ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
6965 HOUSE JUDICIARY

(7) HOUSE COMMITTEE REPORT

Date Referred: March 16, 1992 FURTHER REFERRALS:

Date of Committee Action: 3-27-92

The JUDICIARY Committee considered: HB 398

HOUSE BILL NO. 398 DISCLOSURE IN REAL PROPERTY SALES

"An Act requiring certain disclosures in real property sales; and providing for an effective date."

RECOMMENDATIONS: [X] the same title
be replaced with CS HB 398 (JUDICIARY) [ ] 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)

[ ] fiscal impact _____

[ ] zero fiscal note _____

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) _____

[X] zero fiscal note(s) Commerce/Occup. Lic. 3-16-92

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
		Dave Donley		X	
Jay Ellis	•	Terry Martin			
		Mark Hanley		X	

Dave Donley
CHAIRMAN'S SIGNATURE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

FISCAL NOTE

Bill Version: CSHB 398(L&C)
(H) Publish Date: 3-16-92

Revision Date. _____ Department Affected: Commerce & Economic Development

Title: An Act requiring certain disclosures in real property sales: and providing for an effective date. BRU: Occupational Licensing

Component: Administration

Sponsor: Reps. Parnell and Gruenberg

Requestor: House Labor & Commerce COMPONENT SERIAL NO. 0356

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	0.0	0.0	0.0	0.0	0.0	0.0
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL	0.0	0.0	0.0	0.0	0.0	0.0
REVENUE	0.0	0.0	0.0	0.0	0.0	0.0

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME	0.0	0.0	0.0	0.0	0.0	0.0
TEMPORARY	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

Prepared By: Jennifer Strickler Phone: 465-2144

Division: Occupational Licensing Date: 02/03/92

Approved by Commissioner: Glenn A. Olds for Bill Allen Acting Comm. 2/3/92

Agency: Department of Commerce & Economic Development Date: _____

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

Rev 10/90

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. HB 398

Revision Date: _____ Department Affected: Department of Environmental Conservation

Title: Real Estate Disclosures BRU: Spill Prevention & Response

Component: Contaminated Sites

Sponsor: Representative Parnell

Requestor: (H) L&C COMPONENT SERIAL NO. 1 4 3 1

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

GENERAL FUND	0.0	0.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL						

POSITIONS:

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Richard Cormack Phone: 465-5200

Division: Spill Prevention and Response Date: 2/3/92

Approved by Commissioner: Harold Heinbockel

Agency: Department of Environmental Conservation Date: 2/4/92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/7/91

STATE OF ALASKA FISCAL NOTE BILL NO. HB 398

1992 LEGISLATIVE SESSION

Revision Date. Department Affected: Commerce & Economic Development

Title: An Act requiring certain disclosures in real property sales; and providing for an effective date. BRU: Occupational Licensing

Component: Administration

Sponsor: Reps. Parnell and Gruenberg

Requestor: House Labor & Commerce COMPONENT SERIAL NO. 0356

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	0.0	0.0	0.0	0.0	0.0	0.0
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL	0.0	0.0	0.0	0.0	0.0	0.0
REVENUE	0.0	0.0	0.0	0.0	0.0	0.0

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME	0.0	0.0	0.0	0.0	0.0	0.0
TEMPORARY	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

Prepared By: Jennifer Strickler Phone: 465-2144

Division: Occupational Licensing Date: 02/03/92

Approved by Commissioner: Glenn A. Olds for Asst Comm. 2.3.92

Agency: Department of Commerce & Economic Development Date:

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

Rev 10/90

Official Business

Alaska State Legislature

HOUSE OF REPRESENTATIVES

Kevin "Pat" Parnell

Room 128

State Capitol
Juneau, AK 99801-1182

SPONSOR LIST OF MATERIALS FOR CSHB398 (L & C)

HOUSE JUDICIARY HEARING

I. Sponsor Statement

II. Sectional Analysis of CSHB398 (L & C)

III. Fiscal notes.
   a. Department of Environmental Conservation, Spill Prevention & Response.
   b. Department of Environmental Conservation, Occupational Licensing.

IV. California Statute (1991)

V. Bevins v. Ballard, AK, 655 P.2d 757.

VI. Cousineau v. Walker, AK 613 P.2d 608.

Committees: Judiciary, Labor & Commerce, Military & Veterans Affairs
Finance Subcommittee, Administration

Alaska State Legislature
HOUSE OF REPRESENTATIVES
Kevin "Pat" Parnell
Official Business
Room 123
State Capitol
Juneau, AK 99801-1182

SPONSOR STATEMENT

I have submitted House Bill 398, "An Act requiring certain disclosures in residential real property transfers," to help eliminate a problem. This stemmed from a constituent complaint last summer in Anchorage.

The constituent bought into a condominium complex built in the late 1970's. It was built on inferior ground, allowing for sagging of supports, etc. Once the property was examined by engineers, it was found to be in dire need of repair. As in many residential properties built during the oil boom years, attention to detail was lacking. Because the constituent was not made aware of the faults, he shouldered the financial responsiblity of repairs.

HB 398 is to help guard against this in the future. It would not provide for a specific avenue of legal recourse, but provides the transferee (buyer) and transferor (seller) the knowledge in transacting a transfer of residential real property beforehand.

This disclosure statement allows both parties to understand the general condition of the property, thus allowing no surprises.

HB 398 would not change a realtor's existing liability. It would only affect the realtor if they negligently or wilfully knew of, and then withheld information. In those particular cases, they would be subject to damages allowed in this Act.

This act's effective date would be January 1, 1993, allowing the industry and future transferors and transferees the time needed to implement the disclosure statement form.

Committees: Judiciary, Labor & Commerce, Military & Veterans Affairs
Finance Subcommittee, Administration

Alaska State Legislature
HOUSE OF REPRESENTATIVES
Kevin "Pat" Parnell
Official Business
Room 128
State Capitol
Juneau, AK 99801-1182

SECTIONAL ANALYSIS FOR CSHB 398 (L & C)

Section 1. A new chapter is added.

CHAPTER 70. DISCLOSURES IN RESIDENTIAL REAL PROPERTY TRANSFERS.

Sec. 34.70.010. DISCLOSURES REQUIRED.

A transferor of real property (their interest in) must complete and deliver a disclosure statement to the transferee (buyer) before the transferee (buyer) makes a written offer on the real property. Delivery to one's spouse is considered to be a delivery.

Sec. 34.70.020. TERMINATION OF OFFER

The transferee (buyer) may terminate the offer if a disclosure statement, or an amended one, is delivered to the transferee (buyer) after the written offer is made. This is done by written notice, made within three (3) days after personal delivery of the statement, or five (5) days if mailed.

Sec. 34.70.030. DISCLOSURE LIABILITY.

(a) Transferor (Seller) is not liable for a defect if they disclose the existence of that defect.
(b) Agent of transferor (seller) is not liable for error, inaccuracy, or omission in the information provided, if they did not have personal knowledge of it, and they exercised due diligence in obtaining their information.

Sec. 34.70.040. SUBSEQUENT EVENTS AND APPROXIMATIONS.

(a) If information in the statement become inaccurate after the statement is delivered to the transferee (buyer), the transferor (seller) must deliver the amendment to the disclosure statement to the transferee (buyer).
(b) If an item is unknown, the transferor (seller) may make an approximation, if they have exercised a reasonable effort, and must clearly mark it as an approximation.

Committees: Judiciary, Labor & Commerce, Military & Veterans Affairs
Finance Subcommittee, Administration

Sec. 34.70.050. FORM OF DISCLOSURE STATEMENT.

Describes this statement as not a warranty of any kind, and is not a substitute for any inspections or warranties they may wish to have otherwise.

Part I, TRANSFEROR (Seller) INFORMATION, is made for variety of objects, and with a space available for any defects known in the home itself, i.e., foundation, ceilings, driveways, etc.

Part II, allows for the parties involved to know that they can obtain professional advice, make inspections, etc. Followed by the signed statement of acknowledgment of the statement.

Sec. 34.70.060. GOOD FAITH.

Sec. 34.70.070. EFFECT ON OTHER REQUIRED DISCLOSURES.

This statement does not affect other obligations for disclosures as provided by law.

Sec. 34.70.080. WRITTEN AMENDMENT.

Sec. 34.70.100. DUTIES OF BROKER.

(a) If a broker has obtained the offer, they must be the one to deliver the statement to the transferee (buyer), unless instructed otherwise.

(b) The broker must advise the transferee (buyer) in writing that the transferee (buyer) has the right to receive the disclosure statement, if the disclosure statement has not received from the transferor (seller).

(c) The broker must maintain written record of action taken.

(d) "Listing agent" is included in this section.

34.70.120. FAILURE TO COMPLY.

(a) A transfer is not invalidated solely because a person fails to comply with this chapter.

(b) A person must negligently violate this chapter, and then is liable for the actual amount of damages suffered by the transferee (buyer), plus cost and attorney fees allowed under the law.

(c) If they wilfully violate this chapter, they are liable for treble the actual damages, plus cost and attorney fees allowed under the law.

34.70.200. DEFINITIONS.

(1) "Disclosure statement" defined.

(2) "real property" defined as including those under AS 34.07 "Horizontal Property Regimes Act," and AS 34.08 "Common Interest Ownership."

(3) "Residential Real Property" defined as single-family dwelling unit.

(4) "Transfers" defined as including those done by sale, exchange, installment land sale contract, lease with an option to purchase, other option to purchase, or a ground lease coupled with improvements.

Section 2. AS 08.88.071(a) is amended.

Allows the Real Estate Commission, under the authority of the Department of Occupational Licensing, to suspened or revoke a real estate license of an agent who violates this chapter.

Section 3 & 4. Effective date(s) of January 1, 1993

Alaska State Legislature
HOUSE OF REPRESENTATIVES

Official Business

Kevin "Pat" Parnell

Room 128
State Capitol
Juneau, AK 99801-1182

TO: All House Judiciary Committee Members

FR: Kevin "Pat" Parnell, Prime Sponsor
CSHB 398 (L & C)

DT: March 25, 1992

RE: Response to AK Association Realtors Letter

CSHB 398 (L & C)

1. Concerning signature line, Page 6, Line 17, "Agent Representing the Seller."

This line acknowledges the receipt of a copy of this statement (See Line 14). Page 2, Line 30 states, "IT IS NOT A WARRANTY OF ANY KIND BY THE TRANSFEROR(S) OR ANY AGENT(S) REPRESENTING ANY PRINCIPAL(S)..."

A "guarantee," as quoted from the Webster's New World Dictionary is that of "a pledge or security for another's debt or obligation." A "warranty" is listed as a "guarantee." As stated, "this is not a warranty of any kind," (Page 2, Line 30).

2. Regarding placing "ESCROW AGENTS" back into the bill.

By eliminating "Escrow Agents," the liability factor is eliminated. If it is the wish of the committee, the wording can be added; the sponsor will defer to the wishes of the Judiciary Committee.

3. Removing "DUTIES OF BROKERS."

Brokers have existing duties. There is not a proposed change. The courts have ruled that people have a cause of action against a broker for their representations. This is a "disclosure statement;" a statement is "to set forth in words, (Webster's New World Dictionary). According to Bevins v. Ballard, 18 AK 655 P.2d 757, 763 (1982), "Accordingly, we hold that a purchaser who relies on a material misrepresentation, even though innocently made, has a cause of action against the broker originating or communicating the misrepresentation."

Since the broker is giving this disclosure statement to the transferee, he or she is communicating the information concerning the unit. The courts have determined that purchasers should be entitled to rely on a broker's representations. As quoted in Bevins v. Ballard (763) "Real estate brokers and their agents hold themselves out to the public as having specialized knowledge with regard to housing, housing conditions and related matters." Lyons v. Christ Episcopal Church, 71 Ill. App.3d 257, 27 Ill.Dec.559, 389 N.E.2d 623, 628 (1979)(dissenting opinion).

4. "DEFINITIONS" regarding (2) "residential real property."

The current listing of definitions is more clear, and definite. They are to be applied in any listing of residential real property, whether a freestanding home or a unit in a large complex.

5. Referring to the Alaska Real Estate Commission, the language allows for the Real Estate Commission to have flexibility in determining the punishment. A real estate broker who violates this act does so either "negligently" or "wilfully." A suggestion may be that the committee consider amending this section by placing a (.) after "AS 34.70.100," Page 8, Line 29.

REALTOR ®

ALASKA ASSOCIATION OF REALTORS, INC.
741 Sesame Street, Suite 100 • Anchorage, Alaska 99503
Telephone 907-563-7133

March 25, 1992

Representative Dave Donley, Chairman
House Judiciary Committee
Alaska State Legislature
Room 120, Capitol
Juneau, AK 99801

Dear Representative Donley:

The Alaska Association of REALTORS® (AAR) is actively supporting the passage of legislation requiring mandatory residential property disclosure.

However, AAR would like to bring to the attention of the House Judiciary Committee the following sections of CSHB 398 that are of concern, and asks for your careful consideration of these sections:

Page 6, line 17 - The signature line for the "Agent Representing the Seller." This implies that the Agent is guaranteeing information supplied by the Seller (Transferor). To place a third party in the position of liability for another's statements is unfair; this line should be deleted.

Page 6 - Section 34.70.090 Escrow Agents. This section has been deleted from the original bill. An escrow agent who acts merely as a facilitator for closing a transaction should not be responsible and subject under this chapter for disclosure or considered as having an agency relationship with either Buyer or Seller (Transferee or Transferor). This section should be <u>included</u> in the legislation.

Pages 6 and 7 - Section 34.70.100 Duties of Broker. This entire section should be deleted. Again, the responsibility for property disclosure should lie with the Transferor, not with the real estate broker or agent.

Representative Kevin "Pat" Parnell
March 25, 1992
Page 2 of 2

Page 7, lines 20 through 22 - Definitions - (3) "residential real property." In the interest of clarifying real estate transfers covered by this act, the section could read: "Transfers of one to four residential dwelling units transferred, by sale, exchange, installment land sale contract, lease with option to purchase, or ground lease coupled with improvements."

Page 7, beginning on line 28 - Sec. 2. AS 08.88.071. This section amends Alaska Statutes covering actions of the Alaska Real Estate Commission regarding real estate licensees. Beginning on page 8, lines 29 through 31 define penalties for real estate licensees for a failure to comply with property disclosure under AS 34.70.100. Again, this section should be deleted. To make real estate licensees liable for the failure of a Transferor to disclose is not protecting the public. The Transferor who wilfully or negligently violates this chapter or fails to perform a duty required by this chapter should be liable to the Transferee for the amount of the actual damages suffered as a result of the violation or failure.

The Alaska Association of REALTORS® appreciates the opportunity to comment on this important consumer protection legislation, and thanks the members of the Committee for their consideration of these suggested amendments to CSHB 398.

Sincerely,

Dale A. Price
President

an element of the relative nature of the work test. Thus, only if it is determined that Kroll acted as an employer in the course of his construction activities may Donald reasonably be said to have been engaged in work which was "a regular part of the employer's regular work." *Ostrem v. Alaska Workmen's Compensation Board*, 511 P.2d at 1063.[5]

[5] For purposes of the Act, an employer is defined as "a person employing one or more persons in connection with a business or industry coming within the scope of this chapter." AS 23.30.265(12). The Board stated in this regard:

> The definition of subsection (12) 'in connection with a business or industry coming within the scope of this chapter' is interpreted to mean *all business or industry is to be considered as covered by the Act* and that interpretation would follow Larson's which includes every person in the service of another under contract. [Emphasis added.]

The Board's broad construction of AS 23.30.265(12) fails to give proper weight to the statutory limitation to employment relationships "in connection with a business or industry." In Larson's terms,[6] the policy question is whether Kroll's construction activity, either by itself or as an element of his rental activities,[7] was a profit-making enterprise which ought to bear the costs of injuries incurred in the business, or was the construction activity simply a cost-cutting shortcut in what was basically a *consumptive* and not a *productive* roll played by Kroll.[8]

We conclude that the Board's statement with respect to the parameters of the statutory definition of an employer reflects an erroneous standard of law. As a result, the threshhold issue of whether Kroll's construction activity was sufficient to establish his status as an employer must also be remanded to the Board for further consideration.[9]

REVERSED and REMANDED.

Max BEVINS and Johnson-Bevins Inc., d/b/a Star Realty, Appellants,

v.

David L. BALLARD and Linda K. Ballard, Appellees.

No. 4571.

Supreme Court of Alaska.

Nov. 19, 1982.

Purchasers brought action against vendors and real estate broker alleging, in part, intentional and negligent misrepresentation in describing condition of well on property. The Superior Court, Third Judicial District, Anchorage, Eben H. Lewis, J., rendered judgment in favor of purchasers, and broker appealed. The Supreme Court, Burke, J., held that: (1) trial court's dismissal of purchasers' negligence claim against real estate broker precluded broker's liability from resting on a negligent representation

5. The concept of "regular work" as used in *Ostrem* as part of the test for differentiating between employees and independent contractors is a subclass of "business" as used in AS 23.30.265(12). Whether a person engages in a "business" within the meaning of AS 23.30.265(12), is relevant for purposes of determining the "extent to which claimant's work is a regular part of the employer's regular work." *Ostrem*, 511 P.2d at 1063. The Board's first obligation is to ascertain the nature of the particular business enterprise in which the injury allegedly occurred, and then to determine whether the work being done by the claimant is a regular part of that business.

6. *See* 1C A. Larson, *supra* note 2, § 50.21.

7. *Id.* at § 50.24.

8. *Id.* at § 50.21, at 9–70 to 9–71 & nn. 4 and 5. *But see Donald v. Whatley*, 346 So.2d 898 (Miss.1977).

9. *Burgess Constr. Co. v. Smallwood*, 623 P.2d 312, 317 (Alaska 1981).

theory, even though postjudgment amendments are allowed to conform issues tried to evidence, where, subsequent to dismissal, neither party argued negligent misrepresentation in trial briefs, court and parties treated case as one involving innocent misrepresentations, and broker neither expressly nor impliedly consented to trying negligence claim, but (2) real estate broker who made material misrepresentation to purchasers as to condition of well on unimproved property was liable to purchasers, even though representation was innocently made.

Affirmed.

Connor, J., dissented in part and filed an opinion in which Rabinowitz, J., joined.

1. Negligence ⇐2

In determining whether duty exists to provide accurate information once speaker undertakes to speak, factors to consider are whether speaker had knowledge, or its equivalent, that information was desired for serious purpose and that listener intended to rely upon it, foreseeability of harm, degree of certainty that listener would suffer harm, directness of causation, and policy of preventing future harm.

2. Brokers ⇐102

In land sales context, duty to provide accurate information when real estate broker undertakes to speak can arise when broker becomes aware of suspicious facts regarding his or her representations, or when purchaser makes affirmative inquiry and broker fails to check accuracy of subsequent responding representation, or when court determines that public policy requires brokers to undertake certain functions.

3. Pretrial Procedure ⇐693

Trial court's dismissal of purchasers' negligence claim against real estate broker precluded broker's liability for misrepresentations from resting on a negligent representation theory, even though postjudgment amendments are allowed to conform issues tried to evidence, where, subsequent to dismissal, neither party argued negligent misrepresentation in trial briefs, court and parties treated case as one involving innocent misrepresentations, and broker neither expressly nor impliedly consented to trying negligence claim.

4. Vendor and Purchaser ⇐37(1)

Vendors guilty of even innocent misrepresentation cannot hide behind doctrine of caveat emptor because vendors are presumed to know character and attributes of land conveyed and purchasers are consequently entitled to rely on vendors' reasonable representations.

5. Fraud ⇐13(2)

Owner of land must be both truthful and informed in making any representations, for fraud includes pretense of knowledge where there is none.

6. Brokers ⇐102

Policy favoring liability of real estate brokers for innocent misrepresentation is founded on recognition that purchasers should be entitled to rely on a broker's representations.

7. Brokers ⇐106

Purchaser who relies on a material misrepresentation of real estate broker, even though innocently made, has a cause of action against broker.

8. Brokers ⇐102

Real estate broker who made material misrepresentation to purchasers as to condition of well on unimproved property was liable to purchasers, even though representation was innocently made.

Fredrick P. Pettyjohn, Anchorage, for appellants.

Saul R. Friedman, Hedland, Fleischer & Friedman, Anchorage, for appellees.

Before RABINOWITZ, C.J., CONNOR, BURKE, and MATTHEWS, JJ., and DIMOND, Senior Justice.*

* Dimond, Senior Justice, sitting by assignment made pursuant to article IV, section 11 of the Constitution of Alaska, and Alaska R.Admin.P. 23(a).

OPINION

BURKE, Justice.

This is an appeal from a judgment holding a real estate broker liable for certain misrepresentations made in the course of a real estate transaction.

A. Facts

On February 3, 1975, David and Linda Ballard purchased a lot with an unfinished dwelling from Josephine, Patricia, and William Ferris. Prior to their purchase, certain representations were allegedly made to the Ballards regarding the adequacy of a well on the property. The purchaser, David Ballard, who had previous experience as a general contractor, attempted to complete the existing well on the property. He installed a pump and piping from the well to the house. The well, however, failed to provide sufficient water. As a result, the Ballards were forced to haul water to their property. They subsequently incurred expenses of $6,935.00 in deepening the well to an adequate level.

Believing themselves the victims of fraudulent misrepresentations, the Ballards sued the sellers, the broker (Bevins), and an employee of the broker (Lucas). Their complaint alleged, in part, intentional and negligent misrepresentation.[1] In addition, it alleged that Bevins and Lucas had a duty to check the well's condition, that Lucas knew there was no functional well, that Bevins was vicariously liable for Lucas's acts, and that the Ferrises were vicariously liable for the actions of their agents, Bevins and Lucas. The complaint did not explicitly allege innocent misrepresentation.

After the close of plaintiffs' evidence, the trial court dismissed certain counts of the complaint. First, the court ruled that the broker did *not* have a general duty to inspect the premises. Second, it held that the broker was *not* vicariously liable for the acts of his employee, Lucas. In a subsequent written decision, the court further ruled that Lucas was not liable. It then held that Bevins and the sellers were jointly and severally liable, each with a right of contribution from the other for any payment in excess of a pro rata share. While both the sellers and the broker filed timely notice of appeal, only Bevins, the broker, pursues his appeal.

The basis of the broker's liability is not clear. The court found that the sellers were the source of the representation that the well was "good," i.e., capable of supplying the reasonable water needs of the residents. It ruled that the broker had a right to rely on the representations, and thus the sellers were liable (as principals) for the act of Bevins (their broker and thus their agent) who passed on the misrepresentation. The court also found that Lucas passed on the representation intending that

1. The complaint made the following factual allegations:

(a) Bevins personally inspected the property;
(b) sellers told Bevins that there was a well drilled on the property;
(c) sellers failed to disclose to Bevins the incomplete nature of the well, with the knowledge and intent that Bevins would tell potential buyers there was a well;
(d) sellers represented to the broker's employee that the well was finished, held 36 feet of standing water, and was capable of supporting the reasonable water needs of residents of the house;
(e) sellers made those representations with the intent that Lucas would tell the buyers;
(f) Lucas did so represent to the Ballards;
(g) the representations were false;
(h) Lucas made the representations with the knowledge they were false;
(i) sellers made the representations knowing they were false, for the purpose of deceiving plaintiffs and inducing them to buy;
(j) plaintiffs did rely and were induced; and,
(k) plaintiffs were unable to discover the defect until after purchase.

In addition, the following legal allegations were made:

(1) Bevins owed plaintiffs a duty to investigate the accuracy of the sellers' representations, and breached that duty (this count was dismissed at the close of plaintiffs' evidence);
(2) Lucas (broker's employee) owed plaintiffs a duty to investigate, and breached that duty;
(3) Bevins was vicariously liable for acts of his employee Lucas (this count was dismissed at the close of plaintiffs' evidence); and,
(4) sellers were vicariously liable for the acts of their agents, Bevins, the broker, and his employee, Lucas.

it be relied upon; Bevins admitted to the same intent. The court further found that the Ballards did so rely, and that their reliance was justified.

Although the court earlier concluded that Bevins had no general duty to inspect, it subsequently held that a duty of inquiry arose when Lucas asked Bevins, on behalf of the Ballards, about the adequacy of the well. The court concluded that Bevins acted unreasonably by simply assuring Lucas that it was a "good well" rather than by investigating. Thus Bevins' liability appears to rest on a negligence theory.

Certain facts are not contested:

1. The listing mentioned a 100 foot well.
2. The well proved to be incomplete, i.e., inadequate to support reasonable water needs.
3. Bevins, the broker, testified that the listing of a well would reasonably lead buyers to assume the well was "good," i.e., adequate.
4. The Ballards relied on the listing and representations that the well was "good."
5. Both Lucas and Bevins intended that the Ballards so rely.

As to the source of the misrepresentation, Bevins testified that he would not have written it on the listing unless it came from the sellers. The sellers, however, denied telling him about it; they testified that Bevins must have misunderstood. The court believed Bevins, concluding that the sellers were the original source of the representation.

B. The Broker's Liability

There are three types of misrepresentations: intentional, negligent, and innocent. While the Ballards did assert an intentional misrepresentation claim against the sellers, they did not do so against Bevins or Lucas. Thus, we need address only the negligent and innocent misrepresentation claims in this appeal. Bevins' liability to be sustained, must rest on one of these two theories.[2]

1. Negligent Misrepresentation

The Ballards' third claim for relief stated a cause of action for negligence against Bevins. That claim alleged that Bevins had a duty to "take reasonable steps to determine whether or not the well ... was a completed well" and had sufficient capacity to support a purchaser's reasonable water needs, that Bevins breached that duty, and that as a direct and proximate result of Bevins' breach the Ballards purchased the property believing the well was completed. As noted, the trial court subsequently dismissed that claim, and the Ballards did not appeal. In its final opinion, however, the trial court imposed liability on grounds that Bevins had a "duty to inquire of the sellers whether the well was, in fact, 'a good well.'" Bevins argues that the court thus held him negligent even though negligence was dismissed from the case and, further, that he was prejudiced thereby because dismissal of the third claim led him to forego a negligence defense.

[1, 2] We recognized the tort of negligent misrepresentation in *Transamerica Title Insurance Co. v. Ramsey*, 507 P.2d 492 (Alaska 1973), and *Howarth v. Pfeifer*, 443 P.2d 39 (Alaska 1968). Under this theory, Bevins could have been liable for breaching his duty to provide accurate information once he undertook to speak. In determining whether such a duty exists, one must consider: (a) whether the defendant had knowledge, or its equivalent, that the information was desired for a serious purpose and that the plaintiff intended to rely upon it; (b) the foreseeability of harm; (c) the degree of certainty that plaintiff would suf-

2. Bevins' liability could be based on a vicarious liability for the acts of his employee Lucas. As we noted in *Black v. Dahl*, 625 P.2d 876, 879 n. 3 (Alaska 1981), a real estate broker can be liable under the doctrine of respondeat superior for the acts of his or her sales-people. However, two of the rulings below preclude resting liability on such a basis. First, at the close of the Ballards' evidence, the trial court dismissed the eighth claim for relief, which had asserted that Bevins was vicariously liable. Second, in its written opinion, the trial court found in favor of Lucas, the salesman. Thus there is no underlying liability for which Bevins could be held vicariously responsible. The Ballards have not appealed these rulings.

fer harm; (d) the directness of causation; and (e) the policy of preventing future harm. *Howarth v. Pfeifer*, 443 P.2d at 42; *see Transamerica Title Insurance Co. v. Ramsey*, 507 P.2d at 494–95.[3] In the land sales context, such a duty can arise when a broker becomes aware of suspicious facts regarding his or her representations, or when a buyer makes an affirmative inquiry and the broker fails to check the accuracy of his subsequent responding representation, or when a court determines that public policy requires brokers to undertake certain functions. *See, e.g., First Church of the Open Bible v. Cline J. Dunton Realty, Inc.*, 19 Wash.App. 275, 574 P.2d 1211 (1978).

[3] We believe, however, that the trial court's dismissal of Ballards' third claim for relief, which was their only negligence claim against Bevins, precludes the broker's liability from resting on a negligent misrepresentation theory.[4] While Alaska Rule of Civil Procedure 15(b) allows post-judgment amendments to conform the issues tried to the evidence, and further provides that the failure to so amend "does not affect the result of the trial" on those issues, the rule sets as a threshold the requirement that such issues be "tried by express or implied consent of the parties." We do not believe that this condition was met in the case at bar. Subsequent to the dismissal neither party argued *negligent* misrepresentation in their trial briefs. The court and parties treated the case as one involving innocent misrepresentations. Bevins neither expressly nor impliedly consented to trying a negligence claim. Accordingly, Bevins' liability cannot rest on a negligent misrepresentation theory.

2. Innocent Misrepresentation

The case went forward against Bevins on an apparent theory of innocent misrepresentation, evidenced by the colloquy quoted in note 4 and the arguments advanced in the trial briefs.[5] The tort of innocent mis-

3. In *Transamerica Title*, we upheld submitting the negligence issue to the jury where a title insurance company failed to inform a client that a power of attorney, upon which she was relying in asserting her authority to sell the property, had been revoked. Although the title company was unaware of the revocation, that information was readily available to it. We concluded that the title insurer knew that the seller, its client, desired information about her legal capacity to sell the land, that she intended to rely on that information, and that there was foreseeable harm to her should she be poorly advised. We concluded that the jury could find that the title company had a "duty to speak carefully." We rejected any distinction between the nonfeasance of the title company and the misfeasance in the *Howarth* case. 507 P.2d at 494–95.

   In *Howarth*, a vendor sought damages for the alleged negligent misrepresentation by the defendant insurer that a purchaser of vendor's property had obtained fire insurance on the property. We held that assuming the presence of the essential factors establishing a duty of care, those engaged in the insurance business are required to speak with reasonable care.

4. That the court intended to dismiss negligence claims from the case is further evidenced by the following colloquy:

   THE COURT: ... I feel that it's the third claim for relief that you seek thereby to impose upon realtors a burden that does not exist except in extraordinary circumstances. That is when there's been—when there has been evidence adduced as to the duty of a realtor to inquire arising from some circumstances directing the attention of a reasonable prudent realtor to some—some—something unusual. In this case it seems to me that this was just an ordinary transaction. That it's rural property, most of which does require that it be serviced by a well. It is incomplete, and if I accept the evidence as it now stands, that it was represented that there was a good well, that that's the end of the matter, that there's no duty on the realtors to go further and inquire whether that is the actual fact. You know, there's nothing unusual about that well that would alert the ordinary prudent realtor of the need to do something about it. To check it out.

   MR. FRIEDMAN: Well, if the court finds that there was no duty, then they can't obviously be negligent. But I still ask the court ....

   THE COURT: They—well, they still can be—the defendants still could be—they made the representation, which is—facts show was not true.

   MR. FRIEDMAN: Correct.

   THE COURT: So that they can be—they can be held liable for having made the same. But not on—not on—(indiscernible) negligence—or negligence theory.

5. The *elements* of innocent misrepresentation were alleged to a sufficient degree. Paragraph 8 of the Ballards' first claim for relief makes

representation is defined by section 552C(1) of the Restatement (Second) of Torts (1977) as follows:

> One who, in a sale, rental or exchange transaction with another, makes a misrepresentation of a material fact for the purpose of inducing the other to act or to refrain from acting in reliance upon it, is subject to liability to the other for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation, even though it is not made fraudulently or negligently.

Id. The Restatement leaves open the question of whether such a cause of action lies against real estate brokers. *Id.* § 552C, Comment g.

[4, 5] We have recognized a cause of action against the *owner* of realty who innocently misrepresents its condition to the purchaser. *Cousineau v. Walker*, 613 P.2d 608 (Alaska 1980). In *Cousineau*, we granted rescission and restitution to a purchaser where the seller made false statements concerning the highway frontage and gravel content of the purchased land. In so doing, we held that an owner guilty of even innocent misrepresentation could not hide behind the doctrine of caveat emptor. *Id.* at 614–16. This is so because owners are presumed to know the character and attributes of the land conveyed and buyers are consequently entitled to rely on the seller's reasonable representations. *See Sorenson v. Adams*, 98 Idaho 708, 571 P.2d 769, 776 (1977), *quoted in Cousineau v. Walker*, 613 P.2d 608, 615 n. 14 (Alaska 1980). The owner of land must therefore be both truthful and informed in making any representations, for fraud includes the pretense of knowledge where there is none. *Spargnapani v. Wright*, 110 A.2d 82, 84 (D.C.App. 1954).

The question presented in this case is whether or not liability for innocent misrepresentation should extend to the owner's agent, the real estate broker, where that party serves as a conduit for the owner's misinformation. Most courts addressing this issue recognize a cause of action by the purchasers of property against the broker for the latter's innocent misrepresentation.[6]

An illustrative case is *Spargnapani v. Wright*, 110 A.2d 82 (D.C.App.1954). There, both the seller and broker were held liable for representing that a house could be heated for a little more than $100.00 per year, when a defect in the boiler made it impossible to heat the house at all. *Id.* at 85. The broker had merely passed on the seller's information, and neither defendant had knowledge of a defect. Nevertheless, the court sustained liability:

> If the broker innocently represented that the heating plant was in workable condition and was mistaken in that representation, or made the representation without knowing whether it was true or false, the injured party may recover in an action for fraud.
>
> . . . We may assume that the broker was guilty of no deliberate deception and had no actual knowledge of the concealed defect. But on defendants' own evidence their selling agent did not disclaim such knowledge . . . . The representation . . . was flagrantly inaccurate, since the defect . . . made it impossible to heat the house at all . . . . "Fraud includes the

the necessary allegation concerning Bevins' scienter. Paragraph 2 of the fifth claim for relief alleged that Bevins' agent passed on the representation with the intent to cause action in reliance thereon. Finally, paragraph 15 of the first claim for relief alleged actual reliance. In light of this, plus the court's and the parties' arguments concerning Section 552 of the Restatement, we conclude that Bevins was "adequately notified" that the Ballards were asserting a cause of action based on innocent misrepresentations. *See Clary Ins. Agency v. Doyle*, 620 P.2d 194, 201 (Alaska 1980).

6. *Sodal v. French*, 35 Colo.App. 16, 531 P.2d 972, 973 (1974); *Spargnapani v. Wright*, 110 A.2d 82, 85 (D.C.App.1954); *Pumphrey v. Quillen*, 165 Ohio St. 343, 135 N.E.2d 328, 331 (1956); *Berryman v. Riegert*, 286 Minn. 270, 175 N.W.2d 438, 442 (1970); *Lawlor v. Scheper*, 232 S.C. 94, 101 S.E.2d 269, 271 (1957); *Polk Terrace, Inc. v. Harper*, 386 S.W.2d 588, 593 (Tex.App.1965). *Contra Lyons v. Christ Episcopal Church*, 71 Ill.App.3d 257, 27 Ill.Dec. 559, 389 N.E.2d 623, 625 (1979).

pretense of knowledge when knowledge there is none."

Id. at 83–84 (citations omitted).

[6] The policy favoring liability for innocent misrepresentation is found on a recognition that purchasers should be entitled to rely on a broker's representations. As one opinion notes:

> Real estate brokers and their agents hold themselves out to the public as having specialized knowledge with regard to housing, housing conditions and related matters. The public is entitled to and does rely on the expertise of real estate brokers in the purchase and sale of its homes. Therefore there is a duty on the part of real estate brokers to be accurate and knowledgeable concerning the product they are in the business of selling—that is, homes and other types of real estate. Courts have held in many cases that purchasers are entitled to rely on real estate brokers' statements.

Lyons v. Christ Episcopal Church, 71 Ill. App.3d 257, 27 Ill.Dec. 559, 389 N.E.2d 623, 628 (1979) (dissenting opinion).

[7] We find this reasoning persuasive. Parties to real estate transactions frequently do not deal on equal terms. Real estate brokers are licensed professionals, possessing superior knowledge of the realty they sell and the real estate market generally. Prospective purchasers recognize this expertise and tend to rely on a broker's representations. Just as purchasers are entitled to rely on an owner's representations, *Cousineau v. Walker*, 613 P.2d 608 (Alaska 1980), purchasers should be entitled to rely on the broker's representations. Any other rule would permit brokers to use misleading statements in selling the property, yet remain immune from liability by simply remaining ignorant of the property's true characteristics. Accordingly, we hold that a purchaser who relies on a material misrepresentation, even though innocently made, has a cause of action against the broker originating or communicating the misrepresentation. *See* Restatement (Second) of Torts § 552C(1) (1977).

In our view, the consequences of recognizing a cause of action in this situation are entirely beneficial. The presence of a cause of action against the broker would tend to lessen the likelihood of transactions tainted by misinformation and confusion. Additionally, recognizing a cause of action against the broker would provide another source of recovery to the purchaser of defective property. Frequently, the owners may move away, leaving the broker as the only reachable defendant. As between the broker who communicated the misrepresentation, and the purchaser whose only fault was to rely on the broker, we think it preferable that the broker bear any loss caused by misrepresentation. Brokers, in turn, can protect themselves from liability by investigating the owner's statements, or by disclaiming knowledge, by requiring the seller to sign at the time of listing a statement setting forth representations which will be made, certifying that they are true and providing for indemnification if they are not.[7] *See Goldman v. Hart*, 134 Ga. App. 422, 214 S.E.2d 670 (1975).

[8] Having determined that a cause of action in innocent misrepresentation exists, it is apparent that the judgment below must be affirmed. Bevins does not contest that the listing he prepared mentioned a 100 foot well, that this listing would reasonably lead buyers to assume the well was good, that the Ballards so relied, and that the well was, in actuality, inadequate. These facts establish liability under an innocent misrepresentation theory. *See* Restatement (Second) of Torts § 552C(1) (1977). The decision below is therefore AFFIRMED.[8]

COMPTON, J., not participating.

7. Some listing agreements contain indemnification provisions, entitling the broker to indemnity from the owner should the broker's communication of the owner's representations engender liability. *See, e.g., Barnes v. Lopez*, 25 Ariz.App. 477, 544 P.2d 694, 698–99 (1976).

8. This case is distinguishable from *Stepanov v. Gavrilovich*, 594 P.2d 30 (Alaska 1979), where-

CONNOR, Justice, with whom RABINOWITZ, Justice, joins, dissenting in part.

I dissent from the holding that an action for innocent misrepresentation should be permitted against the real estate broker.

When a realtor acts as a mere conduit for passing on information supplied by the seller, he should be under no duty independently to verify that information unless he has reason to believe the information to be false. See *Lyons v. Christ Episcopal Church*, 71 Ill.App.3d 257, 27 Ill.Dec. 559, 389 N.E.2d 623, 625 (1979). Allowing an innocent misrepresentation action against the broker in such circumstances is quite close to imposing strict liability. There is no reason to make the broker the "insurer" of the seller's representation.

Although we recognized a claim based on innocent misrepresentation in *Cousineau v. Walker*, 613 P.2d 608 (Alaska 1980), that case is distinguishable from a case between a buyer and a broker. Sellers who make representations about their property should be held to the accuracy of the representations, as they are normally in the best position to know the facts. But a broker often has little personal knowledge of the property which he offers for sale. I see no reason to make the broker the guarantor of representations emanating from the seller. I would hold that innocent misrepresentation is not available as a cause of action by the buyer against the broker. Thus, I would reverse the judgment of the superior court. I agree with the balance of the majority opinion.

in we affirmed a judgment in favor of a small "subdivider," in a damage action founded upon the subdivider's innocent failure to disclose undetected permafrost conditions in lots sold to the plaintiffs.

Subdividers are subject to, and protected by, the Alaska Land Sales Practices Act, AS 34.55. Under the act, a subdivider is liable for material misrepresentations or omissions affecting the land, "unless in the case of an untruth or omission it is proved that ... the person offering or disposing of subdivided land did not know and in the exercise of reasonable care could not have known of the untruth or omission." AS 34.55.030(a). Thus, a "subdivider" is not liable for innocent misrepresentations. Such liability is barred by the statute. This protection, however, is not available to the defendants in the case at bar, since they are not "subdividers."

Laureen BAILEY, Appellant and Cross-Appellee,

v.

Dennis J. HAAS, Appellee and Cross-Appellant.

Nos. 6177, 6688.

Supreme Court of Alaska.

Dec. 3, 1982.

Cross appeals were taken from a decision of the Superior Court, Third Judicial District, Kenai, James A. Hanson, J., which was entered in an action brought pursuant to the Uniform Reciprocal Enforcement of Support Act. The Supreme Court, Connor, J., held that: (1) failure of petition to include a prayer for arrearages did not justify dismissal of the claim where respondent had notice of the claim for arrearages at the very latest by time motion for an order of support was filed, and (2) request for arrearages in child support need not be reduced to judgment by petitioning state prior to recovering such arrearages in an Uniform Reciprocal Enforcement of Support Act action.

Reversed and remanded.

1. Parent and Child ⇐3.4(2)

Failure of petition to initiate support proceedings under Uniform Reciprocal Enforcement of Support Act to include a prayer for arrearages did not justify dismissal of the claim where respondent had notice of the claim for arrearages at the very latest by time motion for an order of support was filed. AS 25.25.010–25.25.270.

Loren R. COUSINEAU and Marilyn J. Cousineau, Wayne F. Cousineau and Diane B. Cousineau, Curtis E. Dahl and Bonnie L. Dahl, Appellants,

v.

Devon A. WALKER and Joan Walker, Appellees.

No. 4551.

Supreme Court of Alaska.

June 27, 1980.

Action was brought by purchasers seeking recission of land sale contract because of alleged false statements by vendors. The Superior Court, Third Judicial District, J. Justin Ripley, J., denied restitution, and purchasers appealed. The Supreme Court, Boochever, J., held that: (1) purchaser of land may rely on material representations made by seller and is not obligated to ascertain whether such representations are truthful; and (2) although purchasers' actions may have exhibited poor judgment for an experienced businessman, they were not so unreasonable or preposterous in view of vendors' description of property that recovery should be denied.

Reversed and remanded.

1. Vendor and Purchaser ⇐33

False statements, which concerned highway frontage and gravel content and which were made by vendors and real estate agent in listing agreements, could not be characterized as "puffing" since they were positive statements susceptible of exact knowledge at time they were made.

2. Vendor and Purchaser ⇐33

To determine whether purchasers were entitled to rescission of land sale contract and restitution of amount paid for property on basis of misrepresentations, it had to be determined whether purchasers in fact relied on vendors' statements, whether statements were material to transaction, that is, whether reasonable person would have considered statements important in deciding whether to purchase property, and whether reliance of purchasers was justified.

3. Appeal and Error ⇐1008.1(5)

When finding leaves court with definite and firm conviction on the entire record that mistake has been made, such a finding is clearly erroneous. Rules of Civil Procedure, Rule 52(a).

4. Vendor and Purchaser ⇐33

In action by purchasers seeking rescission of land sale contract because of false statements by vendors, trial court erred in finding that purchasers, who were in gravel extraction business, who first became aware of property through multiple listing that said "1 MILLION IN GRAVEL" and whose first act upon acquiring property was to contract for gravel removal and to purchase gravel scales, did not rely on vendors' statement that there was gravel on property.

5. Vendor and Purchaser ⇐44

In action by purchasers seeking rescission of land sale contract because of false statements by vendors, trial court's finding that purchasers, who were experienced and knowledgeable in real estate matters and who in determining whether to purchase property would certainly have considered amount of highway frontage to be of importance, did not rely on vendors' statements regarding highway frontage was clearly erroneous.

6. Contracts ⇐94(2)

A "material fact" is a fact which could reasonably be expected to influence someone's judgment or conduct concerning a transaction.

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

7. Contracts ⇐94(2)

Reasons behind rule requiring proof of materiality in an action seeking rescission and restitution is to encourage stability in contractual relations; rule prevents parties who later become disappointed at outcome of their bargain from capitalizing on any insignificant discrepancy to avoid contract.

8. Vendor and Purchaser ⇐33

Since a reasonable person would be likely to consider existence of gravel deposits and important consideration in developing a piece of property, and since purchasers received less than three-fourths of highway frontage described in listings, vendors' statements regarding highway frontage and gravel content were material for purposes of determining whether purchasers were entitled to rescission and restitution of amount paid for property under land sale contract.

9. Vendor and Purchaser ⇐33

A purchaser of land may rely on material representations made by seller and is not obligated to ascertain whether such representations are truthful; a buyer, relying on an innocent misrepresentation, is barred from recovery only if buyer's acts in failing to discover defects were wholly irrational, preposterous, or in bad faith.

10. Vendor and Purchaser ⇐33

Although purchasers' actions in failing to obtain and review engineer's report on property, in failing to obtain survey or examine available plat, and in failing to make calculations that would have revealed true highway frontage of lot may well have exhibited poor judgment for experienced businessman, they were not so unreasonable or preposterous in view of vendors' descriptions of property that recovery had to be denied in purchasers' action seeking rescission of land sale contract because of false statements by vendors.

11. Vendor and Purchaser ⇐196, 203

Where purchasers apparently caused extensive damage to one building on property and removed 6,000 cubic yards of gravel, vendors were entitled to some recoupment for these items plus amount for fair rental value of property and reasonable costs of rental before amount that purchasers were entitled to recover was determined in their suit seeking rescission of land sale contract because of false statements by vendors.

Dennis M. Mestas, Mestas & Schneider, Anchorage, for appellants.

John W. Sivertsen, Jr., and Terry C. Aglietti, Aglietti, Offret & Pennington, Anchorage, for appellees.

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

OPINION

BOOCHEVER, Justice.

The question in this case is whether the appellants are entitled to rescission of a land sale contract because of false statements made by the sellers. The superior court concluded that the buyers did not rely on any misrepresentations made by the sellers, that the misrepresentations were not material to the transaction, and that reliance by the buyers was not justified. Restitution of money paid under the contract was denied. We reverse and remand the case to the superior court to determine the amount of damages owed the appellants.

In 1975, Devon Walker and his wife purchased 9.1 acres of land in Eagle River, Alaska, known as Lot 1, Cross Estates. They paid $140,000.00 for it. A little over a year later, in October, 1976, they signed a multiple listing agreement with Pat Davis, an Anchorage realtor. The listing stated that the property had 580 feet of highway frontage on the Old Glenn Highway and that "ENGINEER REPORT SAYS OVER 1 MILLION IN GRAVEL ON PROP." The asking price was $245,000.00.

When the multiple listing expired, Walker signed a new agreement to retain Davis as an exclusive agent. In the broker's contract, the property was again described as having 580 feet of highway frontage, but the gravel content was listed as "minimum 80,000 cubic yds of gravel." The agreement also stated that 2.6 acres on the front of the parcel had been proposed for B–3 zoning (a commercial use), and the asking price was raised to $470,000.00.

An appraisal was prepared to determine the property's value as of December 31,

1976. Walker specifically instructed the appraiser not to include the value of gravel in the appraisal. A rough draft of the appraisal and the appraiser's notes were introduced at trial. Under the heading, "Assumptions and Limiting Conditions," the report stated the appraisal "does not take into account any gravel . . . ." But later in the report the ground was described as "all good gravel base . . . covered with birch and spruce trees." The report did not mention the highway footage of the lot.

Wayne Cousineau, a contractor who was also in the gravel extraction business, became aware of the property when he saw the multiple listing. He consulted Camille Davis, another Anchorage realtor, to see if the property was available. In January, Cousineau and Camille Davis visited the property and discussed gravel extraction with Walker, although according to Walker's testimony commercial extraction was not considered. About this time Cousineau offered Walker $360,000.00 for the property. Cousineau tendered a proposed sales agreement which stated that all gravel rights would be granted to the purchaser at closing.

Sometime after his first offer, Cousineau attempted to determine the lot's road frontage. The property was covered with snow, and he found only one boundary marker. At trial the appraiser testified he could not find any markers. Cousineau testified that he went to the borough office to determine if any regulations prevented gravel extraction.

Despite Walker's reference to an "Engineer Report" allegedly showing "over 1 million in gravel," Walker admitted at trial that he had never seen a copy of the report. According to Walker's agent, Pat Davis, Camille Davis was told that if either she or Cousineau wanted the report they would have to pay for it themselves. It was undisputed that Cousineau never obtained the report.

In February, 1977, the parties agreed on a purchase price of $385,000.00 and signed an earnest money agreement. The sale was contingent upon approval of the zoning change of the front portion of the lot to commercial use. The amount of highway frontage was not included in the agreement. Paragraph 4(e) of the agreement conditionally granted gravel rights to Cousineau.[1] According to the agreement, Cousineau would be entitled to remove only so much gravel as was necessary to establish a construction grade on the commercial portion of the property. To remove additional gravel, Cousineau would be required to pay releases on those portions of ground where gravel was removed. This language was used to prevent Walker's security interest in the property from being impaired before he was fully paid.

Soon after the earnest money agreement was signed, the front portion of the property was rezoned and a month later the parties closed the sale.

There is no reference to the amount of highway frontage in the final purchase agreement. An addendum to a third deed of trust incorporates essentially the same language as the earnest money agreement with regard to the release of gravel rights.

After closing, Cousineau and his partners began developing the commercial portion of the property. They bought a gravel scale for $12,000.00 and used two of Cousineau's trucks and a loader. The partners contracted with South Construction to remove the gravel. According to Cousineau's testimony, he first learned of discrepancies in the real estate listing which described the lot when a neighbor threatened to sue Cousineau because he was removing gravel from the neighbor's adjacent lot. A recent survey shows that there is 415 feet of highway frontage on the property—not 580 feet, as advertised.

1. Paragraph IX of the judge's factual findings states that there was no mention of the amount of gravel or road frontage in the purchase agreement. This statement is correct insofar as the agreement did not mention specific amounts of gravel or frontage, but the agreement plainly does provide for the transfer of gravel rights.

At the same time Cousineau discovered the shortage in highway frontage, South Construction ran out of gravel. They had removed 6,000 cubic yards. To determine if there was any more gravel on the property, a South Construction employee bulldozed a trench about fifty feet long and twenty feet deep. There was no gravel. A soils report prepared in 1978 confirmed that there were no gravel deposits on the property.

After December, 1977, Cousineau and his partners stopped making monthly payments. At that time they had paid a total of $99,000.00 for the property, including a down payment and monthly installments. In March, 1978, they informed Walker of their intention to rescind the contract. A deed of trust foreclosure sale was held in the fall of 1978, and Walker reacquired the property. At a bench trial in December, Cousineau and his partners were denied rescission and restitution.

Among his written findings of fact, the trial judge found:

> At some point in time, between October 24, 1976, and January 11, 1977, there existed a multiple listing advertisement which included information relating to gravel as well as road frontage, said information subsequently determined to be incorrect.

He further found:

> The plaintiffs did not rely on any misinformation or misrepresentations of defendants. The claimed misinformation about gravel on the property and the road frontage was not a material element of the parties' negotiations, and these pieces of information did not appear in the February 16, 1977 purchase agreement document prepared by attorney Harland Davis, attorney for the plaintiffs and signed by the parties.

In part, based on these findings, the court adopted the following conclusions of law:

> The plaintiffs are not entitled to rescission of the contract of sale or restitution as they were not entitled to rely on the alleged misrepresentation.
>
> . . . . .
>
> The information which allegedly formed the basis of the misrepresentation was not material in the instant transaction, the agreement reached by the parties was valid and does not suffer any taint or defect of misrepresentation.

I. RESCISSION OF THE CONTRACT

[1, 2] Numerous cases hold and the Restatement provides that an innocent misrepresentation [2] may be the basis for rescinding a contract.[3] There is no question, as the trial judge's findings of fact state, that the statements made by Walker and his real estate agent in the multiple listing were false.[4] Three questions must be resolved,

2. In the context of land sale contracts, see *Osborne v. Cal-Am Financial Corp.*, 80 Cal. App.3d 259, 145 Cal.Rptr. 584, 588 (1978), and *Halpert v. Rosenthal*, 267 A.2d 730, 733 (R.I. 1970). *See* Restatement of Contracts § 476, Comment b (1932); Restatement of Restitution § 9(2) (1937); Restatement (Second) of Torts § 552C (1977).

3. We decline to consider whether Walker's statements amounted to fraudulent or negligent misrepresentations. The trial judge made no findings on the question and our resolution makes it unnecessary to consider it. It is apparent, however, that Walker had little basis for making statements regarding gravel content. For example, the basis for the statement in the first listing, "over 1 million in gravel," was Walker's neighbor, Riley Curtis, not the "Engineer Report." Walker claimed that Curtis told him an engineering firm had dug core samples on the property and had prepared a report which estimated the amount of gravel. At trial, Curtis denied telling Walker that there was gravel on the property. He testified that he told Walker there was over one million in *material*, not gravel. As discussed in the text, Walker never actually saw the report. Moreover, Pat Davis, Walker's real estate agent, was aware of these facts, but included the statement on the listing anyway.

4. The statements made regarding highway frontage and gravel content in the two listing agreements cannot be characterized as "puffing." They were positive statements "susceptible of exact knowledge" at the time they were made. *Young & Cooper, Inc. v. Vestring*, 214 Kan. 311, 521 P.2d 281, 290 (1974). Although not applicable to real property sales, it is revealing that under the Uniform Commercial Code, where it is frequently necessary to distin-

however, to determine whether Cousineau is entitled to rescission and restitution of the amount paid for the property on the basis of the misrepresentations. First, it must be determined whether Cousineau in fact relied on the statements. Second, it must be determined whether the statements were material to the transaction—that is, objectively, whether a reasonable person would have considered the statements important in deciding whether to purchase the property. Finally, assuming that Cousineau relied on the statements and that they were material, it must be determined whether his reliance was justified.[5]

A. Reliance on the False Statements

[3] As quoted above, in his findings of fact, the trial judge stated, "The plaintiffs did not rely on any misinformation or misrepresentations of defendants." Because this case was decided by a judge without a jury, our standard of review of factual findings is the "clearly erroneous" standard. Alaska R.Civ.P. 52(a). When a finding leaves the court with the definite and firm conviction on the entire record that a mistake has been made, it is clearly erroneous. *Lewis v. Anchorage Asphalt Paving Co.*, 579 P.2d 532, 534 (Alaska 1978). In our opinion, the trial judge's finding that Cousineau and his partners did not rely on the statements made by Walker is clearly erroneous.

[4] Regardless of the credibility of some witnesses,[6] the uncontroverted facts are that Wayne Cousineau was in the gravel extraction business. He first became aware of the property through a multiple listing that said "1 MILLION IN GRAVEL." The subsequent listing stated that there were 80,000 cubic yards of gravel. Even if Walker might have taken the position that the sale was based on the appraisal, rather than the listings, the appraisal does not disclaim the earlier statements regarding the amount of highway frontage and the existence of gravel. In fact, the appraisal might well reaffirm a buyer's belief that gravel existed, since it stated there was a good gravel base. All the documents prepared regarding the sale from the first offer through the final deed of trust make provisions for the transfer of gravel rights. Cousineau's first act upon acquiring the property was to contract with South Construction for gravel removal, and to purchase gravel scales for $12,000.00. We conclude that the court erred in finding that Cousineau did not rely on Walker's statement that there was gravel on the property.

[5] We are also convinced that the trial court's finding that Cousineau did not rely on Walker's statement regarding the amount of highway frontage was clearly erroneous. The Cousineaus were experienced and knowledgeable in real estate matters. In determining whether to purchase the property, they would certainly

guish "sales talk" from those statements which create express warranties, such definite statements as those made in the listing agreements would most probably be construed as creating an express warranty. *See* Annot., 94 A.L.R.3d 729 (1979).

5. Restatement (Second) of Contracts § 306, comment (a), (Tent. Draft no. 11, 1976) states:

> A misrepresentation may make a contract voidable under the rule stated in this Section, even though it does not prevent the formation of a contract under the rule stated in the previous section. Three requirements must be met in addition to the requirement that there must have been a misrepresentation. First, the misrepresentation must have been either fraudulent or material. . . . Second, the misrepresentation must have induced the recipient to make the contract. . . . Third, the recipient must have been justified in relying on the misrepresentation.

6. The judge's findings state that the testimony of Camille Davis was "not credible on those key issues wherein it conflicted with evidence produced by the defendants." There are discrepancies in the record as to whether Camille received a copy of the appraisal, whether she or Pat Davis was to obtain a copy of the "Engineer Report," or whether she saw the discrepancies between the first and second listing regarding the amount of gravel. Camille stated at numerous points in her testimony that Cousineau was primarily interested in the property because of its gravel content, while the defendants, as might be expected, took the position that gravel was an insignificant part of the transaction. In view of the trial court's findings, we have resolved any conflicts in Camille's testimony in favor of Walker.

have considered the amount of highway frontage to be of importance. Despite Walker's insistence that Cousineau knew the location of the boundary markers, neither Cousineau nor the appraiser ever found them. It is improbable that Cousineau would have started removing gravel from a neighbor's property had he known the correct location of his boundary line.

B. Materiality of the Statements

[6, 7] Materiality is a mixed question of law and fact. A material fact is one "to which a reasonable man might be expected to attach importance in making his choice of action." W. Prosser, Law of Torts § 108, at 719 (4th ed. 1971). It is a fact which could reasonably be expected to influence someone's judgment or conduct concerning a transaction. *HomeLite v. Trywilk Realty Co.*, 272 F.2d 688, 691 (4th Cir. 1959); *Nader v. Allegheny Airlines, Inc.*, 445 F.Supp. 168, 174 (D.D.C.1978); Restatement of Restitution § 8(2) (1937). Under § 306 of the tentative draft of the Restatement (Second) of Contracts, a misrepresentation may be grounds for voiding a contract if it is either fraudulent or material. Restatement (Second) of Contracts § 306 (Tent. Draft No. 11, 1976). The reason behind the rule requiring proof of materiality is to encourage stability in contractual relations. The rule prevents parties who later become disappointed at the outcome of their bargain from capitalizing on any insignificant discrepancy to void the contract.

[8] We conclude as a matter of law that the statements regarding highway frontage and gravel content were material. A reasonable person would be likely to consider the existence of gravel deposits an important consideration in developing a piece of property. Even if not valuable for commercial extraction, a gravel base would save the cost of obtaining suitable fill from other sources. Walker's real estate agent testified that the statements regarding gravel were placed in the listings because gravel would be among the property's "best points" and a "selling point."[7] It seems obvious that the sellers themselves thought a buyer would consider gravel content important.

The buyers received less than three-fourths of the highway frontage described in the listings. Certainly the amount of highway frontage on a commercial tract would be considered important. Numerous cases from other jurisdictions have held discrepancies to be material which were similar in magnitude to those here.[8]

C. Justifiable Reliance

The trial judge concluded as a matter of law that the plaintiffs "were not entitled to rely on the alleged misrepresentation."

The bulk of the appellee's brief is devoted to the argument that Cousineau's unquestioning reliance on Walker and his real estate agent was imprudent and unreasonable. Cousineau failed to obtain and review the engineer's report. He failed to obtain a survey or examine the plat available at the recorder's office. He failed to make calculations that would have revealed the true frontage of the lot. Although the property was covered with snow, the plaintiffs, according to Walker, had ample time to inspect it. The plaintiffs were experienced businessmen who frequently bought and sold real estate. Discrepancies existed in

7. Walker testified that gravel was not a "selling point." This testimony obviously conflicts with the testimony of his real estate agent, who thought the information was of some importance. A person experienced in real estate sales would seem to be in a better position to evaluate what a buyer would be likely to consider important.

8. *Piazzini v. Jessup*, 152 Cal.App. 58, 314 P.2d 196 (1957) (misrepresentation as to boundary line and existence of termites); *Richard v. Baker*, 141 Cal.App.2d 857, 297 P.2d 674 (1956) (misrepresentation as to boundary location); *Sorenson v. Adams*, 98 Idaho 708, 571 P.2d 769 (1977) (discrepancy as to amount of tillable acreage); *Bennett v. Finley*, 54 N.M. 139, 215 P.2d 1013 (1950) (misrepresentation as to amount of farmland); *Heverly v. Kirkendall*, 257 Or. 232, 478 P.2d 381 (1970) (existence of encroachment); *Dreifus Lumber Co. v. Werner*, 221 Or. 467, 351 P.2d 684 (1960) (misrepresentation as to boundary line and amount of timber); Annot., 33 A.L.R. 853 § 48–51 (1924).

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the various property descriptions which should have alerted Cousineau and his partners to potential problems. In short, the appellees urge that the doctrine of caveat emptor precludes recovery.

In fashioning an appropriate rule for land sale contracts, we note initially that, in the area of commercial and consumer goods, the doctrine of caveat emptor has been nearly abolished by the Uniform Commercial Code and imposition of strict products liability. In real property transactions, the doctrine is also rapidly receding. Alaska has passed the Uniform Land Sales Practices Act, AS 34.55.004–.046, which imposes numerous restrictions on vendors of subdivided property. Criminal penalties may be imposed for violations. The Uniform Residential Landlord and Tenant Act, AS 34.03.010–.380, has greatly altered the common law of landlord and tenant in favor of tenants. Many states now imply warranties of merchantability in new home sales.[9] Wyoming has recently extended this warranty beyond the initial purchaser to subsequent buyers. *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733, 735–36 (Wyo.1979).[10]

There is a split of authority regarding a buyer's duty to investigate a vendor's fraudulent statements, but the prevailing trend is toward placing a minimal duty on a buyer. Recently, a Florida appellate court reversed long-standing precedent which held that a buyer must use due diligence to protect his interest, regardless of fraud, if the means for acquiring knowledge concerning the transaction were open and available. In the context of a building sale the court concluded:

> A person guilty of fraudulent misrepresentation should not be permitted to hide behind the doctrine of *caveat emptor.*

Upledger v. Vilanor, Inc., 369 So.2d 427, 430 (Fla.App.), *cert. denied*, 378 So.2d 350 (Fla. 1979).

The Supreme Court of Maine has also recently reversed a line of its prior cases, concluding that a defense based upon lack of due care should not be allowed in land sales contracts where a reckless or knowing misrepresentation has been made. *Letellier v. Small*, 400 A.2d 371, 375 (Me.1979). This is also the prevailing view in California, Idaho, Kansas, Massachusetts, and Oregon.[11] On the other hand, some jurisdictions have reaffirmed the doctrine of caveat emptor,[12] but as noted in Williston on Contracts,

> [t]he growing trend and tendency of the courts will continue to move toward the [illegible] negligence in trusting in a [illegible]ation will not excuse positive [illegible] or deprive the defrauded person of his remedy.

W. Jaeger, Williston on Contracts § 1515B at 487 (3d ed. 1970).

There is also authority for not applying the doctrine of caveat emptor even though the misrepresentation is innocent. The Restatements, case law, and a ready analogy to express warranties in the sale of goods support this view.

The recent draft of the Restatement of Contracts allows rescission for an innocent material misrepresentation unless a buyer's fault was so negligent as to amount to "a failure to act in good faith and in accord-

9. *See, e. g., Carpenter v. Donohoe*, 154 Colo. 78, 388 P.2d 399, 402 (1964); *Theis v. Heuer*, 280 N.E.2d 300, 303–06 (Ind.1972); *Humber v. Morton*, 426 S.W.2d 554, 557–62 (Tex.1968).

10. *Accord, Barnes v. MacBrown & Co., Inc.*, 342 N.E.2d 611 (Ind.1976). *See* Note, *Builders Liability for Latent Defects in Used Homes*, 32 Stan.L.Rev. 607 (1980).

11. *Piazzini v. Jessup*, 152 Cal.App.58, 314 P.2d 196, 198 (1957); *Sorenson v. Adams*, 98 Idaho 708, 571 P.2d 769, 776 (1977); *Fox v. Wilson*, 211 Kan. 563, 507 P.2d 252, 266 (1973); *Kannavos v. Annino*, 356 Mass. 42, 247 N.E.2d 708, 712 (1969); *Heverly v. Kirkendall*, 257 Or. 232, 478 P.2d 381, 383 (1970).

12. Recent decisions in Georgia, Illinois and North Carolina are illustrative. *P.B.R. Enterprises, Inc. v. Perren*, 243 Ga. 280, 253 S.E.2d 765, 767 (1979); *Bezin v. Ginsberg*, 59 Ill. App.3d 429, 16 Ill.Dec. 595, 603, 375 N.E.2d 468, 476 (1978) ("Nowhere in the law is the rule of *caveat emptor* more strictly followed than in the arms length transaction involving an interest in real property"); *Odom v. Little Rock & I–85 Corp.*, 40 N.C.App. 242, 252 S.E.2d 217, 219 (1979).

ance with reasonable standards of fair dealing." [13] Restatement (Second) of Contracts § 314, Comment b (Tent. Draft. no. 11, 1976).

In *Van Meter v. Bent Construction Co.*, 46 Cal.2d 588, 297 P.2d 644 (1956), the city of San Diego failed to properly mark the area of a reservoir that needed to be cleared of brush. A lower court concluded that the city's failure to mark the area properly was an innocent mistake, and that a bidder's actions in failing to discover the true area to be cleared was negligent. Recovery was denied because the city's misrepresentation was not willful. The California Supreme Court reversed, first noting that a party's negligence does not bar rescission for mutual mistake, and then concluding:

> There is even more reason for not barring a plaintiff from equitable relief where his negligence is due in part to his reliance in good faith upon the false representations of a defendant, although the statements were not made with intent to deceive. A defendant who misrepresents the facts and induces the plaintiff to rely on his statements should not be heard in an equitable action to assert that the reliance was negligent unless plaintiff's conduct, in the light of his intelligence and information, is preposterous or irrational.

Id. 297 P.2d at 648 (citations omitted). The Massachusetts Supreme Judicial Court has expressed a similar view in *Yorke v. Taylor*, 332 Mass. 368, 124 N.E.2d 912, 916 (1955).[14]

We do not contend that real property transactions are the same as those involving sales of goods. Nevertheless, an analogy to the applicability of the doctrine of caveat emptor under the Uniform Commercial Code is helpful.[15] Under the Code, factual statements regarding the sale of goods constitute an express warranty. AS 45.05.094.

13. As an illustration of "fair dealing," the proposed Restatement suggests the following example:

> A, seeking to induce B to make a contract to buy land, tells B that the land is free from encumbrances. Unknown to either A or B, C holds a recorded and unsatisfied mortgage on the land. B could easily learn this by walking across the street to the register of deeds in the courthouse but does not do so. B is induced by A's statement to make the contract. B's reliance is justified since his fault does not amount to a failure to act in good faith and in accordance with reasonable standards of fair dealing, and the contract is voidable by B.

Restatement (Second) of Contracts § 314, Comment b, Illustration 2 (Tent. Draft no. 11, 1976).

14. *See also Sorenson v. Adams*, 98 Idaho 708, 571 P.2d 769, 776 (1977), in which the tillable acreage sold was misrepresented by reference to an erroneous form prepared by the Department of Agriculture. The buyers sought damages for the shortage, and the Supreme Court of Idaho reversed a judgment of nonsuit, stating:

> In short, the general rule is that "a vendor may be liable in tort for misrepresentations as to the area of land conveyed, notwithstanding such misrepresentations were made without actual knowledge of their falsity." The reason, of course, is that the parties to a real estate transaction do not deal on equal terms. An owner is presumed to know the boundaries of his own land, the quantity of his acreage, and the amount of water available. If he does not know the correct information, he must find out or refrain from making representations to unsuspecting strangers. "Even honesty in making a mistake is no defense as it is incumbent upon the vendor to know the facts."

Id. 571 P.2d at 776 (citations omitted). In addition, the sellers argued that the buyers had no right to rely on the A.S.C. figures, since they could have checked the figures themselves or conducted their own survey. In rejecting this argument, the court stated:

> "False statements found . . . to have been made and relied on cannot be avoided by the appellants by the contention that the respondents could have, by independent investigation, ascertained the truth
>
> "The appellants having stated what was untrue cannot now complain because respondents believed what they were told. Lack of caution on the part of respondents because they so believed, and the contention that respondents could have made an independent investigation and determined the true facts, is no defense to the action." *Weitzel v. Jukich*, 73 Idaho 301, 305, 251 P.2d 542, 544 (1953). *And see, Lanning v. Sprague*, [71 Idaho. 138, 227 P.2d 347] *supra*.

Id.

15. We also looked to the Uniform Commercial Code in *Rego v. Decker*, 482 P.2d 834, 838 (Alaska 1971), to decide analogous questions in the law of the land sale contracts.

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The official comment to section 2–316 of the Code (codified as AS 45.05.100), dealing with disclaimers of warranties, states:

> Application of the doctrine of "caveat emptor" in all cases where the buyer examines the goods regardless of statements made by the seller is, however, rejected by this Article. Thus, if the offer of examination is accompanied by words as to their merchantability or specific attributes and the buyer indicates clearly that he is relying on those words rather than on his examination, they give rise to an "express" warranty.

Numerous cases have concluded that a buyer is entitled to rely on an express warranty, regardless of an inadequate examination of the goods.[16]

[9] Furthermore, the protections of the Code extend to highly sophisticated buyers in arms length transactions as well as to household consumers. Other than tradition, no reason exists for treating land sales differently from the sale of commercial goods insofar as application of the doctrine of caveat emptor is involved. We conclude that a purchaser of land may rely on material representations made by the seller and is not obligated to ascertain whether such representations are truthful.

A buyer of land, relying on an innocent misrepresentation, is barred from recovery only if the buyer's acts in failing to discover defects were wholly irrational, preposterous, or in bad faith.

[10] Although Cousineau's actions may well have exhibited poor judgment for an experienced businessman, they were not so unreasonable or preposterous in view of Walker's description of the property that recovery should be denied. Consequently, we reverse the judgment of the superior court.

II. RESTITUTION

[11] Walker received a total of $99,000.00 from Cousineau and his partners, but the appellants are not entitled to restitution of this amount. Cousineau apparently caused extensive damage to one building on the property, and he removed 6,000 cubic yards of gravel. Walker should be allowed some recoupment for these items, plus an amount for the fair rental value of the property less reasonable costs of rental.

It is necessary to remand this case to the trial court to determine the correct amount of damages.

REVERSED and REMANDED.

16. *See, e. g., United States v. Aerodex, Inc.*, 469 F.2d 1003 (5th Cir. 1972); *General Electric Co. v. U. S. Dynamics, Inc.*, 403 F.2d 933 (1st Cir. 1968); *City of Paragould v. Int'l Power Machinery Co.*, 233 Ark. 872, 349 S.W.2d 332 (1961).

B–C CABLE COMPANY, INC., Appellant,

v.

CITY AND BOROUGH OF JUNEAU, Appellee.

No. 4587

Supreme Court of Alaska.

June 27, 1980.

Cable television company appealed from summary judgment granted by the Superior Court, First Judicial District, Allen T. Compton, J., in favor of municipality in its action to collect unpaid franchise fees allegedly owed by company. The Supreme Court, Connor, J., held that neither the municipal code, nor the Public Utilities Commission Act, either expressly or by implication nullified the rights and liabilities of company and municipality under the franchise agreement between them, and thus, the general savings statute precluded a finding that the municipal franchises were superseded, and operated to keep the agreements in force.

Affirmed.

10. Any zoning violations, nonconforming uses, violations of "setback" requirements ..... __ Yes __ No
11. Neighborhood noise problems or other nuisances .... __ Yes __ No
12. CC&R's or other deed restrictions or obligations..... __ Yes __ No
13. Homeowners' Association which has any authority over the subject property ..... __ Yes __ No
14. Any "common area" (facilities such as pools, tennis courts, walkways, or other areas co-owned in undivided interest with others) ..... __ Yes __ No
15. Any notices of abatement or citations against the property ..... __ Yes __ No
16. Any lawsuits against the seller threatening to or affecting this real property ..... __ Yes __ No

If the answer to any of these is yes, explain. (Attach additional sheets if necessary.): _____

Seller certifies that the information herein is true and correct to the best of the Seller's knowledge as of the date signed by the Seller.

Seller_____ Date_____

Seller_____ Date_____

III

AGENTS INSPECTION DISCLOSURE

(To be completed only if the Seller is represented by an agent in this transaction.)

THE UNDERSIGNED, BASED ON THE ABOVE INQUIRY OF THE SELLER(S) AS TO THE CONDITION OF THE PROPERTY AND BASED ON A REASONABLY COMPETENT AND DILIGENT VISUAL INSPECTION OF THE ACCESSIBLE AREAS OF THE PROPERTY IN CONJUNCTION WITH THAT INQUIRY, STATES THE FOLLOWING: _____

Agent (Broker Representing Seller) _____ By _____ Date _____
(Please Print) (Associate Licensee or Broker-Signature)

IV

AGENTS INSPECTION DISCLOSURE

(To be completed only if the agent who has obtained the offer is other than the agent above.)

THE UNDERSIGNED, BASED ON A REASONABLY COMPETENT AND DILIGENT VISUAL INSPECTION OF THE ACCESSIBLE AREAS OF THE PROPERTY, STATES THE FOLLOWING: _____

Agent (Broker obtaining the Offer) _____ By _____ Date _____
(Please Print) (Associate Licensee or Broker-Signature)

V

BUYER(S) AND SELLER(S) MAY WISH TO OBTAIN PROFESSIONAL ADVICE AND/OR INSPECTIONS OF THE PROPERTY AND TO PROVIDE FOR APPROPRIATE PROVISIONS IN A CONTRACT BETWEEN BUYER AND SELLER(S) WITH RESPECT TO ANY ADVICE/INSPECTIONS/DEFECTS.

I/WE ACKNOWLEDGE RECEIPT OF A COPY OF THIS STATEMENT.

Seller _____ Date _____ Buyer _____ Date _____

Seller _____ Date _____ Buyer _____ Date _____

Agent (Broker Representing Seller) _____ By _____ Date _____
(Associate Licensee or Broker-Signature)

Agent (Broker obtaining the Offer) _____ By _____ Date _____
Associate Licensee or Broker-Signature)

A REAL ESTATE BROKER IS QUALIFIED TO ADVISE ON REAL ESTATE. IF YOU DESIRE LEGAL ADVICE, CONSULT YOUR ATTORNEY.

Amended Stats 1989 ch 171 § 1.

§ 1102.6. (Second of two; Operative July 1, 1991) Form of disclosure statement

The disclosures required by this article pertaining to the property proposed to be transferred are set forth in, and shall be made on a copy of, the following disclosure form:

REAL ESTATE TRANSFER DISCLOSURE STATEMENT

THIS DISCLOSURE STATEMENT CONCERNS THE REAL PROPERTY SITUATED IN THE CITY OF _____, COUNTY OF _____, STATE OF CALIFORNIA, DESCRIBED AS _____. THIS STATEMENT IS A DISCLOSURE OF THE CONDITION OF THE ABOVE DESCRIBED PROPERTY IN COMPLIANCE WITH SECTION 1102 OF THE CIVIL CODE AS OF _____, 19____. IT IS NOT A WARRANTY OF ANY KIND BY THE SELLER(S) OR ANY AGENT(S) REPRESENTING ANY PRINCIPAL(S) IN THIS TRANSACTION, AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THE PRINCIPAL(S) MAY WISH TO OBTAIN.

I

COORDINATION WITH OTHER DISCLOSURE FORMS

This Real Estate Transfer Disclosure Statement is made pursuant to Section 1102 of the Civil Code. Other statutes require disclosures, depending upon the details of the particular real estate transaction (for example: special study zone and purchase-money liens on residential property).

Substituted Disclosures: The following disclosures have or will be made in connection with this real estate transfer, and are intended to satisfy the disclosure obligations on this form, where the subject matter is the same:

(list all substituted disclosure forms to be used in connection with this transaction)

II

SELLERS INFORMATION

The Seller discloses the following information with the knowledge that even though this is not a warranty, prospective Buyers may rely on this information in deciding whether and on what terms to purchase the subject property. Seller hereby authorizes any agent(s) representing any principal(s) in this transaction to provide a copy of this statement to any person or entity in connection with any actual or anticipated sale of the property.

THE FOLLOWING ARE REPRESENTATIONS MADE BY THE SELLER(S) AND ARE NOT THE REPRESENTATIONS OF THE AGENT(S), IF ANY. THIS INFORMATION IS A DISCLOSURE AND IS NOT INTENDED TO BE PART OF ANY CONTRACT BETWEEN THE BUYER AND SELLER.

Seller __ is __ is not occupying the property.

A. The subject property has the items checked below (read across):

__ Range	__ Oven	__ Microwave
__ Dishwasher	__ Trash Compactor	__ Garbage Disposal
__ Washer/Dryer Hookups	__ Window Screens	__ Rain Gutters
__ Burglar Alarms	__ Smoke Detector(s)	__ Fire Alarm
__ T.V. Antenna	__ Satellite Dish	__ Intercom
__ Central Heating	__ Central Air Cndtng.	__ Evaporator Cooler(s)
__ Wall/Window Air Cndtng.	__ Sprinklers	__ Public Sewer System
__ Septic Tank	__ Sump Pump	__ Water Softener
__ Patio/Decking	__ Built-in Barbeque	__ Gazebo
__ Sauna	__ Pool	__ Spa __ Hot Tub
__ Security Gate(s)	__ Automatic Garage Door Opener(s)*	__ Number Remote Controls
Garage: __ Attached	__ Not Attached	__ Carport
Pool/Spa Heater: __ Gas	__ Solar	__ Electric
Water Heater: __ Gas		__ Private Utility or Other _____
Water Supply: __ City	__ Well	
Gas Supply: __ Utility	__ Bottled	
Exhaust Fan(s) in _____	220 Volt Wiring in _____	Fireplace(s) in _____
Gas Starter _____	Roof(s): Type: _____	Age: _____ (approx.)

Other: _____

Are there, to the best of your (Seller's) knowledge, any of the above that are not in operating condition? __ Yes __ No. If yes, then describe.

(Attach additional sheets if necessary): _____

B. Are you (Seller) aware of any significant defects/malfunctions in any of the following? __ Yes __ No. If yes, check appropriate space(s) below.

__ Interior Walls __ Ceilings __ Floors __ Exterior Walls __ Insulation
__ Roof(s) __ Windows __ Doors __ Foundation __ Slab(s)
__ Driveways __ Sidewalks __ Walls/Fences __ Electrical Systems
__ Plumbing/Sewers/Septics __ Other

Structural Components (Describe: _____)

If any of the above is checked, explain. (Attach additional sheets if necessary): _____

*This garage door opener may not be in compliance with the safety standards relating to automatic reversing devices as set forth in Chapter 12.5 (commencing with Section 19890) of Part 3 of Division 13 of the Health and Safety Code.

C. Are you (Seller) aware of any of the following:

1. Substances, materials, or products which may be an environmental hazard such as, but not limited to, asbestos, formaldehyde, radon gas, lead-based paint, fuel or chemical storage tanks, and contaminated soil or water on the subject property ..... __ Yes __ No
2. Features of the property shared in common with adjoining landowners, such as walls, fences, and driveways, whose use or responsibility for maintenance may have an effect on the subject property ..... __ Yes __ No
3. Any encroachments, easements or similar matters that may affect your interest in the subject property ..... __ Yes __ No
4. Room additions, structural modifications, or other alterations or repairs made without necessary permits ... __ Yes __ No
5. Room additions, structural modifications, or other alterations or repairs not in compliance with building codes ..... __ Yes __ No
6. Landfill (compacted or otherwise) on the property or any portion thereof ..... __ Yes __ No
7. Any settling from any cause, or slippage, sliding, or other soil problems ..... __ Yes __ No
8. Flooding, drainage or grading problems ..... __ Yes __ No
9. Major damage to the property or any of the structures from fire, earthquake, floods, or landslides ..... __ Yes __ No
10. Any zoning violations, nonconforming uses, violations of "setback" requirements ..... __ Yes __ No
11. Neighborhood noise problems or other nuisances .... __ Yes __ No
12. CC&R's or other deed restrictions or obligations .... __ Yes __ No
13. Homeowners' Association which has any authority over the subject property ..... __ Yes __ No
14. Any "common area" (facilities such as pools, tennis courts, walkways, or other areas co-owned in undivided interest with others) ..... __ Yes __ No
15. Any notices of abatement or citations against the property ..... __ Yes __ No
16. Any lawsuits against the seller threatening to or affecting this real property ..... __ Yes __ No

If the answer to any of these is yes, explain. (Attach additional sheets if necessary.): _____

_____

_____

Seller certifies that the information herein is true and correct to the best of the Seller's knowledge as of the date signed by the Seller.

Seller _____ Date _____

Seller _____ Date _____

III

AGENTS INSPECTION DISCLOSURE

(To be completed only if the Seller is represented by an agent in this transaction.)

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_____

_____

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(Please Print) (Associate Licensee or Broker-Signature)

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_____

_____

_____

Agent (Broker obtaining the Offer) _____ By _____ Date _____

(Please Print) (Associate Licensee or Broker-Signature)

V

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I/WE ACKNOWLEDGE RECEIPT OF A COPY OF THIS STATEMENT.

Seller _____ Date _____ Buyer _____ Date _____

Seller _____ Date _____ Buyer _____ Date _____

Agent (Broker Representing Seller) _____ By _____ Date _____

(Associate Licensee or Broker-Signature)

Agent (Broker obtaining the Offer) _____ By _____ Date _____

(Associate Licensee or Broker-Signature)

A REAL ESTATE BROKER IS QUALIFIED TO ADVISE ON REAL ESTATE. IF YOU DESIRE LEGAL ADVICE, CONSULT YOUR ATTORNEY.

Amended Stats 1990 ch 1336 § 2 (AB 3600), operative July 1, 1991.

Amendments:

1990 Amendment: Amended the SELLERS INFORMATION disclosure form by (a) substituting "Automatic Garage Door Opener(s)*" for "Garage Door Opener(s)" in subd A; and (2) added the footnote referring to a garage door opener.

Note—Stats 1990 ch 1336 provides:

SECTION 1. The Legislature finds and declares all of the following:

(a) The garage door is the largest and heaviest piece of moving equipment in most homes, and in order to avoid injury, it should be designed, manufactured, equipped, and maintained with due care. For this reason, garage door springs are currently regulated under California law.

(b) There are over 20 million automatic garage door openers in the nation today, a large portion of them in California.

(c) New residential automatic garage door openers should possess an automatic reversing safety device in compliance with current voluntary standards.

(d) There is no current California state regulation of these devices. Voluntary standards were established in 1973; however, prior to that date, there were no applicable industry safety standards requiring automatic reversing safety devices. Although automatic garage door openers have a life expectancy of approximately eight years, it is possible for individual openers to last as long as 40 years.

(e) Therefore, many automatic garage door openers currently installed do not have automatic safety reversing devices, and for many of the doors that do have these devices, the door and operator systems may not be properly adjusted and maintained. This condition is worsened by the fact that many persons are not aware of this problem and may have a false sense of security because they possess a door which purports to have an automatic safety device, yet the door and operator system may not have been tested or properly maintained and, therefore, may not be able to protect small children living in, or visiting, the home from serious injury or death.

(f) Since 1982, nationally, at least 44 children under 14 years of age have died in accidents involving automatic garage door openers. In November of 1989, a five-year-old girl died in Sacramento in an accident involving a garage door.

(g) It is, therefore, necessary that mandatory safety standards be established with respect to residential garage door opener systems.

Section 2 of this act shall be operative on July 1, 1991.

Taking a closer look: Significant new California legislation enacted in 1989. 13 CEB Real Prop L Rep No. 2 p 37.

§ 1099. Structural pest control inspection report prior to transfer of title or execution of sales contract

(a) As soon as practical before transfer of title of any real property or the execution of a real property sales contract as defined in Section 2985, the transferor, fee owner, or his agent, shall deliver to the transferee a copy of a structural pest control inspection report prepared pursuant to Section 8516 of the Business and Professions Code upon which any certification in accordance with Section 8519 of the Business and Professions Code may be made, provided that certification or preparation of a report is a condition of the contract effecting that transfer, or is a requirement imposed as a condition of financing such transfer.

(b) If a notice of work completed as contemplated by Section 8518 of the Business and Professions Code, indicating action by a structural pest control licensee in response to an inspection report delivered or to be delivered under provisions of subdivision (a), or a certification pursuant to Section 8519 of the Business and Professions Code, has been received by a transferor or his agent before transfer of title or execution of a real property sales contract as defined in Section 2985, it shall be furnished to the transferee as soon as practical before transfer of title or the execution of such real property sales contract.

(c) Delivery to a transferee as used in this section means delivery in person or by mail to the transferee himself or any person authorized to act for him in the transaction or to such additional transferees who have requested such delivery from the transferor or his agent in writing. For the purposes of this section, delivery to either husband or wife shall be deemed delivery to a transferee, unless the contract affecting the transfer states otherwise.

(d) No transfer of title of real property shall be invalidated solely because of the failure of any person to comply with the provisions of this section unless such failure is an act or omission which would be a valid ground for rescission of such transfer in the absence of this section.

Added Stats 1974 ch 649 § 2, operative July 1, 1975.

Collateral References:
Witkin Summary (9th ed) Contracts § 725.
Miller & Starr, Cal Real Estate 2d §§ 1:123, 25:32.

ARTICLE 1.5

Disclosures Upon Transfer of Residential Property

[Division 2, Property—Part 4, Acquisition of Property—Title 4, Transfer —Chapter 2, Transfer of Real Property—Article 1.5, Disclosures Upon Transfer of Residential Property; Article added Stats 1985 ch 1574 § 2, operative January 1, 1987.]

Historical Derivation: Former § 1134.5, as added by Stats 1984 ch 1183 § 1, amended by Stats 1985 ch 982 § 1.

Law Revision Commission Comments:
1985 Revision—Paragraph (4) of subdivision (b) of Section 1134.5 is amended to make clear that the section does not apply to transfers by a fiduciary in the course of administration of a probate estate. This amendment is consistent with the purpose of that paragraph. Other disclosures on transfer of residence: §§ 1102 et seq.

Cross References:
Recording transfers of real property: CC §§ 1158 et seq.

Collateral References:
Witkin Summary (9th ed) Agency and Employment § 269, Real Property § 26, Torts §§ 700, 959.
Cal Condominium Handbook (2d ed) §§ 11.8, 16.53.

Miller & Starr, Cal Real Estate 2d §§ 3:27, 4:24.
Cal Digest of Official Reports 3d Series, Deeds §§ 1 et seq., Real Estate Sales §§ 1 et seq.
Am Jur 2d (Rev) Property §§ 43 et seq.

Forms:

Am Jur Legal Forms 2d, Real Estate Sales §§ 219:1 et seq.

Law Review Articles:

Seller's attorney has no duty to disclose to buyer property's defects. CEB Real Prop L Rep (1986) Vol. 9 No. 6 p 129.
Down to earth practice tips for the real property lawyer in California: Transfer disclosure statements. (1987) 10 CEB Real Prop L Rep No. 8, p 165.
A legislative response to Easton v. Strassburger. 4 Cal Real Property J No. 1 p 18.
Review of Selected 1984 Legislation. 16 Pacific LJ 699.

Annotations:

Validity, construction, and application of statutes requiring assessment of environmental information prior to grants of entitlements for private land use. 76 ALR3d 388.
Conveyance of land as including mature but unharvested crops. 51 ALR4th 1263.
Specificity of description of premises as affecting enforceability of contract to convey real property—modern cases. 73 ALR4th 135.

§ 1102. Transactions to which article applies

Except as provided in Section 1102.1, this article applies to any transfer by sale, exchange, installment land sale contract, as defined in Section 2985, lease with an option to purchase, any other option to purchase, or ground lease coupled with improvements, of real property, or residential stock cooperative, improved with or consisting of not less than one nor more than four dwelling units.

Added Stats 1985 ch 1574 § 2, operative January 1, 1987. Amended Stats 1986 ch 460 § 1.

Amendments:

1986 Amendment: Added (1) "exchange," before "installment"; (2) "any other option to purchase," before "or ground"; (3) ", or residential stock cooperative," after "property"; and (4) "or consisting of" before "not less".

Collateral References:

Witkin Summary (9th ed) Agency and Employment § 269.
Miller & Starr, Cal Real Estate 2d § 1:123.

Law Review Articles:

Review of 1985 legislation. 17 Pacific LJ 784.

§ 1102.1. Transactions to which article does not apply

The provisions of this article do not apply to the following:

(a) Transfers which are required to be preceded by the furnishing to a prospective transferee of a copy of a public report pursuant to Section 11018.1 of the Business and Professions Code and transfers which can be made without a public report pursuant to Section 11010.4 of the Business and Professions Code.

(b) Transfers pursuant to court order, including, but not limited to,

transfers ordered by a probate court in administration of an estate, transfers pursuant to a writ of execution, transfers by any foreclosure sale, transfers by a trustee in bankruptcy, transfers by eminent domain, and transfers resulting from a decree for specific performance.

(c) Transfers to a mortgagee by a mortgagor or successor in interest who is in default, transfers to a beneficiary of a deed of trust by a trustor or successor in interest who is in default, transfers by any foreclosure sale after default, transfers by any foreclosure sale after default in an obligation secured by a mortgage, transfers by a sale under a power of sale or any foreclosure sale under a decree of foreclosure after default in an obligation secured by a deed of trust or secured by any other instrument containing a power of sale, or transfers by a mortgagee or a beneficiary under a deed of trust who has acquired the real property at a sale conducted pursuant to a power of sale under a mortgage or deed of trust or a sale pursuant to a decree of foreclosure or has acquired the real property by a deed in lieu of foreclosure.

(d) Transfers by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust.

(e) Transfers from one co-owner to one or more other co-owners.

(f) Transfers made to a spouse, or to a person or persons in the lineal line of consanguinity of one or more of the transferors.

(g) Transfers between spouses resulting from a decree of dissolution of marriage or a decree of legal separation or from a property settlement agreement incidental to such a decree.

(h) Transfers by the Controller in the course of administering Chapter 7 (commencing with Section 1500) of Title 10 of Part 3 of the Code of Civil Procedure.

(i) Transfers under Chapter 7 (commencing with Section 3691) or Chapter 8 (commencing with Section 3771) of Part 6 of Division 1 of the Revenue and Taxation Code.

(j) Transfers or exchanges to or from any governmental entity.

Added Stats 1985 ch 1574 § 2, operative January 1, 1987. Amended Stats 1986 ch 460 § 2.

Amendments:

1986 Amendment: (1) Added "transfers by any foreclosure sale," after "execution," in subd (b); (2) amended subd (c) by adding (a) "or successor in interest who is" after "mortgagor" and after "trustor"; (b) ", transfers by any foreclosure sale after default" before "in an obligation"; (c) "or any foreclosure sale under a decree of foreclosure" after "under a power of sale" and (d) "or a sale pursuant to a decree of foreclosure" after "deed of trust"; and (3) added "or exchanges" in subd (j).

Collateral References:

Witkin Summary (9th ed) Agency and Employment § 269.
Miller & Starr, Cal Real Estate 2d §§ 1:123, 3:27, 28:8.

Law Review Articles:
Review of 1985 legislation. 17 Pacific LJ 784.

§ 1102.2. Delivery of disclosure statement; Amendments; Termination of offer

The transferor of any real property subject to this article shall deliver to the prospective transferee the written statement required by this article, as follows:

(a) In the case of a sale, as soon as practicable before transfer of title.

(b) In the case of transfer by a real property sales contract, as defined in Section 2985, or by a lease together with an option to purchase, or a ground lease coupled with improvements, as soon as practicable before execution of the contract. For the purpose of this subdivision, "execution" means the making or acceptance of an offer.

With respect to any transfer subject to subdivision (a) or (b), the transferor shall indicate compliance with this article either on the receipt for deposit, the real property sales contract, the lease, or any addendum attached thereto or on a separate document.

If any disclosure, or any material amendment of any disclosure, required to be made by this article, is delivered after the execution of an offer to purchase, the transferee shall have three days after delivery in person or five days after delivery by deposit in the mail, to terminate his or her offer by delivery of a written notice of termination to the transferor or the transferor's agent.

Added Stats 1985 ch 1574 § 2, operative January 1, 1987. Amended Stats 1986 ch 460 § 3.

Amendments:
1986 Amendment: (1) Amended subd (b) by adding (a) "as soon as practicable" after "improvements,"; and (b) the second sentence; and (2) substituted "the transferor's" for "his or her" near the end of the last paragraph.

Collateral References:
Witkin Summary (9th ed) Agency and Employment § 269.
Miller & Starr, Cal Real Estate 2d §§ 1:123, 3:27.

Law Review Articles:
Review of 1985 legislation. 17 Pacific LJ 784.

§ 1102.3. [No section of this number]

§ 1102.4. Liability for errors or omissions

(a) Neither the transferor nor any listing or selling agent shall be liable for any error, inaccuracy, or omission of any information delivered pursuant to this article if the error, inaccuracy, or omission was not within the personal knowledge of the transferor or that listing or selling agent, was based on information timely provided by public agencies or by other persons providing information as specified in

subdivision (c) that is required to be disclosed pursuant to this article, and ordinary care was exercised in obtaining and transmitting it.

(b) The delivery of any information required to be disclosed by this article to a prospective transferee by a public agency or other person providing information required to be disclosed pursuant to this article shall be deemed to comply with the requirements of this article and shall relieve the transferor or any listing or selling agent of any further duty under this article with respect to that item of information.

(c) The delivery of a report or opinion prepared by a licensed engineer, land surveyor, geologist, structural pest control operator, contractor, or other expert, dealing with matters within the scope of the professional's license or expertise, shall be sufficient compliance for application of the exemption provided by subdivision (a) if the information is provided to the prospective transferee pursuant to a request therefor, whether written or oral. In responding to such a request, an expert may indicate, in writing, an understanding that the information provided will be used in fulfilling the requirements of Section 1102.6 and, if so, shall indicate the required disclosures, or parts thereof, to which the information being furnished is applicable. Where such a statement is furnished, the expert shall not be responsible for any items of information, or parts thereof, other than those expressly set forth in the statement.

Added Stats 1985 ch 1574 § 2, operative January 1, 1987. Amended Stats 1986 ch 460 § 4.

Amendments:
1986 Amendment: (1) Substituted "any listing or selling" and "that listing or selling" for "his or her" wherever such words appear; and (2) deleted ", by the transferor or his or her agent" at the end of the first sentence in subd (c).

Collateral References:
Witkin Summary (9th ed) Agency and Employment § 269.
Miller & Starr, Cal Real Estate 2d §§ 1:123, 3:27.

Law Review Articles:
Review of 1985 legislation. 17 Pacific LJ 784.

§ 1102.5. Information rendered inaccurate due to subsequent even Use of approximations

If information disclosed in accordance with this article is subsequently rendered inaccurate as a result of any act, occurrence, or agreement subsequent to the delivery of the required disclosures, the inaccuracy resulting therefrom does not constitute a violation of this article. If at the time the disclosures are required to be made, an item of information required to be disclosed is unknown or not available to the transferor, and the transferor or his or her agent has made a reasonable effort to ascertain it, the transferor may use an approximation of the information, provided the approximation is clearly identi-

fied as such, is reasonable, is based on the best information available to the transferor or his or her agent, and is not used for the purpose of circumventing or evading this article.

Added Stats 1985 ch 1574 § 2, operative January 1, 1987.

Collateral References:
Witkin Summary (9th ed) Agency and Employment § 269.
Miller & Starr, Cal Real Estate 2d §§ 1:123, 3:27, 29:51.

Law Review Articles:
Review of 1985 legislation. 17 Pacific LJ 784.

→ See 1991 Supplement, attached.

§ 1102.6. Form of disclosure statement

The disclosures required by this article pertaining to the property proposed to be transferred are set forth in, and shall be made on a copy of, the following disclosure form:

REAL ESTATE TRANSFER DISCLOSURE STATEMENT

THIS DISCLOSURE STATEMENT CONCERNS THE REAL PROPERTY SITUATED IN THE CITY OF_____, COUNTY OF_____, STATE OF CALIFORNIA, DESCRIBED AS _____. THIS STATEMENT IS A DISCLOSURE OF THE CONDITION OF THE ABOVE DESCRIBED PROPERTY IN COMPLIANCE WITH SECTION 1102 OF THE CIVIL CODE AS OF_____, 19____. IT IS NOT A WARRANTY OF ANY KIND BY THE SELLER(S) OR ANY AGENT(S) REPRESENTING ANY PRINCIPAL(S) IN THIS TRANSACTION, AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THE PRINCIPAL(S) MAY WISH TO OBTAIN.

I

COORDINATION WITH OTHER DISCLOSURE FORMS

This Real Estate Transfer Disclosure Statement is made pursuant to Section 1102 of the Civil Code. Other statutes require disclosures, depending upon the details of the particular real estate transaction (for example: special study zone and purchase-money liens on residential property).

Substituted Disclosures: The following disclosures have or will be made in connection with this real estate transfer, and are intended to satisfy the disclosure obligations on this form, where the subject matter is the same:_____

_____

_____

_____

(list all substituted disclosure forms to be used in connection with this transaction)

II

SELLERS INFORMATION

The Seller discloses the following information with the knowledge

that even though this is not a warranty, prospective Buyers may rely on this information in deciding whether and on what terms to purchase the subject property. Seller hereby authorizes any agent(s) representing any principal(s) in this transaction to provide a copy of this statement to any person or entity in connection with any actual or anticipated sale of the property.

THE FOLLOWING ARE REPRESENTATIONS MADE BY THE SELLER(S) AND ARE NOT THE REPRESENTATIONS OF THE AGENT(S), IF ANY. THIS INFORMATION IS A DISCLOSURE AND IS NOT INTENDED TO BE PART OF ANY CONTRACT BETWEEN THE BUYER AND SELLER.

Seller __ is __ is not occupying the property.

A. The subject property has the items checked below (read across):

__ Range	__ Oven	__ Microwave
__ Dishwasher	__ Trash Compactor	__ Garbage Disposal
__ Washer/Dryer Hookups	__ Window Screens	__ Rain Gutters
__ Burglar Alarms	__ Smoke Detector(s)	__ Fire Alarm
__ T.V. Antenna	__ Satellite Dish	__ Intercom
__ Central Heating	__ Central Air Cndtng.	__ Evaporator Cooler(s)
__ Wall/Window Air Cndtng.	__ Sprinklers	__ Public Sewer System
__ Septic Tank	__ Sump Pump	__ Water Softener
__ Patio/Decking	__ Built-in Barbeque	__ Gazebo
__ Sauna	__ Pool	__ Spa __ Hot Tub
__ Security Gate(s)	__ Garage Door Opener(s)	__ Number Remote Controls
Garage: __ Attached	__ Not Attached	__ Carport
Pool/Spa Heater: __ Gas	__ Solar	__ Electric
Water Heater: __ Gas		__ Private Utility or Other _____
Water Supply: __ City	__ Well	
Gas Supply: __ Utility	__ Bottled	
Exhaust Fan(s) in _____	220 Volt Wiring in _____	Fireplace(s) in _____
Gas Starter _____	Roof(s): Type: _____	Age: _____ (approx.)

Other: _____

Are there, to the best of your (Seller's) knowledge, any of the above that are not in operating condition? __ Yes __ No. If yes, then describe.

(Attach additional sheets if necessary.): _____

_____

_____

_____

B. Are you (Seller) aware of any significant defects/malfunctions in any of the following? __ Yes __ No. If yes, check appropriate space(s) below.

__ Interior Walls __ Ceilings __ Floors __ Exterior Walls
__ Insulation __ Roof(s) __ Windows __ Doors __ Foundation

__ Slab(s) __ Driveways __ Sidewalks __ Walls/Fences
__ Electrical Systems __ Plumbing/Sewers/Septics __ Other
Structural Components (Describe: _____

_____

If any of the above is checked, explain. (Attach additional sheets if necessary): _____

_____

_____

_____

C. Are you (Seller) aware of any of the following:

1. Substances, materials, or products which may be an environmental hazard such as, but not limited to, asbestos, formaldehyde, radon gas, lead-based paint, fuel or chemical storage tanks, and contaminated soil or water on the subject property .... __ Yes __ No

2. Features of the property shared in common with adjoining landowners, such as walls, fences, and driveways, whose use or responsiblity for maintenance may have an effect on the subject property ..... __ Yes __ No

3. Any encroachments, easements or similar matters that may affect your interest in the subject property ..... __ Yes __ No

4. Room additions, structural modifications, or other alterations or repairs made without necessary permits ..... __ Yes __ No

5. Room additions, structural modifications, or other alterations or repairs not in compliance with building codes ..... __ Yes __ No

6. Landfill (compacted or otherwise) on the property or any portion thereof ..... __ Yes __ No

7. Any settling from any cause, or slippage, sliding, or other soil problems ..... __ Yes __ No

8. Flooding, drainage or grading problems ..... __ Yes __ No

9. Major damage to the property or any of the structures from fire, earthquake, floods, or landslides ..... __ Yes __ No

10. Any zoning violations, nonconforming uses, violation of "setback" requirements ..... __ Yes __ No

11. Neighborhood noise problems or other nuisances ..... __ Yes __ No

12. CC&R's or other deed restrictions or obligations __ Yes __ No

13. Homeowners' Association which has any authority over the subject property ..... __ Yes __ No

14. Any "common area" (facilities such as pools, tennis courts, walkways, or other areas co-owned in undivided interest with others) ..... __ Yes __ No

15. Any notices of abatement or citations against the property ..... __ Yes __ No

16. Any lawsuits against the seller threatening to or affecting this real property ..... __ Yes __ No

If the answer to any of these is yes explain. (Attach additional sheets if necessary.): _____

_____

_____

Seller certifies that the information herein is true and correct to the best of the Seller's knowledge as of the date signed by the Seller.

Seller _____ Date _____

Seller _____ Date _____

III

AGENTS INSPECTION DISCLOSURE

(To be completed only if the seller is represented by an agent in this transaction.)

THE UNDERSIGNED, BASED ON THE ABOVE INQUIRY OF THE SELLER(S) AS TO THE CONDITION OF THE PROPERTY

AND BASED ON A REASONABLY COMPETENT AND DILIGENT VISUAL INSPECTION OF THE ACCESSIBLE AREAS OF THE PROPERTY IN CONJUNCTION WITH THAT INQUIRY, STATES THE FOLLOWING:

_____

_____

_____

_____

Agent (Broker Representing Seller) _____ By _____ Date _____
(Please Print) (Associate Licensee or Broker-Signature)

IV

AGENTS INSPECTION DISCLOSURE

(To be completed only if the agent who has obtained the offer is other than the agent above.)

THE UNDERSIGNED, BASED ON A REASONABLY COMPETENT AND DILIGENT VISUAL INSPECTION OF THE ACCESSIBLE AREAS OF THE PROPERTY, STATES THE FOLLOWING:

_____

_____

_____

_____

Agent (Broker obtaining the Offer) _____ By _____ Date _____
(Please Print) (Associate Licensee or Broker-Signature)

V

BUYER(S) AND SELLER(S) MAY WISH TO OBTAIN PROFESSIONAL ADVICE AND/OR INSPECTIONS OF THE PROPERTY AND TO PROVIDE FOR APPROPRIATE PROVISIONS IN A CONTRACT BETWEEN BUYER AND SELLER(S) WITH RESPECT TO ANY ADVICE/INSPECTIONS/DEFECTS.

I/WE ACKNOWLEDGE RECEIPT OF A COPY OF THIS STATEMENT.

Seller _____ Date _____ Buyer _____ Date _____
Seller _____ Date _____ Buyer _____ Date _____

Agent (Broker Representing Seller) _____ By _____ Date _____
(Associate Licensee or Broker-Signature)

Agent (Broker obtaining the Offer) _____ By _____ Date _____
(Associate Licensee or Broker-Signature)

A REAL ESTATE BROKER IS QUALIFIED TO ADVISE ON REAL ESTATE IF YOU DESIRE LEGAL ADVICE, CONSULT YOUR ATTORNEY.

Added Stats 1985 ch 1574 § 2, operative January 1, 1987. Amended Stats 1986 ch 460 § 5; Stats 1989 ch 171 sec 1.

Amendments:

1986 Amendment: Revised the required disclosure form.

1989 Amendment: Amended subd C of the SELLERS INFORMATION disclosure form by (1) adding subd 1; (2) redesignating former subds 1-15 to be subds 2-16; and (3) substituting "this" for "his" in subd 16.

Collateral References:

Witkin Summary (9th ed) Agency and Employment § 269.

Miller & Starr, Cal Real Estate 2d §§ 1:123, 3:27.

Law Review Articles:

Review of 1985 legislation. 17 Pacific LJ 784.

Review of 1989 legislation. 21 Pacific LJ 537.

§ 1102.6a. Additional disclosures

(a) On and after July 1, 1990, any city or county may elect to require disclosures on the form set forth in subdivision (b) in addition to those disclosures required by Section 1102.6. However, this section does not affect or limit the authority of a city or county to require disclosures on a different disclosure form in connection with transactions subject to this article pursuant to an ordinance adopted prior to July 1, 1990. Such an ordinance adopted prior to July 1, 1990, may be amended thereafter to revise the disclosure requirements of the ordinance, in the discretion of the city council or county board of supervisors.

(b) Disclosures required pursuant to this section pertaining to the property proposed to be transferred, shall be set forth in, and shall be made on a copy of, the following disclosure form:

LOCAL OPTION

REAL ESTATE TRANSFER DISCLOSURE STATEMENT

THIS DISCLOSURE STATEMENT CONCERNS THE REAL PROPERTY SITUATED IN THE CITY OF_____, COUNTY OF_____, STATE OF CALIFORNIA, DESCRIBED AS _____. THIS STATEMENT IS A DISCLOSURE OF THE CONDITION OF THE ABOVE DESCRIBED PROPERTY IN COMPLIANCE WITH ORDINANCE NO. _____ OF THE _____ CITY OR COUNTY CODE AS OF _____, 19____. IT IS NOT A WARRANTY OF ANY KIND BY THE SELLER(S) OR ANY AGENT(S) REPRESENTING ANY PRINCIPAL(S) IN THIS TRANSACTION, AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THE PRINCIPAL(S) MAY WISH TO OBTAIN.

I

SELLERS INFORMATION

The Seller discloses the following information with the knowledge that even though this is not a warranty, prospective Buyers may rely on this information in deciding whether and on what terms to purchase the subject property. Seller hereby authorizes any agent(s) representing any principal(s) in this transaction to provide a copy of this statement to any person or entity in connection with any actual or anticipated sale of the property.

THE FOLLOWING ARE REPRESENTATIONS MADE BY THE SELLER(S) AS REQUIRED BY THE CITY OR COUNTY OF _____. AND ARE NOT THE REPRESENTATIONS OF THE AGENT(S), IF ANY, THIS INFORMATION IS A DISCLOSURE AND IS NOT INTENDED TO BE PART OF ANY CONTRACT BETWEEN THE BUYER AND SELLER.

1. _____
_____
_____
_____
2. _____
_____
_____
_____

(Example: Adjacent land is zoned for timber production which may be subject to harvest.)

Seller certifies that the information herein is true and correct to the best of the Seller's knowledge as of the date signed by the Seller.

Seller _____ Date _____
Seller _____ Date _____

II

BUYER(S) AND SELLER(S) MAY WISH TO OBTAIN PROFESSIONAL ADVICE AND/OR INSPECTIONS OF THE PROPERTY AND TO PROVIDE FOR APPROPRIATE PROVISIONS IN A CONTRACT BETWEEN BUYER AND SELLER(S) WITH RESPECT TO ANY ADVICE/INSPECTIONS/DEFECTS.

I/WE ACKNOWLEDGE RECEIPT OF A COPY OF THIS STATEMENT

Seller _____ Date _____ Buyer _____ Date _____
Seller _____ Date _____ Buyer _____ Date _____

Agent (Broker Representing Seller) _____ By _____ (Associate Licensee or Broker-Signature) Date _____

Agent (Broker Obtaining the Offer) _____ By _____ (Associate Licensee or Broker-Signature) Date _____

A REAL ESTATE BROKER IS QUALIFIED TO ADVISE ON REAL ESTATE IF YOU DESIRE LEGAL ADVICE, CONSULT YOUR ATTORNEY.

(c) This section does not preclude the use of addenda to the form specified in subdivision (b) to facilitate the required disclosures. This section does not preclude a city or county from using the disclosure form specified in subdivision (b) for a purpose other than that specified in this section.

Added Stats 1989 ch 171 sec 2.

Collateral References:

Law Review Articles:
Review of 1989 legislation. 21 Pacific LJ 537.

§ 1102.7. Disclosures to be made in good faith; "Good faith"

Each disclosure required by this article and each act which may be performed in making the disclosure, shall be made in good faith. For purposes of this article, "good faith" means honesty in fact in the conduct of the transaction.

Added Stats 1985 ch 1574 § 2, operative January 1, 1987.

Collateral References:
Witkin Summary (9th ed) Agency and Employment § 269.
Miller & Starr, Cal Real Estate 2d § 1:123.

Law Review Articles:
Review of 1985 legislation. 17 Pacific LJ 784.

§ 1102.8. Effect of article on other required disclosures

The specification of items for disclosure in this article does not limit or abridge any obligation for disclosure created by any other provision of law or which may exist in order to avoid fraud, misrepresentation, or deceit in the transfer transaction.

Added Stats 1985 ch 1574 § 2, operative January 1, 1987.

Collateral References:
Witkin Summary (9th ed) Agency and Employment § 269.
Miller & Starr, Cal Real Estate 2d § 1:123.

Law Review Articles:
Review of 1985 legislation. 17 Pacific LJ 784.

§ 1102.9. Amendment of disclosure statement

Any disclosure made pursuant to this article may be amended in writing by the transferor or his or her agent, but the amendment shall be subject to the provisions of Section 1102.2.

Added Stats 1985 ch 1574 § 2, operative January 1, 1987.

Collateral References:
Witkin Summary (9th ed) Agency and Employment § 269.
Miller & Starr, Cal Real Estate 2d §§ 1:123, 3:27.

Law Review Articles:
Review of 1985 legislation. 17 Pacific LJ 784.

§ 1102.10. Means of delivering statement

Delivery of disclosures required by this article shall be by personal delivery to the tranferee or by mail to the prospective transferee. For the purposes of this article, delivery to the spouse of a transferee shall be deemed delivery to the transferee, unless provided otherwise by contract.

Added Stats 1985 ch 1574 § 2, operative January 1, 1987.

Collateral References:
Witkin Summary (9th ed) Agency and Employment § 269.
Miller & Starr, Cal Real Estate 2d §§ 1:123, 3:27.

Law Review Articles:
Review of 1985 legislation. 17 Pacific LJ 784.

§ 1102.11. Escrow agents

Any person or entity, other than a real estate licensee licensed pursuant to Part 1 (commencing with Section 10000) of Division 4 of the Business and Professions Code, acting in the capacity of an escrow agent for the transfer of real property subject to this article shall not be deemed the agent of the transferor or transferee for purposes of the disclosure requirements of this article, unless the person or entity is empowered to so act by an express written agreement to that effect. The extent of such an agency shall be governed by the written agreement.

Added Stats 1985 ch 1574 § 2, operative January 1, 1987.

Collateral References:
Witkin Summary (9th ed) Agency and Employment § 269.
Miller & Starr, Cal Real Estate 2d §§ 1:123, 3:27.

Law Review Articles:
Review of 1985 legislation. 17 Pacific LJ 784.

§ 1102.12. Broker's duties

(a) If more than one licensed real estate broker is acting as an agent in a transaction subject to this article, the broker who has obtained the offer made by the transferee shall, except as otherwise provided in this article, deliver the disclosure required by this article to the

transferee, unless the transferor has given other written instructions for delivery.

(b) If a licensed real estate broker responsible for delivering the disclosures under this section cannot obtain the disclosure document required and does not have written assurance from the transferee that the disclosure has been received, the broker shall advise the transferee in writing of his or her rights to the disclosure. A licensed real estate broker responsible for delivering disclosures under this section shall maintain a record of the action taken to effect compliance in accordance with Section 10148 of the Business and Professions Code.

Added Stats 1985 ch 1574 § 2, operative January 1, 1987; Amended Stats 1986 ch 460 § 6.

Amendments:
1986 Amendment: Substituted "delivering" for "making" in the first and second sentence of subd (b).

Collateral References:
Witkin Summary (9th ed) Agency and Employment § 269.
Miller & Starr, Cal Real Estate 2d §§ 1:123, 3:27.

Law Review Articles:
Review of 1985 legislation. 17 Pacific LJ 784.

§ 1102.13. Failure to comply with article; Liability for damages

No transfer subject to this article shall be invalidated solely because of the failure of any person to comply with any provision of this article. However, any person who willfully or negligently violates or fails to perform any duty prescribed by any provision of this article shall be liable in the amount of actual damages suffered by a transferee.

Added Stats 1985 ch 1574 § 2, operative January 1, 1987.

Collateral References:
Witkin Summary (9th ed) Agency and Employment § 269.
Miller & Starr, Cal Real Estate 2d §§ 1:123, 3:27.

Law Review Articles:
Review of 1985 legislation. 17 Pacific LJ 784.

§ 1102.14. "Listing agent;" "Selling agent"

(a) As used in this article, "listing agent" means listing agent as defined in subdivision (f) of Section 1086.

(b) As used in this article, "selling agent" means selling agent, as defined in subdivision (g) of Section 1086, exclusive of the requirement that the agent be a participant in a multiple listing service as defined in Section 1087.

Added Stats 1986 ch 460 § 7.

§ 1102.15. Disclosure of former ordnance locations within neighborhood area

The seller of residential real property subject to this article who has

actual knowledge of any former federal or state ordnance locations within the neighborhood area shall give written notice of that knowledge as soon as practicable before transfer of title.

For purposes of this section, "former federal or state ordnance locations" means an area identified by an agency or instrumentality of the federal or state government as an area once used for military training purposes which may contain potentially explosive munitions. "Neighborhood area" means within one mile of the residential real property.

The disclosure required by this section does not limit or abridge any obligation for disclosure created by any other law or that may exist in order to avoid fraud, misrepresentation, or deceit in the transfer transaction.

Added Stats 1989 ch 294 sec 1.

Cross References:
Disclosure of former ordinance location by landlord: CC § 1940.7.

Collateral References:

Law Review Articles:
Review of 1989 legislation. 21 Pacific LJ 542.

ARTICLE 2

Effect of Transfer

[Division 2, Property—Part 4, Acquisition of Property—Title 4, Transfer —Chapter 2, Transfer of Real Property—Article 2, Effect of Transfer; Enacted 1872.]

Cross References:
Recording transfers of real property: CC §§ 1158 et seq.

Collateral References:
Witkin Evidence (3d ed) § 223.
Witkin Summary (9th ed) Real Property §§ 452 et seq.
Cal Jur 3d Deeds §§ 276 et seq.
Cal Digest of Official Reports 3d Series, Deeds §§ 1 et seq., Real Estate Sales §§ 1 et seq.
Am Jur 2d (Rev) Property §§ 43 et seq.

Forms:
Am Jur Legal Forms 2d, Real Estate Sales §§ 219:1 et seq.

Annotations:
Validity, construction, and application of statutes requiring assessment of environmental information prior to grants of entitlements for private land use. 76 ALR3d 388. Conveyance of land as including mature but unharvested crops. 51 ALR4th 1263.
Specificity of description of premises as affecting enforceability of contract to convey real property—modern cases. 73 ALR4th 135.

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

240 Main Street, Suite 500
Juneau, Alaska 99801-2101

MEMORANDUM March 27, 1992

SUBJECT: Agent liability in CSHB 398 (L&C)

TO: Representative Pat Parnell
Attn: Dan

FROM: Theresa L. Bannister TLB
Legislative Counsel

You have asked for an opinion relating to a real estate agent's liability under CSHB 398 (L&C). Specifically you have asked whether the inclusion of the acknowledgement-of-receipt line for the agent in the disclosure statement increases the agent's liability in the transfer of the real property. In my opinion, it does not. As the bill is presently drafted, an agent's signature on the line indicates only that the agent has received a copy of the disclosure statement. It does not imply that the agent warrants or approves the information in the disclosure statement. The disclosure statement clearly states that the representations made in the disclosure statement are not the representations of the agent (see p. 3, ll. 10 - 11 of the bill). The disclosure statement also clearly states that it is not a warranty by the agent (see p. 2, ll. 30 - 31 of the bill). Finally, the liability of the agent for the information in the disclosure statement is addressed by AS 34.70.030(b),[1/] and the criteria in that subsection will govern whether the agent is liable, not whether the agent signs an acknowledgement of receipt. In this bill as it is presently drafted, I would characterize the acknowledgement-of-receipt line as just that, an indication that the agent has received a copy of the document.

If I may be of further assistance, please advise.

TLB:pl
92-214.plm

[1/] AS 34.70.030(b) reads as follows:

(b) The agent of a transferor is not liable for an error, inaccuracy, or omission in the information provided in the disclosure statement if the agent did not have personal knowledge of the error, inaccuracy, or omission, and the agent exercised due diligence in obtaining and transmitting the information.

HB
404

HOUSE COMMITTEE REPORT

(7)

Date Referred: April 2, 1992 FURTHER REFERRALS:

Date of Committee Action: 4/24/92

The JUDICIARY Committee considered: HB 404

HOUSE BILL NO. 404 FILING DEADLINE FOR CERTAIN CANDIDATES

"An Act amending the filing deadline for a candidate seeking to appear on the general election ballot as a candidate not representing a political party; and providing for an effective date."

RECOMMENDATIONS:
be replaced with CS HB404 (JUD) [ ] the same title [X] 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)

[ ] fiscal impact _____

[ ] zero fiscal note _____

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) _____

[X] zero fiscal note(s) Elections 1/16/92

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
Mike Thurmond		Dave Donley		✓	
		Jim Ellis		X	
Mark Hanley	X				
Terry Martin					

Dave Donley
CHAIRMAN'S SIGNATURE

FISCAL NOTE

1

STATE OF ALASKA
1992 LEGISLATIVE SESSION

Bill Version: HB 404
(H) Publish Date: 1/16/92

Revision Date: _____ **Department Affected:** Office of the Governor
Title: "An Act amending filing deadline for candidates not representing a political party." **BRU:** Elections
Sponsor: Office of the Governor **Component:** Elections
Requestor: _____ **COMPONENT SERIAL NO.** 0 0 2 2

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE FUND SOURCE:	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	0	0	0	0	0	0

POSITIONS:

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

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Elizabeth A. Ziegler **Phone:** 465-4611
Division: Division of Elections

Approved by Commissioner: _____
Agency: _____ **Date:** _____

COMMITTEE COPY

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/7/91

STATE OF ALASKA

OFFICE OF THE GOVERNOR

DIVISION OF ELECTIONS
P.O. BOX AF
JUNEAU, ALASKA 99811-0105
PHONE (907) 465-4611

April 6, 1992

Representative Dave Donley, Chairman
House Judiciary Committee
P.O. Box V
Juneau, Alaska 99811

Dear Representative Donley:

The Division of Elections would like to formally request that you bring CS for House Bill 404 (STA), "An Act amending the requirements for changing voter residence; amending the filing deadline for a candidate seeking to appear on the general election ballot as a candidate not representing a political party; and providing for an effective date," before the House Judiciary Committee for a hearing.

CS for House Bill 404 (STA) allows for a voter to request that their voter registration reflect a change of address by executing a sworn statement which could be witnessed by a notary public, commissioned officer of the armed forces including the National Guard, district judge or magistrate, United States postal official, registration official, or other person qualified to administer oaths and deletes the current language which requires that the voter execute an affidavit.

This bill also addresses the filing deadline for a candidate not representing a political party who is seeking to appear on the general election ballot. As you know the Courts ruled that the Division of Elections must accept the filing application for "no party" candidates no sooner than Primary Election Day of the year the candidate wishes to appear on the General Election ballot. Statute previously set the filing deadline for at or before 5:00pm August 1st as that date, but CSHB 404 (STA) changes that date to Primary Election Day.

CS for House Bill 404 (STA) received no opposition in the House State Affairs Committee and is a necessary piece of legislation. I urge you to schedule CS for House Bill 404 (STA) to be heard in the House Judiciary Committee at your earliest convenience.

Sincerely,

Charlot E. Thickstun

Charlot E. Thickstun,
Director

01-A2LH

HOUSE COMMITTEE REPORT

(7)

Date Referred: January 16, 1992 FURTHER REFERRALS: Judiciary

Date of Committee Action: 4/1/92

The STATE AFFAIRS Committee considered: HB 404

HOUSE BILL NO. 404 FILING DEADLINE FOR CERTAIN CANDIDATES

"An Act amending the filing deadline for a candidate seeking to appear on the general election ballot as a candidate not representing a political party; and providing for an effective date."

RECOMMENDATIONS: [ ] the same title
be replaced with CSHB404 (STA) [X] a new title

[ ] have attached amendments(s)

[Y] 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) _____

[ ] zero fiscal note _____ [X] zero fiscal note(s) ELECTIONS 1/16/92

SIGNING DO PASS	*DP*	*OTHER RECOMMENDATIONS*	*DNP*	*NR*	*AM*
	—				
	—				
	—				
	—				

Eugene H. Kaberle
CHAIRMAN'S SIGNATURE

STATE OF ALASKA

OFFICE OF THE GOVERNOR

DIVISION OF ELECTIONS
P.O. BOX AF
JUNEAU, ALASKA 99811-0105
PHONE (907) 465-4611

M E M O R A N D U M

To: Representative Eugene Kubina, Chair
House State Affairs Committee

From: Charlot E. Thickstun, Director
Division of Elections
Office of the Lt. Governor

Subj: HB 404, "Amending filing deadline for no-party candidate petitions"

Date: February 5, 1992

The Division of Elections requested that HB 404 be drafted to correct in statute the filing date for no party candidate petitions because the existing statute was held to be unconstitutional in 1990. In Sykes v. Division of Elections, the state superior court determined that the existing August 1 filing deadline did not serve any compelling state interest.

We now request that HB 404 be amended to change the deadline from the day of the primary to September 1. In the current version of HB 404 the deadline for filing a no party petition is the date of the primary election. Upon further review the Division determined that it would be best to change the date so that it would be fixed like the party candidacy deadline of June 1.

Also we request that the Committee consider allowing the Division to add another section to this bill which would take care of a problem in AS 15.05.020(10). This statute requires that when a voter changes his or her voting residence that the voter execute an affidavit on a form prepared by the director of elections. The Attorney General's office recently advised the Division that the required affidavit can not be witnessed by an election official such as a registrar. AS 09.63, the code of civil procedure, expressly limits who can witness an affidavit. These witnesses include a notary, magistrate, judge or commissioned officer in the military.

The Division feels strongly that a voter should not be required to find a special type of witness to make an address change. This existing statutory process requires the voter to go to more effort than when he or she originally registered to vote since at that time the registration can be witnessed by a registrar.

The Division urges the committee to pass out HB 404 with these requested changes.

WALTER J. HICKEL
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 16, 1992

The Honorable Ben Grussendorf
Speaker of the House
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear Speaker Grussendorf:

Under the authority of art. III, sec. 18 of the Alaska constitution, I am transmitting a bill that would change the deadline by which a candidate not representing a political party must file a nominating petition for an office to be voted upon at the general election. The bill would change the deadline under AS 15.25.150 from the current date of August 1 in the year of a general election to the date of the primary election, which under AS 15.25.020 is the fourth Tuesday in August of that year.

In 1990, the superior court in Anchorage, in the case of Sykes v. Division of Elections, 3AN-90-5708 Civ., ruled that the August 1 date unconstitutionally burdened the constitutional right of access to the ballot of a candidate not representing a political party. The court found that the Division of Elections did not require over three months to process such a candidate's petition and, if the petition was sufficient, to take the administrative steps required in connection with the candidate's ballot placement. I am submitting this bill in response to that decision.

The Sykes court specifically noted that, for a candidate not representing a political party, a filing deadline that was no earlier than the date of the primary election would be constitutionally defensible. I have chosen the earliest deadline that the court found acceptable in order to give the Division of Elections the most time possible to accomplish its functions. For instance, under AS 15.58.080(a), the official election pamphlet must be mailed to all registered voters at least 30 days before the election, or no later than early October. It must be printed before it can be mailed, a process requiring two or three more weeks. A filing deadline any later

than the date of the primary would make it very difficult for the division to ascertain the sufficiency of the petition of a candidate not representing a political party and, if the petition is found sufficient, to rework the election pamphlet in time to meet the statutory deadlines. Similarly, in light of the statutory command in AS 15.20.082(a) that special absentee ballots be prepared so that they may be sent to voters outside of the United States no later than 60 days before the general election, the division needs the earliest deadline constitutionally permissible.

Because this bill will affect the 1992 legislative election, I am proposing an immediate effective date.

I urge your prompt and favorable action on this bill.

Sincerely,

Walter J. Hickel
Governor

HB

407

STATE OF ALASKA

1992 LEGISLATIVE SESSION

(H) Publish Date: 1/16/92

Revision Date: _____ **Department Affected:** Environmental Conservation

Title: Immunity for SERC, LEPCs, and HSSTRC **BRU:** Spill Prevention and Response

Component: Spill Prevention, Planning and Management

Sponsor: Governor

Requestor: Governor **COMPONENT SERIAL NO.** 1 4 3 0

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	0	0	0	0	0	0

POSITIONS:

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

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Janice Adair **Phone:** 465-5050

Division: Commissioner's Office **Date:** December 10, 1991

Approved by Commissioner: Janice Adair for John Sandor

Agency: Department of Environmental Conservation **Date:** December 10, 1991

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/7/91

Page ___ of ___

COMMITTEE COPY

1992 LEGISLATIVE SESSION (H) Publish Date: 1/16/92

Revision Date: _____ Department Affected: Administration

Title: An Act providing for immunity for the Alaska Emergency Response Comm. BRU: Risk Management

Sponsor: Rules Committee Component: Risk Management

Requestor: Governor COMPONENT SERIAL NO. 0 0 7 1

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE FUND SOURCE:	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER FUND SOURCE:	0	0	0	0	0	0
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 the Division of Risk Management's budget.

ANALYSIS: (Attach a separate page if necessary.)

See attached.

Prepared by: Donald J. Hitchcock Phone: 465-2180

Division: Risk Management Date: 12·10·91

Approved by Commissioner: Nancy Bear Usera Nancy Bear Usera by nw

Agency: Administration Date: Dec. 16, 1991

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

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9/1/FN34621A.KP/1

COMMITTEE COPY

CONTINUATION OF FISCAL NOTE ANALYSIS
HB 407

An act providing statutory immunity for the Alaska State Emergency Response Commission and the Hazardous Substance Spill Technology Review Council and their members while acting within the course and scope of their official duties unless gross negligence or intentional misconduct is involved. Gross negligence, intentional misconduct or acts which fall under federal law are excluded from this immunity statute.

This bill will make it easier to get qualified members to serve on these very sensitive and important Commissions. The Division of Risk Management is in favor of this legislation.

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

OFFICE OF THE COMMISSIONER
410 WILLOUGHBY AVENUE, SUITE 105
JUNEAU, AK 99801-1795

Phone: (907) 465-5000
Fax: (907) 465-5070

April 22, 1992

The Honorable Dave Donley
Chairman
House Judiciary Committee
P.O. Box V
Juneau. AK 99811

Dear Representative Donley:

HB 407 was recently referred to your committee from the House Resources Committee. This bill would provide immunity to the members of the Alaska State Emergency Response Commission (SERC), the Local Emergency Planning Committees (LEPCs) created under the SERC, and the Hazardous Substance Spill Technology Review Council (HSSTRC or TRC) for their acts or omissions which are in accordance with their official duties, unless the act or omission constitutes gross negligence or intentional misconduct or which may be the subject of relief under an applicable federal law.

As explained in the Governor's transmittal letter, state officials and members of the public serve on the SERC, the LEPCs and the RTC. Each of these entities is charged with tasks relating to hazardous substance emergency planning and preparedness, community right-to-know reporting, toxic substance release reporting, and the management of hazardous substances. The potential exposure to liability arising from these statutorily mandated activities may discourage qualified individuals from accepting appointments to the SERC, LEPCs and RTC.

The success of the SERC, LEPCs and RTC are critical to the success of the State of Alaska in emergency preparedness when dealing with oil spills or other hazardous substance releases. Enclosed herewith is a legal opinion relating to this issue that may be of interest to the members of your committee when reviewing HB 407. While the opinion is long, the pertinent part begins on page 32. We are also enclosing statutes from other states which have adopted this kind of immunity for members of their SERC, and the federal law allowing for citizen suits against members of a SERC.

We respectfully ask that you schedule this bill for a hearing at the earliest possible convenience. We look forward to your favorable action.

If you need any further information, please do not hesitate to contact me, at 465-5010.

Sincerely,

Janice Adair
Assistant Commissioner

JA/vr/ars (asdlr\donley.407)

Enclosures: Legal Opinion
Statutes

cc: Paul Fuhs, Governor's Office

(9)

HOUSE COMMITTEE REPORT

Date Referred: March 9, 1992 FURTHER REFERRALS: JUDICIARY

Date of Committee Action: 4/9/92

The RESOURCES Committee considered: HB 407

HOUSE BILL NO. 407 IMMUNITY FOR ACTIONS TAKEN UNDER AS 46.13

"An Act providing immunity for the Alaska State Emergency Response Commission, the local emergency planning committees, and the Hazardous Substance Spill Technology Review Council and their members for actions taken under AS 46.13; and providing for an effective date."

RECOMMENDATIONS: [ ] the same title
be replaced with ~~HB 407~~ [ ] a new title

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

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal impact _____

[ ] zero fiscal note _____

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) _____

[ ] zero fiscal note(s) _____

SIGNING DO PASS	*DP*	*OTHER RECOMMENDATIONS*	*DNP*	*NR*	*AM*
Cliff Davidson	✓			✓	
Tom Morgan	✓			✓	
Drew A. Kernan	✓			✓	
				✓	

Cliff Davidson
CHAIRMAN'S SIGNATURE

MEMORANDUM

State of Alaska
'Department of Law

TO: Hon. John A. Sandor
Commissioner
Department of
Environmental Conservation

DATE: March 31, 1992

FILE NO.: 663-91-0483

TEL. NO.: 465-3600

SUBJECT: Tort liability and emergency response planning

FROM: Marie Sansone
Marie Sansone
Assistant Attorney General
Natural Resources Section--Juneau

The attached memorandum of advice was prepared in response to the State Emergency Response Commission's (SERC's) request for advice dated May 13, 1991, concerning SERC authority and the liability of responders. In addition, this memorandum of advice supersedes the memorandum dated October 29, 1990, which was prepared in response to SERC's request for advice dated July 30, 1990, concerning the liability of the state and the members of the SERC, the local emergency planning committees (LEPCs), and the Hazardous Substance Spill Technology Review Council (HSSTRC) for actions taken under AS 46.13. The Department of Law had indicated in that memorandum that further legal analysis would be undertaken in connection with proposed immunity legislation for these entities and their members.

Also attached for your convenience are copies of House Bill No. 407 and Senate Bill No. 359, the proposed immunity legislation, along with the governor's transmittal letters dated January 16, 1992, and the Memorandum of Agreement (Indemnity Agreement), executed June 13, 1991 which provides the members of the SERC, the LEPCs, and the HSSTRC a guarantee of defense and indemnification for negligence claims until such time as immunity legislation is enacted.

Please do not hesitate to contact me at the number indicated above if you have any questions regarding this matter.

MS:tg

Enclosures

cc w/enc.: Janice Adair, DEC, Special Assistant
Amy Skilbred, DEC, SERC Coordinator
Camille Stephens, DEC, DSPAR

MEMORANDUM

State of Alaska
Department of Law

TO: Hon. John A. Sandor
Commissioner
Dep't of Envtl. Conservation

DATE: March 31, 1992

FILE NO.: 663-91-0483

TEL. NO.: 465-3600

SUBJECT: Tort liability and emergency response planning

FROM: Marie Sansone
Assistant Attorney General
Natural Resources Section - Juneau

On behalf of the Alaska State Emergency Response Commission, you have asked whether the commission may delegate to a committee the authority to grant interim approval of emergency plans. The statutes that create the commission and specify its powers do not authorize the delegation of authority; therefore, the commission may not delegate interim approval authority.

You also requested our advice concerning the potential tort liability associated with response actions carried out in accordance with emergency plans. A number of statutes that provide immunity under specified circumstances are discussed below, as is AS 09.50.250(1), which establishes the "discretionary function exception" to state tort liability. In addition, in a memorandum dated October 29, 1990, the Department of Law advised you that the potential liability of the Alaska State Emergency Response Commission, the local emergency planning committees, and the Hazardous Substance Spill Technology Review Council and their members would be addressed in greater detail in connection with proposed immunity legislation. House Bill No. 407 and Senate Bill No. 359, which would provide immunity, were introduced in the legislature on January 16, 1992, and the potential tort liability of these entities and their members is discussed below. Conclusions and recommendations are found beginning on page 35.

BACKGROUND

The Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C.A. §§ 11001--11050 (1991) (Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA Title III)), which provides the legal framework for emergency planning for extremely hazardous substances, was passed in response to the tragic chemical accident in 1984 at Bhopal, India. H.R. Rep. No. 99-253(I), 99th Cong., 1st Sess., Vol. 4, at 258 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2932. SARA Title III has two distinct parts: an emergency planning mechanism and community right-to-know provisions. The emergency planning provisions

require the governor of each state to establish an emergency planning commission and to appoint to the commission persons with technical expertise in emergency response. The commission in turn sets up emergency planning districts and appoints an emergency planning committee for each district. Using information provided by facilities that store, use, or release certain chemicals, the local committees are required to prepare emergency plans. 42 U.S.C.A. §§ 11001--11005.

I. ADMINISTRATIVE ENTITIES ESTABLISHED BY AS 46.13

A. The Alaska State Emergency Response Commission and the Local Emergency Planning Committees

The Alaska State Emergency Response Commission (Alaska SERC), established as of September 24, 1990, by AS 46.13.010, is a continuation of the commission established on October 21, 1987, by Administrative Order No. 103. Sec. 25, ch. 190, SLA 1990. AS 46.13.020 prescribes its composition:

> The commission consists of the commissioners of community and regional affairs, environmental conservation, fish and game, health and social services, labor, natural resources, public safety, and transportation and public facilities, or the designees of the commissioners, the adjutant general of the Department of Military and Veterans' Affairs or a designee, and seven members of the public to be appointed by the governor. . . .

Under SARA Title III, a state emergency response commission is required to establish emergency planning districts to facilitate the preparation and implementation of emergency response plans. Two state statutes govern district boundaries. Under AS 46.13.040(2), the Alaska SERC is given the authority to designate and revise as necessary district boundaries, using the boundaries of regions established by the Department of Environmental Conservation (DEC) under AS 46.04.200--46.04.210 for the state master and the regional master oil and hazardous substance discharge prevention and contingency plans (state master plan and regional master plans) and of political subdivisions where appropriate. Under AS 46.13.060, unless otherwise designated by the Alaska SERC, the boundaries for the districts are the regions designated by DEC for the regional master plans. The Alaska SERC has created 25 local emergency planning districts.

The Alaska SERC appoints the members of a local emergency planning committee (LEPC) for each district. Each LEPC

must include representatives from each of the following groups: elected state and local officials; law enforcement, civil defense, firefighting, first aid, health, local environmental, hospital, and transportation personnel; broadcast and print media; community groups; and owners and operators of facilities subject to SARA Title III (covered facilities). The Alaska SERC may revise its appointments to the LEPCs as it deems appropriate. In addition, interested persons may petition the commission to modify the membership of an LEPC. 42 U.S.C.A. § 11001(c)-(d); AS 46.13.040(5). Under SARA Title III, state emergency response commissions were required to establish an LEPC for each local emergency planning district by August 1987. 42 U.S.C.A. § 11001(c). The Alaska SERC has currently appointed 11 LEPCs for 25 districts, and thus is not in compliance with SARA Title III.

The Alaska SERC supervises and coordinates the activities of the LEPCs. 42 U.S.C.A. § 11001(a); AS 46.13.040(6). The duties of the LEPCs are prescribed throughout SARA Title III and in AS 46.13.080. Under SARA Title III, the LEPCs were required to develop emergency response plans for extremely hazardous substances by October 17, 1988, and to review the plans at least annually thereafter. 42 U.S.C.A. § 11003(a). SARA Title III requires each LEPC to submit its plans to the Alaska SERC for review and recommendations as may be necessary to ensure coordination with the plans of other districts. Id., § 11003(e). State law requires in addition that the plans prepared by the LEPCs include procedures to be followed in the event of a hazardous substance release. AS 46.13.090(a)(2). Under AS 46.13.040(4) and AS 46.13.045(a), the Alaska SERC must review and approve the extremely hazardous substances and hazardous substances emergency plans.

The Alaska SERC also reviews and approves the state and regional master plans and the state, interjurisdictional, and local plans prepared under the Alaska Disaster Act, AS 26.23, to the extent the latter plans pertain to hazardous substance response. AS 26.23.215; AS 46.13.040(3)-(4). The Alaska SERC is directed to use the criteria established by AS 46.13.045[1] for

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[1] AS 46.13.045 provides:

> **PLAN APPROVAL; INCIDENT COMMAND SYSTEMS.** (a) The commission shall review and exercise approval authority over local, interjurisdictional, regional, and state plans for hazardous substance discharge response, including plans prepared under AS 26.23, AS 46.04.200--46.04.210,

(continued...)

the review and approval of the various plans, and to adopt regulations to carry out the purposes of AS 46.13 and the emergency planning provisions of SARA Title III. AS 46.13.040(4) and (11).

B. The Hazardous Substance Spill Technology Review Council

The legislature established the Hazardous Substance Spill Technology Review Council (HSSTRC) in the Alaska SERC to assist in the identification of containment and cleanup products and procedures for arctic and sub-arctic hazardous substance releases and to make recommendations to state agencies regarding their use. AS 46.13.100--46.13.110. The HSSTRC consists of the commissioner of DEC, the adjutant general of the Department of Military and Veterans' Affairs (DMVA), a representative of the University of Alaska appointed by the governor, the governor's senior science advisor, a representative of the Prince William Sound Science Center appointed by the governor, and four members, appointed by the governor, with broad expertise in physical or biological science; oil technology, transportation, or management; fisheries; economics; environmental engineering; or law. The U.S. Coast Guard and the U.S. Environmental Protection Agency (EPA) may each appoint an employee to the council to represent their agencies as nonvoting members. AS 46.13.110(b).

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[1] (...continued)
and this chapter.

(b) Before approving a plan, the commission shall ensure that the plan includes an incident command system that describes the respective roles of affected persons and agencies in a clear and specific manner and that the respective roles of state agencies are consistent with their statutory duties. The commission shall also ensure that the plans are well-integrated with related plans.

(c) To the extent consistent with other law, an incident command system approved under this section must provide the Alaska division of emergency services has a major role in mobilization of personnel and resources, communications, transportation planning, and other logistics involved in a state response to an imminent or actual hazardous substance discharge.

The HSSTRC is charged with a variety of tasks related to hazardous substance research. The council recommends research topics to DEC; establishes DEC spill technology testing protocols; identifies research funding sources; makes proposals to the governor, the Alaska SERC, and other entities to encourage and fund discharge prevention and response; compiles and maintains information related to containment and cleanup technology, hazardous substances management, industry and government practices and laws, and DEC research; and performs other functions as requested by the Alaska SERC. AS 46.13.120.

II. EMERGENCY PLANS

A. Emergency Planning for Hazardous and Extremely Hazardous Substances Under AS 46.13 and SARA Title III

The emergency response plans prepared by the LEPCs establish the procedures to be followed in the event of a release of extremely hazardous substances as defined by federal law, plus the procedures to be followed in the event of a release of

hazardous substances as defined by state law.[2] Each plan must include:

> (1) Identification of covered facilities, routes likely to be used to transport extremely hazardous substances, and additional facilities contributing or subjected to additional risk due to their proximity to covered facilities, such as hospitals or natural gas facilities;
>
> (2) Procedures to be followed by facilities and local emergency and medical personnel to respond to a release of hazardous or extremely hazardous substances;

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[2] Emergency planning under SARA Title III pertains to some 360 substances on EPA's List of Extremely Hazardous Substances, which is published at 40 C.F.R. Part 355 appendices A-B (1991). The list establishes threshold planning quantities for each substance. See 42 U.S.C.A. § 11002(a). Except for emergency notification procedures applicable to covered facilities, SARA Title III does not apply to the transportation or storage incident to transportation of extremely hazardous substances. 42 U.S.C.A. § 11047.

In contrast, AS 46.13.090(a)(2) requires that the emergency plans contain procedures to be followed in the event of a release of "hazardous substances." "Hazardous substance" is defined very broadly to mean:

> (A) an element or compound which, when it enters into the atmosphere or in or upon the water or surface or subsurface land of the state, presents an imminent and substantial danger to the public health or welfare, including but not limited to fish, animals, vegetation, or any part of the natural habitat in which they are found;
>
> (B) oil; or
>
> (C) a substance defined as a hazardous substance under 42 U.S.C. 9601(14) [Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)].

AS 46.03.826(5); see AS 46.13.900(3).

(3) Designation of a community emergency coordinator and facility emergency coordinators to make determinations necessary to implement the emergency plan;

(4) Procedures for notification of a release by the facility emergency coordinators to persons designated in the emergency plan and to the public;

(5) Methods for determining whether a release has occurred and the area or population likely to be affected;

(6) A description of available emergency equipment and facilities;

(7) Evacuation plans;

(8) Training programs for local emergency response and medical personnel; and

(9) Methods and schedules for emergency plan drills.

See 42 U.S.C.A. § 11003(c); AS 46.13.090(a). In addition, each plan must include an incident command system that describes the respective roles of affected persons and agencies. AS 46.13.090(b).

B. State and Regional Master Oil and Hazardous Substance Discharge Prevention and Contingency Plans

The Alaska SERC is responsible for reviewing and approving state and regional master plans prepared by DEC. AS 46.13.040(3)-(4); AS 46.04.200(c)(5); AS 46.04.210(b). These plans must:

(1) take into consideration the elements of an oil discharge prevention and contingency plan approved or submitted for approval under AS 46.04.030;[3]

[3] AS 46.04.030 requires oil discharge prevention and contingency plans for oil terminal facilities, exploration and production facilities, pipelines, tank vessels, and oil barges. DEC is the only state agency that may approve, modify, or revoke these plans. AS 46.04.030(h).

(2) include an incident command system that specifies the responsibilities for the assessment, containment, and cleanup of oil or hazardous substance discharges on the part of DEC, DMVA Division of Emergency Services, and other state agencies; municipalities; federal agencies; operators of facilities; private parties whose property may be affected by a discharge; and other parties having an interest in or the resources to assist in containment and cleanup;

(3) include incident command systems for an emergency response under AS 26.23, AS 46.03.865, or AS 46.04.080;[4]

(4) identify actions necessary to reduce the likelihood of catastrophic oil discharges and significant discharges of hazardous substances; and

(5) designate locations where oil and hazardous substance emergency response supply and equipment storage depots should be established and where emergency response corps personnel should be available.

See AS 46.04.200--AS 46.04.210.

C. The State Emergency Plan and Local and Interjurisdictional Plans Prepared Under the Alaska Disaster Act

Under AS 46.13.040(3)-(4) and AS 46.13.045, the Alaska SERC is also responsible for reviewing and approving local, interjurisdictional, and state emergency plans for hazardous substance discharge response prepared under the Alaska Disaster Act, AS 26.23.[5] The Alaska Disaster Act defines "disaster" to

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[4] AS 26.23 is the Alaska Disaster Act. AS 46.03.865 defines the authority of DEC in cases of emergency. AS 46.04.080 concerns the role of DEC and the Division of Emergency Services with respect to catastrophic oil discharges.

[5] AS 26.23.215 clarifies the relationship between the emergency plans prepared under the Alaska Disaster Act and the other plans approved by the Alaska SERC:

(continued...)

include "the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or man-made cause, including . . . the release of oil or a hazardous substance, if the release requires prompt action to avert environmental danger or damage." AS 26.23.900(1)(B).

AS 26.23.040(a) requires the Division of Emergency Services to prepare and maintain a state emergency plan. The plan may include measures for:

> (1) Preventing and minimizing injury and damage;
>
> (2) Prompt and efficient response;
>
> (3) Emergency relief;
>
> (4) Identification of geographical areas, municipalities, or villages especially vulnerable to a disaster;
>
> (5) Recommendations for zoning, building, and land use controls; safety measures for securing nonpermanent or semipermanent structures; and other preventive and preparedness measures;
>
> (6) Assistance to local officials in designing local emergency plans;

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[5] (...continued)

Relationship to other planning statutes. To the extent that the state emergency plan, interjurisdictional plans, and local plans prepared under this chapter relate to action required to avert damage from a release of oil or a hazardous substance, the plans must be substantially equivalent in relevant respects to the local emergency plans prepared under AS 46.13 and the state and regional master plans prepared by the Department of Environmental Conservation under AS 46.04.200--46.04.210, use the same incident command systems used in those plans, and be approved by the Alaska State Emergency Response Commission under AS 46.13.045.

(7) Authorization and procedures for the construction of temporary works designed to protect against or mitigate danger or loss;

(8) Organization of manpower and chains of command;

(9) Coordination of federal, state, and local disaster activities;

(10) Coordination of the state emergency plan with federal disaster plans; and

(11) Other matters necessary to carry out the Alaska Disaster Act.

See AS 26.23.040(a).

Each local and interjurisdictional disaster agency is required to prepare and keep current a disaster emergency plan for its area. AS 26.23.060(e). The state emergency plan and the local and interjurisdictional plans, insofar as they contain provisions relating to the release of oil or hazardous substances, must be substantially equivalent to the local emergency response plans prepared by the LEPCs and the state and regional master plans prepared by DEC, use the same incident command systems, and be approved by the Alaska SERC. AS 26.23.215.

DISCUSSION

To respond to your request for advice, the topics of discussion have been arranged in the following order: delegation of authority; preliminary definitions relating to tort liability; the status of the LEPCs for purposes of liability; immunity statutes; the effect on liability of the state of completion of the plans; personal liability of the members of the Alaska SERC, the LEPCs, and the HSSTRC; and overall conclusions and recommendations.

Your questions concerning the potential tort liability associated with response actions carried out during various stages of emergency response plan development and approval pose several difficulties. First, there are an infinite variety of circumstances under which a hazardous substance release could occur and under which an emergency response or the failure to respond could cause injury. While it's possible to outline the contours of tort law, the application of the law in any given circumstance to determine whether negligence exists and whether

liability will be imposed ultimately depends on the unique facts of each case. Even slight differences in facts may lead to different findings regarding liability and immunity. Moreover, the law of torts changes frequently as the Alaska Supreme Court and the state legislature create new rights and remedies. The following discussion therefore highlights a number of statutes which provide protection from liability under the specific circumstances described in the statutes. In some instances, these statutes protect only the governmental entity mentioned; in others, the statutes limit personal liability. Because there may be instances where these statutes would not apply, the statutory "discretionary function exception" to state tort liability (statutory sovereign immunity) and the common law "official immunity" for state officers are discussed at length.

A second difficulty posed by your request is that the Department of Law may provide advice only to state agencies and state officials. To the extent your request seeks advice concerning the liability of local governments, responders, and plan holders, it would be more appropriate for these entities to obtain advice from their own counsel. The potential liability of the LEPCs as state agencies, however, is discussed; and some background information is presented, although not analyzed, which concerns the liability of entities other than the state as these entities play an integral role in emergency planning.

I. DELEGATION OF AUTHORITY

In general, apart from ministerial functions, an administrative entity cannot delegate authority and functions which under the law may be exercised only by that entity. 73 C.J.S. Public Administrative Law and Procedure § 56 at 513 (1983). Unless authorized by statute, "administrative officers and agencies cannot delegate to a subordinate or another powers and functions which are discretionary or quasi-judicial in character, or which require the exercise of judgment; and subordinate officials have no power with respect to such duties." Id. at 513-14 (footnote omitted). See also 2 Am. Jur. 2d Administrative Law § 221, at 51 (1962).

The Alaska SERC is composed of nine department heads or their designees and seven members of the public appointed by the governor. AS 46.13.020. The public members serve at the pleasure of the governor for staggered terms of three years. AS 46.13.030. While the nine department heads may delegate their authority to designees, the seven public members may not do so. See City of Cordova v. Medicaid Rate Comm'n, 789 P.2d 346, 351-53 (Alaska 1990).

The Alaska SERC adopted bylaws on November 2, 1990, which provide for the establishment of committees. Under Article VIII, section 2, "The chair of the Commission may appoint persons other than Commission members or their designees to serve on committees." With respect to the approval of hazardous substance emergency response plans, Article IX, section 5, of the commission's bylaws states:

> Any hazardous substance Emergency response plan subject to approval by the Commission under AS 46.13 shall first be referred to an appropriate committee for review, consideration, and its recommendation.

To facilitate the approval process, the Alaska SERC has proposed a procedure whereby an emergency response committee could grant interim approval or interim approval with conditions to the plans, pending review and approval by the full commission.

The statute which establishes the Alaska SERC and sets forth its powers and duties, AS 46.13, does not authorize the commission to delegate its powers and duties. Moreover, as discussed below at pages 23 to 28, the review and approval of emergency response plans is largely a discretionary function which requires the exercise of judgment. Based on established administrative law cited above, AS 46.13.020, which specifies the composition of the commission and requires that its seven public members be appointed by the governor, should be interpreted to require that the Alaska SERC function as a whole, with the benefit of the expertise and experience of all its members. Without statutory authorization, the Alaska SERC cannot delegate its power to approve emergency response plans to a committee.

II. PRELIMINARY DEFINITIONS RELATING TO TORT LIABILITY

SARA Title III authorizes citizen suits against a state governor or state emergency response commission, but not an LEPC,

for failure to comply with certain requirements of the Act.[6] 42 U.S.C.A. § 11046(a)(1)(C)-(D). SARA Title III also provides:

> Nothing in this section [authorizing citizen suits] shall restrict or expand any right which any person (or class of persons) may have under any Federal or State statute or common law to seek enforcement of any requirement or to seek any other relief (including relief against the Administrator [of EPA] or a State agency).

Id., § 11046(g). Thus, any person who believes he or she has been injured by an act or omission of the Alaska SERC or an LEPC or their members may file a tort claim in state court.

EPA, in a report entitled "Tort Liability in Emergency Planning," provides a helpful definition of the word "tort":

> A tort is an action that harms another person, business, or group. It occurs when a person acts or fails to act, without right, and thus harms another directly or indirectly. A tort is an act for which a civil action for personal injuries or property damage [may be brought], rather than a criminal suit.
>
> Each state, through its laws, regulations, and court decisions, recognizes certain rights of individuals and businesses. A state's tort law protects these rights by providing a means for a

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[6] SARA Title III authorizes citizen suits against a state governor or a state emergency response commission for failure to provide access to an emergency response plan, material safety data sheets, lists of hazardous chemicals, inventory forms, toxic chemical release forms, and follow up emergency notices and for failure to respond to a request for tier II information. 42 U.S.C.A. § 11046(a)(1)(C)-(D). The Act does not authorize financial penalties; however, a court may award the costs of litigation, including reasonable attorney's fees and expert witness fees, to the prevailing or substantially prevailing party. Id., § 11046(f).

SARA Title III also provides for criminal penalties against any person who knowingly and willfully discloses trade secrets entitled to protection under the Act. Id., § 11045(d)(2).

person or business to seek compensation for losses or harm caused by another.

EPA, Tort Liability in Emergency Planning 2 (Jan. 1989).

"Negligence" is the failure to use reasonable care. State v. Abbott, 498 P.2d 712, 725 (Alaska 1972). In a negligence case, the plaintiff must prove all four of the following elements:

> (1) A duty requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks.
>
> (2) A failure on his or her part to conform to the standard required.
>
> (3) Proximate cause, that is, a reasonably close causal connection between the conduct and the resulting injury.
>
> (4) Actual loss or damage.

Id.

Statutes which provide immunity often distinguish between negligence and gross negligence or intentional misconduct. "Gross negligence" or "reckless misconduct" occurs when one has full knowledge of the hazards he or she is creating, so as to evidence a reckless disregard of the possible consequences and an indifference to the rights of others. Leavitt v. Gillaspie, 443 P.2d 61, 65 (Alaska 1968). Gross negligence differs from ordinary negligence in several important respects:

> [Reckless misconduct or gross negligence] differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be