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6762 HOUSE COMMUNITY & REGIONAL AFFAIRS

The AAMC states that "In Alaska the positions of both the municipal clerk and the municipal attorney may enjoy a distinctive status in the administrative branch of local government." The key word here is "may". CSHB 128 would change that, at least for the clerks, to "shall". Again, that should be a local decision, not one mandated by the state legislature. And, if mandated for the clerks, why not for the attorneys or any other "administrative" position?

AAMC states that the bill is not a limitation of home rule powers because it does not apply to home rule municipalities. This statement avoids the issue of its interference with the "home rule" powers of non-home rule municipalities. It is also an implicit admission that it does in fact interfere with local government control and authority in non-home rule municipalities. It can also be argued that the bill is discriminatory against non-home rule power municipalities, by forcing them to assign duties to a municipal officer without requiring the same of home rule governments. If there is an overriding need for this legislation (because of abuse or a need for uniformity) why shouldn't it apply to home rule municipalities as well?

The AAMC policy statement also contends that "House Bill 128 updates the legal mandates of the municipal clerk....The minor word changes from the former language as presented in...the bill are offered to enhance the reader's understanding of the duties and responsibilities and they are not intended to be insidious."

The proposed legislation, as indicated, is more than merely an "update", and the new list of duties goes far beyond "minor word changes" to the existing Title 29. It lists ten specific duties of the clerk, whereas the current provision lists only five more general assignments. (Actually, within the new list are six additional duties not mentioned in the current Title 29 or elsewhere in state law.) It thereby greatly expands the list of legally mandated duties for the clerk above and beyond the general duties now assigned. Some of the specific duties actually could conflict with Sec. 29.20.500 of Title 29. Paragraph (2) of this Section provides that the Manager shall "supervise the enforcement of municipal law and carry out the directives of the governing body."

The specific list of duties assigned to the clerk also reduces the flexibility of the local government to organize itself as it sees fit and to provide for organizational development. Rather than an update, in many respects CSHB 128 is a regression away from the flexibility and meticulously crafted document that became a complete Title 29 update in 1986. This update should not be tinkered with in such a piecemeal basis.

Legally mandating such a list of duties also detracts from the accountability of the clerk. If all of the clerks's duties are mandated by state law, then the clerk is less accountable to legislative body (or mayor/manager) responsible for the hiring and supervising of this position. Accountability would be reduced to merely assuring the clerk satisfactorily carries out authorities and duties mandated by state law.

Specific Comments on the Mandated Duties

1) CSHB 128 wording: "attend meetings of the governing body and its boards and committees as required and keep the journal".

Present wording: "attend meetings of the governing body and keep the journal".

Comment: This new requirement, mandating that the clerk attend all meetings of all boards and committees as required (required by the governing body?), is actually superfluous. Title 29 already requires the clerk to perform other duties as required. In addition, there are some real practical and logistical problems in having the clerk attend all such meetings. Does this requirement, for example, include meetings of the planning commission? All service area boards?

2) CSHB 128 wording: "have custody of the municipal seal".

Present wording: none.

Comment: This is a new mandate. No specific objections are raised for this new requirement, other than the fact that who has custody of the municipal seal should be a local question.

3) CSHB 128 wording: "assure that notice and other requirements for public meetings are complied with and assure that public records are available for public inspection as required by law".

Present wording: "give notice of the time and place of meetings of the governing body to the governing body and to the public"; and "arrange publication of notices, ordinances, and resolutions".

Comment: "Assure that public records are available" might create real logistical problems. Does this mean all public records, including those of other municipal departments? Does this provision give the clerk a state mandated authority to "inspect" these other departments to make sure that their records are "available for public inspection?"

4) CSHB 128 wording: "manage municipal records and develop retention schedules and procedures for inventory, storage, and destruction of records as necessary".

Present wording: none.

Comment: This seems to require that sole authority be placed with the clerk to develop retention schedules and procedures for

the inventory, storage and destruction of records. Does this mean there is no authority by the council (assembly), the manager, the mayor, or any department head over their own records? There is also a potential conflict with 29.20.500(5), which mandates that the manager (under the manager plan) "exercise custody over all real and personal property of the municipality". Could such "personal property" include records? What about the records of the real and personal property?

5) CSHB 128 wording: "maintain an indexed file or all permanent municipal records, provide for codification of ordinances, and authenticate or certify records as necessary."

Present wording: "maintain and make available for public inspection an indexed file containing municipal ordinances, resolutions, rules, regulations, and codes" and "attest deeds and other documents"

Comment: No particular objection, since this is basically a restatement of what is already in Title 29.

6) CSHB 128 wording: "prepare agendas and agenda packets as required by the governing body".

Present wording: none.

Comment: This is a major new power that would be given to the clerk, potentially taking authority away from the legislative body, the mayor, and/or the manager, all of whom in a number of municipalities have a role in preparing the agenda and agenda packets. This could create very serious role conflicts. Again, is it really the state's concern who is responsible for these duties at the local level?

7) CSHB 128 wording: "administer all municipal elections".

Present wording: none.

Comment: This would be a completely new, major authority. While the clerks do administer the elections in many local governments, is there a real need to impose this requirement on <u>all</u> municipalities employing clerks? The clerk is not necessarily, in all cases, the most qualified municipal official to administer local elections. Perhaps the municipal attorney, for example, might be more qualified in certain instances.

8) CSHB 128 wording: "assure that the municipality complies with 42 U.S.C. 1971-1974 (Voting Rights Act of 1965, as amended)".

Present wording: none.

Comment: All municipalities have to comply with this federal law. Is it really advisable to make the clerk responsible for this? Compliance with such a comprehensive piece of federal legislation in many cases should be the responsibility of the municipal attorney.

9) CSHB 128 wording: "take oaths, affirmations, and acknowledgements as necessary".

Present wording: none.

Comment: There is probably no particular problem with this provision. Apparently AS 09.63.010 already gives the clerk this authority.

10) CSHB 128 wording: "act as parliamentary advisor to the governing body".

Present wording: none.

Comment: This takes away the flexibility of local government in its ability to designate the person most qualified to act as "parliamentary advisor" (parliamentarian?). Usually, such a person advises the presiding officer, not the body as a whole. In addition, do all clerks have the background and expertise necessary to act as the parliamentarian? In many municipalities, the attorney quite logically and satisfactorily fulfills this role.

11) CSHB 128 wording: "perform other duties required by law or the governing body".

Present wording: "perform other duties specified in this title or prescribed by the chief administrator or by the governing body."

Comment: The proposed wording takes away the authority of the chief administrator (mayor or manager) to assign duties, even in those municipalities where the clerk is appointed by the administrator.

It should also be noted that this rather long and detailed list of duties would greatly eliminate the authority of the manager, administrator, mayor, or even the elected governing body to prescribe duties for the clerk. Such a list also reduces flexibility of hiring, particularly in smaller communities. What if a local government can only hire a part time clerk? Would this part time employee still be responsible for all of the mandated duties?

Summary and Conclusions

Title 29 underwent a complete revision several years ago. At that time, all of the major concerns expressed by municipalities with that state law were addressed, and the new Title 29 seems to be working quite well. As noted earlier, Title 29 is a carefully crafted and integrated document that should not be tinkered with in a piecemeal fashion. This is particularly so given the fact that no real problem with these existing provisions have been identified by the clerks. "If it's not broke, why fix it?" Everything in CSHB 128 can be directly addressed at the local level. Any "job duty" problems perceived by the clerks should be addressed directly with their own employers. The clerks have stated that "our goal is

obviously to enhance the importance of the clerk's position." CSHB 128 is therefore "special interest" legislation that may be of some benefit to the Clerks themselves, but which provides no demonstrated significant benefit to local government.

--Submitted by the Ketchikan Gateway Borough
April 9, 1991

PRESTON
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February 15, 1991

Scott Burgess, Executive Director
Alaska Municipal League
217 Second Street, Suite 200
Juneau, AK 99801

Re: HB 128 (Appointment and Duties of Clerk and Clerk/Treasurer)

Dear Scott:

The following comments are my own as adviser to the AML Legislative Committee. They do not reflect the position of the firm nor are they made on behalf of any client of the firm.

The subject bill has three major effects. First, it provides that the municipal clerk is appointed only by the governing body and does not even permit the governing body to authorize appointment of the clerk by the chief administrative officer. Currently, the municipal clerk is appointed by the chief administrator and confirmed by the governing body unless provided otherwise by ordinance. This permits the governing body to take control of the appointment of the municipal clerk if it so desires. Considering the League policy that local government should be free to decide how it wants to order its affairs, this bill would constitute a clear incursion on that flexibility. Under current law, if the governing body wants to take control of the appointment of the clerk it may do so. This legislation is not needed to give the governing body the authority to appoint the clerk.

The second effect is to add a subsection (b) to AS 29.20.360 authorizing the governing body to combine the offices of clerk and clerk/treasurer and providing for the appointment of the clerk-treasurer only by the governing body. The comments in the preceding paragraph apply here as well. Additionally, the authority to combine the office of clerk and treasurer already exists in AS 29.20.380(b). The effect of sections 2 and 3 of the bill is to move this specific authority to combine the offices from sections 380 to section 360. Thus, unless the municipalities want to restrict their options as to who is to act as appointing authority for the clerk or clerk-treasurer, sections 1 and 2 of this bill appear to be unnecessary.

Section 3 adds to, deletes and rearranges the statement of various duties of the clerk. By adding specific duties to the clerk, once again, the legislature would be restricting the options of the municipality. For example, under proposed section 29.20.380(1) a new duty is added requiring the clerk to attend meetings of all boards and committees of the governing body as required (presumably by the governing body). This appears superfluous as the statute already requires that the clerk perform other duties as required by law or the governing body. New subsection (4) appears to place, within the sole discretion of the clerk, the authority to develop retention schedules and procedures for the inventory, storage and destruction of records. Query whether this implies that neither the administration nor the assembly has any control over records retention and management. Subparagraph (6) is superfluous as it is covered by the requirement that the clerk perform other duties as required by the governing body. If it is felt that subparagraph (7) is required, perhaps something should be added to indicate that the clerk is also required to ensure that all local ordinance requirements are complied with, however, the phrase requiring assurance that various laws are complied with appears superfluous. Subparagraph (9) again takes away flexibility of the governing body as it permits only the clerk to be the parliamentary advisor. I presume that by "parliamentary advisor" it is meant "parliamentarian." Traditionally, the parliamentarian is the advisor to the presiding officer, and not to the body as a whole. I know that the practice in a lot of communities permit members of the body to make direct inquiry of the parliamentarian, but this is not in accordance with Roberts Rules. As the parliamentarian is the advisor to the presiding officer, the presiding officer should be permitted to select his or her own parliamentarian. Further, not all clerks come to the job with either the background or knowledge necessary to act as a parliamentarian. There may be another member of staff or member of the governing body that is much better equipped to act parliamentarian. Why shouldn't the governing body or the presiding officer have the flexibility of determining who will act, from time to time, as the parliamentarian? The addition of subparagraph (8) regarding to oaths and affirmations clearly expands the authority of the clerk without infringing on the flexibility of the municipality and is probably a good addition. One of the other changes that will occur is the elimination of the authority of the chief administrator to prescribe duties for the clerk (compare the existing subparagraph (6) with its counterpart (10) in the bill). The clerk is responsible for the maintenance of all the official records of the municipality. The bulk of these records are actually generated by the administration. Thus, there may be situations where the chief administrator should be giving directions to the clerk. This would be particularly so if the clerk is appointed by the chief administrator. Again, as with the question of where the appointing authority should lie, the

legislature should leave to each municipality the ability and the authority to determine what will work best for its municipality.

Sincerely,

PRESTON THORGRIMSON
SHIDLER GATES & ELLIS

By: 
Gerald Lee Sharp

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HB

130

HOUSE COMMITTEE REPORT

(7)

Date Referred: February 11, 1991 FURTHER REFERRALS: Judiciary

Date of Committee Action: 2-20-91

The COMMUNITY AND REGIONAL AFFAIRS Committee considered: HB 130

HOUSE BILL NO. 130 MUNICIPAL OMBUDSMAN'S IMMUNITY

"An Act relating to immunity of a municipal ombudsman and staff and privilege of a municipal ombudsman and staff not to testify about certain matters."

RECOMMENDATIONS: [ ] the same title
be replaced with _____ [ ] a new title

[ ] have attached amendments(s)
[X] do pass
[ ] do not pass
[ ] no recommendations
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact _____ [ ] fiscal note(s) _____

[X] zero fiscal note Dept of Community + Regional Affairs [ ] zero fiscal note(s) _____

SIGNING DO PASS: SIGNING OTHER RECOMMENDATIONS:

	Check appropriate column:	Do Not Pass	No Rec	Amend
John C. Douglas				
Cheri A. Davies				
Jay Mahoney				
Tom Wilson				
Bettye Davis				
	Gail Phillips		X	

Jay Mahoney
Chairman's Signature

ALASKA LEGISLATURE

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Kevin "Pat" Parnell
Representative
University-Midtown, Anchorage

MEMORANDUM
February 19, 1991

TO: Representative Jerry Mackie, Chair
House Community & Regional Affairs Committee

FROM: Representative Kevin "Pat" Parnell Kevin Pat Parnell

SUBJECT: HB 130, relating to Municipal Ombudsman immunity

HB 130 provides immunity for a municipal ombudsman and staff in the same fashion as has been granted to the state ombudsman in Alaska statute 24.55.250 and 24.55.260. In order for an ombudsman to guarantee that the confidentiality laws are not violated and the citizens can continue to enjoy their right to speak freely to their ombudsman, it is necessary to establish the privilege for a municipal ombudsman and their staff not to testify in court regarding matters involving an ombudsman's official duties.

The bill:

1. protects a municipal ombudsman and staff from civil action for anything done, said or omitted in performing the ombudsman's duties.

2. allows a municipal ombudsman and staff to claim immunity and therefore may decline to testify as a witness or to withhold confidential files to protect the citizen's privacy, yet retains, at their discretion, the option to testify.

Passage will ensure that a municipal ombudsman in this State carry out his/her duties as prescribed by law without reservation; the potential was recognized for an ombudsman to hesitate to investigate certain matters, or reserve criticism of agencies and officials, based on a threat or fear of civil action being brought as a result of carrying out their official duties.

Passage will also provide citizens who wish to report matters to a municipal ombudsman, or witnesses coming before an ombudsman, the confidentiality to which they are entitled.

February 13, 1991

Position Paper

AN ACT TO PROVIDE MUNICIPAL OMBUDSMEN IMMUNITY AND PRIVILEGE NOT TO TESTIFY (SECTION 09.65.075)

A. Confidentiality / Privilege Not To Testify

The ability for an ombudsman to effectively investigate complaints depends primarily on the ability to determine the facts surrounding the issue. Common among nearly all ombudsman offices is their authority to access essentially all information within their jurisdiction. Along with this power comes the requirement to protect information received which is confidential or privileged by law. Similarly, in an effort to ensure that an ombudsman is provided the most factual information possible from complainants or witnesses, their confidentiality is protected.

In order for an ombudsman to guarantee that these confidentiality laws are not violated and that citizens can continue to enjoy their right to speak freely to their ombudsmen, it is necessary to establish the privilege for an ombudsman and their staff not to testify in court regarding matters involving an ombudsman's official duties.

There is precedence for establishing this privilege not to testify for ombudsmen both on a national and international level. The State of Alaska specifically restricts the Ombudsman from testifying (Sec. 24.55.260); and the State of Nebraska prevents the Ombudsman from being required to testify or produce evidence (Sec. 81-8,253).

Common among nearly every classical ombudsman office is the provision to protect the confidentiality of certain individuals and information. The inclusion of specific language within a statute provides further clarification that an ombudsman should not be required to divulge information, or the identity of a complainant or a witness, which was received with the expectation of privacy. Case law is supportive of this protection at the state level, with Alaska contributing toward the courts' respect for the provisions contained within ombudsman statutes. Notwithstanding the limitations of states' statutes, the U. S. federal courts have exhibited considerable efforts in respecting the confidentiality provisions of state ombudsmen.

B. Immunity From Civil Action

The structure of the classic ombudsman is designed to ensure that the ombudsman be provided the freedom to investigate any act or failure to act by an agency, official, or public employee with only specific exceptions. One of the essential provisions which the American Bar Association recommended in its 1969 Resolution promoting the establishment of ombudsmen within state and local governments was to provide immunity for ombudsmen and their staff from civil liability on account of official actions. Apparently the potential was recognized for an ombudsman to hesitate to investigate certain matters, or reserve criticism of agencies and officials, based on a threat or fear of civil action being brought as a result of carrying out their official duties.

The Immunity provision has been previously established at the local level as exemplified in the Charter of the City of Detroit (Sec. 4-315). The majority of classic ombudsman offices at state, provincial and national levels are provided protection from civil suits according to survey results from the International Ombudsman Institute. Many of these offices are protected from criminal suits as well; Hawaii and Puerto Rico among them. The Hawaii State Ombudsman also has jurisdiction over local governmental units.

SUMMARY

The proposed amendments essentially allow duly established municipal ombudsmen the same protection from civil suits, and the privilege not to testify, as afforded our State Ombudsman. The benefits of these provisions within the Alaska State Ombudsman Statute have already reached certain local governments in this State by virtue of their contracting with the State Ombudsman for ombudsman services (i.e. Juneau). It would be consistent to include similar provisions as proposed for municipal ombudsmen.

Passage will ensure that municipal ombudsmen in this State carry out their duties as prescribed by law without reservation; and provide citizens who wish to report matters to an Ombudsman, or witnesses coming before an Ombudsman, the confidentiality to which they are entitled.

The appendices, including model statutes from the American Bar Association and the Harvard Journal on Legislation, provide significant justification for passage of this legislation.

Prepared by:
Michael P. Mills
Municipal Ombudsman, Anchorage
(Past President, U. S. Association of Ombudsmen)

Appendix

A. University of Miami Law Review (Spring 1975)
American Bar Association Model Ombudsman Statute for State Governments
Q. Section 17. Ombudsman's Immunities and *C. Section 3. Definitions*
Comment by Bernard Frank, Chairman, Ombudsman Committee, ABA.

B. American Bar Association Model Ombudsman Statute *Background Summary*
Ombudsman Committee Chairman Bernard Frank.

C. American Bar Association Resolution (1969).
Dealing with Establishment of an Ombudsman

D. Harvard Journal on Legislation (June 1965)
A State Statute to Create the Office of Ombudsman
Sections 603, 604 & 605, and Comment.

E. International Bar Association, Ombudsman Committee Letter (November 1978)
Chairman Bernard Frank to MOA Ombudsman, Karla L. Forsythe
Necessity of State Statute for Municipal Ombudsman Protection.

F. Anchorage Municipal Attorney Memorandum (July 1990)
Lack of Privilege Not to Testify.

G. Alaska Statute: *Sec. 24.55.240-260, Office of The Ombudsman*

H. Alaska Statute: *Sec. 44.21.231, 235 & 236, Long Term Care Ombudsman*

I. International Ombudsman Institute Report (July 1986)
Court Cases of Special Interest to the Ombudsman Institution
(Excerpts from United States court cases)

university of miami law review

VOLUME 29 SPRING 1975 NUMBER 3

STATE OMBUDSMAN LEGISLATION IN THE UNITED STATES

BERNARD FRANK*

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I. INTRODUCTION

Year after year, Ombudsman proposals have been introduced in a majority of the state legislatures in the United States.[1] Legislation has been passed for state-wide Ombudsmen in Hawaii, Nebraska, Iowa, and Alaska.[2] The word "Ombudsman," Swedish in origin, means ...

ABA MODEL STATUTE

Q. *Section 17. Ombudsman's Immunities*

(a) NO PROCEEDING, CONCLUSION, RECOMMENDATION, OR REPORT OF THE OMBUDSMAN OR MEMBER OF HIS STAFF SHALL BE REVIEWABLE IN ANY COURT;
(b) THE OMBUDSMAN AND HIS STAFF SHALL HAVE THE SAME IMMUNITIES FROM CIVIL AND CRIMINAL LIABILITIES AS A JUDGE OF THIS STATE.
(c) THE OMBUDSMAN AND HIS STAFF SHALL NOT BE COMPELLED TO TESTIFY OR PRODUCE EVIDENCE IN ANY JUDICIAL OR ADMINISTRATIVE PROCEEDING WITH RESPECT TO ANY MATTER INVOLVING THE EXERCISE OF THEIR OFFICIAL DUTIES EXCEPT AS MAY BE NECESSARY TO ENFORCE THIS ACT.

COMMENT. (a) Sub-section (a) precludes judicial review of the Ombudsman's work, unless, of course, he has violated the Act.

(b) This sub-section avoids litigation and harassment by an uncooperative agency, but does not preclude

78. HAWAII REV. STAT. §§ 96-13, -16 (1968).

prosecution for serious misconduct, or removal from office (§ 8(a)).

(c) This sub-section acts with § 11(h) to protect the secrecy and confidentiality of information obtained—in order to instill public confidence in his work; it also prevents unnecessary interruptions of his work to testify, while allowing him to proceed in court whenever necessary (§ 11(i)).

Section 17(a) precludes judicial review of the proceedings, conclusions, recommendations, or reports of the Ombudsman or members of his staff. Judicial review is likewise forbidden in the Nebraska statute and the Hawaii statute except if in Hawaii the Ombudsman contravenes the provisions of the statute.[79] The Iowa law is silent on the subject. It would seem to be implicit in the ABA Model Statute and the Nebraska statute that if the Ombudsman violates the Ombudsman statute his actions are subject to court review.

Section 17(b) further provides that the Ombudsman and staff shall have the same immunities from civil and criminal liabilities as a judge of the state. Somewhat similar language is used in the Hawaii statute except staff are omitted.[80] Iowa provides for no civil action except removal from office under Iowa law against the Citizens' Aide or his staff unless an act or omission is actuated by malice or is grossly negligent.[81] There is no provision in the Nebraska statute with respect to immunity from civil and criminal liabilities.

Section 17(c) specifically gives the Ombudsman and his staff immunity from being compelled to testify or produce evidence in any judicial or administrative proceeding with respect to any matter involving the exercise of their official duties except such testimony or evidence that might be necessary to enforce the Act. Somewhat similar language is used in the Nebraska statute as to both judicial or administrative proceedings and in the Hawaii and Iowa statutes as to court proceedings.[82] As written, the Ombudsman and his staff may voluntarily testify, but cannot be compelled to do so at least in the state courts. It is the inability to compel the Ombudsman and his staff to testify in the state courts which protects the confidentiality of the information obtained by the Ombudsman. Application of the privileged communication immunity by statute to the activities of the Ombudsman is important to the Ombudsman office. However, it is submitted that the state Ombudsman and his staff can be compelled to testify in the federal courts[82a]—a problem which would have to be resolved by appropriate federal legislation.[83] That a complaint-handling official appointed by, responsible to, and serving at the pleasure of the executive has no immunity at all, is one of the reasons the use of the term "Ombudsman" should be confined to those coming within the definition given at the outset of this article.

79. NEB. REV. STAT. § 81-8,253 (Supp. 1969); HAWAII REV. STAT. § 96-17 (1968).

80. HAWAII REV. STAT. § 96-17 (1968).

81. IOWA CODE ANN. § 601G.20 (Supp. 1974).

82. NEB. REV. STAT. § 81-8,253 (Supp. 1969); HAWAII REV. STAT. § 96-17 (1968); IOWA CODE ANN. § 601G.20 (Supp. 1974).

82a. Raymond A. Cornell, Deputy Citizen's Aide for Corrections, Iowa, was subpoenaed to

C. *Section 3. Definitions*

ABA MODEL STATUTE

AS USED IN THIS ACT,
(a) "AGENCY" MEANS ANY DEPARTMENT, ORGANIZATION, BOARD, COMMISSION, COUNCIL, INSTITUTION OR OTHER GOVERNMENTAL ENTITY OF _____ [NAME OF STATE], AND ANY OFFICIAL, OFFICER, EMPLOYEE, OR MEMBER THEREOF ACTING OR PURPORTING TO ACT BY REASON OF HIS CONNECTION WITH _____ [NAME OF STATE], EXCEPT:
(1) ANY COURT, OR JUDGE AND APPURTENANT JUDICIAL STAFF;
(2) THE LEGISLATURE, ITS MEMBERS, ITS COMMITTEES, ITS STAFF AND ITS EMPLOYEES;
(3) THE GOVERNOR AND HIS PERSONAL STAFF;
[(4) (ALTERNATE A) ANY POLITICAL SUBDIVISION OF THE STATE;]
[(4) (ALTERNATE B) MAYORS, COUNCIL MEMBERS, AND JUDGES OF ANY POLITICAL SUBDIVISION AND THEIR PERSONAL STAFFS;]
(5) ANY MULTI-STATE GOVERNMENTAL ENTITY.
(b) AN "ACT OF AN AGENCY" MEANS ANY ACTION, DECISION, FAILURE TO ACT, OMISSION, RULE OR REGULATION, INTERPRETATION, RECOMMENDATION, POLICY, PRACTICE OR PROCEDURE OF ANY AGENCY.
(c) "PERSON" MEANS ANY INDIVIDUAL, AGGREGATE OF INDIVIDUALS, CORPORATION, PARTNERSHIP, OR UNINCORPORATED ASSOCIATION.

COMMENT.

1. ...

4. Local government exclusion from or inclusion in the Ombudsman's jurisdiction is left to the decision of the legislature. If political subdivisions are to be excluded (as in Nebraska), appropriate language is recommended in the ABA Model Statute. If local government is to come within the jurisdiction of the Ombudsman, then the ABA Model Statute recommends that the phrase "and local" be included in the legislative purpose (section one) and further that consideration be given to exclude in the section three definition of "agency" certain local officials. Both Iowa and Hawaii have jurisdiction over

19. IOWA CODE ANN. § 601G.1-2(a) (Supp. 1974); NEB. REV. STAT. § 81-8,240(1) (Supp. 1969).
20. HAWAII REV. STAT. § 96-1(a)(1) (Supp. 1974).
21. HAWAII REV. STAT. § 96-1(a)(2) (1968); IOWA CODE ANN. § 601G.1-2(b) (Supp. 1974).
22. NEB. REV. STAT. § 81-8,240(1)(b) (Supp. 1969).
23. HAWAII REV. STAT. § 96-1(a)(6) (Supp. 1974).

local government, but only the Hawaii law makes provision (by a 1974 amendment) for an exclusion for mayors and councils of the various counties.[24]

It is appropriate to discuss at this point several problems in connection with local government. It is obvious that omitting local government from the jurisdiction of the state Ombudsman does not prevent the creation of the office by a political subdivision of the state. On the other hand, the comment to section one does raise the question (originally posed by Professor L. Harold Levinson, a member of the Ombudsman Committee) whether inclusion of local government will be interpreted as preempting to the state jurisdiction over both state and local agencies to prevent a local government from establishing its own local Ombudsman. The ABA Model Statute does not address this point, but this writer believes that the question must be answered in the affirmative. The problem of immunities of the local Ombudsman discussed hereafter under section 17 points to the desirability of state legislation covering the subject of local government. Either a state should give its Ombudsman jurisdiction over both local and state agencies or a state should have several statutes, one permitting local government to establish a local Ombudsman under the detailed provisions of a state statute and the other establishing a state Ombudsman without local jurisdiction.[25]

Another possible alternative suggested by Professor Levinson is to have a statute provide for a state-wide Ombudsman without local jurisdiction but to give enabling authority for any local government to establish a local Ombudsman with essentially the same attributes and powers, subject to some variations.[26]

5. It is made clear in the ABA Model Statute and the three state statutes that multi-state government entities are exempt from the jurisdiction of the Ombudsman.[27] However, the language of the ABA Model Statute and the Hawaii statute is preferable, because of its simplicity, to the language of the Nebraska and Iowa statutes, the latter stating, "any instrumentality formed pursuant to an interstate compact and answerable to more than one state."

6. The ABA Model Statute like Iowa does not specify an exclusion for federal agencies because it was deemed superfluous in view of constitutional limitations. However, the Hawaii and Nebraska statutes do contain such an explicit exclusion.[28]

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24. HAWAII REV. STAT. § 96-1(a)(7)(8) (Supp. 1974).

25. For example, the Georgia legislature passed in 1974, H.B. 35 amending the Atlanta City Charter providing for an Ombudsman. On opinion of the City Attorney to the effect that the state law was improper, the City Council passed its own Ombudsman ordinance.

26. Letters from Professor L. Harold Levinson to Bernard Frank, Oct. 30, 1973, and Jan. 11, 1974.

AMERICAN BAR ASSOCIATION

You will find attached a Model Ombudsman Statute for State Governments (pages 1-15), the American Bar Association resolution on the Ombudsman (page 16), and a recommended bibliography on the Ombudsman (pages 17-19).

The Ombudsman Committee, Section of Administrative Law, American Bar Association, concluded several years ago that a uniform State Ombudsman Act was not needed in this country but that a Model Ombudsman Statute would serve a very useful purpose.

At the request of the Ombudsman Committee, Yale Legislative Services undertook to prepare a Model Ombudsman Statute for State Governments. Edward G. Grossman, a student at Yale University Law School, acted as project co-ordinator and prepared a first draft of a Model Ombudsman Statute for State Governments. The Model Statute as prepared by Yale Legislative Services was reviewed by a special committee of the Ombudsman Committee and the comments of the committee members are reflected in the final draft of the Model Statute attached hereto. The Model Statute draws heavily on Professor Walter Gellhorn's Unofficial Model Ombudsman Statute. Professor Gellhorn, who is a member of the special committee, gave his consent to the use of his Unofficial Model Ombudsman Statute as a base to prepare the Model Ombudsman Statute for State Governments.

The Model Ombudsman Statute for State Governments meets the twelve (12) essentials of an Ombudsman Statute set forth in the resolution adopted by the House of Delegates of the American Bar Association in 1969 as recommended by the Ombudsman Committee then headed by Professor Kenneth Culp Davis and amended in 1971.

This Model Ombudsman Statute for State Governments is issued by the Ombudsman Committee, Section of Administrative Law, American Bar Association, but represents a joint work product of the Yale Legislative Services and the Ombudsman Committee, Section of Administrative Law, American Bar Association. The bibliography was prepared by Mr. Grossman.

The Ombudsman Committee extends its appreciation to Yale Legislative Services and to Edward G. Grossman.

Bernard Frank, Chairman
Ombudsman Committee
Section of Administrative Law
American Bar Association
931 Hamilton Mall
Allentown, Pennsylvania 18105

American Bar Association Resolution

The following Resolution dealing with the establishment of an Ombudsman was adopted by the American Bar Association at the Midyear Meeting of the House of Delegates in 1969:

Be it Resolved, That the American Bar Association recommends:

1. That state and local governments of the United States should give consideration to the establishment of an ombudsman authorized to inquire into administrative action and to make public criticism.

2. That each statute or ordinance establishing an ombudsman should contain the following twelve essentials: (1) authority of the ombudsman to criticize all agencies, officials, and public employees except courts and their personnel, legislative bodies and their personnel, and the chief executive and his personal staff; (2) independence of the ombudsman from control by any other officer, except for his responsibility to the legislative body; (3) appointment by the legislative body or appointment by the executive with confirmation by a designated proportion of the legislative body, preferably more than a majority, such as two-thirds; (4) indepedence of the ombudsman through a long term, not less than five years, with freedom from removal except for cause, determined by more than a majority of the legislative body, such as two-thirds; (5) a high salary equivalent to that of a designated top officer; (6) freedom of the ombudsman to employ his own assistants and to delegate to them, without restraints of civil service and classification acts; (7) freedom of the ombudsman to investigate any act or failure to act by any agency, official, or public employee; (8) access of the ombudsman to all public records he finds relevant to an investigation; (9) authority to inquire into fairness, correctness of findings, motivation, adequacy of reasons, efficiency, and procedural propriety of any action or inaction by any agency, official, or public employee; (10) discretionary power to determine what complaints to investigate and to determine what criticisms to make or to publicize; (11) opportunity for any agency, official, or public employee criticized by the ombudsman to have advance notice of the criticism and to publish with the criticism an answering statement; (12) immunity of the ombudsman and his staff from civil liability on account of official action.

3. That for the purpose of determining the workability of the ombudsman idea within the Federal government, the Federal government should experiment with the establishment of an ombudsman or ombudsmen for limited geographical area or areas, for a specific agency or agencies or for a limited phase or limited phases of Federal activity.

4. That establishment of a Federal government-wide ombudsman program should await findings based upon the experimentation recommended.

Be it Further Resolved, That the Section of Administrative Law is authorized to present the views of the Association and to encourage the establishment of ombudsmen in accordance with the provisions of this Resolution, by all necessary and appropriate means.

Harvard Journal on Legislation

A State Statute to Create The Office of Ombudsman

SECTION 603. *Judicial review.*

No proceeding or decision of the Ombudsman may be reviewed in any court, unless it contravenes the provisions of this Act.

SECTION 604. *Immunity of the Ombudsman.*

The Ombudsman has the same immunities from civil and criminal liability as a judge of this state.

SECTION 605. *Ombudsman's privilege not to testify.*

The Ombudsman and his staff shall not testify in any court with respect to matters coming to their attention in the exercise or purported exercise of their official duties except as may be necessary to enforce the provisions of this Act.

COMMENT

SECTION 603. *Judicial Review.*

This section prevents an agency or official from securing judicial review of the Ombudsman's recommendations. Since the Ombudsman has no power to revise agency actions, it is unlikely that anyone would be held to have standing to object to his recommendations. However, since the institution is new in this country, one cannot be certain how the law will develop. This provision is included to guarantee that the Ombudsman will not be frequently involved in litigation when an agency disagrees with his appraisal of its actions.

SECTION 604. *Immunity of the Ombudsman.*

The Ombudsman is given the immunities from civil and criminal prosecution that are enjoyed by a state judge. The most significant of these is immunity from liability for defamation arising out of statements made in the exercise of his duties.

SECTION 605. *Ombudsman's privilege not to testify.*

The purpose of this section is to encourage people to cooperate with the Ombudsman, without fear that he will divulge information disclosed to him in confidence. This section also protects the Ombudsman and his staff from the embarrassment and interruption of having to testify in regard to cases they have investigated. However, since the Ombudsman may need recourse to the courts to perform his duties under this act, this privilege is not withheld from him. Its most likely use is to enforce his subpoena power under section 403. He may also testify in regard to the penalty for obstruction under section 607.

International Bar Association

Ombudsman Committee

Chairman
Bernard Frank (USA)

Vice Chairman
Alex B. Weir (Canada)

November 17, 1978

Ms. Karla L. Forsythe
Ombudsperson
Municipality of Anchorage
Office of the Ombudsman
Pouch 6-650
Anchorage, Alaska 99502

Dear Ms. Forsythe:

Thank you for the copy of the letter to Peter Freeman. You raised two points:

1. Confidentiality of communications between complainants and your office. This problem, please note pages 439 to 441 inclusive from my article on "State Ombudsman Legislation in the United States", Section 17, pages 13-14, of the Model Ombudsman Statute, and pages 47-48 of my article on the Nebraska Public Counsel. This problem was discussed at one of the workshops at the Dayton conference. The problem with local government is that the only item on the subject is a local ordinance and then the immunity extends only in those courts which are subject to the jurisdiction of the local governments. You will not have immunity in the state courts and certainly not in the federal courts. However, if I were you I would do what I could on the local level and you will note there are sections on immunity in the Flint Charter, page 20, and the Detroit Charter, Section 4-315. The state statute might be necessary to protect you in the state courts but this would, of course, not preclude being subpoenaed for a federal court. Your only hope there would be to have a federal statute to cover this subject. There remains a great deal of work in this particular area. I would suggest that you write to William P. Angrick, II, Office of the Citizens' Aide, 515 East Twelfth Street, Des Moines, Iowa, 50319, because his office has been involved in several cases involving freedom from subpoena in a federal court. The early part of this year, a Federal Judge upheld the confidentiality of the Iowa Ombudsman records on the basis that there was no federal interest involved and the state policy should prevail as reflected in the Statute granting immunity.

Address correspondence to the Chairman
931 Hamilton Mall, P. O. Box 419, Allentown, PA 18105, U.S.A. Telephone (215) 435-8091

2. With respect to provisions containing non-retaliation sections, I would refer you to page 44 of the Nebraska article, Section 13(e) of the Model Statute, and page 432 of the University of Miami article. Offhand, I found only a section on this in the Nebraska statute.

If you wish to discuss this further, please contact me.

Sincerely,

Bernard Frank

BF:dc

Enclosures

CONFIDENTIAL
Communication
Attorney/Client

RECEIVED
JUL 12 1990
Office of the Ombudsman

MUNICIPALITY OF ANCHORAGE

MEMORANDUM

DATE: July 6, 1990

TO: Michael Mills, Ombudsman

FROM: Kevin Finnigan, Assistant Municipal Attorney KF

THRU: James E. Ramsey, Deputy Municipal Attorney

THRU: Richard D. Kibby, Municipal Attorney

SUBJECT: MOA v. Robert H. Stafford
Superior Court Case No. 3AN-89-7397 Civil

You have asked whether AMC 2.60.120(C) provides authority to exempt the Ombudsman from honoring a subpoena to testify at a trial.

SHORT ANSWER

AMC 2.60.120(C) does not provide a recognizable privilege exempting the Ombudsman from honoring a subpoena and testifying at trial.

FACTS

Mr. Stafford has advised the Ombudsman and his assistant that he would be issuing them a subpoena to appear and testify at his upcoming trial. Mr. Stafford had previously filed a complaint with the Ombudsman's office concerning alleged improprieties by an employee at the Parks and Recreation Department. The Ombudsman's office made an initial inquiry into the matter but did not investigate the matter because of pending litigation.

DISCUSSION

AMC 2.60.070(C) states:

> The Ombudsman shall protect the confidentiality of complainants or witnesses coming before them except insofar as disclosure may be necessary to enable the Ombudsman to carry out his duties.

The above provision does not provide a privilege from honoring a subpoena or testifying in court. Instead, AMC 2.60.070(C) prohibits the Ombudsman from voluntarily disclosing information

obtained from complainants and witnesses except insofar as disclosure may be necessary to enable the Ombudsman to carry out his duties. The State Ombudsman is afforded protections not given to the Municipal Ombudsman. AS 24.55.260 states that "the ombudsman and the staff of the ombudsman's office may not testify in a court regarding matters coming to their attention in the exercise or purported exercise of their official duties except as may be necessary to enforce the provisions of this chapter." Based on AS 24.55.260, the State Ombudsman may refuse to testify as a witness. Alaska Rule of Court 501 recognizes certain privileges from testifying in court. Among those recognized are privileges provided in enactments of the Alaska Legislature. Alaska Rule of Court 501 thus would recognize the privilege of the State Ombudsman pursuant AS 24.55.260 from testifying as provided by state law. No such protection is recognized for the Municipal Ombudsman.

Please contact this office if we may be of further assistance.

KF:ld
M/MILLS1

ALASKA STATUTES

LEGISLATURE

Chapter 55. Office of the Ombudsman.

Sec. 24.55.240. Judicial review. A proceeding or decision of the ombudsman may be reviewed in superior court only to determine if it is contrary to the provisions of this chapter. (§ 1 ch 32 SLA 1975)

Sec. 24.55.250. Immunity of the ombudsman. A civil action may not be brought against the ombudsman or a member of the ombudsman's staff for anything done, said or omitted in performing the ombudsman's duties or responsibilities under this chapter. (§ 1 ch 32 SLA 1975)

Sec. 24.55.260. Ombudsman's privilege not to testify. The ombudsman and the staff of the ombudsman may not testify in a court regarding matters coming to their attention in the exercise or purported exercise of their official duties except as may be necessary to enforce the provisions of this chapter. (§ 1 ch 32 SLA 1975)

Article 4. Older Alaskans Commission.

Sec. 44.21.231. Office of the long term care ombudsman. (a) The office of the long term care ombudsman is established in the commission.

(b) The ombudsman shall be hired by the commission. A member of the commission who has a financial interest in a long term care facility in the state, or who has any other conflict of interest, may not participate in the hiring of the ombudsman. The ombudsman is a full-time position in the classified service.

(c) The ombudsman may not have a financial interest in a long term care facility in the state. The commission shall adopt regulations to ensure that the ombudsman, and employees and volunteers of the office, do not have a conflict of interest or an appearance of a conflict of interest. (§ 2 ch 108 SLA 1988)

Sec. 44.21.235. Confidentiality. (a) Records obtained or maintained by the ombudsman are confidential, are not subject to inspection or copying under AS 09.25.110 — 09.25.120 and, except as provided in (b) of this section, may be disclosed only at the discretion of the ombudsman.

(b) The identity of a complainant or an older Alaskan on whose behalf a complaint is made may not be disclosed without the consent of the identified person or the person's legal guardian, unless required by court order. (§ 2 ch 108 SLA 1988)

Sec. 44.21.236. Immunity from liability. (a) A person who, in good faith, makes a complaint described in AS 44.21.232 is immune from civil or criminal liability that might otherwise exist for making the complaint.

(b) The ombudsman, or an employee, volunteer, or other representative of the office, is immune from civil or criminal liability for the good faith performance of official duties. (§ 2 ch 108 SLA 1988)

INTERNATIONAL OMBUDSMAN INSTITUTE: CASES
July 24, 1986

UNITED STATES - ALASKA

"Kimberly Shinn v. Charles Dexter, et al."
4FA -81-1736-Civ. (Alaska S.C.) Order June 8, 1982

OMBUDSMAN OFFICES - CONFIDENTIALITY*

The plaintiff sought to compell the testimony of a staff member of the Office of Ombudsman for Alaska at trial. The Office of Ombudsman had investigated a complaint which related to the plaintiff's present legal action. The Office of Ombudsman brought a Motion to Strike the staff member's name from the Witness List and a Protective Order barring the production of witnesses on documents from the office of Ombudsman. The Ombudsman's motion was based primarily on the confidentiality provisions of the statute: AS 24.55.160(b) "The Ombudsman shall maintain confidentiality with respect to all matters and the identities of the complainants or witnesses coming before him except insofar as disclosures may be necessary to enable him to carry out his duties and to support his recommendations."; and on AS 24.55.260 "The Ombudsman and his staff may not testify in a court regarding matters coming to their attention in the exercise or purported exercise of their official duties except as may be

necessary to enforce the provisions of this chapter." The Superior Court granted the Order striking the staff members name from the Witness List and a Protective Order barring the production of witnesses and/or documents from the Ombudsman Office was entered

INTERNATIONAL OMBUDSMAN INSTITUTE: CASES
July 24. 1986

UNITED STATES - IOWA

"Kelly v. Brewer"
RC Civil No. 73-177-2, order filed April 28, 1975

ICWA CITIZENS' AIDE* U.S. FEDERAL COURT SUBPOENA* OMBUDSMAN - CONFIDENTIALITY*

The Iowa Citizens' Aide (Ombudsman) Mr. Thomas R. Mayer was served with a Federal Court subpoena. Mr. Mayer has tried to resist attempts to have his Ombudsman office used as a means of discovery for litigation. The only possible solution to the present dilemma facing State Ombudsmen in the United States would be Federal legislation granting immunity from Federal subpoena. The court ruling requiring a member of the Ombudsman's staff to testify in court was not appealed since an accord was worked out between the plaintiff's counsel and the Ombudsman's counsel enabling the testimony to be given "in camera" if the subpoena was withdrawn.

27

UNITED STATES - IOWA

"Remmers et al. v. Brewer"
U.S. District Court, Southern District of Iowa, Judgment delivered January 4, 1978 36 pages

CITIZEN'S AIDE FOR CORRECTION* U.S. FEDERAL COURT SUBPOENA* OMBUDSMAN - CONFIDENTIALITY*

A prison ombudsman was subpoenaed to testify in United States District Court regarding Remmers v. Brewer. Litigation was to determine the status of a prison religion. The state was trying to prove no such religion existed, and the prison ombudsman's testimony was to provide proof through information gathered in the course of his duties. The Citizen's Aide objected, based on Iowa Code which stated that information gathered by the prison ombudsman was confidential. He wished to protect the confidentiality, credibility, and physical safety of the prison ombudsman and other staff while in the prisons. On November 29, 1977 a magistrate granted the motion to quash, because no serious federal interest overrode his statutory immunity from subpoena. The state's interest in protecting the confidentiality of the Ombudsman outweighed the defendant's need for the prison ombudsman's testimony. An appeal to the District Court was dismissed because "the state interest in the efficient operation of its administrative agenices as embodied in the Citizen's Aide concept would clearly be adversely affected by compelling Cornell (the prison ombudsman) to testify."

UNITED STATES -ALASKA

"Patricia v State of Alaska(Department of Health and Social Services,et al."
1985 Annual Report of Alaska Ombudsman, App. F 6pages, 161-167

Ombudsman-Non-Compellibility* Ombudsman Statute, A.S., s24.55.260*

The Ombudsman for the State of Alaska sought to quash a subpoena which had been issued requiring an employee of his office to provide a deposition, and for a further order enforcing the privilege of the Alaska Statute and barring any production of witnesses from The Office of the Ombudsman in the action. An employee of The Office of the Ombudsman, in the course of his employment, had investigated a complaint by the plaintiff against the State of Alaska, Department of Health and Social Services. The complainant had alleged that the department's hiring, practises contravened the State Personnel Act and Personnel Rules. The employee had completed the investigation and drafted a report which was issued to Ms. Williams and signed by the Ombudsman, Frank Flavin. Ms. Williams ultimately filed an action against The Department of Health and sought through the subpoena, information obtained during the course of the investigation. The Court reviewed the provisions of -The Ombudsman Act- regarding the confidentiality of the Ombudsman and the protection afforded him and members of his staff from testifying in respect to matters coming to their attention during the course of their investigation and concluded that the privilege was such that it should be recognized and accordingly ordered that the subpoena be quashed and a protective order issued. In coming to this conclusion, the Court viewed the privilege necessary in order to protect the confidentiality of information obtained by the Ombudsman, encourage co-operation on an investigation, and keep the Ombudsman out of vexatious litigation. In addition, the Court held that the plaintiff would have to establish the special need for the information. Finally, it concluded that the adverse impact in compelling testimony would be substantial. For all the above reasons the Court recognized the privilege from testifying and quashed the subpoena.

UNITED STATES -HAWAII

"Jake Lapin v. William C. Plowden, Jr., and Joshua C. Agsalud Re: Civil No. 84-0143, order filed April 10,1984"

U.S. Federal Court Subpoena*

The State Ombudsman, Herman S. Doi, was served with a Federal Court subpoena which was issued at the request of a Plaintiff in a civil suit. A motion to quash the subpoena was filed to resist the attempt to have the Ombudsman testify and produce records in court pursuant to the subpoena. The motion was based on the premise that court may quash or modify the subpoena if it is unreasonable and oppressive. The memorandum in support of the motion sited section 96-9(b), Hawaii Revised Statutes (HRS), the Ombudsman is required to maintain secrecy in respect to all matters and identities of complainants and witnesses - section 96-17, HRS, the Ombudsman and his staff shall not testify in any court- and that the court should decide the issue by balancing State and Federal interest under Rule 501, Federal Rules of Evidence. Hawaii's interest, to protect the statutory privilege granted the Ombudsman, an officer of the legislature, prevailed and the subpoena was quashed by the magistrate hearing the motion. Plaintiff appealed the decision of the magistrate by filing a "Motion to Set Aside the Magistrate's Order Granting Motion to Quash Subpoena Duces Tecum", which motion was denied on the grounds of mootness because the court dismissed the case for Plaintiff's lack of

Iowa Statute

CHAPTER 601G

CITIZENS' AIDE

601G.1 Definitions.
601G.2 Office established.
601G.3 Appointment — vacancy.
601G.4 Citizen of United States and resident of Iowa.
601G.5 Term — removal.
601G.6 Deputy — assistant for penal agencies.
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601G.10 No charge for services.
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601G.12 Complaints investigated.
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601G.14 Institutionalized complainants.
601G.15 Reports critical of agency or officer.
601G.16 Recommendations to agency.
601G.17 Publication of conclusions.
601G.18 Report to general assembly.
601G.19 Disciplinary action recommended.
601G.20 Immunities.
601G.21 Witnesses.
601G.22 Penalties.
601G.23 Citation.

601G.1 Definitions.

As used in this chapter:

1. *"Person"* means an individual, aggregate of individuals, corporation, partnership, or unincorporated association.

2. *"Agency"* means all governmental entities, departments, boards, commissions, councils or institutions, and any officer, employee or member thereof acting or purporting to act in the exercise of official duties, but it does not include:

a. Any court or judge or appurtenant judicial staff.

b. The members, committees, or permanent or temporary staffs of the Iowa general assembly.

c. The governor of Iowa or the governor's personal staff.

d. Any instrumentality formed pursuant to an interstate compact and answerable to more than one state.

3. *"Officer"* means any officer of an agency.

4. *"Employee"* means any employee of an agency.

5. *"Administrative action"* means any policy or action taken by an agency or failure to act pursuant to law.

[C73, 75, 77, 79, 81, §601G.1]

601G.2 Office established.

The office of citizens' aide is established.

[C73, 75, 77, 79, 81, §601G.2]

601G.3 Appointment — vacancy.

The citizens' aide shall be appointed by the legislative council with the approval and confirmation of a constitutional majority of the senate and with the approval and confirmation of a constitutional majority of the house of representatives. The legislative council shall fill a vacancy in this office in the same manner as the original appointment. If the appointment or vacancy occurs while the general assembly is not in session, such appointment shall be reported to the senate and the house of representatives within thirty days of their convening at their next regular session for approval and confirmation.

The citizens' aide shall employ and supervise all employees under the citizens' aide's direction in such positions and at such salaries as shall be authorized by the legislative council. The legislative council shall hear and act upon appeals of aggrieved employees of the office of the citizens' aide.

[C73, 75, 77, 79, 81, §601G.3]

601G.4 Citizen of United States and resident of Iowa.

The citizens' aide shall be a citizen of the United States and a resident of the state of Iowa, and shall be qualified to analyze problems of law, administration and public policy.

[C73, 75, 77, 79, 81, §601G.4]

601G.5 Term — removal.

The citizens' aide shall hold office for four years from the first day in July of the year of approval by the senate and the house of representatives, and until a successor is appointed by the legislative council, unless the citizens' aide can no longer perform the official duties, or is removed from office. The citizens' aide may at any time be removed from office by constitutional majority vote of the two houses of the general assembly or as provided by chapter 66. If a vacancy occurs in the office of citizens' aide, the deputy citizens' aide shall act as citizens' aide until the vacancy is filled by the legislative council.

[C73, 75, 77, 79, 81, §601G.5]

601G.6 Deputy — assistant for penal agencies.

The citizens' aide shall designate one of the members of the staff as the deputy citizens' aide, with authority to act as citizens' aide when the citizens' aide is absent from the state or becomes disabled. The citizens' aide may delegate to members of the staff any of the citizens' aide's authority or duties except the duty of formally making recommendations to agencies or reports to the governor or the general assembly.

The citizens' aide shall appoint an assistant who shall be primarily responsible for investigating complaints relating to penal or correctional agencies.

[C73, 75, 77, 79, 81, §601G.6]

84 Acts, ch 1046, §1

plaint, whether or not it has been investigated, the citizens' aide shall without delay inform the complainant of the fact, and if appropriate, shall inform the administrative agency involved. The citizens' aide shall on request of the complainant, and as appropriate, report the status of the investigation to the complainant.

[C73, 75, 77, 79, 81, §601G.13; 82 Acts, ch 1026, §2]

601G.14 Institutionalized complainants.

A letter to the citizens' aide from a person in a correctional institution, a hospital, or other institution under the control of an administrative agency shall be immediately forwarded, unopened to the citizens' aide by the institution where the writer of the letter is a resident. A letter from the citizens' aide to such a person shall be immediately delivered, unopened to the person.

[C73, 75, 77, 79, 81, §601G.14]

601G.15 Reports critical of agency or officer.

Before announcing a conclusion or recommendation that criticizes an agency or any officer or employee, the citizens' aide shall consult with that agency, officer or employee, and shall attach to every report sent or made under the provisions of this chapter a copy of any unedited comments made by or on behalf of the officer, employee, or agency.

[C73, 75, 77, 79, 81, §601G.15]

601G.16 Recommendations to agency.

If, having considered a complaint and whatever material the citizens' aide deems pertinent, the citizens' aide finds substantiating facts that:

1. A matter should be further considered by the agency;
2. An administrative action should be modified or canceled;
3. A rule on which an administrative action is based should be altered;
4. Reasons should be given for an administrative action; or
5. Any other action should be taken by the agency, the citizens' aide shall state the recommendations to the agency. If the citizens' aide requests, the agency shall, within twenty working days notify the citizens' aide of any action taken on the recommendations or the reasons for not complying with them.

If the citizens' aide believes that an administrative action has occurred because of laws of which results are unfair or otherwise objectionable, the citizens' aide shall notify the general assembly concerning desirable statutory change.

[C73, 75, 77, 79, 81, §601G.16]

601G.17 Publication of conclusions.

The citizens' aide may publish the conclusions, recommendations, and suggestions and transmit them to the governor, the general assembly or any of its committees. When publishing an opinion adverse to an administrative agency or official the citizens' aide shall, unless excused by the agency or official affected, include with the opinion any unedited reply made by the agency.

Any conclusions, recommendations, and suggestions so published may at the same time be made available to the news media or others who may be concerned.

[C73, 75, 77, 79, 81, §601G.17]

601G.18 Report to general assembly.

The citizens' aide shall by April 1 of each year submit an economically designed and reproduced report to the general assembly and to the governor concerning the exercise of the citizens' aide functions during the preceding calendar year. In discussing matters with which the citizens' aide has been concerned, the citizens' aide shall not identify specific persons if to do so would cause needless hardship. If the annual report criticizes a named agency or official, it shall also include unedited replies made by the agency or official to the criticism, unless excused by the agency or official affected.

[C73, 75, 77, 79, 81, §601G.18; 82 Acts, ch 1026, §3]

601G.19 Disciplinary action recommended.

If the citizens' aide believes that any public official, employee or other person has acted in a manner warranting criminal or disciplinary proceedings, the citizens' aide shall refer the matter to the appropriate authorities.

[C73, 75, 77, 79, 81, §601G.19]

601G.20 Immunities.

No civil action, except removal from office as provided in chapter 66, or proceeding shall be commenced against the citizens' aide or any member of the staff for any act or omission performed pursuant to the provisions of this chapter unless the act or omission is actuated by malice or is grossly negligent, nor shall the citizens' aide or any member of the staff be compelled to testify in any court with respect to any matter involving the exercise of the citizens' aide's official duties except as may be necessary to enforce the provisions of this chapter.

[C73, 75, 77, 79, 81, §601G.20]

601G.21 Witnesses.

A person required by the citizens' aide to provide information shall be paid the same fees and travel allowances as are extended to witnesses whose attendance has been required in the district courts of this state. Officers and employees of an agency shall not be entitled to such fees and allowances. A person who, with or without service of compulsory process, provides oral or documentary information requested by the citizens' aide shall be accorded the same privileges and immunities as are extended to witnesses in the courts of this state, and shall also be entitled to be accompanied and advised by counsel while being questioned.

[C73, 75, 77, 79, 81, §601G.21]

601G.22 Penalties.

A person who willfully obstructs or hinders the lawful actions of the citizens' aide or the citizens' aide's staff, or who willfully misleads or attempts to mislead the citizens' aide in the citizens' aide's inquiries, shall be guilty of a simple misdemeanor.

[C73, 75, 77, 79, 81, §601G.22]

601G.23 Citation.

This chapter shall be known and may be cited as the "Iowa Citizens' Aide Act".

[C73, 75, 77, 79, 81, §601G.23]

CITIZENS' AIDE[210]

(OMBUDSMAN)

Chapter 1-6 rescinded and the following chapter 1-8 published 9/16/81 and effective 10/21/81, adopted 9/16/81

CHAPTER 1
ORGANIZATION
1.1(601G) Function
1.2(601G) Operation

CHAPTER 2
PROCEDURES
2.1(601G) Intake methods
2.2(601G) Jurisdiction
2.3(601G) Investigations
2.4(601G) Hearings
2.5(601G) Case disposition after investigation
2.6(601G) Review

CHAPTER 3
DECLARATORY RULINGS
3.1(17A) General
3.2(17A) Petition for declaratory rulings
3.3(17A) Procedure after petition is filed

CHAPTER 4
RULEMAKING
4.1(17A,601G) Commencing rulemaking
4.2(17A,601G) Oral presentations
4.3(17A) Conferences or consultation
4.4(17A) Adoption
4.5(17A) Statement of reasons
4.6(17A) Petition for rulemaking
4.7(17A) Procedure after petition is filed

CHAPTER 5
CONFIDENTIALITY
5.1(601G,68A) Public information
5.2(601G) Private information
5.3(601G) Confidential information
5.4(601G) Request for information in citizens' aide/ombudsman files

CHAPTER 6
PRIVILEGES AND IMMUNITIES
6.1(601G) Privileges and immunities

CHAPTER 7
PENALTIES
7.1(601G) Penalties

CHAPTER 8
FORMS
8.1(601G) Subpoena form
8.2(601G) Patient waiver form
8.3(601G) General information waiver form

CHAPTER 1
ORGANIZATION

210—1.1(601G) Function. The citizens' aide/ombudsman office was created pursuant to chapter 601G, The Code, and is charged with the responsibility to accept and investigate complaints and render an objective opinion or recommendation on a complaint from a member of the public about an action or inaction of an agency of the state or local government in Iowa, and by doing so, resolving citizens' complaints and improving administrative processes and procedures.

210—1.2(601G) Operation.

1.2(1) Location. The office of the citizens' aide/ombudsman is located at 515 E. 12th Street, Des Moines, Iowa 50319. The phone number is area code (515) 281-3592. Office hours

5.4(5) The citizens' aide/ombudsman will provide open access to the files, at the written request of the governor, the general assembly or standing committee of the general assembly pursuant to Iowa Code section 601G.8.

These rules are intended to implement Iowa Code chapter 601G as amended by 1982 Iowa Acts, chapter 1026.

[Filed 8/26/81, Notice 7/22/81—published 9/16/81, effective 10/21/82]
[Filed 11/5/82, Notice 6/23/82—published 11/24/82, effective 12/29/82]

CHAPTER 6
PRIVILEGES AND IMMUNITIES

210—6.1(601G) Privileges and immunities.

6.1(1) No civil action, except removal from office, as provided in chapter 66, The Code, or proceeding shall be commenced against the citizens' aide/ombudsman or any member of his/her staff for any act or omission performed pursuant to the provisions of this chapter unless the act or omission is actuated by malice or is grossly negligent.

6.1(2) The citizens' aide/ombudsman or any member of his/her staff shall not be compelled to testify in any court with respect to any matter involving the exercise of his/her official duties except as may be necessary to enforce the provisions of chapter 601G, The Code.

[Filed 8/26/81, Notice 7/22/81—published 9/16/81, effective 10/21/81]

CHAPTER 7
PENALTIES

210—7.1(601G) Penalties. Any person who willfully obstructs or hinders the lawful actions of the citizens' aide/ombudsman or a member of the citizens' aide/ombudsman's staff or who willfully misleads or attempts to mislead the citizens' aide/ombudsman in his/her inquiries shall be guilty of a simple misdemeanor. The citizens' aide/ombudsman shall refer all violations of this section to the county attorney in the county where the obstruction or hinderance occurred.

[Filed 8/26/81, Notice 7/22/81—published 9/16/81, effective 10/21/81]

CHAPTER 8
FORMS

210—8.1(601G) Subpoena form. Citizens' aide/ombudsman form number CA/O-1 is a subpoena/subpoena duces tecum form.

210—8.2(601G) Patient waiver form. Citizens' aide/ombudsman form number CA/O-2 is an authorization for medical or hospital information form.

210—8.3(601G) General information waiver form. Citizens' aide/ombudsman form number CA/O-3 is an authorization for release of information form.

[Filed 8/26/81, Notice 7/22/81—published 9/16/81, effective 10/21/81]

State of Alaska
Ombudsman
Duncan C. Fowler

Reply to:

☐ P.O. Box 102636
Anchorage, AK 99510-2636
(907) 277-8848
(800) 478-2624

☑ P.O. Box WO
Juneau, AK 99811-3000
(907) 465-4970
(800) 478-4970

☐ P.O. Box 74358
Fairbanks, AK 99707-4358
(907) 452-4001
(800) 478-3257

February 19, 1991

Representative Jerry Mackie, Chairman
Community and Regional Affairs Committee
Alaska State Legislature
Post Office Box V
Juneau, Alaska 99811-3100

RE: HB 130, Municipal Ombudsmen

Dear Representative Mackie:

Please consider this letter to be in support of HB 130. Its passage will provide protections to ombudsmen established by municipal ordinance similar to those granted ombudsmen in state government.

The Alaska Ombudsman Act, which established this office, and the statutes which established the Long Term Care Ombudsman have provisions similar to the proposed HB 130. Both laws grant the ombudsmen offices immunity from civil action, excuse the ombudsmen from testifying in court and have strict confidentiality provisions preventing the disclosure of file materials. HB 130 would insure municipal ombudsmen have similar protections.

The immunity from civil action, assurance of confidentiality of investigative files, and immunity from testifying in court are common elements in model ombudsman legislation promoted by both national and international organizations. These provisions are cited as being desirable by the International Bar Association's Ombudsman Committee, the American Bar association model law and the model ombudsman act proposed in the Harvard Law Review.

There are several practical effects of such provisions. Ombudsmen, by the nature of their work, continually deal with situations where two persons are in disagreement. Some citizens believe the way to resolve disagreements is in the courts. If possible, they would sue the ombudsman if they disagreed with the office's findings and recommendations. Although the ombudsman only has the power to recommend change, the information we obtain during the course of an investigation would be valuable to persons interested in suing the state. Some attorneys would like to rely on ombudsman staff to do their paralegal work.

It is important that ombudsmen have clear access to agencies and their records in order to make factual findings and practical recommendations. This can only be done if the agencies have confidence the ombudsman will be able to maintain the confidentiality of the materials. The investigative files should not be subject to subpoena nor the subject of testimony by ombudsman staff.

In summary, I do support the passage of HB 130. I believe passage will provide municipal ombudsman offices with protections that are consistent with model ombudsman laws. Please let me know if you have any other questions regarding ombudsmen and the effect of this bill.

Sincerely,

Duncan C. Fowler
Ombudsman

DCF:pjc

STATE OF ALASKA

OFFICE OF THE GOVERNOR

BILL ANALYSIS

DEPARTMENT	DIVISION	BILL NUMBER	SPONSOR
DCRA	MRAD	HB 130	Representative Parnell

SHORT TITLE OF BILL

An Act relating to immunity of a municipal ombudsman and staff...

DEPARTMENT POSITION

The department has no position.

PREPARED BY	DATE	COMMISSIONER'S SIGNATURE	DATE
Patrick Poland, Deputy Director	2/19/91	[signature]	2-20-91

SUMMARY

OTHER AGENCIES AFFECTED BY BILL	CONSTITUENT GROUP(S) AFFECTED BY BILL
None	Unknown
ORGANIZATIONAL SUPPORT FOR BILL	**ORGANIZATIONAL OPPOSITION TO BILL**
Unknown	Unknown

FISCAL IMPACT: ☒ NONE ☐ FISCAL NOTE ATTACHED

BACKGROUND/LEGISLATIVE INTENT

Very few other states, if any, give total immunity to their ombudsmen.

ANALYSIS OF BILL/PROGRAM EFFECTS

This bill would make a municipal ombudsman and staff immune from legal suit over actions taken on behalf of the municipality. To qualify for immunity, the action must be one that falls within the parameters of the charter or ordinance authorizing the office of municipal ombudsman.

The bill also exempts a municipal ombudsman from having to testify in court regarding any action taken as a municipal ombudsman.

Since this bill has no direct impact on the department, we are not taking an active position for or against the bill. The department does feel that public employees in general should be accountable for their actions. We would note also that, presently, firemen are the only municipal employees specifically cited in statute as being exempt from personal suit (AS 09.65.070[c]). All other municipal employees, from grader operators to policemen, are subject to the provision of AS 09.65.070.

AMENDMENTS PROPOSED

None

PLEASE ATTACH A SEPARATE SHEET FOR ADDITIONAL COMMENTS OR ANALYSIS.

01-009 (Rev. 12/83)

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. HB 130

Revision Date: _____ Department Affected: Community & Regional Affairs

Title: "An Act relating to immunity of a municipal ombudsman and staff..." BRU: Local Government Assistance

Component: Training and Development

Sponsor: Parnell et al

Requestor: _____ COMPONENT SERIAL NO. | | 6 | 7 | 2 |

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
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						

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Remond Henderson Remond Henderson Phone: 465-4708

Division: Administrative Services Director Date: 2/19/91

Approved by Commissioner: Edgar Blatchford

Agency: Community & Regional Affairs Date: 2-19-91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/90

HB

143

HOUSE COMMITTEE REPORT

(7)

Date Referred: February 19, 1991 FURTHER REFERRALS: Resources, Finance

Date of Committee Action: 3-14-91

The COMMUNITY AND REGIONAL AFFAIRS Committee considered: HB 143

HOUSE BILL NO. 143 MUNICIPAL LAND GRANT SELECTIONS

"An Act relating to general grant land selections; and providing for an effective date."

RECOMMENDATIONS: [ ] the same title
be replaced with _____ [ ] a new title
[ ] have attached amendments(s)
[ ] do pass
[ ] do not pass
[X] no recommendations
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[✓] fiscal impact Natural Resources [ ] fiscal note(s) _____

[✓] zero fiscal note DCRA / F&G [ ] zero fiscal note(s) _____

SIGNING DO PASS: SIGNING OTHER RECOMMENDATIONS:

Foster	Check appropriate column:	Do Not Pass	No Rec	Amend
	John C. Douglas		X	
	Cheri Davis		X	
	Mackie		X	
	Bettye Davis		X	
	Gail Phillips	X		
	Baker	X		

Mackie
Chairman's Signature

WALTER J. HICKEL
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

Hickel Administration Position on HB 143

The Departments of Community and Regional Affairs, Natural Resources, and Fish and Game, support the concept of transferring state land to municipalities to help ensure local and statewide economic health. We believe the formation of additional boroughs should be encouraged. To that end we support the removal of the 20 acre per capita municipal land selection restriction (Section 1 of the bill) for new boroughs and boroughs whose entitlements have not yet been certified (Aleutians East, Lake and Peninsula, Denali). We do not, however, believe the cap should be retroactively removed.

The Hickel Administration municipal grant land entitlement policy assures that additional land will be made available to boroughs that are already formed, as well as new boroughs, above what has already been certified as their statutory entitlement, if a need for the additional land can be demonstrated.

We do not believe that wildlife habitat should become part of the vacant, unreserved, unappropriated land (VUU) from which basic statutory municipal selections can be made.

We believe that keeping some restrictions on the size and shape of parcels is in the public interest. Adjustments to the 4 to 1 ratio should be made on a case-by-case basis, to meet statewide and local needs.

The Department of Natural Resources is the state's land manager and has the expertise to approve or disapprove municipal land selections. The Department of Natural Resources will consult with the Departments of Fish and Game and Community and Regional affairs when determining whether a municipal land conveyance is in the best interest of the state.

Municipalities may appeal municipal selection decisions of the Director of Land and Water to the Commissioner of Natural Resources, according to the department's standard appeal process.

In line with this philosophy, the Departments recommend the following additions and deletions to HB 143:

1. Add a Section to the bill that requires the Governor to present a policy on municipal selection of state land to the first session of each Legislature. Included with the policy will be information about selections approved and disapproved to date.
2. In Section 1, make it clear that the cap is removed only for boroughs incorporated after July 1, 1987.
3. Delete sections 4,5,6,9,10, and 11.
4. Modify Section 2 to allow more time for certification and selection by municipalities or the state, if both parties agree.

MUNICIPAL GRANT LAND ENTITLEMENT POLICY

March 12, 1990

The Hickel Administration supports the transfer of state land to municipalities to help ensure local and statewide economic health. Accordingly, it is the policy of the State of Alaska that the basic municipal land entitlement shall not be less than 10% of the vacant, unappropriated, unreserved state land within the municipality's boundaries. It is also the policy of the State of Alaska that a municipality be granted additional land, above the municipal entitlement certified under AS 29.65.030 (b), when the municipality demonstrates that additional land is necessary for:

1. A public facility site;

2. Revenue production through sales or leases;

3. The overall economic vitality of the municipality;

4. Local public recreation;

5. Protection of locally unique or important cultural, traditional, archeological, or other public resources;

6. Other important local or statewide needs.

Municipalities may select additional land, above the amount certified under AS29.65.030 (b), from any land classification category, including wildlife habitat, but must demonstrate that the conveyance of land currently classified as non-VUU land is in the public interest. The size and shape of parcels selected by municipalities can be adjusted from the standard 4:1 ratio, as necessary, to meet statewide and local needs and concerns.

The Department of Natural Resources will consult with the Department of Community and Regional Affairs and the Department of Fish and Game when considering whether conveyance of a municipality's land selection is in the best interest of the state.

Municipalities may appeal municipal selection decisions of the Director of Land and Water to the Commissioner of Natural Resources, according to the department's standard appeal regulations.

In response to the House Committee on Community and Regional Affairs interest, particularly Representative Gail Phillips' questions on House Bill 143, the Departments' of Community and Regional Affairs, Fish and Game and Natural Resources are pleased to provide the following responses:

Question 1: Should wildlife habitat land be added to the land base that is selectable by a municipality?

The administration supports the selection of wildlife habitat or any other state land when a municipal entitlement is not adequate to meet the municipalities needs, and those needs outweigh the state's interest in retention of the land. Existing law allows such a transfer.

Question 2: Will land be added to the VUU land base by the addition of wildlife habitat lands?

The addition of wildlife habitat lands to the VUU land base would not add to the VUU land base for municipalities formed prior to 1986. For new municipalities formed after 1986 the base would be increased as shown on the attached chart. We have no figures available for areas in the unorganized borough.

Question 3: With regard to fairness among municipalities, how will existing municipalities be affected by HB 143 if enacted. If they are not affected by HB 143 as drafted, what would be the effect on these municipalities if HB 143 were applied to them?

As drafted HB143 does not affect existing municipalities created prior to 1986. The eleven boroughs established prior to that date had their entitlement established by statute. It is possible to retroactively add any cities or boroughs to this legislation if desired which would require DNR to recertify all entitlements not previously established by statute. See the attached chart for a conveyance summary.

Question 4: Should shape criteria be a part of municipal land entitlement selections? If not, what are the possible effects on state land and state land policy? If kept, what are the effects on land selections?

Shape criteria as currently used today generally involve a four to one ratio length to width. There is authority to waive this requirement in proposed DNR regulations when it can be proved to be in the best interest of all parties. Size and shape requirements have always been a part of a variety of land selection programs to include mining claims, state land selections, and homestead programs to name a few. Without these criteria a municipality could select a narrow strip of land along the banks of a river course. Such a strip would reduce the value of adjacent land and reduce access. Shape criteria tend to limit selections to useful parcels and to permit better land management patterns.

Deleting shape criteria for the selection process would restrict management opportunities

to the state and invites possible abuse.

Question 5: What agency within the executive branch is in charge of land policy? Would this change with HB 143?

DNR is the lead agency on land policy. Often agencies, such as DF&G or DCRA have occasional roles, usually through interagency coordination to facilitate reaching established goals.

HB 143's inclusion of DCRA in an appeal process would alter that by introducing an appeal board comprised of a DNR representative, a DCRA representative, and an elected municipal official appointed by the Governor. This would appear to alter the basic responsibility authority of state land management.

Municipal Entitlement Estimates for New Boroughs under SSHB 143

Borough	*Incorporation Date*	*Population*	*Total State Land*	*VUU Land* ****	*Present Entitlement*	*Entitlement W/O 20 Acre Cap*	*Entitlement W/ Wildlife Hab*
*Northwest Arctic**	6/2/86	6,696	2,669,552	131,402			
			2,854,382	2,854,382	133,920***	285,438	285,438
Aleutians East	10/23/87	2,091	1,122,016	76,334	7,633	7,633	35,000
Lake and Peninsula	4/24/89	1,800**	4,885,000	150,000	15,000	15,000	115,000
Denali	12/7/90	2,000**	2,898,000	494,000	40,000***	49,400	189,400

*The first acreage figures are for the original certification prior to 1987 law change
The second set is after passage of Chap. 34, SLA 87, which defined Resource Management land as VUU

**Estimates from DCRA

***Established by 20 acre cap

****VUU is defined as Statehood Act Sections 6(a) or 6(b) land that is unclassified or if classified is agricultural, grazing, material, public recreation, settlement or resource management (if classification effective on or after Sep 1, 1983). Further, land that has been set aside by statute for one or more particular uses or purposes is not VUU land.

CONVEYANCE SUMMARY:
UNIFIED HOME RULE MUNICIPALITIES AND BOROUGHS

CONVEYANCES BY AUTHORITY

Municipality	Incorp	38.05.347	AS 07	AS 29	38.05.810	38.05.320	Legislative	Other
Aleutians East Borough	Oct-87							
Bristol Bay Borough	Oct-62			2,672.7				
City & Borough of Juneau	Jul-70			4,279.6	11.4	852.9		
City & Borough of Sitka	Dec-71	1.8		2,276.4	6,237.7	194.5		0.6
Fairbanks North Star Borough	Jan-64			83,964.9	44.9			
Haines Borough	Jul-68			1,082.8				
Kenai Peninsula Borough	Jan-64			79,206.0	181.9			117.0
Ketchikan Gateway Borough	Sep-63			4,033.3				
Kodiak Island Borough	Sep-63			11,654.0	14.3			
Lake & Peninsula Borough	Apr-89							
Matanuska-Susitna Borough	Jan-64		40.3	201,771.0	432.1			79.3
Municipality of Anchorage	Sep-75	391.1		12,883.7	5,897.1	1,328.5		1,256.4
North Slope Borough	Jul-72							
Northwest Arctic Borough	Jun-86							
	TOTALS	392.9	40.3	403,824.4	12,819.4	2,375.9	0.0	1,453.3

The state has conveyed land to municipalities under various authorities; AS 38.05.347, AS 07.05, AS 07.10, AS 29.18, AS 29.65, AS 38.05.315, AS 38.05.810 and AS 38.05.320.

The authority for many early conveyances is not always stated. Where the authority is unknown, the conveyance is included in the AS 29 column.

The figures in this table represents the actual amount of land conveyed to each individual municipality and does not reflect the entitlement. In most cases, however, the municipality manages its full entitlement. Land cannot be conveyed to a municipality until a land survey is complete.

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. HB 143

Revision Date: 27-Feb-91
Department Affected: Natural Resources
Title: An Act relating to general grant land selections; and providing for date
BRU: Land & Water Management
Components: Land & Water Management
Sponsor: Rep. MacLean
Requestor: House Community and Regional Affairs
COMPONENT SERIAL NO. 431

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES	136.6	136.6	136.6			
TRAVEL	3.5	3.5	3.5			
CONTRACTUAL	7.5	7.5	7.5			
SUPPLIES	0.5	0.5	0.5			
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	148.1	148.1	148.1	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	148.1	148.1	148.1			
FEDERAL FUNDS						
OTHER						
TOTAL	148.1	148.1	148.1	0.0	0.0	0.0

POSITIONS:

FULL-TIME	3.0	3.0	3.0			
PART-TIME						
TEMPORARY						

Estimate of Current year impact:

ANALYSIS: (Attach a separate page if necessary)

See Attached

Prepared by: Dennis Daigger
Phone: 762-2680
Division: Land & Water Management
Date: 27-Feb-91

Approved by Commissioner: Harold Heinze cw for
Date: 27-Feb-91
Agency: Department of Natural Resources

Distribution (by preparer) : Legislative Finance, legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

REV 10/90

Fiscal Note HB 143, continued.

Enactment of HB 143 will result in approximately 246,000 new municipal selection acres for the Northern Region Office of the Division of Land and Water to process, and approximately 125,000 new acres for the Southcentral Region Office to process.

100	Personal Services 1 NRO II (Fbx) 1 NRO I (Fbx) 1 NRO II (Anch.)	136.6
200	Travel (to visit affected communities and sites)	3.5
300	Contractual (required public notices in newspapers)	7.5
400	Supplies	.5

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. HB 143

Revision Date: _____ Department Affected: Community & Regional Affairs

Title: "An Act..general grant land selections...." BRU: Local Government Assistance

Component: Local Government Support

Sponsor: Rep MacLean

Requestor: _____ COMPONENT SERIAL NO. | | 6 | 7 | 5 |

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
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						

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Remond Henderson, Director Remond Henderson Phone: 465-4708

Division: Administrative Services Date: 2/28/91

Approved by Commissioner: _____

Agency: Community & Regional Affairs Date: 2/28/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/90

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. HB 143

Revision Date: 3-14-91 Department Affected: Fish and Game

Title: Municipal Land Grant Selections BRU: Habitat

Component: Habitat

Sponsor: Representative MacLean

Requestor: COMPONENT SERIAL NO. | | 4 | 8 | 6 |

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

Estimate of current year impact: no impact on current year

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Frank Rue, Director Phone: 465-4105

Division: Division of Habitat Date: 3/14/91

Approved by Commissioner: CARL ROSIER by [signature] Date: 3/14/91

Agency: Department of Fish and Game

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/90

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

WALTER J. HICKEL, GOVERNOR

400 WILLOUGHBY AVENUE
JUNEAU, ALASKA 99801-1796
PHONE: (907) 465-2400
FACSIMILE: (907) 586-2754

February 27, 1991

The Honorable Jerry Mackie, Chair
House Community and Regional Affairs Committee
P.O. Box V
Juneau, AK 99811

Dear Representative Mackie:

Subject: HB 143, relating to general grant land selections for municipalities.

Position: The Department of Natural Resources is unable to support this bill. It would increase the land entitlement of certain municipalities (those incorporated after July 1, 1978) by a large amount, whether or not a local need for additional land exists (as is required under current state policy). While we firmly support municipal land transfers as a basis for local government self-determination, the approach in this bill is contrary to existing state law and policy. If it is the Legislature's intent to place more state land under local control, the entire policy for state land needs to be changed.

Background: In 1978, after 15 years of disputes between municipalities and the state over interpretations of the existing law, a number of amendments to the municipal land entitlement law (AS 29.18) were enacted. The new version of the law granted unified home rule municipalities and all boroughs specific state land acreage entitlements, and specified important policies and procedures. In 1987, the law was again amended. Additions expanded the category of land eligible for selection by a municipality and, among other things, placed an upper limit on the amount of "vacant, unappropriated, unreserved" land a municipality could select. The law also specified that the new land entitlement for the Northwest Arctic Borough was a partial entitlement that could be increased on a recommendation by the Governor to the Legislature. The Governor then submitted his general grant land entitlement policy to the legislature.

This bill removes the current 20 acre per capita limit on the land entitlement of a new municipality, and eliminates the criteria for the shape of a land selection. The 20 acre per capita limit is approximately equal to the maximum per capita acreage any borough has received from the state since statehood. Removal of this per capita limit, combined with the inclusion of wildlife habitat land within the "vacant, unappropriated, unreserved" land category eligible for selections, will greatly increase the land entitlement for new boroughs. Shape criteria are important if public access to adjacent state land is to be protected and sound land management

policies are to be maintained.

Recommendations: The municipalities affected by this bill have not yet received any entitlement land. It seems logical to allow them to receive their existing land entitlement before determining that additional land is needed for municipal purposes. However, the department supports Section 2 of this bill. It allows municipalities that wish to receive their land early an opportunity to have their land entitlements certified within six months of incorporation. Currently, municipalities must wait two years for certification. We would be happy to work with the committee to improve other municipal land entitlement administrative procedures that present problems to municipalities.

Sincerely,

Harold C. Heinze

cc: Committee Members
Representative MacLean
Bruce Kendall, Legislative Liaison, Office of the Governor
Edgar Blatchford, Commissioner, Department of Community and Regional Affairs
Gary Gustafson, Director, Division of Land and Water

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. HB 143

Revision Date: 27-Feb-91
Department Affected: Natural Resources
Title: An Act relating to general grant land selections; and providing for date
BRU: Land & Water Management
Components: Land & Water Management
Sponsor: Rep. MacLean
Requestor: House Community and Regional Affairs
COMPONENT SERIAL NO. 431

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES	136.6	136.6	136.6			
TRAVEL	3.5	3.5	3.5			
CONTRACTUAL	7.5	7.5	7.5			
SUPPLIES	0.5	0.5	0.5			
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	148.1	148.1	148.1	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	148.1	148.1	148.1			
FEDERAL FUNDS						
OTHER						
TOTAL	148.1	148.1	148.1	0.0	0.0	0.0

POSITIONS:

FULL-TIME	3.0	3.0	3.0			
PART-TIME						
TEMPORARY						

Estimate of Current year impact:

ANALYSIS: (Attach a separate page if necessary)

See Attached

Prepared by: Dennis Daigger
Phone: 762-2680
Division: Land & Water Management
Date: 27-Feb-91

Approved by Commissioner: Harold Heinze cwf
Date: 27-Feb-91
Agency: Department of Natural Resources

Distribution (by preparer) : Legislative Finance, legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

REV 10/90

Fiscal Note HB 143, continued.

Enactment of HB 143 will result in approximately 246,000 new municipal selection acres for the Northern Region Office of the Division of Land and Water to process, and approximately 125,000 new acres for the Southcentral Region Office to process.

100	Personal Services 1 NRO II (Fbx) 1 NRO I (Fbx) 1 NRO II (Anch.)	136.6
200	Travel (to visit affected communities and sites)	3.5
300	Contractual (required public notices in newspapers)	7.5
400	Supplies	.5

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

P.O. Box Y, Juneau, Alaska 99811
(907) 465-3867 or 465-2450
FAX (907) 465-2029

Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM February 23, 1991

SUBJECT: General Grant Land Selections (HB 143)

TO: Representative Eileen MacLean

FROM: Tamara Brandt Cook TBC
Director

Here is the sectional summary that you requested.

Sec. 1. Deletes the limitation on the size of a general grant land entitlement for a municipality based on population.

Sec. 2. Permits the governing body of a city to request expeditious certification of its entitlement by resolution and requires the entitlement to be certified within six months after receipt of the resolution.

Sec. 3. Adds a cross reference to the new appeal procedure added under section 5 of the bill.

Sec. 4. Requires the director of the division of lands to disapprove a selection only upon a finding that the public interest in retaining state ownership of the land outweighs the municipality's interest in obtaining the land. The Department of Community and Regional Affairs is required to review each selection and recommend approval or disapproval of it to the director.

Sec. 5. Before disapproving a selection, the director is required to notify the municipality. The municipality may submit a written response and, if the selection is disapproved, file notice of an appeal. The appeal will be heard by a municipal land mediation committee and the decision of that committee may be appealed by the municipality to the superior court.

Sec. 6. No restrictions may be placed on the shape of a parcel of land that may be selected by a municipality.

Sec. 7. Requires the commissioner of natural resource to consult with the Department of Community and Regional Affairs before adopting regulations to carry out the general grant land entitlement program.

Sec. 8. Adds a statement of policy to the general grant land entitlement program.

Sec. 9. Amends the definition of "vacant, unappropriated, unreserved land" to include land classified for wildlife habitat other than critical wildlife habitat for purposes of determining both the size of an entitlement and the land that may be selected in fulfillment of the entitlement.

Sec. 10. Requires the director of lands to redetermine and recertify the entitlement of each municipality incorporated after June 2, 1986 in accordance with the new provisions of the bill. If the entitlement of a municipality is increased, land may be selected within one year after the recertification.

Sec. 11. Makes two bill sections retroactive to June 2, 1986. These sections may have the effect of increasing entitlements for certain municipalities.

Sec. 12. The bill has an immediate effective date.

TBC:gc
91-098.glc

By: Rep. MacLean
2/26/91

THE NEED FOR HB 143

The purpose of HB 143 is to restore equity in the General Grant Land Entitlement process, to return the emphasis of the program to its original intent of developing independent and strong local governments, and to temper the Department of Natural Resource's (DNR's) broad discretion in determining the process and procedure for transferring general grant land to municipalities.

The Mandatory Borough Act, enacted in 1963, created opportunities for municipalities to acquire state land for their local use. The intent was "to provide maximum local self-government". General grant land provides a means of creating a tax base, of generating revenues through land sales and leases, and a land base for community and public purposes.

The State Constitution was based on the premise that municipalities should be independent and self governing. Clearly, the intent is to provide for strong local governments. It can be argued that the state's best interest is best served by allowing local governments the opportunity to manage and develop their own land base, thereby developing local economies and strengthening the statewide economy.

However, DNR's report (entitled Municipal General Grant Land Entitlements. A State-Municipal Partnership) predetermines that it may not be in the best interests of the state that land in rural Alaska be managed and developed by local governments because the rural character of the state land "is often not well suited for development or other municipal purposes".

Because many areas in remote parts of Alaska are in the very initial stages of development, it is premature to make broad generalizations about the use or character of land in rural Alaska. Furthermore, subsistence is a major influence in the rural economy and therefore could result in large selections of land being held sacrosanct.

Finally, it is important for the legislature to evaluate the municipal entitlement statutes, to include language to provide for liberal construction of the law, as provided for by the State Constitution and, to make changes which favor the original intent of this program.

POPULATION CAP

Section 1 removes the requirement that a municipality incorporated after July 1, 1978, not receive a general grant land entitlement that exceeds 20 acres per resident; and returns to the former "10 percent of vacant, unappropriated and unreserved land".

A per capita limit on municipal grant land was established at 20 acres, based on the Mat-Su Borough entitlement in 1978. At that time it was the highest per capita entitlement to any municipality.

DNR has suggested that the 20 acre cap is the most generous entitlement formula because it represents the highest per capita entitlement given to any municipality. While this may at first seem a fair and equitable justification, it is neither, given the very broad range of values of lands. Urban area lands are often worth three times the rural acreage. A more equitable distribution of land would be based on a 'value' determination, not a per capita determination which is discriminatory to sparsely populated areas. Since establishing values of lands is such a difficult, if not impossible effort in rural selections, it makes more sense to rely upon the historical 10 percent of available land formula.

It should be noted that had the Matanuska-Susitna Borough been restricted to the 20 acre cap based on the population on the date of incorporation, (which is the way current law reads), their entitlement would have been no more than 216, 680 acres, not the 355, 210 acre entitlement they received in 1978.

Legislative records for the 1978 legislation allude to a number of considerations that influenced final acreage determinations, but little, if no, information is available which describe the need to limit entitlements to municipalities using a population cap.

Finally, the population cap was put into effect in 1987, and only after urban areas organized leaving rural areas with greater restrictions and less available land on which to base their future growth and development.

STATE INTEREST VS. MUNICIPALITY'S INTEREST

Section 4 of the bill requires that before the Division of Lands acts on a selection, the Department of Community and Regional Affairs must review the selection and recommend approval or disapproval. A selection may be disapproved only upon a finding that the public interest in retaining state ownership of the land outweighs the municipality's interest in obtaining the land. A decision to disapprove would be subject to a new appeal process which specifically evaluates state and municipal interests.

This process does not exclude DNR's usual practice of consulting with resource agencies to evaluate municipal land selections. It assures, however, that the agency established by the Constitution to advise and assist local governments is inherently involved in this process.

Most municipalities received entitlements as part of the 1978 statutes. At that time they played a greater role in determining their municipal land selections by influencing both legislative and regulatory provisions. For example, these municipalities negotiated a compromise in the 1978 legislation which required a municipality's consent for classification over 3,200 acres; established a joint planning process where DNR and municipalities jointly considered state and municipal interests; and which provided the state and municipalities to jointly determine what areas would be available for selection.

Through efforts to expedite the land disposal process, the provisions which required consent and joint planning were dropped and replaced with a one-year deadline for both the state and municipalities to determine selectable lands. There was no need for a special appeal process because DNR and municipalities were constrained by the one year period. That is, DNR had little time to decide state interests and new classifications within this one-year period had little potential to negatively affect these municipalities. As a result of dropping consent and joint planning, however, DNR was left with greater discretion and responsibility for making policy decisions with little or no mechanism for oversight by the newer municipalities.

DNR exercises tremendous discretion in deciding the rules by which justifications are reviewed for municipal purposes and for evaluations of selections for state interest. Municipalities have little say in the award process, have no ability to work with DNR to jointly determine land classifications, and have no appeal process which evaluates these land selections for municipal interests.

MUNICIPAL LAND MEDIATION COMMITTEE / APPEAL PROCESS

Section 5 provides for a notification process to be made to municipalities and, for an appeal process by a municipal land mediation committee composed of a person appointed by the commissioner of DNR, an appointee by the commissioner of C&RA, and an elected municipal official. An adverse decision of the committee may be appealed to the superior court.

This section is necessary to insure that the municipalities' interests are protected in the land selection process. As stated above, the ability of new municipalities to influence the municipal land selection process has been greatly diminished. DNR exercises tremendous discretion in deciding the rules by which justifications are reviewed for municipal purposes and for evaluations of these selections for state interest. An appeal section should be included to insure the public interest is served. It should be noted that the public interest is served when municipal interest is considered.

Drafters of the early municipal entitlement program clearly intended for municipalities to play a role in the decision making process. This requirement will restore parity between the two philosophically differing agencies.

SIZE AND SHAPE OF PARCELS

Section 6 of the bill requires that the commissioner may not impose restrictions on the shape of a parcel and land selected by a municipality.

DNR currently uses a 4:1 width to depth ratio as a standard policy for limiting the size of municipal land selections. The length of any parcel cannot be more than four times it width.

DNR has suggested a ratio of 4 to 1 because it is the same one they use for their mineral leasing program. It does not logically follow that a rule used for leased lands is one which should be used for lands which become the management responsibility of a municipality. It is cumbersome and unwieldy for efficient land selection processes and can quadruple the cost of surveying.

Furthermore, DNR has imposed this stipulation because "it would not serve the state's best interest to convey long narrow tracts that could block public access to adjacent state land and interfere with sound management". However, the state's interest in protecting public access could easily be granted by reserving easements on municipal land selections.

DNR has also stated that regulations require municipal selections to be compact and that they will implement a 4 to 1 ratio on the erroneous premise that rural land development should meet the same standards of compact development on urban land.

On the contrary, rural land selections, by definition, should have greater flexibility to meet changing and diverse needs of sparsely populated communities spread out over vast areas. Rural selections should not be restricted by the same guidelines used for urban selections.

DNR REGULATIONS

Section 7 requires the Commissioner of Natural Resources to consult with the Department of Community and Regional affairs prior to adopting regulations necessary to carry out the General Grant Land program.

DNR has developed elaborate regulations to carry out the municipal land entitlement program. Although these regulations deeply affect the municipal statutes (Title 29), the Department of Community and Regional Affairs has no vested authority in the promulgation of those regulations.

Fish and Game statutes for example have similar provisions in Title 16 which require DNR to consult ADF&G before adopting regulations which govern public use areas managed by DNR.

POLICY STATEMENT

Section 8 adds a statement of policy to the general grant land entitlement program.

The 1987 legislation included a reference that the entitlement for the Northwest Arctic Borough was a partial entitlment and that the governor would submit recommendations to the legislature for additional general grant land entitlements for the the Northwest Arctic and other newly formed municipalities, consistent with a general grant land entitlement policy.

The policy statement in HB 143 clarifies that the intent of the legislature is that no less than 10 percent of vacant, unappropriated, or unreserved land will be provided to newly formed municipalities; and that the transfer of such land will be prompt and efficient.

In addition, the state has 20 million acres of land still to select of its entitlement under the Statehood Act and it is important, as a policy matter, to encourage full and expeditious transfers of land. Because the municipal entitlement program was created as an incentive for borough formation and was based on a 10% formula, it is only reasonable to return to its original intent. This will still leave the state with 90% of its land base.

WILDLIFE HABITAT IN "VUU"

Section 9 expands the definition of "vacant, unappropriated and unreserved land" used to determine both the amount of land and the classes of land that a municipality may select, to include certain land classified wildlife habitat, other than critical wildlife habitat.

Using land classifications to define selectable land (vuu land) was put into place in 1979. Past municipalities had to select their land by 1980, so the use of land classifications had no affect on the amount of their entitlement and little potential to impact which lands could be selected.

Newly formed municipalities, on the other hand, are detrimentally impacted by classifications which were imposed on millions of acres of land between 1978 and the present

time. These classifications were developed with little or no regard to municipal interests and are based on broad, generalized resource information. There is no justifiable reason to restrict this entire category as a general rule.

There will be occasions where state and municipal interests may conflict. DNR will continue to exercise substantial discretion and will not be easily overturned when valid interests are shown. The discretion of any regulatory agency is great and could adequately protect the state concerns, even given the appeal committee's existence. Thus, there is no reason to automatically exclude wildlife habitat from consideration, particularly when the state is still left with 90% of its land base.

RECERTIFICATION OF ENTITLEMENTS

Section 10 requires Department of Natural Resources to recertify entitlements for municipalities incorporated after June 2, 1986 to determine final entitlement lands that may be selected as a result of this legislation.

By: Rep. MacLean
2/26/91

HB 143 GENERAL GRANT LAND SELECTIONS

"An Act relating to general grant land selections; and providing for an effective date"

Section 1: removes the requirement that a municipality incorporated after July 1, 1978 can not receive a general grant land entitlement that exceeds 20 acres per resident; returns to the former "10 percent of vacant, unappropriated or unreserved land".

Section 2: allows a city to request an expedited entitlement to be determined within six months.

Section 3: after a municipal selection is rejected, existing law grants a municipality 90 days to select additional land in fulfillment of its entitlement. A reference to the appeal process is added so that the 90 day period begins after the final appeal decision.

Section 4: before the Director of the Division of Lands acts on a selection, the Department of Community & Regional Affairs (DCRA) must review the selection and recommend approval or disapproval. A selection may be disapproved only upon a finding that the public interest in retaining state ownership of the land outweighs the municipality's interest in obtaining the land.

Section 5: provides for a notification process to be made to municipalities, and for an appeal process by a municipal land mediation committee composed of a person appointed by the Commissioner of Natural Resources, an appointee by the Commissioner of Community & Regional Affairs, and an elected municipal official. An adverse decision of the committee may be appealed to the superior court.

Section 6: the Commissioner of Natural Resources may not place restrictions on the shape of a parcel of land that may be selected by a municipality.

Section 7: requires the Commissioner of Natural Resources to consult with Department of Community and Regional Affairs prior to adopting regulations necessary to carry out the General Grant Land Entitlement program.

Section 8: the policy of the state is to provide newly formed municipalities with entitlements that are no less than 10 percent of "vuu" property; and to provide for expeditious transfer of land.

Section 9: the definition of "vacant, unappropriated, and unreserved land" used to determine both the amount of land and the classes of land that a municipality may select is expanded to include certain land classified as wildlife habitat, other than critical wildlife habitat.

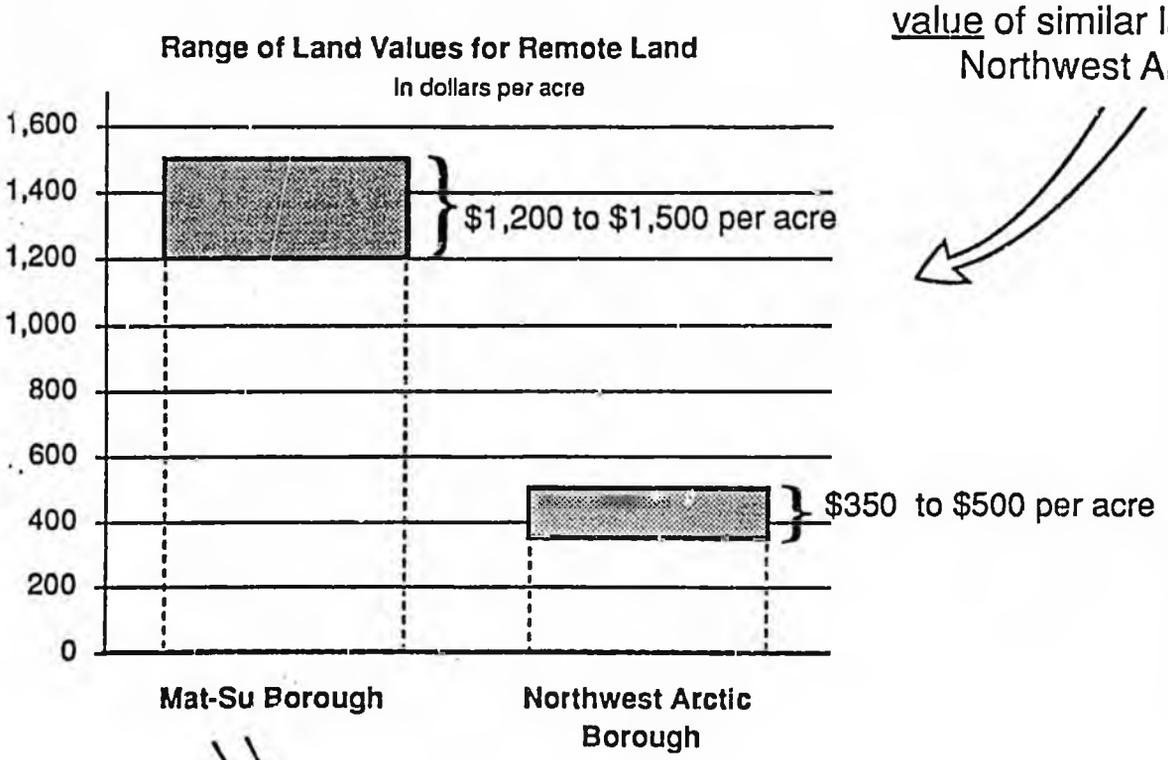
Section 10: the Department of Natural Resources will recertify entitlements for municipalities incorporated after June 2, 1986, to determine the final entitlement that may be selected as a result of this legislation.

Section 11: sections 1 and 9 are retroactive to June 2, 1986.

Section 12: this Act takes effect immediately.

A Population Cap on Acreage is Not an Equitable Approach for Municipal Land Entitlements:

Remote land located in the Mat-Su Borough has about <u>three times the value</u> of similar land located in the Northwest Arctic Borough.



The Mat-Su Borough land entitlement of 355,210 acres was processed in 1978. At that time, the Borough population was 17,760 — the land entitlement represented 20 acres per capita. At an average value of $1,350 per acre, this equates to $27,000 per capita. A similar entitlement in the Northwest Arctic Borough would equate to $8,500 per capita.

Therefore, to receive an <u>equivalent value per capita</u> for its land entitlement, the Northwest Arctic Borough would have to receive three times the acreage per capita compared to the Mat-Su Borough, or approximately 60 acres per capita.

ALEUTIANS EAST BOROUGH

SERVING THE COMMUNITIES OF
■ KING COVE ■ SAND POINT ■ AKUTAN ■ COLD BAY ■ FALSE PASS ■ NELSON LAGOON

February 22, 1991

Representative Eileen MacLean
P.O. Box V
Juneau, Ak 99811

Re: HB 143

Dear Representative MacLean:

The Aleutians East Borough was formed in 1987. In the existing municipal land entitlement program, it is eligible to receive approximately 7,000 + acres. The program allows for possibly up to 40,000 acres based on the 20 acre per person category requirement. The Borough, because of land classification restrictions, obviously will receive considerably less.

In light of the land entitlements by those who incorporated in the '60's, the AEB is concerned about being treated fairly and equitably under this program. This is compounded by the fact that the State of Alaska settled a dispute with the University of Alaska and an important element of that settlement was the conveyance of some of the little State-owned property in any settlement within the Borough. Additionally, most lands that are available to the Borough, are not of comparable value to that of say the Mat-Su or Kenai Peninsula Borough under their municipal entitlement program. The Borough therefore views the changes as proposed in the HB 143 as a positive step in the right direction to assist not only this Borough with its land entitlement programs but also serve as needed changes which will serve as incentive for other areas to seriously consider a borough organization in the future.

The AEB therefore supports the concept of HB 143 and recommends its passage.

Sincerely,

Lamar J. Cotten
Borough Administrator

LJC:emn

LAKE AND PENINSULA BOROUGH
P.O. Box 495
King Salmon, Alaska 99613

MEMORANDUM

To: Rena
From: Chow Taylor, Borough Manager
Date: February 22, 1991
Re: HB 143

The Lake and Peninsula Borough supports HB 143. By including wildlife habitat other than critical wildlife habitat in the definition of VUU lands the amount of lands selectable by this borough would be significantly increased.

In the Lake and Peninsula Borough, although DNR has not yet certified VUU lands, we believe we will be entitled to select only around 8,000-9,000 acres. If habitat lands were added, since there is a large amount of habitat land in the north end of the borough, we would be entitled to much more. I do believe, under this scenario you are right in removing the 20 acres per person cap.

In the event wildlife habitat is not added to the VUU definition, I would suggest language be added to increase the percentage of VUU lands a borough may select to at least seventy percent. In a borough which covers over 25,000 square miles, the amount of land available to us under current law is unreasonably small.

We also support the addition of Community and Regional Affairs as the first agency to review selections. That agency works extensively and closely with municipalities statewide and therefore has a better perspective as to what is reasonable and what is not. We also agree DCRA should be consulted as regulations are developed.

Thank you for the opportunity to comment.

A SPECIAL REPORT

MUNICIPAL GENERAL GRANT LAND ENTITLEMENTS

A State-Municipal Partnership

DEPARTMENT OF NATURAL RESOURCES
Division of Land and Water Management

January 1990

Prepared by Dennis P. Daigger

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Municipal General Grant Land Entitlements
January 1990

INTRODUCTION

Decades of neglect by the federal government, resource exploitation by corporations and individuals outside Alaska and a lack of control of their destiny instilled in the fifty-five drafters of the Alaska Constitution a unique vision of what would become America's 49th state. The observations and experiences of the residents of the territory who were self-reliant and independent would manifest themselves throughout the constitution. Nowhere are these concepts more evident than in Article X of the constitution where the relationship between state government and local government are unselfishly defined.

> SECTION 1. The purpose of this article is to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions. A liberal construction shall be given to the powers of local government units.
>
> SECTION 3. The entire State shall be divided into boroughs, organized or unorganized. They shall be established in a manner and according to standards provided by law. The standards shall include population, geography, economy, transportation, and other factors. Each borough shall embrace an area and population with common interests to the maximum degree possible. The legislature shall classify boroughs and prescribe their powers and functions. Methods by which boroughs may be organized, incorporated, merged, consolidated, reclassified, or dissolved shall be prescribed by law.

The delegates having been deprived of the right of self determination, thoughtfully remembered territorial governance and conferred autonomy and broad powers on municipalities of Alaska through the constitution. By offering incentives to encourage municipal incorporations, the State of Alaska furthers the goal of maximum local self-government contained in Article X.

Since 1962, one of these incentives has been receipt of state general grant land within the boundaries of the local government thereby providing a means of creating or expanding a tax base, a means to generate revenue through land sales and leases, a land base for community expansion and a land base for other public purposes.

In addition to these general grant land entitlements, municipalities can acquire otherwise unavailable state land under the public and charitable use statute (AS 38.05.810). Land acquired under this statute must be used for a public purpose that is available to the public at large. However, if the

municipality receiving the land has an outstanding municipal land grant entitlement, the acreage of the conveyance is subtracted from this balance.

Tide and submerged lands are the last category of state land made available to cities who were incorporated on or before the date of statehood. Under rigid guidelines established in the Alaska Land Act, cities could acquire tidelands adjacent their boundaries. This provision was codified AS 38.05.320.

BACKGROUND: MUNICIPAL LAND GRANTS

Legislative History

Alaska's first municipal land entitlement was created in 1962 when a new section was added to the Alaska Land Act. This section stated:

> Any city of the first class may apply in the manner prescribed by the director, within five years from the effective date of this Act, for a conveyance to the city of all surplus state lands located within the present boundaries of the city. "Surplus state lands" means all land owned by the state which is not presently used or for which there is no anticipated use by the state for governmental purposes.

This act, codified AS 38.05.347, although containing scant procedural guidance, resulted in the conveyance of thousands of acres of state land to a small number of municipalities throughout the state. This law was repealed June 21, 1976.

In 1963 the state legislature enacted the "Mandatory Borough Act". This act was unrelated to the Alaska Land Act but, like AS 38.05.347, created opportunities for municipalities to acquire state land for their local use. The intent of this act (ch 52, SLA 1963) was "to provide maximum local self-government" and caused the creation of numerous boroughs statewide. These boroughs encompassed the populated areas of the state. Although boroughs could not opt out of organizing, some local options existed in the law, such as final location of the municipal boundaries. The act, additionally, provided incentives in the form of cash grants and grants of state land.

Unlike the 1962 act, the "Mandatory Borough Act"(codified AS 07.10.150) provided a formula for the amount of the state land grant entitlement.

This act provided:

> (that) "an organized borough may select 10 per cent of the vacant, unappropriated, unreserved state lands located within its boundaries within five years after the date of

availability of state lands in the borough."

The act also provided certain necessary procedural guidance for the selection, survey and conveyance of these entitlement lands.

Several changes to the law were eventually enacted. In 1970 Chapter 213, SLA 1970 removed the five year selection deadline, and extended general grant land entitlements to first and second class cities by adding AS 07.05.040. In 1972 AS 07.10 was renumbered to AS 29.18.

Fifteen years of disputes between municipalities and the state over interpretation of the law culminated in the first major amendment to AS 29.18 in 1978. Some of the more important disputes illustrate the range of problems faced by the program.

-Land selections by municipalities had no time frames for adjudication and conveyance. Municipalities felt that the state deliberately dragged its feet on selections that it wanted to retain and that after approving selections that the conveyances were unnecessarily delayed.

-Southeast boroughs believed that getting concurrence of the land trust boards for conveyance of university, mental health and school trust lands was an unduly cumbersome process.

-The North Slope Borough had selected resource management and industrial lands at Prudoe Bay which were rejected in the state's interests.

-When municipalities selected agricultural lands they received only the agricultural interest. These lands often were more valuable for subdivisions and other uses than as agricultural land and municipalities wanted more than just the agricultural interest.

-Municipal land selections occurred on an ad hoc basis, often before the state could evaluate resources and perform its mandated land planning functions.

-Contention by the North Slope Borough that they have an absolute right to select 10 percent of the state land within their boundaries, irrespective the land classification.

Features of the new law were:

1) Unified home rule municipalities and all boroughs were granted acreage specific entitlements;

2) "vacant, unappropriated, unreserved" (VUU) land was now statutorily defined based on a two part test: 1) the grant type

under which the state acquired the land from the federal government and 2) the state's land classification system;

3) General grant land entitlements were limited to general grant land that the state acquired under sections 6(a) and 6(b) of the Statehood Act;

4) Entitlements were fixed as of July 1, 1978, based on the state's VUU land base on that date;

5) Entitlements were extended to municipalities incorporated after July 1, 1978, and a method of computing these entitlements was established;

6) Entitlements became vested property rights and could be fulfilled at any time before two years after the state's right to select federal land under 6(a) or 6(b) of the Statehood Act expired;

7) Selections must be approved or disapproved within nine months of selection and further patent issuance must occur within three months of survey plat approval;

8) Municipalities with an entitlement of less than one and one-half acre per capita could select vacant school, university or mental health trust lands;

9) Deficiency payments were established for municipalities whose entitlment land bases were unsuitable for residential, commercial or industrial purposes;

10) Authority for land exchanges between municipalities and the state when in the public interest was established;

11) Municipalities in litigation with the state over general grant land entitlements had to elect to benefit under the new law or receive the fruits of the litigation, but not both; and;

12) A comprehensive and detailed definitions section was added.

For the first time, a detailed and clear law existed, specifying important policies and procedures, under which general grant land entitlements would be administered.

In 1979, AS 29.18 was amended so that entitlements could no longer be fulfilled by selections filed up to two years after the state's selection rights with the federal government expired, but now must be made prior to October 1, 1980.

In 1981, to ensure that all entitlements were fulfilled, amendments gave municipalities 90 days to re-select new land upon rejection of a previous selection. This was necessary because in law a selection deadline had been established.

Municipal General Grant Land Entitlements
January 1990

In 1985 university trust land was removed from the group of lands available to a municipality with a per capita entitlement of less than one and one-half acres. This resulted from successful litigation by the University Board of Regents against the state over management of its land trust corpus.

In 1985 AS 29.18.201 - 29.18.205 were repealed effective January 1, 1986. These sections were the major provisions of the general grant land entitlement law. They were, however, replaced with the same provisions that were renumbered AS 29.65.010 - 29.65.140.

In 1987 the most recent amendments to the law occurred. The major provisions of the new law are:

1) Expands general grant entitlements to capture all state VUU land within the municipal boundaries between September 16, 1970 and January 1, 1988;

2) Bases entitlements of cities and boroughs incorporated after July 1, 1978, on the maximum amount of VUU land within their boundaries between incorporation and two years thereafter;

3) Establishes upper limit of entitlements to newly incorporated municipalities not to exceed 20 acres per capita based on the population of the municipality on the date of incorporation;

4) Extends selection deadline of boroughs and unified home rule municipalities listed in AS 29.65.010 to October 1, 1990.

5) Invalidates all selections of school or mental health trust lands occurring after October 4, 1985 the date of the mental health land trust litigation decision;

6) Prohibits a municipality from trading entitlement land for federal subsurface rights or any interest in the Arctic National Wildlife Refuge;

7) Categorizes material and public recreation classified land as VUU;

8) Categorizes resource management classified land as VUU if the classification occurred on or after September 1, 1983;

9) Specifies that the new entitlement for the Northwest Arctic Borough is a partial entitlement. Additional entitlement for the Northwest Arctic Borough and municipalities incorporating after the Northwest Arctic Borough depends upon the governor's recommendation to the legislature, after completion of the Northwest Area Plan, for additional entitlement consistent with

his general grant land entitlement policy.

10) Reinstates the 89,850 acre entitlement to the North Slope Borough lost through litigation in 1978.

A brief discussion of Alaska's statehood land grant entitlement will help focus the parallel municipal general grant land entitlements. The Alaska Statehood Act granted land entitlements to the state under sections 6(a) and 6(b) totaling 103,350,000 acres to be selected from the federal public domain. In 1962, when the state enacted the first municipal entitlement law, less than eight million acres of the statehood entitlement had been received from the federal government. There were less than 40 municipalities in the state at that time. Up until the 1978 law, a municipality was entitled to select 10% of the VUU land within the municipality without a date final for fulfilling that entitlement. This appears to have been intended as an ongoing process so that as the state received more of its entitlement, the municipality could continue to select 10% of that which was VUU.

The 1978 law, for the first time established date certain time lines. The pool of land from which to compute the 10% of VUU entitlement was limited to land within the municipal boundaries between the first date of eligibility for each municipality (September 16, 1970, or date of incorporation which ever came later) and July 1, 1978. The deadline for selection was, however, set two years after expiration of the state's selection rights from the federal public domain. The state's selection deadline was 25 years from statehood (1984). The Alaska National Interest Lands Conservation Act (ANILCA) extended this by ten years to 1994.

In 1978 the state had received about 35 million acres of its entitlement. The 1978 city certifications resulted in an allocation of 7,727 acres to 19 qualifying cities and 861,608 acres to 11 unified home rule municipalities and boroughs. A total of 869,335 acres of state land were granted to municipalities under the 1978 law.

Entitlement acreages for unified home rule municipalities and boroughs contained in AS 29.18.201, as amended in 1978, did not always represent fulfillable entitlements. When the state legislature was considering provisions to be incorporated into the AS 29.18 amendments, they established acreage entitlements for each of the unified home rule municipalities and boroughs based on a complicated scheme that considered population, areal extent and availability of state land within the municipal boundaries. The Municipality of Anchorage and the Kodiak Island Borough had considerably less state VUU land within their boundaries than was needed to meet the statutory entitlement.

The Municipality of Anchorage received $4,000,000 as deficiency payment under AS 29.18.208 for 4,000 acres of entitlement land and in 1985 entered into an agreement with the state to zero out

a yet unfulfillable entitlement with 4,628 designated acres of state land within the municipal boundaries. Prior to the agreement, 20,671 acres of land had been approved or patented to the municipality. Under the settlement Anchorage can also receive up to 1,000 acres of National Forest Community Grant land at Girdwood if land is ever conveyed to the state.

The Kodiak Island Borough likewise entered into an agreement with the state to zero out its entitlement with 48,700 designated acres of state land within their boundaries. As part of the agreement the borough would return to the state 3,069 acres of the 13,960 acres of land that had been patented or approved for patent prior to the agreement. The borough would also receive up to 17,800 acres of land under selection by ANCSA corporations if the land was ever available to the state.

The amount of additional state land granted to cities by the 1987 amendments is 11,892.3 acres. The state had about 80 million acres of its entitlement in 1987. The major affect of the new law, however, is re-establishing a 1978, 89,850 acre entitlement to the North Slope Borough and increasing the 13,000 acre entitlement certified under the old statute to the new Northwest Arctic Borough to 133,920 acres. In round figures about 236,000 acres of state VUU land will be conveyed to two boroughs and nine cities under the 1987 law.

VUU Land Definitions History

Between 1963 and 1978, municipal entitlement selections were limited to "vacant, unappropriated, unreserved land". It appears, by extension of application, that state administrators conceptually adopted the similar guidelines used by federal administrators when statehood land selections were being adjudicated. Neither statutory nor policy definitions existed for VUU land and as a result municipalities and the state disagreed about whether specific parcels of land were VUU.

In 1978, the amended law adopted specific definitions for VUU land.
Following were the limitations placed on this definition:

1) Land must be Statehood Act section 6(a) or 6(b) land that has been patented or tentatively approved to the state and excludes the mineral estate;

2) Land cannot have been set aside by statute for one or more particular uses or purposes;

3) Land must be unclassified or if classified is classified agricultural, grazing, commercial, industrial, private recreational, residential, utility or open-to-entry.