

**ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8072**  
**7079 HOUSE LABOR & COMMERCE**

(d) If the verification is sworn to or affirmed before a notary public of the state, the notary public shall

(1) endorse after the signature of the notary public the information required by AS 09.63.030(c)(1) [DATE OF EXPIRATION OF THE NOTARY'S COMMISSION];

(2) place [PRINT OR EMBOSS] the notary's seal on the document;

(3) comply with AS 44.50 [AS 44.50.060 - 44.50.080] or other applicable law.

\* Sec. 3. AS 09.63.100(b) is amended to read:

(b) If a document is acknowledged before a notary public of the state, the notary public shall

(1) endorse after the notary's signature the information required by AS 09.63.030(c)(1) [DATE OF EXPIRATION OF THE NOTARY'S COMMISSION];

(2) place [PRINT OR EMBOSS] the notary's seal on the document;

(3) comply with AS 44.50 [AS 44.50.060 - 44.50.080] or other law.

\* Sec. 4. AS 44.50.020 is amended by adding a new subsection to read:

(b) A person may not be appointed and commissioned a notary public under AS 44.50.010 if the person has been convicted within five years before the appointment of a crime involving dishonesty.

\* Sec. 5. AS 44.50.040 is amended to read:

Sec. 44.50.040. FEES. A fee established by the lieutenant governor by regulation [OF \$40] shall be paid to the lieutenant governor for each commission issued to a person other than a state employee.

\* Sec. 6. AS 44.50.060 is amended to read:

Sec. 44.50.060. DUTIES. A notary public shall

(1) when requested, demand acceptance and payment of foreign and inland bills of exchange, or promissory notes, protest them for nonacceptance and nonpayment, and exercise the other powers and duties that by the law of nations and according to commercial usages, or by the laws of any other state, government, or country, may be performed by notaries;

(2) take the acknowledgment or proof of powers of attorney, mortgages, deeds, grants, transfers, and other instruments of writing, and give a certificate of the proof or acknowledgment, endorsed on or attached to the instrument; [THE CERTIFICATE SHALL BE SIGNED BY THE NOTARY IN THE NOTARY'S OWN HANDWRITING;]

1 (3) take depositions and affidavits, and administer oaths and affirmations, in all  
2 matters incident to the duties of the office, or to be used before a court, judge, officer, or board  
3 in the state;

4 (4) keep a journal under AS 44.50.095 of the notarial acts performed by the  
5 notary [A DEPOSITION, AFFIDAVIT, OATH, OR AFFIRMATION SHALL BE SIGNED BY  
6 THE NOTARY IN THE NOTARY'S OWN HANDWRITING, AND THE NOTARY SHALL  
7 ENDORSE AFTER THE SIGNATURE THE DATE OF EXPIRATION OF THE NOTARY'S  
8 COMMISSION].

9 \* Sec. 7. AS 44.50.060 is amended by adding a new subsection to read:

10 (b) When a notarial act requires the signature of a notary, the notary shall sign the  
11 document, shall insert after the signature the information required by AS 09.63.030(c)(1), and  
12 shall place the notary's seal on the document.

13 \* Sec. 8. AS 44.50 is amended by adding a new section to read:

14 Sec. 44.50.065. DISQUALIFICATIONS. A notary is disqualified from performing a  
15 notarial act if the notary

- 16 (1) is a signer of or named in the document that is to be notarized;
- 17 (2) will receive directly from a transaction connected with the notarial act a  
18 commission, fee, advantage, right, title, interest, cash, property, or other consideration exceeding  
19 in value the normal fee charged by the notary for the notarial act; or
- 20 (3) is related to the person whose signature is to be notarized as a spouse, sibling,  
21 or lineal ascendant or descendant to the second degree of kindred.

22 \* Sec. 9. AS 44.50 is amended by adding new sections to read:

23 Sec. 44.50.072. IMPARTIALITY. (a) A notary may not influence a person to enter or  
24 not enter into a lawful transaction involving a notarial act by the notary.

25 (b) A notary shall perform notarial acts in lawful transactions for a requesting person  
26 who tenders the fee charged by the notary, if a fee is required by the notary, unless the notary  
27 has stated a reason for refusal and recorded that reason in the journal as required by  
28 AS 44.50.095(c).

29 Sec. 44.50.074. FALSE CERTIFICATE. A notary may not execute a certificate  
30 containing a statement known by the notary to be false or perform an official action with intent  
31 to deceive or defraud.

1           Sec. 44.50.076. TESTIMONIALS. A notary may not endorse or promote a product,  
 2 service, contest, or other offering if the notary's title or seal is used in the endorsement or  
 3 promotional statement.

4           Sec. 44.50.078. UNAUTHORIZED PRACTICE. (a) A notary who is not an attorney  
 5 may complete but may not select notarial certificates, and may not assist another person in  
 6 drafting, completing, selecting, or understanding a document or transaction requiring a notarial  
 7 act.

8           (b) This section does not prohibit a notary who is qualified in, and, if required, licensed  
 9 to practice, a particular profession from giving advice relating to matters in that professional  
 10 field.

11           (c) A notary may not make representations to have powers, qualifications, rights, or  
 12 privileges that the office of notary does not have.

13 \* Sec. 10. AS 44.50.080(b) is repealed and reenacted to read:

14           (b) A notary public seal must be on a stamp, contain the information required by (a) of  
 15 this section, and be printed in black ink. The seal may be circular and not over two inches in  
 16 diameter, or may be rectangular and not over an inch wide and two and one-half inches long.

17 \* Sec. 11. AS 44.50 is amended by adding a new section to read:

18           Sec. 44.50.095. NOTARY JOURNAL. (a) A notary public shall maintain and preserve  
 19 a chronological, permanently bound journal of the notarial acts performed by the notary.

20           (b) When a notary performs a notarial act, the notary shall record in the journal at the  
 21 time of the notarial act at least

- 22                   (1) the date and time of day of the notarial act;
- 23                   (2) the type of notarial act;
- 24                   (3) a description of the document or proceeding that is the subject of the notarial  
 25 act;
- 26                   (4) the name and address of each person for whom a notarial act is performed;
- 27
- 28                   (5) a description of the evidence used to identify each person for whom a notarial  
 29 act is performed;
- 30                   (6) the fee, if any, charged for the notarial act; and
- 31                   (7) the address where the notarial act was performed if the notarial act was not

1 performed at the notary's business address.

2 (c) If a notary refuses to perform or complete a notarial act, the notary shall record the  
3 circumstances of the refusal in the journal.

4 (d) The journal is an official record that is available at reasonable times and in the  
5 notary's presence for public inspection or reproduction. A notary may charge a fee for  
6 reproducing pages of the journal.

7 (e) A notary shall keep the journal in the exclusive custody of the notary. The journal  
8 of a notary may not be used by another notary.

9 \* Sec. 12. AS 44.50.100 is amended to read:

10 Sec. 44.50.100. RETURN OF PAPERS TO LIEUTENANT GOVERNOR. If a notary  
11 public dies, resigns, is disqualified, removed from office, or permanently moves [OR  
12 REMOVES] from the state, or if a notary public's commission is not reissued when it expires,  
13 [ALL] the notary's seal, journal, and other public papers that are related to the notary  
14 commission shall be delivered to the office of the lieutenant governor.

15 \* Sec. 13. AS 44.50.110 is amended to read:

16 Sec. 44.50.110. APPLICATION OF ADMINISTRATIVE PROCEDURE ACT [TO  
17 REVOCATION OF NOTARY COMMISSION]. The procedures set out in the Administrative  
18 Procedure Act (AS 44.62) shall be followed in the revocation of the commission of a notary  
19 public and in the adoption of regulations under this chapter.

20 \* Sec. 14. AS 44.50 is amended by adding a new section to read:

21 Sec. 44.50.185. REGULATIONS AND HANDBOOK. (a) The lieutenant governor may  
22 adopt regulations to carry out the purposes of this chapter. The regulations must include  
23 standards for the revocation of the commission of a notary.

24 (b) The lieutenant governor shall produce a handbook for notaries and distribute the  
25 handbook to each person who is appointed and commissioned a notary public under this chapter.  
26 The handbook must contain a summary of the provisions of this chapter and the regulations  
27 adopted under this chapter.

28 \* Sec. 15. AS 44.50 is amended by adding a new section to read:

29 Sec. 44.50.200. DEFINITION. In this chapter, "notary" means notary public.

30 \* Sec. 16. TRANSITIONAL PROVISION. Notwithstanding AS 44.50.080(b), amended by sec. 10  
31 of this Act, a person who has a valid notary public commission on July 1, 1992, may use a stamp with

- 1 an ink color other than black or a seal press until the person's commission that is in effect on July 1,
- 2 1992, terminates.
- 3 \* Sec. 17. This Act takes effect July 1, 1992.



JOHN B. COGHILL  
LIEUTENANT GOVERNOR

STATE OF ALASKA  
P. O. BOX AA  
JUNEAU 99811-0111  
(907) 465-3520

January 17, 1992

The Honorable David Finkelstein  
House of Representatives  
PO Box V  
Juneau, Alaska 99811

Dear Representative Finkelstein,

Representative Max Gruenberg has introduced House Bill 394, "An Act relating to notaries; and providing for an effective date." This has been referred to the House Labor and Commerce Committee.

House Bill 394 deals with three important notary issues. First, it would require all notaries after July 1, 1992 to use a rubber inking stamp instead of the embossed seal. Secondly, HB 394 would require Alaskan notaries to keep a journal of each notarial act performed. Lastly, it would require the notary's expiration date to be included with the information already required on the seal.

The current notarial statutes have not been changed since they were written in 1961. HB 394 offers improvements to the statutes which are designed to protect the notary.

The Lieutenant Governor's Office offers its full support of HB 394. We would greatly appreciate your quick consideration. If you have any questions in regards to the specifics of HB 394, please contact the Notary Administrator, Patty Trott in my office.

Sincerely,

John B. Coghill  
Lieutenant Governor

cc: Representative Gruenberg

"An Act relating to notaries; and providing for an effective date."

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#### Journal

(1) Currently, Alaskan notary's are not required to record any information on completed notarial acts. Alaska Statute does indirectly refer to maintaining a journal, but does not specifically require it. HB 394 would specifically require Alaskan Notaries to keep a journal for each notarial act completed.

Journals are important for two simple reasons, they deter fraud, and it protects the notary against lawsuits. HB 394 requires a notary to record specific information concerning each notarial act completed. Lawsuits are usually initiated three to five years after the notarial act has been performed. If accurate records are kept, the notary should be able to go right to the date the act was completed, and answer pertinent questions in regards to it. Currently Alaskan notaries who do not keep a journal do not have this option.

#### Notary Stamp

(2) HB 394 will also require notaries commissioned after July 1, of this year to purchase a rubber inking stamp instead of the familiar embossed seal. Changing from the embossed seal to the rubber inking stamp will accomplish two goals. First, it will improve the efficiency of government by eliminating the "smudging" process. Currently, each document that is submitted to the recorders office that has been notarized by an embossed seal must be "smudged." Smudging is the lengthy process of rubbing a pencil or carbon paper over the top of a seal impression in order for it to be microfilmed. Using a rubber inking stamp will eliminate this process.

Secondly, HB 394 will almost eliminate the instances which invalidate notarial acts due to illegible seal impressions, and handwriting. Many times an embosser does not crimp the paper well enough to tell who the notary was, and if the notary did not legibly write their name the act would be considered invalid. Using a rubber inking stamp will alleviate this concern.

#### Expiration Date

(3) Virtually every state, including Alaska, require notaries to write or type their expiration date on each notarial certificate. HB 394 would require notaries to include their expiration date along with the information already required by statute on the stamp. The main purpose of this clause is to prevent notaries from illegally using their stamp after their commission has expired.

For more information contact:  
Stan Robbins  
Representative Gruenberg's Office

Patty Trott  
Notary Commissions Administrator  
Lieutenant Governor's Office

# MEMORANDUM

DEPARTMENT OF NATURAL RESOURCES

State of Alaska

DIVISION OF MANAGEMENT

TO: Sharon Barton  
Director

DATE: January 24, 1992

FILE NO: 8-300

TELEPHONE NO.: 762-2437

FROM: Linda Plumb  
State Recorder

SUBJECT: HB 394

Yesterday I received a call from the Lieutenant Governor's Office requesting our support for HB 394 "An Act relating to notaries; and providing for an effective date." While most of this bill does not affect the Recorders/UCC Section, the proposed amendments to Sec. 44.50.080. SEAL.(b), would require that the notary seal be printed and in black ink that legibly reproduces under photographic methods. Current statute is not specific on this point and many of the attested documents that Recorders receive bear seals that are illegible, thus often rendering expiration dates and notary names unreadable. HB 394 would provide the statutory authority to reject documents that bear illegible notarial seals.

Unless this bill undergoes significant change before it reaches the floor vote, I request that the Department support its passage.

The only caveat I would like to bring up regarding this bill involves Sec. 44.50.185. Regulations and Handbook. and would be as an advisory note only. If a printed seal becomes a requirement under statutory directive, a portion of the notary handbook should require that the seal not encroach on any printed or signed portion of a document. Currently, no such information is given to notaries on receiving their commission and many do not realize the affect of placing the seal over signatures or on top of the certificate of acknowledgement or a portion of the document's text. After recording and microfilming, these printed seals may obliterate important elements of a document that may culminate in litigation for the parties involved.

Attachment: HB 394

cc: Meg Hayes, Assistant Director  
Patty Trott, Lt. Governor's Office

NENANA CITY PUBLIC SCHOOLS

P.O. BOX 00010  
NENANA, ALASKA 99760  
907-832-5464  
FAX 907-832-5625

January 24, 1992

David Finkelstein, Chairman  
Labor and Commerce Committee  
Room 17 Capitol  
Juneau, Ak. 99811

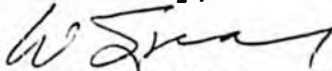
Re: House Bill No. 394

Dear Mr. Finkelstein,

I support most of the changes recommended under HB 394 especially Sec. 4 AS 44.50.060 (4) and Sec. 7 AS 44.50.095 the requirement to keep a journal of all notarized acts performed by the notary.

I disagree with the changes made to Sec. 44.50.080 (A) & (B). At \$30.00 each (Fairbanks price) for replacement stamp, the cost to notaries in the State of Alaska would be \$392,000 for the 1st year and approximately \$98,000 for each year there after. I would encourage you to look into other less costly methods of addressing the application of the expiration date.

Sincerely,



William Spear, Notary  
Business Manager

PostNet brand

**Fax Transmittal Memo**

To: Mr. Spears  
 Consignee: Wenana City Schools  
 Location: Wenana  
 Fax #  
 Telephone #

7672 No of Pages  
 From: Patty Inott  
 Company: Lt. Gov. OFFICE  
 Location: Juneau  
 Fax #  
 Original Disposition:  Destroy  Return  Call for memo  
 Days Date  
 Time  
 Dept. Charge: Notary  
 Telephone #: 465-3509

Comments

Thanks for looking it over!

Labor & Commerce Committee  
 Rm 17, Capitol  
 Juneau, Ak 99811

Chair: David Finkelstein ✓  
 -Chair: Kevin "Pat" Parnell  
 Betty Bruckman  
 Dave Donley  
 Ivan M. Ivan  
 Robin L. Taylor  
 James E. "Jim" Zawacki

Judiciary Committee  
 Rm 120, Capitol  
 Juneau, Ak 99811

Chair: Dave Donley  
 V-Chair: Max F. Gruenberg, Jr.  
 Johnny Ellis  
 Kevin "Pat" Parnell  
 Mark Hanley  
 Terry Martin  
 Mike Miller



# City of Nenana

P.O. Box 00070  
Nenana, Alaska 99760  
(907) 832-5441  
FAX 832-5503



February 18, 1992

David Finkelstein, Chair  
Labor & Commerce Committee  
Rm 17, Capital  
Juneau, AK 99811

RE: HB 394 - An Act relating to notaries

Dear Chairman Finkelstein,

Patty Trott of Lt. Governor's Office asked me if I would write to you making comment on the referenced bill. I am happy to do so. I am a notary as well as city clerk for the City of Nenana. While, I personally feel that procedures can easily be over-regulated, I believe that the casual manner in which many notaries dispatch their duties warrants attention. I have reviewed HB 394 and find the amendments to be satisfactory and not overly burdensome.

Thank you for the opportunity to comment on this bill.

Sincerely,

Karen Harvey, Municipal Clerk  
Notary for State of Alaska

cc: Lt. Governor Coghill  
Committee Members



H B

3 9 8

# HOUSE COMMITTEE REPORT

(7)  
Date Referred: January 14, 1992

FURTHER REFERRALS:

Judiciary

Date of Committee Action: 3-12-92

The LABOR AND COMMERCE 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:  
 be replaced with CSHB 398 (L+C)  the same title  
 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) \_\_\_\_\_

APPROVES PREVIOUS: (Dept/Date) \_\_\_\_\_

fiscal impact \_\_\_\_\_

fiscal note(s) \_\_\_\_\_

zero fiscal note Commerce

zero fiscal note(s) \_\_\_\_\_

SIGNING <u>DO</u> PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
				X	
				✓	
				X	
				✓	

\_\_\_\_\_  
 CHAIRMAN'S SIGNATURE

1992 LEGISLATIVE SESSION

Revision Date: \_\_\_\_\_ Department Affected: Commerce & Economic Development  
 Title: An Act requiring certain disclosures in BRU: Occupational Licensing  
real property sales; and providing for an effective date. Component: Administration  
 Sponsor: Reps. Parnell and Gruenberg  
 Requestor: House Labor & Commerce COMPONENT SERIAL NO. 

0	3	5	6
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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
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REVENUE	0.0	0.0	0.0	0.0	0.0	0.0
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FUNDING: (Thousands of Dollars)

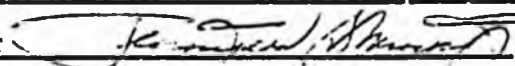
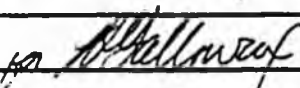
GENERAL FUND	0.0	0.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS	0.0	0.0	0.0	0.0	0.0	0.0
OTHER	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

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  2.3.92  
 Agency: Department of Commerce & Economic Development Date: \_\_\_\_\_

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



Official Business

# Alaska State Legislature

## HOUSE OF REPRESENTATIVES

Kevin "Pat" Parnell

465-2647

Room 128  
State Capitol  
Juneau, AK 99801-1182

### SPONSOR STATEMENT

I have submitted House Bill 398, "An Act requiring certain disclosures in real property sales..." to help eliminate a problem in the area of residential home sales. This came from a constituent complaint in Anchorage.

The constituent bought into a condominium complex, which was built in the late 1970's. The complex was built upon 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.

The estimates of the repair ran in the neighborhood of \$164,000 combined for the ten unit complex. At this point, the owner proclaimed bankruptcy and the Alaska Housing Financing Corporation (AHFC) took over ownership.

The only recourse for the constituent was through the AHFC, which would only offer a loan under the Condominium Association Loan Program. The total available is \$5,000 per unit, or 80% of cost of the improvement, whichever is less.

This legislation does not provide for a specific avenue of legal recourse. It merely provides the buyer and the seller knowledge in transacting a sale of residential property.



Official Business

# Alaska State Legislature

## HOUSE OF REPRESENTATIVES

Kevin "Pat" Parnell

Room 128

State Capitol  
Juneau, AK 99801-1182

465-2647

### BRIEF SECTIONAL ANALYSIS OF HB 398

#### Sec. 34.70.010...DISCLOSURES REQUIRED

- a) If one is going to sell residential property, a disclosure statement must be given.
- b) Delivery of the statement.
- c) Disclosure of defect in multiple unit development.
  - 1) One week after discovery or before the loan is finalized.

#### Sec. 34.70.020...TERMINATION OF OFFER

If Disclosure Statement can affect the sale, and is delivered AFTER written offer has been made, may terminate offer by written notice within THREE days after the Disclosure Statement was given personally, or FIVE days if by mail.

#### Sec. 34.70.030...LIABILITY FOR ERRORS OR OMISSIONS

The seller or agent, is not liable for errors or omissions if they had no personal knowledge, or it was based on information from experts (i.e., engineers, etc.), or they used ordinary care in getting the information.

#### Sec. 34.70.040...SUBSEQUENT EVENTS AND APPROXIMATIONS

If event causes the Disclosure Statement to be inaccurate AFTER it is delivered, the resulting inaccuracy does not violate this chapter.

- Approximations of information are included in this text.

#### Sec. 34.70.050...FORM OF DISCLOSURE STATEMENT

Contains the legal description and address of the property, and states that this is not a warranty of any kind.

- Pages 3-4, Lines 27 to Line 23, represent individual items, if represented in property.
- Page 5, Lines 1-4, deals with structural items.

- Page 5, Lines 11 to Page 6, Line 11, deals with subjects in regard to the environment around the real property.

II) Offers the opportunity to get professional advice for the seller or the buyer.

Sec. 34.70.060...GOOD FAITH

Sec. 34.70.070...EFFECT ON OTHER REQUIRED DISCLOSURES  
The Disclosure Statement has no effect on other disclosures required.

Sec. 34.70.080...WRITTEN AGREEMENT

Sec. 34.70.090...ESCROW AGENTS  
Escrow agents are not an agent of the seller or buyer unless express written agreement authorizes them to do so.

Sec. 34.70.100...DUTIES OF BROKER  
Broker who has obtained offer from seller to deliver the Disclosure Statement to the buyer.

Sec. 34.70.120...FAILURE TO COMPLY  
Anyone who willfully violates this duty outlined by this chapter is liable to the amount of the damages suffered as a result of the violation.

Sec. 34.70.200...DEFINITIONS

#### SUMMARY

This legislation does not deal with enforcement aspects, rather it relies on self-enforcement, and provides a more solid basis for someone to gain remedy in the court system. It provides protection for seller and the buyer.



Official Business

# Alaska State Legislature

## HOUSE OF REPRESENTATIVES

Kevin "Pat" Parnell

Room 128

State Capitol  
Juneau, AK 99801-1182

465-2647

To: House Labor & Commerce Committee Members  
Fr: Rep. Kevin "Pat" Parnell  
Dt: March 12, 1992

Re: Subcommittee Changes to HB 398

### I. CHANGE IN TITLE

- A. Inserted "residential" before "real property."
  - 1. Wanted to affect residential properties only.
- B. Replaced "sales" with "transfers."
  - 1. "Transfers" covers more transactions; "sales" can be limited in application.

### II. TRANSFEROR/TRANSFeree

- A. Changed "seller" to be that of "transferor" and "buyer" to be that of "transferee."
  - 1. Rationale being that it is more broad, and allows that some people involved will be just transferring interest in property, and the change allows for them to fall under this act.

### III. Sec. 34.70.010. DISCLOSURES REQUIRED.

- A. (a) changed "the" to "that," before "transferor's interest."
- B. Deleted "that is used as a residence."
- C. Deleted (c): would eliminate banks to being involved in this process, when the primary purpose of the bank is financing.
  - 1. If a bank was selling property, it would fall under this Act as a "transferor."

### IV. REWORDING OF of Sec. 34.70.030. LIABILITY FOR ERRORS AND OMISSIONS.

- A. Reworded the section to eliminate (c), and place the level of care as "due diligence," instead of "ordinary care."

### V. Sec. 34.70.040. SUBSEQUENT EVENTS & APPROXIMATIONS

- A. Removed "not" from last line of (a), before "required to..." making the transferor required to deliver the amendment to the disclosure statement to the transferee.

VI. Sec. 34.70.050. FORM OF DISCLOSURE STATEMENT

- A. Added "Built-in" to Microwave.
  - 1. Some people would have microwaves brought in with them.
- B. Added Line 11, "that the property is located in a flood plain, avalanche area, high wind area, permafrost area, or earthquake zone.

VII. DELETED Sec.34.70.090. ESCROW AGENTS.

- A. Felt that escrow agents should not be included, as they fell outside the scope of this legislation.

VIII. Sec. 34.70.100. DUTIES OF BROKER.

- A. Inserted "or more" to first line.
- B. Added (d) to include the "listing agent."

IX. Sec. 34.70.200. DEFINITIONS.

- A. Added definitions for "residential property," and replaced "sales" with "transfers."

X. SECTION 2.

- A. Added (I) to AS 08.88.071(a), which gives the Real Estate Commission of Occupational Licensing the authority to determine if a real estate agent's license should be revoked or suspended for violating 34.70.100.



Official Business

# Alaska State Legislature

## HOUSE OF REPRESENTATIVES

Kevin "Pat" Parnell

Room 128

State Capitol  
Juneau, AK 99801-1182

465-2647

TO: Rep. David Finkelstein, Chair  
House Labor & Commerce Committee

FROM: Rep. Kevin "Pat" Parnell

DATE: March 9, 1992

RE: HB398

This is a letter prepared in response to the questions posed from your previous correspondence of March 5. As for your question, "if a seller or agent makes an innocent misrepresentation on the form, and exercised due diligence in obtaining the information included on the form, the seller is not liable." This is true and not as intended. The intent of this section is to protect someone if they do everything within their power and knowledge to gain information needed on the disclosure statement.

This point is emphasized in Bevins v. Ballard (AK 655 P.2d 757) of which I have provided a copy for you. In this case, the court said that "Purchaser who relies on a material misrepresentation of a real estate broker, even though innocently made, has a cause of action against broker," (Pg. 758). In quoting Cousineau v. Walker, 613 P.2d, 608, 615 n. 14 (AK 1980), stated that "the owner of land must therefore be truthful and informed in making any representations, for fraud includes the pretense of knowledge where there is none."

The amendment that your office provided, concerning section 34.70.030, DISCLOSURE LIABILITY, is therefore, acceptable, without (b). This should handle all our concerns.

To address your question concerning section 34.70.120 of the CS which seemed unclear concerning the possibility of punitive damages. AS 45.50.531(a) allows the person affected to get treble damages. I would like to borrow the wording from this statute, and allow for damages incurred (including court and attorney costs) for someone who "negligently" violates this chapter, and treble damages for a person who "wilfully" violates it. This would allow flexibility.

Your suggested amendment for page 6, line 20, might have merit to it, and if the committee is more approachable with that idea, I have no problem. I feel that if the need arises to add something in the future, the legislature can handle it.

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

Page 2 of 2

March 10, 1992

Letter to Rep. Finkelstein, re: HB398

On the question, "if the seller's statements are not warranties, what are they?" They are part of the disclosure statement. They can be used as an express warranty, if the two parties agree. Then the parties involved can attach the document to the contract and make it a part of the contract process.

Question #2, if the seller's disclosure form is not part of the contract of sale, why not? If the parties want it to be a part of the contract, they can. The intent of the law is for disclosure. Question #3 in the agents can be misled by clients, and if they are and they have done everything within their power, they need not be penalized. This will happen in a only small number of cases, because the agent is being held to a higher level of performance, therefore a higher duty. Question #4 refers to condominiums, and that can be answered in the definition section of this bill, in referring to "single family dwellings," but we may want to add "...including condominiums, but not apartment rental buildings."

I appreciate your time and effort in this matter. I hope that this answers your questions.



# Alaska State Legislature

## HOUSE OF REPRESENTATIVES

Official Business

State Capitol  
Juneau, AK 99801-1182

TO: Rep. Pat Parnell  
FROM: Rep. David Finkelstein  
DATE: March 5, 1992  
SUBJECT: HB 398

Thank you for your work with the House Labor and Commerce subcommittee on HB 398. At our private meeting before the bill was first heard and during the committee hearing, I expressed my concern that a seller's liability would decrease if the seller stated on the form that he or she was not aware of any problems with the property. While the draft CS resolves many issues raised by the committee, I remain concerned that the bill will reduce sellers' liability in ways that are not fair to buyers.

My aide, Catherine, has discussed the draft CS with Terry Bannister. This is our understanding of the impact of the bill on sellers' and agents' liability. Current law, including case law, holds the seller and the agent liable for innocent misrepresentation of the condition of the property. In other words, if the seller says the foundation is fine and the seller sincerely believes the statement is true, the seller is still liable if the foundation turns out to be damaged. Similarly, if an agent tells the buyer the foundation is in good condition and believes it, the agent is liable for the mistake.

Section 34.70.030 of the draft CS changes the liability situation. Under the terms of the bill, if a seller or agent makes an innocent misrepresentation on the form, and exercised due diligence in obtaining the information included on the form, the seller or agent is not liable. It will be up to the courts to define due diligence.

If a seller states that he is not aware of any significant defects in a building's insulation, and the buyer discovers the insulation is ruined, the court may make the following decisions. First, the court will decide if the seller's statement that he was not aware of the problem was true. If the statement accurately described the seller's level of knowledge of the property, the court might decide that there was no misrepresentation, and therefore, no liability.

On the other hand, the court might decide that even though the statement was accurate, there was a misrepresentation on the disclosure form, because the disclosure form leads buyers to think the insulation is fine. In that case, section 34.70.030 would apply and the court would decide if the seller had exercised due diligence in learning about the insulation. If the seller had, the seller would not be liable for the insulation.

Finally, section 34.70.120 of the CS says that a person who willfully or negligently violates the provisions of the bill is liable for the amount of actual damages suffered by the buyer. Terry Bannister says that this section does not prevent the court from awarding court costs. However, it is unclear whether the bill allows the award of punitive damages. You may want to make it clear that the buyer can be compensated in these additional ways. As it is, the seller does not have much to lose by lying on the disclosure form.

Thank you for considering these issues.



Official Business

# Alaska State Legislature

## HOUSE OF REPRESENTATIVES

Kevin "Pat" Parnell

Room 128

State Capitol  
Juneau, AK 99801-1182

465-2647

TO: Rep. David Finkelstein, Chair  
House Labor & Commerce Committee

FROM: Rep. Kevin "Pat" Parnell *Kevin Parnell*

DATE: 1/22/92

RE: Proposed Amendments to House Bill 398

### Amendment #1

Section 1, Page 2, under TERMINATION OF OFFER

Line 7: After "that is...as soon as practical before execution of contract. For purposes of this paragraph, "execution" means the making or acceptance of an offer [SUBSTANTIAL ENOUGH TO EFFECT THE SALE, IS DELIVERED TO THE BUYER AFTER THE BUYER HAS MADE A WRITTEN OFFER TO PURCHASE REAL PROPERTY].

### Amendment #2

Section 1, Page 2, under LIABILITY FOR ERRORS OR EMISSIONS

Line 13 add and/or [AND]; Line 16, #1, add and/or [AND]; line 19, after "agency or by other [A]"; and line 21, #3, add and/or [AND].

### Amendment #3

Section 1, Part C, page 5, under SELLER INFORMATION

Line 30, add #10 Is this property located in a flood plain, avalanche area, high wind area, permafrost area, or earthquake zone.

{Note: Renumbering needed after this point}.

### Amendment #4

Section 1, Part C, page 6, under SELLER INFORMATION

Line 2, add #13 to read as follows: Has this property ever been used in the commission of a felony or drug-related crime.

Amendment #5

Section 1, Part C, Page 6, under SELLER INFORMATION

Line 4, add #14 to read as follows: Have any violent crimes occurred on the property.

Amendment #6

Section 3, Page 7, to read as follows: This act takes effect January 1, 1993

Amendment #7

Concerning all Yes or No spaces, add Unknown space.

DONLEY

1. "What effort is made to educate the private transactors?"

ANN BOUDREAUX

1. "What does before the sale mean? (1.8)
  - a. Need to define before the sale.
2. Substantial Enough (2.7)
  - a. Our Amendment takes care of this problem.
  - b. Bruckman also has problems with this.
3. The seller is not required... (2.26)
  - a. They should be required.
4. Seller and Agent
  - a. Amendment takes care of this one.
5. The broker who obtained, and ... (7.9)
  - a. Should have and listing agent.
  - b. Bruckman also has problem with it.
6. If they fail to get disclosure is there a penalty?
  - a. Need to get a disciplinary action.
7. Do the realtors need to get a written out, if they find out that something is wrong?
  - a. Yes, they do..."Brokers, in turn, can protect themselves from liability by investigating the owner's statements,...by requiring the seller to sign at the time of listing a statement which will be made, certifying that they are true and provide for indemnification if they are not." (BEVINS & BALLARD, 655 P.2d 757, [AK 1982]).

KONRAD REINKE

1. Place "transferor" and "transferee" in place of "buyer" and "seller."
  - a. Will not change; complicates the matter.
2. Delete Lender provision (1.13-2.5).
3. Change "substantial" and eliminate "material" line.
  - a. Amendment takes care of first and the last is reasonable.
4. Removing Line 26, page 6. No demand by the bill to require the agent to have a higher level of quality.
  - a. They want blanket covering [See above #7].
  - b. Believes that it increases liability to the realtors.

5. Delete Sec. 34.70.090 Escrow Agents
  - a. No reason given.
  - b.
6. Delete Sec. 34.70.200 Definitions
  - a. Why?

BILL MC NALL

1. Why is it not a warranty? Put in a disclaimer.
  - a. Answer: not a warranty, Sec. 45.02.313.
  - b. Spoke to legal and found out that the courts do not want to follow this as this is the "Uniform Commercial Code" which handles everything but property, but they have applied it to the use of real property sells.
2. In Wyoming, there is a law that if the problem is under \$2000 or less, then the person is not allowed to rescind the contract.
  - a. If the problem was above \$2000, they still would not be able to rescind, because the problem would have been obvious and the disclosure statement allows for that to affect the sale, which it would.
3. "Ordinary Care" to "Due Diligence"
  - a. Not a problem, willing to change.
4. Zoning problems, etc., the average person will not have this.
5. GOOD FAITH. Covered in the Uniform Commercial Code.

BETTY BRUCKMAN

1. Major concern is the felony line and drug line; wishes for it to be deleted.
  - a. Not a problem, what we wanted from the first place.

A M E N D M E N T #1

OFFERED IN THE HOUSE

BY REPRESENTATIVE PARNELL

TO: CSHB 398 ( ) (7-LS1569J, dated 3/2/92)

Page 7, line 11:

Delete "wilfully or"

Page 7, following line 13:

Insert a new subsection to read:

"(c) A person who wilfully violates this chapter or fails to perform a duty required by this chapter is liable to the transferee for up to three times the actual damages suffered by the transferee as a result of the violation or failure."

(d) In addition to the damages allowed under (b) or (c) of this section, a court may also award the transferee costs and attorney fees to the extent allowed under the rules of court.

A M E N D M E N T #2

OFFERED IN THE HOUSE

BY REPRESENTATIVE FINKELSTEIN

TO: CSHB 398 ( ) (7-LS1569J, dated 3/2/92)

Page 1, line 1:

Delete "requiring certain"

Insert "relating to"

Page 2, lines 5 - 12:

Delete (a) and insert:

"Sec. 34.70.030. DISCLOSURE LIABILITY. (a) A transferor is not liable for a defect or other condition in the real property or the real property interest being transferred if the transferor discloses the existence of the defect or condition in the disclosure statement.

OK

Amendment # 3

Page 9, line 4, following "transfers of  
Insert "interests in"

AMENDMENT #4

OFFERED IN THE HOUSE

BY REPRESENTATIVE FINKELSTEIN

TO: CSHB 398 ( ) (7-LS1569J, dated 3/2/92)

Page 2, line 24:

Delete "The"

Insert "(a) Except as provided by (b) of this section, the"

Page 6, following line 20:

Insert a new subsection to read:

"(b) The Department of Commerce and Economic Development may by regulation adopted under AS 44.62 (Administrative Procedure Act) add disclosures to the disclosure statement contained in (a) of the section when the department determines that the additional disclosures are necessary."

A M E N D M E N T

#5

OFFERED IN THE HOUSE

BY REPRESENTATIVE PARNELL

TO: CSHB 398( ) (7-LS1569M, dated 3/11/92)

Page 7, following line 16:

Insert a new paragraph to read:

"(2) "real property" includes units in real property subject to AS 34.07 or AS 34.08;"

Renumber the following paragraphs accordingly.

7-LS1569J  
Bannister  
3/2/92

CS FOR HOUSE BILL NO. 398 ( )  
IN THE LEGISLATURE OF THE STATE OF ALASKA  
SEVENTEENTH LEGISLATURE - SECOND SESSION

BY

Offered:  
Referred:

Sponsor(s): REPRESENTATIVES PARNELL, Gruenberg, B.Davis

A BILL  
FOR AN ACT ENTITLED

1 "An Act requiring certain disclosures in residential real property transfers; and providing  
2 for an effective date."

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

4 \* Section 1. AS 34 is amended by adding a new chapter to read:

5 CHAPTER 70. DISCLOSURES IN RESIDENTIAL REAL PROPERTY TRANSFERS.

6 Sec. 34.70.010. DISCLOSURES REQUIRED. (a) A transferor of that transferor's  
7 interest in residential real property shall complete and deliver to the transferee before the  
8 transferee makes a written offer a disclosure statement in the form set out in AS 34.70.050.

9 (b) The disclosure statement shall be delivered to the transferee by personal delivery or  
10 mail. Delivery to the spouse of the transferee constitutes delivery to the transferee unless the  
11 transferor and the transferee agree otherwise before the delivery.

12 Sec. 34.70.020. TERMINATION OF OFFER. If a disclosure statement, or an  
13 amendment of the disclosure statement that is material enough to affect the transfer, is delivered  
14 to the transferee after the transferee has made a written offer to purchase residential real property,

1 the transferee may terminate the offer by delivering a written notice of termination to the  
 2 transferor or the transferor's agent within three days after the disclosure statement or amendment  
 3 is delivered in person or within five days after the disclosure statement or amendment is  
 4 delivered by deposit in the mail.

5 Sec. 34.70.030. LIABILITY FOR ERRORS OR OMISSIONS. (a) A transferor is not  
 6 liable for an error, inaccuracy, or omission in the information provided in the disclosure statement  
 7 if the transferor did not have personal knowledge of the error, inaccuracy, or omission, and the  
 8 transferor exercised due diligence in obtaining and transmitting the information.

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

13 Sec. 34.70.040. SUBSEQUENT EVENTS AND APPROXIMATIONS. (a) If  
 14 information disclosed in a disclosure statement becomes inaccurate as a result of an act or  
 15 agreement after the disclosure statement is delivered to the transferee, the resulting inaccuracy  
 16 does not violate this chapter and the transferor is required to deliver an amendment for the  
 17 disclosure statement to the transferee.

18 (b) If an item that is required in the disclosure statement is unknown or is unavailable  
 19 to the transferor, and if the transferor or the transferor's agent has made a reasonable effort to  
 20 ascertain the information, the transferor may insert an approximation of the information. The  
 21 approximation must be reasonable, clearly identified as an approximation, based on the best  
 22 information available to the transferor or the transferor's agent, and not used to avoid the  
 23 requirements of this chapter.

24 Sec. 34.70.050. FORM OF DISCLOSURE STATEMENT. The disclosure statement must  
 25 read as follows:

26 RESIDENTIAL REAL PROPERTY TRANSFER DISCLOSURE STATEMENT  
 27 THIS DISCLOSURE STATEMENT CONCERNS THE RESIDENTIAL REAL PROPERTY  
 28 LOCATED IN THE CITY OF \_\_\_\_\_, \_\_\_\_\_ JUDICIAL DISTRICT, STATE  
 29 OF ALASKA, DESCRIBED AS \_\_\_\_\_. THIS STATEMENT  
 30 IS A DISCLOSURE OF THE CONDITION OF THE ABOVE DESCRIBED PROPERTY IN  
 31 COMPLIANCE WITH AS 34.70. IT IS NOT A WARRANTY OF ANY KIND BY THE

1 TRANSFEROR(S) OR ANY AGENT(S) REPRESENTING ANY PRINCIPAL(S) IN THIS  
 2 TRANSACTION AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR  
 3 WARRANTIES THE PRINCIPAL(S) MAY WISH TO OBTAIN

4 I

5 TRANSFEROR INFORMATION

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

11 THE FOLLOWING ARE REPRESENTATIONS MADE BY THE TRANSFEROR(S)  
 12 AND ARE NOT THE REPRESENTATIONS OF THE AGENT(S), IF ANY. THIS  
 13 INFORMATION IS A DISCLOSURE AND IS NOT INTENDED TO BE PART OF A  
 14 CONTRACT BETWEEN THE TRANSFEREE AND TRANSFEROR.

15 Transferor \_\_\_ is \_\_\_ is not occupying the property.

16 A. The subject property has the items checked below:

- |    |  |   |
|----|--|---|
| 17 | <input type="checkbox"/> Range                 | <input type="checkbox"/> Washer/Dryer Hookups   |
| 18 | <input type="checkbox"/> Oven                  | <input type="checkbox"/> Window Screens         |
| 19 | <input type="checkbox"/> Built-in Microwave    | <input type="checkbox"/> Rain Gutters           |
| 20 | <input type="checkbox"/> Dishwasher            | <input type="checkbox"/> Burglar Alarms         |
| 21 | <input type="checkbox"/> Trash Compactor       | <input type="checkbox"/> Smoke Detector(s)      |
| 22 | <input type="checkbox"/> Garbage Disposal      | <input type="checkbox"/> Fire Alarm             |
| 23 | <input type="checkbox"/> T.V. Antenna          | <input type="checkbox"/> Number Remote Controls |
| 24 | <input type="checkbox"/> Satellite Dish        | <input type="checkbox"/> Garage: Attached       |
| 25 | <input type="checkbox"/> Intercom              | <input type="checkbox"/> Garage: Not Attached   |
| 26 | <input type="checkbox"/> Central Heating       | <input type="checkbox"/> Carport                |
| 27 | <input type="checkbox"/> Central Air Cndng     | Pool/Spa Heater: <input type="checkbox"/> Gas   |
| 28 | <input type="checkbox"/> Evaporator Cooler(s)  | <input type="checkbox"/> Solar                  |
| 29 | <input type="checkbox"/> Wall/Window Air Cndng | <input type="checkbox"/> Electric Water         |
| 30 | <input type="checkbox"/> Sprinklers            | Heater: <input type="checkbox"/> Gas            |
| 31 | <input type="checkbox"/> Public Sewer System   | Water Supply: <input type="checkbox"/> City     |



- 1                    1. substances, materials, or products that may be an environmental hazard
- 2                    such as asbestos, formaldehyde, radon gas, lead based paint, fuel or chemical storage
- 3                    tanks, and contaminated soil or water on the subject property . . . . .  Yes  No
- 4                    2. features of the property shared in common with adjoining landowners,
- 5                    such as walls, fences, and driveways, whose use or responsibility for maintenance may
- 6                    have an effect on the subject property . . . . .  Yes  No
- 7                    3. encroachments, easements, or similar matters that may affect your
- 8                    interest in the subject property . . . . .  Yes  No
- 9                    4. room additions, structural modifications, or other alterations or repairs
- 10                   made without necessary permits . . . . .  Yes  No
- 11                   5. room additions, structural modifications, or other alterations or repairs
- 12                   not in compliance with building codes . . . . .  Yes  No
- 13                   6. landfill (compacted or otherwise) on the property or any portion of the
- 14                   property . . . . .  Yes  No
- 15                   7. settling from any cause, or slippage, sliding, or other soil problems
- 16                   . . . . .  Yes  No
- 17                   8. flooding, drainage, or grading problems . . . . .  Yes  No
- 18                   9. major damage to the property or any of the structures from fire,
- 19                   earthquakes, floods, or landslides . . . . .  Yes  No
- 20                   10. zoning violations, nonconforming uses, violations of setback
- 21                   requirements . . . . .  Yes  No
- 22                   11. that the property is located in a flood plain, avalanche area, high wind
- 23                   area, permafrost area, or earthquake zone . . . . .  Yes  No
- 24                   12. neighborhood noise problems or other nuisances . . . . .  Yes  No
- 25                   13. deed restrictions or obligations . . . . .  Yes  No
- 26                   14. homeowners' association that has authority over the subject
- 27                   property . . . . .  Yes  No
- 28                   15. common areas (facilities such as pools, tennis courts, walkways, or
- 29                   other areas co-owned in undivided interest with others) . . . . .  Yes  No
- 30                   16. notices of abatement or citations against the property . . .  Yes  No
- 31                   17. lawsuits against the transferor threatening to affect or affecting this

1 real property ..... Yes No

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

3 \_\_\_\_\_  
4 \_\_\_\_\_  
5 \_\_\_\_\_

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

8 Transferor \_\_\_\_\_ Date \_\_\_\_\_

9 Transferor \_\_\_\_\_ Date \_\_\_\_\_

10 II

11 TRANSFEREE(S) AND TRANSFEROR(S) MAY WISH TO OBTAIN PROFESSIONAL  
12 ADVICE AND/OR INSPECTIONS OF THE PROPERTY AND TO PROVIDE FOR  
13 APPROPRIATE PROVISIONS IN A CONTRACT BETWEEN TRANSFEREE(S) AND  
14 TRANSFEROR(S) WITH RESPECT TO ADVICE/INSPECTIONS/DEFECTS.

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

16 Transferor \_\_\_\_\_ Date \_\_\_\_\_ Transferee \_\_\_\_\_ Date \_\_\_\_\_

17 Transferor \_\_\_\_\_ Date \_\_\_\_\_ Transferee \_\_\_\_\_ Date \_\_\_\_\_

18 Agent Representing Transferor \_\_\_\_\_ By \_\_\_\_\_ Date \_\_\_\_\_

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

21 Sec. 34.70.060. GOOD FAITH. A person who makes a disclosure or performs an act  
22 under this chapter shall do so in good faith.

23 Sec. 34.70.070. EFFECT ON OTHER REQUIRED DISCLOSURES. The requirements  
24 of this chapter do not affect other obligations for disclosure required by law.

25 Sec. 34.70.080. WRITTEN AMENDMENT. An amendment to a disclosure statement  
26 must be in writing.

27 Sec. 34.70.100. DUTIES OF BROKER. (a) If one or more licensed real estate brokers  
28 are acting as agents in a transfer subject to this chapter, the broker who has obtained the offer  
29 made by the transferee shall, except as otherwise provided in this chapter, deliver the disclosure  
30 statement required by this chapter to the transferee unless the transferor gives other written  
31 instructions for delivery.

1 (b) If a real estate broker who is responsible for delivering the disclosure statement under  
2 this chapter cannot obtain the disclosure document from the transferor and does not have written  
3 assurance from the transferee that the disclosure statement has been received, the broker shall  
4 advise the transferee in writing that the transferee has the right to receive the disclosure  
5 statement.

6 (c) A real estate broker who is responsible for delivering the disclosure statement under  
7 this chapter shall maintain a record of the action taken by the broker to comply with this chapter.

8 (d) In this section, "real estate broker" includes a listing agent.

9 Sec. 34.70.120. FAILURE TO COMPLY. (a) A transfer that is subject to this chapter  
10 is not invalidated solely because a person fails to comply with this chapter.

11 (b) A person who wilfully or negligently violates this chapter or fails to perform a duty  
12 required by this chapter is liable to the transferee for the amount of the actual damages suffered  
13 by the transferee as a result of the violation or failure.

14 Sec. 34.70.200. DEFINITIONS. In this chapter,

15 (1) "disclosure statement" means the disclosure statement required by  
16 AS 34.70.010;

17 (2) "residential real property" means real property whose primary purpose is to  
18 provide a single-family dwelling;

19 (3) "transfer" means transfers by sale, exchange, installment land sale contract,  
20 lease with an option to purchase, other option to purchase, or a ground lease coupled with  
21 improvements.

22 \* Sec. 2. AS 08.88.071(a) is amended to read:

23 (a) The commission shall

24 (1) pass on qualifications of applicants for licenses and issue licenses to those  
25 who qualify;

26 (2) prepare and grade examinations;

27 (3) after hearing, have the authority to suspend or revoke the license of a licensee  
28 who

29 (A) with respect to a real estate transaction

30 (i) made a substantial misrepresentation;

31 (ii) made a false promise likely to influence, persuade, or induce;

1 (iii) in the case of a real estate broker, pursued a flagrant course  
2 of misrepresentation or made a false promise through an agent, associate real  
3 estate broker, or real estate salesman;

4 (iv) has engaged in conduct that is fraudulent or dishonest;

5 (v) violates AS 08.88.391;

6 (B) procures a license by deceiving the commission, or aids another to do  
7 so;

8 (C) has engaged in conduct in which the commission had no knowledge  
9 at the time the licensee was licensed demonstrating the licensee's unfitness to engage in  
10 the business for which the licensee is licensed;

11 (D) knowingly authorizes, directs, connives at or aids in publishing,  
12 distributing, or circulating a material false statement or misrepresentation concerning the  
13 licensee's business or concerning real estate for sale in the licensee's business in this or  
14 any other state;

15 (E) if a real estate broker, wilfully violates AS 08.88.171(d) or 08.88.291;

16 (F) if an associate real estate broker, claims to be a real estate broker, or,  
17 if a real estate salesman, claims to be a real estate broker or associate real estate broker;

18 (G) if a real estate broker, employs an unlicensed associate real estate  
19 broker or real estate salesman;

20 (H) if an associate real estate broker or real estate salesman, fails  
21 immediately to turn money collected in a real estate transaction over to the employing  
22 real estate broker;

23 (I) violates the licensee's obligations under AS 34.70.100 and the  
24 violation occurs under circumstances that the commission determines by regulation  
25 justifv the suspension or revocation of the license;

26 (4) prosecute, through the Department of Law, violations of the provisions of this  
27 chapter or lawful regulations adopted under this chapter;

28 (5) publish, on three consecutive weekends in a newspaper of general circulation  
29 in the locale of the offending person's principal office licensed under this chapter, [ANY]  
30 disciplinary action taken by the commission against a person licensed under this chapter;

31 (6) issue a temporary permit to the personal representative of the estate of a

1       deceased broker or to some other person designated by the commission with the approval of the  
2       personal representative of the estate [,] in order to secure proper administration in concluding the  
3       affairs of the decedent broker's real estate business.

4   \* Sec. 3. This Act applies to transfers of residential real property that occur on or after January 1,  
5 1993.

6   \* Sec. 4. This Act takes effect January 1, 1993.

Page 8, lines 23-24

Delete "and the violation occurs"

Page 8, line 24:

Delete "by regulation"

Not adopted  
by HLC



**Southeast Board of Realtors**

P.O. Box 2646  
Juneau, Alaska 99803

HB 398

Dan, a suggested change that might/should help clarify intent

**CHAPTER 70. DISCLOSURES IN RESIDENTIAL REAL PROPERTY TRANSFERS**

Sec 34.70.010 (a) A transferor of residential real property, as more specifically set in AS 30.70.020 (new section titled TRANSFERS COVERED) shall complete and deliver.....

**New Section**

Sec 34.70.020. TRANSFERS COVERED. The provisions of this chapter apply only to transfers of one (1) to four (4) residential dwelling units by sale, exchange, installment land sale contract, lease with an option to purchase, other option to purchase, or ground lease coupled with improvements.

*Kenwood*

**THE FOLLOWING PAGES MAY  
NOT FILM LEGIBLY BECAUSE OF  
THE POOR QUALITY OF THE ORIGINAL**

Sec 34.70.010

~~(c) The provisions of subsection (a) of this section apply only with respect to transfers by sale, exchange, installment land sale contract, lease with an option to purchase, any other option to purchase or ground lease coupled with improvements, of real property, or of units in common interest communities or cooperatives improved with or consisting of not less than one (1) nor more than four (4) dwelling units.~~

Sec. 34.70.030. LIABILITY FOR ERRORS OR OMISSIONS. (2) A transferor or the transferor's agent is not liable for an error, inaccuracy, or omission in the information provided in the disclosure statement if

(1) with regard to the liability of

(A) the transferor, the transferor did not have personal knowledge of the error, inaccuracy, or omission, and the transferor exercised ordinary care in obtaining and transmitting the information; or

(B) the agent, the agent did not have personal knowledge of the error, inaccuracy, or omission, and the agent exercised ordinary care in transmitting the information; or

(2) the error, inaccuracy, or omission was based on information provided by a public agency, an expert, or another person, if the other person is capable of providing the information.

(b) A report or opinion prepared by a licensed engineer, licensed land surveyor, geologist, construction contractor, or other expert that deals with matters within the scope of the expert's license or expertise, satisfies (a)(2) of this section if the information is provided in response to a written or oral request for the information. When responding to the request, the expert may indicate in writing the expert's understanding that the information provided will be used to satisfy the disclosure requirement established by AS 34.70.010 and may indicate the required disclosures or parts of required disclosures to which the information being furnished applies. \*

HOUSE BILL NO. 398

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY REPRESENTATIVES PARNELL, Gruenberg

Introduced: 1/14/92

Referred: Labor & Commerce, Judiciary

A BILL

FOR AN ACT ENTITLED

1 "An Act requiring certain disclosures in real property sales; and providing for an effective  
2 date."<sup>H</sup>

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

4 \* Section 1. AS 34 is amended by adding a new chapter to read:

5 CHAPTER 70. DISCLOSURES IN REAL PROPERTY SALES.

6 Sec. 34.70.010. DISCLOSURES REQUIRED. (a) <sup>THE TRANSFEROR OF</sup> A person who sells the person's  
7 interest in improved residential<sup>!</sup> real property <sup>!</sup>that is used as a residence<sup>!</sup> shall complete and  
8 deliver to the prospective buyer before the sale a disclosure statement in the form set out in  
9 AS 34.70.050.

10 (b) The disclosure statement shall be delivered to the <sup>Transfer</sup> [buyer] by personal delivery or mail.  
11 Delivery to the spouse of the <sup>TRANSFEREE</sup> [buyer] constitutes delivery to the <sup>TRANSFEREE</sup> [buyer] unless the <sup>TRANSFEREE</sup> [seller] and the  
12 buyer agree otherwise before the delivery. <sup>TRANSFEREE</sup>

13 \* <sup>STRIKE OUT</sup> (c) If a person who proposes to lend money to another person for the purchase of real  
14 property that is in a multiple unit development governed by AS 34.07 or AS 34.08 discovers a

<sup>AND SUBSTITUTE OUR WORDING</sup>

1 physical defect in the sale property, the prospective lender shall disclose the defect to the  
2 managing organization of the development in which the sale property is located. The disclosure  
3 shall be made within one week of the discovery or before the loan is finalized, whichever is  
4 earlier. In this subsection, "lender" includes the employees of the lender and a person who  
5 contracts with the lender to provide services that are related to the making of the loan.

6 Sec. 34.70.020. TERMINATION OF OFFER. If a disclosure statement, or an  
7 amendment of the disclosure statement that is substantial enough to affect the sale, is delivered  
8 to the <sup>TRANSFER</sup> buyer after the <sup>TRANSFER</sup> buyer has made a written offer to purchase <sup>AN INTEREST IN</sup> real property, the <sup>TRANSFER</sup> buyer may  
9 terminate the offer by delivering a written notice of termination to the <sup>TRANSFER</sup> seller or the <sup>TRANSFER</sup> seller's agent  
10 within three days after the disclosure statement or amendment is delivered in person or within  
11 five days after the disclosure statement or amendment is delivered by deposit in the mail. In this  
12 section, "material" means important enough to affect the sale.

13 Sec. 34.70.030. LIABILITY FOR ERRORS OR OMISSIONS. The seller <sup>and or</sup> and the seller's  
14 agent <sup>MEANS ERROR OR TRANS</sup> are not liable for an error, inaccuracy, or omission in the information provided in the  
15 disclosure statement if the <sup>under</sup>

16 (1) seller <sup>and</sup> and agent did not have personal knowledge of the error, inaccuracy, or  
17 omission;

18 (2) error, inaccuracy, or omission was based on information provided by a public  
19 agency or by a person who is an expert with regard to the information, including an engineer,  
20 architect, or land surveyor; and

21 (3) seller and agent exercised ordinary care in obtaining and transmitting the  
22 information.

23 Sec. 34.70.040. SUBSEQUENT EVENTS AND APPROXIMATIONS. (a) If  
24 information disclosed in a disclosure statement becomes inaccurate as a result of an act or  
25 agreement after the disclosure statement is delivered to the <sup>TRANSFER</sup> buyer, the resulting inaccuracy does  
26 not violate this chapter and the <sup>TRANSFER</sup> seller is not required to deliver an amended disclosure statement  
27 to the <sup>TRANSFER</sup> prospective buyer.

28 (b) If at the time a disclosure statement is required to be delivered to a <sup>PROSPECTIVE TRANSFER</sup> buyer, an item of  
29 information that is required to be included in the statement is unknown or is not available to the  
30 <sup>TRANSFER</sup> seller and if the <sup>TRANSFER</sup> seller or the <sup>TRANSFER</sup> seller's agent has made a reasonable effort to ascertain the  
31 information, the <sup>TRANSFER</sup> seller may insert an approximation of the information. The approximation must

DELETE  
AND SUBSTITUTE  
Copy to substitute

1 be reasonable, clearly identified as an approximation, based on the best information available  
2 the ~~seller or the seller's agent~~, and <sup>may be</sup> not used to avoid the requirements of this chapter.

3 <sup>Form 1-1-80</sup> Sec. 34.70.050. FORM OF DISCLOSURE STATEMENT. The disclosure statement may  
4 read as follows:

5 REAL ESTATE TRANSFER DISCLOSURE STATEMENT

6 THIS DISCLOSURE STATEMENT CONCERNS THE REAL PROPERTY LOCATED IN THE  
7 CITY OF \_\_\_\_\_, \_\_\_\_\_ JUDICIAL DISTRICT, STATE OF ALASKA  
8 DESCRIBED AS \_\_\_\_\_ THE

9 STATEMENT IS A DISCLOSURE OF THE CONDITION OF THE ABOVE-DESCRIBE  
10 PROPERTY IN COMPLIANCE WITH AS 34.70. IT IS NOT A WARRANTY OF ANY KIND  
11 BY THE SELLER(S) OR ANY AGENT(S) REPRESENTING ANY PRINCIPAL(S) IN THIS  
12 TRANSACTION AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR  
13 WARRANTIES THE PRINCIPAL(S) MAY WISH TO OBTAIN

14 I

15 <sup>TRANSFEROR</sup> SELLER INFORMATION

16 The <sup>TRANSFEROR</sup> [Seller] discloses the following information with the knowledge that even though this  
17 is not a warranty, prospective <sup>TRANSFERS</sup> Buyer[s] may rely on this information in deciding whether and on  
18 what terms to purchase the subject property. <sup>TRANSFEROR</sup> (Seller) hereby authorizes any agent(s) representing  
19 any principal(s) in this transaction to provide a copy of this statement to any person or entity in  
20 connection with any actual or anticipated <sup>TRANSFER</sup> sale of the property.

21 THE FOLLOWING ARE REPRESENTATIONS MADE BY THE <sup>TRANSFEROR</sup> (SELLER)(S) AND ARE  
22 NOT THE REPRESENTATIONS OF THE AGENT(S), IF ANY. THIS INFORMATION IS A  
23 DISCLOSURE AND IS NOT INTENDED TO BE PART OF A CONTRACT BETWEEN THE

24 <sup>TRANSFEROR</sup> (BUYER) AND <sup>TRANSFEROR</sup> (SELLER).

25 <sup>TRANSFEROR</sup> [Seller] is \_\_\_\_\_ is not occupying the property.

26 A. The subject property has the items checked below:

- 27  Range  Washer/Dryer Hookups
- 28  Oven  Window Screens
- 29  Microwave  Rain Gutters
- 30  Dishwasher  Burglar Alarms
- 31  Trash Compactor  Smoke Detector(s)

- 1  Garbage Disposal  Fire Alarm
- 2  T.V. Antenna  Number Remote Controls
- 3  Satellite Dish  Garage: Attached
- 4  Intercom  Garage: Not Attached
- 5  Central Heating — *TYPE*  Carport
- 6  Central Air Cndng Pool/Spa Heater:  Gas
- 7  Evaporator Cooler(s)  Solar
- 8  Wall/Window Air Cndng  Electric Water
- 9  Sprinklers *WATER* Heater:  ~~Gas~~ *TYPE*
- 10  Public Sewer System Water Supply:  City
- 11  Septic Tank  Well
- 12  Sump Pump  Private Utility or
- 13  Water Softener Other \_\_\_\_\_
- 14  Patio/Decking Gas Supply:  Utility
- 15  Built-in Barbecue  Bottled
- 16  Gazebo Exhaust Fan(s) in \_\_\_\_\_
- 17  Sauna 220 Volt Wiring in \_\_\_\_\_
- 18  Pool Fireplace(s) in \_\_\_\_\_
- 19  Spa  Hot Tub Gas Starter \_\_\_\_\_
- 20  Security Gate(s) Roof(s): Type \_\_\_\_\_
- 21  Auto Garage Door Opener(s) Age: \_\_\_\_\_ (approx.)

22

23 (Other: \_\_\_\_\_)

24 Are there, to the best of your <sup>TRANSPARENT</sup> (Seller's) knowledge, any of the above that are not in

25 operating condition?  Yes  No. If yes, then describe: (Attach additional sheets

26 if necessary): \_\_\_\_\_

27 \_\_\_\_\_

28 \_\_\_\_\_

29 \_\_\_\_\_

30 11. Are you (Seller) aware of any significant defects/malfunctions in any of the following?

31  Yes  No. If yes, check appropriate space(s) below.

1     \_\_\_ Interior Walls \_\_\_ Ceilings \_\_\_ Floors \_\_\_ Exterior Walls \_\_\_ Insulation \_\_\_ ?  
 2     \_\_\_ Windows \_\_\_ Doors \_\_\_ Foundation \_\_\_ Slab(s) \_\_\_ Driveways \_\_\_ Sid  
 3     \_\_\_ Walls/Fences \_\_\_ Electrical Systems \_\_\_ Plumbing/Sewers/Septics \_\_\_ Other  
 4     Structural Components (Describe: \_\_\_\_\_  
 5     \_\_\_\_\_

6             If any of the above is checked, explain. (Attach additional sheets if nece  
 7     \_\_\_\_\_  
 8     \_\_\_\_\_  
 9     \_\_\_\_\_

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

- 11            1. substances, materials, or products that may be an environmental hazard  
 12     such as asbestos, formaldehyde, radon gas, lead based paint, fuel or chemical storage  
 13     tanks, and contaminated soil or water on the subject property ..... \_\_\_ Yes\_\_\_  
 14            2. features of the property shared in common with adjoining landowners,  
 15     such as walls, fences, and driveways, whose use or responsibility for maintenance may  
 16     have an effect on the subject property ..... \_\_\_ Yes\_\_\_  
 17            3. encroachments, easements, or similar matters that may affect your  
 18     interest in the subject property ..... \_\_\_ Yes\_\_\_  
 19            4. room additions, structural modifications, or other alterations or repairs  
 20     made without necessary permits ..... \_\_\_ Yes\_\_\_  
 21            5. room additions, structural modifications, or other alterations or repairs  
 22     not in compliance with building codes ..... \_\_\_ Yes\_\_\_  
 23            6. landfill (compacted or otherwise) on the property or any portion of the  
 24     property ..... \_\_\_ Yes\_\_\_  
 25            7. settling from any cause, or slippage, sliding, or other soil problems  
 26     ..... \_\_\_ Yes\_\_\_  
 27            8. flooding, drainage, or grading problems ..... \_\_\_ Yes\_\_\_  
 28            9. major damage to the property or any of the structures from fire,  
 29     earthquakes, floods, or landslides ..... \_\_\_ Yes\_\_\_  
 30            10. zoning violations, nonconforming uses, violations of setback  
 31     requirements ..... \_\_\_ Yes\_\_\_

*Be aware with your proposed amendments to this section*

*[Handwritten initials]*

- 1 11. neighborhood noise problems or other nuisances .....      Yes      No
- 2 12. deed restrictions or obligations .....      Yes      No
- 3 13. homeowners' association that has authority over the subject
- 4 property .....      Yes      No
- 5 14. common areas (facilities such as pools, tennis courts, walkways, or
- 6 other areas co-owned in undivided interest with others) .....      Yes      No
- 7 15. notices of abatement or citations against the property ...      Yes      No
- 8 16. lawsuits against the seller threatening to or affecting this real
- 9 property .....      Yes      No

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

\_\_\_\_\_

Transferor \_\_\_\_\_ Transferee  
(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) Transferor

(Seller) Transferor \_\_\_\_\_ Date \_\_\_\_\_

(Seller) Transferor \_\_\_\_\_ Date \_\_\_\_\_

Transferee Transferor 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 Transferee BUYER AND Transferor SELLER(S) WITH RESPECT TO ADVICE/INSPECTIONS/DEFECTS.

I/WE ACKNOWLEDGE RECEIPT OF A COPY OF THIS STATEMENT

Seller Transferor \_\_\_\_\_ Date \_\_\_\_\_ Buyer Transferee \_\_\_\_\_ Date \_\_\_\_\_

Seller Transferor \_\_\_\_\_ Date \_\_\_\_\_ Buyer Transferee \_\_\_\_\_ Date \_\_\_\_\_

Agent Representing Seller \_\_\_\_\_ By \_\_\_\_\_ Date \_\_\_\_\_

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

Sec. 34.70.060. GOOD FAITH. A person who makes a disclosure or performs an act under this chapter shall do so in good faith.

Sec. 34.70.070. EFFECT ON OTHER REQUIRED DISCLOSURES. The requirements

1 of this chapter do not affect other obligations for disclosure required by law.

2 Sec. 34.70.080. WRITTEN AMENDMENT. An amendment to a disclosure state-  
3 must be in writing. *SUBSTITUTE CLERK*

4 Sec. 34.70.090. ESCROW AGENTS. A person, other than a real estate broker, who  
5 as an escrow agent for the transfer of real property whose sale is subject to this chapter is  
6 the agent of the <sup>Transferor</sup> seller or <sup>Transferee</sup> buyer under this chapter unless an express written agreement author-  
7 the person to act as an agent. The extent of the agency is governed by the written agreement.

8 Sec. 34.70.100. DUTIES OF BROKER. (a) If more than one licensed real estate broker  
9 is acting as an agent in a transfer subject to this chapter, the broker who has obtained the order  
10 made by the buyer shall, except as otherwise provided in this chapter, deliver the disclosure  
11 statement required by this chapter to the prospective buyer unless the seller gives other written  
12 instructions for delivery.

13 (b) If a real estate broker who is responsible for delivering the disclosure statement under  
14 this chapter cannot obtain the disclosure document from the seller and does not have written  
15 assurance from the buyer that the disclosure statement has been received, the broker shall advise  
16 the buyer in writing that the buyer has the right to receive the disclosure statement.

17 (c) A real estate broker who is responsible for delivering the disclosure statement under  
18 this chapter shall maintain a record of the action taken by the broker to comply with this chapter.

19 Sec. 34.70.120. FAILURE TO COMPLY. (a) The transfer of real property whose <sup>interest</sup> sale  
20 is subject to this chapter is not invalidated solely because a person fails to comply with this  
21 chapter.

22 (b) A person who wilfully or negligently violates this chapter or fails to perform a duty  
23 required by this chapter is liable to the <sup>Transferor</sup> buyer for the amount of the actual damages suffered by  
24 the <sup>Transferee</sup> buyer as a result of the violation or failure.

25 Sec. 34.70.200. DEFINITIONS. In this chapter,

26 (1) "disclosure statement" means the disclosure statement required by  
27 AS 34.70.010;

28 (2) "sale" includes an exchange, option to buy, or a lease with an option to  
29 buy.

30 • Sec. 2. This Act applies to sales of real property that occur on or after January 1, 1994. *July 1, 1992*

31 • Sec. 3. This Act takes effect January 1, 1994. *July 1, 1992*



*Re-write*

*Amend*

**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 10, 1992

**SUBJECT:** Liability of agents under CSHB 398( ) (7-LS1569J, dated 3/2/92)

**TO:** Representative Pat Parnell  
Attn: Dan

**FROM:** Theresa L. Bannister *TB*  
Legislative Counsel

You have asked whether sec. 34.70.030(b) in the above-identified bill decreases the liability of real estate agents from what it is under current law. It is my conclusion that the subsection does decrease their liability.

The bill relieves an agent of liability for misrepresentations in the disclosure statement under conditions that would not relieve the agent from liability under current law. Under sec. 34.70.030(b)<sup>1/</sup> of the bill, an agent who doesn't know the information statement is incorrect is not liable for passing the statement along to the buyer, if the agent exercises due diligence in obtaining and transmitting the information. However, under current law a real estate agent is liable for communicating a misrepresentation<sup>2/</sup> even if the misrepresentation is innocent and even if the information came from the seller. Bevins v. Ballard, 655 P.2d 757, 763 (1982). There is no stated exception under Bevins for an agent who doesn't know information in the statement is incorrect or who uses due diligence. It is unclear whether the court would be more lenient with agents required by law, as in this bill, to pass along the statement of the seller without further involvement in the statement, except to sign that they have received the statement. The court was fairly adamant about

---

<sup>1/</sup>Section 34.70.030(b) reads:

(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.

<sup>2/</sup>In addition, the misrepresentation must be material and the buyer must have relied on it.

Representative Pat Parnell  
March 10, 1992  
Page 2

placing the responsibility for misrepresentations on the agent. Therefore, if an agent passes along a material misrepresentation<sup>3/</sup> in the disclosure statement, the bill appears to provide the agent with some liability relief that is not presently available under Bevins.

If I may be of further assistance, please advise.

TLB:gc  
92-216.glc

---

<sup>3/</sup>An issue arises whether certain incorrect statements in the disclosure statement could be considered misrepresentations when honestly made. Where the statement is prefaced by the seller's honest statement that the seller "is not aware of" a particular condition or fact, it could be argued that the statement, even if incorrect as to the existence of the fact or condition, cannot misrepresent the fact, since it is only a statement of the seller's state of knowledge, not of the condition or fact. However, one could argue that if, under the particular circumstances of the case, it actually misleads a buyer, the statement should be considered a misrepresentation of the condition or fact.

March 10, 1992

*new yesterday*

Re: CSHB 398  
Page 1 of 2

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 Labor and Commerce Committee the following sections of CSHB 398 that are of concern, and asks for your careful consideration of these sections:

Page 6 (work draft), line 16 - 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 (work draft), lines 25 through 29 - 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 included in the legislation.

Pages 6 and 7 (work draft) - 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.

Page 7 (work draft), lines 20 through 22 - Definitions - (2) "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, 1) by sale, exchange, installment land sale contract, lease with option to purchase, or ground lease coupled with improvements."

And finally,

Page 7 (work draft), beginning on line 25 - Sec. 2. AS 08.88.071. This section amends Alaska Statutes covering actions of the Alaska Real Estate Commission regarding real estate licensees. The amendment on page 8 of the work draft, lines 26 through 28, defines 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.

McNall & Rankine, P.C.  
Attorneys

William L. McNall  
David Rankine  
Sandra J. Wicks  
Melinda D. Miles  
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**CONFIDENTIAL TO NAMED PERSON(S) ONLY**

**FACSIMILE MESSAGE COVER SHEET**

DATE: 3/12/92

TIME: \_\_\_\_\_

FROM: William McNally

TO: Representative Tinkler

ATTENTION: Whiterie Reardon

FAX NUMBER: 465-3442

RE: House Bill 398

OUR FILE NO. Admin

TOTAL PAGES INCLUDING COVER SHEET 3

ORIGINAL SENT BY MAIL YES X NO \_\_\_\_\_

MESSAGE: For your review - presentation  
to Committee today -

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Please call if the telecopy you receive is incomplete or illegible.

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**McNall & Rankine, P.C.**  
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March 12, 1992

VIA FACSIMILE AT 465-3442

Representative Finklestein  
House Labor & Commerce Committee  
P. O. Box Y  
Juneau, AK 99811

Attn: Catharine Reardon

Re: House Bill No. 398

Dear Ms. Reardon:

I spoke with Mr. McNall this morning to see if you were able to communicate regarding House Bill No. 398. I advised him there was a hearing at 1:00 today and he wanted me to pass along the following two concerns to you that he still has regarding the Bill:

1. He is concerned that there is no clear distinction made between "warranty" and "disclosure". Asking the seller, "Does your home have a dishwasher" is a disclosure; asking the seller, "What is the condition of the dishwasher?" is a warranty. To reiterate what was said in Mr. McNall's earlier letter, to the extent you are asking the owner to make a specific representation as to the physical condition of the appliances or the property, you are asking him/her to warrant the condition of the property. If you are asking the owner to simply disclose whether or not he/she is aware there is a potential for asbestos or easement or encroachment problems on the property and not make a specific representation about that item, then you are talking disclosure.

He also wishes to point out that AS 34.08 does not just apply to condominiums; it applies to any property that has any ownership interest in common. How is a condominium, townhome or other common interest property owner going to be able to provide the information on the disclosure form regarding common elements? As not all of the information is directly covered in the resale certificate, the seller may not, and mostly likely will not, have the information requested; he or she only has information pertaining to his or her

Representative Finklestein  
March 12, 1992  
Page 2

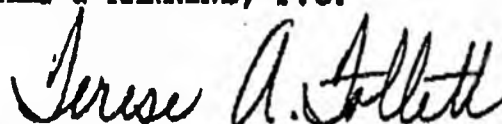
particular unit. To truly disclose all that is included in the sale of the property, the condominium association, homeowners association or other managing group with knowledge of the condition of the common areas would need to supply this information.

Mr. McNall will be back in the office on Monday, March 16. In the interim, he can be reached at (206)776-0540. Thank you for your assistance in facilitating Mr. McNall's input into this Bill.

Sincerely yours,

McNALL & RANKINE, P.C.

By:



Terese A. Follett  
Assistant to  
William L. McNall

/tf

**McNall & Rankine, P.C.**  
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March 5, 1992

VIA FACSIMILE AT 465-3442

Representative Finklestein  
House Labor & Commerce Committee  
P. O. Box Y  
Juneau, AK 99811

Re: House Bill No. 398

Dear Representative Finklestein:

I have reviewed the new House Bill No. 398 and still am somewhat troubled by the failure to recognize the risk you are creating for the real estate agents by the identification of the disclosure form as a document that does not constitute a warranty. I hereby provide for your information the Black's Law Dictionary definition of "disclosure" and also refer you to the definitions of "warranty" set forth therein. A warranty is also discussed in Title 34.08 as well as ways to minimize liability therefor.

Having debated at some length with Anita Bates on the difference between disclosure and warranty, I concluded that there is some of both in this bill. To the extent you are asking the owner to make a specific representation as to the physical condition of the appliances or the property, you are asking him/her to warrant the condition of the property. If you are asking the owner to simply disclose whether or not he/she is aware there is a potential for asbestos or easement or encroachment problems on the property and not make a specific representation about that item, then you are talking disclosure. I believe this should clarify for you why there is some persistence on both sides of this issue; the real estate industry wanting to have a disclosure without liability bill, and the legal industry claiming that you are making warranties by making these types of statements for which the seller should be responsible.

Representative Finklestein  
March 5, 1992  
Page 2

I hope this assists you in getting this matter moved forward. I still believe it would be simpler if the real estate agents were simply left out of the bill and the owner made responsible for the contents of the declaration.

How is a condominium, townhome or other common interest property owner going to provide the information in this form? The owner only owns the air in the unit!

I also note that by concluding this is not part of the contract, I assume it is the intention of the Committee to preclude this from being a part of any contract, whether it be with the buyer, buyer's agent, seller's agent, or as part of the listing contract with the real estate broker, and so on. I do not know that the statute needs to be made any clearer than it is, but wish to point out that I was unclear as to the extent the disclosure statement will be eliminated as part of a contract.

Again, I appreciate your hard work on this matter.

Sincerely yours,

MCNALL & RANKINE, P.C.

By: William L. McNall  
William L. McNall

WLM/tf  
Enclosure

## DISCONTINUANCE

**ruptcy.** The release of a bankrupt from all of debts which are provable in bankruptcy, except as are excepted by the Bankruptcy Act. The discharge of the bankrupt is the step which regularly follows the adjudication of bankruptcy and the administration of his estate. By it the debtor is released from the obligation of all his debts which were or might be proved in the proceedings, so that they are no longer a charge upon him, and so that he may afterwards engage in business and acquire property without its being liable for the satisfaction of such former debts.

**Contract.** To cancel the obligation of a contract; to render an agreement or contract null and inoperative. In law, the word means the act or instrument by which the binding force of a contract is terminated, irrespective of whether the contract is carried out to its full extent contemplated (in which case the discharge is the result of *performance*) or is broken off before complete execution.

**Criminal law.** The act by which a person in confinement, held on an accusation of some crime or misdemeanor, is set at liberty.

**Accounting practice.** In the process of accounting before a master in chancery, the *discharge* is a statement of assets and counter-claims brought in and filed, by way of set-off, by the accounting defendant; which discharges the charge in order.

**Jury.** To discharge a jury is to relieve them from any further consideration of a cause. This is done when the continuance of the trial is, by any cause, rendered impossible; also when the jury, after deliberation, has rendered a verdict or cannot agree on a verdict.

**Military discharge.** The release or dismissal of a soldier, sailor, or marine, from further military service, either at the expiration of his term of enlistment, or previous thereto on special application therefor, or as a punishment. An "honorable" discharge is one granted at the end of an enlistment and accompanied by an official certificate of good conduct during the service. A "dishonorable" discharge is a dismissal from the service for bad conduct or as a punishment imposed by sentence of a court-martial for offenses against the military law. There is also in occasional use a form of "discharge without honor," which implies censure, but is not in itself a punishment.

**Mortgage.** Formal document which recites that a mortgage debt has been satisfied and which is generally recorded in Registry of Deeds or in other appropriate place for recording deeds to real estate.

**Chargeable claim.** In bankruptcy, a claim which is discharged by bankrupt's discharge if properly scheduled.

**Disciplinary proceedings.** Proceedings which are brought against an attorney to secure his censure, suspension or disbarment.

**Discipline.** Instruction, comprehending the communication of knowledge and training to observe and act in accordance with rules and orders.

**Correction, chastisement, punishment, penalty, rules and regulations.**

**Disclaimer.** The repudiation or renunciation of a claim or power vested in a person or which he had formerly

alleged to be his. The refusal, or rejection of an estate or right offered to a person. The disavowal, denial, or renunciation of an interest, right, or property imputed to a person or alleged to be his. Also the declaration, or the instrument, by which such disclaimer is published.

The rejection, refusal, or renunciation of a claim, power, or property. I.R.C. § 2518 sets forth the conditions required to avoid gift tax consequences as the result of a disclaimer.

See also Refusal; Renunciation; Repudiation.

**Estates.** The act by which a party refuses to accept an estate which has been conveyed to him.

**Patents.** When the title and specifications of a patent do not agree, or when part of that which it covers is not strictly patentable, because neither new nor useful, the patentee is empowered, with leave of the court, to enter a disclaimer of any part of either the title or the specification, and the disclaimer is then deemed to be part of the letters patent or specification, so as to render them valid for the future.

**Pleading.** In common law pleading, a renunciation by the defendant of all claim to the subject of the demand made by the plaintiff's bill.

**Warranty.** Words or conduct which tend to negate or limit warranty in sale of goods and which in certain instances must be conspicuous and refer to specific warranty to be excluded. U.C.C. § 2-316.

**Disclose.** To bring into view by uncovering; to expose; to make known; to lay bare; to reveal to knowledge; to free from secrecy or ignorance, or make known. See Discovery.

**Disclosure.** Act of disclosing. Revelation; the impartation of that which is secret or not fully understood.

In patent law, the specification; the statement of the subject-matter of the invention, or the manner in which it operates.

Under Truth in Lending Act is a term of art which refers to the manner in which certain information (e.g. total cost of loan), deemed basic to an intelligent assessment of a credit transaction, shall be conveyed to the consumer. *Doggett v. Ritter Finance Co. of Louisa, D.C.Va., 384 F.Supp. 150, 153.*

See Compulsory disclosure; Discovery; Freedom of Information Act; Full disclosure; Subpoena.

**Disclosure by parties.** Term sometimes used in law of deceit or fraud as to the obligation of parties to reveal fact which is material if its revelation is necessary because of the position of the parties to each other. See also Material fact.

**Discommon /diskómən/. To deprive commonable lands of their commonable quality, by inclosing and appropriating or improving them.**

**Discontinuance /diskantinyuwn(t)s/. Ending, causing to cease, ceasing to use, giving up, leaving off. Refers to the termination or abandonment of a project, structure, highway, or the like.**

The cessation of the proceedings in an action where the plaintiff voluntarily puts an end to it, either by giving notice in writing to the defendant before any step has been taken in the action subsequent to the

cer has reasonable grounds to believe that the person has committed a felony or if the person has committed a misdemeanor amounting to a breach of the peace in the officer's presence.

**Warrantor.** One who makes a warranty. Any supplier or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty. 15 U.S.C.A. § 2301.

**Warrantor potest excipere quod querens non tenet terram de qua petit warrantiam, et quod donum fuit insufficientis / wóhrántor pówdast aksipóry kwóð kwíran(d)z nón ténat téhram díy kwéy pédot wóhránsh(ly)am, èt kwóð dównam fyúwád insáfísh(ly)en(d)z/. A warrantor may object that the complainant does not hold the land of which he seeks the warranty, and that the gift was insufficient.**

**Warranty.** A promise that a proposition of fact is true. The Fred Smartley, Jr., C.C.A.Va., 108 F.2d 603, 606. A promise that certain facts are truly as they are represented to be and that they will remain so, subject to any specified limitations. In certain circumstances a warranty will be presumed, known as an "implied" warranty.

#### Commercial Sales

A warranty is a statement or representation made by seller of goods, contemporaneously with and as a part of contract of sale, though collateral to express object of sale, having reference to character, quality, or title of goods, and by which seller promises or undertakes to insure that certain facts are or shall be as he then represents them. Bell v. Menzies, 110 Ga.App. 436, 138 S.E.2d 731, 732. A promise or agreement by seller that article sold has certain qualities or that seller has good title thereto. A statement of fact respecting the quality or character of goods sold, made by the seller to induce the sale, and relied on by the buyer.

The general statutory law governing warranties on sales of goods is provided in U.C.C. § 2-312 et seq.

See also Magnuson-Moss Warranty Act; Privty; Promissory warranty; Special warranty.

**Express warranty.** (1) Express warranties by the seller are created as follows: (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise. (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description. (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model. (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty. U.C.C. § 2-313.

A written statement arising out of a sale to the consumer of a consumer good pursuant to which the

manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance; or in the event of any sample or model, that the whole of the goods conforms to such sample or model. It is not necessary to the creation of an express warranty that formal words such as "warrant" or "guarantee" be used or that a specific intention to make a warranty be present, but an affirmation merely of the value of the goods or a statement purporting to be merely an opinion or commendation of the goods does not create a warranty. Statements or representations such as expressions of general policy concerning customer satisfaction which are not subject to any limitation do not create an express warranty. Calif.Civil Code, § 1791.2.

See also *Written warranty, infra*.

**Full warranty.** A warranty as to full performance covering generally both labor and materials. Under a full warranty, the warrantor must remedy the consumer product within a reasonable time and without charge after notice of a defect or malfunction. 15 U.S.C.A. § 2304. Compare *Limited warranty, infra*.

**Implied warranty.** A promise arising by operation of law, that something which is sold shall be merchantable and fit for the purpose for which the seller has reason to know that it is required. (a) Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale, if the seller is a merchant with respect to goods of that kind. The serving for value of food or drink to be consumed either on the premises or elsewhere is a sale for this purpose. U.C.C. § 2-314(1). (b) Where the seller, at the time of contracting, has reason to know any particular purpose for which the goods are required, and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. U.C.C. § 2-315.

"Implied warranty of fitness" means that when the retailer, distributor, or manufacturer has reason to know any particular purpose for which the consumer goods are required, and further, that the buyer is relying on the skill and judgment of the seller to select and furnish suitable goods, then there is an implied warranty that the goods shall be fit for such purpose. Calif.Civil Code, § 1791.1.

"Implied warranty of merchantability" or "implied warranty that goods are merchantable" means that the consumer goods meet each of the following: (1) Pass without objection in the trade under the contract description; (2) Are fit for the ordinary purposes for which such goods are used; (3) Are adequately contained, packaged, and labeled; (4) Conform to the promises or affirmations of fact made on the container or label. Calif.Civil Code, § 1791.1.

See also *Fitness for particular purpose*.

**Limited warranty.** A written warranty which fails to meet one or more of the minimum standards for a "full" warranty. 15 U.S.C.A. § 2303. See *Full warranty, infra*. Warranty limited to labor or to materials for a specified time, commonly given by automobile dealers in connection with sale of used cars.

*Third party beneficiaries of warranties.* See Privity.

*Warranty of title.* An implied promise that the seller owns the item offered for sale. (1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that (a) the title conveyed shall be good, and its transfer rightful; and (b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge. (2) A warranty under subsection (1) will be excluded or modified only by specified language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have. (3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications. U.C.C. § 2-312.

*Written warranty.* Any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified period of time, or any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet with the specifications set forth in the undertaking, which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product. 15 U.S.C.A. § 2301. See also *Express warranty, supra*.

#### Insurance

A warranty in the law of insurance consists of a statement by insured upon the literal truth of which the validity of the contract depends. Statement, made in insurance contract by insured, which is susceptible of no construction other than that parties mutually intended that policy should not be binding, unless such statement be literally true. *Brotherhood of Railroad Trainmen v. Wood*, Tex.Civ.App., 79 S.W.2d 685, 688.

A statement, description or undertaking on the part of insured, appearing in the policy or in another instrument properly incorporated in the policy and relating contractually to the risk insured against. *Reid v. Hardware Mut. Ins. Co. of Carolinas*, S. C., 252 S.C. 339, 166 S.E.2d 317, 321.

*Affirmative warranty.* In the law of insurance, warranties may be either affirmative or promissory. Affirmative warranties may be either express or implied, but they usually consist of positive representations in the policy of the existence of some fact or state of things at the time, or previous to the time, of the making of the policy; they are, in general, conditions precedent, and if untrue, whether material to the risk or not, the policy does not attach, as it is not the contract of the insurer.

*Express warranty.* An agreement expressed in a policy, whereby the assured stipulates that certain facts relating to the risk are or shall be true, or certain acts relating to the subject have been or shall be done.

*Promissory warranty.* In the law of insurance, a warranty which requires the performance or omission of certain things or the existence of certain facts after the beginning of the contract of insurance and during its continuance, and the breach of which will avoid the policy. See also *Promissory warranty*.

#### Generally

*Construction warranty.* An undertaking or promise made by seller or building contractor of new home that such home is fit for the purpose intended; i.e. free from structural, electrical, plumbing, etc. defects. Many states have statutes which provide the purchaser with such warranty protection. See *Home Owners Warranty*; also, *Warranty of habitability, below*.

*Continuing warranty.* One which applies to the whole period during which the contract is in force; e.g., an undertaking in a charter-party that a vessel shall continue to be of the same class that she was at the time the charter-party was made.

*Covenant of warranty.* See *Covenant*.

*Cumulation and conflict of warranties.* Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply: (a) Exact or technical specifications displace an inconsistent sample or model or general language of description. (b) A sample from an existing bulk displaces inconsistent general language of description. (c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose. U.C.C. § 2-317.

*General warranty.* The name of a covenant of warranty inserted in deeds, by which the grantor binds himself, his heirs, etc., to "warrant and forever defend" to the grantee, his heirs, etc., the title thereby conveyed, against the lawful claims of all persons whatsoever. Where the warranty is only against the claims of persons claiming "by, through, or under" the grantor or his heirs, it is called a "special warranty."

*Implied warranty.* Exists when the law derives it by implication or inference from the nature of the transaction or the relative situation or circumstances of the parties. *Great Atlantic & Pacific Tea Co. v. Walker*, Tex.Civ.App., 104 S.W.2d 627, 632. See also this topic under *Commercial Sales* above.

*Lineal warranty.* In old conveyancing, the kind of warranty which existed when the heir derived title to the land warranted either from or through the ancestor who made the warranty.

*Personal warranty.* One available in personal actions, and arising from the obligation which one has contracted to pay the whole or part of a debt due by another to a third person. *Flanders v. Seelye*, 105 U.S. 718, 26 L.Ed. 1217.

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March 3, 1992

VIA FACSIMILE AT 465-3442

Representative Finklestein  
House Labor & Commerce Committee  
P. O. Box Y  
Juneau, AK 99811

Attn: Catherine Reardon

Re: House Bill No. 398

Dear Ms. Reardon:

After reviewing the redraft of House Bill No. 398, I believe that the subcommittee's changes have addressed several of the concerns raised by my earlier review. However, I am still confused on the following points:

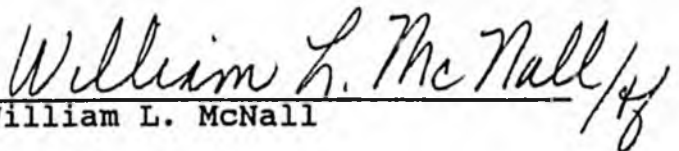
1. If the seller's statements about the condition of the property are not warranties, what are they?
2. If the seller's disclosure form is not part of the contract of sale, why not?
3. If the intent is to make the seller responsible for providing the buyer with the form and immunize the agent from liability for its contents but not change the law on other obligations to make disclosures, why include agents at all? (See AS 34.70.070)
4. What about AS 34.08 properties?

Representative Finkelstein  
March 3, 1992  
Page 2

5. Is it the committee's intent to allow intentional misconduct and noncompliance with this Act but limit damage to actual damages? It seems to be worth the risk to lie about a problem; the worst that could happen is actual damage, no punitive, costs, interest, attorney's fees.

Sincerely yours,

MCNALL & RANKINE, P.C.

By: William L. McNall /s/   
William L. McNall

WLM/tf

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January 29, 1992

Representative Finkelstein  
House Labor & Commerce Committee  
State House Legislature  
P. O. Box Y  
Juneau, AK 99811

Re: House Bill No. 398

Dear Representative Finkelstein:

The following is my opinion with regard to House Bill No. 398, a Bill for an Act Entitled "An Act requiring certain disclosures in real property sales; and providing for an effective date."

HB 398 purports to place more information into the process of selling real estate such that a buyer will be a more informed buyer. This goal is laudable. Certainly we would hope that all parties to a real estate transaction, from the real estate agents that list the property and the broker that is supervising that agent, to the real estate agents that are selling the property and their supervising broker, to the lender, the mortgage insurance company, the investor who is buying the loan, and the homeowner who is buying the home, should all be given as much information as possible. This information should also be injected into the appraisal framework so that the appraiser has a complete understanding of the condition of the property or title to the property he or she is appraising.

Unfortunately, what this Bill does is make it too attractive for a real estate agent to escape liability by remaining blissfully ignorant of any problems regarding the property being sold. The burden is placed on the person who is probably least able to pay for the errors made in disclosure and who has the greatest opportunity to misstate the true facts: the seller of the property. Any argument that such temptation really does not exist in the real estate market when a seller has a defective home that he wishes to sell and must conceal or misrepresent information to accomplish the sale, is a scenario with which the real estate industry truly cannot argue.

Representative Finkelstein  
January 29, 1992  
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It is the failure to make adequate disclosure that has created the bulk of the cases our supreme court has had to decide. Caveat emptor, "let the buyer beware", is no longer the law in Alaska. This Bill places the buyer at an even greater risk than the buyer presently has under existing law. The Legislature would better spend its time in attempting to mandate inspections on used residential housing that are similar to the inspections AHFC presently requires on new housing (refer to appended information) such that all parties to the transaction are fully informed by an objective third party trained to inspect a residential property and, from there, can make a decision on selling, buying, listing, promoting, financing, or investing.

Although the aim of Representative Finkelstein's Bill is laudable, when it is compared to the Bill sponsored by the realtors, it is obvious that the effect of this Bill is to minimize the real estate industry's exposure to claims for misrepresentation while doing nothing to that industry's obligations to the public consumers. This then is a special interest Bill designed to protect the 1,700 or so realtors at the expense of the consuming public.

The Alaska Supreme Court has stated:

The official comment to Section 2-316 of the Code (codified as AS 45.05.100), dealing with disclaimer 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, regardless of an inadequate examination of the goods.

. . . other than tradition, no reason exists to treat land sales differently from the sale of commercial goods insofar as the doctrine of caveat emptor is involved.

Cousineau v. Walker, 613 P.2d 608 (Alaska 1980). (The Alaska landmark case on innocent misrepresentation.)

Representative Finkelstein  
January 29, 1992  
Page 3

In the Cousineau case, the Court adopted a definition of materiality by stating that a material fact is one to which a reasonable man might be expected to attach importance in making his choice of action. It is a fact which would reasonably be expected to affect someone's judgment or conduct concerning a transaction.

In Cousineau the buyers had received less than 3/4ths of the highway frontage described in the listing and had also extracted roughly \$100,000 of the \$1 million in gravel that was represented to be on the property.

Significant Discussion of the Doctrine of Caveat Emptor - The caveat emptor or "let the buyer beware" has been the traditional law in America. In the Cousineau case, however, the Court stated that there was no place for the doctrine in modern society and stated at 616:

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.

Finally, the Court made a specific holding that, "a buyer of land, relying on an innocent representation, is barred from recovery only if the buyer's acts in failing to discover defects were wholly irrational, preposterous, or in bad faith."

Our Supreme Court thus eliminated caveat emptor (let the buyer beware) as a doctrine in the State of Alaska. HB 398 returns us to that doctrine.

Bevins v. Ballard, 655 P.2d 757 (Alaska 1982).

In this case, the Court held that an agent would be liable for innocent misrepresentations. Of importance, on that issue, is that the Court also asserted that the agent would be liable as a matter of public policy. The Court believed that it was the agent that was most knowledgeable and professional in handling these transactions and could prevent misrepresentations from being made.

Representative Finkelstein  
January 29, 1992  
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Also, the Court held that it was the agents who could defend themselves through an indemnification agreement with the sellers from any financial losses resulting from such misrepresentations.

HP 398 voids this public policy.

While real estate brokers and agents are obtaining more education under the new licensing law, they are now attempting to avoid all liability for their transactions.

The Code of Ethics of National Association of Realtors states at Article 9:

REALTORS shall avoid exaggeration, misrepresentation, or concealment of pertinent facts relating to the property or the transaction. REALTORS shall not, however, be obligated to discover latent defects in the property or to advise on matters outside the scope of their real estate license.

\* \* \*

Standard of Practice 9-8

REALTORS shall be obligated to discover and disclose adverse factors reasonably apparent to someone with expertise in only those areas required by their real estate licensing authority. Article 9 does not impose upon the REALTOR the obligation of expertise in other professional or technical disciplines.

The Alaska Administrative Code states at 12 AAC 64.130(14):

UNETHICAL BUSINESS PRACTICES. The following acts, in addition to those specified elsewhere in this chapter, are grounds for revoking or suspending real estate licenses and are unethical business practices:

\* \* \*

(14) failing to disclose to a prospective buyer a known material defect regarding the condition of or a legal defect pertaining to the offered real estate or interest in real estate of which the licensee has knowledge or should have knowledge.

The current contract form utilized by the MLS, which is a trade group representing the bulk of the real estate agents in the State of Alaska, has a provision stated at paragraph 6 as follows:

6. BROKER. It is mutually agreed by all parties that the Brokers and/or their agents shall not be held liable in any manner whatsoever for damages arising from defaults or acts by or upon the part of either party to this agreement. Brokers and/or their agents make no representations that the residence of other improvements meet current building code, safety or other requirements.

#### Section-by-Section Analysis of the Bill

Section 34.70.010 contemplates disclosure of specific information related to the sale of a residence and as a concept is a laudable goal since it is important that all parties of the transaction know as much as possible about the real estate that is the subject of the transaction. It is certainly important that community associations such as those that handle property or manage property under 34.07 and 34.08 be advised of defects by anyone who is familiar with the defects. Certainly a lender who might learn through this disclosure or through subsequent inspections should be obligated to make that information available to the managing organization.

In Section 34.70.020, Termination of Offer, the last sentence helps to define the word "material" which is not used in 34.70.020. I do not believe this definition assists anyone since anything that would affect the sale is "material". I refer you to the definition of "material" in Cousineau v. Walker, which is defined as:

A material fact is one 'to which a reasonable man might be expected to attach importance in making his choice of action' . . . it is a fact which would reasonably be expected to influence someone's judgment or conduct concerning a transaction.

Cousineau v. Walker, 613 P.2d 608 (Alaska 1980).

In Section 34.70.030, the limitation of liability for seller and the seller's agent flies in the face of all the existing case law that obligates the seller to make the appropriate disclosures that relate to the sale of real estate and includes such statements as, "A seller is obligated to both truthful and informed when he makes representations." Fraud includes the pretense of knowledge where there is none. See Bevins v. Ballard, 655 P.2d 757 (Alaska 1982). Real estate agents are burdened with the obligation to be informed

Representative Finkelstein  
January 29, 1992  
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and knowledgeable; in short, competent. The issue, of course, really revolves around an agent's ability to remain intentionally ignorant of errors, inaccuracies, or omissions such that the agent could claim that he or she was uninformed of the problem, thereby avoiding any responsibility under this Section.

The third paragraph of Section 34.70.030 also talks in terms of the exercise of ordinary care in obtaining and transmitting information. I believe the standard that should be appropriate in this case is the exercise of the due diligence standard. Due diligence is the concept which is the burden that the brokers must meet to convince the court that they did what was appropriate under the circumstances. I believe in light of the administrative code sections previously referenced, the code of ethics referenced, and case law referenced, the burden on the agent should be to exercise a due diligence requirement, not an ordinary care requirement.

Section 34.70.040, Subsequent Events and Approximations, allows the seller and the agent to escape responsibility if the information they have provided turns out to be inaccurate, and the seller specifically is not required to deliver an amended disclosure statement to the prospective buyer. Hence, the buyer may never know that the information was inaccurate. Such a scenario was exactly the case in Turnbull v. LaRose, 702 P.2d 1331 (Alaska 1985), wherein our courts refused to adopt a rule that was tantamount to a rule "which would allow the seller to lie his head off". In Turnbull, the agent for the seller discovered that the primary tenant was not going to remain in the property and, after having told the buyer that the tenant would stay in the property, failed to then advise the buyer that the tenant had changed its mind. The court held that such a failure to clarify a previously correct statement that was now incorrect was a misrepresentation on the part of the seller and the seller's agent. I am also greatly troubled by this Section in that it is attempting to avoid the responsibility for verifying information provided by the seller. Simply put, if the seller provides the information to the buyer, the agent remains blissfully ignorant of problems with the property, then the seller will be liable and the agent will be immune from liability, even though it appears the agent is responsible for providing the information under all other criteria by which we measure agent's conduct.

Representative Finkelstein  
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In Section 34.70.050, Form of Disclosure Statement, I do not understand how a factual representation of the condition of real estate and/or personal property contained therein can be a representation upon which a buyer can rely, but is not a warranty. A warranty, under Alaska State law, is a statement of the physical condition of the property. Such statements do constitute warranties. This Statute, however, simply removes the statements as a warranty, but does say the buyer is allowed to rely upon the statements. I need to have somebody smarter than I explain the difference because this statute conflicts with AS 45.05.100.

The second paragraph of Section I, Seller Information, also specifically identifies the information as a disclosure. This information is not to be part of the contract between the buyer and seller. I do not understand how it can be a disclosure which the buyer is to rely upon, but is in fact not part of the contract. The end of the checklist has questions that say, "Are there, to the best of your (Seller's) knowledge . . ." This language appears to be redundant; I assume that the seller, if the seller is going to fill this document out, will be doing so to the best of the seller's knowledge. This language should be deleted because otherwise it allows the seller to argue that he did not know about the problem specifically, hence, it could not be a misrepresentation.

Section C of Section I has a series of questions that the seller is obligated to respond to. Item 1, for example, states ["Are you (Seller) aware of any of the following:] 1. substances, materials, or products that may be an environmental hazard such as asbestos, formaldehyde, radon gas, lead based paint, fuel or chemical storage tanks, and contaminated soil or water on the subject property . . .        Yes        No." In my experience, the average person does not know that they have asbestos in their home, even though they may have asbestos in their home. The little chunks of material sprayed on the average ceiling contain asbestos; all real estate agents who have taken any educational courses at all know that those ceilings do contain asbestos. Many homeowners do not know whether radon gas is a problem in the general vicinity of their home; almost all real estate agents understand that there are maps available that show where radon gas is a problem. Homeowners have not kept current with the fuel or chemical storage tank issues, although virtually every real estate agent is familiar with the problem and has listened to experts talk on this issue.

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Contaminated soil or water problems on the subject property are also items that every real estate agent is trained to be aware of. The seller checks "No", the agent does not ask, and no one tells the buyer.

Numerous of the problems set forth in the remaining portions of Section C are really more appropriately identified by someone experienced with real estate, preferably the real estate agent. Deed restrictions or violations (#12), zoning violations (#10), encroachments (#3), are generally matters of public record. Again, the certification at the end of Section C has the seller certifying that the information is true and correct to the best of seller's knowledge. I do not believe such a limitation on the seller's signature is appropriate.

Section II is certainly an appropriate disclosure and I think that as opposed to having this at the end of this statement, the buyer and seller should be given this piece of information right up at the beginning of the statement. They also should be required to sign off on this particular section so that it is clear that they were told to get an attorney, or to have a home inspection, or get other professional advice as appropriate.

Section 34.70.060, Good Faith, certainly is not necessary if the intent is to limit the obligation of the seller to the best of seller's knowledge.

In Section 34.70.070, Effect on Other Required Disclosures, the limitation on the effect of this disclosure is confusing at best. If we are going to provide the information to buyers such that they can rely upon this information, and immunize agents for any wrong information that the agents were unaware of, then I believe we are significantly and materially affecting the disclosure obligations real estate agents presently have. I have outlined state case decisions, administrative code sections, and requirements of the code of ethics establishing these duties.

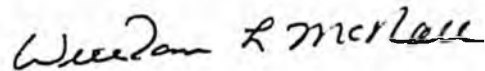
Section 34.70.090, Escrow Agents, is very puzzling. Why a limited disclosure bill would contain a provision freeing up title companies from any obligations they may have as an escrow agent is certainly puzzling. Essentially, the escrow agents will no longer be escrow agents at all; they will simply be a party that contracts to provide closing services and all obligations will be under the contract, not under general agency law. I suspect that the title companies are wishing to engender as much immunity as they can and have attempted to obtain additional immunities by adding this to this contract. I do not believe it is appropriate nor is it necessary. It will not further any of the obligations the real

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estate agent has, but will immunize escrow agents such as title companies from mistakes they may have made in the escrow process. I also believe that the title companies will limit their liability for contractual damages by appropriate contract terms.

In light of 34.70.070, 34.70.120 appears to place some burden on the seller in case the seller was negligent or wilful in violating the chapter or failing to perform a duty required by this chapter. This will have the effect of immunizing agents from any liability as long as they can remain blissfully ignorant of any material facts. What is clear is that one of the brokers (the buyer's or the seller's broker) has an obligation to provide the information, but that is the sole obligation of the real estate agent or broker as it relates to the buyer. The Bill fails to address the duties of a real estate agent who represents a buyer in determining the accuracy of the information.

Sincerely yours,



William L. McNall

WLM/tf  
Attachments

IST Mtg.  
1/2/91

MANDATORY HOME INSPECTIONS:

LEGISLATION TO PREVENT LOSSES BY  
UNSUSPECTING BUYERS OF DEFECTIVE HOUSES

I. SUMMARY

This proposal recommends legislation requiring a thorough physical inspection of every non-rural Alaskan home by a qualified professional engineer prior to its sale. In addition to a thorough evaluation of all essential structures and systems, currently available for about \$350.00; we anticipate an additional preliminary environmental assessment can be made by the same inspector for about an additional \$150.00. A certificate certifying<sup>1</sup> that the house meets basic minimum standards of structural soundness and safety, signed by the inspector, will be recorded along with other title documents at the sale of the house<sup>2</sup>  
3.

II. PROBLEM: DEFECTIVE HOUSE SALES  
LEAD TO EXPENSIVE LITIGATION

A house purchase is the most significant financial commitment most individuals ever make. Not only is a house an enormous financial commitment, it is also an enormously complicated collection of systems which average home buyers are not fully equipped to understand or evaluate. In part, this explains the proliferation of professionals who assist in the housing market: real estate agents<sup>4</sup>, appraisers, lenders, building inspectors and attorneys. These persons do not, however, represent the buyer; moreover, they lack the expertise, time or motivation adequately to investigate the physical condition of the houses they assist in selling.

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<sup>1</sup>See Exhibit "1", California State Regulations.

<sup>2</sup>See Exhibit "2", Newspaper Article by Clair Ramsey: "'Gotcha' Inspections Lurk for Unsuspecting Home Sellers".

<sup>3</sup>See Exhibit "3", Newspaper Article by Ted Johnson, P.E., P.S., Criterium Alaska Engineers: "Home Inspections, Are There Standards?".

<sup>4</sup>See Exhibit "4", "Federal Regulation of Real Estate Brokers" article.

While many home buyers are adequately apprised of the condition of the property they purchase, or, in a rising market, find that they can readily absorb the costs of repairing defects, the recent declining market has made buyers particularly sensitive to defective property. Many have successfully brought suit against the seller or one or more of the professionals involved in the transaction upon discovering that the house was not as it had been represented to be. While the traditional rule of caveat emptor once precluded many such suits, the Alaska Supreme Court has substantially eroded that doctrine, and legislation such as the Uniform Commercial Code and the Uniform Land Sale Practices Act have given buyers additional rights against sellers under certain circumstances. Thus, sellers and their agents who make intentional, negligent or even innocent misrepresentations of material fact regarding the property may be liable in damages, or the transaction may be rescinded.

A buyer's substantial legal remedies may not be practical for him to enforce, however. Proving misrepresentation of material facts may be expensive and subject to the uncertain whims of a jury. In short, the high cost of litigation precludes many otherwise valid defective house lawsuits. Moreover, liable parties may be judgment proof.

Although the buyer frequently remains legally liable to the lender regardless of the condition of the house, the hard choice between expensive repairs or expensive litigation may mandate his default. After the expenses of foreclosure, repair, management and resale, the lender has probably suffered a significant loss.

We anticipate that a mandatory home inspection program, at a cost of approximately \$500.00 per house, will significantly reduce the risk of actionable misrepresentation in the sale of a house and the resulting losses to all parties.

### III. PROPOSAL: MANDATORY HOME INSPECTIONS

We propose that every house in non-rural Alaska be inspected by a qualified, insured inspector (probably a professional engineer<sup>5</sup>) before its sale<sup>6</sup>. In the case of sales which are handled through real estate listings, the inspections would be required at the time the house was listed with the agent.

The proposed inspection would cover an examination of the foundation, including potential settlement and water problems, the overall soundness of the structure, its framing, including potential rot and condensation problems, and an examination of the

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<sup>5</sup>See Exhibit "5", letter from Ted Johnson, P.E., L.S.

<sup>6</sup>See Exhibit "1", California Statute Regulations.

following mechanical systems: air conditioning, water heater, plumbing and piping, electrical systems, chimneys and fireplaces, septic system, and roof. In addition, the inspection will include an examination of the interior finishes, windows, exterior finishes, energy efficiency, ventilation and insect infestation. These inspections are currently available in Anchorage for \$350.00<sup>7</sup>  
8 9.

In addition to the structural examination, an initial inspection for evidence of environmental hazards and violations of law would be required. This evaluation would disclose evidence of asbestos, chemical hazards, underground storage tanks, radon and other known environmental hazards. Finally, the investigation will include a chemical analysis of well water, if any<sup>10 11</sup>.

After the inspection, the inspector will issue a complete report outlining all problems which were discovered. If appropriate, the inspector would issue a certificate affirming that the residence was safe and habitable. It is anticipated that sales would not be financed unless the certificate of habitability was completed; thus, sellers would be required to repair their houses to meet minimum standards of safety and habitability.

Although older homes, and homes in areas which lack building codes, will frequently not meet current code standards, it is anticipated that the disclosure of the discrepancies from current codes will be sufficient to give a buyer adequate information concerning the risks he takes in purchasing the house. Obviously, the proposal is not intended to mandate that all houses in all areas be brought to the standards mandated by most recent codes. Nevertheless, it is recognized that there may be houses which appear to have functioned adequately for many years, but which contain hidden defects, the repair of which could cost thousands of dollars. We believe these losses should fall on the current owner, rather than on an unsuspecting buyer.

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<sup>7</sup>See Exhibit "6", Criterium Alaska Engineers brochure: "A Professional Engineer's Residential Building Inspection and Consultation Service".

<sup>8</sup>See Exhibit "7", American Society of Home Inspectors brochure: "Enter, the Home Inspector".

<sup>9</sup>See Exhibit "8", National Association of Home Inspectors, Inc. brochure, dated 1989.

<sup>10</sup>See Exhibit "9", Memorandum by H. Frank Cahill, dated November 5, 1990, Underground Storage Tank Regulations.

<sup>11</sup>See Exhibit "10", Department of Environmental Conservation Requirements.