ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990

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6325 SENATE JUDICIARY

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Court Rule 21 is concerned with "petitions for review." Rule 21(a) provides:

"An aggrieved party may petition the superior court for review of any order or decision of a magistrate court or an administrative agency *where there is no appeal or other plain, speedy or adequate remedy*, and where the magistrate or administrative agency appears to have exercised his or its functions erroneously or to have exceeded his or its jurisdiction, to the injury of some substantial right of such party.

Relief heretofore available by writs of review, certiorari, mandamus, prohibition, and other writs may be obtained by petition for review under the practice prescribed in these rules." (emphasis added)

Since the legislature had provided for a trial de novo for any tenured teacher who was dismissed by a school board or appeal panel,[3] a plain, speedy and adequate remedy at law existed within the meaning of Rule 21(a). This means that Rule 21(e) was inapplicable.

At the time that appellees sought a trial de novo in the superior court, it was unclear what law controlled the time for filing. If school board decisions such as the present one could be construed to fall within the Administrative Procedure Act, then AS 44.62.560(a) of that Act would have controlled. AS 44.62.560(a) establishes a 30-day time period for appealing from administrative rulings. However, the Administrative Procedure Act by its express terms did not apply to local school boards.[4]

[3] The trial judge apparently felt that Appellate Rule 45(a)(2) controlled, as he so indicated in a letter dated July 27, 1973. While Appellate Rule 45(a)(2) sets a 30-day deadline for appealing from administrative rulings, that rule did not become effective until March of 1973.[5] Thus it would not have controlled litigation commenced in September, 1972.

[4] Apparently no express provision covered the time for filing in this case. Under these circumstances our ruling in *McCarrey v. Commissioner of Natural Resources*, 526 P.2d 1353 (Alaska 1974), is useful. In *McCarrey* the appellant had waited over five months before seeking judicial review of an administrative determination. It was somewhat uncertain as to whether the 30-day provision in the Administrative Procedure Act was to govern. We stated that in May of 1971 when the superior court action was commenced,

". . . [A] great deal of confusion existed concerning the method and procedures by which appeals from an administrative decision might be taken to the superior court. The matter has now been resolved by adoption of Appellate Rule 45. . . . *Moreover, failure to file an appeal within strict time limitations does not create a jurisdictional defect.* Courts in Alaska have authority to relax the strict requirements of the rules in order to avoid surprise or a serious miscarriage of justice, or otherwise in aid of their appellate jurisdiction." 526 P.2d, at 1355. (footnotes omitted, emphasis added)

Since the Administrative Procedure Act sets a 30-day time period and since Appellate Rule 45(a)(2) now sets a 30-day period for all administrative appeals, we conclude that an appeal brought 29 days after the final administrative decision was made was timely.

3. AS 14.20.205 provides:
"If a school board or appeal panel reaches a decision unfavorable to a teacher, the teacher is entitled to a de novo trial in the superior court. However, a teacher who has not attained tenure rights is not entitled to judicial review according to this section."

4. *See* AS 44.62.330.

5. Appellate Rule 45(i) says that these rules superceded all other procedural methods in Alaska for appealing from administrative rulings to the state's courts.

The Trial De Novo Question

Mr. Lum, as cross-appellant, argues that the express language of AS 14.20.205 guarantees him the right to a trial de novo. The statute provides:

"If a school board or appeal panel reaches a decision unfavorable to a teacher, the teacher is entitled to a de novo trial in the superior court. However, a teacher who has not attained tenure rights is not entitled to judicial review according to this section."

Lum claims that the legislative intent is clear from this language and that the purpose of the act is to protect tenured teachers from potentially biased school boards. He asserts that the record in this case in fact shows just such a bias. The board, in its cross-reply brief, refers us to the arguments on the same point which the board made in response to the Lums' petition for review.

Pared to its essence, the board's earlier brief argues that *Keiner v. City of Anchorage*, 378 P.2d 406 (Alaska 1963), disposes of this issue in regard to all administrative reviews, and that even if *Keiner* is not dispositive of the issue, the doctrine of separation of powers requires that AS 14.20.205 be declared unconstitutional or be restricted severely in its meaning. The brief also argues that a chronological review of the statutes in question shows a clear legislative intent to repeal the special de novo rights granted by AS 14.20.205. We find none of these arguments totally persuasive.

In *Keiner v. City of Anchorage, supra*, the city brought proceedings to have Keiner's building declared a fire and health hazard, to declare it a public nuisance, and to order it removed. After an initial determination by the city manager, Keiner filed objections, and the city council, acting as a board of adjustment, found the building hazardous and ordered its removal. On appeal to the superior court and to this court Keiner claimed the right to a de novo judicial determination of whether his building constituted a fire and health hazard. In rejecting that claim, this court held that a territorial statute, § 16-1-35, Twenty-fourth, A.C.L.A.1949, providing for an appeal from such municipal actions and for de novo hearing and trial in the territorial district court, was superseded by the Administrative Procedure Act which became law in 1959, after statehood.

The school board itself acknowledges that *Keiner* does not mandate review on the record. As the board notes, "this court has treated all appeals to the superior court from administrative agencies as being on the record unless otherwise ordered in the discretion of the superior court." Thus *Keiner* does not foreclose the possibility of requiring a trial de novo for tenured teachers.

[5] The "separation of powers" argument asserts that to require a full trial de novo by the superior court encroaches on the executive powers of an administrative agency such as the school board. It is urged that this is unconstitutional. This overlooks, however, the scope of administrative power delegated by the legislature to the school board. At the same time that it has empowered these boards to terminate teachers, it has also guaranteed tenure rights to teachers. The statute granting a trial de novo to teachers can hardly be said to violate the separation of powers. We shall not consider the point further.[6]

[6] We shall now turn to a chronological review of certain pertinent statutes.

In 1949 a territorial statute provided that determinations of municipal boards of adjustment "shall be heard and tried de novo in the District Court."[7]

6. For a case in which we rejected a similar argument, in the context of real property tax assessments, see Wingerdner v. Greater Anchorage Area Borough, 534 P.2d 541 (Alaska 1975).

7. § 16-1-35, Twenty-fourth, A.C.L.A.1949.

In 1959 the state adopted title 22, the statutory scheme governing the judiciary. AS 22.10.020(a) provides in part:

"All hearings on appeal from any final order or judgment of a subordinate court or administrative agency shall be on the record unless the superior court, in its discretion, shall grant a trial de novo, in whole or in part."[8]

In 1963 Mr. Keiner appealed from the denial of his demand for a trial de novo from a municipal board's condemnation of his property. As noted above, in *Keiner v. City of Anchorage, supra*, this court held that the 1949 statute had been superseded by the 1959 act, and thus de novo trials were discretionary.

In 1966 the legislature enacted an entirely revised education code. *Alaska Statutes*, title 14. AS 14.20.205 provided tenured teachers with a right to a trial de novo in the superior court following an unfavorable ruling by a school board.[9]

In 1970 the legislature amended AS 22.10.020, in a manner irrelevant to this case. However, it reenacted the de novo provision, stating:

"All hearings on appeal from any final order or judgment of a subordinate court or administrative agency shall be on the record unless the superior court, in its discretion, shall grant a trial de novo, in whole or in part."[10]

The board argues in effect that the last statute in time repeals pre-existing statutes, and that since the 1970 judiciary statute essentially states that *all* appeals from administrative agencies are merely discretionarily de novo, this supersedes the 1966 Education statute which expressly mandates de novo reviews for tenured teachers. We find this argument unpersuasive.

In support of its "chronology" argument, the board relies on Professor Sutherland's work on statutory construction,[11] and the cases cited therein. Paraphrased, the cited portions of Sutherland hold that where a statute has been modified by an intermediate act, and where the initial act is then reenacted, the *general rule* is that the intermediate act remains in force. A well-recognized caveat to the *general rule* holds that the intermediate act is impliedly repealed if its terms and the reenactment's terms are "wholly inconsistent." The board argues that in 1959 the legislature made all administrative appeals *discretionarily* de novo; in 1966 it carved out an intermediate act which made tenured teachers' appeals mandatorily de novo; in 1970 it reenacted the original law making *all* administrative appeals discretionarily de novo. Since *all* appeals can't be discretionarily de novo if tenured teachers' appeals are mandatorily de novo, the board finds the two provisions "wholly inconsistent" and hence the 1970 act impliedly repeals the 1966 act.

This argument might be sound if the intermediate act of 1966 had been an *amendment* to the general rule of 1959 or had been a modification of the statutory rules governing the judiciary.[12] However, the 1966 act is more properly characterized as a "special" statute dealing with education. On its face, this title 14 statute concerning tenured teachers bears no relation to the general provisions governing judicial appeals, which is covered by title 22.[13]

8. The Michie Company, in its bound volume, has changed the session law phraseology from "All hearings . . . ." to "The hearings . . . . ." However, the language used in the session laws is controlling in this case.

9. AS 14.20.205 was amended in 1968 but the amendment merely deleted surplus language.

10. *See* footnote 8 *supra*.

11. J. G. Sutherland, Statutory Construction (4th ed. 1972).

12. All of the cases cited by the school board appear to fit this type of description. *See, e. g., United States Smelting Refining & Mining Co. v. Locw*, 74 F.Supp. 917, 11 Alaska 429 (1947).

13. Several cases have found the titles of various legislation helpful in determining similar issues of judicial construction. *See Allison v. Hatton*, 46 Or. 370, 80 P. 101 (1905); *Eddy v. Kincaid*, 28 Or. 537, 41 P. 156 (1895).

The role of special statutes was treated by the Montana Supreme Court in *Teamsters Local 45 v. Montana Liquor Control Bd.*, 155 Mont. 300, 471 P.2d 541, 543 (1970). There the court said:

"Where one statute deals with a subject in general and comprehensive terms and another deals with a part of the same subject in a more minute and definite way, *to the extent of any necessary repugnancy between them* the special will prevail over the general." (emphasis in the original)

In addition, facially conflicting special statutes may simply establish *exceptions* to a general rule. Thus the Oregon Supreme Court has stated that where a "later special or local statute is not irreconcilable with the general statute to the degree that both statutes cannot have coterminous operation, the general statute will not be repealed, but the special or local statute will exist as an exception to its terms." *Andersen v. Heltzel*, 197 Or. 23, 251 P.2d 482, 483–84 (1952).[14]

Certainly in reenacting AS 22.10.020 the legislature has not unequivocally expressed any intent to deny tenured teachers de novo review. Nor was the reenactment part of a comprehensive revision. Since the two statutes are not irreconcilably conflicting, but can be intelligently read as conterminous expressions of a general rule and an exception to it, nothing in the edicts of statutory construction requires us to find that AS 14.20.205 has been rendered inoperative by the reenactment of AS 22.10.020.

Additionally, there are strong policy reasons for holding that tenured teachers have a mandatory right to a trial de novo.[15]

The primary reason for granting a trial de novo is that the legislature apparently intended to create such a right in enacting AS 14.20.205. In *Alaska Foods, Inc. v. American Manufacturer's Mutual Insurance Co.*, 482 P.2d 842, 846 (Alaska 1971), we stated, in dictum, why a trial de novo is normally denied in cases involving administrative agencies. The denial results from the

". . . recognition of the respective functions of administrative agencies and the superior court, and [from] the deference the courts feel constrained to show to findings made by such an agency charged by law with the making of factual determinations in a particular area within the scope of executive power." (footnote omitted)

While courts normally feel constrained to defer to the fact-finding role which the

14. Sutherland himself states that subsequent enactment of a general statute will only rarely operate to impliedly repeal a special statute. Thus he writes:

"The enactment of a general law broad enough in its scope and application to cover the field of operation of a special or local statute will generally not repeal a statute which limits its operation to a particular phase of the subject covered by the general law, or to a particular locality within the jurisdictional scope of the general statute. An implied repeal of prior statutes will be restricted to statutes of the same general nature, since the legislature is presumed to have known of the existence of prior special or particular legislation, and to have contemplated only a general treatment of the subject matter by the general enactment. Therefore, where the later general statute does not present an irreconcilable conflict the prior special statute will be construed as remaining in effect as a qualification or exception to the general law.

However, since there is no rule of law to prevent the repeal of a special by a later general statute, prior special or local statutes may be repealed by implication from the enactment of a later general statute where the legislative intent to effectuate a repeal is unequivocally expressed. A repeal will also result by implication when a comprehensive revision of a particular subject is promulgated, or upon the predication of a statewide system of administration to replace previous regulation by localities." Sutherland, *supra*, § 23.15, at 245–46. (footnotes omitted)

15. A thorough recapitulation of many of the factors affecting de novo reviews of administrative hearings can be found in Forkosch: *Judicial De Novo Review of Administrative Quasi-Judicial Fact Determination*, 25 Hast. L.J. 963 (1974).

legislature has given to a particular agency, no such constraint logically should exist where the legislature itself has granted the courts a fact-finding role in their review of administrative action. AS 14.20.205 seemingly does just that, for it expressly grants a tenured teacher a "trial de novo" following an unfavorable school board decision. Under these circumstances, our statement in *Aleutian Homes v. Fischer*, 418 P.2d 769, 773 (Alaska 1966), should be borne in mind:

> "As a general statement of law, we are in agreement with [the] contention that where the legislature has established a specific procedure for review of administrative decisions, or orders, such procedure is controlling." (footnote omitted)

In the state of Washington a similar remedy was created by the legislature to insure that tenured teachers would receive an appeal de novo.[16] The Washington Supreme Court expressed no reservations whatever, in upholding the procedures established by the legislature. In *Hattrick v. North Kitsap School Dist.*, 81 Wash.2d 668, 504 P.2d 302, 303 (1972), the court construed the statute to require no less than a determination by the trial court which was "independent of any conclusion of the school board, and . . . based solely upon the evidence and testimony which the trial court receives." *See also Denton v. South Kitsap School Dist.*, 10 Wash.App. 69, 516 P.2d 1080 (1973).

A second reason for upholding Mr. Lum's claim for a trial de novo is that school boards, unlike many administrative agencies, have no unique fact-finding expertise.

In *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S.Ct. 456, 465, 95 L. Ed. 456 (1951), the United States Supreme Court stated why courts are normally allowed only a very narrow scope of review in cases involving appeals from administrative agencies. The restraint exists because the agencies are "presumably equipped or informed by experience to deal with a specialized field of knowledge . . . ." Thus agency "findings within that field carry the authority of an expertness which courts do not possess and therefore must respect."

Professor Louis L. Jaffee, one of the foremost authorities on administrative law, acknowledges that, generally speaking, agency expertise is a legitimate rationale for restricting the scope of judicial review.[17] But Jaffee goes on to state, "it is notorious that [this rationale] can easily become an absurd and mesmerizing shibboleth." Jaffee concludes by noting, "The usual court . . . demands, and properly so, that the agency convince the court that its 'putative' expertness is in fact relevant to the finding in question; and even then it takes this expertness as but one factor in the agency decision which must run the gauntlet of its common sense."[18]

It is well known that the composition of many school boards is not such as to endow them with fact-finding expertise in matters of teacher nonretention.

The state legislature has provided that to qualify as a school board member, one merely needs to be eligible to vote in the municipal elections. AS 14.12.080. Under these circumstances we are not convinced that the school board possesses such expertise that we should defer to the findings in question. From this standpoint there is no policy reason for restricting the superior court's scope of review.

The final policy factor militating in favor of a full application of AS 14.20.205 is that Mr. Lum is faced with the loss of a very important right: his source of income. In this connection we do not feel that it is necessary to indulge in such classificatory labels as "vested right" or "property right," for it is enough that the right

16. Rev.Code of Wash. 28A.58.480

17. L. Jaffee, Judicial Control of Administrative Action, 613–16 (Student Ed. 1965).

18. *Id.* at 614–15.

be recognized as important for it to act as a guide to decision in the interpretation of the statute.[19]

From this review of the arguments concerning the construction of the statute and the public policy arguments which bear upon the outcome, we hold that Mr. Lum is entitled to a judicial review de novo on the question of his nonretention. It follows that his case should not be remanded to the school board.

Helen Lum's Claim for Damages

[7] Helen Lum has cross-appealed from the order of the superior court which directed her reinstatement but made no mention of damages or back pay. The order instructs the school board to "take appropriate action not inconsistent with this decision." However, the findings of fact and conclusions of law regarding Helen Lum make no reference to back pay or damages.[20]

Helen Lum's argument can be cast into the form of a syllogism. She first states a well recognized premise which holds that if a person has been denied procedural due process during the course of job termination, then reinstatement with back pay is automatic. See *University of Alaska v. Chauvin*, 521 P.2d 1234, 1239 n. 18 (Alaska 1974). She then cites cases which hold that a hearing before a biased panel denies procedural due process. *See Simard v. Board of Education*, 473 F.2d 988, 993 (2nd Cir. 1973). Finally, she refers us to an affidavit which allegedly establishes that the board was biased against Mrs. Lum. Hence, the argument concludes, Helen Lum was denied procedural due proc and is entitled to reinstatement with ba pay.

The difficulty with that argument is t assertion of bias in fact on the part of t school board. This assertion was ch lenged by the school board both below a on appeal. The evidence is clearly co flicting, and the superior court made findings on the point. Under these circu stances Mrs. Lum's argument for orderi damages is not persuasive.

Courts traditionally have granted rei statement with back pay under only thr conditions. The first is when the admin trative agency has denied the employ certain procedural due process rights. *Se e. g., University of Alaska v. Chauvin*, 5 P.2d 1234, 1239 n. 18 (Alaska 1974); *Ha ton v. Board of Education*, 422 F.2d 4 (6th Cir. 1970); *Moses v. Washingto Parish School Board*, 304 F.Supp. 11 (D.C.La.1969); *School Dist. v. Karabe sos*, 17 Mich.App. 10, 168 N.W.2d 6 (1969); *but see, Shorba v. Amioka*, Haw. 43, 501 P.2d 807, 813 (1972). Th second circumstance is when the employe was fired for exercising certain substa tive constitutional rights. *Ramsey v. Ho kins*, 447 F.2d 128 (5th Cir. 1971), *mod fying Ramsey v. Hopkins*, 320 F.Supp 477 (D.C.Ala.1970); *Callaway v. Kirklan* 334 F.Supp. 1034 (D.C.Ga.1971); *Black School Comm. of Malden*, 310 N.E.2 330 (Mass.1974). Finally, some statute expressly provide for such treatment b the reviewing court. *See, e. g., Mass Bd. of Education*, 61 Cal.2d 612, 39 Ca

19. Where a vested right or a basic constitutional right is at stake, courts normally expand the scope of judicial review of administrative action affecting teacher tenure. *See, e. g., Adcock v. Board of Education*, 10 Cal. 3d 60, 109 Cal.Rptr. 676, 513 P.2d 900 (1973); *Bixby v. Pierno*, 4 Cal.3d 130, 93 Cal.Rptr. 234, 481 P.2d 242 (1971). And as we have noted in *Nichols v. Eckert*, 504 P.2d 1359, 1364 n. 9 (Alaska 1973), the job of even a non-tenured teacher is sufficiently important to warrant certain constitutional protections.

20. It is unclear whether the superior cour intended to have the school board determin back pay, or intended to deny to Helen Lum any claim to back pay. At one point th judge stated that no back pay would be ap propriate if the school system acted in goo faith. At another point he seems to say tha Mrs. Lum would have to pursue an indepen ent action for damages. In any event, th findings and final order make no reference t back pay.

Rptr. 739, 394 P.2d 579, 582 (1964); Rev. Code of Wash. 28A.58.480 (1970).

Since none of these conditions is present in Mrs. Lum's case, we hold that she has not demonstrated a right to the automatic imposition of damages in the form of back pay.[21]

This still leaves undetermined the question of whether Mrs. Lum is entitled to adduce proof of any damages she claims to have suffered. That question is answered for the most part by our disposition of the case in other respects.

At oral argument, counsel for Mrs. Lum stated that she would accept a trial de novo of her case together with that of Mr. Lum. In view of our disposition of this case as to Mr. Lum, we deem it appropriate that a trial de novo be had as to the nonretention of Mrs. Lum. At that trial her damage claims may also be considered by the superior court. Such a proceeding will also afford the school board a full opportunity to present its case, both as to nonretention of each of the Lums and as to damages.

In view of our holdings it is unnecessary to consider the question of whether the record of the proceeding before the school board contains substantial evidence to support the board's findings.

The case is remanded to the superior court for further proceedings consistent with this opinion.

Remanded.

ERWIN, J., concurring.

ERWIN, Justice (concurring).

I concur with the opinion, but because of possible implications which arise from that portion of the opinion concerning the power of the legislature to enact procedures governing the appeal of administrative decisions to the superior court and the Supreme Court, I find additional clarification is required.

The quotation from *Aleutian Homes v. Fischer*[1] that "where the legislature has established a specific procedure for review of administrative decisions . . . such procedure is controlling" must be interpreted in light of the fact that at the time of the *Fischer* decision there were no rules of court concerning the appeal of administrative decisions. Clearly, legislative enactment of procedural statutes would be permitted as a matter of comity[2] where the Supreme Court of Alaska had not exercised its constitutional rule-making power in the area under section 15, article IV of the Alaska Constitution.[3] However, in 1973 this Court adopted Appellate Rule 45(i) which specifically provides:

> These rules shall supersede all other procedural methods specified in Alaska statutes for appeals from administrative agencies to the courts of Alaska.

In *Winegardner v. Greater Anchorage Area Borough*,[4] the Supreme Court noted that the adoption of Appellate Rule 45 was an expression of supremacy over procedural statutes and constituted the exercise of judicial power distributed to the Supreme Court under sections 1 and 15, article IV of the Alaska Constitution.[5] *Winegardner* then determined that the grant of a jury trial on review of an assessment by the Greater Anchorage Area Borough as pro-

21. *Cf. Redman v. Department of Education*, 519 P.2d 760 (Alaska 1974).

1. 418 P.2d 769, 773 (Alaska 1966) (footnote omitted).

2. *See State v. Scott*, 387 S.W.2d 539, 543 (Mo.1965); *Perin v. Peuler*, 373 Mich. 531, 130 N.W.2d 4, 9–10 (1964) (Missouri and Michigan both have constitutional provisions similar to our section 15, article IV). *See also Leege v. Martin*, 379 P.2d 447, 449 (Alaska 1963).

3. The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. . .

4. 534 P.2d 541 (Alaska 1975).

5. *Id.* at 545.

vided by statute[6] was a grant of a substantive right[7] and thus did not constitute a violation of the doctrine of separation of powers as reflected in section 15 of article IV.

Therefore, while the legislature may grant substantive rights to litigants, it may not enact procedural statutes in the area of administrative appeals contrary to our Rules without complying with the constitutional requirements of section 15, article IV of the Alaska Constitution.[8]

In the Matter of A. A., a minor, Appellant,

v.

STATE of Alaska, Appellee.

No. 2400.

Supreme Court of Alaska.

Aug. 8, 1975.

The Superior Court, Fourth Judicial District, Fairbanks, Gerald J. Van Hoomissen, J., made an order of disposition in a juvenile delinquency proceeding, and an appeal was taken by the minor. The Supreme Court held that conduct of a disposition hearing in the absence of the minor's appointed counsel was erroneous. The trial court initially erred also in ordering the juvenile to be placed in a specific institution, but where the final order did not designate any specific institution but merely placed the minor in the custody of the Department of Health and Social Services and designated a specific period of time for duration of detention, any issue pertaining to the earlier order was moot.

Reversed and remanded.

6. AS 29.52.140(f).

7. 534 P.2d at 547.

1. Infants ⇐16.9

Conduct of disposition hearing in absence of minor's appointed counsel was erroneous. AS 47.10.080, 47.10.080(b)(1).

2. Infants ⇐16.11, 16.14

Trial court initially erred in ordering juvenile to be placed in specific institution but where final order did not designate any specific institution but merely placed minor in custody of Department of Health and Social Services and designated specific period of time for duration of detention any issue pertaining to earlier order was moot. AS 47.10.080, 47.10.080(b)(1).

Stephen R. Cline, Asst. Public Defender, Fairbanks, Herbert D. Soll, Public Defender, Anchorage, for appellant.

No appearance for appellee.

Before RABINOWITZ, C. J., and CONNOR, ERWIN, BOOCHEVER and BURKE, JJ.

OPINION

PER CURIAM.

On November 6, 1974, A. A., a minor child, admitted in superior court the allegations of three counts of a petition seeking his adjudication as a delinquent. A disposition hearing was scheduled to be held before that court on November 27, 1974 at 9:30 a. m., and the juvenile was released from custody to return to his home with his father pending the hearing.

The Division of Corrections' classification committee held a meeting on November 19, 1974 which the minor's attorney attended. The committee unanimously recommended not to detain the minor. Work and school plans were formulated as the result of consultations with the boy and his father.

At the conclusion of the November 27, 1974 disposition hearing, the superior court

8. . . . These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

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Chenoweth
3/16/89

Original sponsors: Binkley, Sturgulewski, Fischer, et al.

IN THE SENATE BY THE JUDICIARY COMMITTEE

CS FOR SENATE BILL NO. 202 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to factors in aggravation of the presumptive term of a criminal sentence."

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

* Section 1. AS 12.55.155(c) is amended by adding a new paragraph to read:

(27) the defendant, being 18 years of age or older, knowingly induced, caused, or permitted a person under 18 years of age to participate in planning or committing the offense.

SB 204

Senate – House Joint Supp. #8

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH V STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

March 3, 1989

The Honorable Mike Davis
Chair, Alaska Legislative Council
Pouch V, State Capitol
Juneau, Alaska 99811

Re: Bill on the Alaska Corporations Code (AS 10.06)
(6-0953A and 6-0395A)

Dear Representative Davis:

The attached bills (one for the House and one for the Senate) are submitted to the Alaska Legislative Council pursuant to AS 24.20.075 with the request that they be introduced in the Sixteenth Legislature. A sectional analysis accompanies the bills.

The bills are the product of work done by the Alaska Code Revision Commission and the Task Force for the Alaska Corporation Code and represent a consensus of changes and additions to AS 10.06 which passed the Legislature during the second session of the Fifteenth Legislature.

By way of background, AS 10.06 (CSHB 322(Jud)(efd am S)), passed the House by a vote of 38-0 and the Senate by a vote of 14-4. During the final week of consideration of this bill, both individuals and groups indicated to various legislative members that they had not had sufficient time to consider the wholesale revision of the Alaska's for-profit corporation code (bills virtually identical to the bill that finally passed the Legislature were introduced and considered by the Legislature beginning in 1982 through 1986). In an effort to allow additional comments on AS 10.06, Senator Kelly offered an amendment in the Senate to postpone the effective date of the bill until July, 1989. The Legislature approved the amendment and the bill was forwarded to Governor Cowper where it was signed into law.

The purpose of the delayed effective date was to allow for the creation of a task force (the ACC Task Force) representing those interests which wanted additional time to consider

AS 10.06 to propose changes and amendments to the bill as passed for consideration by the Legislature prior to the July 1989 effective date. The Task Force was comprised of the following interests:

1. Erik LeRoy representing the Alaska Bar Association's Business Law Committee and the interests of Native Village Corporations;

2. Willis Kirkpatrick, Director of the Division of Banking, Corporations and Securities (Mr. Kirkpatrick chaired the Task Force);

3. David Wolf representing the Alaska Federation of Natives and the interests of the Native Regional Corporations;

4. J.P. Tangen representing the interests of the State Chamber of Commerce;

5. John W. Abbott representing the Alaska Code Revision Commission.

The Task Force was also to have included Elizabeth Johnstone because she had earlier led a group of five attorneys designed by the Alaska Federation of Natives to work with the Code Revision Commission in tailoring the new code so that it reflected the interests of Alaska Native Corporations. Her whereabouts were unknown and, as such, she did not participate. A representative of the Anchorage Chamber of Commerce was also contacted to participate in the Task Force but did not do so.

The Task Force first met in November of 1988 and essentially finished its work (which was approved by the Alaska Code Revision Commission) on February 28, 1989. The draft bill accompanying this letter of transmittal is basically the work product of the Task Force. Although the Task Force has not seen the final form of the bill, it is our understanding that the Task Force agrees with the changes proposed by the bill.

Although the bill appears lengthy, in fact the number of changes is minimal. In many instances, sections of AS 10.06 which are being modified are duplicated in their entirety, even though only two or three words are added or deleted. New sections have been added to clarify the duties of offi-

cers and directors so that the duties appear in respective sections dealing with directors or officers (the provisions generally mirror each other in language). In other sections of the bill, substantive changes have been made to AS 10.06, which substantive changes are reflected in the sectional analysis accompanying this letter of transmittal. A member of the Alaska Code Revision Commission will be available to testify as to the legal ramifications of each such change at any committee hearings.

The work of the Task Force has enhanced the clarity of AS 10.60 by the addition of new language spelling out what corporate conduct is acceptable. It also reflects the needs of a cross-section of the Alaskan community that will be operating under the corporations code. We feel that the changes made are good ones, are defensible and should be made to make AS 10.06 an even better statutory product. I would encourage the Legislative Council to give this bill serious consideration and to encourage its expeditious passage in both houses of the Legislature.

Because time is short for consideration of this bill, and because there may be questions concerning the changes and amendments, I can make my self available for telephone or teleconference consultation concerning the draft bill. Again, the Commission would appreciate your consideration of this bill which, if passed by the Legislature, will take effect at the same time that AS 10.06 is scheduled to become law in Alaska.

Respectfully submitted,

Tamara Cook for

John Abbott
Chair
Alaska Code Revision Commission

JA:gc
WKG7/087

Enclosure

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

MEMORANDUM March 3, 1989

SUBJECT: Sectional analysis
(Work Orders 6-0395 and 6-0953)

TO: Representative Mike Davis
Chair, Legislative Council

FROM: Theresa L. Bannister TB
Legislative Counsel

This provides a sectional analysis of the above described bill.

As a preliminary matter, note that a sectional analysis or summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1 (AS 10.06.010). Eliminates an inconsistency with AS 10.06.485 by making the loan approval requirement applicable to employee loans as well as loans to officers and directors. Clarifies that a corporation has the power to make guarantees to eliminate a question that they were included in corporate powers. Gives corporations the powers of a limited or general partner. Corrects the term for joint ventures.

Section 2 (AS 10.06.020). The current content is designed to protect third parties from an ability of the corporation, or any shareholder asserting a derivative claim, to evade liability for an act or undertaking of a corporate agent by claiming that it was done without real authority. The amendment allows the corporation to assert limitations on the powers of corporate agents set forth in the articles but not to assert limitations found in its bylaws or board resolutions as a defense to the third party's claim. This change would protect shareholders to the extent that the articles of the corporation contained such limitations on either the nature of agency power or the manner of its exercise.

Section 3 (AS 10.06.025(a)). Deletes language that created an internal conflict within AS 10.06.

Section 4 (AS 10.06.105(c)). Clarifies that the subsection is not intended to prevent a limited partnership from using the word "limited" in its name.

Section 5 (AS 10.06.130). Eliminates the need for a corporation to take any other steps to protect the exclusivity of its name and allows the corporation to enjoin the use of the same or a deceptively similar name.

Section 6 (AS 10.06.343). States that the corporation may issue stock purchase rights or options for shares of any class or classes. Substitutes "shall" for "must" as a technical change.

Section 7 (AS 10.06.348). Coordinates AS 10.06.348 with the proposed new AS 10.06.349.

Section 8 (AS 10.06.349). Allows a corporation to issue shares without certificates and establishes a procedure for notifying the shareholder of certain information that is usually disclosed on certificates under other sections of AS 10.06.

Section 9 (AS 10.06.353). Coordinates section with new ability to issue certificateless shares.

Section 10 (AS 10.06.355). Coordinates section with new ability to issue certificateless shares.

Section 11 (AS 10.06.356). Allows a corporation to establish procedures by which the beneficial owner of shares that are registered in the name of a nominee is recognized by the corporation as the shareholder. The purpose of the section is to facilitate communication between the corporation and the beneficial owner.

Section 12 (AS 10.06.358(c)). Eliminates the unqualified requirement that the amount of distributions payable in property be based on generally accepted accounting principles.

Section 13 (AS 10.06.358(d)). Eliminates the unqualified requirement that the eligibility to make certain

distributions is limited to corporations that classify their assets under generally accepted accounting principles.

Section 14 (AS 10.06.358(e)-(f)). Allows a board to determine that a distribution is not prohibited either by generally accepted accounting principles or by accounting practices and principles that are fair and reasonable in the circumstances. States that statements and determinations prepared or arrived at under generally accepted accounting principles are fair and reasonable, but that the fairness and reasonableness of statements and determinations made under other practices and principles must be proved by the corporation.

Section 15 (AS 10.06.360). Changes the insolvency test. Allows existing directors to make the distribution and then determine whether the distribution did, in fact, render the corporation unable to meet its current debts. If it does, the corporation could theoretically recover the illicit dividend from the shareholders.

Section 16 (AS 10.06.385(b)). Coordinates subsection with new ability to issue certificateless shares.

Section 17 (AS 10.06.385(d)). Coordinates subsection with new ability to issue certificateless shares.

Section 18 (AS 10.06.405). States that the failure of a corporation to hold an annual meeting at the required time does not cause the corporation to forfeit its status, does not cause a dissolution of the corporation, and does not affect the validity of corporate action. Restores to the new corporations code the section from the former corporations code that indicated that the failure did not affect the validity of corporate action.

Section 19 (AS 10.06.410). Substitutes a ten-day minimum notice of shareholders' meeting for the current twenty-day requirement because some corporations find it difficult to know 20 days ahead that a meeting will be necessary. Makes a minor change relating to the mailing of the meeting notice to a shareholder's new address.

Section 20 (AS 10.06.418(b)). Makes two minor changes relating to revocation of a proxy.

Section 21 (AS 10.06.418(e)). Defines the term "pledgee" and makes a citation change to coordinate with the changes to AS 10.06.425.

Section 22 (AS 10.06.418(f)). Coordinates the section with the changes in AS 10.06.425.

Section 23 (AS 10.06.418(g)). Gives to a transferee (of a share having an otherwise irrevocable proxy) title clear of the proxy unless the transferee knows about the proxy provision or the proxy, or the irrevocability or notice of the proxy appears on the certificate.

Section 24 (AS 10.06.420(c)). Allows a shareholder's authorized attorney-in-fact to vote for the shareholder in person or by written proxy.

Section 25 (AS 10.06.420(e)). Clarifies the intent of the subsection. States that shares may not be voted if they are owned, directly or indirectly, by a second corporation, domestic or foreign, and if the first corporation owns, directly or indirectly, a majority of the shares entitled to vote for the directors of the second corporation. This section is based on a public policy objection to permitting a corporate subsidiary that is presumably under the direct or indirect control of the parent to vote shares of the parent at a meeting of the parent corporation's shareholders.

Section 26 (AS 10.06.420(i)). Coordinates subsection with new ability to issue certificateless shares.

Section 27 (AS 10.06.421). Based on the Revised Model Business Corporation Act, its purpose is to provide guidelines for election judges and directors when deciding whether to accept certain documents.

Section 28 (AS 10.06.425(a). Indicates that the subsection doesn't invalidate an irrevocable proxy that complies with AS 10.06.418(e).

Section 29 (AS 10.06.425(b). Rewrites the subsection to expressly allow shareholders to enter into a voting agreement or any other agreement if the agreement is consistent with this chapter.

Section 30 (AS 10.06.430(a)). Makes technical wording changes to make the use of the term "books and records of account" consistent throughout the section.

Section 31 (AS 10.06.430(b)). Conforms the section to the demand and scope provisions of Sec. 16.02(b)-(c) of the Revised Model Business Corporation Act. Requires that a shareholder's demand to inspect the books and records of a corporation be made with reasonable particularity. Places some burden on the shareholder making the request in order to avoid harassment requests. Substitutes "directly connected" for "relevant". Makes a technical wording change to make the use of the term "books and records of account" consistent throughout the section.

Section 32 (AS 10.06.430(c)). Makes technical wording changes, including one to make the use of the term "books and records of account" consistent throughout the section.

Section 33 (AS 10.06.433(a)). Exempts a corporation with less than 100 shareholders from the requirement of sending out an annual report, unless its articles or bylaws impose the requirement.

Section 34 (AS 10.06.435(a)). Coordinates subsection with new ability to issue certificateless shares.

Section 35 (AS 10.06.450(c)). Is taken from Sec. 8.30(c) of the Revised Model Business Corporation Act and indicates when a director cannot be considered to be acting in good faith.

Section 36 (AS 10.06.450(f)). Follows the suggestion of the ALI Statement on Corporate Governance and articulates the business judgment defense for directors. No jurisdiction has, to this point, ever attempted a statutory formulation of the business judgment rule. The reader is referred to the official comments of the ALI statement for a fuller understanding of the relationship between the duties of care and loyalty and the business judgment rule.

Section 37 (AS 10.06.453(a)). States that the board consists of one or more members. Establishes how the number of directors is fixed. Restricts changing the number of directors to amendment of the articles, if the articles fix the number of directors. Sets the number of directors at three if the number is not otherwise set.

Section 38 (AS 10.06.453(b)). Coordinates subsection with new language of AS 10.06.453(a).

Section 39 (AS 10.06.465(d)). Allows a director to resign at any time.

Section 40 (AS 10.06.470(a)). Coordinates subsection with new language of AS 10.06.453(a).

Section 41 (AS 10.06.470(b)). Allows a corporation to establish in its bylaws the machinery for holding a special board meeting or a meeting of a committee designated by the board. Shortens the general provision relating to the minimum required written notice of the meeting from 20 to 10 days and notice by other listed means from 72 to 24 hours. The general requirement that notice of a special meeting must disclose the proposed agenda is made subject to bylaw provisions.

Section 42 (AS 10.06.483(d)). Corrects a citation. Deletes the reference to "share certificates" because they are covered by another section and there was a conflict.

Section 43 (AS 10.06.483(e)). Allows officers a limited right to rely on legal counsel and public accountants.

Section 44 (AS 10.06.483(f)-(g)). Follows the suggestion of the ALI Statement on Corporate Governance and articulates the business judgment defense for officers. No jurisdiction has, to this point, ever attempted a statutory formulation of the business judgment rule. The reader is referred to the official comments of the ALI statement for a fuller understanding of the relationship between the duties of care and loyalty and the business judgment rule.

Section 45 (AS 10.06.576(f)). Coordinates subsection with new ability to issue certificateless shares.

Section 46 (AS 10.06.576(g)). Coordinates subsection with new ability to issue certificateless shares.

Section 47 (AS 10.06.578(c)). Coordinates subsection with new ability to issue certificateless shares.

Section 48 (AS 10.06.580(f)). Coordinates subsection with new ability to issue certificateless shares.

Section 49 (AS 10.06.605(b)). In addition to technical changes, indicates that a corporation may dissolve if one of the three listed situations occurs.

Section 50 (AS 10.06.528(d)). Coordinates subsection with changes to AS 10.06.425(d).

Section 51 (AS 10.06.530(e)). Coordinates subsection with changes to AS 10.06.425(e).

Section 52 (AS 10.06.633(a)). Allows the commissioner to dissolve a corporation if the corporation is delinquent six months in paying its biennial corporation tax. Deletes paragraph (8) since AS 10.06.155 (registration of agent by nonresident with controlling interest) is repealed by sec. 57 of the bill.

Section 53 (AS 10.06.828). Makes an application for a certificate of authority or any other application subject to a filing fee.

Section 54 (AS 10.06.855). Requires that fees and charges provided for in AS 10.06 be paid in advance.

Section 55 (AS 10.06.960). Updates the citation for the Alaska Native Claims Settlement Act.

Section 56 (AS 10.06.960(e)-(f)). Grants the boards of native corporations the authority to amend their articles without the necessity of a vote of the shares if the purpose is to bring the articles into conformity with federal law. Defines "act" for the section.

Section 57 (AS 10.06.990(12)). Deletes the term "controlling interest" since it is not used in AS 10.06.

Section 58 (AS 10.06.990(47)). Defines "entire board" for the chapter.

Section 59 (AS 10.06.155). Repeals AS 10.06.155, "Registration of agent by non-resident with controlling interest".

Section 60 gives the bill an effective date.

TLB:lmb
L7/024

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

M E M O R A N D U M April 24, 1989

SUBJECT: Sectional analysis of CSSB 204(Jud)
(Work Order 6-0953E)

TO: Senator Pat Rodey

FROM: Theresa L. Bannister TLB
Legislative Counsel

This provides a sectional analysis of the above described bill.

As a preliminary matter, note that a sectional analysis or summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1 (AS 10.06.010). Eliminates an inconsistency with AS 10.06.485 by making the loan approval requirement applicable to employee loans as well as loans to officers and directors. Clarifies that a corporation has the power to make guarantees to eliminate a question that they were included in corporate powers. Gives corporations the powers of a limited or general partner. Corrects the term for joint ventures.

Section 2 (AS 10.06.020). The current content is designed to protect third parties from an ability of the corporation, or any shareholder asserting a derivative claim, to evade liability for an act or undertaking of a corporate agent by claiming that it was done without real authority. The amendment allows the corporation to assert limitations on the powers of corporate agents set forth in the articles but not to assert limitations found in its bylaws or board resolutions as a defense to the third party's claim. This change would protect shareholders to the extent that the articles of the corporation contained such limitations on either the nature of agency power or the manner of its exercise.

Section 3 (AS 10.06.025(a)). Deletes language that created an internal conflict within AS 10.06.

Section 4 (AS 10.06.105(c)). Clarifies that the subsection is not intended to prevent a limited partnership from using "limited" or an abbreviation of "limited" in its name.

Section 5 (AS 10.06.130). Eliminates the need for a corporation to take any other steps to protect the exclusivity of its name and allows the corporation to enjoin the use of the same or a deceptively similar name.

Section 6 makes a technical deletion in order to make AS 10.06.230(a) consistent with the other changes made in the bill regarding the number of directors.

Section 7 (AS 10.06.343). States that the corporation may issue stock purchase rights or options for shares of any class or classes. Substitutes "shall" for "must" as a technical change.

Section 8 (AS 10.06.348). Coordinates AS 10.06.348 with the proposed new AS 10.06.349.

Section 9 (AS 10.06.349). Allows a corporation to issue shares without certificates and establishes a procedure for notifying the shareholder of certain information that is usually disclosed on certificates under other sections of AS 10.06.

Section [illegible] (AS 10.06.353). Coordinates section with new abilit[illegible] issue certificateless shares.

Sect[illegible] 11 (AS 10.06.355). Coordinates section with new abi[illegible] to issue certificateless shares.

Sec[illegible] 12 (AS 10.06.356). Allows a corporation to establis[illegible]ocedures by which the beneficial owner of shares that are [illegible]stered in the name of a nominee is recognized by the corpo[illegible]ion as the shareholder. The purpose of the section is to [illegible]ilitate communication between the corporation and the ben[illegible]icial owner.

Section 13 (AS 10.06.358(c)). Eliminates the unqualified requirement that the amount of distributions payable in property be based on generally accepted accounting principles.

Section 14 (AS 10.06.358(d)). Eliminates the unqualified requirement that the eligibility to make certain dis-

tributions is limited to corporations that classify their assets under generally accepted accounting principles.

Section 15 (AS 10.06.358(e)-(f)). Allows a board to determine that a distribution is not prohibited either by generally accepted accounting principles or by accounting practices and principles that are fair and reasonable in the circumstances. States that statements and determinations prepared or arrived at under generally accepted accounting principles are fair and reasonable, but that the fairness and reasonableness of statements and determinations made under other practices and principles must be proved by the corporation.

Section 16 (AS 10.06.360). Changes the insolvency test. Allows existing directors to make the distribution and then determine whether the distribution did, in fact, render the corporation unable to meet its current debts. If it does, the corporation could theoretically recover the illicit dividend from the shareholders.

Section 17 (AS 10.06.385(b)). Coordinates subsection with new ability to issue certificateless shares.

Section 18 (AS 10.06.385(d)). Coordinates subsection with new ability to issue certificateless shares.

Section 19 (AS 10.06.405). States that the failure of a corporation to hold an annual meeting at the required time does not cause the corporation to forfeit its status, does not cause a dissolution of the corporation, and does not affect the validity of corporate action. Restores to the new corporations code the section from the former corporations code that indicated that the failure did not affect the validity of corporate action.

Section 20 (AS 10.06.410). Substitutes a ten-day minimum notice of shareholders' meeting for the current twenty-day requirement because some corporations find it difficult to know 20 days ahead that a meeting will be necessary. Makes a minor change relating to the mailing of the meeting notice to a shareholder's new address.

Section 21 makes technical changes to make AS 10.06.413(a) consistent with the 10-day notice requirement in sec. 45 of this bill.

Section 22 makes a technical change to make AS 10.06.413(c) compatible with the 10-day notice requirement in sec. 45 of this bill.

Section 23 (AS 10.06.418(b)). Makes two minor changes relating to revocation of a proxy.

Section 24 (AS 10.06.418(e)). Defines the term "pledgee" and makes a citation change to coordinate with the changes to AS 10.06.425.

Section 25 (AS 10.06.418(f)). Coordinates the section with the changes in AS 10.06.425.

Section 26 (AS 10.06.418(g)). Gives to a transferee (of a share having an otherwise irrevocable proxy) title clear of the proxy unless the transferee knows about the proxy provision or the proxy, or the irrevocability or notice of the proxy appears on the certificate.

Section 27 (AS 10.06.420(e)). Clarifies the intent of the subsection. States that shares may not be voted if they are owned, directly or indirectly, by a second corporation, domestic or foreign, and if the first corporation owns, directly or indirectly, a majority of the shares entitled to vote for the directors of the second corporation. This section is based on a public policy objection to permitting a corporate subsidiary that is presumably under the direct or indirect control of the parent to vote shares of the parent at a meeting of the parent corporation's shareholders.

Section 28 (AS 10.06.420(i)). Coordinates subsection with new ability to issue certificateless shares.

Section 29 (AS 10.06.421). Based on the Revised Model Business Corporation Act, its purpose is to provide guidelines for election judges and directors when deciding whether to accept certain documents.

Section 30 adds a new section addressing the use of shareholder agreements.

Sec. 10.06.424(a) authorizes the use of unanimous shareholder agreements that impose restrictions on the transfer or registration of corporate shares to accomplish certain listed purposes and any other reasonable purpose.

Sec. 10.06.424(b) authorizes the use of unanimous shareholder agreements to provide for the selection of directors and officers.

Sec. 10.06.424(c) establishes disclosure requirements when there is a shareholders' agreement under this section.

Sec. 10.06.424(d) removes certain shares in certain circumstances from being covered by a shareholders' agreement under this section.

Sec. 10.06.424(e) defines "shares" to include a security that is convertible into shares or that carries a right to subscribe for or acquire shares.

Section 31 (AS 10.06.425(a). Indicates that the subsection doesn't invalidate an irrevocable proxy that complies with AS 10.06.418(e).

Section 32 (AS 10.06.425(b). Rewrites the subsection to expressly allow shareholders to enter into a voting agreement or any other agreement if the agreement is consistent with this chapter.

Section 33 (AS 10.06.430(a)). Makes technical wording changes to make the use of the term "books and records of account" consistent throughout the section.

Section 34 (AS 10.06.430(b)). Conforms the section to the demand and scope provisions of Sec. 16.02(b)-(c) of the Revised Model Business Corporation Act. Requires that a shareholder's demand to inspect the books and records of a corporation be made with reasonable particularity. Places some burden on the shareholder making the request in order to avoid harassment requests. Substitutes "directly connected" for "relevant". Makes a technical wording change to make the use of the term "books and records of account" consistent throughout the section.

Section 35 (AS 10.06.430(c)). Makes technical wording changes, including one to make the use of the term "books and records of account" consistent throughout the section.

Section 36 (AS 10.06.433(a)). Exempts a corporation with less than 100 shareholders from the requirement of sending out an annual report, unless its articles or bylaws impose the requirement.

Section 37 (AS 10.06.435(a)). Coordinates subsection with new ability to issue certificateless shares.

Section 38 (AS 10.06.450(c)). Is taken from Sec. 8.30(c) of the Revised Model Business Corporation Act and indicates ·· ɔn a director cannot be considered to be acting in good ɹth.

Section 39 (AS 10.06.450(f)). Follows the suggestion of the ALI Statement on Corporate Governance and articulates the business judgment defense for directors. No jurisdiction has, to this point, ever attempted a statutory formulation of the business judgment rule. The reader is referred to the official comments of the ALI statement for a fuller understanding of the relationship between the duties of care and loyalty and the business judgment rule.

Section 40 (AS 10.06.453(a)). States that the board consists of one or more members. Establishes how the number of directors is fixed. Restricts changing the number of directors to amendment of the articles, if the articles fix the number of directors. Sets the number of directors at three if the number is not otherwise set.

Section 41 (AS 10.06.453(b)). Coordinates subsection with AS 10.06.230 and the new language of AS 10.06.453(a).

Section 42 (AS 10.06.465(d)). Allows a director to resign at any time.

Section 43 (AS 10.06.470(a)). Coordinates subsection with new language of AS 10.06.453(a).

Section 44 (AS 10.06.470(b)). Allows a corporation to establish in its bylaws the machinery for holding a special board meeting or a meeting of a committee designated by the board. Shortens the general provision relating to the minimum required written notice of the meeting from 20 to 10 days and notice by other listed means from 72 to 24 hours. The general requirement that notice of a special meeting must disclose the proposed agenda is made subject to bylaw provisions.

Section 45 (AS 10.06.483(d)). Corrects a citation. Deletes the reference to "share certificates" because they are covered by another section and there was a conflict.

Section 46 (AS 10.06.483(e)). Allows officers a limited right to rely on legal counsel and public accountants.

Section 47 (AS 10.06.483(f)-(g)). Follows the suggestion of the ALI Statement on Corporate Governance and articulates the business judgment defense for officers. No jurisdiction has, to this point, ever attempted a statutory formulation of the business judgment rule. The reader is referred to the official comments of the ALI statement for a fuller understanding of the relationship between the duties of care and loyalty and the business judgment rule.

Section 48 (AS 10.06.576(f)). Coordinates subsection with new ability to issue certificateless shares.

Section 49 (AS 10.06.576(g)). Coordinates subsection with new ability to issue certificateless shares.

Section 50 (AS 10.06.578(c)). Coordinates subsection with new ability to issue certificateless shares.

Section 51 (AS 10.06.580(f)). Coordinates subsection with new ability to issue certificateless shares.

Section 52 (AS 10.06.605(b)). In addition to technical changes, indicates that a corporation may dissolve if one of the three listed situations occurs.

Section 53 (AS 10.06.528(d)). Coordinates subsection with changes to AS 10.06.425(d).

Section 54 (AS 10.06.530(e)). Coordinates subsection with changes to AS 10.06.425(e).

Section 55 (AS 10.06.633(a)). Allows the commissioner to dissolve a corporation if the corporation is delinquent six months in paying its biennial corporation tax. Deletes paragraph (8) since AS 10.06.155 (registration of agent by nonresident with controlling interest) is repealed by sec. 61 of the bill.

Section 56 (AS 10.06.828). Makes an application for a certificate of authority or any other application subject to a filing fee.

Section 57 (AS 10.06.855). Requires that fees and charges provided for in AS 10.06 be paid in advance.

Section 58 (AS 10.06.960). Updates the citation for the Alaska Native Claims Settlement Act.

Section 59 (AS 10.06.960(e)-(g)). Grants the boards of native corporations the authority to amend their articles without the necessity of a vote of the shares if the purpose is to bring the articles into conformity with federal law. Defines "act" for the section. States that a native corporation is governed by ANCSA (43 U.S.C. 1601 - 1629e) to the extent the act is inconsistent with AS 10.06, authorizes the corporation to take any action, including amendments of its articles, authorized by ANCSA, and considers the action approved and adopted if approved under ANCSA. States that an amendment approved under ANCSA and delivered to the commissioner under AS 10.06.512 shall be filed by the commissioner under AS 10.06.910, and a certificate of amendment issued.

Section 60 (AS 10.06.990(12)). Deletes the term "controlling interest" since it is not used in AS 10.06.

Section 61 (AS 10.06.990(47)). Defines "entire board" for the chapter.

Section 62 authorizes a native corporation, under certain conditions and after the effective date of the corporations code, to continue to elect its directors in the classes and for the terms provided under its bylaws, notwithstanding certain sections of AS 10.06. Withdraws this authorization if the corporation modifies or eliminates its bylaw provisions on the classification and terms of its directors.

Section 63 (AS 10.06.155). Repeals AS 10.06.155 ("Registration of agent by non-resident with controlling interest"), 10.06.210(1)(L), and 10.06.230(b). AS 10.06.210(1)(L) is repealed because it is not consistent with the changes made in sec. 37. AS 10.06.230(b) is inconsistent with the changes made in the bill regarding the number of directors.

Section 64 gives the bill an effective date.

TLB:lmb:kb
L7/074

Halfore

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

MEMORANDUM April 25, 1989

SUBJECT: Sectional comparison and analysis of proposed CSSB 204(Jud) and SB 204

TO: Senator Pat Rodey

FROM: Theresa L. Bannister TB
Legislative Counsel

This provides a sectional comparison and analysis of the above described bills.

As a preliminary matter, note that a sectional comparison and analysis of a bill should not be considered an authoritative interpretation of the bills and the bills themselves are the best statement of their contents.

Section 1 (AS 10.06.010). Same as SB 204. Eliminates an inconsistency with AS 10.06.485 by making the loan approval requirement applicable to employee loans as well as loans to officers and directors. Clarifies that a corporation has the power to make guarantees to eliminate a question that they were included in corporate powers. Gives corporations the powers of a limited or general partner. Corrects the term for joint ventures.

Section 2 (AS 10.06.020). Same as SB 204. The current content is designed to protect third parties from an ability of the corporation, or any shareholder asserting a derivative claim, to evade liability for an act or undertaking of a corporate agent by claiming that it was done without real authority. The amendment allows the corporation to assert limitations on the powers of corporate agents set forth in the articles but not to assert limitations found in its by-laws or board resolutions as a defense to the third party's claim. This change would protect shareholders to the extent that the articles of the corporation contained such limitations on either the nature of agency power or the manner of its exercise.

Section 3 (AS 10.06.025(a)). Same as SB 204. Deletes language that created an internal conflict within AS 10.06.

Section 4 (AS 10.06.105(c)). Same as SB 204, except adds "or an abbreviation of "limited"."

Section 5 (AS 10.06.130). Same as SB 204. Eliminates the need for a corporation to take any other steps to protect the exclusivity of its name and allows the corporation to enjoin the use of the same or a deceptively similar name.

Section 6 (AS 10.06.230(a)). A new section. Makes a technical deletion in order to make AS 10.06.230(a) consistent with the other changes made in the bill regarding the number of directors.

Section 7 (AS 10.06.343). Same as sec. 6 in SB 204. States that the corporation may issue stock purchase rights or options for shares of any class or classes. Substitutes "shall" for "must" as a technical change.

Section 8 (AS 10.06.348). Same as sec. 7 in SB 204. Coordinates AS 10.06.348 with the proposed new AS 10.06.349.

Section 9 (AS 10.06.349). Same as sec. 8 in SB 204. Allows a corporation to issue shares without certificates and establishes a procedure for notifying the shareholder of certain information that is usually disclosed on certificates under other sections of
AS 10.06.

Section 10 (AS 10.06.353). Same as sec. 9 in SB 204. Coordinates section with new ability to issue certificateless shares.

Section 11 (AS 10.06.355). Same as sec. 10 in SB 204. Coordinates section with new ability to issue certificateless shares.

Section 12 (AS 10.06.356). Same as sec. 11 in SB 204. Allows a corporation to establish procedures by which the beneficial owner of shares that are registered in the name of a nominee is recognized by the corporation as the shareholder. The purpose of the section is to facilitate communication between the corporation and the beneficial owner.

Section 13 (AS 10.06.358(c)). Same as sec. 12 in SB 204. Eliminates the unqualified requirement that the amount of

distributions payable in property be based on generally accepted accounting principles.

Section 14 (AS 10.06.358(d)). Same as sec. 13 in SB 204. Eliminates the unqualified requirement that the eligibility to make certain distributions is limited to corporations that classify their assets under generally accepted accounting principles.

Section 15 (AS 10.06.358(e)-(f)). Same as sec. 14 in SB 204. Allows a board to determine that a distribution is not prohibited either by generally accepted accounting principles or by accounting practices and principles that are fair and reasonable in the circumstances. States that statements and determinations prepared or arrived at under generally accepted accounting principles are fair and reasonable, but that the fairness and reasonableness of statements and determinations made under other practices and principles must be proved by the corporation.

Section 16 (AS 10.06.360). Same as sec. 15 in SB 204. Changes the insolvency test. Allows existing directors to make the distribution and then determine whether the distribution did, in fact, render the corporation unable to meet its current debts. If it does, the corporation could theoretically recover the illicit dividend from the shareholders.

Section 17 (AS 10.06.385(b)). Same as sec. 16 in SB 204. Coordinates subsection with new ability to issue certificateless shares.

Section 18 (AS 10.06.385(d)). Same as sec. 17 in SB 204. Coordinates subsection with new ability to issue certificateless shares.

Section 19 (AS 10.06.405). Same as sec. 18 in SB 204. States that the failure of a corporation to hold an annual meeting at the required time does not cause the corporation to forfeit its status, does not cause a dissolution of the corporation, and does not affect the validity of corporate action. Restores to the new corporations code the section from the former corporations code that indicated that the failure did not affect the validity of corporate action.

Section 20 (AS 10.06.410). Same as sec. 19 in SB 204. Substitutes a ten-day minimum notice of shareholders' meet-

ing for the current twenty-day requirement because some corporations find it difficult to know 20 days ahead that a meeting will be necessary. Makes a minor change relating to the mailing of the meeting notice to a shareholder's new address.

Section 21 (AS 10.06.413(a)). A new section. Makes technical changes to make AS 10.06.413(a) consistent with the 10-day notice requirement in sec. 45 of this bill.

Section 22 (AS 10.06.413(c)). A new section. Makes a technical change to make AS 10.06.413(c) compatible with the 10-day notice requirement in sec. 45 of this bill.

Section 23 (AS 10.06.418(b)). Same as sec. 20 of SB 204. Makes two minor changes relating to revocation of a proxy.

Section 24 (AS 10.06.418(e)). Same as sec. 21 of SB 204. Defines the term "pledgee" and makes a citation change to coordinate with the changes to AS 10.06.425.

Section 25 (AS 10.06.418(f)). Same as sec. 22 of SB 204. Coordinates the section with the changes in AS 10.06.425.

Section 26 (AS 10.06.418(g)). Same as sec. 23 of SB 204. Gives to a transferee (of a share having an otherwise irrevocable proxy) title clear of the proxy unless the transferee knows about the proxy provision or the proxy, or the irrevocability or notice of the proxy appears on the certificate.

[Former sec. 24 (AS 10.06.420(c)) of SB 204 has been deleted from proposed CSSB 204(Jud).]

Section 27 (AS 10.06.420(e)). Same as sec. 25 of SB 204. Clarifies the intent of the subsection. States that shares may not be voted if they are owned, directly or indirectly, by a second corporation, domestic or foreign, and if the first corporation owns, directly or indirectly, a majority of the shares entitled to vote for the directors of the second corporation. This section is based on a public policy objection to permitting a corporate subsidiary that is presumably under the direct or indirect control of the parent to vote shares of the parent at a meeting of the parent corporation's shareholders.

Section 28 (AS 10.06.420(i)). Same as sec. 26 of SB 204. Coordinates subsection with new ability to issue certificateless shares.

Section 29 (AS 10.06.421). Same as sec. 27 of SB 204. Based on the Revised Model Business Corporation Act, its purpose is to provide guidelines for election judges and directors when deciding whether to accept certain documents.

Section 30 (sec. 10.06.424). Adds a new section to SB 204 addressing the use of shareholder agreements.

Sec. 10.06.424(a) authorizes the use of unanimous shareholder agreements that impose restrictions on the transfer or registration of corporate shares to accomplish certain listed purposes and any other reasonable purpose.

Sec. 10.06.424(b) authorizes the use of unanimous shareholder agreements to provide for the selection of directors and officers.

Sec. 10.06.424(c) establishes disclosure requirements when there is a shareholders' agreement under this section.

Sec. 10.06.424(d) removes certain shares in certain circumstances from being covered by a shareholders' agreement under this section.

Sec. 10.06.424(e) defines "shares" to include a security that is convertible into shares or that carries a right to subscribe for or acquire shares.

Section 31 (AS 10.06.425(a). Sec. 28 of SB 204. Indicates that the subsection doesn't invalidate an irrevocable proxy that complies with AS 10.06.418(e).

Section 32 (AS 10.06.425(b). Sec. 29 of SB 204. Rewrites the subsection to expressly allow shareholders to enter into a voting agreement or any other agreement if the agreement is consistent with this chapter.

Section 33 (AS 10.06.430(a)). Sec. 30 of SB 204. Makes technical wording changes to make the use of the term "books and records of account" consistent throughout the section.

Section 34 (AS 10.06.430(b)). Sec. 31 of SB 204. Conforms the section to the demand and scope provisions of Sec. 16.02-(b)-(c) of the Revised Model Business Corporation Act. Requires that a shareholder's demand to inspect the books and records of a corporation be made with reasonable particularity. Places some burden on the shareholder making the re-

quest in order to avoid harassment requests. Substitutes "directly connected" for "relevant". Makes a technical wording change to make the use of the term "books and records of account" consistent throughout the section.

Section 35 (AS 10.06.430(c)). Sec. 32 of SB 204. Makes technical wording changes, including one to make the use of the term "books and records of account" consistent throughout the section.

Section 36 (AS 10.06.433(a)). Sec. 33 of SB 204. Exempts a corporation with less than 100 shareholders from the requirement of sending out an annual report, unless its articles or bylaws impose the requirement.

Section 37 (AS 10.06.435(a)). Sec. 34 of SB 204. Coordinates subsection with new ability to issue certificateless shares.

Section 38 (AS 10.06.450(c)). Sec. 35 of SB 204. Is taken from Sec. 8.30(c) of the Revised Model Business Corporation Act and indicates when a director cannot be considered to be acting in good faith.

Section 39 (AS 10.06.450(f)). Sec. 36 of SB 204. Follows the suggestion of the ALI Statement on Corporate Governance and articulates the business judgment defense for directors. No jurisdiction has, to this point, ever attempted a statutory formulation of the business judgment rule. The reader is referred to the official comments of the ALI statement for a fuller understanding of the relationship between the duties of care and loyalty and the business judgment rule.

Section 40 (AS 10.06.453(a)). Sec. 37 of SB 204. States that the board consists of one or more members. Establishes how the number of directors is fixed. Restricts changing the number of directors to amendment of the articles, if the articles fix the number of directors. Sets the number of directors at three if the number is not otherwise set.

Section 41 (AS 10.06.453(b)). A slightly altered version of Sec. 38 of SB 204. Coordinates subsection with AS 10.06.230 and the new language of AS 10.06.453(a). Changes the references in the introductory phrase of the subsection.

Section 42 (AS 10.06.465(d)). Sec. 39 of SB 204. Allows a director to resign at any time.

Section 43 (AS 10.06.470(a)). Sec. 40 of SB 204. Coordinates subsection with new language of AS 10.06.453(a).

Section 44 (AS 10.06.470(b)). Sec. 41 of SB 204. Allows a corporation to establish in its bylaws the machinery for holding a special board meeting or a meeting of a committee designated by the board. Shortens the general provision relating to the minimum required written notice of the meeting from 20 to 10 days and notice by other listed means from 72 to 24 hours. The general requirement that notice of a special meeting must disclose the proposed agenda is made subject to bylaw provisions.

Section 45 (AS 10.06.483(d)). Sec. 42 of SB 204. Corrects a citation. Deletes the reference to "share certificates" because they are covered by another section and there was a conflict.

Section 46 (AS 10.06.483(e)). Sec. 43 of SB 204. Allows officers a limited right to rely on legal counsel and public accountants.

Section 47 (AS 10.06.483(f)-(g)). Sec. 44 of SB 204. Follows the suggestion of the ALI Statement on Corporate Governance and articulates the business judgment defense for officers. No jurisdiction has, to this point, ever attempted a statutory formulation of the business judgment rule. The reader is referred to the official comments of the ALI statement for a fuller understanding of the relationship between the duties of care and loyalty and the business judgment rule.

Section 48 (AS 10.06.576(f)). Sec. 45 of SB 204. Coordinates subsection with new ability to issue certificateless shares.

Section 49 (AS 10.06.576(g)). Sec. 46 of SB 204. Coordinates subsection with new ability to issue certificateless shares.

Section 50 (AS 10.06.578(c)). Sec. 47 of SB 204. Coordinates subsection with new ability to issue certificateless shares.

Section 51 (AS 10.06.580(f)). Sec. 48 of SB 204. Coordinates subsection with new ability to issue certificateless shares.

Section 52 (AS 10.06.605(b)). Sec. 49 of SB 204. In addition to technical changes, indicates that a corporation may dissolve if one of the three listed situations occurs.

Section 53 (AS 10.06.628(d)). Sec. 50 of SB 204. Coordinates subsection with changes to AS 10.06.425(d).

Section 54 (AS 10.06.630(e)). Sec. 51 of SB 204. Coordinates subsection with changes to AS 10.06.425(e).

Section 55 (AS 10.06.633(a)). Sec. 52 of SB 204. Allows the commissioner to dissolve a corporation if the corporation is delinquent six months in paying its biennial corporation tax. Deletes paragraph (8) since AS 10.06.155 (registration of agent by nonresident with controlling interest) is repealed by sec. 61 of the bill.

Section 56 (AS 10.06.828). Sec. 53 of SB 204. Makes an application for a certificate of authority or any other application subject to a filing fee.

Section 57 (AS 10.06.855). Sec. 54 of SB 204. Requires that fees and charges provided for in AS 10.06 be paid in advance.

Section 58 (AS 10.06.960). Same as sec. 55 of SB 204, except corrects citation. Updates the citation for the Alaska Native Claims Settlement Act.

Section 59 (AS 10.06.960(e)-(g)). An altered version of sec. 56 of SB 204. Adds a new subsec. (f). Makes SB 204's subsec. (f) now (g). Grants the boards of native corporations the authority to amend their articles without the necessity of a vote of the shares if the purpose is to bring the articles into conformity with federal law. Defines "act" for the section. States that a native corporation is governed by ANCSA (43 U.S.C. 1601 - 1629e) to the extent the act is inconsistent with AS 10.06, authorizes the corporation to take any action, including amendments of its articles, authorized by ANCSA, and considers the action approved and adopted if approved under ANCSA. States that an amendment approved under ANCSA and delivered to the commissioner under AS 10.06.512 shall be filed by the commissioner under AS 10.06.910, and a certificate of amendment issued.

Section 60 (AS 10.06.990(12)). Same as sec. 57 of SB 204. Deletes the term "controlling interest" since it is not used in AS 10.06.

Section 61 (AS 10.06.990(47)). Same as sec. 58 of SB 204. Defines "entire board" for the chapter.

Section 62. A new section. Authorizes a native corporation, under certain conditions and after the effective date of the corporations code, to continue to elect its directors in the classes and for the terms provided under its bylaws, notwithstanding certain sections of AS 10.06. Withdraws this authorization if the corporation modifies or eliminates its bylaw provisions on the classification and terms of its directors.

Section 63 (AS 10.06.155). An altered version of sec. 59 of SB 204. Adds two additional items to be repealed: AS 10.06.210(1)(L) and AS 10.06.230(b). Repeals AS 10.06.155 ("Registration of agent by non-resident with controlling interest"), 10.06.210(1)(L), and 10.06.230(b). AS 10.06.210(1)(L) is repealed because it is not consistent with the changes made in sec. 37. AS 10.06.230(b) is inconsistent with the changes made in the bill regarding the number of directors.

Section 64 gives the bill an effective date.

TLB:kb
wkk4/046

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SENATOR FRED F. ZHAROFF
ALASKA STATE LEGISLATURE

P.O. BOX 405, KODIAK, ALASKA 99615 (907) 486-5259
DURING SESSION:
P.O. BOX V, JUNEAU, ALASKA 99811 • (907) 465-3473 • 465-3474

DISTRICT N
ALASKA PENINSULA • ALEUTIAN CHAIN • BRISTOL BAY • KODIAK ISLAND • LAKE CLARK/LAKE ILIAMNA • PRIBILOF ISLANDS • SHUMAGIN ISLANDS

MEMORANDUM

TO: Senator Jan Faiks
Chair
Senate Judiciary Committee

FROM: Senator Fred F. Zharoff

DATE: March 21, 1989

RE: Senate Bill 205 - "An Act relating to the lease of certain tideland to nonresidents of the state."

I respectfully request that SB 205 be scheduled for a hearing before the Senate Judiciary Committee at the committee's earliest convenience.

SB 205 raises the rental fees that nonresidents must pay for leases of tideland for set net fishing sites. Under this bill, nonresidents would be charged a fee five times the fee charged to residents. The purpose of this differential is to capture a greater share of the cost that Alaskans bear year-round for the management of the tideland leasing program, the protection and regulation of the marine environment, and the management of our fisheries resources.

Alaska's statutes and departmental fee schedules contain many instances where residents and nonresidents are charged different fees. Some examples:

Commercial Fishing License - $30 for residents, $90 for nonresidents.

Limited entry and interim-use fisheries permits - $250 maximum for residents, $750 maximum for nonresidents.

University of Alaska tuition - $1,013-$1,298 for residents, $2,573-$2,858 for nonresidents.

The Division of Insurance also has an extensive list of fees in which different rates are charged to residents and nonresidents. The Division of Occupational Licensing charges nonresident collection agencies double the fees it charges resident collection agencies.

SB 205 extends this same principle of the resident/nonresident differential to the rental fees the Department of Natural Resources charges for leases of set net fishing sites.

The following backup information is attached:

1. Letter from Assistant Attorney General Larri Spengler, Aug. 22, 1988, explaining why nonresidents may be charged higher fees than residents.

2. List of current market values of Alaska salmon set net limited entry permits and number of nonresidents holding those permits. Though not an exact measurement, permit values do tend to reflect the level of profitability in the fishery.

SET NET PERMIT PRICES AS OF FEB. 28, 1989 AND NUMBER OF NONRESIDENTS HOLDING SET NET PERMITS AS OF DEC. 31, 1988.

Set Net Permits	Average Value	Total Permits	Nonresidents	Percentage
Yakutat	$ 31,000	164	29	17.7
Prince William Sound	$ 49,833	30	3	10.0
Cook Inlet	$ 63,286	743	83	11.2
Kodiak	$ 76,019	187	39	20.9
Alaska Peninsula	$ 85,542	113	19	16.8
Bristol Bay	$ 62,286	941	229	24.3

Source: Commercial Fisheries Entry Commission

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

REPLY TO:

☐ *1031 W 4th AVENUE*
SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 276-3550

☐ *1st NATIONAL CENTER*
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SUITE 400
FAIRBANKS, ALASKA 99701-4679

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

March 14, 1989

The Honorable Jan Faiks, Chair
Senate Judiciary Committee
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Re: SB 205

Dear Senator Faiks:

Senate Bill ("SB") 205, by Senator Zharoff, would amend AS 38.05.082(c) to provide that nonresidents would pay five times the amount paid by Alaska residents to lease state tidelands for set net fishing. The constitutionality of a similar fee differential between residents and nonresidents -- the requirement in AS 16.43.160(b) that nonresidents pay three times the amount paid by Alaska residents for the issuance and annual renewal of limited entry permits -- has been challenged in Carlson v. State, 3AN-84-5790 Civ. We are defending the constitutionality of the limited entry permit fee differential, in part, on the ground that it is justified to ensure that nonresidents pay their fair share of the costs of state activities protecting the marine environment and the state's fishery resources.

To justify a fee differential between residents and nonresidents, the courts require evidence of the costs of the various programs which, it is asserted, justify the differential, and a showing that the differential is reasonably related to the difference in contributions toward those costs by residents and nonresidents. SB 205 would use some of the same justifications for the fee differential with respect to tidelands rental fees that we are citing as justification for the fee differential with respect to limited entry permit fees. In the absence of empirical data regarding the cost of various state programs to protect the marine environment and fishery resources, our ability to defend the constitutionality of the fee differential for limited entry permits could be substantially undermined if we use that identical justification to support a fee differential for tideland leases.

We would be happy to discuss these matters with you or the committee at your convenience.

Sincerely,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By: G. Thomas Koester
G. Thomas Koester
Assistant Attorney General

GTK:dlm
cc: Senator Zharoff
Commissioner Gorsuch
Commissioner Collinsworth
Commissioner Twomley
Bob Evans

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

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PHONE: (907) 465-3600

August 22, 1988

The Hon. Fred Zharoff
Alaska State Legislature
720 Mill Bay Road, Room 231
Kodiak, AK 99615

AUG 29 1988

Re: Leases to non-state residents
Our file: 663-88-0480

Dear Senator Zharoff:

You have inquired whether the state could statutorily require that leases of state land for hunting or fishing lodges, for example, be limited to Alaska residents only, and whether non-state residents could be charged more for such leases than state residents. As discussed below, it appears likely that the state could limit leases of state lands to state residents, depending on what purpose was expressed. It also appears that the state might be able to charge non-state residents more for leases than state residents, but in practical effect that would probably result in state residents obtaining leases for less than fair market value, a policy choice which the legislature would obviously have to consider carefully.

Leasing land for purposes other than the extraction of natural resources is currently governed by AS 38.05.070 -- AS 38.05.105. The general guidelines for leasing are set out in AS 38.05.070, and leasing procedures in AS 38.05.075, neither of which contains a state resident limitation. There are no statutes governing leasing land for the specific purpose you use as an example in your opinion request, namely leasing land for hunting or fishing lodges.

With respect to AS 38.05.082, a specific statute governing leases for shore fisheries development that does not now limit issuance of state tidelands leases to residents of Alaska, this office has in the past expressed the view that it could be amended to add such a limitation. 1983 Op. Att'y Gen. No. 3 (April 21). We explained that such a limitation would have to be shown to be "reasonable, not arbitrary, and [it] must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." Id., at 6-7, quoting Gilman v. Martin, 662 P.2d 120, 125 (Alaska 1983), in turn quoting State v. Wylie, 516 P.2d 142, 145 (Alaska 1983). Our office noted with respect to the prospect of restricting shore fishery

leases to residents that "since article VIII, section 17, of the Alaska Constitution requires that 'laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation,' it is especially important that any residency requirement be based upon valid constitutional and statutory objectives." 1983 Op. Att'y Gen. No. 3 (April 21), p. 7.

In Gilman v. Martin, 662 P.2d 120 (Alaska 1983), the Alaska Supreme Court was examining a land sale lottery ordinance of the Kenai Peninsula Borough which, among other things, restricted participants to residents of the borough. The court noted that the borough contended its discrimination against non-residents was not unconstitutional and that "one of the purposes of the state's grant of land to it was to permit the borough to sell the land to its residents." Id. at 126. The borough argued that thus "all boroughs may limit the sale of land received from the state to residents of the boroughs." Id. Unfortunately for the borough's argument, which the court said otherwise "might have been worthy of consideration," the ordinance did not state that to be its purpose. Id. Instead, it specifically indicated that its purpose was to "resolve existing controversies regarding access and title." Id. The court concluded that the decision by the borough to restrict the sale of its land through the lottery to borough residents -- "and thereby assist only 44 percent of the land owners in resolving existing controversies regarding access and title" -- was "unreasonable" and without "some ground of difference having a fair and substantial relation to the [avowed] object of the legislation, so that all persons similarly circumstanced [are] treated alike." Id. at 126-27 (brackets in original).

Thus, it is clear that in evaluating a statutory restriction of state land leases to state residents, a court would look closely at whether the purpose of the legislation amounted to a legitimate governmental objective, and secondly, whether the means chosen (the limitation to state residents) further the purported goals. Alaska Pacific Assurance Company v. Brown, 687 P.2d 264, 269-70 (Alaska 1984). An example of a goal which might well be considered legitimate by a court is one similar to the one mentioned by the court in Gilman, distribution of state land to state residents. That could be particularly persuasive if there was not sufficient land being made available for lease for all residents desiring to have some, at least if non-residents were also allowed to apply. On the other hand, if the purpose were, for example, to discourage newcomers from moving to

Alaska, the purpose might not be viewed as legitimate, given the United States Constitution's protection of interstate commerce.

You have also inquired whether it is possible to impose a different rate structure for nonresident leases, "similar to the one in place for hunting and fishing licenses whereby non-residents could be charged a higher fee." Under Alaska statutes, non-state residents can be charged up to three times the amount as state residents for engaging in commercial fishing. AS 16.05.480; AS 16.43.160. In that instance, we believe the fee differential is constitutional because the sum that nonresidents pay only compensates the state for their share of the state's expenses in conserving and managing its fisheries. The United States Supreme Court has explained that the "state is not without power...to charge nonresidents a differential which would merely compensate the state for any added enforcement burden they may impose or for any conservation expenditures." Toomer v. Whitsell, 334-US-385, 398-9 9 (1948).

In a broader context, the Alaska Supreme Court has noted that "freedom from disparate taxation is not a federally protected fundamental right for the purpose of equal protection analysis under the 14th Amendment." Williams v. Zobel, 619 P.2d 422, 427 (Alaska 1980). Logically, the same conclusion could be reached with respect to disparate leasing fees. Accordingly, the appropriate standard of review would be to determine whether the classification bears a fair and substantial relation to a legitimate governmental objective. Id. Thus, if some rationale exists for charging non-state residents higher fees than residents, it would appear that a differential leasing fee schedule could be authorized. For example, if non-state residents were escaping bearing their share of the leasing program's administrative costs, a differential compensating for that might well be justified. (In such a case, Alaska residents would be shouldering their share by money from their state's resources being allocated to pay the administrative costs.)

The possibility of different fees, however, raises a practical problem. Currently, under AS 38.05.075 and AS 38.05.840, in general land leased in Alaska is already required to be leased at fair market value. Since it would not be likely that non-state residents would wish to pay greater than fair market value for the lease of state land in Alaska, it appears that the only way to impose a fee differential based on residency would be to allow state residents to lease state land at less than fair market value. For example, currently AS 38.05.810 provides that state land may be leased (or otherwise disposed of) to a state or federal agency or a political

subdivision for less than the appraised value if that is determined by the Commissioner of Natural Resources to be "fair and proper and in the best interests of the public." Whether the legislature would wish to forego receiving the full fair market value for leases of state land to residents is obviously a policy choice. If the legislature determined that such a choice was desirable, it should explain its reasons, so that it is clear that the differential bears a substantial relationship to a legitimate governmental objective, as discussed above.

Another policy question that the legislature may wish to consider with respect to both alternatives--limitation of leases to residents and fee differentials--is whether subleasing by residents to nonresidents should be statutorily prohibited. If it were not, whatever purpose the legislature believed was being served by the basic enactment could be circumvented. Obviously, whether subleasing would pose a problem would depend on what purposes the legislature wanted to further. If use of state land by state residents was the purpose, the situation might be different than if the goal was to foster state residents making money off of state land.

In sum, with the proper legislative findings demonstrating the legitimacy of the ends, and the connection of the means to the ends, leases of state lands could be statutorily limited to state residents, or a higher fee could be charged to non-state residents for those leases.

Sincerely,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: Larri Irene Spengler
Larri Irene Spengler
Assistant Attorney General

LIS:tg

cc: Judith Brady, Commissioner
Department of Natural Resources

Rod Swope, Special Assistant
Office of the Governor

Tom Koester, Assistant Attorney General
Department of Law

STATE OF ALASKA

Bill Sheffield, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K – STATE CAPITOL
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PHONE: (907) 465-3600

April 21, 1983

AG OP #03, 1983

The Honorable Jerry Ward
Representative
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Re: Can the state require shore fisheries lessees to be residents?
Our file: 366-511-83

Dear Representative Ward:

Thank you for your recent request regarding the constitutionality of shore fishery leases under AS 38.05.082 and the possibility of amending its provisions to require that shore fisheries leases be restricted to residents of Alaska.

In summary, we believe the provision does satisfy the U.S. and Alaska Constitutions, and it can be amended to exclude nonresidents.

A. Statutory Background

Section 82(a) of the Alaska Land Act (ch. 160, SLA 1959) provides for the lease of tide and submerged lands for fisheries development purposes. Specific mention is made of shore leases for set net sites. Associated legislative findings evidence the need to limit the number of set net sites in the "interest of conservation." Sec. 1, ch. 93, SLA 1963.

Implementing regulations provide for the establishment

of tidelands leases in all areas open to fishing by the Alaska Board of Fisheries. 11 AAC 64.200. The distance between sites corresponds to minimum distances the board allows between gill nets. 11 AAC 64.100. Set net areas in various parts of the state are limited by regulation to beaches exposed at low tide (5 AAC 06.331(e)), specified distances from shore (5 AAC 06.-31(i)(2)) and portions of waterways (5 AAC 03.331(b); 5 AAC 04.331(b); 5 AAC 05.331(e); 5 AAC 07.31(e)). In many areas, strong tidal currents (Cook Inlet) or deep water (Kodiak, Prince William Sound) make it possible to fish set gill nets only from beaches.

Regulations of the Alaska Board of Fisheries provide for set net fishing for salmon in all areas of the state except Southeast Alaska, the Aleutian Islands and Chignik. 1/ According to recent data from the Alaska Commercial Fisheries Entry Commission, of 4529 fishermen who have received set net permits for 1983, only 350 are nonresidents, or 7.7% of the total. 2/ Appendix A gives the area breakdown.

1/ See Title 5, Alaska Administrative Code at sections .330 of chapters 3 -- 7, 9, 12, 15, 21, and 24.

2/ A resident for purposes of licensing under AS 16.05.480 is a person who has maintained a permanent place of abode in Alaska for 12 consecutive months and who has continually maintained his voting residence here. AS 16.05.940(14).

Although other provisions of the Alaska Land Act include residency requirements (e.g., AS 38.05.057, 38.05.058, and 38.05.069), the shore fisheries provisions include no residency restriction.

B. AS 38.05.082 Does Not Establish An Exclusive Right Of Fishery

Your question regarding the validity of shore fisheries leases under the Constitution of Alaska requires analysis of art. VIII, sec. 15 which prohibits creation or authorization of an "exclusive right or special privilege of fishery . . . in the natural waters of the State."

As explained in the attached March 13, 1963 Attorney General's Opinion, establishment of individual tidelands leases for fisheries purposes does not violate this section. This opinion notes that individual uses of tidelands are based on real property rights and do not represent an exclusive fishery interest in "the natural waters of the state." The opinion points to the predecessor provision of art. 15 in the federal law applicable to the Territory of Alaska. That statute, known as the White Act, 43 Stat. 464, 48 U.S.C. § 221 (June 6, 1924), also prohibited exclusive rights to fisheries. However, that prohibition did not preclude exclusive use of tideland property for a limited number of fish traps. See e.g., Dow v. Ickes, 123 F.2d 909, 916 (D.C. Cir. 1941).

In other words, as long as a lease of tidelands grants

only a property interest, the lease is compatible with art. VIII, sec. 15.

In this case, the shore fishery lease is strictly a property interest. The lease does not grant an interest in water nor does it assure an exclusive share or quota of fish or have any other bearing on harvests. 3/ Indeed, set net fishermen usually compete with other gear types 4/ and, even where set nets are the only legal gear type, 5/ a shore fisheries lease is no guarantee that fish will actually be harvested.

Accordingly, it is our opinion that AS 38.05.082 does not create an exclusive right of fishery and therefore is not

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3/ The Alaska Board of Fisheries is responsible for establishing fishing areas, methods and means, seasons and periods, and all other fisheries management requirements. AS 16.05.251(a). The commissioner of the Alaska Department of Fish and Game has joint authority to set seasons and areas. AS 16.05.060.

4/ For example, both drift gill nets and set gill nets are permitted in Norton Sound (5 AAC 04.330), the Yukon area (5 AAC 05.330), Bristol Bay (5 AAC 06.330), the Kuskokwim (5 AAC 07.330), the Alaska Peninsula (5 AAC 09.330(a) -- (e)), Kodiak (5 AAC 18.330(b)(1)), the Cook Inlet area (5 AAC 21.330), and the Eshamy District of the Prince William Sound area (5 AAC 124.331(b)(51); set gill nets and troll gear share fishing opportunities in the Yakutat area under 5 AAC 30.330.

5/ Set nets only are permitted in the Kotzebue-Northern area (5 AAC 03.330), Port Clarence (5 AAC 04.330), Alaska Peninsula (5 AAC 09.330(f)(3), and part of the Alitak area Kodiak (5 AAC 18.330(b)(5)), and in the Northern district of Cook Inlet (5 AAC 21.330).

unconstitutional under art. VIII, sec. 15 of the Alaska Constitution.

C. Residency Requirements

Your letter also refers to the possibility of amending AS 38.05.082 to limit issuance of state tidelands leases for fisheries development to residents of Alaska. Since the leasehold interest in question is not a fisheries interest, but is an interest in property originating in the Alaska Land Act, it is possible to grant an exclusive land interest to residents of Alaska only if such restrictions do not violate the equal protection clauses of the U.S. and Alaska Constitutions.

Several recent cases have struck down the award of various benefits based solely on length of residency, especially where that residency referred to accumulated years of residence before the enactment of the statute. Williams v. Zobel, 619 P.2d 422 (Alaska 1980); Williams v. Zobel, 619 P.2d 448 (Alaska 1980); Williams v. Zobel, ____ U.S. ____, 102 S.Ct. 2309 (1982). However, courts have allowed a broad variety of other state services to be reserved to residents. These include college tuition, Vlandis v. Kline, 412 U.S. 441 (1973); termination of marriage relationships, Sosna v. Iowa, 419 U.S. 393 (1975); voting privileges, Dunn v. Blumstein, 405 U.S. 330 (1972) and others so long as a certain durational length of residency is not a

qualifying factor. 6/ We believe grants of interests in land owned by the state are included in this group. In fact, on April 1, 1983, the Alaska Supreme Court issued an opinion regarding the validity of restricting land grants to residents. In that case the Kenai Peninsula Borough restricted a local land lottery to borough residents. Gilman v. Martin, slip op. no. 2652 (April 1, 1983). The court found that sale of land to residents might have been permissible if "the purpose of the lottery was to benefit its residents." Id at 15. However, in that case the court invalidated the borough's residency restriction because there was no indication that the ordinance was benefiting area residents. Instead, the ordinance was designed to sell land to "adjoining property owners or to leaseholders so as to resolve existing controversies regarding access and title." Id. No reason was given for the differential treatment between residents and non-residents.

Therefore, though it is possible to restrict land disposals to residents, the restriction "must be reasonable, not

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6/ The state may, however, require some minimum period of presence in the state as an objective test of a bona fide claim of residency in order to avoid having to make more detailed and time consuming inquiries into a person's subjective intent, Williams v. Zobel, ___ U.S. ___, 102 S.Ct. 2309 (1982). The permissible length of this period will depend on the nature of the interest or activity involved and the legislative reasons for restricting access to only residents.

arbitrary, and must rest upon some grounded difference having a fair and substantial relation to the object of the legislation." Gilman v. Martin, supra at 13. In particular since Article 8, Section 17, of the Alaska Constitution requires that "(l)aws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation," it is especially important that any residency requirement be based upon valid constitutional and statutory objectives. For example, the legislation must comply with the natural resource provisions of Article VIII, particularly sections 1 and 2 regarding the utilization and development of Alaska's land resources in the maximum public interest.

In addition, it is extremely important that the legislature treat the shore fisheries leases as interests in land and not as fisheries interests. As you know, art. VIII, § 15 of the Alaska Constitution prohibits the creation or authorization of an "exclusive right or or special privilege of fishery." Therefore, it would not be possible to exclude specific individuals or groups on the authority of fisheries considerations.

If the legislature decides to impose a residency requirement on shore fishery lessees, adequate due process consideration should be given to the existing leasehold interests of the 350 nonresidents. The due process provision of the Alaska

Constitution at art. I, sec. 7 provides special protections to property interests and they cannot be arbitrarily taken away. Herscher v. State Dept. of Commerce, 568 P.2d 996, 1002 (Alaska 1977); Nichols v. Eckert, 504 P.2d 1359, 1362 (Alaska 1973). Thus, in order to apply a residency requirement retrospectively to existing leasehold interests, the state would have to demonstrate a legitimate governmental purpose for nullifying an individual's existing interest. Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough, 527 P.2d 447 (Alaska 1974).

If you have further questions regarding the shore fisheries statute or additional information regarding non-resident use, please contact us at your convenience.

Sincerely yours,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: John G. Gissberg
Assistant Attorney General

JGG:eja

Attachment:

cc: Honorable Don W. Collinsworth, Commissioner
Department of Fish and Game

Honorable Esther Wunnicke, Commissioner
Depa.tment of Natural Resources

Sec. 38.05.077. Classification and disposal of remote parcels. [Repealed, § 7 ch 103 SLA 1983. For current law see AS 38.09.]

Sec. 38.05.078. Purchase of land in a remote parcel. [Repealed, § 7 ch 103 SLA 1983. For current law see AS 38.09.]

Sec. 38.05.079. Remote cabin permit. (a) After September 1, 1980, the commissioner may issue a permit for the use of remote state land in a municipality for a cabin site if the land was classified for that purpose under former AS 38.05.047(a)(5)(B). After September 1, 1981, the commissioner may issue a permit for the use of remote state land outside a municipality for a cabin site if the land is classified for that purpose under the procedures required by AS 38.05.300 and 38.05.945.

(b) The fee for a remote cabin permit is $100 a year. The commissioner shall establish regulations which specify the application procedures for and the terms and conditions of a remote cabin permit. A permit must be for a term of not less than 25 years, and may be assigned by the original permittee during the term of the permit.

(c) A remote cabin permit may be terminated by the commissioner before the expiration of the term of the permit if a permittee fails to use the land under permit in the manner required by the terms of the permit. After termination of a remote cabin permit, improvements or personal property on the land subject to the permit shall be managed in the same manner as required by AS 38.05.090.

(d) If land subject to a remote cabin permit is offered for sale or long-term lease, the commissioner shall first offer to sell or lease the land to the permittee or the assigns of the permittee. The land shall be sold for its fair market value. (§ 32 ch 85 SLA 1979; am § 98 ch 6 SLA 1984)

Effect of amendments. — The 1984 amendment made a series of technical and internal reference changes throughout subsection (a).

Sec. 38.05.080. Rejection of bids. Before the director signs the lease, the commissioner may reject all bids for leases when the best interest of the state justifies this action. (§ 2 art V ch 169 SLA 1959; am § 10 ch 61 SLA 1960; am § 3 ch 74 SLA 1961)

NOTES TO DECISIONS

Quoted in Alyeska Ski Corp. v. Holdsworth, Sup. Ct. Op. No. 406 (File No. 620), 426 P.2d 1006 (1967).

Sec. 38.05.082. Leases for shore fisheries development. (a) The director, with the approval of the commissioner, may lease tide and submerged land for fisheries development. Fisheries development

includes the utilization of shore gill nets or set nets for the taking of fish. Every lease issued under this section shall reserve to the public a right-of-way for access to navigable waters and other tide and submerged land.

(b) The director may classify land as subject to leases for fisheries development, and publicly invite applications for lease of the selected areas. Each application shall be accompanied by an affidavit to the effect that the applicant presently intends to personally utilize the leased area for fishing purposes the following season. If two or more applications are received for the same shore area, the director shall award the lease to the most qualified applicant. In determining the qualifications of applicants, the director shall consider the length of time during which the applicant has been engaged in set netting, the proximity of the past fishing sites of the applicant to the land to be leased, the present ability of the applicant to utilize the location to its maximum potential, and other factors relevant to the equitable assignment of the disputed area. If the director cannot determine a preference between conflicting applicants for the same lease site on the basis of qualifications, the director shall select between the applicants by lot. An aggrieved applicant may appeal to the commissioner within five days for a review of the director's determination.

(c) A lease for set net fishing may be issued for any period not exceeding 10 years. If the commissioner determines that the land is not being utilized for the purpose for which the lease is issued, the lease may be declared void. The director shall establish a reasonable rental for the lease, equal to the administrative costs involved in processing the leasehold applications.

(d) Subleasing and renewals of leases are governed by AS 38.05.095 and 38.05.102.

(e) The lease of submerged land conveys no interest in the water above the land or in the fish in the water. (§ 2 ch 93 SLA 1963; am § 99 ch 6 SLA 1984)

Effect of amendments. — The 1984 amendment changed the internal reference in subsection (d).

Opinions of attorney general. — This section, which authorizes shore fishery leases, does not create an exclusive right of fishery and therefore is not unconstitutional under § 15, art. VIII, of the state constitution. 1983 Op. Att'y Gen. No. 03.

This section can be amended to limit the issuance of state tidelands leases for fisheries development to residents of Alaska. 1983 Op. Att'y Gen. No. 03.

Sec. 38.05.085. Term of lease. (a) The lease shall provide that

(1) for the initial 25-year period of the lease, the lessee shall pay the state a fixed base annual rent to be agreed upon by the parties in compliance with the provisions of this chapter;

(2) the fixed base annual rent to be paid by the lessee shall be readjusted when the initial 25-year period of the lease has expired and, thereafter, every 10 years; and

right. Except for public water supply, an appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law, and to the general reservation of fish and wildlife.

Access to Navigable Waters

SECTION 14. Free access to the navigable or public waters of the State, as defined by the legislature, shall not be denied any citizen of the United States or resident of the State, except that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes.

No Exclusive Right of Fishery

SECTION 15. No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

(The amendment to this section was approved by the voters of the state August 22, 1972 and became effective October 14, 1972. This amendment added the second sentence.)

Protection of Rights

SECTION 16. No person shall be involuntarily divested of his right to the use of waters, his interests in lands, or improvements affecting either, except for a superior beneficial use or public purpose and then only with just compensation and by operation of law.

* Uniform Application

SECTION 17. Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

Private Ways of Necessity

SECTION 18. Proceeding in eminent domain may be undertaken for private ways of necessity to permit essential access for extraction or utilization

Sec. 38.05.077. Classification and disposal of remote parcels. [Repealed, § 7 ch 103 SLA 1983. For current law see AS 38.09.]

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(b) The fee for a remote cabin permit is $100 a year. The commissioner shall establish regulations which specify the application procedures for and the terms and conditions of a remote cabin permit. A permit must be for a term of not less than 25 years, and may be assigned by the original permittee during the term of the permit.

(c) A remote cabin permit may be terminated by the commissioner before the expiration of the term of the permit if a permittee fails to use the land under permit in the manner required by the terms of the permit. After termination of a remote cabin permit, improvements or personal property on the land subject to the permit shall be managed in the same manner as required by AS 38.05.090.

(d) If land subject to a remote cabin permit is offered for sale or long-term lease, the commissioner shall first offer to sell or lease the land to the permittee or the assigns of the permittee. The land shall be sold for its fair market value. (§ 32 ch 85 SLA 1979; am § 98 ch 6 SLA 1984)

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Private Ways of Necessity

SECTION 18. Proceeding in eminent domain may be undertaken for private ways of necessity to permit essential access for extraction or utilization

SB 207

SENATE COMMITTEE REPORT

FIRST COMMITTEE OF REFERRAL

Date of 5-DAY NOTICE _____
IN ACCORDANCE WITH UNIFORM RULE 23

FURTHER JUD

**FISCAL NOTE(S) MUST BE ATTACHED
IN ACCORDANCE WITH AS 24.08.035

DATE TURNED INTO OFFICE 3.23.89

3/7/89

Mr. President:

C&RA Committee considered SB 207

liens on real property to secure payment for services provided by a utility owned by a municipality

and recommended:

[✓] replace with CS SB207 (C&RA) [✓] same title
[ ] new title

[ ] attached amendment(s) and

[ ] _____ letter of intent adopted

[✓] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] further referral to _____

FISCAL NOTE(S) attached [ ] zero [ ] fiscal impact
[ ] appropriation no FN attached [ ] Gov. FN introduced w/ bill

MEMBERS SIGNING DO PASS

OTHER RECOMMENDATIONS

Pat Pourchot

Chairman signature and recommendation

[ ] Committee backup attached

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: SB 207
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act..liens on real property to secure payment..services..utilitv.."
Sponsor: Senators Adams & Coghill
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)

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)

Jim Plasman

Prepared by: Jim Plasman, Deputy Director — Phone: 465-4750
Division: Municipal & Regional Assistance — Date: 3/20/89

Approved by Commissioner: _____ — Date: 20 March 89.
Agency: Community & Regional Affairs

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

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

M E M O R A N D U M March 2, 1989

SUBJECT: Liens for Utility Services
(Work Order No. 16-0949)

TO: Senator Al Adams

FROM: Tamara Brandt Cook
Director TBC
Division of Legal Services

You have asked whether a municipality has the power to impose a lien on real property to secure payment for utility services provided by a utility owned by the municipality. A municipality probably does have that power under its general authority to exercise by ordinance any power not prohibited by law. (See AS 29.35.200 - 29.35.220) However, it does not have specific authority to establish liens for these purposes as is granted under AS 29.45.300 for property taxes, AS 29.45.650(e) for sales and use taxes, and AS 29.46.080(c) for special assessments.

The enclosed draft would provide specific authority for a municipality to provide for liens for these utility services by ordinance. In addition, the enforcement provision now in place for foreclosure of property tax liens is made applicable to utility liens under this draft.

TBC:gc:kb
WKG7/083

Enclosure

NOME JOINT UTILITY SYSTEM

BOX 70
NOME, ALASKA 99762
(907) 443-5288
TELEFAX (907) 443-3028

March 22, 1989

Senator Al Adams
Alaska State Legislature
Juneau, Alaska
FAX 465-3700

Dear Senator Adams:

Please find attached a copy of Nome Joint Utility System Resolution 89-09, A Resolution Supporting Senate Bill No. 207, "An Act Relating to Liens on Real Property to Secure Payment for Services Provided by a Utility Owned by a Municipality."

Resolution 89-09 was passed by the Nome Joint Utility Board on March 21, 1989, to establish a record of the Board's support of Senate Bill No. 207.

Thank you for your time.

Sincerely,

Joe Murphy

Joe Murphy, General Manager
NOME JOINT UTILITY SYSTEM

JM/mt

NOME JOINT UTILITY SYSTEM

RESOLUTION 89-09

A RESOLUTION SUPPORTING SENATE BILL NO. 207,
AN ACT RELATING TO LIENS ON REAL PROPERTY TO SECURE PAYMENT
FOR SERVICES PROVIDED BY A UTILITY OWNED BY A MUNICIPALITY

WHEREAS, there is a Senate Bill No. 207 in the Legislature of the State of Alaska Sixteenth Legislature - First Session, and

WHEREAS, this Bill is "An Act relating to liens of real property to secure payment for services provided by a utility owned by a municipality.", and

WHEREAS, the Nome Joint Utility Board would like to go on record as being in support of this Bill,

NOW THEREFORE BE IT RESOLVED that the Nome Joint Utility Board, sitting in Regular Session on March 21, 1989, supports Senate Bill No. 207, An Act Relating to Liens on Real Property to Secure Payment for Services Provided by a Utility Owned by a Municipality.

SIGNED THIS 21 DAY OF MARCH, 1989 AT NOME, ALASKA.

Stan Sobocienski, Chairman
NOME JOINT UTILITY BOARD

ATTEST:

Gary Eutcher, Secretary
NOME JOINT UTILITY SYSTEM

Office of the City Clerk
832-5441
Incorporated November 17, 19

City of Nenana

State of Alaska

February 14, 1989

Senator John B. Coghill
Alaska State Legislature
Pouch V [MS 3100]
Juneau, AK 99811

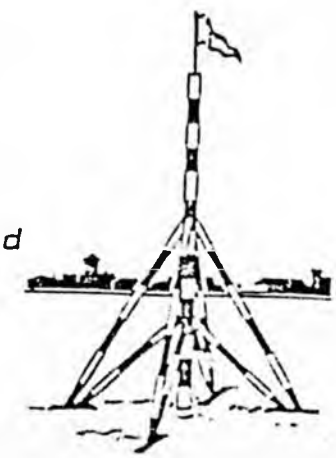
Dear Senator Coghill,

The City has introduced an ordinance which creates a lien against real property if the charges for water and sewer services provided to the property are not paid.

The State supreme court has never decided whether a home rule municipality, such as Nenana, has the authority to create liens without statutory authority. There is no provision in Alaska law which specifically prohibits Nenana from creating these liens, and under the state constitution a home rule municipality can do anything which is not prohibited by law.

The legislature could easily resolve the question as to the City's authority by simply making a small change in Title 29 - specifically 29.35.070. To this end I would suggest the following addition to Section 29.35.070. Public Utilities: [additions underlined, deletions bracketed]

> Sec. 29.35.070. Public Utilities. [a] The assembly acting for the area outside all cities in the borough and the council acting for the area in a city may regulate, fix, establish, and change the rates and charges imposed for a utility service provided to the municipality or its inhabitants by a utility that is not subject to regulation under AS 42.05 unless that utility is exempted from regulation under AS 42.05.711[a] or [d] - [k].
>
> [b] A municipality may provide for a reasonable deposit for meters and service to be given if interest is paid on the deposit.
>
> [c] Unless the utility is owned by the municipality, all rates, charges, and regulations established under this section shall be established



by ordinance and shall be reasonable and permit a fair return on invested capital.

(d) A municipality may provide for the creation, recording, notice, and foreclosure of a lien on real property to secure the payment of charges for water, sewer, electric, and other utilities provided to the property by the municipality, and the interest, penalties, and administration costs in the event of delinquency. When recorded the utility lien has priority over all other liens except (1) liens for property taxes and special assessments; (2) liens that were perfected before the recording of the utility lien for amounts actually advanced before the recording of the utility lien; (3) mechanic's and materialman's liens for which claims of lien under AS 34.35.070 or notices of right of lien under AS 34.35.060 have been recorded before the recording of the utility lien; and (4) sales and use tax liens created under AS 29.45.650 (e).

[(d)] (e) This section applies to home rule and general law municipalities.

Subsection (d) which is added above is copied verbatim from the language enacted by the legislature last session to establish the priority of liens for delinquent sales and use taxes. The statute which was copied is AS 29.45.650(e).

Please call should you have any questions, but basically all we are trying to do here is make everyone responsible for their own bills. There are always some utility customers who don't feel obligated to pay, and this effort would help in collecting past due accounts.

Sincerely,

Steve Bainbridge
City Administrator

cc Representative Richard Shultz

Chapter 35. Municipal Powers and Duties.

Article 1. General Powers.

Sec. 29.35.070. Public utilities. (a) The assembly acting for the area outside all cities in the borough and the council acting for the area in a city may regulate, fix, establish, and change the rates and charges imposed for a utility service provided to the municipality or its inhabitants by a utility that is not subject to regulation under AS 42.05 unless that utility is exempted from regulation under AS 42.05.711(a) or (d) — (k).

(b) A municipality may provide for a reasonable deposit for meters and service to be given if interest is paid on the deposit.

(c) Unless the utility is owned by the municipality, all rates, charges, and regulations established under this section shall be established by ordinance and shall be reasonable and permit a fair return on invested capital.

(d) This section applies to home rule and general law municipalities. (§ 10 ch 74 SLA 1985)

Editor's notes. — This section is set out to correct an error in enactment.

Article 3. Additional Powers.

Sec. 29.35.210. Second class borough powers. (a) A second class borough may by ordinance exercise the following powers on a nonareawide basis:

(1) provide transportation systems;

(2) regulate the offering for sale, exposure for sale, sale, use, or explosion of fireworks;

(3) license, impound, and dispose of animals;

(4) provide garbage, solid waste, and septic waste collection and disposal;

(5) provide air pollution control in accordance with AS 46.03.140 — 46.03.230;

(6) provide water pollution control;

SB 212

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT

OFFICE OF THE COMMISSIONER

P. O. BOX D
JUNEAU, ALASKA 99811-0800
PHONE: (907) 465-2500

March 5, 1990

Honorable Jan Faiks
Alaska State Senate
P.O. Box V
Juneau, AK 99811

Dear Senator Faiks:

SB 212, relating to insurer solvency, passed out of the Senate Labor and Commerce Committee on February 28 and is now in the Senate Judiciary Committee.

As you were present during Labor and Commerce Committee hearings on the bill, I am sure you realize that this piece of legislation is very important to the department in carrying out its responsibility of protecting the consumer from the insolvency or impairment of an insurer. Recent events in this state and others convince me all the more of the critical need for this legislation.

In addition, the statutes in the Alaska Insurance Code which provide basic public protection mechanisms were adopted in 1966 and are largely unchanged since that time. These statutes need to be updated, upgraded and clarified.

I would like to request that you schedule SB 212 for a hearing in the Senate Judiciary Committee as soon as possible. Please feel free to contact me or my staff if you have any questions or desire additional information on the bill.

Sincerely,

Larry Merculieff
Commissioner

LM/LW/bkt1319c
030590a
cc: David J. Walsh, Director
Division of Insurance

LH

Amendment submitted by MACLEAN on 5-20-90

CSSB 212

Section 14 of CSSB 212 should be replaced with a new Section 14 to read:

* Sec. 14. AS 21.09.080(a) is repealed and reenacted to read:

(a) In order for a domestic insurer to renew and continue the insurer's certificate of authority after June 30, 1991, the insurer must possess at least the basic capital, basic guarantee surplus, and additional maintained surplus required under AS 21.09.070(a), or the additional maintained surplus and that amount of basic capital or basic surplus, the sum of which equals the insurer's annual net earned premium. In no event, however, shall the capital and surplus for an insurer be less than was required when that insurer was first granted its certificate of authority.

CSSB 212 (L&C)
AN ACT RELATING TO INSURANCE

Sectional Analysis by the
Department of Commerce and Economic Development,
Division of Insurance

OVERVIEW

The business of insurance is a dynamic, constantly changing business. The business of insurance is interstate commerce, however, unlike other forms of interstate commerce, it is regulated by the individual states. The most important concern of the individual states is that the consumer, both individual and business, be protected from an insolvency or impairment of an insurer. The concern with solvency is critical because insurance is an intangible product. It is concerned with whether the insurance company will be able to meet its obligations.

The statutes in the Alaska Insurance Code that provide this public protection mechanism were adopted in 1966 and are basically unchanged since that time. Events have occurred in this state and others which highlight the need to update, to upgrade and to clarify those laws. SB 212 is intended to accomplish that aim. The proposed changes have been substantially developed and adopted by the National Association of Insurance Commissioners.

In the Governor's transmittal letter for SB 212, six main points were listed. These were:

1. The minimum amount of capital and surplus required of an insurer wishing to do business has been increased. Capital and surplus provide the minimum amount of capitalization required to be an insurance company. This appears in several places throughout the bill and applies to admitted as well as non-admitted insurers. Minimum capital and surplus provides a tangible minimum floor on which to base solvency. When that floor is too low, it is considerably more difficult to detect problems in time to avoid loss to the public.

2. Reserving and reinsurance manipulations are a serious concern. The proposed changes strengthen our ability to determine whether adequate reinsurance or some other financial arrangement exists.

3. The investment chapter has been modernized to assure that the insurer's capital is not placed in weak of fraudulent investments.

4. Reporting requirements are strengthened. Quarterly reports and electronic media reporting is enabled. The examination expense recovery provisions have been clarified, which will make it possible to examine more companies and more often.

5. Some insurers and licensee have used civil lawsuits as a means to deter insurance regulators from carrying out their duties. The bill extends immunity for civil liability to division of insurance personnel for carrying out their duties.

6. During a recent insurer insolvency, Alaska's delinquency proceeding statutes proved inadequate. This has been remedied in SB 212.

SB 212 is very lengthy and in some areas it is complex. It is very important that our regulatory mechanism be kept as up to date as possible. SB 212 does that.

DIRECTOR OF INSURANCE. (Sections 1-7)

These sections pertain primarily to the director's ability to examine insurers and surplus lines brokers. The director may contract with independent examiners and may order the insurer or surplus lines broker to make direct payment to the contract examiner for the cost of examination. Formerly licensed insurers and surplus lines brokers may also be examined.

Participation is allowed by Alaska examiners in NAIC association examination of insurers that conduct the business of insurance in Alaska and other states. Civil immunity is provided to division personnel, agents of the division, regulators of other states, and NAIC staff in regard to the publication of and documentation of reports and in the exchange of regulatory information.

Section 1. AS 21.06.120(a). Examination of Insurers
Page 1. lines 12-22.

This section clarifies the director's ability to examine formerly licensed insurers and surplus lines brokers. Insurance contracts issued while the person was licensed many times continue to be in force after the person's license has terminated.

Section 2. AS 21.06.120. Examination of Insurers
Page 1. lines 23-29.

These new subsections specifically allow the division to participate along with insurance regulators from other states in the examination of an insurer located outside of Alaska. The director is also permitted to utilize contract examiners. Both of these functions have been assumed to exist under current statute but the clarification will avoid conflict with a differing opinion.

Section 3. AS 21.06.140(b). Conduct of Examination
Page 2. lines 1-9.

This section clarifies the director's ability to require that photocopies of documents requested during an examination be produced.

Section 4. AS 21.06.150(e). Examination Reports
Page 2. lines 10-16.

Changes in this section are primarily editorial in nature and provide that the director may withhold from public inspection any materials gathered as part of an examination if necessary for the protection of any person from unwarranted injury or if it is in the public's best interest.

Section 5. AS 21.06.160. Examination Expense
Page 2. line 17 to page 3 line 19.

Changes in this section make it clear that insurers are required to bear all costs of examinations and that the director can order an insurer to pay a contract examiner directly for its examination charges.

Section 6. AS 21.06.165. Immunity for Director and Others
Page 3. line 20 to page 4. line 2.

This is a new subsection that provides civil immunity for all division staff and insurance regulators in other states in regards to information and reports which are shared. However, immunity is not provided if there is reckless, willful, or intentional misconduct. This new section follows a National Association of Insurance Commissioners Model Immunity Act.

Section 7. AS 21.06.250. Fees and Licenses
Page 4. lines 3-12.

This change is editorial in nature. It is intended to avoid conflict with AS 21.06.160 which has been modified in Section 5.

AUTHORIZATION OF INSURERS. (Sections 8-19)

The format for insurer's financial statements is established to conform with the format adopted by the National Association of Insurance Commissioners (NAIC). The director may require that an insurer, in addition to the required annual financial reporting, file quarterly financial statements.

Foreign and alien admitted insurers are required to maintain the same financial requirements (capital and surplus) as Alaska domestic insurers. Minimum financial requirements (capital and surplus) for Alaska incorporated insurers are established if they wish to assume reinsurance ($10,000,000 at 12/31/90, $15,000,000 at 12/31/91, and $20,000,000 at 12/31/92). Domestic property or casualty insurers are prohibited from issuing life insurance or annuity contracts.

Section 8. AS 21.09.020(3). Exception. Certificate of Authority Requirement
Page 4. lines 13-28.

This change is editorial in nature. It is to provide the correct cross reference, AS 21.34.

Section 9. AS 21.09.060. Combinations of Insuring Power in One Insurer
Page 4. line 29 to page 5. line 14.

A life and annuity insurer is barred from transacting a property or casualty business. The changes in this section clarify the reverse situation. that a property or casualty insurer is precluded from transacting life insurance or from issuing annuities.

Section 10. AS 21.09.070(a). Capital Funds Required of Foreign Insurers and New Domestic Insurers
Page 5. line 15 to page 7. line 5.

The amendments to this section are intended to provide for more stringent financial criteria for an insurer to become and remain licensed. The additional surplus required to be maintained when first licensed is required to be maintained beyond initial licensure. Under existing law, the additional surplus could be siphoned off the day after the original certificate of authority was issued. The minimum amounts of capital and surplus have been increased.

Section 11. AS 21.09.070(b).
Page 7. lines 6-16.

This section allows the director to issue an order following a hearing, requiring an insurer to maintain funds required in AS 21.09.070(a) (see Section 10). Failure to maintain the ordered funds would be grounds for suspension or revocation of the certificate of authority.

Section 12. AS 21.09.070 (c).
Page 7. lines 17-21.

The repeal and reenactment of this section requires foreign or alien admitted insurers to maintain the currently required capital and surplus amounts. Under existing law, a foreign or alien admitted insurer need only maintain the amount required when first licensed even if that insurer was first licensed 25 years ago when the amounts required were substantially lower. Alaska domestic insurers have been required to meet the higher standards as adopted over the years. So, in effect, this amendment provides for equitable treatment both domestic and foreign or alien insurers.

Section 13. AS 21.09.070(f)
Page 6. line 22 to page 7. line 4.

This is a new section that establishes that a domestic insurer must possess policyholder surplus in adequate amounts in order to assume reinsurance. Policyholder surplus required is $10,000,000 at 12/31/90, $15,000,000 at 12/31/91 and $20,000,000 at 12/31/92. This requirement does not apply to intracompany pooling arrangements between affiliated insurers. A stronger financial position is required for a domestic insurer to get into the reinsurance business.

Section 14. AS 21.09.080 (a).
Page 8 lines 5-9.

The repeal and reenactment of this section requires domestic insurers to maintain the currently required capital and surplus amounts.

Section 15. AS 21.09.110(3). Application for Certificate of Authority
Page 7. lines 10-15.

This section is amended to include the requirement that quarterly financial statements as required by the director be attested to by at least two officers of the insurer or certified by the regulatory official of the insurer's state of domicile.

Section 16. AS 21.09.140(a). Mandatory Revocation. Suspension of Certificate
Page 8. lines 16-25.

Amendment to this section is necessary due to the change in AS 21.09.070(c) (see Section 12) requiring foreign insurers to maintain the current levels of policyholder surplus. Also, the more correct terms of "impaired" and "insolvent" have been substituted for "deficiency of assets". This section

generally pertains to mandatory revocation or suspension of an insurer's license.

Section 17. AS 21.09.200(a). Annual Statement
Page 8, line 26 to page 9, line 13.

This section pertains to the format of the annual financial statement required by each licensed insurer. Amendment to this section provides for the adoption of the National Association of Insurance Commissioners (NAIC) format, which has been utilized historically. This promotes consistency in financial reporting in all states. Additionally, this section has been amended to allow the director to require that the financial statement be filed via electronic media (e.g. on computer disc).

Section 18. AS 21.09.200(f)
Page 9, lines 14-22.

This section requires all domestic insurers to also file their annual financial statements with the NAIC and to pay the appropriate fee to the NAIC. The purpose of this is that the NAIC has developed a data base for all insurers and provides analytical services to the various states. (Each state is linked by computer to the NAIC data base.) Eventually, it is expected that only one filing of the financial statement via electronic media will be filed with the NAIC. This would eliminate the need of a "hard copy" annual financial statement being filed in each state in which an insurer is licensed. This will be an expense savings. Also, it will provide for a more timely analysis of each financial statement.

Section 19. AS 21.09.205. Quarterly Statement
Page 9, line 23, to page 10, line 3.

This new section allows the director to require that quarterly financial statements be filed with the division. A means is provided for more closely monitoring the financial well being of an insurer. Quarterly statements, when required, are due to be filed within 60 days after the end of a calendar quarter and a penalty of $100 per day for late filing is imposed.

KINDS OF INSURANCE, LIMITS OF RISK, AND REINSURANCE.
(Sections 20-21)

In order to limit risk to meet with statutory requirements and sound business practices, insurers transfer risk to other insurers via reinsurance contracts. These sections provide the guidelines and parameters for an Alaska domestic

insurer reinsuring its insurance contracts with reinsurers. Credit (reduced liabilities) is allowed in the financial statement for reinsurance ceded if done in accordance with the guidelines. The term "reinsurance" is defined.

Section 20. AS 21.12.020. Reinsurance Credit Allowed a Domestic Ceding Insurer

Page 10, line 4 to page 15, line 14.

In order to help protect their financial integrity and to meet the requirements that no more risk be retained in any one subject than 10% of its policyholders surplus, most insurers reinsure the insurance contracts they have underwritten. By appropriately passing this risk to a reinsurer, an insurer is allowed to reduce the liabilities for claim payments it is required to exhibit in its financial statement by an amount commensurate with the risk reinsured.

If a reinsurer becomes insolvent, all of the risk previously transferred falls back to the insurer. For that reason, it is important that standards exist for reinsurers that domestic insurers may transfer risk to and receive credit for the risk transferred in the form of reduced claim liabilities. The repeal and reenactment of this section provides the criteria for the reinsurers that domestic insurers may use and receive credit for in their financial statements.

Generally credit is allowed for reinsurance ceded by a domestic insurer to a reinsurer if:

1. the reinsurer is licensed in this state as in insurer;

2. the reinsurer is an accredited reinsurer in the state;

3. the reinsurer is domiciled in a state that employs standards for reinsurance substantially the same as Alaska and submits to examination by the division;

4. the reinsurer is an alien reinsurer that trustees specified amounts of funds in the United States and the trustees provide an annual accounting of the funds trusteed, and provides certification of its solvency by a independent auditor and the domestic regulator; or

5. the reinsurer does not meet any of the criteria in 1. through 4. above, then credit is allowed only if funds are trusteed in a form (cash, approved securities, or acceptable letters of credit) and for amounts corresponding to only the amount of funds trusteed.

This section also maintains the existing laws requirement that no credit for reinsurance is allowed if the reinsurance contract does not contain the classic "insolvency provision". The "insolvency provision' essentially provides that reinsurance will continue to be paid if due even if the ceding insurer were to become insolvent.

The director is also given the discretionary authority to require an insurer to provide information in regards to any material change in its reinsurance transactions.

Section 21. AS 21.12.120. Reinsurance Defined
Page 15, lines 15-19.

The term "reinsurance" is defined in this new section. This term was not previously defined in Title 21. The definition is intended to convey that a transfer of risk directly flowing from the underlying insurance contract is required to meet with this definition. It is necessary to define this term as other contractual arrangements between insurers have been reported as reinsurance when in fact the transactions are other financial arrangements having nothing to do with the transfer of the risk of the underlying insurance contract. Many such arrangements have been utilized due to recent changes in the federal income tax schema for insurers.

ASSETS AND LIABILITIES. (Sections 22-27)

These sections pertain to the basics in determining an insurer's solvency. It includes amended rules for determining which assets may be included and those which are specifically excluded in determining the asset base for an insurer. Requirements for the establishment of liabilities for the contractual obligations of an insurer are included. A material change requiring title insurers to establish an unearned premium reserve is included. Also, the director may require a surety insurer to establish a special reserve for bail bonds or other single premium bonds that do not have a definite expiration date.

Section 22. AS 21.18.010. Allowable Assets
Page 15, line 20 to page 21, line 27.

This section has a number of general changes in defining the types of assets allowed in the determination of the insurer's ability to pay its liabilities.

Paragraph (1) is essentially the same as the existing Paragraph (1). The allowance of deposits in solvent savings and loan associations has been added. This adds alternative financial institutions to those already listed in the current law, such as banks and trust companies.

Paragraphs (2)(A)-(C) remain the same as the current law.

Paragraph (2)(D) essentially the same as the existing Paragraph (2)(D). The allowance of interest due or accrued on deposits in solvent savings and loan

associations to complete its inclusion as an allowed depository above has been added .

Paragraph (2)(E) further defines allowable interest due or accrued as that earned on real estate mortgage loans which are allowed in the investments section of this title. Also changed is the exception that, when the interest or any taxes are overdue more than three months, none of the interest due or accrued may be allowed on that loan. This changes the exception in the current law from interest overdue 18 months to interest overdue for three months and includes the exception when taxes are overdue for three months. These modifications ensure that interest on only mortgages acceptable per this chapter are allowed and the exception eliminates those interest amounts not yet paid that may not be forthcoming.

Paragraph (2)(F) has been changed. It adds the requirement that, when collateral is accepted to guarantee the payment of rent more than three months overdue, the collateral must have a current market value that is at least 75% of the amount of total rent due. With this addition, when the current market value is less than 75% of the total rent due, the due and accrued rent cannot be allowed as an asset. This applies only when rent is more than three months overdue. All other due and accrued rent less than three months overdue is allowed as an asset without collateral as defined in current law.

Paragraph (2)(G) remains the same as the current law.

Paragraph (3) remains the same as the current law.

Paragraph (4) has been added to allow as an asset bills receivable for premiums and installment premiums for other than life insurance policies when the total of the receivable is not more than the unearned premium held for the policy and only when the payments are current.

This allows the insurance company to record premium receivable only when past payments have been made thereby showing a good chance that future payment will be received. The receivable is limited in that it cannot be more than the unearned premium held on the individual policy which ensures this is an ongoing policy that has some premium in reserve for future policy periods.

Old Paragraph (4) has been renumbered (5) and remains the same as the current law..

Old Paragraph (5) has been renumbered (6) and reformatted to add Subparagraph (A). To Subparagraph (A) has been added two subparagraph. These are regarding exemption from the limitation of allowing as assets only three months of premium in course of collection (less commissions) per policy.

Paragraph (6)(B) exempts reinsurance premiums from reinsurers authorized to do business in this state from this three-month limitation.

Paragraph (6)(C) allows as an asset more than three months of reinsurance premiums receivable from reinsurers when a corresponding liability is recorded by the reinsurance company but not when the amount due more than 90 days is more than 10% of the total assets reported in the last financial statement filed with the director. This helps to ensure the receivables are recognized by the reinsurer and the reinsurer has the ability to pay.

Paragraph (7) deals with premiums receivable less commissions payable from a person controlled by or controlling the insurer. This control is through ownership or by contract and when the person owes more than 50% of the insurer's premium in course of collection as reported in the financial statement.

In (7)(A), the premiums collected by the controlled or controlling person must be held in a trust account at a bank approved by the division. These funds must be kept separate from all other funds and paid only to the insurer or the insured. The investment income from the account can be allocated as the parties wish. All premiums collected by the controlled or controlling person must be deposited in the trust account within 5 working days. This ensures the receipt of premiums receivable by the insurer and reinforces the person's fiduciary responsibilities.

In (7)(B), the controlled or controlling person must provide a clean, unexpired irrevocable and unconditional letter of credit payable to the insurer for a term of at least one year which meets or exceeds the amount of the premiums payable to the insurer at any time. The letter of credit must have an automatic extension for one year unless the insurer has received 30 days prior to expiration written notice that the letter will not be renewed. The letter of credit must be issued by a Federal Reserve Bank and satisfactory to the division. This subsection is meant to ensure that premiums collected by a person controlled by or controlling an insurer will be available and paid to the insurer when due and, therefore, can be reported as an asset.

In (7)(C), the controlled or controlling person must provide a financial guaranty bond payable to the insurer for a term of at least one year which meets or exceeds the amount of the premiums payable to the insurer at any time. The guarantee bond must be of a continuous term and cancelable only when the insurer receives a 30 day written notice of termination with the bond continuing to cover any acts committed prior to the termination. The financial guaranty bond must be issued by an insurer authorized to transact business in Alaska, who is not related to the insurer or the purchaser of the bond and be satisfactory to the division. This subsection is meant to ensure that premiums collected by a person controlled by or controlling an insurer will be available and paid to the insurer when due and, therefore, can be reported as an asset.