA 1985 provides: "This Act takes effect January 1, 1986."

Sec. 29.45.700. Power of levy. (a) A city in a borough that levies and collects areawide sales and use taxes may levy sales and use taxes on all sources taxed by the borough in the manner provided for boroughs, except that the assembly may by ordinance authorize a city to levy and collect sales and use taxes on other sources.

(b) A city in a borough that does not levy and collect sales and use taxes for areawide borough functions may levy and collect sales and use taxes in the manner provided for boroughs.

(c) A city outside a borough may levy and collect sales and use taxes in the manner provided for boroughs. (§ 12 ch 74 SLA 1985)

Sec. 29.45.710. Combining sales and use tax with incorporation of a second class city. A petition for incorporation of a second class city may request that a sales and use tax proposal be placed on the same ballot. The petition must state the proposed tax rate. The petition may request that incorporation be dependent on the passage of the tax proposition. If so, the incorporation proposition fails if the tax fails. (§ 12 ch 74 SLA 1985)

Chapter 46. Special Assessments.

Section
10. Assessment and proposal
20. Procedure
30. Creation of district
40. Record owner
50. Objections and revision
60. Assessment roll
70. Hearing and settlement

Section
80. Payment
90. Exemption
100. Reassessment
110. Allowable costs
120. Objection and appeal
130. Interim financing
140. Special assessment bonds

(d) If the assembly charges interest on sales taxes not paid when due, the rate of interest may not exceed 15 percent a year on the delinquent taxes and shall be charged from the due date until paid in full. This subsection applies to home rule and general law municipalities.

(e) A borough may provide for the creation, recording, and notice of a lien on real or personal property to secure the payment of a sales and use tax, and the interest, penalties, and administration costs in the event of delinquency. When recorded, a lien authorized under this section has priority over other liens except those for property taxes and special assessments. (§ 12 ch 74 SLA 1985)

Sec. 29.45.660. Notice of sales and use tax. (a) If the borough levies and collects only a sales tax and use tax, the assembly shall provide a notice substantially in the form set out in AS 29.45.020. In providing notice under this subsection, the assembly shall substitute for the millage equivalency its estimate of the equivalent sales tax rate for each of the categories of financial assistance set out in AS 29.45.020. Notice shall be provided

(1) by publishing in a newspaper of general circulation in the borough a copy of the notice once each week for a period of three successive weeks, with publication to occur not later than 45 days after the final adoption of the borough's budget; or

(2) if there is no newspaper of general circulation in the borough, by posting a copy of the notice for at least 20 days in at least two public places in the borough, with posting to occur not later than 45 days after the final adoption of the borough's budget.

(b) Compliance with the provisions of this section is a prerequisite to receipt of municipal tax resource equalization assistance under AS 29.60.010 — 29.60.080 and state aid for miscellaneous municipal services under AS 29.60.100 — 29.60.180. The department shall withhold annual allocations under those sections until municipal officials demonstrate that the requirements of this section have been met. (§ 12 ch 74 SLA 1985)

Sec. 29.45.670. Referendum, adoption, and modification. A new sales and use tax or an increase in the rate of levy of a sales tax approved by ordinance does not take effect until ratified by a majority of the voters at an election. (§ 12 ch 74 SLA 1985)

#6

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

THE LAKE AND PENINSULA SCHOOL DISTRICT; BAY VIEW, INCORPORATED; BRISTOL BAY NATIVE CORPORATION,

Appellants,

vs.

ALASKA LOCAL BOUNDARY COMMISSION, ALEUTIANS EAST BOROUGH, CITY OF KING COVE, CITY OF SAND POINT, CITY OF AKUTAN, CITY OF COLD BAY,

Appellees.

No. 3AN-87-8005 CIV

ALASKA PENINSULA CORPORATION,

Appellant,

vs.

ALASKA LOCAL BOUNDARY COMMISSION,

Appellee.

No. 3AN-87-9217 CIV
(Consolidated)

Appeal from the Decision of the Local Boundary Commission
Regarding the Petition for Incorporation of the
Aleutians East Borough

BRIEF OF APPELLEE ALASKA LOCAL BOUNDARY COMMISSION

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: MARJORIE L. ODLAND
ASSISTANT ATTORNEY GENERAL
Department of Law
P.O. Box K - State Capitol
Juneau, AK 99811
Telephone: 907-465-3600
Attorneys for Appellee LBC

Filed April 1, 1988 in the Superior Court of the State of Alaska

DAVID HAAS, Clerk

By: ______________________
Deputy Clerk

another borough in the Bristol Bay region, they will have an opportunity to seek a readjustment of the disputed eastern boundary. The same degree of objectivity and consideration will be given to their petition as was given to that submitted by AFB.

VI. ENACTMENT OF THE BOROUGH SALES TAX WAS PROPER

Appellant LPSD asserts that the LBC erred when it authorized an incorporation election that also contained a proposition by which the voters could authorize the levy of a sales and use tax. This assignment of error does not appear to bear any relation to the validity of the LBC's decision concerning the incorporation of the borough. At first, the LBC desired to present a ballot to the voters that combined the incorporation question and the referendum on the levy of a sales and use tax into a single ballot proposition. Under that approach, an affirmative vote on the incorporation question also constituted an affirmative vote on the levy of a sales or use tax.

The LBC, after receiving the advice of the attorney general, severed the incorporation question from the tax levy proposition. The voters were free to approve the incorporation proposition and to express a separate opinion on the tax levy proposition. The LBC desired to promote two important policies by providing for the tax levy referendum. The LBC wanted to simplify the procedures necessary for the new borough to adopt an ordinance for the generation of local revenues. It was also desirable to save the new borough the cost and the delay associated

with calling and holding a special election after incorporation on the tax levy proposition. The latter motivation was especially important because there was a generally acknowledged shortfall of state revenues that threatened the ability of the state to fully support local governments.

Under the procedure authorized by the LBC, the voters would express their will concerning the authority of the borough to levy a sales tax before the tax ordinance was adopted. In effect, the assembly was given prior authorization rather than post-adoption approval. The LBC believed that "it would exalt form over substance" to require post-adoption approval. This makes a lot of sense in the context of borough formation when none of the machinery of local government is in place. A similar procedure is authorized for the formation of second class cities. AS 29.45.710. Section 710 authorizes an incorporation election for a second class city that combines the incorporation question with a tax levy ratification. In that case, a "yes" vote on the question of incorporation is also an affirmative vote for the imposition of a sales or use tax.

The procedure adopted by the LBC is similar to the assumption of powers procedure authorized by law for a newly incorporated borough. AS 29.05.110(b) provides

> Areawide borough powers included in an incorporation petition are considered to be part of the incorporation question. In an election for the incorporation of a second class borough, each non-areawide power to be exercised is placed separately on the ballot.

Appellants must agree that the incorporation petition included notice that the new borough was intended to have the power to levy a sales and use tax at a specific rate. However, they argue that the ratification cannot be effective unless the ordinance levying the tax is adopted before the ratification vote.

A careful reading of AS 29.45.670 does not disclose a requirement that a new sales tax for a newly incorporated borough may only be ratified after the levy is authorized by ordinance. Section 670 provides, "A new sales and use tax or an increase in the rate of levy of a sales tax approved by ordinance does not take effect until ratified by a majority of the voters at an election." Section 670 can be interpreted to permit sufficient latitude for prior authorization of a new sales tax proposed for levy by a new general law borough. There is no dispute that a sales tax may only be levied by ordinance. AS 29.25.010(a)(3). However, the words "approved by ordinance" can be read to modify only the phrase "increase in the rate of levy of a sales tax...." This supports the interpretation accepted by the LBC that a new sales and use tax can take effect if it is authorized (ratified) and subsequently levied by an ordinance within the scope of the prior authorization.

Section 670 uses the word "ratify." The term "ratify" means to approve and sanction, to authorize, to confirm, to make valid, and may apply to past events as well as to present. Corbin Supply Co. v. Loftis, 178 S.E. 185 (Ga. 1934). To be effective, a ratification must be made with an intent to be bound by

the acts of, in this case, the borough assembly. Cf. Bruton v. Automatic Welding & Supply Corp., 513 P.2d 1122, 1126 (Alaska 1973). All of the material facts concerning the extent of the proposed sales or use tax were known by the voters. The type of tax, the activity upon which the tax is to be levied, and the rate of the tax were set out in the ballot proposal. There can be little doubt that the voters intended to authorize the levy of a sales or use tax.

Other statutes in pari materia with section 670 support a construction that permits prior authorization of tax levy ordinances. See AS 29.45.600; 29.45.710. Sections 600 and 710 permit merging sales and property tax propositions with incorporation propositions. These sections apply to the incorporation of a second class city. Here, the borough is classified as second class. A second class city and a second class borough are considered general law municipalities, that is, they may exercise only those powers conferred by law. Nothing in the standards for incorporation appear to require a stricter interpretation of the tax levy ratification procedures for a second class borough. Sections 600 and 710 provide evidence that the legislature considered a ratification of a tax to be the equivalent of a prior authorization. Further, appellants can point to no express limitation on the power of the LBC to direct that the incorporation question for a second class borough appear on the same ballot as a tax levy proposition.

Putting aside the question of whether prior authoriza-

tion is appropriate, the issue before the court is whether the borough was properly incorporated. As mentioned earlier, the incorporation question was separate from the tax proposition. Appellants make no argument that supports a finding that the composition of the ballot materially affected the outcome of the incorporation election. Nor could they. Clearly, a voter could have voted "yes" on incorporation while voting "no" on the sales tax. The voters' decisions on the questions presented were entirely voluntary. If the prior authorization procedure is defective, the remedy available to the borough is simple. It must hold a special election after the tax ordinance is adopted. The borough is not forever foreclosed from levying a sales tax. It would take more time and money to do this but certainly would not permanently affect the borough's ability to generate enough local revenue to finance the cost of local government.

VII. APPELLANTS WERE NOT DEPRIVED OF CONSTITUTIONAL RIGHT TO NOTICE AND HEARING

Bay View complains that it was denied its right to due process as to a meaningful opportunity to participate before the LBC made its decision to accept the petition. Bay View Br. at 44. Furthermore, Bay View claims that there was no notice calculated to inform it (or any other property owner adjacent to the boundaries) of the petitioner's intent to annex Bay View's land in the proposed borough and that this denial of due process resulted in an unconstitutional "taking" of its land.

A review of the record on appeal in this case discloses

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

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THE LAKE AND PENINSULA SCHOOL DISTRICT, ALASKA PENINSULA CORPORATION, BAY VIEW, INCORPORATED, BRISTOL BAY NATIVE CORPORATION,	)
Appellants,	)
vs.	)
ALASKA LOCAL BOUNDARY COMMISSION,	)
Appellee.	)

Nos. 3AN-87-8005 and 3AN-87-9217 Civil
(Consolidated)

APPEAL FROM A DECISION OF THE
ALASKA LOCAL BOUNDARY COMMISSION

BRIEF OF APPELLANT
THE LAKE AND PENINSULA SCHOOL DISTRICT

John S. Hedland, Esq.
HEDLAND, FLEISCHER, FRIEDMAN,
BRENNAN & COOKE
1227 West 9th Avenue, #300
Anchorage, Alaska 99501
(907) 279-5528

for incorporation unless a property tax is levied, and if a property tax is levied, there is no rational basis for including the disputed areas. Even allowing the greatest latitude possible for Commission discretion, there is no reasonable basis for its decision to include the disputed areas.

4. A borough sales tax may not be validly enacted at the incorporation election. As noted, the department originally recommended that incorporation of the borough, regardless of the outcome of the incorporation election, be conditioned upon simultaneous enactment of a ballot proposition imposing a sales tax. R. 285. This recommendation grew out of the recognition that the borough would not impose a property tax, and that

> [i]n order for the LBC to approve the incorporation proposal, it must determine that the borough is indeed financially viable. . . . Without assurance that the borough will possess the authority to levy the proposed sales tax, the department does not understand how the required determination could reasonably be made. R. 285.

L&P objected to this feature of the proposed action on two grounds, (1) that the Local Boundary Commission had no authority to accept the petition conditionally, and (2) that a tax enacted in that manner would not be valid in any event. R. 293-99. Ultimately, the Commission decided to place the sales tax proposition on the ballot, but did not condition an incorporation upon its approval. Its actions thus leave open the question of the

legitimacy of the ballot proposition relative to the tax, and the effect of its passage.[8]

Deletion of the linkage between enactment of the tax and incorporation of the borough does not solve the problem. In the first place, there is absolutely no authority whatsoever in the Constitution or laws of Alaska for the Local Boundary Commission to place a borough sales tax proposition on the ballot, at an incorporation election or otherwise. See, Alaska Constitution Article X, Section 12, which provides for the Local Boundary Commission and grants it the authority to "consider any proposed local government boundary change." Statutes defining the power of the Local Boundary Commission are contained in AS 29.05 and AS 29.06, and likewise confer no such authority. AS 29.45.650-.710 govern generally the enactment of municipal sales taxes. AS 29.45.710 permits a sales tax proposal to be placed on the ballot at an incorporation election relating to a second-class city only, and it does not apply to an election on incorporation of a borough.

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[8] AS 29.05.100 and 19 AAC 10.430(a) plainly do not envision or authorize conditional acceptance of an incorporation petition. Moreover, AS 29.45.710, whose application is expressly limited to second-class cities, specifically authorizes a simultaneous election on incorporation of a second-class city and enactment of a sales tax, with incorporation dependent upon enactment of the tax proposition. There is no comparable provision relating to boroughs or first-class cities. This provision obviously applies only to the incorporation of local government entities which do not have responsibility for education.

The decision cites no authority for the placement of the sales tax proposition on the ballot. Moreover, the specific manner in which a sales tax may be levied by a borough is set out in the statutes. AS 29.45.650 provides that a borough may levy a sales tax. Under AS 29.25.010(a)(3) a tax may be levied by a municipality only through the enactment of an ordinance. AS 29.25.020 sets out certain procedures that must be followed by a municipality in enacting an ordinance, which, beyond argument, are not complied with in this case. In any event, it is conceptually impossible for an ordinance (which must be voted upon by the assembly) to be enacted simultaneously with incorporation and prior to the election of an assembly.

Finally, AS 29.45.670 provides that a borough sales tax ordinance "does not take effect until ratified by a majority of the voters at an election." Consequently, even if the borough assembly enacted a sales tax ordinance after the election, it would not be valid since Section .670 plainly requires that the election be a ratification one <u>after</u> enactment of the ordinance, and not prior to it.

The Commission's response to these problems was two-fold. First, it referred to AS 29.05.110(c), which it read to authorize simultaneous submittal to the voters of the question of incorporation and the approval of the assumption of areawide powers. R. 514. This reference misses the mark completely. In the first place, the Commission is simply misreading the statute,

since it authorizes non-areawide, not areawide, powers to be placed on the ballot. It states as follows:

> Areawide borough powers included in an incorporation petition are considered to be part of the incorporation question. In an election for the incorporation of a second-class borough, each nonareawide power to be exercised is placed separately on the ballot. Adoption of a nonareawide power requires a majority of the votes cast on the question, and the vote is limited to the voters residing in the proposed borough outside all cities in the proposed borough.

The sales tax is, beyond argument, of areawide applicability and the Commission is simply wrong in its interpretation of this statute. As the statute plainly provides, areawide powers included in the petition (which include taxation) are "considered to be part of the incorporation question." In other words, approval of the incorporation by the electorate automatically carries with it approval of areawide powers proposed in the petition, including the power of taxation.

The whole issue is moot anyway, since taxation is a mandatory areawide power of a second-class borough. See, AS 29.35.170(a) which provides, under the rubrick "mandatory areawide powers", that "A borough shall assess and collect property, sales, and use taxes that are levied in its boundaries, subject to AS 29.45." Finally, the Commission has totally disregarded the distinction between the taxation power, which is mandatory and automatically exists by virtue of incorporation of the borough, and the exercise of that power through the enactment

of a sales tax. Even if AS 29.05.110(c) authorized placing the question of whether the borough should have the taxing power on the ballot, that is not what occurred in this case; rather, the Commission purported to permit the borough to enact a sales tax, without prior enactment of an ordinance, at the incorporation election through an unauthorized plebiscite.

Secondly, the Commission held that it would be more convenient to ignore the law than to follow it, and stated as follows:

> An interested party appearing before the Commission has objected to any simultaneous assumption of the sales and use tax power. [sic] The party argues that there must be a strict adherence to the provisions of AS 29.45.670 by first requiring the new assembly to adopt a tax ordinance and then referring it to the voters.
>
> The Commission finds that a strict adherence to AS 29.45.670 as suggested by the interested party would exalt form over substance. The cost to the Municipality of holding an additional election and the delay occasioned by waiting for the election to be held warrants a procedure which consolidates the electoral process.

R. 514. Since the Local Boundary Commission felt that adherence to the law would "exalt form over substance", it purported to usurp the power of the legislature and simply repeal the law. It obviously does not have the authority to do so. Moreover, in this respect, the Commission also failed to appreciate not only the argument made by the "interested party" but the fundamental distinction between assumption of the taxation power (which is

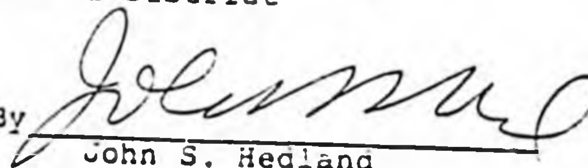
mandatory and automatic with approval of the incorporation) and the exercise of that power through the enactment of a sales tax. The sales tax is null and void since it was not enacted in accordance with law.

CONCLUSION

The action of the Local Boundary Commission with respect to the eastern boundary of the Aleutians East Borough should be reversed.

DATED at Anchorage, Alaska, this 15th day of January, 1988.

HEDLAND, FLEISCHER, FRIEDMAN,
BRENNAN & COOKE
Attorneys for Appellant
The Lake and Peninsula
School District



By John S. Hedland

SB

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HOFSTRA UNIVERSITY
HEMPSTEAD · NEW YORK 11550

SCHOOL OF LAW FACULTY

March 9, 1989

Ms. Kerry Hoffman
Anchorage Historic Properties, Inc.
524 West 4th Avenue
Anchorage, Alaska 99501

Re: Conservation/Preservation Easement Legislation

Dear Ms. Hoffman:

As we discussed on the telephone yesterday, I have been involved with legislation of the above nature for over 10 years and have written substantially in the field (see Chapter 34A, Volume III of Powell on Real Property). Frequently, concern is expressed with respect to the impact of such legislation on the real property tax base. Such fears have proven to be groundless. Perhaps the best proof is the experience of the 45 states that have some form of conservation easement legislation. In New York, the statute has been in effect for five years and no problem has arisen in this respect. Many states have had conservation easement statutes for between 10 and 20 years, and I know of none in which diminution of the tax base has proven to be a problem.

The reasons are varied why conservation easements do not present a substantial fiscal problem for local governments. They include:

a) As a general proposition, a limited number of property owners are willing to make the substantial economic sacrifice which results from restricting the use of their land or structures on the land. Visions of property owners lining up for the privilege of terminating or limiting their development rights are unrealistic.

b) To the extent that conservation easements limit the use or development of real property, they also limit the financial demands for services from local government. Property that is not developed sends no children to school, creates no sewage or garbage, and requires little police protection. Historic structures protected by preservation easements cannot be replaced with more intensive development that would make greater demands on the community.

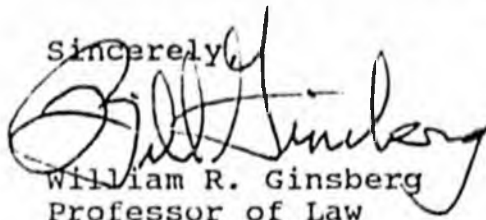
c) Overall, conservation and preservation easements tend to enhance the attractiveness of a community and the real property

within a community. They create offsetting values and economic benefits that compensate for the loss of any real property taxes from the specific parcels that are burdened by the restrictions.

The question of the impact of conservation easements came up in New York State prior to the passage of our conservation easement statute (Article 49 of the New York Environmental Conservation Law). I enclose a copy of a letter that I wrote in 1982 when the legislature was considering enactment. While the letter is addressed mainly toward open space uses, it also applies to easements which protect historic sturctures.

Please let me know if I can be of any further assistance.

Sincerely,



William R. Ginsberg
Professor of Law

WRG:mkh
Enc.

HOFSTRA UNIVERSITY
HEMPSTEAD · NEW YORK 11550

SCHOOL OF LAW FACULTY

March 18, 1982

Senator John Dunne
Room 711
Legislative Office Building
Albany, New York 12247

Attention: Thomas Faist, Esq.

Re: Conservation Easement Legislation S. 6753-A

Dear Mr. Faist:

I appreciate your taking the time to discuss this matter with me on the telephone the other day. As I indicated to you, I believe that the legislation will be useful in providing an additional tool to the private sector for the preservation of open space. Such private sector activity complements state and local expenditures for such purposes and will be of substantial economic benefit. The advantages of the legislation are, I believe, easy to appreciate and I will not dwell on them further. Instead, I will address myself to the major issue raised in opposition, namely the fear of erosion of the local tax base.

During my professional career in the practice of law, in government, and as a law professor, a major aspect of my work has been in the field of land use, real property, and real property taxation. I am, therefore, fully aware of the ramifications of the proposed legislation. Realistically, it is extremely unlikely that it will result in a rush of private property owners to give up their development rights. Federal tax benefits will result only if such rights are given up in perpetuity. Few property owners will be willing to make the substantial long-term economic sacrifice which would result from restricting the use of their land. In addition, in most of the taxing jurisdictions in the State, the major portion of the tax base is improvements rather than land. Use of the mechanism provided for in the statute may result in a minor diminution of a small portion of a community's tax base.

This minor loss should, in the normal course of events, be offset by increased values resulting from open space preservation. Also, reduction in revenue would be offset in the long run by decreased pressure on community expenditures. Open space sends few children to school, and reduces the cost of police and fire protection.

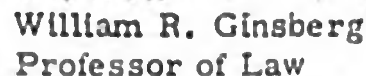
A community amenity, such as open space, has ripple effects in terms of its benefits. It can maintain and enhance the value of properties a considerable distance away. Thus, over a period of time, property values in any area will reflect the desirability of the area which will be based upon many factors, one of which is open space preservation.

It would, of course, be nonsensical to tax the non-profit organizations which are receiving the restrictive covenants. They are not receiving anything of economic value to them. On the contrary, they may be incurring some expense in order to administer and monitor the covenants. They will be performing a public service, benefiting the state and the community, and it would strike at the heart of the legislative purpose to penalize them for doing so.

While it is not determinative, it is also comforting to know that other states have adopted similar legislation. These include Colorado, Connecticut, Delaware, Florida, Georgia, Maryland, Massachusetts, New Hampshire, North Carolina, Oregon, Rhode Island and Utah. A useful list with citations is at pages 567-577 of the Fall, 1979 issue of the Real Property, Probate and Trust Journal, at the end of an excellent article on the subject.

Please feel free to call if you have any questions or if I may be of further assistance.

Sincerely,



William R. Ginsberg
Professor of Law

WRG/gms

UNIFORM LAWS ANNOTATED

Volume 12

Civil Procedural and Remedial Laws

1988
Cumulative Annual Pocket Part

Replacing 1987 pocket part in back of volume

DIRECTORY OF UNIFORM ACTS AND CODES with TABLES AND INDEX See special pamphlet which accompanies these Pocket Parts

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UNIFORM CONSERVATION EASEMENT ACT

Table of Jurisdictions Wherein Act Has Been Adopted

Jurisdiction	Laws	Effective Date	Statutory Citation
Arizona	1985, c. 171	4-18-1985 *	A.R.S. §§ 33-271 to 33-[illegible]76.
District of Columbia	D.C.Law 6-113	5-16-1986	D.C.Code 1981, §§ 45-2601 to 45-2605.
Indiana	1984, H.1074	9-1-1984	West's A.I.C. 32-5-2.6-1 to 32-5-2.6-7.
[illegible]	1985, c. 395	6-21-1985 *	33 MRSA §§ 476 to 479-B.
Minnesota	1985, c. 232	5-24-1985 *	M.S.A. §§ 84C.01 to 84C.05.
Mississippi	1986, c. 404	3-27-1986	Code 1972, §§ 89-19-1 to 89-19-13.
Nevada	1983, c. 291	5-13-1983*	N.R.S.111.390 to 111.400.
Texas	1983, c. 434	9-1-1983	V.T.C.A., Natural Resources Code §§ 183.001 to 183.005.
Wisconsin	1981, c. 261	4-27-1982	W.S.A. 700.40.

* Date of approval.

Historical Note

The Uniform Conservation Easement Act was approved by the National Conference of Commissioners on Uniform State Laws in 1981. The complete text of the act, the prefatory note and comments are set forth in this supplement.

PREFATORY NOTE

The Act enables durable restrictions and affirmative obligations to be attached to real property to protect natural and historic resources. Under the conditions spelled out in the Act, the restrictions and obligations are immune from certain common law impediments which might otherwise be raised. The Act maximizes the freedom of the creators of the transaction to impose restrictions on the use of land and improvements in order to protect them, and it allows a similar latitude to impose affirmative duties for the same purposes. In each instance, if the requirements of the Act are satisfied, the restrictions or affirmative duties are binding upon the successors and assigns of the original parties.

The Act thus makes it possible for Owner to transfer a restriction upon the use of Blackacre to Conservation, Inc., which will be enforceable by Conservation and its successors whether or not Conservation has an interest in land benefitted by the restriction, which is assignable although unattached to any such interest in fact, and which has not arisen under circumstances where the traditional conditions of privity of estate and "touch and concern" applicable to covenants real are present. So, also, the Act enables the Owner of Heritage Home to obligate himself and future owners of Heritage to maintain certain aspects of the house and to have that obligation enforceable by Preservation, Inc., even though Preservation has no interest in property benefitted by the obligation. Further, Preservation may obligate itself to take certain affirmative actions to preserve the property. In each case, under the Act, the restrictions and obligations bind successors. The Act does not itself impose restrictions or affirmative duties. It merely allows the parties to do so within a consensual arrangement freed from common law impediments, if the conditions of the Act are complied with.

These conditions are designed to assure that protected transactions serve defined protective purposes (Section 1(1)) and that the protected interest is in a "holder" which is either a governmental body or a charitable organization having an interest in the subject matter (Section 1(2)). The interest may be created in the same manner as other easements in land (Section 2(a)). The Act also enables the parties to establish a right in a third party to enforce the terms of the transaction (Section 3(a)(3)) if the possessor of the right is also a governmental unit or charity (Section 1(3)).

The interests protected by the Act are termed "easements." The terminology reflects a rejection of two alternatives suggested in existing state acts dealing with non-possessory conservation and preservation interests. The first removes the common law disabilities associated with covenants real and equitable servitudes in addition to those associated with easements. As statutorily modified, these three common law interests retain their separate existence as instruments employable for conservation and preservation ends. The second approach seeks to create a novel additional interest which, although unknown to the common law, is, in some ill-defined sense, a statutorily modified amalgam of the three traditional common law interests.

The easement alternative is favored in the Act for three reasons. First, lawyers and courts are most comfortable with easements and easement doctrine, less so with restrictive covenants and equitable servitudes, and can be expected to experience severe confusion if the Act opts for a hybrid fourth interest. Second, the easement is the basic less-than-fee interest at common law; the restrictive covenant and the equitable servitude appeared only because of then-current, but now outdated, limitations of easement doctrine. Finally, non-possessory interests satisfying the requirements of covenant real or equitable servitude doctrine will invariably meet the Act's less demanding requirements as "easements." Hence, the Act's easement orientation should not prove prejudicial to instruments drafted as real covenants or equitable servitudes, although the converse would not be true.

In assimilating these easements to conventional easements, the Act allows great latitude to the parties to the former to arrange their relationship as they see fit. The Act differs in this respect from some existing statutes, such as that in effect in Massachusetts, under which interests of this nature are subject to public planning agency review.

There are both practical and philosophical reasons for not subjecting conservation easements to a public ordering system. The Act has the relatively narrow purpose of sweeping away certain common law impediments which might otherwise undermine the easements' validity, particularly those held in gross. It is is the intention to facilitate private grants that serve the ends of land conservation and historic preservation, moreover, the requirement of public agency approval adds a layer of complexity which may discourage private actions. Organizations and property owners may be reluctant to become involved in the bureaucratic, and sometimes political, process which public agency participation entails. Placing such a requirement in the Act may dissuade a state from enacting it for the reason that the state does not wish to accept the administrative and fiscal responsibilities of such a program.

In addition, controls in the Act and in other state and federal legislation afford further assurance that the Act will serve the public interest. To begin with, the very adoption of the Act by a state legislature facilitates the enforcement of conservation easement serving the public interest. Other types of easements, real covenants and equitable servitudes are enforceable, even though their myriads of purposes have seldom been expressly scrutinized by state legislative bodies. Moreover, Section 1(2) of the Act restricts the entities that may hold conservation and preservation easements to governmental agencies and charitable organizations, neither of which is likely to accept them on an indiscriminate basis. Governmental programs that extend benefits to private donors of these easements provide additional controls against potential abuses. Federal tax statutes and regulations, for example, rigorously define the circumstances under which easement donations qualify for favorable tax treatment. Controls relating to real estate assessment and taxation of restricted properties have been, or can be, imposed by state legislatures to prevent easement abuses or to limit potential loss of local property tax revenues resulting from unduly favorable assessment and taxation of these properties. Finally, the American legal system generally regards private ordering of property relationships as sound public policy. Absent conflict with constitutional or statutory requirements, conveyances of fee or non-possessory interests by and among private entities is the norm, rather than the exception, in the United States. By eliminating certain outmoded easement impediments which are largely attributable to the absence of a land title recordation system in England centuries earlier, the Act advances the values implicit in this norm.

The Act does not address a number of issues which, though of conceded importance, are considered extraneous [illegible]'s primary objective of enabling private parties to enter into consensual arrangements with char[illegible]e organizations or governmental bodies to protect land and buildings without the encumbrance of certain potential common law impediments (Section 4). For example, with the exception of the requirement of Section 2(b) that the acceptance of the holder be recorded, the formalities and effects of recordation are left to the state's registry system; an adopting state may wish to establish special indices for these interests, as has been done in Massachusetts.

Similarly unaddressed are the potential impacts of a state's marketable title laws upon the duration of conservation easements. The Act provides that conservation easements have an unlimited duration unless the instruments creating them provide otherwise (Section 2(c)). The relationship between this provision and the marketable title act or other statutes addressing restrictions on real property of unlimited duration should be considered by the adopting state.

The relationship between the Act and local real property assessment and taxation practices is not dealt with; for example, the effect of an easement upon the valuation of burdened real property presents issues which are left to the state and local taxation system. The Act enables the structuring of transactions so as to achieve tax benefits which may be available under the Internal Revenue Code, but parties intending to attain them must be mindful of the specific provisions of the income, estate and gift tax laws which are applicable. Finally, the Act neither limits nor enlarges the power of eminent domain; such matters as the scope of that power and the entitlement of property

owners to compensation upon its exercise are determined not by this Act but by the adopting state's eminent domain code and related statutes.

General Statutory Notes

Arizona. The Arizona act is a substantial adoption of the major provisions of the Uniform Act, but contains numerous variations, omissions and additional matter which cannot be clearly indicated by statutory notes.

Indiana. Adds section as follows:

"32-5-2.6-7 Taxation

"For the purposes of IC 6-1.1, real property subject to a conservation easement shall be assessed and taxed on a basis that reflects the easement."

Mississippi. Adds a section as follows:

"§ 89-19-11. **Capital improvements on property upon which easements have been granted.**

"With the exception of 'Mississippi Landmarks,' as defined by the Antiquities Law of Mississippi (Section 39-7-1 et seq., Mississippi Code of 1972) and of properties entered in the National Register of Historic Places, no public money, derived either from a special fund or the General Fund, shall be expended for capital improvements on any real property upon which a conservation easement has been granted unless the conservation easement is perpetual, a governmental body is the holder of the easement and the capital improvements are solely for the use and benefit of such holder."

Nevada. The Nevada act is a substantial adoption of the major provisions of the Uniform Act, but contains numerous variations, omissions and additional matter which cannot be clearly indicated by statutory notes.

New York. Sections 49-0301 to 49-0311 of the New York Environmental Conservation Law do not constitute a substantial adoption of the Uniform Act, although they contain some similar provisions and have the same general purpose.

UNIFORM CONSERVATION EASEMENT ACT

1981 ACT

An Act to be known as the Uniform Conservation Easement Act, relating to (here insert the subject matter requirements of the various states).

Section
1. Definitions.
2. Creation, Conveyance, Acceptance and Duration.
3. Judicial Actions.
4. Validity.
5. Applicability.
6. Uniformity of Application and Construction.

§ 1. [Definitions]

As used in this Act, unless the context otherwise requires:

(1) "Conservation easement" means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

(2) "Holder" means:

(i) a governmental body empowered to hold an interest in real property under the laws of this State or the United States; or

(ii) a charitable corporation, charitable association, or charitable trust, the purposes or powers of which include retaining or protecting the natural, scenic, or open-space values of real property, assuring the availability of real property for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

(3) "Third-party right of enforcement" means a right provided in a conservation easement to enforce any of its terms granted to a governmental body, charitable corporation, charitable association, or charitable trust, which, although eligible to be a holder, is not a holder.

COMMENT

Section 1 defines three central elements: What is meant by a conservation easement; who can be a holder; and who can possess a "third-party right of enforcement." Only those inter-

ests held by a "holder," as defined by the Act, fall within the definitions of protected easements. Such easements are defined as interests in real property. Even if so held, the easement must serve one or more of the following purposes: Protection of natural or open-space resources; protection of air or water quality; preservation of the historical aspects of property; or other similar objectives spelled out in subsection (1).

A "holder" may be a governmental unit having specified powers (subsection (2)(i)) or certain types of charitable corporations, associations, and trusts, provided that the purposes of the holder include those same purposes for which the conservation easement could have been created in the first place (subsection (2)(ii)). The word "charitable", in Section 1(2) and (3), describes organizations that are charities according to the common law definition regardless of their status as exempt organizations under any tax law.

Recognition of a "third-party right of enforcement" enables the parties to structure into the transaction a party that is not an easement "holder," but which, nonetheless, has the right to enforce the terms of the easement (Sections 1(3), 3(a)(3)). But the possessor of the third-party enforcement right must be a governmental body or a charitable corporation, association, or trust. Thus, if Owner transfers a conservation easement on Blackacre to Conservation, Inc., he could grant to Preservation, Inc., a charitable corporation, the right to enforce the terms of the easement, even though Preservation was not the holder, and Preservation would be free of the common law impediments eliminated by the Act (Section 4). Under this Act, however, Owner could not grant a similar right to Neighbor, a private person. But whether such a grant might be valid under other applicable law of the adopting state is left to the law of that state. (Section 5(c).)

Action in Adopting Jurisdictions

Variations from Official Text:

District of Columbia. Introductory material reads: "For the purposes of this act, the term:".

Maine. In subsec. (1), omits "or preserving the historical, architectural, archaeological, or cultural aspects".

In subsecs. (2)(ii) and (3), substitutes "nonprofit corporation" for "charitable corporation, charitable association".

Additionally, defines "real property" to include surface waters.

Mississippi. Section reads:

"For purposes of this chapter, the following words shall have the meaning ascribed herein unless the context otherwise requires:

"(1) 'Conservation easement' shall mean a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations, the purposes of which include retaining or protecting natural, scenic, historical or open-space values of real property, assuring its availability for agricultural, forest, recreational, educational or open-space use, protecting natural features and resources, maintaining or enhancing air and water quality or preserving the natural, historical, architectural, archaeological or cultural aspects of real property.

"(2) 'Holder' shall mean either:

"(a) A governmental body empowered by the law of this state or the United States to hold an interest in real property; or

"(b) A private, nonprofit, charitable or educational corporation, association or trust, the purposes or powers of which include retaining or protecting the natural, scenic, historical or open-space values of real property, assuring the availability of real property for agricultural, forest, recreational, educational or open-space use, protecting natural features and resources, maintaining or enhancing air or water quality or preserving the natural, historical, architectural, archaeological or cultural aspects of real property which is the recipient or grantee of a conservation easement.

"(3) 'Third-party right of enforcement' shall mean a right granted in a conservation easement to a governmental body or private, nonprofit charitable corporation, association or trust, which is not a holder but which is eligible to be a holder, to enforce any of the terms of the conservation easement.

"(4) 'Person' shall mean any natural person or legal entity."

Texas. In subsec. (1), substitutes "designed to" for "the purposes of which include" (with conforming grammatical variations not affecting substance, e.g., "retain" for "retaining").

In subsec. (2)(ii), substitutes "created or empowered to" for "the purposes or powers of which include" (with conforming grammatical variations not affecting substance, e.g., "retain" for "retaining").

In subsec. (3), substitutes "that is eligible to be a holder but is not a holder" for ", which, although eligible to be a holder, is not a holder".

Adds subsec. (4) as follows: " 'Servient estate' means the real property burdened by the conservation easement."

Wisconsin. In subsec. (1), inserts "preserving a burial site, as defined in s. 157.70(1)(b)," following "water quality,".

Library References

Health and Environment ⟹25.5(4).

C.J.S. Health and Environment §§ 91 et seq., 130, 132.

§ 2. [Creation, Conveyance, Acceptance and Duration]

(a) Except as otherwise provided in this Act, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements.

(b) No right or duty in favor of or against a holder and no right in favor of a person having a third-party right of enforcement arises under a conservation easement before its acceptance by the holder and a recordation of the acceptance.

(c) Except as provided in Section 3(b), a conservation easement is unlimited in duration unless the instrument creating it otherwise provides.

(d) An interest in real property in existence at the time a conservation easement is created is not impaired by it unless the owner of the interest is a party to the conservation easement or consents to it.

COMMENT

Section 2(a) provides that, except to the extent otherwise indicated in the Act, conservation easements are indistinguishable from easements recognized under the pre-Act law of the state in terms of their creation, conveyance, recordation, assignment, release, modification, termination or alteration. In this regard, subsection (a) reflects the Act's overall philosophy of bringing less-than-fee conservation interests under the formal easement rubric and of extending that rubric to the extent necessary to effectuate the Act's purposes given the adopting state's existing common law and statutory framework. For example, the state's requirements concerning release of conventional easements apply as well to conservation easements because nothing in the Act provides otherwise. On the other hand, if the state's existing law does not permit easements in gross to be assigned, it will not be applicable to conservation easements because Section 4(2) effectively authorizes their assignment.

Conservation and preservation organizations using easement programs have indicated a concern that instruments purporting to impose affirmative obligations on the holder may be unilaterally executed by grantors and recorded without notice to or acceptance by the holder ostensibly responsible for the performance of the affirmative obligations. Subsection (b) makes clear that neither a holder nor a person having a third-party enforcement right has any rights or duties under the easement prior to the recordation of the holder's acceptance of it.

The Act enables parties to create a conservation easement of unlimited duration subject to the power of a court to modify or terminate it in states whose case or statute law accords their courts that power in the case of easement. See Section 3(b). The latitude given the parties is consistent with the philosophical premise of the Act. However, there are additional safeguards; for example, easements may be created only for certain purposes and may be held only by certain "holders." These limitations find their place comfortably within similar limitations applicable to charitable trusts, whose duration may also have no limit. Allowing the parties to create such easements also enables them to fit within federal tax law requirements that the interest be "in perpetuity" if certain tax benefits are to be derived.

Obviously, an easement cannot impair prior rights of owners of interests in the burdened property existing when the easement comes into being unless those owners join in the easement or consent to it. The easement property thus would be subject to existing liens, encumbrances and other property rights (such as subsurface mineral rights) which pre-exist the easement, unless the owners of those rights release them or subordinate them to the easement. (Section 2(d).)

Action in Adopting Jurisdictions

Variations from Official Text:

District of Columbia. Section reads:

"(a)(1) Except as otherwise provided in this act, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements, provided that the recordation of any conservation easement as defined in section 2, or of any assignment, release, modification, termination, or other alteration of a conservation easement shall be exempt from the recordation tax imposed by section 303 of the District of Columbia Real Estate Deed Recordation Tax Act, approved March 2, 1962 (76 Stat. 12; D.C.Code, sec. 45-923), and from the transfer tax imposed by section 403 of the District of Columbia Revenue Act of 1980, effective September 13, 1980 (D.C.Law 3-92; D.C. Code, sec. 47-903).

"(2) The exemption provided for in subsection (2) of this section shall not apply if the consideration for the conservation easement exceeds $100 in value.

"(b) No right or duty in favor of or against a person having a third-party right of enforcement arises under a conservation easement before its acceptance by the holder and a recordation of the acceptance.

"(c) Except as provided in section 4(b), a conservation easement is unlimited in duration unless the instrument creating it otherwise provides.

"(d) An interest in real property in existence at the time a conservation easement is created is not impaired by it unless the owner of the interest is a party to the conservation easement or consents to it.

"(e) A conservation easement is valid even under the following circumstances:

"(1) It is not appurtenant to an interest in real property;

"(2) It can be or has been assigned to another holder;

"(3) It is not of a character that has been recognized traditionally at common law;

"(4) It imposes a negative burden;

"(5) It imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder;

"(6) The benefit does not touch or concern real property; or

"(7) There is no privity of estate or of contract."

Maine. In subsec. (a), adds "created by written instrument" at the end thereof.

Subsec. (b) reads: "No right or duty in favor of or against a holder arises under a conservation easement unless it is accepted by the holder and no right in favor of a person

having a 3rd-party right of enforcement arises under a conservation easement unless it is accepted by any person having a 3rd-party right of enforcement."

Subsec. (c) reads:

"Except as provided in this subchapter, a conservation easement is unlimited in duration unless:

"A. The instrument creating it otherwise provides; or

"B. Change of circumstances renders the easement no longer in the public interest as determined in an action under section 478."

Adds a subsection which reads: "The instrument creating a conservation easement must provide in what manner and at what times representatives of the holder of a conservation easement or of any person having a 3rd-party right of enforcement shall be entitled to enter the land to assure compliance."

Mississippi. In subsec. (a), substitutes "affected in the same method and manner as other easements" for "affected in the same manner as other easements".

In subsec. (b), substitutes "no right of a person having a third-party right" for "no right in favor of a person having a third-party right".

In subsec. (c), inserts "its" following "unlimited in".

In subsec. (d), substitutes "the conservation easement" for "it" following "is not impaired by".

Texas. Subsec. (b) reads as follows: "A right or duty in favor of or against a holder and a right in favor of a person having a third-party right of enforcement does not arise under a conservation easement before its acceptance by the holder and the recordation of the acceptance."

In subsec. (c), substitutes "makes some other provision" for "otherwise provides".

In subsec. (d), substitutes "that exists in real property" for "in real property in existence" and omits "by it" following "impaired".

Adds subsections as follows:

"(e) A conservation easement must be created in writing, acknowledged and recorded in the deed records of the county in which the servient estate is located, and must include a legal description of the real property which constitutes the servient estate.

"(f) If land that has been subject to a conservation easement is no longer subject to such easement, an additional tax is imposed on the land equal to the difference, if any, between the taxes imposed on the land for each of the five years preceding the year in which the easement terminates and the taxes that would have been imposed had the land not been subject to a conservation easement in each of those years, plus interest at an annual rate of seven percent calculated from the dates on which the differences would have become due."

Wisconsin. Makes minor language changes not affecting substance.

Library References

Health and Environment ⟹25.5(4).
C.J.S. Health and Environment §§ 91 et seq., 130, 132.

§ 3. [Judicial Actions]

(a) An action affecting a conservation easement may be brought by:

(1) an owner of an interest in the real property burdened by the easement;

(2) a holder of the easement;

(3) a person having a third-party right of enforcement; or

(4) a person authorized by other law.

(b) This Act does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity.

COMMENT

Section 3 identifies four categories of persons who may bring actions to enforce, modify or terminate conservation easements, quiet title to parcels burdened by conservation easements, or otherwise affect conservation easements. Owners of interests in real property burdened by easements might wish to sue in cases where the easements also impose duties upon holders and these duties are breached by the holders. Holders and persons having third-party rights of enforcement might obviously wish to bring suit to enforce restrictions on the owners' use of the burdened properties. In addition to these three categories of persons who derive their standing from the explicit terms of the easement itself, the Act also recognizes that the state's other applicable law may create standing in other persons. For example, independently of the Act, the Attorney General could have standing in his capacity as supervisor of charitable trusts, either by statute or at common law.

A restriction burdening real property in perpetuity or for long periods can fail of its purposes because of changed conditions affecting the property or its environs, because the holder of the conservation easement may cease to exist, or for other reasons not anticipated at the time of its creation. A variety of doctrines, including the doctrines of changed conditions and *cy pres*, have been judicially developed and, in many states, legislatively sanctioned as a basis for responding to these vagaries. Under the changed conditions doctrine, privately created restrictions on land use may be terminated or modified if they no longer substantially achieve their purpose due to the changed conditions. Under the statute or case law of some states, the court's order limiting or terminating the restriction may include such terms and conditions, including monetary adjustments, as it deems necessary to protect the public interest and to assure an equitable resolution of the problem.

The doctrine is applicable to real covenants and equitable servitudes in all states, but its application to easements is problematic in many states.

Under the doctrine of *cy pres*, if the purposes of a charitable trust cannot carried out because circumstances have changed after the trust came into being or, for any other reason, the settlor's charitable intentions cannot be effectuated, courts under their equitable powers may prescribe terms and conditions that may best enable the general charitable objective to be achieved while altering specific provisions of the trust. So, also, in cases where a charitable trustee ceases to exist or cannot carry out its responsibilities, the court will appoint a substitute trustee upon proper application and will not allow the trust to fail.

The Act leaves intact the existing case and statute law of adopting states as it relates to the modification and termination of easements and the enforcement of charitable trusts.

Action in Adopting Jurisdictions

Variations from Official Text:

Indiana. In subsec. (b), adds the following at the end thereof: ", or the termination of a conservation easement by agreement of the grantor and grantee."

Maine. Section reads:

"1. Action or intervention. An action affecting a conservation easement may be brought or intervened in by:

"A. An owner of an interest in the real property burdened by the easement;

"B. A holder of the easement; or

"C. A person having a 3rd-party right of enforcement.

"2. Intervention only. An action affecting a conservation easement may be intervened in by the State or a political subdivision of the State in which the real property burdened by the easement is located.

"3. Power of court. This subchapter does not affect the power of a court to enforce a conservation easement by injunction or proceeding in equity or to modify or terminate a conservation easement in accordance with principles of law and equity. A court may deny equitable enforcement of a conservation easement when it finds that change of circumstances has rendered that easement no longer in the public interest. If the court so finds, the court may allow damages as the only remedy in an action to enforce the easement.

No comparative economic test may be used to determine under this subsection if a conservation easement is in the public interest."

Mississippi. In subsec. (a), substitutes "Any action" for "An action".

Subsec. (a)(4) reads: "A person otherwise authorized and empowered by law."

In subsec. (b), inserts ", and shall not be construed to," following "This Act does not".

Texas. In subsec. (a)(4), inserts "some" following "authorized by".

Wisconsin. Makes minor language changes not affecting substance.

Library References

Health and Environment ⇐25.5(4).

C.J.S. Health and Environment §§ 91 et seq., 130, 132.

§ 4. [Validity]

A conservation easement is valid even though:

(1) it is not appurtenant to an interest in real property;

(2) it can be or has been assigned to another holder;

(3) it is not a of a character that has been recognized traditionally at common law;

(4) it imposes a negative burden;

(5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder;

(6) the benefit does not touch or concern real property; or

(7) there is no privity of estate or of contract.

COMMENT

One of the Act's basic goals is to remove outmoded common law defenses that could impede the use of easements for conservation or preservation ends. Section 4 addresses this goal by comprehensively identifying these defenses and negating their use in actions to enforce conservation or preservation easements.

Subsection (1) indicates that easements, the benefit of which is held in gross, may be enforced against the grantor or his successors or assigns. By stating that the easement need not be appurtenant to an interest in real property, it eliminates the requirement in force in some states that the holder of the easement must own an interest in real property (the "dominant estate") benefitted by the easement.

Subsection (2) also clarifies common law by providing that an easement may be enforced by an assignee of the holder.

Subsection (3) addresses the problem posed by the common law's recognition of easements that

served only a limited number of purposes and its reluctance to approve so-called "novel incidents." Easements serving the conservation and preservation ends enumerated in Section 1(1) might fail of enforcement under this restrictive view. Accordingly, subsection (3) establishes that conservation or preservation easements are not unenforceable solely because they do not serve purposes or fall within the categories of easements traditionally recognized at common law.

Subsection (4) deals with a variant of the foregoing problem. The common law recognized only a limited number of "negative easements"—those preventing the owner of the burdened land from performing acts on his land that he would be privileged to perform absent the easement. Because a far wider range of negative burdens than those recognized at common law might be imposed by conservation or preservation easements, subsection (4) modifies the common law by eliminating the defense that a conservation or preservation easement imposes a "novel" negative burden.

Subsection (5) addresses the opposite problem—the unenforceability at common law of an easement that imposes affirmative obligations upon either the owner of the burdened property or upon the holder. Neither of those interests was viewed by the common law as true easements at all. The first, in fact, was labelled a "spurious" easement because it obligated the owner of the burdened property to perform affirmative acts. (The spurious easement was distinguished from an affirmative easement, illustrated by a right of way, which empowered the easement's holder to perform acts on the burdened property that the holder would not have been privileged to perform absent the easement.)

Achievement of conservation or preservation goals may require that affirmative obligations be incurred by the burdened property owner or by the easement holder or both. For example, the donor of a facade easement, one type of preservation easement, may agree to restore the facade to its original state; conversely, the holder of a facade easement may agree to undertake restoration. In either case, the preservation easement would impose affirmative obligations. Subsection (5) treats both interests as easements and establishes that neither would be unenforceable solely because it is affirmative in nature.

Subsections (6) and (7) preclude the touch and concern and privity of estate or contract defenses, respectively. Strictly speaking, they do not belong in the Act because they have traditionally been asserted as defenses against the enforcement not of easements but of real covenants and of equitable servitudes. The case law dealing with these three classes of interests, however, had become so confused and arcane over the centuries that defenses appropriate to one of these classes may incorrectly be deemed applicable to another. The inclusion of the touch and concern and privity defenses in Section 4 is a cautionary measure, intended to safeguard conservation and preservation easements from invalidation by courts that might inadvertently confuse them with real covenants or equitable servitudes.

Action in Adopting Jurisdictions

Variations from Official Text:

District of Columbia. Omits this section.

Maine. In subsec. (1), inserts "or does not run with" following "to".

Adds a subsec. (8) which reads: "It does not run to the successor and assigns of the holder."

Mississippi. Introductory material reads: "A conservation easement shall be valid despite the following".

In subsec. (2), substitutes "It may be" for "It can be".

Texas. In subsec. (5), substitutes "on" for "upon" in both instances.

Wisconsin. Makes minor language changes not affecting substance.

Library References

Health and Environment ⟹25.5(4).

C.J.S. Health and Environment §§ 91 et seq., 130, 132.

§ 5. [Applicability]

(a) This Act applies to any interest created after its effective date which complies with this Act, whether designated as a conservation easement or as a covenant, equitable servitude, restriction, easement, or otherwise.

(b) This Act applies to any interest created before its effective date if it would have been enforceable had it been created after its effective date unless retroactive application contravenes the constitution or laws of this State or the United States.

(c) This Act does not invalidate any interest, whether designated as a conservation or preservation easement or as a covenant, equitable servitude, restriction, easement, or otherwise, that is enforceable under other law of this State.

COMMENT

There are four classes of interests to which

HOUSE COMMITTEE REPORT

(5)
Date Referred: April 6, 1989

FURTHER REFERRALS: RESOURCES
JUDICIARY

Date of Committee Action: ______

The COMMUNITY & REGIONAL AFFAIRS Committee considered: CSSB 123(JUD)

CS FOR SENATE BILL NO. 123 (Judiciary)
[UNIFORM CONSERVATION EASEMENT ACT]
"An Act adopting the Uniform Conservation Easement Act; and providing for an effective date."

RECOMMENDATIONS:

[ ] be replaced with ______ [ ] 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): (Dept)

[ ] fiscal impact ______

[✓] zero fiscal note C+RA

[ ] zero with analysis ______

APPROVES PREVIOUS: (Date/Dept)

[ ] fiscal note(s) ______

[✓] zero fiscal note(s) DNR Fish + Game

[ ] zero fn/analysis ______

SIGNING DO PASS:

Eileen P MacLean

SIGNING: (Check approp. column)

	Do Not Pass	No Rec	Amend
Richard Foster		X	
Chris Davies		X	

Eileen P. MacLean
Chairman's Signature

Washington

64.04.130 Interests in land for purposes of conservation, protection, preservation, etc.——Ownership by certain entities——Conveyances. A development right, easement, covenant, restriction, or other right, or any interest less than the fee simple, to protect, preserve, maintain, improve, restore, limit the future use of, or conserve for open space purposes, any land or improvement on the land, whether the right or interest be appurtenant or in gross, may be held or acquired by any state agency, federal agency, county, city, town, or metropolitan municipal corporation, nonprofit historic preservation corporation, or nonprofit nature conservancy corporation. Any such right or interest shall constitute and be classified as real property. All instruments for the conveyance thereof shall be substantially in the form required by law for the conveyance of any land or other real property.

As used in this section, "nonprofit nature conservancy corporation" means an organization which qualifies as being tax exempt under 26 U.S.C. section 501(c)(3) (of the United States Internal Revenue Code of 1954, as amended) as it existed on June 25, 1976, and which has as one of its principal purposes the conducting or facilitating of scientific research; the conserving of natural resources, including but not limited to biological resources, for the general public; or the conserving of natural areas including but not limited to wildlife or plant habitat.

As used in this section, "nonprofit historic preservation corporation" means an organization which qualifies as being tax exempt under 26 U.S.C. section 501(c)(3) of the United States Internal Revenue Code of 1954, as amended, and which has as one of its principal purposes the conducting or facilitating of historic preservation activities within the state, including conservation or preservation of historic sites, districts, buildings, and artifacts. [1987 c 341 § 1; 1979 ex.s. c 21 § 1.]

Acquisition of open space, land, or rights to future development by certain entities: RCW 84.34.200 through 84.34.250.

Property tax exemption for conservation futures on agricultural land: RCW 84.36.500.

Alaska State Legislature

House of Representatives
Community & Regional Affairs

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ITEM 7: Resolution - Alaska Municipal League

ITEM 8: House Research on Conservation Easements

ITEM 9: Memos - Legislative Counsel

ITEM 10: Uniform Conservation Easement Act

Room 128, Capitol Building, P.O. Box V, Juneau, Alaska 99811 (907) 465-3882 or 465-4833

Alaska State Legislature

SENATOR
ARLISS STURGULEWSKI
Senate President Pro Tempore
Chairman, Senate Rules Committee

2957 SHELDON JACKSON STREET
ANCHORAGE, ALASKA 99508

While in Juneau
P.O. BOX V
JUNEAU, ALASKA 99811
(907) 465-3818

Senate

M E M O R A N D U M   07 April 1989

TO: Representative Eileen MacLean
Chair, House Community & Regional Affairs Committee

FROM: Senator Arliss Sturgulewski

I respectfully request that you schedule a hearing in your committee as soon as is practicable on Senate Bill 123 "An Act adopting the Uniform Conservation Easement Act; and providing for an effective date"

A conservation easement is a voluntary legal agreement made by a private property owner. The agreement limits, for the benefit of the public, the type or amount of use of a property. It is a restriction on the use of real estate.

This act is necessary because common law does not allow such a restriction on the use of land to be a perpetual restriction unless the recipient of the easement owns an adjoining piece of land.

This act, adopted by 46 states, is a Uniform act. Two changes to the Uniform Act were made in the Senate Judiciary Committee.

The first change to the original bill was the addition of (e) to Sec. 34.17.010 stating that neither the state nor a municipality may establish a conservation easement by eminent domain.

The second change was the addition of a provision to Title 29 which requires land upon which there is a conservation easement to be assessed by a municipality both as though there were no easement and as though there were. In addition, the owner of property on which there is a

conservation easement is subject to pay any tax liability that was abated because of the easement if the property should be used contrary to the easement.

The Act itself does not impose restrictions or affirmative duties; it allows the private parties to enter into consensual arrangements with a charitable organization or a governmental body to protect land and buildings without the encumbrance of certain potential common law impediments.

I will appreciate your hearing this bill soon. Please call me or Melissa Fouse of my staff if you have any questions.

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION : SB 123
PUBLISH DATE :

FISCAL NOTE

REQUEST:

Revision Date: 6-Mar-89
Title: An Act adopting the Uniform Conservation Easement Act
Sponsor: Sturgulewski
Requestor: Senate Judiciary

Agency Affected: Natural Resources
BRU: Parks Management
Land & Water Mgmt
Components: Parks Management
Land & Water Mgmt

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	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0.0					

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Larry Ostrovsky
Division: Commissioner's Office
Phone : 465-2400
Date : 6-Mar-89

Approved by Commissioner: Lennie Gorsuch *Lennie Gorsuch*
Agency: Department of Natural Resources
Date: 6-Mar-89

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

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: CSSB 123 (Jud)
PUBLISH DATE:

FISCAL NOTE

REQUEST:

Revision Date:
Title: Uniform Conservation Easement Act
Sponsor: Sturgulewski
Requestor: Senate Judiciary

Agency Affected: Fish and Game
BRU: Habitat
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES	0	0	0	0	0	0
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						

FUNDING: (Thousands of Dollars)

	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Roland Shanks
Division: Commissioner's Office
Phone: 465-4100
Date: 3/15/89

Approved by Commissioner: [signature]
Agency: Fish and Game
Date: 3.15.89

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

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