

ALASKA LEGISLATURE COMMITTEE FILES 1997-1998 8672

9173 HOUSE JUDICIARY

# LEGAL SERVICES

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STATE OF ALASKA

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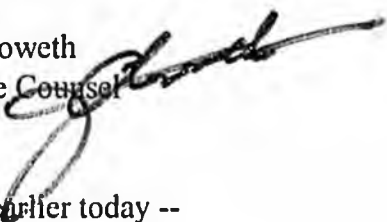
130 Seward Street, Suite 409  
Juneau, Alaska 99801-2105

## MEMORANDUM

March 11, 1997

**SUBJECT:** Amendment K.32 to House Bill 53 (Work Order No. 20-LS0194\K.32)

**TO:** Representative Joe Green  
ATTN: Lisa Kirsch

**FROM:** Jack Chenoweth  
Legislative Counsel 

To the points of your inquiry of earlier today --

1. From the original work order request, I omitted "or political subdivision"--in the context of local government, the political subdivisions of the state are its cities and boroughs. Since "municipality" already covers both, adding "political subdivision" adds nothing.
2. In the state's Municipal Code, provision for dual majorities is not unknown. Look, for example, at AS 29.06.280(a), 29.35.330(c), and 29.35.450(a)(2).

In this amendment, if you want a dual majority to have to approve the facility, the majorities to be of all residents of the municipality and all residents within the immediate area, consider the following:

-- using a two-mile (or three-mile, or five-mile) radius and requiring that the majority of the residents of the area shall also approve the proposed facility; this is the process used for votes on issuance or suspension of issuance of liquor licenses in small towns, but it has obvious drawbacks if it is to be applied in an urban area; or

-- using, for a facility to be located in a borough and within a city of that borough, a dual majority consisting of a majority of all voters of the borough and also all voters of the city; or

-- using, for a facility to be located in a borough outside of any city or in a unified municipality, a dual majority consisting of a majority of all voters of the borough and also a majority of all voters of the affected service area; in the case of a municipality that has designated community councils, consider substituting the area subject to the jurisdiction (if that is the proper term) of the appropriate community council; in an urban area having

Representative Joe Green

March 11, 1997

Page 2

multiple election (or senate) districts for purposes of electing members of the state legislature, the concurrent majority could be of the voters within the election (or senate) district in which the facility may be constructed; in municipalities using single- or dual-member (i.e. not "at-large") assembly district to elect members to the borough assembly, the concurrent majority could be of the voters within the appropriate assembly district.

Who will pay for the election(s) at which all of this will be determined? The bill and the amendment do not specify.

3. The assertion in testimony that there are very few municipalities in Alaska is incorrect. There are, at present, on the order of 16 boroughs and unified municipalities and in excess of 140 cities. All of these are municipalities.

JBC:glc

97-162.glc

is AK. Does "municipality" as used in the AS have a meaning that includes villages, boroughs, etc., or does it literally mean municipalities? I know in HB 22 we used language that Mike Ford suggested which I believe was "and political subdivisions of the state."

Could you please let me know whether you think these changes will have the desired effect? Chairman Green was particularly concerned whether or not the legislature could give a community the power to override the municipality's decision to locate a prison at a particular site.

One final minor word change. Chairman Green thought that the use of the word "at" on lines 5 and 11 (first appearance) of amendment 0-LS0194\K.32 was awkward since the "correctional facility" does not yet exist. He will defer to your drafting expertise if this is the only way to convey our intent.

Thanks for your help.

A M E N D M E N T

OFFERED IN THE HOUSE

TO: HB 53

1 Page 1, line 8:

2 Delete "and giving notice of"

3 Insert "giving notice of, authorizing,"

4 Page 1, line 10:

5 Delete ", construction, and"

6 Insert "and construction of a correctional facility, authorizing an agreement for  
7 the"

8 Page 1, line 11, following "operation":

9 Insert "; and amending the duties and responsibilities of the state bond committee  
10 in conjunction with lease-purchase agreements, use-purchase agreements, and other  
11 agreements to use a facility as those agreements relate to correctional facilities"

12 Page 2, line 9:

13 Delete "that"

14 Insert "for the operation of a correctional facility if the agency"

15 Page 3, following line 25:

16 Insert a new bill section to read:

17 "\* Sec. 3. AS 37.15.140 is amended to read:

18 Sec. 37.15.140. Duties of state bond committee. The state bond committee  
19 shall

20 (1) adopt the resolution and prepare the documents necessary for the  
21 issuance, sale, and delivery of bonds;

1                   **(2) manage the interim and long-term financing and refinancing**  
2                   **of correctional facilities acquired by the state through lease-purchase agreements:**  
3                   **exercise of authority under this paragraph shall be in accordance with lease-**  
4                   **purchase agreements authorized by law under AS 36.30.085."**

5    Renumber the following bill sections accordingly.

6    Page 4, line 27:

7           Delete "sec. 4"

8           Insert "sec. 5"

9    Page 5, line 3, following "facilities,":

10           Insert "the state, acting through"

11   Page 5, line 6, following "design":

12           Delete ", construction, and operation"

13           Insert "and construction"

14   Page 5, line 7, following "corrections":

15           Insert ", and, in conjunction with the design and construction of the correctional  
16    facility, may enter into a separate agreement to operate the correctional facility. Under this  
17    subsection, the Department of Administration may act as the lessee under the lease-purchase  
18    agreement of the correctional facility and may represent the state in obtaining and entering  
19    into the agreement to operate the correctional facility"

20   Page 5, line 8:

21           Delete "(b) - (e) and (g)"

22           Insert "(b) - (h)"

23   Page 5, line 12:

24           Delete "agreement"

25           Insert "lease-purchase agreement, use-purchase agreement, or other agreement to use

1 a facility"

2 Page 5, line 14:

3 Delete "Department of Corrections under the lease or use"

4 Insert "state under the"

5 Page 5, line 29:

6 Delete "lease-purchase or use-purchase agreement"

7 Insert "agreement to operate the correctional facility"

8 Page 5, line 31, through page 6, line 1:

9 Delete "designed, constructed, and"

10 Page 6, lines 2 - 4:

11 Delete "the agreement described in this subsection is made for the purpose of  
12 acquiring, improving, and maintaining the correctional facility structure under AS 36.30.085,  
13 and is exclusive of one or more agreements"

14 Insert "the agreement described in this paragraph is made for the purpose of operating  
15 and maintaining the correctional facility under AS 36.30.085 and may include provisions, or  
16 may be exclusive of one or more agreements, as authorized by (2) of this subsection."

17 Page 6, line 6:

18 Delete "operating"

19 Page 6, lines 26 - 27:

20 Delete all material and insert:

21 "(f) With respect to a correctional facility, the design and construction of which is  
22 described in (a) of this section,

23 (1) the state shall make lease payments under the lease-purchase, use-  
24 purchase, or other agreement to use a facility only from currently appropriated funds, and all  
25 payments are subject to appropriation;

26 (2) notwithstanding AS 36.30.085(c)(1), the term of the agreement may not

1 exceed 30 years;

2 (3) the agreement may include other terms and conditions agreed upon by the  
3 parties;

4 (4) the state may enter into contracts for credit enhancement of the agreement  
5 in order to limit the recourse of the provider of credit enhancement solely to the security  
6 provided under the agreement;

7 (5) the state may grant a security interest in property acquired under the  
8 agreement: the security interest may be perfected as provided by AS 45.01 - AS 45.09 or as  
9 otherwise provided by law for perfecting liens on real estate;

10 (6) the agreement and contracts for credit enhancement entered into under the  
11 limitations set out in (4) and (5) of this subsection do not constitute a debt or the contracting  
12 of indebtedness under a statute limiting debt of the state or under art. IX, sec. 8, of the state  
13 constitution;

14 (7) the state bond committee

15 (A) may provide for the issuance of certificates of participation in  
16 financing the design and construction of the correctional facility authorized by this  
17 section; if the state bond committee authorizes issuance of certificates of participation  
18 and if payment is conditioned upon payment by the state under the agreement with  
19 respect to which the certificates relate, the certificates of participation in payments to  
20 be made under the agreement do not constitute a debt or the contracting of an  
21 indebtedness under a statute limiting the debt of the state or under art. IX, sec 8, of  
22 the state constitution;

23 (B) may give the state approval to enter into agreements with trustees  
24 relating to the agreement and the issuance of certificates of participation with respect  
25 to it.

26 (g) For the purposes of financing or refinancing a correctional facility described in  
27 this section, the lessor may assign all or a part of the lessor's interest in the lease-purchase,  
28 use-purchase, or other agreement to use a correctional facility described in this section. The  
29 lessor may assign the lessor's interest to an investor or to a trustee for the purpose of issuing  
30 certificates of participation. The assignment authorized by this subsection may be for the  
31 purpose of providing interim financing preparatory to long-term financing for the correctional  
32 facility or for long-term financing for the correctional facility. Under this subsection,

1 (1) the lessor may not make an assignment of the agreement unless the lessor  
2 first obtains the approval of the commissioner of administration; and

3 (2) when the lessor has made an assignment of the agreement,

4 (A) the lessee's obligation to pay rent is independent of any  
5 requirement of this section with respect to the design, construction, or operation of the  
6 correctional facility;

7 (B) the lessee's obligation is subject to failure by the state to  
8 appropriate money to make the payments required by the lease obligation;

9 (C) except as provided in (B) of this paragraph, the obligation of the  
10 lease is not subject to abatement, set-off, or reduction of any kind by reason of a  
11 requirement of this section or by reason of a breach, failure of performance, or  
12 another act or omission by the contractor, lessor, the state, or a state agency or officer;  
13 and

14 (D) the agreement may be modified for purposes of refunding it and  
15 any certificates of participation issued with respect to it."

16 Reletter the following subsection accordingly.

17 Page 6, line 30:

18 Delete "sec. 3"

19 Insert "sec. 4"

20 Page 7, following line 1:

21 Insert a new subsection to read:

22 "(i) Subsection (a) of this section constitutes the notice and approval required by  
23 AS 36.30.085."

24 Page 7, line 9:

25 Delete "sec. 4"

26 Insert "sec. 5"

# Nikiski halfway house passes hurdle

by STEVE KADEL

Peninsula Clarion

A proposed halfway house in Nikiski got a green light Wednesday.

The Kenai Peninsula Borough Assembly, meeting as the Board of Adjustment, upheld a planning commission decision to grant a land-use permit for a Department of Corrections halfway house at North Star Lodge.

About 55 people attended Wednesday's meeting. After public testimony for and

against the halfway house, many citizens stayed more than an hour as the board met behind closed doors to discuss the appeal.

Audience members, most of whom were Nikiski residents, weren't happy about the decision — or the manner in which it was reached.

"What's the story about you going into a secret meeting when we're all sitting here?" a man asked as board members returned to the borough assembly chambers.

Jack Brown was the only board member opposed to making the decision in private.

Doing so would add even more uncertainty to an already sensitive issue, he said.

Brown said he voted in favor of the appeal by Janet Miller to overturn the planning commission decision. Drew Scalzi said he voted to uphold the original decision.

Other board members didn't reveal how they voted, although Mike Wiley said it was a 6-3 vote.

Brown predicted the board's decision won't be the final chapter in the halfway house saga.

"What we do today will more than likely

end up in court," Brown said.

Board members cited possible future appeals as a reason for not discussing their decision in detail.

Sandra Wicks, an attorney representing Allvest Inc. of Anchorage, a rehabilitative services company, agreed with Brown's assessment.

"This is probably going to get appealed to the Superior Court," Wicks said.

Allvest would operate the 56-bed halfway house at North Star Lodge, which is owned

See NIKISKI, back page

10 Peninsula Clarion, March 20, 1997

## ...Nikiski

Continued from page 1

by Jerry Pfaff. Allvest operates two halfway houses in Anchorage, one in Fairbanks and one in Bethel.

Miller, whose husband Larry joined her in filing the appeal, described halfway house residents as threats to community safety.

It would be easy for residents to walk away from the house, she said. There would be a two- or three-hour delay before police could respond, given the distance between Alaska State Troopers' Soldotna office and Nikiski, Miller said.

"They're not where they are by accident," she said of halfway house residents. "That place could become a collection point for sex offenders."

"I perceive an inebriated resident convict as a hazard to my community."

The halfway house also would cause Nikiski residents to start locking their cars instead of leaving them unlocked with keys inside, as many people do, Miller added.

The perception of halfway house residents as people serving short sentences for misdemeanor crimes is misleading, she said, because many have plea bargained after being charged with more serious felonies.

Wicks tried to dispel residents' fears by saying those placed in halfway houses "have earned degrees of freedom."

They are strictly prohibited from having drugs or alcohol, and would be released from the program and sent to prison if found in possession of either substance, she said.

One Anchorage halfway house is located a block from a school, and residents routinely volunteer at the school without incident, Wicks said.

Few residents have walked away from halfway houses since the facilities opened in Alaska in 1980, she said. When someone does walk off, it is reported to the Department of Corrections, Wicks said.

Also, several years of halfway house operations in Alaska show no effect on property values in the adjoining neighborhood, she said.

Wicks called Nikiski residents' concerns "an emotional reaction."

"We have a question of perception," she said. "Land-use decisions are not popularity contests."

Distr. buted by Rep. Croft  
To HJUA members

ADN 3/24/97

# Halfway house all done in Nikiski lodge burns before plan effected

By RACHEL D'ORO  
Daily News reporter

A Nikiski lodge targeted to be the Kenai Peninsula's first halfway house amid local opposition was destroyed by fire Sunday.

No one was injured in the 3 a.m. blaze that gutted the two-story North Star Lodge, said Nikiski Fire Battalion Chief Doug Nightingale. No one was inside the wood-frame building at the time, he said.

Firefighters continued to douse hot spots Sunday afternoon, Nightingale said. Firefighters will continue to check for glowing embers at least through today, he said.

The state fire marshal was investigating the fire because it involved a commercial building, according to Nightingale. He said the cause of the blaze had not been determined.

"The building is totally gone," he said. "There's nothing left for anybody to build from."

The lodge was the focus of a controversy over a planned 56-bed halfway house for convicts at the end of their sentences. But Nikiski residents said a halfway house would threaten the community's safety and fought to keep it from opening. They lost their appeal Wednesday when the Kenai Peninsula Borough Assembly upheld a decision to allow Allvest Inc. to turn the lodge into a halfway house.

Lodge owner Jerry Pfaff said he and his wife were on their way to church Sunday morning when they passed the burned property. He said the lodge was in the process of being sold to Allvest, which owns halfway houses in Anchorage, Fairbanks and Bethel.

Pfaff declined to disclose details about the sale, saying only that replacing the building would cost at least \$800,000. The future of the three-acre site is now uncertain, he said.

Pfaff bought the lodge in 1992, remodeling it the following year and operating it as a hotel until mid-December. Until last week, Pfaff leased the lodge to Cook Inlet Processing to house cannery workers, he said.

Much of the opposition to a halfway house was directed at Pfaff but only in angry words, he said. He couldn't imagine the opponents stooping to arson, he said.

"There was a lot of verbal abuse," he said. "But I don't know anybody who would do anything as vicious as this."

AMENDMENT #3

OFFERED IN THE HOUSE

CROFT/GREEN

TO: HB 53

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Page 3, following line 3:

Insert a new bill section to read:

"\*Sec. 2. AS 33.30.031 is amended by adding a new subsection to read:

(f) The commissioner may not enter into an agreement to provide necessary facilities under (a) of this section as a correctional facility that is to be constructed in this state after the effective date of this Act unless the commissioner initiates and completes a site selection process. The site selection process must provide the public reasonable opportunity to comment about sites to be considered for the location of the correctional facility. In addition, if, on the basis of the site selection process, the commissioner determines to enter into an agreement to contract for provision of necessary facilities at a correctional facility that is to be located at a site within a municipality or legal subdivision of the state, the correctional facility may not be constructed at the site unless approved by a majority of the residential landowners within the "affected area" who vote at an election conducted by the municipality or legal subdivision of the state. For the purpose of this subsection, "affected area" means the area within 2 miles of the external perimeter of the correctional facility. This restriction does not apply to construction within the perimeter of correctional facilities in existence before the effective date of this act.

(g) In conducting the site selection process required by (f) of this section, the commissioner may solicit proposals from private entities by publishing a request for proposal in a newspaper of general circulation. The commissioner shall accept proposals for six months after initial publication of the request for proposals. Any such proposal shall certify in a manner prescribed by the commissioner that (1) the facility to be constructed will meet the department's requirements as described by the commissioner in the RFP or other document;

(2) the facility will be operated at a cost to the state below the state's cost to operate a comparable facility, that cost to be described by the commissioner in the RFP or other documents;

(3) the entity owns or has an option to buy at a fixed cost the land on which the proposed facility would be located, and the entity agrees that the state may purchase the land at a price fixed at the time of contracting if the state assumes ownership or control of the facility pursuant to statute or provision of contract;

(h) in order for the certification of approval under subsection (f) to be valid, the approval process must meet the following requirements:

- 36 (1) not more than one month after initial publication of the RFP, the private entity
- 37 shall publish in a newspaper of general circulation notice of intent to make a
- 38 proposal, including a description of the location to be proposed;
- 39 (2) not more than one month after initial publication of the RFP, the private entity
- 40 shall deliver by certified mail to all ~~residential landowners~~<sup>VOTERS</sup> residing within two miles
- 41 of the proposed site notice of intent to make a proposal, including a description of
- 42 the location to be proposed;
- 43 (3) at least three months prior to the bid closure date published on the RFP, the
- 44 municipality ~~or political subdivision~~ of the state conducting the election shall
- 45 deliver by certified mail to all residential landowners residing within two miles of
- 46 the proposed site a mail-in ballot approved by the commissioner that ~~residential~~<sup>VOTERS</sup>
- 47 ~~landowners~~ may use to signify approval of the proposed site;
- 48 (4) the approval process shall last not more than three months from the mailing of
- 49 the ballots and no indication of approval shall be counted after the close of this
- 50 period;
- 51 (i) If the proposed site lies within the boundaries of a municipality ~~or political~~
- 52 ~~subdivision~~ of the state, the entity making the proposal may, at the expense of the
- 53 entity, contract with the administrator of the municipality ~~or political subdivision~~ to
- 54 count ballots prepared under (h) of this section, publish the results in a newspaper of
- 55 general circulation, and make all ballots received available for inspection by parties
- 56 with reasonable interest in the proposal. ~~If the entity making the proposal does not~~
- 57 ~~enter into a contract with the administrator of the municipality or political~~
- 58 ~~subdivision~~ to count ballots, the ~~commissioner~~<sup>MUNICIPALITY</sup> shall count the ballots, publish the
- 59 results in a newspaper of general circulation, and make all ballots received available
- 60 for inspection by parties with reasonable interest in the proposal.

61  
62 Renumber the following bill sections accordingly.

63  
64 Page 4, line 27:

- 65 Delete "sec. 4"
- 66 Insert "sec. 5"

\* SHALL PAY FOR THE COST OF COUNTING THE BALLOTS,

67  
68 Page 6, line 30:

- 69 Delete "sec. 3"
- 70 Insert "sec. 4"

71  
72 Page 7, line 9:

- 73 Delete "sec. 4"
- 74 Insert "sec. 5"

AMENDMENT #3

Revised K.32

OFFERED IN THE HOUSE

TO: HB 53

1 Page 3, following line 3:

2 Insert a new bill section to read:

3 \*\*Sec. 2. AS 33.30.031 is amended by adding a new subsection to read:

4 (f) The commissioner may not enter into an agreement to provide necessary  
5 facilities under (a) of this section as a correctional facility that is to be constructed in  
6 this state after the effective date of this Act unless the commissioner initiates and  
7 completes a site selection process. The site selection process must provide the public  
8 reasonable opportunity to comment about sites to be considered for the location of the  
9 correctional facility. In additions, if, on the basis of the site selection process, the  
10 commissioner determines to enter into an agreement to contract for provision of  
11 necessary facilities at a correctional facility that is to be located at a site within a  
12 municipality or legal subdivision of the state, the correctional facility may not be  
13 constructed at the site unless approved by a majority of the voters within the  
14 "affected area" voting at an election conducted by the municipality or legal  
15 subdivision of the state. For the purpose of this subsection, "affected area" means  
16 the area within 2 miles of the external perimeter of the correctional facility. This  
17 restriction does not apply to construction within the perimeter of correctional  
18 facilities in existence before the effective date of this act.

19 Renumber the following bill sections accordingly.

20 Page 4, line 27:

21 Delete "sec. 4"

22 Insert "sec. 5"

23 Page 6, line 30:

24 Delete "sec. 3"

25 Insert "sec. 4"

27 Page 7, line 9:

28 Delete "sec. 4"

29 Insert "sec. 5"

*who vote*

*residence that  
land owners*

## MEMORANDUM

To: Rep. Jeannette James, Chair, HB 53 HJUD subcommittee  
Rep. Joe Green, subcommittee member  
From: Rep. Eric Croft, subcommittee member *Eric Croft*  
Date: March 22, 1997  
Re: Draft language for site selection process

In the proposed draft, below, I've tried to accomplish a strong, fair site selection process that addresses concerns both of you have voiced. The proposed language:

- in subsection (f) ensures that voters in an areawide plebiscite will have an opportunity to register their objection to or approval of a private prison in their community;
- in subsection (g)(3) addresses Rep. James' fiscal responsibility concern by assuring stability in the price and transfer of real property on which a private prison might be sited;
- in subsection (h) addresses Rep. Green's local control concern by providing a mechanism by which residential property owners within a two-mile radius of the proposed private prison may nix the project;
- in subsections (h) and (i), provides that the entity proposing to build the private prison bear the cost for most elements of the site selection process;
- is modeled as closely as possible after a viable Municipality of Anchorage process (for establishing Business Improvement Districts and other special assessments) that has already proven to work well.

I look forward to working with you to further refine subcommittee language for submission to the Judiciary Committee. I know the language looks complex, but I believe this is mainly a reflection of our concern for specificity.

A M E N D M E N T #3 (Subcommittee revision)

OFFERED IN THE HOUSE

TO: HB 53

Page 3, following line 3:

Insert a new bill section to read:

\*Sec. 2. AS 33.30.031 is amended by adding a new subsections to read:

(f) The commissioner may not enter into an agreement to provide facilities under (a) of this section after the effective date of this Act unless the commissioner initiates and completes a site selection process in accordance with (f)-(i) of this section. The commissioner shall not initiate a site selection process to consider sites within a municipality or political subdivision of the state unless, within four years prior to the commissioner's initial publication of a request for proposals under (g) of this section, a majority of the voters voting at an election conducted by the municipality, the state, or political subdivision of the state have approved locating a facility described in (a) of this section within the boundaries of the municipality or political subdivision of the state.

(g) In conducting the site selection process required by (f) of this section, the commissioner may solicit proposals from private entities by publishing a request for proposal in a newspaper of general circulation. The commissioner shall accept proposals for six months after initial publication of the request for proposals. Any such proposal shall certify in a manner prescribed by the commissioner that

- (1) the facility to be constructed will meet the department's requirements as described by the commissioner in the RFP or other document;
- (2) the facility will be operated at a cost to the state below the state's cost to operate a comparable facility, that cost to be described by the commissioner in the RFP or other document;
- (3) the entity owns or has an option to buy at a fixed cost the land on which the proposed facility would be located, and the entity agrees that the state may purchase the land at a fixed price, if the state assumes ownership or control of the facility pursuant to statute or provision of contract;
- (4) the site has been approved by more than fifty percent of the residential landowners residing within two miles of the proposed site.

*Confined at the time of contracting*

(f)

(h) In order for the certification of approval under subsection ~~(g)(4)~~ to be valid, the approval process must meet the following requirements:

- (1) not more than one month after initial publication of the RFP, the private entity shall publish in a newspaper of general circulation notice of intent to make a proposal, including a description of the location to be proposed;
- (2) not more than one month after initial publication of the RFP, the private entity shall deliver by certified mail to all residential landowners residing within two miles of the proposed site notice of intent to make a proposal, including a description of the location to be proposed;
- (3) at least three months prior to the bid closure date published on the RFP, the ~~commissioner~~ or municipality or political subdivision of the state conducting the election shall deliver by certified mail to all residential landowners residing within two miles of the proposed site a mail-in ballot approved by the commissioner that residential landowners may use to signify approval of the proposed site;
- (4) the approval process shall last no more than three months from the mailing of the ballots and no indication of approval shall be counted after the close of this period;
- (5) during the three month approval period, any residential landowner may, in a manner prescribed by the party conducting the election, elect to withdraw his or her indication of approval;

(i) If the proposed site lies within the boundaries of a municipality or political subdivision of the state, the entity making the proposal may, at the expense of the entity, contract with the administrator of the municipality or political subdivision to count ballots prepared under (h) of this section, publish the results in a newspaper of general circulation, and make all ballots received available for inspection by parties with reasonable interest in the proposal. If the entity making the proposal does not enter into a contract with the administrator of the municipality or political subdivision to count ballots, the commissioner shall count the ballots, publish the results in a newspaper of general circulation, and make all ballots received available for inspection by parties with reasonable interest in the proposal.

## MEMORANDUM

**Date:** March 14, 1997  
**To:** Jack Chenoweth, Legislative Legal  
**From:** Lisa Kirsch, House Judiciary Committee  
**Re:** HB 53

---

We attempted to move some of the amendments that you have drafted for HB 53 and quite a few questions arose during the meeting. The bill has been sent to subcommittee on the vote amendment (K.32) and Rokeberg's amendment requiring a women's facility (K.37).

### Questions that arose:

- 1) The sponsor opposed our amendment to add bond requirements, insurance, etc. (K.31). His argument is that AS 36.25.010 applies to lease purchase under the bill. I question whether it covers pure leases where the building is private and not a "public building." I also looked to AS 36.30.040, but even though the regs. may cover the current concerns some didn't like the fact that the procurement regs could change.
- 2) There was a great deal of confusion over whether this bill applied to one prison or all future construction. Some felt the plural or singular language controlled, some felt the dollar amount limited the bill to a single facility.
- 3) If the bill only covers a single prison how will Rokeberg's amendment fit in?

I am sure you are busy, so you can just call me Monday if that is easiest. However, the other committee members may ask you the same questions, so it might be faster to send one memo that I could distribute. It is up to you.

Thanks for your help.

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES  
LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA

(907) 465-3867 or 465-2450  
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130 Seward Street, Suite 409  
Juneau, Alaska 99801-2105

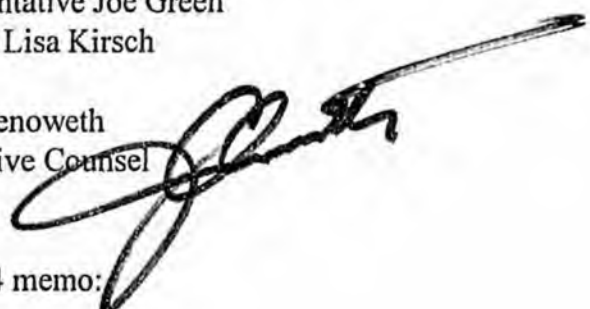
## MEMORANDUM

March 17, 1997

**SUBJECT:** Amendments to House Bill 53 (Work Order No. 20-LS0194\K)

**TO:** Representative Joe Green  
ATTN: Lisa Kirsch

**FROM:** Jack Chenoweth  
Legislative Counsel



To the points of your March 14 memo:

1. Amendment K.31, relating to bond and insurance requirements, is not project specific. By its terms, it would apply whenever the Department of Corrections proposes to look to a private agency to provide prisoner confinement and care services. I honestly don't know whether the state requires bid security in the construction phase of lease-purchase agreements, and didn't find a statute or regulation that was definitive on the point. Consequently, the bill sponsor may be correct in that it is duplicative of AS 36.25 and of AS 36.30.120 for construction bids. However, AS 33.30.031(c) as amended by K.31 also has applicability as relating to contracted operational services. Bid security for operational services is addressed in the last sentence of AS 36.30.120(a).
2. Apart from its amendments to the permanent law provisions, HB 53 applies to authorize and direct development of a new correctional facility project using one procurement method or the other--that is, procurement of space under the special provisions of HB 53 would proceed either on the basis of a lease under bill sec. 3 or under a lease-purchase under bill sec. 4. Projects could not be developed using both methods. After a project is in place using one method or the other, then the Department of Corrections would have to return to the legislature under AS 36.30.085 for authorization for another lease-purchase arrangement. Under the permanent law provision of HB 53, the department's general authority to lease additional space is being expanded: under amended AS 33.30.031(a), the commissioner may lease space from a public or private agency in this or another state, and under proposed AS 33.30.043, the commissioner may lease space in a facility constructed by a municipality. Space leases that exceed the limitations of AS 36.30.080(c) are subject to prior legislative approval.

Representative Joe Green

March 17, 1997

Page 2

3. The amendment request by Representative Rokeberg, reflected in amendment K.37, was entirely silent on the question of amending or leaving untouched the number of facilities to be built under the lease and lease-purchase procurement methods. Admittedly, it presented a tricky problem to open the door to multiple facilities (one of which would be required to be used to house female prisoners) when the text of the statute to be amended did not contemplate more than one facility. However, I concluded that we could probably respond to the request by taking the lease-purchase authorization and revising it to authorize its use for multiple facilities without having effect on the choice of procurement methods used. You're right in observing that the dollar limitations set out in the lease-purchase authorization might limit use of the lease-purchase procurement method for multiple prison facilities. However, I had no instruction on the point from the amendment sponsor's office and figured that if there were sufficient support for that approach, the committee could adjust the dollar limitations in bill section 4 as the members saw fit.

JBC:glc  
97-181.glc

MEMORANDUM

*Mitchell*

Date: April 1, 1997

To: Joe Green

From: Lisa Kirsch

Re: HB 53 --Amendments proposed by Rep. Croft

I have reviewed Eric Croft's amendments, and they differ from ours in that they:

1) do not provide for bond requirements. Existing law provides for bonding on construction contracts, But not on operational contracts;

*OK*

2) Include a simple two mile radius for the approval vote area--this has the problems we discussed earlier which are incumbent to defining the area, deciding who is inside and outside and the costs associated with this process of drawing lines.

3) allows "residential landowners" to approve the site. Does this mean we have to further process the list of voters residing within a two mile radius to determine that they hold title to real property? This may be equal protection problem if renters affected by a proposed prison are excluded simply because they don't hold title to their homes. Commercial landowners would also be excluded even though the proposed prison might affect their business;

*OK*

4) require a majority greater than 50% of the "residential landowners." (g)(4)What if we get low response (less than 50% reply) to the mail in ballots? Does this mean the site cannot be used?

*business improvement district forces proponents to lobby*

5) require approval of a "majority of the voters" (section (f)) to locate a prison within the municipality within four years. It isn't clear whether this is a different election, or is intended to mean the election described in subsection (g)(4);

*of those who ~~qualify~~ vote*

*election approval lasts 4 years.*

*No, Croft's intent sep was election*

6) require a proposal that shows a cost savings in operation. This is a less stringent requirement compared to the earlier requests for 20-25% cost savings on both construction and operations;

7) allow the state an option to buy the land at a fixed price.

\* James

At time of contract or floats @ CPI

8) require publication by the DOC of the RFP in a newspaper and requires that the bid process remain open for six months;

9) require publication of the "intent to make a proposal" in the newspaper by the private entity;

10) require the private entity to send the "intent to make a proposal" to the residential landowners within 2 miles by certified mail;

Mary?

11) require mail in ballots to be sent out at least three months before bid closure. This amendment does not indicate whether the state or the municipality pays for the election, and only says either the state, the municipality or the political subdivision shall conduct the election; and

[dept

12) allows the private entity to count ballots at their expense if they choose to do so--otherwise it appears that this task falls to the Commissioner of DOC.

[only private

[procedural  
[give notice & take vote

\* Site selection comm. choose  
should site

~~State~~  
Municipality pays for

~~Michelle~~  
Shila  
w 343 4215  
h 338 3636  
cell 240 3682

set Sel craig  
Sellers

AMENDMENT #3      Revised

OFFERED IN THE HOUSE

TO: HB 53

1 Page 3, following line 3:

2 Insert a new bill section to read:

3 "\*Sec. 2. AS 33.30.031 is amended by adding a new subsection to read:

4 (f) The commissioner may not enter into an agreement to provide necessary  
5 facilities under (a) of this section as a correctional facility that is to be constructed in  
6 this state after the effective date of this Act unless the commissioner initiates and  
7 completes a site selection process. The site selection process must provide the public  
8 reasonable opportunity to comment about sites to be considered for the location of the  
9 correctional facility. In additions, if, on the basis of the site selection process, the  
10 commissioner determines to enter into an agreement to contract for provision of  
11 necessary facilities at a correctional facility that is to be located at a site within a  
12 municipality or legal subdivision of the state, the correctional facility may not be  
13 constructed at the site unless approved by a majority of the voters within the  
14 "affected area" voting at an election conducted by the municipality or legal  
15 subdivision of the state. For the purpose of this subsection, "affected area" means  
16 the area within 2 miles of the external perimeter of the correctional facility. This  
17 restriction does not apply to construction within the perimeter of correctional  
18 facilities in existence before the effective date of this act.

19 Renumber the following bill sections accordingly.

20 Page 4, line 27:

21 Delete "sec. 4"

22 Insert "sec. 5"

23 Page 6, line 30:

24 Delete "sec. 3"

25 Insert "sec. 4"

27 Page 7, line 9:

28 Delete "sec. 4"

29 Insert "sec. 5"

Bond requirements missing

2 mile radius def. problems

(g) (4) — [ approval by more than 50%  
What if little or no response?

(g) (2) operation costs lower (no construction  
swing requirement)

HB 53

dual majority

Must it be dual?

→ Actually approval only of affected neighborhood

2 mile radius

but how do they draw lines

- middle of the prison
- the 4 corners?

→ service area?

→ Pay for it - (by mail?)

if muni expenses

- draw line - prob

→ voter registration - match up

Closest approx.

- municipality decides

- smallest existing area  
covers all res. @ or 2 mile

- city

- serv area

- elect dist

- coun council

- neighborhood

***South Anchorage Coalition***

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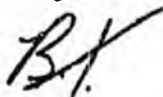
**FAX**

Page 1 of 12

**Date:** 3/11/97**TO:** Rep. Joe Green**Fax #** (907) 465-4316**FROM:** B.K. Powell**Fax #** (907) 345-5542**Tel** (907) 345-4854**e-mail:** amunra@alaska.net**RE:** State of Oklahoma private prison information**Message:****Joe:**

Here is some information you may find interesting. I received this from the Oklahoma Department of Corrections. Oklahoma has 5 private prisons. They stated that one of their statutes regarding prison location is that a prison cannot be located any closer than 1 mile from the nearest school. I hope you find this information useful. If you have questions or require additional information, please feel free to contact me.

PS: I've requested a hard copy of Oklahoma's statutes and reports regarding private prisons. I'll send you a copy.

**Regards:**

B.K. Powell  
South Anchorage Coalition

**Subject:** Private Prison Inquiry

**Date:** Wed, 12 Mar 1997 17:57:21 -0600

**From:** rebobz@doc.state.ok.us (Bob Zapffe)

**To:** <amunra@alaska.net>

Please review our website pages on private prisons at <http://www.doc.state.ok.us/docs/privatep.htm> If you need more information, Dennis Cunningham is our private prison contract administrator. His e-mail is [didennic@doc.state.ok.us](mailto:didennic@doc.state.ok.us). I believe our statutes require a prison facility be at least a mile from a school. I'm not surprised people in Anchorage are not excited about a prison, since the economic impact more remote areas seek is diluted in a big city atmosphere. Good luck. Check back with me if you need more info. Please browse our website.

Bob Zapffe, Executive Assistant  
Oklahoma Department of Corrections  
Research & Evaluation  
(405) 425-2512 Fax (405) 425-2741  
P.O. Box 11400  
Oklahoma City, OK 73136-0400

**Subject:** Re: Private Prison location  
**Date:** Thu, 13 Mar 1997 07:25:24 -0600  
**From:** didennic@doc.state.ok.us (Dennis Cunningham)  
**To:** "BK Powell" <"amunra@alaska.net"@Alaska.NET>

Private Companies have built speculative private prisons in the past few years here. We built one new prison. All these have been, as you said primarily rural locations, in areas that needed an economic boost.

Our agency's stance has been that the communities must want us, for us to consider locating a facility somewhere. The facility that the state built was in response to an RFP process, in which communities competed for the facility. The 'winner' even offered a million dollars of incentives to the state. The RFP process is a public process.

If you are interested in receiving hard copies of statutes and reports send me your address.

Dennis Cunningham, Private Prison Administrator  
P.O. Box 11400  
Oklahoma City, OK 73136-0400  
(405) 425-2616 FAX (405) 425-2578

-----  
> From: BK Powell <"amunra@alaska.net"@Alaska.NET>  
> To: didennic@doc.state.ok.us  
> Subject: Private Prison location  
> Date: Wednesday, March 12, 1997 7:38 PM  
>  
> Your name and e-mail address was forwarded to me by Mr. Zapffe. Alaska is in debate regarding  
> contracting for a private prison. As is the case with most states, we are in need of beds.  
> The issue is the location of the proposed prison. The proponents own the land (40 acre site)  
> and feel this is the best location (in the state). This site is in Anchorage  
> (pop. 250,000) within 1/2 of established high density neighborhoods.  
> The proposed operator has no experience with prison operation, they do operate 2 halfway houses  
> in Anchorage. 1000's of Anchorage residents are  
> upset over the proposed location. Concerns about  
> safety, property values, etc. My question is this: what process did Oklahoma use regarding  
> site selection, was it a public process? It is my understanding that new prisons  
> (over the last 10 years) are located in  
> rural areas, with somewhat of a depressed economy, and that these areas would welcome  
> the prison business. Anchorage is not rural nor is the economy flatlined. Alaska does  
> have sites that fit the rural/economic description and would welcome the business.  
> Any information regarding this subject that you would care to share would  
> be greatly appreciated.  
>  
> Regards  
>  
> B.K. Powell

# Private Prisons with Oklahoma DOC Contracts

As of February 20, 1997

**Wackenhut/Central Texas Parole Violator Facility (148 Male/55 Female)**

Per diem \$39.00 + Medical/security costs

Bob Morales, Acting Facility Administrator

218 S. Laredo

San Antonio, Texas 78207-4532

Phone: 210-227-5600 Fax: 210-226-5007

402 miles from Lexington Assessment and Reception Center

**CCRI/Limestone County Detention Center (490 Male)**

Per Diem \$40.50 + Medical/security costs

Carl White, Director

910 Tyus Road

Groesbeck, Texas 76642

Phone: 817-729-8615 Fax: 817-729-8108

Near Waco, Texas, 220 miles from Lexington Assessment and Reception Center

**Mansfield Law Enforcement Center (180 Male/20 Female)**

Per Diem \$42.00 + Medical/security costs

Jim Owen, Administrator

1601 Heritage Parkway

Mansfield, Texas 76063

Phone: 817-473-8676 Fax: 817-473-8954

Near Ft. Worth, Texas, 170 miles from Lexington Assessment and Reception Center

**GRW/Odessa Detention Center (95 Female)**

Per Diem \$39.00 + Medical/security costs

Kay Tomlinson, Administrator

203 N. Grant

Odessa, Texas 79761

Phone: 915-335-4998 Fax: 915-335-4996

550 miles from Lexington Assessment and Reception Center

**Average TX per diem \$40.37 + Indirect DOC costs = \$3.97 per day**

**CCA/Davis Correctional Facility (960 male)**

Per Diem \$41.95 + Medical/security costs + Therapeutic Community Costs

Stephen W. Kaiser, Warden

Rt. 4 Box 40

Holdenville, OK 74848-9295

Phone: 405-379-6400 Fax: 405-379-6496

62 miles from Lexington Assessment and Reception Center

**CCA/Great Plains Correctional Facility (250 male)**

Per Diem \$46.37 + Medical/security costs

**Tom Martin, Warden**  
**Highway 281 South, P.O. Box 1018**  
**Hinton, OK 73047**  
**Phone: 405-542-3711 Fax: 405-542-3710**

**Map of private prisons with Oklahoma contracts.**

**Profile of Offenders In Private Prisons with DOC Contracts**

**Statutory Authority for Private Prison Contracts**

**Private Prison Contractor Application**

Dennis Cunningham is the contract monitor for the Oklahoma Department of Corrections. He may be reached at 405-425-2616 or fax at 405-425-7236. Other staff deal with records management, medical, population management/classification, transportation, and trust fund issues.

## **Oklahoma Department of Corrections**

### **Private Prison Administration**

## **An Overview of Oklahoma Statutory Guidelines**

### **for Private Prison Contracting**

#### **I. According to O.S. 57 Section 502, A Private prison contractor means:**

**A. a nongovernmental entity or public trust which, pursuant to a contract with the Department of Corrections, operates an institution within the Department, or provides for the housing, care, and control of inmates and performs other functions related to said responsibilities within a minimum or medium security level facility not owned by the Department but operated by the contractor; or**

**B. a nongovernmental entity or public trust which, pursuant to a contract with the United States or another state, provides for the housing care and control of minimum or medium security inmates in the custody of the United States or another state, and performs other functions related to said responsibilities within a facility owned or operated by the contractor.**

#### **II. Overview of O.S. 57 Section 561, Private Prison Contracting**

**A. Title 57 Section 561 allows the Board of Corrections to contract with private prisons contractors (this includes public trusts) for the operation of a prison. The process of contracting for a prison is described as follows.:**

**Step 1 The Department of Corrections shall maintain a comprehensive file of all contractors interested in and capable of operating an institution, either owned by the department or the contractor. The department must furnish necessary application forms within 20 days to any person or firm wishing to be included in the comprehensive file.**

**Step 2 If the department intends to secure the services of a private prison contractor, all persons and firms included in the comprehensive file shall be notified by mail of such intent. The notification shall contain a description of the project, estimated time schedule for the project, last date of submitting notice of interest and other pertinent data.**

**Step 3 Private prison contractors shall submit a letter expressing interest in the project within 30 days of the postmark date of the letter of notification (Step 2).**

**Step 4 The department shall prepare a detailed project plan and submit it to the Board of Corrections for approval.**

**Step 5 After the Board of Corrections has approved the detailed project plan, the department shall select three to five contractors for detailed consideration. The selection to be based on the comprehensive file data, inquiries to former clients, performance, expertise, and capacity of the contractors.**

**Step 6** A report of the evaluation procedures and recommendations of the department shall be submitted to the Board of Corrections for their independent review of the process.

**Step 7** The department shall select and negotiate contract terms with the contractor whose qualifications and project proposal best meet the criteria of the project description. The negotiated project scope and fee shall be submitted to the Board of Corrections for their approval to make an award of contract. Should the department fail to reach a contract agreement with the first-choice contractor, negotiations shall begin with the second-choice contractor, and if agreement is not reached, negotiations shall begin with the third-choice contractor. If agreement is not reached with the third-choice contractor, the process will start over at Step 5.

**B.** In addition to the seven steps noted above, Title 57 Section 561 also provides:

1. For adding contractors to the list for considerations, if there is inadequate response to the project.
2. Assistance from the Department of Central Services in implementing private prison contracting procedures.
3. Authority for the director of the Department of Central Services to lease state owned property in conjunction with a private prison contract.
4. For private prison contracts to be for a term of one year subject to renewal at the state's option for a cumulative total of 50 years.
5. That private prison contractors provide assurances with regard to qualifications, experience, proper staffing, financing and ability, at the Board of Corrections, prior to award of the contract.
6. That private prison contractors demonstrate to the satisfaction of the Board of Corrections, that the contractor can obtain required insurance or can provide self-insurance.
7. That private prisons contractors are exempt from legislation governing correctional employees, except with regard to authorized use of firearms.
8. That any offense which would be a crime if committed within a state correctional facility is also a crime if committed in a facility operated by a contractor.
9. That the director or his designee shall monitor the performance of private prison contractors.
10. Special requirements when the private prison contractor operates a non-state owned facility. This includes granting the department the option to purchase or lease the facility at a

predetermined price at the beginning of each fiscal year. The contractor is required to provide the service in a facility that meets ACA standards. The contractor must receive ACA accreditation within three years of commencement of operations of the facility.

Private Prison Contractor Application

## OKLAHOMA DEPARTMENT OF CORRECTIONS PRIVATE PRISON CONTRACTOR APPLICATION FORM INSTRUCTIONS

### Part I. Specific Instructions

1. Enter the full name of your company and the company's federal employer identification (FEI) number. If your company does not have an FEI number and your company is an individual proprietorship, the social security number of the proprietor may be substituted for the FEI number. **NO OTHER SUBSTITUTIONS ARE PERMITTED.**
2. Enter the date your company was established.
3. Enter the firm structure. Examples of company structure are individual proprietorship, partnership, corporation, etc.
4. Enter the full business mailing address of your company's home office and phone number, including area code.
5. If your company's home office is located in Oklahoma and you want all correspondence to be directed to the home office, enter Asee above. @ Otherwise, enter the full business mailing address of your company's Oklahoma office, and phone number, including area code. If your company has no office in Oklahoma, enter Anone. @
6. List the full names and titles of all principals in your company. Principals include officers, members of the board of directors, owners of individual proprietorships and partnerships, (including limited partners), and corporate stockholders who own or control five percent or more of the outstanding voting stock of the corporation. Principals may be individuals, proprietorships, partnerships, or corporations. Attach additional sheets if necessary.
7. List the full names and titles of all key personnel not listed in item six above. Key personnel would include managers, supervisors, and other employees with a high degree of expertise in their field and who would make substantial contributions to the operation of a privately operated prison. Attach additional sheets if necessary.
8. Enter the current number of employees in your firm. Include partners actively engaged in the operation of the firm.
9. For each type of service listed in items A through I, list the full mailing address of subcontractors normally used by your firm to provide the service. If subcontractors are not normally used for that type of service, enter Anone. @ In item J, list other types of services normally subcontracted by your firm and the full mailing address of subcontractors used for each type of service. Attach additional sheets if necessary.
10. Based on your response to item nine above, indicate the types of services provided by your firm without the use of subcontractors. Attach additional sheets if necessary.
11. Complete a separate page of this section for each principal and key personnel listed in sections six and seven. Make enough copies of page three to provide a separate page for

each principal and key personnel. The pages should be numbered 3-A, 3-B, 3-C, etc.

**Name:** Enter the full name of the principal or key personnel.

**Position in firm:** Enter their title.

**Years of experience:** Enter their years of experience in their field.

**Age:** Enter their age.

**Years in this firm:** Enter the number of years they have been with your company.

**Years as principal in their firms:** Enter the number of years they were principals in other companies.

**Education:** For each college attended, enter the full name of the college, full name of any degrees received, or Anone@ if no degree received, the year they received their degree, and their area of specialization within their degree field.

**Professional organization memberships:** Enter the full name of professional organizations they belong to.

**Professional registrations:** For each professional registration (doctor, lawyer, physiologist, etc.), list the type of registration, the state registered, the year they became registered, and their registration number. Attach additional sheets if necessary.

**Years of professional experience:** List the years they have been engaged in the practice of their profession.

**Specialization and years:** List the area(s) of specialization within their field and the number of years in that specialty.

**Have you ever been convicted of a felony:** If they have never been convicted of a felony, enter ANO.@ If they have been convicted of a felony, enter AYES@ and provide details, including charge, circumstances, and jurisdiction.

**Employment history:** Beginning with their current employment, list the company name, title, and years of employment. Be sure to account for all years of professional experience. Include a brief description of duties performed.

12. Complete a separate page of this section for each past and present contract with the state of Oklahoma. Include all consultant and service contracts with all entities of the state of Oklahoma. If you have no past or present contracts with the state of Oklahoma, enter ANo Past or Present Contracts@ in the space for name of project. Make enough copies of page four to provide a separate page for each contract. The pages should be numbered 4-A, 4-B, 4-C, etc.

**Name of project:** List the name of the contract project.

**Location:** List all locations where contract services were provided.

**Name, address, and contact person of agency:** List the full name and mailing address of the agency the contract was with. Also, list the full name, title, and phone number, including area code, of the person in the agency we could contact regarding the goods or services provided by your company.

**Project period:** List the starting and ending dates of the project.

**Project cost:** For projects currently underway, list the contract amount. For completed projects list the amount you were actually paid.

**Project description:** Describe the purpose of the project, your involvement in the project, and the results of the project. Be sure to note major activities you participated in.

13. Complete a separate page of this section for at least five past and present contracts with private companies, cities, counties, other states, and the federal government. Include all consultant and service contracts with entities other than the state of Oklahoma. If you have no past or present contracts with entities other than the state of Oklahoma, enter ANo past or present contracts@ in the space for name of project. Make enough copies of page five to provide a separate page for each contract. The pages should be numbered 5-A, 5-B, 5-C, etc.

**Name of project:** List the name of the contract project.

**Location:** List all locations where contract services were provided.

**Name, address, and contact person of agency:** List the full name and mailing address of the agency the contract was with. Also, list the full name, title, and phone number including area code of the person in the agency we could contact regarding the goods or services provided by your company.

**Project period:** List the starting and ending dates of the project.

**Project cost:** For projects currently underway, list the contract amount; for completed projects, list the amount you were actually paid.

**Project description:** Describe the purpose of the project, your involvement in the project, and the results of the project. Be sure to note major activities you participated in.

14. The state of Oklahoma requires private prison contractors to obtain certain insurance coverage or to provide self-insurance. If your firm will be self-insured, enter ASelf-Insured.@

15. You are to provide certain financial information about your firm. Audited financial statements must be submitted for the most recently completed year and the year prior to the most recently completed year. These audited financial statements must include an audit

opinion of the financial statements by a **CERTIFIED PUBLIC ACCOUNTANT**. Opinions issued by APublic Accountants@ or other individuals not licensed to practice as a Certified Public Accountant,@ will not be accepted. At a minimum, the financial statements will include a balance sheet, a profit and loss statement, notes to financial statements, and an opinion of the financial statements signed by a certified public accountant. Provide Dun & Bradstreet numbers for the company and all principals of the firm listed in item six.

16. The application must be signed by a principal, officer, or director of the firm who is authorized to make representations concerning the firm. The signer's title, the firm name, and the date signed are also required.

## Part II. General Instructions

The completed application and all attachments are to be mailed to:

Dennis Cunningham  
Private Prisons Administrator  
Oklahoma Department of Corrections  
P.O. Box 11400  
Oklahoma City, OK 73136-0400

All applications must be complete. Failure to properly complete all sections of the application and attach all required statements will result in the application being returned to you.



# ALASKA STATE LEGISLATURE

PLEASE ENTER INTO THE RECORD MY TESTIMONY TO THE HOUSE JUDICIARY  
 COMMITTEE ON PRIVATE PRISON COMMITTEE NAME  
HOUSE BILL 53 DATED \_\_\_\_\_  
 BILL/SUBJECT

HB 53 IS NOT IN THE BEST INTEREST OF THE PEOPLE OF ALASKA. HB 53 IS PUTTING THE CART BEFORE THE HORSE IN THAT HB 150 WHICH IS PENDING IS THE CORRECT AND FISCALLY RESPONSIBLE SOLUTION. THE FACILITIES CURRENTLY AVAILABLE, FUNCTIONALLY SUPPORT COMMUNITY NEEDS AND SAFETY ISSUES TO THE PUBLIC. YEARS AGO THE FACILITIES WERE BUILT WHICH COULD SERVE INCARCERATION NEEDS AND BE EXPANDED AS NEEDED IN THE FUTURE. WELL THE FUTURE IS UPON US AND THE PLANS SIT IN CABINETS WHY REWRITE A PLAN SUCH AS HB 53 AND CREATE A FISCAL DEFICIT FOR FUTURE ALASKANS. CHILDRENS EDUCATION NEEDS FAR OUTWEIGH A PRIVATE PRISON, AND PUBLIC SAFETY AND TRUST CAN NOT BE EASILY REGAINED ONCE AN ALL DOLLAR AND NO SENSE DECISION IS MADE. THE GRASS ISNT ALWAYS GREENER WHEN IT COULD IMPACT ON PUBLIC SAFETY. SPRING CREEK AND OTHER PRISONS NEED THE UPGRADES, AND WE NEED TO COMPARE AND CONTRAST THE COST OF SPRING CREEK IMPROVEMENT COSTS BEFORE REINVENTING THE WHEEL.

SIGNED Robert E. Candell  
 TESTIFIER  
COMMUNITY MEMBER  
COMMUNITY OF FAIRBANKS  
 REPRESENTING (OPTIONAL)  
2209 TURNER STREET FAIRBANKS, AK 99701  
 ADDRESS/PHONE NUMBER

# Florida Statutes (Supplement 1996)

## CHAPTER 957: CORRECTIONAL PRIVATIZATION COMMISSION

[Footnote 1]

### 957.03 Correctional Privatization Commission. ---

(1) **COMMISSION.** The Correctional Privatization Commission is created for the purpose of entering into contracts with contractors for the designing, financing, acquiring, leasing, constructing, and operating of private correctional facilities. For administrative purposes, the commission is created within the Department of Management Services. The commission may enter into contracts with contractors for the designing, financing, acquiring, leasing, and constructing of private juvenile commitment facilities.

(2) **MEMBERS; QUALIFICATIONS.** The commission shall consist of five members appointed by the Governor, none of whom may be an employee of the Department of Corrections or the Department of Juvenile Justice, one of whom must be a minority person as defined in s. 288.703(3), and four of whom must be employed by the private sector. A commissioner may not have been an employee or a contract vendor of or a consultant to the department or the Department of Juvenile Justice, or an employee or a contract vendor of or a consultant to a bidder, for 2 years prior to appointment to the commission and may not become an employee or a contract vendor of or a consultant to the department or the Department of Juvenile Justice, or an employee or a contract vendor of or a consultant to a bidder, for 2 years following the termination of the appointment to the commission.

### (3) **TERMS, ORGANIZATION, AND MEETINGS.**

(a) The term of office for a member of the commission is 4 years.

(b) A vacancy shall be filled in the same manner as the original appointment and shall be for the remainder of the unexpired term only.

(c) The Governor shall appoint from among the members a chair and a vice chair for terms of 2 years each.

(d) Members of the commission shall serve without compensation but are entitled to reimbursement for per diem and travel expenses pursuant to s. 112.061.

(e) The commission may employ an executive director and such staff as is necessary, within the limits of legislative appropriation. The commission may retain such consultants as it deems necessary to accomplish its mission. Neither the executive director nor any consultant retained by the commission may have been an employee or a contract vendor of or a consultant to the department or the Department of Juvenile Justice, or an employee or a contract vendor of or a consultant to a bidder, for 2 years prior to employment with the commission and may not become an employee or a contract vendor of or a consultant to the department or the Department of Juvenile Justice, or an employee or a contract vendor of or a consultant to a bidder, for 2 years following termination of employment with the commission.

(f) The commission shall meet upon the call of the chair or a majority of the members of the commission. A majority of the members of the commission constitutes a quorum.

(g) In accordance with all provisions of law, the commission may lease such office space as is necessary, within the limits of legislative appropriation.

#### **(4) DUTIES.**

(a) The commission shall enter into a contract or contracts with one contractor per facility for the designing, acquiring, financing, leasing, constructing, and operating of that facility or, if specifically authorized by the Legislature, separately contract for any such services. The commission shall not enter into any contract to design, acquire, finance, lease, construct, or operate more than two private correctional facilities without specific legislative authorization.

(b) In its request for proposals, the commission shall invite innovation and shall not require use of prototype designs of state correctional facilities specified or designed by or for the department or of state juvenile facilities specified or designed by or for the Department of Juvenile Justice. The commission shall not require the use of any prototype design that specially advantages any contractor.

(c) The commission must report to the Speaker of the House of Representatives and the President of the Senate by December 1 each year on the status and effectiveness of the facilities under its management. Each report must also include a comparison of recidivism rates for inmates of private correctional facilities to the recidivism rates for inmates of comparable facilities managed by the department.

**(5) ADOPTION OF RULES.** The commission may adopt rules necessary to carry out its contracting and monitoring duties provided under this chapter.

**History:** s. 40, ch. 93-406; s. 1, ch. 94-148; s. 55, ch. 96-312; s. 21, ch. 96-422.

**[Footnote 1]** Note. Section 59, ch. 96-312, provides that "the provisions of ss. 957.03 and 957.04, Florida Statutes, as amended by this act, shall apply to contracts awarded on or after July 1, 1996."

**[Footnote 1]**

#### **957.04 Contract requirements. ---**

**(1)** A contract entered into under this chapter for the operation of private correctional facilities shall maximize the cost savings of such facilities and shall:

(a) Be negotiated with the firm found most qualified. However, a contract for private correctional services may not be entered into by the commission unless the commission determines that the contractor has demonstrated that it has: 1. The qualifications, experience, and management personnel necessary to carry out the terms of the contract. 2. The ability to expedite the siting, design, and construction of correctional facilities. 3. The ability to comply with applicable laws, court orders, and national correctional standards.

(b) Indemnify the state and the department, including their officials and agents, against any and all liability, including, but not limited to, civil rights liability. Proof of satisfactory insurance is required in an amount to be determined by the commission, following consultation with the Division of Risk Management of the Department of Insurance. Not less than 30 days prior to the release of each request for proposals by the commission, the commission shall request the written recommendation of the division regarding indemnification of the state and the department under this paragraph. Within 15 days after such request, the division shall provide a written recommendation to the commission regarding the amount and manner of such indemnification. The commission shall adopt the division's recommendation unless, based on substantial competent evidence, the commission determines a different amount and manner of indemnification is sufficient.

(c) Require that the contractor seek, obtain, and maintain accreditation by the American Correctional Association for the facility under that contract. Compliance with amendments to the accreditation standards of the association is required upon the approval of such amendments by the commission.

(d) Require that the proposed facilities and the management plans for the inmates meet applicable American Correctional Association standards and the requirements of all applicable court orders and state law.

(e) Establish operations standards for correctional facilities subject to the contract. The commission may waive any rule, policy, or procedure of the department related to the operations standards of correctional facilities that are inconsistent with the mission of the commission to establish cost-effective, privately operated correctional facilities.

(f) Require the contractor to be responsible for a range of dental, medical, and psychological services; diet; education; and work programs at least equal to those provided by the department in comparable facilities. The work and education programs must be designed to reduce recidivism, and include opportunities to participate in such work programs as authorized pursuant to s. 946.006.

(g) Require the selection and appointment of a full-time contract monitor. The contract monitor shall be appointed and supervised by the commission. The contractor is required to reimburse the commission for the salary and expenses of the contract monitor. It is the obligation of the contractor to provide suitable office space for the contract monitor at the correctional facility. The contract monitor shall have unlimited access to the correctional facility.

(h) Be for a period of 3 years and may be renewed for successive 2-year periods thereafter. However, the state is not obligated for any payments to the contractor beyond current annual appropriations.

(2) Each contract entered into for the design and construction of a private correctional facility or juvenile commitment facility must include:

(a) Notwithstanding any provision of chapter 255 to the contrary, a specific provision authorizing the use of tax-exempt financing through the issuance of tax-exempt bonds, certificates of participation, lease-purchase agreements, or other tax-exempt financing methods. Pursuant to s. 255.25, approval is hereby provided for the lease-purchase of up to two private correctional facilities and any other facility authorized by the General Appropriations Act.

(b) A specific provision requiring the design and construction of the proposed facilities to meet the applicable standards of the American Correctional Association and the requirements of all applicable court orders and state law.

(c) A specific provision requiring the contractor, and not the commission, to obtain the financing required to design and construct the private correctional facility or juvenile commitment facility built under this chapter.

(d) A specific provision stating that the state is not obligated for any payments that exceed the amount of the current annual appropriation.

(3)

(a) Each contract for the designing, financing, acquiring, leasing, constructing, and operating of a private correctional facility shall be subject to ss. 255.2502 and 255.2503.

(b) Each contract for the designing, financing, acquiring, leasing, and constructing of a private juvenile commitment facility shall be subject to ss. 255.2502 and 255.2503.

(4) A contract entered into under this chapter does not accord third-party beneficiary status to any inmate or juvenile offender or to any member of the general public.

(5) Each contract entered into by the commission must include substantial minority participation unless demonstrated by evidence, after a good faith effort, as impractical and must also include any other requirements the commission considers necessary and appropriate for carrying out the purposes of this chapter.

(6) Notwithstanding [Footnote 2] s. 253.025(8), the Board of Trustees of the Internal Improvement Trust Fund need not approve a lease-purchase agreement negotiated by the commission if the commission finds that there is a need to expedite the lease-purchase.

(7)

(a) Notwithstanding s. 253.025 or s. 287.057, whenever the commission finds it to be in the best interest of timely site acquisition, it may contract without the need for competitive selection with one or more appraisers whose names are contained on the list of approved appraisers maintained by the Division of State Lands of the Department of Environmental Protection in accordance with [Footnote 3] s. 253.025(7)(b). In those instances when the commission directly contracts for appraisal services, it shall also contract with an approved appraiser who is not employed by the same appraisal firm for review services.

(b) Notwithstanding [Footnote 3] s. 253.025(7), the commission may negotiate and enter into lease-purchase agreements before an appraisal is obtained. Any such agreement must state that the final purchase price cannot exceed the maximum value allowed by law.

[Footnote 4] (8) For the 1996-1997 fiscal year only, the Correctional Privatization Commission may expend appropriated funds to assist in defraying impact costs that are incurred by a municipality or county and are associated with the opening and operating of a facility under the authority of the commission and within that municipality or county. The amount that may be paid under this subsection for any facility may not exceed 1 percent of the facility construction cost, less any building and construction impact fees imposed during the permitting process for the facility. This subsection applies only to facilities contracted under the authority of the 1996-1997 General Appropriations Act. This subsection is repealed on July 1, 1997.

**History:** s. 40, ch. 93-406; s. 2, ch. 94-148; s. 56, ch. 96-312; s. 13, ch. 96-420; s. 22, ch. 96-422.

**[Footnote 1] Note.** Section 59, ch. 96-312, provides that "the provisions of ss. 957.03 and 957.04, Florida Statutes, as amended by this act, shall apply to contracts awarded on or after July 1, 1996."

**[Footnote 2] Note.** Redesignated as s. 253.025(7) by s. 2, ch. 94-240.

**[Footnote 3] Note.** Section 253.025(7) was redesignated as s. 253.025(6) by s. 2, ch. 94-240.

**[Footnote 4] Note.** Section 13, ch. 96-420, added subsection (8) "in order to implement Specific Appropriation 571 of the 1996-1997 General Appropriations Act."

### **957.05 Requirements for contractors operating private correctional facilities. ---**

(1) **Each contractor entering into a contract under this chapter is liable in tort with respect to the care and custody of inmates under its supervision and for any breach of contract. Sovereign immunity may not be raised by a contractor, or the insurer of that contractor on the contractor's behalf, as a defense in any action arising out of the performance of any contract entered into under this chapter or as a defense in tort, or any other application, with respect to the care and custody of inmates under the contractor's supervision and for any breach of contract.**

(2)

(a) **The training requirements, including inservice training requirements, for employees of a contractor that assumes the responsibility for the operation and maintenance of a private correctional facility must meet or exceed the requirements for similar employees of the department or the training requirements mandated for accreditation by the American Correctional Association, whichever of those requirements are the more demanding. All employee training expenses are the responsibility of the contractor.**

(b) **Employees of a contractor who are responsible for the supervision of inmates shall have the same legal authority to rely on nonlethal and deadly force as do similar employees of the department.**

(3) **Any contractor or person employed by a contractor operating a correctional or detention facility pursuant to a contract executed under this chapter shall be exempt from the requirements of chapter 493, relating to licensure of private investigators and security officers.**

**History:** s. 40, ch. 93-406; s. 57, ch. 96-312.

### **957.07 Cost-saving requirements. ---**

**The commission may not enter into a contract or series of contracts unless the commission determines that the contract or series of contracts in total for the facility will result in a cost savings to the state of at least 7 percent over the public provision of a similar facility. Such cost savings as determined by the commission must be based upon the actual costs associated with the construction and operation of similar facilities or services as certified to the commission by the Auditor General. In certifying the actual costs for the determination of the cost savings required by this section, the**

Auditor General shall calculate all of the cost components that determine the inmate per diem in correctional facilities of a substantially similar size, type, and location that are operated by the department, including all administrative costs associated with central administration. Services that are provided to the department by other governmental agencies at no direct cost to the department shall be assigned an equivalent cost and included in the per diem. Reasonable projections of payments of any kind to the state or any political subdivision thereof for which the private entity would be liable because of its status as private rather than a public entity, including, but not limited to, corporate income and sales tax payments, shall be included as cost savings in all such determinations. In addition, the costs associated with the appointment and activities of each contract monitor shall be included in such determination. In counties where the Department of Corrections pays its employees a competitive area differential, the cost for the public provision of a similar correctional facility may include the competitive area differential paid by the department. The Auditor General shall provide a report detailing the state cost to design, finance, acquire, lease, construct, and operate a facility similar to the private correctional facility on a per diem basis. This report shall be provided to the commission in sufficient time that it may be included in the request for proposals.

**History:** s. 40, ch. 93-406; s. 5, ch. 94-148; s. 58, ch. 96-312.

### **957.125 Correctional facilities for youthful offenders. ---**

(1) The Correctional Privatization Commission may enter into contracts in fiscal year 1994-1995 for designing, financing, acquiring, leasing, constructing, and operating three correctional facilities, notwithstanding s. 957.07. These three facilities shall be designed to have a capacity of up to 350 beds each and house inmates sentenced or classified as youthful offenders within the custody of the Department of Corrections under chapter 958. Two of these facilities shall be designed to house youthful offenders between the ages of 14 and 18, and one shall be designed to house youthful offenders between the ages of 19 and 24.

(2) These youthful offender facilities shall be designed to provide the optimum capacity for programs for youthful offenders designed to reduce recidivism, including, but not limited to: educational and vocational programs, substance abuse and mental health counseling, prerelease orientation and planning, job and career counseling, physical exercise, dispute resolution, and life skills training. In order to ensure this quality programming, the commission shall give no more than 30 percent weight to cost in evaluating proposals.

(3) Effective July 1, 1996, the authority to contract for the operation of two youthful offender facilities shall be transferred from the Correctional Privatization Commission to the Department of Juvenile Justice, and those facilities shall be used for male or female committed juvenile offenders. The Department of Juvenile Justice is authorized to modify any operational contract with the same contractor to whom the Correctional Privatization Commission awarded the contract for these facilities, without rebidding, in order to conform with the requirements of this subsection.

(4) The commission shall specify the area in which each facility will be located and require that each be located in or near a different metropolitan area in areas of the state close to the home communities of the youthful offenders they house in order to assist in the most effective rehabilitation efforts, including family visitation.

**History:** s. 107, ch. 94-209; s. 23, ch. 96-422.

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# MEMORANDUM

State of Alaska

Department of Law

TO: Honorable Glenn A. Olds  
Commissioner  
Department of Commerce  
and Economic Development

DATE August 13, 1991  
FILE NO 663-92-0061  
TEL NO 465-3600  
SUBJECT Applicability of  
Procurement Code to  
insurance license test  
administration

FROM: Alexis Gabay *Beck*  
Assistant Attorney General  
Commercial Section-Juneau

You have asked whether the State Procurement Code, AS 36.30, applies to contracts for the administration of insurance license tests by the Division of Insurance. You have stated that the division does not pay the testing service any money for the administration of the licensing examinations.

This issue was discussed in an earlier opinion concerning the Division of Occupational Licensing. 1989 Inf. Op. Att'y Gen. (Dec. 6; 663-89-0241). The testing arrangements in that situation appear to be identical to the arrangement employed by the Division of Insurance. In that opinion, we determined that the State Procurement Code was not applicable. Similarly, because no state funds are involved in the arrangement between the Division of Insurance and the testing service, we conclude that the State Procurement Code does not apply.

AS 36.30.850(b) provides that the State Procurement Code "applies to every expenditure of state money by the state, acting through an agency, under a contract . . . ."

"State money" is defined as "any money appropriated to an agency or spent by an agency irrespective of its source, including federal assistance except as otherwise specified in AS 36.30.890, but does not include money held in trust by an agency for a person." AS 36.30.990(20).

As you have described the testing arrangement, the division does not pay any money to the testing service. Instead, all test fees are paid by the applicants directly to the testing service. Therefore, these fees paid do not fit within the definition of state money, and the State Procurement Code does not apply to the division's arrangement with the testing service.

I hope this adequately addresses your concerns. Please let me know if I can be of further assistance.

AG:prm

# STATE OF ALASKA

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

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March 15, 1990

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

Re: Legality of Municipality of  
Anchorage charter provision -  
requiring super-majority vote  
to approve sale municipal  
asset

Our File: 663-90-0197

Dear Senator Faiks:

You have asked our opinion regarding the legality of a provision in the Municipality of Anchorage's (Anchorage) charter that requires a super-majority vote (60%) of the electorate in order to approve the sale of a major municipal asset if the assembly refers the question of the sale to the voters. In particular, you question if it is legal for a charter to allow passage of an ordinance by a simple majority of the assembly, while requiring a supermajority if the same question is presented as a referendum to the voters for approval. In short, it is our opinion that the charter provision in question is legal for the reasons explained below.

Anchorage is a home rule municipality. Under the Alaska Constitution, art. 10, sec. 11, a home rule municipality may exercise all legislative powers not prohibited by law or by charter, 1/ and a liberal construction is given to the powers of municipalities. 2/ In particular, we find nothing in the Alaska

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1/ Alaska Const. art. X, sec. 11 reads: "[a] home rule borough or city may exercise all legislative powers not prohibited by law or by charter."

2/ Alaska Const. art. I, sec. 1 reads in relevant part: "[t]he purpose of this article is to provide for maximum local self-government ... A liberal construction is to be given to the powers of local government units." (Emphasis added).

constitution or statutes that prohibits Anchorage from adopting a charter provision requiring a supermajority vote in order to sell a major municipal asset such as its public utilities when the assembly has referred the question to the voters. Given the home rule status of this municipality, and the liberal construction given to powers of a home rule, municipality under Article X, Section 11, of the Alaska Constitution, we believe that a court would find Anchorage's supermajority provision to be valid.

We want to point out that there are several prohibitions that the legislature has put on home rule powers. The statutory prohibitions are listed in AS 29.10.200, and supersede existing and prohibit future home rule charters or ordinances that provide otherwise. However, AS 29.10.200 does not contain a prohibition as to method of sale of home rule municipal assets nor does it prescribe the voting percentages applicable to public approval (referendum vote) of such a sale. In general, a simple majority vote is all that is needed for a referendum to pass. See AS 29.26.180(d). However, a home rule municipality is not bound by the initiative or referendum procedures set out in AS 29.26.110 --.190, but is allowed to prescribe its own procedures governing use of the initiative and referendum. See AS 29.10.030(a). Given that a home rule municipality can exercise all legislative powers not prohibited by law or charter, we believe that the charter provision in question would be found by the Alaska Supreme Court to be legally permissible.

The ruling in Lien v. City of Ketchikan, 383 P.2d 721 (Alaska 1963), supports our position. In Lien, the Alaska Supreme Court ruled that where a home rule municipality is concerned, the charter is looked to in determining whether a particular power has been conferred upon the municipality on issues of purely local concern. Id. at 723. In that case, the issue concerned the leasing of city property. The charter provision allowing the lease of city property was ruled to be controlling over a statute that prohibited the lease because the court found the lease of city property was an issue of local, not statewide, concern. Id. Unlike the situation in Lien, Anchorage's charter provision requiring a supermajority vote in order to sell a major municipal asset is not contrary to any statute.

If Anchorage's charter had not specifically required the supermajority vote on referenda to approve sale of municipal utilities, our answer on this question might be different. In Malone v. Meekins, 650 P.2d 351 (Alaska 1982), the supreme court decided that supermajority voting requirements are not valid unless they are specifically authorized by the Alaska Constitution. In accord Abood v. Gorsuch, 703 P.2d 1158 (Alaska 1985). Here, while AS 29.10.030(a) mandates that a charter provide "procedures" for the initiative and referendum, we note that AS 29.10.030(c) prohibits a charter from permitting the initiative and referendum to be used for a purpose prohibited by art. XI, sec. 7 of the State Constitution. However, we have an express supermajority voting requirement set out in the charter and have no constitutional requirement to the contrary.

Finally, with regard to a municipality's authority to sell its public utilities, the general rule is that no sale of a municipally owned utility can occur without express authority. 12E McQuillin The Law of Municipal Corporations, § 35.36 at 605 (3rd ed. 1986 Rev). In Alaska, all municipalities are given the general authority to acquire, manage, control, use, and sell real and personal property. AS 29.35.010(7). There is no statutory restriction on the sale of a public utility versus other kinds of municipal property. Anchorage has specific authority in its charter to sell its municipally owned utilities and the assembly may condition its own approval of the sale of a municipal utility on 60 percent voter approval as provided for in the charter. Anchorage's higher percentage voter approval provision for sale of a major municipal asset is not an uncommon practice. The 60 percent approval of the electorate prescribed by the charter must be substantially complied with; otherwise the subsequent steps in completing the sale will be without validity. 12E McQuillin, § 35.36 at 605.

In conclusion, we find no constitutional or statutory provision that prohibits enforcement of Anchorage's charter provision calling for a three-fifths vote of the electorate in order to sell a major municipal asset.

The Honorable Jan Faiks  
Alaska State Senate  
AGO File: 663-90-0197

March 15, 1990  
Page 4

We hope this addresses your concerns. Please do not  
hesitate to call this office if you have further questions.

Sincerely yours,

DOUGLAS B. BAILY  
ATTORNEY GENERAL

By: 

Marjorie L. Odland  
Assistant Attorney General

MLO:jr

tations on the doctrine urged by the State are inapposite to the circumstances of this case.<sup>8</sup>



KILA, INC., Appellant,

v.

STATE of Alaska, DEPARTMENT OF ADMINISTRATION, State of Alaska, Department of Corrections, and Allvest, Inc., Appellees.

No. S-5237.

Supreme Court of Alaska.

July 8, 1994.

Rehearing Denied Aug. 3, 1994.

Unsuccessful bidder brought action to challenge a decision of the Department of Corrections (DOC) awarding a contract to house minimum security prisoners. The Superior Court, Fourth Judicial District Fairbanks, Rodger W. Pegues, J. pro tem., affirmed the Department of Administration's rejection of the unsuccessful bidder's protest. Appeal was taken. The Supreme Court, Rabinowitz, J., held that: (1) neither the Department of Corrections nor the Department of Administration is covered by the Administrative Procedure Act, including its provision that requires a qualified, unbiased, and impartial hearing officer; (2) there was no indication that the hearing officer had lacked impartiality; (3) the Department of Corrections official who was involved in the preparation of requests for proposals for the con-

tract and who had also been employed by the successful bidder had no personal or financial interest prohibited by the Executive Branch Ethics Act; (4) modifications by the successful bidder after it was awarded the contract did not nullify the contract; and (5) the Open Meetings Act did not apply to informal meetings on the requested modifications of the contract.

Affirmed.

1. States ⇨107

Unsuccessful bidder's appeal from award by Department of Corrections (DOC) of contract to house minimum security prisoners was not moot, even though contract had been fully performed by successful bidder, where unsuccessful bidder sought to recover bid preparation costs.

2. Public Contracts ⇨10

Government agency has implied contractual duty to consider solicited bids for goods and services in fair and honest manner.

3. States ⇨98

Neither Department of Corrections, which awarded contract to house minimum security prisoners, nor Department of Administration, which reviewed unsuccessful bidder's protest, is covered by Administrative Procedure Act, including its provision that requires qualified, unbiased, and impartial hearing officer. AS 44.62.330(a, b), 44.62.350.

4. States ⇨93

Informal hearings before Department of Administration on unsuccessful bidder's protest against award by Department of Corrections (DOC) of contract to house minimum security prisoners were specifically exempted from Administrative Procedure Act, included

press no view as to whether the State is collaterally estopped from contending that the foreclosure, as distinct from the delinquency, was effective, in view of the special interest which a state court has in adjudicating title to real property within its boundaries. *Abadon v. Trust*, 624 P.2d 287, 291 n. 6 (Alaska 1981), and in view of the possibility that persons not parties to the Virgin Islands action might have an interest in the foreclosure proceeding. See Restatement (Second) of Judgments § 2815(b) (1982).

Cite as 876 P.2d 1102 (Alaska 1994)

provision requiring qualified, unbiased, and impartial hearing officer. AS 36.30.670(a), 44.62.330(a, b), 44.62.350.

5. States ⇨98

Hearing officer who presided over unsuccessful bidder's protest against award by Department of Corrections (DOC) of contract to house minimum security prisoners did not demonstrate any bias or partiality, even if he had been subject to Administrative Procedure Act, including provision requiring qualified, unbiased, and impartial hearing officer. AS 44.62.330(a, b), 44.62.350.

6. States ⇨98

Alleged variances asserted by unsuccessful bidder when it protested award by Department of Corrections (DOC) of contract to house minimum security prisoners were not so material as to demonstrate that successful bidder had gained competitive advantage by claimed bias of hearing officer who presided over protests.

7. States ⇨73

Department of Corrections official who was involved in preparation of requests for proposals for contract to house minimum security prisoners and who had also been employed by successful bidder had no personal or financial interest in contract that could have been conflict of interest under Executive Branch Ethics Act, official's involvement was limited to advancing some suggestions to change scope of work section and geographic and professional criteria for selecting members of committee to evaluate proposals. AS 39.52.110(b), 39.52.150(a).

8. States ⇨73

Department of Corrections official who was involved in preparation of requests for proposals for contract to house minimum security prisoners and who had also been employed by successful bidder had no personal or financial interest in contract that could have been conflict of interest and, thus, had no duty under Executive Branch Ethics Act to consult with Attorney General. AS 39.52.240.

9. States ⇨104

Alleged variances by successful bidder after it was awarded contract to house minimum security prisoners were not material and did not render contract void; legitimate reasons were offered for changes, need for changes had not been foreseen when Department of Corrections awarded contract, contract amendment was timely, state consistently allowed modifications when in its best interest, and modification did not interfere with intent of contract.

10. Administrative Law and Procedure ⇨124

States ⇨106

Open Meetings Act did not apply to informal meetings of Department of Corrections (DOC) employees on requested modifications of contract to house minimum security prisoners; meetings were teleconferences held between DOC employees and successful bidder's president. AS 44.62.310, 44.62.310(a), 44.62.312.

Robert John and William R. Satterberg, Jr., Fairbanks, for appellant.

Timothy W. Terrell, Asst. Atty. Gen., Office of Sp. Prosecutions and Appeals, Anchorage, and Charles E. Cole, Atty. Gen., Juneau, for appellees.

OPINION

RABINOWITZ, Justice.

This appeal arises from the Department of Corrections' award of a contract to Allvest, Inc. for the housing of minimum security prisoners in the Fairbanks area. KILA, Inc. ("KILA"), an unsuccessful bidder, contested the award, exhausted its administrative appeals, and then appealed to the superior court. The superior court affirmed the Department of Administration's decision denying KILA's protest. This appeal followed.

I. FACTS AND PROCEEDINGS

In August 1988, the Department of Corrections ("DOC") received authorization to seek proposals for a provider of professional services in the operation of an adult community

residential center in Fairbanks.<sup>1</sup> KILA and Allvest, Inc. ("Allvest") submitted bids. DOC subsequently cancelled its original Request for Proposals ("RFP"), because a change in zoning requirements rendered Allvest's proposal non-responsive, and because KILA submitted a bid beyond the amount of money that the State had allocated for the contract.<sup>2</sup> DOC issued a new RFP in August 1989.<sup>3</sup> At that time, Walter Majoros, the Director of Statewide Programs for DOC, was designated by the Commissioner of DOC, Susan Humphrey-Barnett, to serve as its procurement officer in the matter.

Majoros directed Benjamin J. Fewell, Jr., DOC's Program Coordinator, to establish and sit as non-voting chair of a Proposal Evaluation Committee ("PEC") for the purpose of evaluating proposals submitted by KILA and Allvest in response to the new RFP. DOC's Criminal Justice Planner, Marianne McNabb, submitted suggestions on the "experience and geographic location required for a PEC member to have an adequate understanding of the needs and limitations" of the residential center. However, she neither participated in the selection of individual PEC members nor contacted them regarding the evaluation of the bids.

Applying the RFP evaluation criteria, four of the PEC's five voting members rated Allvest's proposal higher than KILA's. Based on the majority vote of the PEC, Fewell recommended to Majoros that DOC negotiate a contract with Allvest. DOC then issued a notice of intent to award a contract to Allvest. KILA protested the award.

1. The purpose of the Request for Proposals was to provide housing security and other services for appropriately classified offenders whom DOC might assign to the center. Alternative placement centers of this type provide DOC with placement options for some misdemeanant offenders, and serve as halfway houses for offenders who are being released back into the community.
2. After submission of the Allvest proposal, the Fairbanks North Star Borough enacted a zoning change that denied use of the building proposed by Allvest for the purpose intended. This left KILA as the only available proposer. It was alleged that KILA's bid was approximately \$185,000 higher than Allvest's bid.

After issuance of the notice of intent, PEC member Lew Reece submitted a memorandum to Humphrey-Barnett, alleging that Fewell had imposed his own values on the PEC proceedings and skewed the outcome. He met with Ken Brown, DOC's Northern Regional Director, and also with Humphrey-Barnett. Majoros immediately investigated Reece's concerns, contacting the other PEC evaluators to determine if they thought Fewell was biased. The other four voting members stated that they believed Fewell was impartial and that they had voted independently. Humphrey-Barnett concurred with Majoros' determination that Reece's allegations were unfounded.

Allvest's original bid outlined a plan to develop a facility on Badger Road. After DOC issued the notice of intent to award the contract, local opposition to using the Badger Road site developed. Aware of the pressure regarding the location, DOC began to discuss its options. Because Allvest had proposed a location that met both the requirements of the RFP and zoning requirements, retracting the intent to award could have caused severe difficulties. Fewell, therefore, advised Majoros not to cancel and re-bid but "to continue on course and try to reach a solution" that would provide for use of the proposed Badger Road location.

On November 21, 1989, DOC signed the contract with Allvest to commence January 1, 1990, giving Allvest approximately one month to bring the facility up to specifications.<sup>4</sup> On the same day Tanana Chiefs Conference, Inc. ("TCC"), the owner of record, was informed

3. The proposal responses were due on or before September 18, 1989. DOC received Allvest's proposal on September 15, 1989. On September 17, KILA informed DOC that although it had delivered its proposal to a private delivery service in Fairbanks, the weather conditions were so bad in Juneau that planes were unable to land. In order to promote fairness and competition, the program coordinator amended the RFP to provide for receipt of KILA's proposal. See 2 AAC 12.850 (authorizing extension of solicitation). Allvest objected to the amendment allowing any extension of time.
4. Allvest had concluded that it would take approximately 20 days to bring the Badger Road facility up to the required standards.

by the United States Department of Housing and Urban Development ("HUD") of potential lease problems involving the Badger Road location. As the hearing officer found, "There is no evidence outside of the viability of the TCC/HUD lease issue from which to conclude that Allvest was not a responsible proposer." As public pressure increased, including substantial pressure on HUD, Allvest contacted a local real estate agent to research the availability of other locations. The agent discovered that KILA did not own the facility it was using and eventually a lease was executed between Allvest and the property owner that would enable Allvest to use the existing facilities.

DOC denied KILA's bid protest on November 16, 1989. KILA appealed the denial of its protest on November 30, 1989. KILA also corresponded with Fewell, Humphrey-Barnett, and Larry McKinstry, an assistant attorney general, requesting "[r]easonable notice of, and right to attend any and all State meetings addressing the Allvest contract modification requests, or the KILA contract dispute, or any meeting related to such."

The Department of Administration granted KILA an administrative hearing to address the bid protest issues in dispute. A hearing was held from May 29 to June 2, 1990. Pursuant to the hearing officer's recommendations, the Commissioner of the Department of Administration denied KILA's appeal in September 1990.

5. Allvest has fully performed the contract in question, a development which normally would moot this entire appeal. Given these circumstances, the State moved to dismiss the appeal. An individual justice of this court denied the motion, stating that "[w]hile appellant's claim that it is entitled to its bid preparation costs may be unsuccessful, the appeal is not rendered moot by the fact that the successful bidder has fully performed the contract." In addition, the State argues that this court should refuse to address the issue of bid preparation costs because KILA failed to raise the point at the administrative level. This is incorrect. In the November 2, 1989 notice of protest letter from KILA's counsel to the Commissioner of DOC, KILA requested that it be awarded the contract, or in the alternative, that the contract be readvertised for bid. On November 7, 1989, KILA's attorney sent the Commissioner a supple-

[1] KILA appealed the decision of the Department of Administration to the superior court. The superior court affirmed the Department of Administration's decision, and this appeal followed. On appeal, KILA raises numerous specifications of error, ultimately seeking to have DOC re-bid the contract and pay KILA's bid preparation costs.<sup>5</sup>

## II. DISCUSSION

### A. Alleged Bias in the Bidding Process

[2] When soliciting bids for goods and services, a government agency has an implied contractual duty to consider bids in a fair and honest manner:

[I]n exchange for a bidder's investment of the time and resources involved in bid preparation, a government agency must be held to an implied promise to consider bids honestly and fairly. Breach of this implied contract on the part of an agency entitles a disappointed bidder to recover the costs incurred in preparation of the bid.... [T]he "reasonable basis" standard for review of administrative decisions, see *Jager v. State*, 537 P.2d 1100, 1107-08 (Alaska 1975); *Kelly v. Zamavello*, 486 P.2d 906, 916-17 (Alaska 1971), is applicable in this situation.<sup>6</sup> See *Keo Industries, Inc. v. United States*, [203 Ct.Cl. 566], 492 F.2d 1200, 1203-04 (1974).

*King v. Alaska State Hous. Auth.*, 633 P.2d 256, 263 (Alaska 1981) (*King II*). A review of the entire record persuades us that KILA's bid was fairly and honestly consid-

ered.<sup>7</sup>

ment that requested bid preparation costs. Thus, KILA made the request at the appropriate time.

6. Under this standard, "we merely seek to determine whether the agency's decision is supported by the facts and has a reasonable basis in law even if we may not agree with the agency's ultimate determination." *Fairbanks N. Star Borough Sch. Dist. v. Bowers Office Prods.*, 551 P.2d 56, 58 (Alaska 1992) (quoting *Tesoro Alaska Petroleum v. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987)).
7. In an administrative appeal based on the agency record, we accord no deference to the decision of the superior court and independently scrutinize the administrative action. *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987).

### 1. KILA's Contention that Majoros Was Not Impartial

Majoros was responsible for all DOC procurements under statewide programs.<sup>8</sup> KILA objects to Majoros' participation in the procurement process, claiming that Majoros was not impartial as required by AS 44.62.350, and that his partiality resulted in a competitive advantage to Allvest.

[3] Alaska Statute 44.62.350 governs the appointment of hearing officers to hear and adjudicate disputes under the Administrative Procedure Act:

The governor shall assign a qualified, unbiased, and impartial hearing officer, with experience in the general practice of law, to conduct hearings under this chapter.

Relying on this provision, KILA contends that Majoros was required to be impartial in reviewing the protest letter. However, the application of AS 44.62.350 is governed by AS 44.62.330(b), which reads in relevant part:

The procedure of an agency not listed in (a) of this section shall be conducted under AS 44.62.330-44.62.630 only as to those functions to which AS 44.62.330-44.62.630

B. Under AS 36.30.250 and AS 36.30.560-585, the procurement officer must make decisions on the contract award and also make the determinations necessary on protests. In determining an award of contract, a procurement officer's initial duty is as follows:

The procurement officer shall award a contract under competitive sealed proposals to the responsible and responsive offeror whose proposal is determined in writing to be the most advantageous to the state taking into consideration price and the evaluation factors set out in the request for proposals.

AS 36.30.250(a).

9. In its notice of bid protest, KILA presented the following points:

1. KILA argued that several years ago, the Department of Health and Social Services rejected the facility that Allvest proposed to lease as "insufficient and inappropriate" for use as a youth facility. Majoros responded, "A decision by the Department of Health and Social Service [sic] as to the suitability of any piece of property to meet their needs for a given project has no bearing on the Department of Corrections [sic] needs or requirements for this contract."

2. KILA disputed Majoros' acceptance of Allvest's proposed location, in light of potential problems with nuisance suits, suits for taking of private property, and local zoning laws, and challenged his reliance on the negotiation pro-

cess to rectify any difficulties, claiming that the failure to address these issues was arbitrary and capricious. Majoros responded that pursuant to the RFP's requirements, Allvest provided information concerning permits, local zoning ordinances, codes, and laws, and also held a public hearing. Majoros noted that "[t]he RFP does not require total community approval, except through zoning requirements, but does provide for expression of community concern and suggestions."

3. KILA asserted that Majoros inadequately considered the effects of the alternative placement center's site upon local property values. Majoros responded that under AS 36.30.250 he could consider only price and the evaluation factors set out in the RFP, and no other factors or criteria, when making his decision.

Further, he contended, the RFP required that comments concerning defects and objectionable material in the solicitation be made in writing and received by the purchasing authority at least 10 days before the opening of the proposals. Therefore, Majoros concluded that any changes in the RFP's evaluation criteria, such as impact on property values within the vicinity of a residential center, should have been requested within that time frame. Majoros also stated that no evidence at the time of the bid indicated that if the state complied with local zoning requirements, a negative impact on local property values would occur.

Neither the Department of Administration nor DOC are among the agencies listed in AS 44.62.330(a), and thus they are not covered by the Administrative Procedure Act.

[4] In addition, AS 36.30.670(a) expressly exempts from the Administrative Procedure Act informal hearings such as the one in which the Department of Administration reviewed the denial of KILA's bid protest. Therefore, AS 44.62.350 does not apply to a procurement officer's decision regarding a bid protest or to informal hearings held subsequent to a protest appeal. Nevertheless, the inapplicability of AS 44.62.350 does not relieve Majoros of the obligation to review bid protests in an impartial and unbiased manner.

[5, 6] Our review of the record, and in particular our consideration of Majoros' response to KILA's letter of protest, persuades us that none of KILA's objections demonstrate bias or a lack of impartiality on Majoros' part.<sup>9</sup> KILA has not shown that Majoros

Cite as 876 P.2d 1102 (Alaska 1994)

ros was biased either in approving the PEC recommendation to award the contract to Allvest or in reviewing and rejecting KILA's protest letter.<sup>10</sup> We further conclude that none of KILA's objections prove that Allvest gained a competitive advantage by virtue of Majoros' decision. Taken individually or cumulatively, the alleged "variances" to which KILA objects are not material.<sup>11</sup>

### 2. KILA'S Assertion that Marianne McNabb Had a Severe Conflict of Interest in Violation of the Executive Branch Ethics Act

[7] KILA asserts that DOC official Marianne McNabb's involvement in the preparation of the RFPs and her involvement in a prior program audit of Allvest's Cordova

Center in Anchorage violated the Executive Branch Ethics Act, AS 39.52.010-.960.<sup>12</sup> Specifically, KILA argues that McNabb's prior involvement with Allvest prohibited her from participating in the bid process.<sup>13</sup> Prior to being hired by DOC, McNabb was employed by Allvest as vice-president of operations from October 1987 through December 1988.<sup>14</sup>

In further support of its contentions of bias, KILA points to Majoros' acceptance of Allvest's allegedly deficient fire-safety plan, resident termination/walking procedures, resident medical/dental services, and disaster plan. KILA also questions Majoros' holding that the PEC did not have an affirmative duty to investigate the representations of the bidders.

10. KILA also asserts that Majoros' rejection of its bid protest was arbitrary, capricious, and an abuse of discretion. This argument is without merit.

11. A material variance from a bid specification requires rejection of the bid. *Chris Berg, Inc. v. State Dep't of Transp.*, 680 P.2d 93, 94 (Alaska 1984). A variance is material if it provides a bidder with a substantial advantage over other bidders, thus limiting or stifling competition. *Id.* All proposals for public contracts must therefore "substantially comply with all requirements contained in the invitation for proposals." *King v. Alaska State Hous. Auth.*, 512 P.2d 887, 492 (Alaska 1973) (*King I*). In *King I* we stated:

This use of ASHA's invitation became by implication part of a valid proposal. In order that competition among redevelopers remain equal. Consistent with this well established principle courts hold that while a "material" variance from the invitation requires rejection of the proposal, a "minor" variance does not require rejection of the proposal.

*Id.* (footnote omitted). We review the agency's determination that a bid is responsive to the agency's solicitation under the reasonable basis standard. *Chris Berg*, 680 P.2d at 94.

12. Alaska Statute 39.52.150(a) provides:

A public officer, or an immediate family member, may not attempt to acquire, receive, apply for, be a party to, or have a personal or financial interest in a state grant, contract, lease, or loan if the public officer may take or

withhold official action that affects the award, execution, or administration of the state grant, contract, lease, or loan.

The hearing officer rejected KILA's contention: KILA alleges a violation of the State ethics law although no explanation is provided as to what specific provision of AS 39.52 is alleged to have been violated. No evidence was brought forward or even hinted at that would suggest that Ms. McNabb

also relevant is AS 39.52.110(b):

Unethical conduct is prohibited, but there is no substantial impropriety if, as to a specific matter, a public officer's

(1) personal or financial interest in the matter is insignificant, or of a type that is possessed generally by the public or a large class of persons to which the public officer belongs; or

(2) action or influence would have insignificant or conjectural effect on the matter.

13. As DOC's Criminal Justice Planner, McNabb is "responsible for the implementation and facilitation of various DOC programs with service contractors such as KILA and Allvest." She recently rewrote the DOC standards regarding the provision of services by various contractors. Her position requires that she stay in close contact with DOC contractors to ensure that they understand and comply with those standards.

14. As a former Allvest employee McNabb was responsible for its Alaska operations. KILA states that McNabb authored and approved the operations manual, which formed a portion of the submittal supporting Allvest's bid. After McNabb started work with DOC as a criminal justice planner, her activities relating to Allvest were minimal. At the request of Humphrey-Barnett in May 1989, McNabb participated in an audit of Allvest's Anchorage program to determine its compliance with DOC standards. The audit was performed independently of the contract award process and was not intended to be used in conjunction with the Fairbanks award. McNabb participated as one of three evaluators who concluded that the Allvest program was in compliance.

benefitted in any way from her former association with Allvest or that she was not honest, truthful, and unbiased in her evaluation of Allvest facilities. Ms. McNabb was not a member of the PEC and testimony established that her only involvement with the solicitation, evaluation, or award of the contract was to suggest minor changes in the scope of work section of the RFP after her input was solicited by DOC and suggested some wording changes in the final contract. No evidence was presented to suggest that her input resulted in an advantage or disadvantage for either proposer.

Our review of the record leads us to conclude that substantial evidence supports the hearing officer's findings. As the State notes, McNabb's involvement was limited to advancing some suggestions for the "scope of work" section of the RFP and the geographic and professional criteria for selecting the PEC members. McNabb had neither a personal nor a financial interest in the contract in question. Any personal or financial interest she may have had was insignificant. Therefore, her actions did not violate the Act. See AS 39.52.110(b)(1).<sup>15</sup>

[8] One final observation should be made in regard to this issue: KILA contends that pursuant to AS 39.52.240, McNabb should have requested an opinion from the Attorney General as to her apparent conflict of interest. As indicated above, in the absence of any personal or financial interest in the contract, and given the fact that McNabb did not participate in or influence the PEC's contract award process, she was not required to contact the Attorney General regarding the alleged conflict.

### 3. KILA's Contention that the Contract Award Process Was Permeated with Illegality

[9] KILA also claims the State's allowance of Allvest's substitution of facilities after the award of the contract resulted in an unlawful competitive advantage to Allvest

15. The exemption found in AS 39.52.110(b)(2) is also applicable since McNabb had no role in the PEC evaluation process and did not affect its outcome.

that requires voiding the contract. In order to establish a competitive advantage, KILA must prove that a "material" variance was effected in the contract:

Not all amendments to competitively bid contracts are prohibited, only those regarded as material. The concept of materiality in this context has not been satisfactorily captured in a single phrase. One court has spoken of "an essential change of such magnitude as to be incompatible with the general scheme" of competitive bidding; another has phrased the question to be whether the amendment "so varied from the original plan, was of such importance, or so altered the essential identity or main purpose of the contract, that it constitutes a new undertaking." These formulations simply recognize that the materiality concept prohibits those changes which tend to be subversive of the purposes of competitive bidding.

*Kenai Lumber v. LeResche*, 646 P.2d 215, 221 (Alaska 1982) (footnotes omitted).<sup>16</sup> Five factors determine whether a contract change constitutes a "material" variance:

- (1) the legitimacy of the reasons for the change;
- (2) whether the reasons for the change were unforeseen at the time the contract was made;
- (3) the timing of the change;
- (4) whether the contract contains clauses authorizing modifications; [and]
- (5) the extent of the change, relative to the original contract.

*Id.* (footnotes omitted).

The hearing officer applied the five factors and concluded that the amendment "was not a major variation of the original plan nor did it so alter the essential identity or main purpose of the contract that it constituted a new undertaking." Based on the facts, supporting testimony, and evidence presented, the hearing officer determined: (1) that there were legitimate reasons for the change in facilities; (2) that DOC did not foresee the

16. *Cf. supra* note 11 (citing similar rule for variance in bids from an RFP).

reasons for the change at the time the contract was signed, and that Allvest acted in good faith; (3) that given the necessity to have an operative facility by January 1, 1990, the contract amendment was timely; (4) that the State consistently allows contract modifications when they are in its best interests;<sup>17</sup> and (5) that the modification did not interfere with the "intent" of the contract—to secure a correctional facility in the Fairbanks area—and that "[t]he specific site of the facility was not relevant to the functioning of the program." We conclude that the hearing officer's factual findings have substantial support in the record and that his interpretation of "material variance" has a reasonable basis in law.

KILA advances numerous other improprieties and alleged illegalities in the contracting process. Our review of these points in light of the entire record and applicable law persuades us that none have merit.<sup>18</sup>

### B. KILA's Contention that the State Violated the Open Meetings Act

[10] KILA argues that the Open Meetings Act ("Act"), AS 44.62.310-.312, required that it be granted reasonable notice of, and the right to attend and participate in, meetings concerning the disposition of KILA's contract, the Allvest contract modification requests, and KILA's contract dispute. Contending that the State failed to give public notice of these meetings and denied KILA's representatives access to them, KILA urges us to void any actions modifying the contract.

17. After reviewing Allvest's request for a change in the facility's location, Fewell contacted both the Department of Administration and the Attorney General's Office. He requested advice concerning the requirements of the procurement code and whether the change in location would constitute a modification in the contract so severe as "to warrant not allowing the request." Both the Department of Administration and the Attorney General's Office indicated that the modification was permissible.

18. KILA argues that DOC's cancellation of the first RFP was improper. Since KILA did not protest DOC's cancellation of the first RFP on appeal to the superior court, the issue is not properly before us. KILA further contends that Allvest's bid was in numerous respects nonre-

The state argues that neither DOC nor the Department of Administration violated the Act because the Act does not apply to informal groups of state employees who have no power to take collective action by vote. More particularly, the State notes that

McKinstry, Fewell, Weimar and Majoros were not part of any formally appointed or constituted body. No statute, regulation or formal administrative action created this group as a collective entity, nor were these persons appointed or elected to the group. As a collective entity they had no powers, and could take no actions. They could not take action by a group vote.

The State further contends that no "meetings" to discuss contract modifications by any official or even informal "bodies" took place. The "meetings" in question consist of two separate teleconferences held between Majoros, Fewell, McKinstry, and the president of Allvest. The hearing officer declined to apply the Act to KILA's appeal because of the nature of the meetings at issue. The hearing officer found that the meetings were "informal" and that it would be "impossible to apply [the Act] to the everyday dealings of public employees when they meet with each other and those outside of State government in the day-to-day conduct of this State's business."

We agree. Alaska Statute 44.62.310(a) provides in relevant part:

All meetings of a legislative body, of a board of regents, or of an administrative body, board, commission, committee, subcommittee, authority, council, agency, or

sponsive. We find no merit in this specific contention.

In addition, KILA argues that under AS 44.62.350(c) the hearing officer was unqualified in that he had not been admitted to practice law for at least two years immediately before his appointment. This contention has little merit. First, review of the record shows that KILA waived this contention by not raising it at the administrative level. Second, AS 36.30.630 provides that hearings held on public contract controversies "shall be conducted according to AS 36.30.670, which in turn expressly exempts hearings under AS 36.30 from the Administrative Procedure Act. AS 44.62. Alaska Statute 36.30.670 does not require that hearing officers appointed under that chapter be admitted to the practice of law.

other organization, including subordinate units of the above groups, of the state or any of its political subdivisions, including but not limited to municipalities, boroughs, school boards, and all other boards, agencies, assemblies, councils, departments, divisions, bureaus, commissions or organizations, advisory or otherwise, of the state or local government supported in whole or in part by public money or authorized to spend public money, are open to the public except as otherwise provided by this section.<sup>19</sup>

KILA has presented no evidence that these informal meetings were held by governmental units whose actions come within the ambit of AS 44.62.310. This statute contemplates meetings of a governmental body, including subordinate units thereof. Under the particular facts of this record we hold that the Act did not apply to the individuals who participated in the two meetings now questioned.

### III. CONCLUSION

KILA has failed to prove that any of the DOC officials involved acted in bad faith, were biased, or lacked impartiality. Further, KILA failed to demonstrate that the hearing officer for the Department of Administration lacked a reasonable basis for his conclusion that Allvest's bid was responsive. KILA's arguments that Majoros was biased, that McNabb had a conflict of interest, and that the process was permeated with illegalities are meritless. Finally, KILA failed to show any violation of the Open Meetings Act. Thus, the contract between DOC and Allvest is not voided, and KILA is not entitled to its bid preparation costs.

AFFIRMED.



19. We have broadly construed the policy objectives of the Act, as stated in AS 44.62.312, to encourage openness in government dealings.

Given the strong statement of public policy in AS 44.62.312, the question is not whether a quorum of a governmental unit was present at a private meeting. Rather, the question is whether activities of public officials have the effect of circumventing the (Act).

Richard SKVARCH, Appellant,

v.

Pnulette SKVARCH, Appellee.

No. S-5690.

Supreme Court of Alaska.

July 8, 1994.

Divorced husband sought to modify his obligation to pay former wife \$500 a month for 36 months under property settlement. The Superior Court, Third Judicial District, Kenai, Jonathan H. Link, J., denied husband's motion, and husband appealed. The Supreme Court, Matthews, J., held that rehabilitative alimony payments established in property settlement agreement were integral part of division of property, and would not be modified.

Affirmed.

#### 1. Husband and Wife ⇨279(2)

Alimony payments are integrated in property settlement, and are not subject to modification, when they constitute part of consideration given for other property benefits.

#### 2. Divorce ⇨245(2)

Where party receives alimony in exchange for claims in other property, it would be unjust to modify alimony while leaving remaining property distribution untouched.

#### 3. Husband and Wife ⇨279(2)

Monthly payments were integral part of division of property, and would not be modified.

*Brookwood Area Homeowners Ass'n v. Municipality of Anchorage*, 702 P.2d 1317, 1323 n. 6 (Alaska 1985). In *Brookwood*, we defined a "meeting" to encompass "every step of the deliberative and decision making process when a governmental unit meets to transact public business." *Id.* at 1323.

### SKVARCH v. SKVARCH

Cite as 876 P.2d 1110 (Alaska 1994)

Alaska 1111

fied, though payments were called temporary rehabilitation alimony in property settlement agreement and referred to as spousal support in letters negotiating settlement; payments were provided for in exhibit to property settlement agreement, payments were included in wife's property and deducted from husband's property, property division could be considered inequitable without payments, payments were not explicitly linked to rehabilitation efforts, duration of payments was negotiated by spouse, unavailability of substantial portion of marital assets made use of alimony-type payments appropriate to adjust settlement, and purpose husband presently claimed for rehabilitative alimony would not support alimony provision as originally formulated.

Allan Beiswenger, Robinson, Beiswenger & Ehrhardt, Soldotna, for appellant.

Peter F. Mysing, Kenai, for appellee.

Before MOORE, C.J., and RABINOWITZ, MATTHEWS and COMPTON, JJ.

### OPINION

MATTHEWS, Justice.

Richard Skvarch seeks to modify his obligation to pay Paulette Skvarch \$500 a month for thirty-six months under a property settlement agreement reached between the parties in connection with their divorce.

Richard and Paulette Skvarch were divorced April 23, 1992, after twenty-six years of marriage. At the time of the divorce decree Richard resided in Alaska, where he earned in excess of \$100,000 per year, and Paulette lived in Pennsylvania, where she was being trained as a medical stenographer. The Skvarchs' marital property was divided between them according to the terms of a property settlement agreement they had reached. The agreement awarded Paulette

assets with a total value of \$108,308.09 and Richard assets with a total value of \$81,372.27.<sup>1</sup> Paulette's total includes \$18,000 for "temporary rehabilitative alimony in the sum of \$500.00 per month, without interest, for a period of thirty-six months, commencing on the 10th day of the month following the entry of a decree of divorce herein." Similarly, Richard's total property distribution includes an \$18,000 credit for "temporary rehabilitative alimony" payments to Paulette.

On February 3, 1993, Richard moved to modify the decree of divorce to eliminate his obligation to pay rehabilitative alimony. In support of this motion, Richard alleged that Paulette had completed her vocational training, had obtained employment as a medical secretary, and had remarried and that therefore the purpose for the rehabilitative alimony no longer existed.<sup>2</sup> Paulette opposed this motion, arguing that the monthly "rehabilitative alimony" payments were part of the parties' property settlement, that vacating the payments would render the settlement inequitable, and that even if the payments were alimony, they were just and necessary to her rehabilitation.

The superior court denied Richard's motion to modify the divorce decree. In a footnote, the court found "that these are rehabilitative alimony payments." Richard appeals.<sup>3</sup>

[1-3] This court has recognized that "[w]here a support provision is an integral part of the property settlement, courts generally hold that the support provision is not subject to later modification." *Keffer v. Keffer*, 852 P.2d 394, 397 (Alaska 1993) (citing John J. Michalik, Annotation, *Divorce: Power of Court to Modify Decree for Alimony or Support of Spouse Which Was Based on Agreement of Parties*, 61 A.L.R.3d 520, 590 (1975)); see also *Vogles v. Vogles*, 644 P.2d 847, 849-50 (Alaska 1982) ("We wish to make

discretion. *Hinchey v. Hinchey*, 722 P.2d 949, 954 (Alaska 1986). This court will find an abuse of discretion only if it is "left with a definite and firm conviction, after reviewing the whole record, that the trial court erred in its ruling." *Id.* (quoting *Jones v. Jones*, 606 P.2d 1031, 1035 (Alaska 1983)).

1. This is a 57.1%/42.9% division in favor of Paulette.

2. Paulette has not denied any of these allegations.

3. A trial court's denial of a motion to modify a support obligation is reviewed for an abuse of

AS 33.30.041  
Lease to Municipality

33.30.026 Procurement Code Applicable  
to contracts. (36.30)

33.30.025 Siting of prison  
Notify community council  
if @ 1/2 mile of council area

33.30.031 Contracts for confinement & care

Amend  
this →  
as  
alternative

36.30.250 Award of Contract  
— gives stds for award decision  
Under Kila

Alt. #2 Must consid. prop. values  
pub safety issues

Rhet v St 582 P2134

35 ALR 32 1293

Eminent Domain

AG Opinion 4/17/81

AS 09.55.240

public uses authorized by the legis.

~~Alternative~~

3330.025 Sityly → NOTICE

Municipality

- Only has powers expressly granted
- Any Q resolved by + muni.

Initiative If in conflict @ Statute to good

Whitson v. Arch 608 P2 759

Acvedo v. City N.P. 672 P2 130

29.08.020 29 48 260 (c)

↳ Libby v. City D 612 P2 33

Liberati 584 P2 1028

Ronai 889 P2 6047

Only powers in Title 29

AK for reform v. St 887 P2 960

Foreman 779 P2 1199

Jud' rev. of initiative

state preempts if interference effective fine

*Lisa's Copy***South Anchorage Coalition FAX**

PAGE 1 OF 3

**Date:** 3/6/97  
**TO:** Rep Joe Green  
ATTN: LISA KIRSCH  
**Fax #** (907) 465-4316  
**FROM:** B.K. Powell  
**Fax #** (907) 345-5542  
**Tel** (907) 345-4854  
**e-mail:** amunra@alaska.net  
**RE:** HB 53 AMENDMENTS

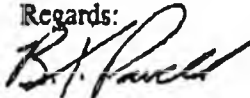
**Message:**

Lisa:

Here is our "draft" of suggested amendments to HB 53. Please review and advise. Our suggestions are in **bold underlined Italics**.

One last note, under Section 4. (A) " for its initial period, not to exceed five years, be entered into with a private third-party contractor that is the same person as the third -party contractor described in (1) of this subsection; and" Perhaps we should look at a five year contract with a contract review (operational review) at the end of 3 years, and if successful in this review the additional 2 years (of the contract) is awarded. If not successful in the review then perhaps a 6 month probation period to adjust to state standards and if standards are not met after probationary period then a re-bid of the contract should occur.

Regards:



B.K. Powell  
South Anchorage Coalition

FROM: South Anchorage Coalition

RE: House Bill No. 53  
In the Legislature of the State of Alaska  
Twentieth Legislature-First Session  
By Representative Mulder  
Introduced: 1/13/97

March 6, 1997

The following represents suggested changes to HB53 as drafted by the South Anchorage Coalition.

Section 1 AS 33.30.031 (a) is amended to read:

(a) The commissioner shall determine the availability of state correctional facilities suitable for the detention and confinement of persons held under authority of state law or under agreement entered into under (e) of this section. If the commissioner determines that suitable state correctional facilities are not available, the commissioner may enter into an agreement with a public or private agency to provide necessary facilities, subject to the following:

does  
36.30.085  
apply?

- (1) the commissioner may enter into an agreement only with an agency that
- (A) demonstrates the qualifications and experience to provide a degree of custody, care and discipline to the extent required by the laws of this state; and
- (B) posts an adequate performance bond and payment bond; and
- (C) if a private agency, demonstrates the capability to provide the necessary qualified personnel to implement the terms of the contract; and
- (D) if a private agency, provides a bond or certificate of insurance sufficient to defend and indemnify the state and the local government against claims or liability arising from the operation of correctional facilities by the contractor; and
- (E) in the event the services are to be provided in a new correctional facility within the State of Alaska, a public site selection process shall be implemented as defined by:
- (1) Local community or political subdivision of the state and approval by a single question ballot, approved by a majority of voters in the affected community; and  
said correctional facility operates under operational standards as defined in  
xxxxxxx ?? applicable national guidelines

procurement code?

33.30.041  
(b) (3)

do provide in AS 33.2625 & amend that?

see  
33.30.031  
(c) competitive bids

Sec 2.

Sec. 33.30.043 Lease of or agreement to use space within a local community, municipality or political subdivision of the state. (a) If the commissioner determines that it would be in the best interest of the state, the commissioner may enter into an agreement with a local community, municipality or political subdivision of the state for the lease by the state of a correctional facility or a part of it or for the use and operation of a correctional facility or a part of it for the benefit of the state.

36.30.300  
36.30.100

Sec. 3. Authorization to the successful bidder to lease, or for use of, correctional facility space with a third-party contractor operation. (a) To relieve overcrowding of existing correctional facilities, the Department of Corrections may enter in an agreement to lease space or for use of space within a correctional facility through the issuance of a RFP. That will house persons who are committed to the custody of the commissioner of corrections. The agreement to lease or for use entered into under this section is predicated upon and must provide for an agreement under which a private qualified and experienced prison contractor operates the facility by providing for custody, care and discipline services for persons held by the commissioner of corrections under authority of state law.

Is this essential - will it foreclose ALL contractors if this is unprejudiced in this state

HB 53

Jim Baldwin

Voter approval

- delegation of lawmaking auth.

- delegation of police power  
intended use of property

— bed # limits

— exempt expansions

specific req

adjoining approval

Cases on both sides

51 ALR 444, 1076

83 ALR 3d 1086 - Senior citizen zoning

NO Alaska cases

AS 46 40 070

Coastal zone mgmt.

Natural resource development

Throwing it over to vote

may have arbitrary decision

Disting btwn various areas of  
regulation

cutting off states ability

is it unreasonable

how complete is statutory scheme

HB 53

IF state prison  
to have

Jim Baldwin — to 3600

"NEW FACILITY"

— Prudhoe Bay — Barrow opposed

— 1/2 way houses "correctional facilities"

"prison"

Award



→ facility > 50

expand other loca.

Meaningful stds.

→ stress pub safety concerns

→ Character of neighborhood

OK

NEW

No facility > 50 beds

if within 1/2 mile of area of pop density > \_\_\_\_\_  
OR CHANGE CHARACTER OF A NEIGHBORHOOD

— unless voters approve

- [b] Objection or recommendation of alternatives
- [c] Hearing
- [d] Decision

- § 14. Nonattendance by agency at local meeting
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#### I. Preliminary matters

##### § 1. Introduction

###### [a] Scope

The purpose of this annotation is to collect and analyze the state and federal cases in which the

courts have considered the validity, construction, and effect of statutes requiring consultation with, or approval of, a local governmental unit prior to locating a group home, halfway house, or similar community residence<sup>1</sup> for persons

1. "Group home," "halfway house," "community residence," and similar phrases, as employed herein, are intended to include any residential fac-

afflicted with any kind or degree of mental or emotional disturbance, retardation, or other disability of a nonphysical nature, within the local governmental unit's jurisdiction.

Since the annotation focuses on procedural requirements governing the location of community homes for the mentally ill under statutes providing for local government participation in the site selection process, issues concerning particular substantive criteria governing the location of such homes are beyond its scope, as are issues concerning the merits of locating a community home at a particular place or within a particular jurisdiction.<sup>2</sup>

Although all of the cases collected in the annotation consider the validity, construction, and effect of statutes governing the placement of group homes, relevant statutes are discussed herein only to the extent that they are reflected in the reported cases within the scope of this annotation. The reader is therefore advised to consult the appropriate statutory compilation in any jurisdiction of interest.

#### [b] Related matters

Community residence for mentally disabled persons as violation of restrictive covenant. 41 ALR4th 1216.

#### Applicability and application of

ity designed to allow a relatively small number of persons needing specialized supervision or care to live together in a homelike, noninstitutional environment.

2. As to issues concerning the valid-

zoning regulations to single residences employed for group living of mentally retarded persons. 32 ALR4th 1018.

Halfway houses: housing facilities for former patients of mental hospital as violating zoning restrictions. 100 ALR3d 876.

Zoning regulations as applied to homes or housing for the elderly. 83 ALR3d 1103.

Validity of zoning for senior citizen communities. 83 ALR3d 1084.

Validity and construction of statute requiring establishment of "need" as precondition to operation of hospital or other facilities for the care of sick people. 61 ALR3d 278.

Validity and construction of zoning regulations expressly referring to hospitals, sanitariums, nursing homes. 27 ALR3d 1022.

Institution for the punishment or rehabilitation of criminals, delinquents, or alcoholics as enjoynable nuisance. 21 ALR3d 1058.

Validity of zoning ordinance or similar public regulation requiring consent of neighboring property owners to permit or sanction specified uses or construction of buildings. 21 ALR2d 551.

Supreme Court's views as to constitutionality of residential zoning restrictions. 52 L Ed 2d 863.

ity, construction, application, and effect of local zoning ordinances, permit requirements, and similar regulations with respect to community homes for the mentally ill, see the annotations at 32 ALR4th 1018 and 100 ALR3d 876.

## § 2. Summary and comment

### [a] Generally

In an apparent effort to reconcile the need of mentally ill persons for treatment in a homelike, noninstitutional environment, and for early integration into normal community life, with the interest of local communities in preserving the integrity of traditional, single-family residential areas, several states have enacted statutes providing for local government participation in the process of selecting sites for community homes for the mentally ill. The need for such legislation seems to have arisen largely from the fact that community homes for the mentally handicapped have usually been licensed, and often sponsored, by state social service and mental health agencies, with local communities and residents having no formal role or direct voice in the site-selection process and resorting to such indirect means of participation as enforcement of zoning ordinances and restrictive covenants.<sup>3</sup>

Courts have upheld the validity of statutes which accord to a state administrative agency the final decision whether to approve the location of such a home, after consultation between the sponsor and the affected municipality, against challenges that the statutes violated the rights of municipalities and neighboring property owners by failing to provide for adequate notice and hearing (§ 3[a]) or for an impartial decisionmaker (§ 3[b]), and despite the contention by mentally re-

tarded persons that a requirement of local government participation in site selection violated their due process rights to purchase and occupy residential property (§ 3[c]). While it has been held that a statute requiring local consultation or approval prior to the location or licensing of a home did not violate the equal protection rights of municipalities or of the mentally retarded (§ 4[a]), one court held that a statute requiring local government approval violated the right of mentally retarded persons to equal protection of the law, where other property owners in the same district did not have to satisfy any such requirement before putting their property to an otherwise legal use (§ 4[b]). The courts have sustained the validity of such statutes against municipal contentions that they unconstitutionally delegated legislative powers to an administrative agency (§ 5), or were invalid because they interfered with the exercise of local zoning power (§ 6).

In a number of cases, the necessity of compliance with a statute requiring notice to, consultation with, or approval by local authorities prior to locating a community home for the mentally ill has turned upon the applicability of the statute to the particular proposed home. It has been held that compliance with a statute, requiring notice to and consultation with a local government unit prior to locating a community home within its jurisdiction, was unnecessary where the statute was inapplicable to a

3. See, for example, "Zoning for community homes serving developmentally disabled persons," 2 Mental

Disability L. Rptr 794-796 (May-June, 1978).

facility which did not meet the statutory definition of a community home with respect to the number of residents which could be placed in such homes (§ 7). It has also been suggested that a statute requiring prior approval was limited in application to community homes located in districts zoned for single-family dwellings, where the statute accorded a right of location for community homes in areas zoned for multifamily dwellings (§ 8). Further, the applicability of a statute empowering a state administrative agency to approve the location of a community home, after consultation between the sponsor and the affected municipality, has been held limited to homes for which sites were selected or licensed after the effective date of the statute (§ 9). Under a statute requiring the sponsor of a community home to notify the affected municipality of its intent to locate such a home within the municipality, and allowing the municipality 40 days thereafter within which to approve, object, or suggest alternative sites, one court held that the municipality was entitled to a second notice and period for response after the parties failed to agree within 40 days and the sponsor then selected a new site not conforming to the original site selection criteria (§ 10).

Whether notice to, consultation with, or approval by local authorities in a given case constituted sufficient compliance with a statute requiring such action has been determined with reference to a variety of factors. Under statutes requiring that particular officials or

political bodies be notified or consulted, compliance has been found despite the fact that some other officials or bodies were notified or consulted, where the proper persons were actually or constructively informed of a sponsor's plans (§ 11[a, b]), although approval of a community home by a mayor has been found insufficient where a statute required approval by a majority vote of the legislative body of the local government unit having jurisdiction over the site of the home (§ 11[c]).

Under statutes requiring the sponsor of a community home to give notice of its intent to establish the home to the local government unit having jurisdiction over the site of the home, the courts have held that particular notices were sufficient despite an alleged failure by the sponsor to provide certain information in or together with such notice, such as the names of lessors of the residence property (§ 12[a]), identification of a particular site for the residence (§ 12[b]), published data as to similar residences in the area (§ 12[c]), and a full description of community support requirements for the residence (§ 12[d]).

Some statutes require that certain actions be taken within a particular period of time. Under a statute requiring a state agency to seek the advice and consultation of the affected municipality before planning and locating a community home for the developmentally disabled in the municipality, it has been held that consultation with a town supervisor was timely, where

it took place before the agency made an irrevocable commitment to locate the home at a particular site (§ 13[a]). Where a statute allowed the affected municipality a certain period of time within which to object to a proposal to locate within it a community residence for the mentally disabled, or to suggest alternative sites for the residence, it has been held that failure of the municipality to object or recommend alternative sites within that time foreclosed it from doing so later (§ 13[b]). And under statutes providing that administrative hearing on municipal objections, and a decision on such objections, take place within a certain period of time, the courts have held that failure to conduct a hearing or to render a decision within that time did not invalidate administrative approval of the placement of the residence, finding that such time limits were not essential to the act to be performed (§ 13[c, d]).

Co-operation required by statute between a state agency seeking to locate group homes for the emotionally disturbed and local authorities has been held sufficient despite the failure of agency representatives to attend a meeting between city officials and concerned residents where the agency was not invited to the meeting, but representatives did attend a later meeting (§ 14). Informal contacts be-

tween a state sponsoring agency and a town supervisor have been held sufficient to comply with a statute requiring the agency to seek the advice and consultation of the governing body of the municipality in which it proposed to locate a community home for the developmentally disabled, against a contention that a public hearing before the town board was necessary, where the statute did not prescribe any particular manner in which advice and consultation was to be sought and did not require the agency to actually obtain consultation or heed any advice (§ 15).

#### [b] Practice pointers

Counsel representing the sponsor of a proposed community home for the mentally ill should consult the statutory law of his jurisdiction early in his representation in order to determine whether any provisions thereof require notice to, consultation with, or approval of, local authorities prior to establishment of such a home within a particular area. Such provisions may or may not apply, and the necessity of compliance therewith may depend on such factors as the number of residents and supervisory staff to be housed in the proposed facility,<sup>4</sup> the nature or zoning classification of the area in which the home is proposed to be

4. For example, see *Shannon v In-trone* (1981, 2d Dept) 80 App Div 2d 834, 436 NYS2d 337, aff'd 53 NY2d 929, 411 NYS2d 60, 423 NE2d 818, in which it was held that compliance by the sponsor with a statutory requirement of notice to local authorities was

not necessary where the statute defined "community residential facility for the disabled" as a residence for 4 to 14 mentally disabled individuals, and the home in question was to house only three such individuals.

located,<sup>5</sup> or on the history of any prior attempts to establish the home at the proposed site.<sup>6</sup>

If counsel determines that a statute does require consultation with or approval of local authorities prior to establishing the proposed home at a particular site, he or she may wish to consider a challenge to the validity of such requirements.<sup>7</sup> Legislative history and statutory declarations of policy may provide useful basis for argument as to whether a rational or substantial relationship exists between a local consultation or approval requirement, on the one hand, and the underlying policies of the stat-

ute or local governmental interests, on the other hand.<sup>8</sup>

Counsel for the sponsoring agency should give attention to the nature and extent of local government participation in, or control over, the site selection process contemplated by the statutes in his jurisdiction. While under some statutes it may be sufficient merely to seek the advice and consultation of local authorities, without having to actually obtain such consultation or heed any advice,<sup>9</sup> other statutes may accord local authorities absolute power to approve or disapprove the proposal.<sup>10</sup>

5. For example, in *Kenner v Normal Life of Louisiana, Inc.* (1985, La App 5th Cir) 465 So 2d 2, 2, aff'd on other grounds (La) 483 So 2d 903, it was held that a statutory provision according community homes a "right" to locate in residential areas zoned for multifamily dwellings did not absolve the sponsors of such a home from its noncompliance with another provision requiring site approval by local authorities, where the home was located in a residential area zoned for single-family dwellings.

6. For example, in *Browe v Champagne* (1979) 97 Misc 2d 1058, 413 NYS2d 103, it was held that a sponsor could not obtain site approval from the state department of retardation under a statute giving the department this power upon notice to and consultation with local authorities, where the sponsor had sought and been denied such approval by local authorities prior to the effective date of the statute.

7. See §§ 3-6.

8. See, for example, *Clark v Manuel* (1985, La) 463 So 2d 1276, 51 ALR4th 1077, where the court, in holding that a statute was subject to heightened scrutiny for purposes of equal protection

analysis, noted a statutory declaration that mentally retarded and developmentally disabled persons have a right to live in the least restrictive residential living option appropriate to their individual needs and abilities, including community homes. The court also noted legislative committee reports determining that legislation was needed to facilitate the establishment of such living arrangements, and the history of unsuccessful efforts to amend such legislation to state that local zoning ordinances be paramount to the state's policy to promote community homes for the mentally handicapped.

9. See, for example, *Distel v Department of Mental Health* (1984) 138 Mich App 576, 360 NW2d 249, in which it was held that informal contacts with a town supervisor, without any public hearing or presentation to the town council, constituted sufficient compliance with a statute requiring the sponsor of a community home to seek the advice and consultation of a municipality before planning and locating such a home within the municipality.

10. See, for example, *Clark v Manuel* (1985, La) 463 So 2d 1276, 51 ALR4th

It may be advisable that statutory requirements of notice to, consultation with, or approval by local authorities be met before making any irrevocable commitment to locating the home at a particular site. In this connection, counsel may wish to postpone entering into any lease, purchase, or contract to improve the proposed site until all of the statutory requirements have been satisfied, or at least to insert into any such agreement a provision making it contingent upon such satisfaction.<sup>11</sup>

Where a statute requires prior notice to the local government unit having jurisdiction over the proposed site of a community home, counsel for the sponsor should be careful that any information required to be provided in such notice be at least as specific, comprehensive, and current as the letter and purpose of the statute requires, since inadequate information supplied to local authorities

may invite a challenge to establishment of the home on the ground that such inadequacy denied them an opportunity to assess the merits of the proposal and participate meaningfully in the site selection process.<sup>12</sup>

Counsel should also be careful, where the statute specifies a particular official or governmental body which must be notified or consulted, or the approval of which must be secured, to involve the proper officials or bodies in the site selection process (§ 11).

Counsel for a sponsoring agency may wish to consider whether and to what extent compliance with statutory requirements of consultation with, or approval of, local authorities obviates the necessity for compliance with local zoning ordinances, permit requirements, and other land use restrictions.<sup>13</sup>

Counsel for a local governmental

1077, in which the court stated that a statute, requiring prior approval by the local governing authority having jurisdiction over the proposed site of a community home for the mentally handicapped, gave local authorities absolute discretion whether to approve or disapprove the site, regardless of whether any applicable zoning ordinances would bar a community home in a particular area.

11. See, for example, *Distel v Department of Mental Health* (1984) 138 Mich App 576, 360 NW2d 249, § 13(a).

12. See, for example, *Pleasant Valley v Wassaic Developmental Disabilities Services Office* (1983, 2d Dept) 92 App Div 2d 543, 459 NYS2d 109, in which the court found that the sponsor's failure to identify any particular sites in its notice violated the spirit of the notice

requirement, but held that the town had not been prejudiced, since it was informed of the proposed sites informally.

13. For example, the court in *Lavonia v Department of Social Services* (1985) 423 Mich 466, 378 NW2d 402, considered a statute providing that group homes for six or fewer emotionally disturbed residents and licensed in accordance with procedures requiring notice to and co-operation with local authorities in site selection be permitted in all residential areas and exempt from local use permit requirements, and held that it superseded local zoning and use permit requirements, in light of state constitutional and statutory provisions designed to foster and support services for the mentally handicapped.

unit entitled by statute to notice and consultation with respect to the location of community homes for the mentally ill should be especially sensitive to any statutory time limits within which objections or alternative site proposals must be made, since the opportunity to raise objections or make alternative proposals may be foreclosed after the expiration of such time limits (§ 13(b)).

Counsel representing property owners in the neighborhood of a proposed community home for the mentally ill, or an association of such property owners, may be consulted with a view to opposing the establishment of such a home. In considering legal action against establishment of the home, such as a petition for injunctive relief or judicial review of an administrative decision approving the location of the home, counsel should be prepared to show that his client has standing to take such action. While some statutes may expressly allow any aggrieved person to seek judicial review of a decision authorizing the establishment of a community home or to seek enforcement of statutory site-selection require-

ments,<sup>14</sup> other statutes may expressly accord such a right only to the sponsor of the home and to the affected municipality. In the latter case, counsel may wish to advance the argument that the statute does not expressly deny standing to other persons or entities, such as neighboring property owners or associations representing them, and that such persons or entities come within the zone of interests protected by the statute.<sup>15</sup> Beyond the issue of standing, counsel for neighboring property owners should clearly allege and be prepared to prove that location of a community home for the mentally ill in their vicinity will adversely affect them, such as by causing a reduction in the market value of their property or by interfering with the beneficial use and enjoyment of such property through increased traffic and parking problems, danger from residents of the home, and other effects. Counsel should be aware that failure clearly to allege such matters in a complaint or a lack of sufficient evidence to prove such allegations may preclude any relief.<sup>16</sup>

14. See, for example, *Livonia v Department of Social Services* (1985) 423 Mich 466, 378 NW2d 402, in which the court considered a statute requiring a "person aggrieved" by an administrative decision to license a community home to petition for judicial review within 10 days of such decision, and apparently treated an association of property owners in the vicinity of two community homes for the developmentally disabled as such an "aggrieved person" for purposes of judicial review.

15. See, for example, *Grasmere*

*Homeowners' Assn. v Introne* (1981, 2d Dept) 84 App Div 2d 778, 443 NYS2d 956.

16. For example, in *Livonia v Department of Social Services* (1985) 423 Mich 466, 378 NW2d 402, the court held that an association of property owners located near the sites of several proposed group homes for the emotionally disturbed failed to sufficiently allege any deprivation of property rights to state a claim that statutory procedures for licensing the homes prior to resolution of administrative proceedings concerning their location

## II. Validity

### § 3. Due process of law

#### [a] Notice and hearing

The validity of statutes empowering a state administrative agency to authorize the placement of a community home for the mentally ill in a particular locality, after consultation between the home's sponsor and the municipality having jurisdiction over the site of the home, was upheld in the following cases, against challenges that the statutes violated the rights of municipalities and neighboring property owners to due process of law because notice and hearing opportunities were insufficient.

A statute requiring the state department of social services to notify a municipality of its intent to license a group home for emotionally disturbed persons to be located within the municipality 45 days in advance of such licensure, requiring the municipality in turn to notify neighboring property owners of the proposal, providing for administrative hearing on any objections to the proposal, and permitting any aggrieved person to seek judicial review of the administrative decision, was held not to violate any right of the municipality or neighboring property owners to due process of law in *Livonia v Department of Social Services* (1985) 423 Mich 466, 378 NW2d 402. Affirming an administrative

violated constitutional guaranties of due process. The court found that the property owners had failed to allege sufficient facts concerning diminution in the value, or interference with the use and enjoyment, of their property caused by the licensures, and noted

decision to license several such homes and a denial of injunctive relief to a city and property owners in the homes' vicinity, the court ruled that the statute provided for adequate notice to the city and neighboring property owners prior to a proposed licensure. While noting that the statute also permitted temporary licensing pending resolution of administrative proceedings concerning the location of group homes, the court held that the city was not thereby denied due process, since it had no constitutionally protected liberty or property interest affected by the temporary licensing. Recognizing that the property owners had a protected interest in the value, use, and enjoyment of their property and a contractual right to enforce restrictive covenants in their deeds, the court found that they had failed sufficiently to allege or prove any deprivation of or interference with these rights as a result of temporary licensing, noting that the proposed use as a group home was otherwise single-family and residential in nature and not violative of any restrictive covenants.

In *Old Field v Introne* (1980) 104 Misc 2d 122, 430 NYS2d 192, the court held that the asserted right of a municipality to due process of law under the federal and New York constitutions was not violated by a statute empowering the state commissioner of mental

that although the property owners had alleged increased traffic and parking problems near the community homes, they did not allege that such problems had interfered with the value, use, or enjoyment of their property.

retardation to authorize the location of a community residence for the mentally disabled, upon notice to the municipality by the residence's sponsor of its intent to locate the residence within the municipality, opportunity for the municipality to object or suggest alternative sites, and a hearing on any objections. Explaining that the requirements of due process include a hearing or opportunity to be heard, the court ruled that the provisions for hearing on municipal objections to site proposals and for judicial review of the commissioner's decision were adequate to protect any right of the municipality to due process.

**[b] Impartial decisionmaker**

In the following case, the validity of a statute, empowering a state administrative agency to authorize the location of a group home for the emotionally disturbed upon notice to the affected municipality and neighboring property owners, and after consultation between the home's sponsor and the municipality, was upheld against a challenge that the statute violated the rights of the municipality and neighboring property owners to due process of law by denying them an impartial decisionmaker.

In *Livonia v Department of Social Services* (1985) 423 Mich 466, 378 NW2d 402, the court held that a city, in which the state department of social services proposed to locate several group homes for the emotionally disturbed, and property owners in the vicinity of the homes, were not denied an impartial decisionmaker for due process purposes by the fact that the director of the department, who made

the final decision whether to authorize placement of the homes, had been publicly criticized by the parties and other communities and citizens concerning decisions to place group homes in residential areas, had been joined as a defendant in separate proceedings to enjoin the establishment of the homes in question, and headed the same agency which investigated the homes' sponsors and conducted administrative hearings on the proposal. Observing that the right to a hearing before an unbiased and impartial decisionmaker is a basic requirement of due process, the court nevertheless ruled that mere disagreement between the parties and the department with respect to the location of group homes in residential areas did not rise to the level of personal abuse and criticism of the director suggesting a probability of actual bias on his part. Nor, stated the court, did the director's involvement in the injunctive proceedings render him so immediately and personally enmeshed in other matters involving the parties as to automatically preclude him from rendering an impartial administrative decision. Finally, the court found that although the director was the final decisionmaker in approving the location of a group home, he did not personally conduct any investigation or preside as factfinder in the administrative proceedings, reasoning that mere familiarity with the facts obtained by him in the course of reviewing investigative and administrative findings did not render the director less than impartial.

**[c] Right of mentally ill to purchase and occupy property**

In the following case, it was held

that a statute, apparently providing for local government participation in the selection of sites for community residences for the mentally disabled, did not violate the due process rights of mentally retarded persons to purchase and occupy residential property, as there existed a rational relationship between the local participation requirement and the purposes sought to be achieved by the statute.

Rejecting the argument advanced by an association of retarded persons that a statute, apparently requiring consultation between the sponsor of a proposed community residence for the mentally disabled and the municipality in which it is to be located, violated the due process rights of the mentally disabled to purchase and occupy residential property, the court in *Di Biase v Piscitelli* (1982, 2d Dept) 87 App Div 2d 611, 448 NYS2d 35, held that the statutory site selection procedure was rationally related to the public policy sought to be implemented by the legislature. Finding that the statute expressed a public policy that the needs of the mentally disabled be met through group homes in community settings rather than in state institutions, the court determined that the statute's local participation requirement was designed to insure that such homes be established through a process of joint discussion and accommodation between the providers of care to the mentally disabled and representatives of the community.

#### § 4. Equal protection of the law

##### [a] Held valid

The validity of statutes requiring

consultation with or approval by local government units prior to the location of a community home for the mentally ill within their jurisdiction was upheld in the following cases, against claims that such statutes violated the rights of the mentally disabled or of a municipality to equal protection of the law.

The court in *Normal Life of Louisiana, Inc. v Jefferson Parish Dept. of Inspection & Code Enforcement* (1986, La App 5th Cir) 483 So 2d 1129, held that a statute requiring the sponsor of a proposed community home for the mentally retarded to secure approval from the local governing authority having jurisdiction over the proposed site prior to locating the home did not, as applied to a home located in a zoned district, violate the right of mentally retarded persons to equal protection of the law. The sponsor of the home in question obtained a permit from the parish department of inspection to construct the home in an area zoned for one-family and two-family dwellings. After the home was completed, the parish obtained an injunction against its operation on the ground that the sponsor failed to secure prior approval of the site from the parish council. In affirming the injunction, the court found that the home's residents would not constitute a "family" as defined by the local zoning ordinance, and that the home would not meet the criteria of any use permitted in the zoning district in which it was located. The court observed that the sponsor would therefore be obliged to obtain the parish council's approval for a building or use exception

before locating the home in the district, in a manner similar to that required by the statute, just as would a person seeking to locate a boarding house in that district. Thus, reasoned the court, the statute placed essentially the same burden on a person wishing to open a community home as the parish zoning ordinance placed on anyone seeking a variance or exception. The court distinguished *Clark v Manuel* (1985, La) 463 So 2d 1276, 51 ALR4th 1077, § 4[b], pointing out that the statutory approval requirement was there held unconstitutional because the community home in question was located in an unzoned district where other property owners were not required to secure local approval before attempting a special use, exception, or variance.

A statute apparently providing for consultation between the sponsor of a proposed community residence for the mentally disabled and the municipality in which it is to be located was held constitutionally valid in *Di Biase v Piscitelli* (1982, 2d Dept) 87 App Div 2d 611, 448 NYS2d 35, against the challenge by an association of retarded persons that the statute violated the right of the mentally disabled to equal protection of the law in the purchase and occupancy of residential property. The court ruled that the statutory site selection procedure was rationally related to the public policy sought to be implemented by the legislature, finding that the statute expressed a public policy that the needs of the mentally disabled be met through group homes in community settings rather than in state institutions, and that the statute's local

participation requirement was designed to insure that group homes be established through a process of joint discussion and accommodation between the providers of care to the mentally disabled and representatives of the community.

In *Old Field v Introne* (1980) 104 Misc 2d 122, 430 NYS2d 192, the court held that the asserted right of a municipality to equal protection of the law was not violated by a statute empowering the state commissioner of mental retardation to authorize the location of a community residence for the mentally disabled upon notice to the municipality by the residence's sponsor of its intent to locate such a residence within the municipality, opportunity for the municipality to object or suggest alternative sites, and hearing on any objections. Assuming that concepts of equal protection applied to municipal corporations, the court ruled that a denial of equal protection could not be found since it was not alleged that the statute was without a rational basis or differentiated in a palpably arbitrary manner.

#### [b] Held invalid

It was held in the following case that a statute, requiring approval of a local governing authority prior to locating within its jurisdiction a community home for the mentally handicapped, violated the right of mentally retarded persons to equal protection of the law, because the mentally retarded were a "quasi-suspect" class and there was no substantial relationship between the approval requirement and various local governmental interests.

In *Clark v Manuel* (1985, La)

463 So 2d 1276, 51 ALR4th 1077, the court held that a statute, requiring the sponsor of a community home for the mentally handicapped to obtain prior approval of the proposed site from the local governing authority having jurisdiction over the site, violated the equal protection clauses of the federal and Louisiana constitutions. An association of mentally retarded persons leased a house in an unzoned residential subdivision for the purpose of operating a community home, but failed to seek or obtain prior approval of the site from the town council. In dismissing a petition for injunctive relief by residents of the subdivision the court construed the statute as granting local authorities absolute discretion to approve or disapprove the proposed site. Since no other property owners in unzoned districts of the state were required to secure such approval before putting their property to a legal use, the court found that the statute imposed on the class of mentally retarded persons a burden not snared by others similarly situated. The court explained that the mentally retarded constitute a "quasi-suspect" class due to historical prejudice against that group, their relative political powerlessness, and the immutability of the retarded condition, requiring that the statutory distinction be substantially related to an important governmental interest in order to survive constitutional challenge. As applied to homes for the mentally retarded, the court found no substantial relationship between the local approval requirement and such governmental interests as controlling population density and

traffic congestion or protecting public safety and health. The court pointed out that the same concerns would apply regardless of whether the residents of the home were retarded, the home was limited to six residents, the statute barred the location of the home near another community home, and another provision of the statute declared a legislative finding that mental retardation does not threaten the safety of a community or the individual.

#### § 5. Delegation of legislative power to administrative agency

Statutes vesting in a state administrative agency the power to approve the location of a community home for the mentally ill, after consultation between the sponsor of the home and the municipality in which it is proposed to be located, were held valid in the following cases as not unconstitutionally delegating legislative powers to the agency, where the statutes provided meaningful standards to control the exercise of administrative discretion.

Under a statute providing that the state department of social services could not license a proposed group home for emotionally disturbed persons without local approval, if issuance of the license would substantially contribute to an excessive concentration of such homes within the affected municipality, the court in *Lavonia v Department of Social Services* (1985) 423 Mich 466, 378 NW2d 402, held that the legislature's failure to define the term "excessive concentration," or to provide any explicit standards to guide the department

in making a licensing determination, did not render the statute unconstitutional as impermissibly delegating legislative power to the department. The court observed that while the legislature could not delegate its power to make a law, it could make a law to delegate to administrative officials the power to determine some fact or state of things upon which the law's operation depended, as long as sufficiently defined limits on the exercise of administrative discretion were provided to avoid delegating legislative powers and exposing the people to the uncontrolled, arbitrary power of administrative officials. The court stated further that, in determining whether a given statute provides sufficient standards, the statute must be read as a whole, the standard should be as reasonably precise as the subject matter requires or permits, in light of the degree to which the subject will require constantly changing regulation, and the statute must, if possible, be construed as conferring administrative and discretionary power, not legislative or arbitrary power. With respect to the statute under review, the court noted a provision requiring that a determination of excessive concentration be made with reference to the particular municipality in which a proposed home is to be located, without regard to the number of such homes located in other municipalities, and a further provision forbidding the location of one group home within a certain distance of another such home. The court also construed the statute to require the department to consider the overall residential character of the surrounding neighborhood as

it exists and how that character would be changed, if at all, by the addition of a group home. The court concluded that, given these limitations, the statute conferred upon the department discretionary, rather than arbitrary or legislative, authority.

The court in *Old Field v Introne* (1980) 104 Misc 2d 122, 430 NYS2d 192, held that a statute empowering the state commissioner of mental retardation to authorize the location of a community residence for the mentally disabled, upon notice to the municipality by the residence's sponsor of its intent to locate the residence within the municipality, opportunity for the municipality to object or suggest alternative sites, and hearing on any objections, did not unconstitutionally delegate legislative power to the administrative agency. Observing that while the legislature may constitutionally confer discretion upon an administrative agency only if it limits the field in which that discretion is to operate and provide standards to govern its exercise, the court stated that a precise or specific formula need not be furnished in a field where flexibility and the adaptation of legislative policy to infinitely variable conditions is essential to the program, and that it is enough if the legislature lays down an intelligible principle, specifying the standards or guides in as detailed a fashion as is reasonably practicable in light of the complexities of the field to be regulated. The court concluded that since the statute under review clearly defined the term "community residential facility for the disabled," set forth procedures to air community ob-

jections, and specified factors to be considered by the commissioner in determining whether and where to locate such a residence, adequate standards were provided to govern the exercise of administrative discretion.

#### § 6. Invasion of local zoning power by state

In the following cases, statutes empowering a state administrative agency to approve the location of a community home for the mentally ill after consultation between the home's sponsor and the municipality having jurisdiction over the proposed site of the home, were held valid against municipal contentions that such legislation deprived local governments of their power to enact and enforce zoning ordinances.

In *Livonia v Department of Social Services* (1985) 423 Mich 466, 378 NW2d 402, the court held valid a statute providing that a group home for six or fewer emotionally disturbed residents, licensed in accordance with procedures requiring notice to and cooperation with the municipality in which it is located, be permitted in any residential zone and exempt from local use permit requirements, despite an argument that the statute violated a state constitutional provision granting to municipalities the power to enact ordinances with respect to property. The court explained that this provision referred to the power of a municipality over its own property, rather than over private property within its boundaries. Acknowledging that another state statute accorded to municipalities a general power to enact zoning ordinances and other land use regulations, and

that prior to the enactment of the provision in question municipalities were permitted to enact reasonable zoning ordinances restricting the placement of group homes in residential areas, the court pointed out that the provision, by its own terms, had been enacted to implement a state policy that persons in need of community residential care should not be excluded by zoning from the benefits of normal residential surroundings. The court further ruled that such restrictive ordinances and regulations must give way to conflicting state constitutional and statutory provisions designed to foster and support services for the mentally handicapped.

A statute empowering the state commissioner of mental retardation to authorize the location of a community residence for the mentally disabled, upon notice to the municipality by the residence's sponsor of its intent to locate the residence within the municipality, opportunity for the municipality to object or suggest alternative sites, and hearing on any objections, was held valid in *Old Field v Introne* (1980) 104 Misc 2d 122, 430 NYS2d 192, against the contention that it interfered with enforcement of local zoning ordinances. Observing that where a local ordinance is in conflict with and hinders state public policy, the ordinance may not be enforced, the court ruled that the municipality's ordinances were void to the extent that they would prohibit the use of the site in question as a community residence for the mentally disabled, and commented that agencies performing a function of substantial state concern in matters of public health and welfare must be able to

act freely of countervailing local concerns and without hindrance by conflicting local ordinances.

### III. Necessity of notice, consultation, or approval

#### § 7. Fewer residents than statutory minimum

In the following case, the court held that compliance with a statute, requiring the sponsor of a proposed community residence for 4 to 14 mentally disabled persons to give written notice of its intent to establish the residence to the municipality in which the residence is to be located, was unnecessary where the residence in question was proposed to house fewer than four persons.

In *Shannon v Introne* (1981, 2d Dept) 80 App Div 2d 834, 436 NYS2d 337, affd 53 NY2d 929, 441 NYS2d 60, 423 NE2d 818, the court held, under a statute requiring the sponsor of a proposed community residence for the mentally disabled to provide advance notice of its intent to establish such a residence to the local government unit having jurisdiction over the proposed site of the residence, that such advance notice was not required where the statute defined "community residential facility for the disabled" as a residence for 4 to 14 mentally disabled individuals, and the residence in question was to house only three such persons. Reversing an injunction against establishment of the residence entered on grounds of noncompliance with the notice requirement, the court refused to adopt the suggestion that, because the legislature intended to provide greater community input into the selection

of sites for such residences, the notice provision of the statute should apply to residences for fewer than four persons. The court concluded that in view of the plain and unambiguous language of the statute, notice was required only if a "residential facility," as defined by the statute, was contemplated.

#### § 8. Effect of local zoning

In the following case, the court held that a statute, requiring approval of a local governing authority prior to locating within its jurisdiction a community home for the mentally retarded, was applicable to a home located in an area zoned for single-family dwellings, even though the same statute expressed a state policy that such homes be permitted "by right" in areas zoned for multifamily dwellings.

Construing a statute expressing a state policy that community homes for the mentally handicapped be permitted "by right" in all residential districts zoned for multifamily dwellings, and otherwise providing that the sponsor of such a home give notice to and secure site approval from the local governing authority having jurisdiction over the proposed site, the court in *Kenner v Normal Life of Louisiana, Inc.* (1985, La App 5th Cir) 465 So 2d 82, affd on other grounds (La) 483 So 2d 903, held that the requirement of prior notice and approval applied to a home located in a residential district zoned only for single-family dwellings. In affirming a permanent injunction against operation of the home sought by the city on the ground that the sponsor had failed to secure site approval from the local governing authority in the manner

required by the statute, the court held that the statute appeared to grant a right of location for community homes only where they were located in areas zoned for multifamily dwellings, and that since such a right was not expressly accorded to homes located in areas zoned for single-family dwellings, such as the home in question, the sponsor of a home located in such an area must secure site approval from the local governing authority.<sup>17</sup>

In the following case the court, construing a statute expressing a state policy that community homes for the mentally handicapped be permitted "by right" in areas zoned for multifamily dwellings, stated that compliance with a further provision requiring prior approval by the local governing authority having jurisdiction over the site of a proposed home would be necessary, regardless of where the home was to be located.

In *Clark v Manuel* (1985, La) 463 So 2d 1276, 51 ALR4th 1077, the court construed a statute, providing that the sponsor of a community home for the mentally handicapped must obtain prior approval of the proposed site from the local governing authority having jurisdiction over the site, to require local government approval regardless of whether any applicable zoning ordinances would permit or prohibit use of the site as a community home for the mentally

handicapped. The court further stated that, although another provision of the statute expressed a state "policy" that such homes be permitted by right in districts zoned for multifamily dwellings even homes located in such districts would be required to secure prior site approval from the local governing authority.

#### § 9. Site selected before statute enacted

The courts in the following cases held inapplicable a statute, empowering a state administrative agency to license a community home for the mentally ill within a particular municipality after consultation between the sponsor and the municipality, where the sponsor had selected the site of the home or negotiated with the municipality concerning such site, or the site-selection process was otherwise completed, prior to the effective date of the statute.

In *Livonia v Department of Social Services* (1985) 423 Mich 466, 378 NW2d 402, the court held that a statute, requiring the state department of mental health to seek the advice and consultation of the affected municipality prior to planning and locating a community home for the emotionally disturbed, was inapplicable where the site-selection process for several such homes in a particular city had been completed through another state agency prior to the effective date of the statute, and that the

17. On petition for rehearing, the court stated that its holding was "incorrect" to the extent based on the local approval provision found unconstitutional in the intervening decision

of *Clark v Manuel* (1985, La) 463 So 2d 1276, 51 ALR4th 1077, § 4(b), but sustained its holding against the sponsor of the home on other grounds.

department's alleged failure to cooperate with the city therefore provided no basis for invalidating licenses issued by the other agency.

A statute requiring notice by a sponsoring agency to the affected municipality of its intent to locate a community residence for the mentally disabled within the municipality, allowing the municipality a certain time thereafter within which to object or suggest alternative sites, and providing for administrative hearing in the event of failure to agree within that time, was determined inapplicable in *Community Board No. 3 v New York, Office of Mental Retardation & Developmental Disabilities* (1980, 2d Dept) 76 App Div 2d 851, 428 NYS2d 520. Ruling that a local planning board was without predicate for its petition seeking judicial review of an administrative decision approving the location of a community residence, the court found that the site in question had been selected, with the board's knowledge, for use as a community residence prior to the effective date of the statute, and that at best the parties had intended to use the statute, which had been enacted during the course of negotiations, merely as a guideline for establishing the residence.

In *Browe v Champagne* (1979) 97 Misc 2d 1058, 413 NYS2d 103, the court held, under a statute empowering the state commissioner of mental retardation to approve the location of a community residence for the mentally disabled after consultation between the sponsor of the residence and the municipality in which it is proposed to be located, that a sponsor

could not employ the statutory procedure to obtain approval of its plan by the commissioner when it had failed to obtain the approval of local authorities for use of the same site prior to the effective date of the statute. It appeared that the sponsor had sought, and been denied, site approval by a city planning commission prior to enactment of the statute, and appealed this denial to the commissioner of mental retardation after enactment of the statute. Although the statute provided that it was not applicable to sites selected prior to its effective date, the commissioner found that the site in question had not been so selected, in view of the sponsor's action in releasing the prospective sellers of the site from their contract after the planning commission's denial and before enactment of the statute. A permit to renovate the premises for use as a community residence was thereafter issued by the city in response to the commissioner's determination, and property owners in the vicinity of the site sought judicial review. Conceding that the sponsor had followed the statutory site selection procedures, the court nevertheless set aside the commissioner's decision and rescinded the permit. The court reasoned that to permit the sponsor to use the statutory procedure as a second vehicle to secure the approval it had been denied previously would undermine the policy expressed in the statute of encouraging co-operation between state and local authorities in the site selection process, so as to ensure acceptance of community residences by local communities.

And in *Gedney Asso. v New*

York Dept. of Mental Hygiene (1982) 112 Misc 2d 209, 445 NYS2d 876, the court held that statutory requirements of notice by the sponsor of a proposed community residence for the mentally disabled to the municipality in which it is to be located, opportunity for the municipality to approve, object, or suggest alternative sites, and for administrative hearing on municipal objections, did not apply to the location at a particular site of eight community residences planned for by the state department of mental retardation several years prior to the effective date of the statute, in view of a provision of that statute that it did not apply with respect to sites selected by the sponsor prior to the statute's effective date. The court accordingly ruled that a complaint for injunctive relief brought by neighboring property owners alleging noncompliance with the statutory requirements would be dismissed in the absence of proof that the state had, at any time, abandoned its plans to locate the residences at the proposed site prior to the effective date of the legislation.

#### § 10. Additional notice and consultation

In the following case, it was held that the sponsor of a proposed community residence for the mentally disabled was required to provide a municipality with advance notice of its intent to locate the residence within the municipality, where it selected a new proposed site for the residence after failing to reach agreement with the municipality concerning previously proposed sites within a certain time fixed by statute.

Under a statute requiring the sponsor of a proposed community residence for the mentally disabled to give notice of its intent to establish the residence to the municipality in which the residence is to be located, and allowing the municipality 40 days thereafter within which to approve the proposed site, suggest alternative sites, or object to the location of any such residence within it, the court in *Pound Ridge v Introne* (1981, 2d Dept) 81 App Div 2d 885, 439 NYS2d 53, held that where the state office of mental retardation and the municipality failed to agree on a site for a community residence within 40 days under site selection criteria established by the state office, and that office subsequently changed its selection criteria and chose a new proposed site not complying with the original criteria, new notice and another 40-day period for objection or alternative site proposals was required to be given to the municipality. Observing that by the time the state had selected a new site, the municipality's right to participate in the site selection process had already expired, the court found that the state's action effectively denied that right with respect to the new proposed site. Noting the serious implications which the state's action might have upon the harmonious working relationship envisioned by the legislature between state agencies and the affected communities in the establishment of community residences for the mentally disabled, the court concluded that the municipality would be entitled to a second opportunity to work with the state in

the designation of potential sites complying with the new criteria.

#### IV. Propriety of particular notice, consultation, or approval

##### § 11. Allegedly improper officials notified, consulted, or approving

###### [a] Bureau of inspection

In the following case, it was held that the sponsor of several proposed group homes for the emotionally disturbed substantially complied with a statute, requiring that notice of its intent to establish or apply for licensing of the homes be given to the clerk, council, or designated agent of the affected municipality, where those officials received actual, albeit indirect, notice of the sponsor's plans as a result of its notice to a city bureau of inspection.

The court in *Livonia v Department of Social Services* (1985) 423 Mich 466, 378 NW2d 402, held that notice by the department of social services to a city bureau of inspection of its intent to license several group homes for emotionally disturbed persons constituted substantial compliance with a statute requiring the department to notify the clerk, council, or designated agent of a municipality as to where a proposed group home will be located at least 45 days prior to licensing of the home. Acknowledging that the bureau of inspection was not a designated agent of the city clerk or council for notification purposes, the court nevertheless found that the clerk and council had received actual, albeit indirect, notice of the department's plans more than 45 days before the

homes were licensed, since city officials and concerned residents had met to discuss the proposed licensure and the clerk and council were sent copies of letters concerning location of the homes by the city attorney, on behalf of the legislative body of the city. The court stated that although mandatory notice provisions could not be ignored, substantial compliance was sufficient, and found no evidence that the city or property owners had been prejudiced by the department's technical noncompliance with the statute.

###### [b] Supervisor

In the following case, the court held that the sponsor of a proposed community home for the developmentally disabled had complied with a statute requiring that it seek the advice and consultation of the governing body of the municipality in which it proposed to locate the home, through contacts with the town supervisor, who was a member of the township board and the agent for transaction of its business.

In *Distel v Department of Mental Health* (1984) 138 Mich App 576, 360 NW2d 249, it was held that the state department of mental health had complied with the terms of a statute requiring that the department, before planning and locating a residential home for the developmentally disabled in any municipality, seek the advice and consultation of the "governing body" of the municipality in which the home is to be located, despite contentions by property owners in the neighborhood of a proposed home that the statute had not been complied with, because the depart-

ment had consulted only the town supervisor and failed to obtain a discussion of the home at a public meeting before the township board. Affirming a denial of injunctive relief to the property owners, the court noted that the statute did not prescribe any particular method by which advice and consultation was to be sought, and found that since the supervisor was a member of the township board, which constituted the "governing body" of the town, and was the township's agent for the transaction of all its legal business, he was the logical person for the department to contact in seeking the advice and consultation of the township board. Further, the court found from the record that a hearing on the proposal before the township board had, in fact, been obtained.

###### [c] Mayor

It was held in the following case that approval by a mayor and city planning officials did not satisfy the requirements of a statute providing that the sponsor of a proposed community home for the mentally handicapped obtain site approval from the local governmental authority having jurisdiction over the site of the home, where the mayor and other officials were not agents of the legislative body of the city and approval could only be had by majority vote of that body.

Applying a statute requiring the sponsor of a community home for the mentally handicapped to secure

18. On petition for rehearing, the court stated that its holding was "incorrect" to the extent based on the local approval provision found unconstitutional in the intervening decision

approval of the site of the proposed home from the "local governmental authority" having jurisdiction over the site, the court in *Kenner v Normal Life of Louisiana, Inc.* (1985, La App 5th Cir) 465 So 2d 82, aff'd on other grounds (La) 483 So 2d 903, held that the sponsor's informal contacts with the mayor and officials of the city planning department, who informed the sponsor that their approval was not required and thereafter welcomed the sponsor to the city, did not constitute sufficient compliance with the requirements of the statute. Affirming a permanent injunction against further operation of the home sought by the city after it received complaints concerning the home, the court noted that the statute defined "governmental authority" as the body which exercises the legislative function of the political subdivision in which the home is to be located, and provided that the required approval or disapproval be by a majority of the membership of that authority. The court concluded that although the mayor and other city officials had inadvertently misled the sponsor, those officials were not vested with authority to waive the mandatory requirements of the statute.<sup>18</sup>

##### § 12. Sufficiency of information provided

###### [a] Names of lessors of the residence property

In the following case, it was held that a notice of application for the

of *Clark v Manuel* (1985, La) 463 So 2d 1276, 51 ALR4th 1077, § 4[b], but sustained its holding against the sponsor of the home on other grounds.

licensing of several group homes for the emotionally disturbed, given by a state agency to the municipality in which the homes were proposed to be located, was not insufficient for failure to include the names of the lessors of the residence properties, where statute required that this information be kept confidential.

Construing a statute requiring the department of social services to give notice of an application for licensing of a group home for the emotionally disturbed to the municipality where it is proposed to be located, the court in *Livonia v Department of Social Services* (1985, 423 Mich 466, 378 NW2d 402, held that the department did not violate the statute by omitting from its notice the names of the lessors of several residences to be used as group homes, even though the statute required the applicant for license to disclose this information to the department. Affirming a denial of injunctive relief to the city and neighboring property owners and an administrative decision to license the homes in question, the court noted that the statute also provided that an application for license and materials submitted therewith be kept confidential until sought by a party in a contested case, and concluded that the department had therefore properly omitted the names of any lessors from its notice of application to the city.

#### (b) Identification of residence site

The courts in the following cases held that a statute, requiring the sponsor of a proposed community residence for the mentally ill to give notice of its intent to establish

the residence to the local government unit having jurisdiction over the site of the residence, had been complied with despite the sponsor's failure to specifically identify the proposed site in the notice, where the statute did not require such identification.

Under a statute requiring the sponsor of a proposed community residence for the mentally disabled to give written notice of its intent to establish the residence to the municipality in which it is to be located, and allowing the municipality 40 days thereafter within which to approve, object, or suggest alternative sites, the court in *Stony Point v New York State Office of Mental Retardation etc.* (1980, 2d Lpt) 78 App Div 2d 858, 432 NY2d 633, § 13(b), held that a town's failure to object within the 40-day period to a proposal to locate such a residence within it could not be excused by the sponsor's failure to identify in its notice a proposed site for the residence, observing that the statute did not require the designation of a particular site in a sponsor's notice of intent.

In *Community Planning Bd. No. 18 v Introne* (1981, 2d Dept) 84 App Div 2d 564, 443 NYS2d 262, the court held that the state office of mental retardation had complied with a statute requiring the department to give notice of its intent to establish a community residence for the mentally disabled to the municipality in which the residence is to be located, by designating in its notice to a local planning board three broad geographic areas among which two proposed residences would be located. Affirming

an administrative decision approving location of the residences within the board's jurisdiction, the court rejected the board's contention that the use of areas rather than specific sites was improper, and ruled that the department's notice was sufficient, since the statute did not require the designation of specific sites in the notice of intent.

And in *Pleasant Valley v Wassaic Developmental Disabilities Services Office* (1983, 2d Dept) 92 App Div 2d 543, 459 NYS2d 109, the court held that the failure of a sponsor of two proposed community residences for the mentally retarded to specify in its notice of intent particular sites where it proposed to locate the residences did not invalidate a decision by the state commissioner of mental retardation authorizing the establishment of the residences in a particular municipality. The statute required that the sponsor give written notice of its intent to establish such a residence to the municipality in which it proposed to locate the residence, and provided that the sponsor in such notice "may" recommend one or more sites for the residence. Observing that the statute had recently been amended to require identification of proposed sites, the court found that the sponsor's failure to identify particular sites in its notice violated the spirit of the notice requirement, but ruled that the town was not prejudiced because it was actually advised of those sites informally. The court also pointed out that under the statute, the town had no right to question the suitability of particular sites, but only the need for any such residences in the town gener-

ally, so that precise identification of the proposed sites was not necessary to presentation of the town's case at an administrative hearing on its objections to establishment of the residences within the town.

#### (c) Published data as to similar residences in area

In the following case, it was held that the sponsor of a proposed community residence for the mentally disabled sufficiently complied with a statute, requiring it to send to the affected municipality a copy of the most recent published data concerning types and locations of similar facilities in the area.

In *Hempstead v Commissioner, State of New York Office of Mental Retardation & Developmental Disabilities* (1985, 2d Dept) 112 App Div 2d 1042, 493 NYS2d 29, the court held that compliance by the sponsor of a community residence for the mentally disabled with a statute, requiring the sponsor to send to the chief executive officer of the affected municipality a copy of the most recent published data concerning types and locations of similar facilities in the area, was not vitiated by the subsequent publication of a new set of data, where the data sent by the sponsor was the most recent available at the time it was sent.

#### (d) Community support requirements

It was held in the following case, under a statute giving a municipality 40 days after receiving notice of a proposal to locate within it a community residence for the mentally disabled in which to object or recommend alternative sites, that the municipality's failure to object

or recommend alternatives within the 40-day period could not be excused by the sponsor's alleged vagueness in describing community support requirements for the residence, where such description was reasonably specific.

In *Stony Point v New York State Office of Mental Retardation etc.* (1980, 2d Dept) 78 App Div 2d 858, 432 NYS2d 633, the court held, under a statute requiring the sponsor of a proposed community residence for the mentally disabled to give written notice of its intent to establish the residence to the municipality in which it proposed to locate the residence, and allowing the municipality 40 days thereafter within which to approve, object, or suggest alternative sites, that a town's failure to object within the 40-day period to a proposal to locate such a residence within it could not be excused by the alleged vagueness of a sponsor's notice of intent in describing community support requirements. The court observed that the sponsor, in notifying the town by letter of its intent to locate a community residence for mentally disabled persons within the geographic limits of the town, described the nature of the contemplated program and, in a general way, the demands that the program would place upon community services. The court ruled that the sponsor's description of community support requirements, which stated that the residents would be doing their personal shopping in the town and would participate in recreational and leisure time activities available in the community under the supervision of qualified staff, was reasonably specific.

### § 13. Timing

#### [a] Consultation

It was held in the following case that consultation between the sponsor of a proposed home for the developmentally disabled and the municipality in which it proposed to locate the home was timely, where the sponsor had not made an irrevocable commitment to the particular site at the time of such consultation.

In *Distel v Department of Mental Health* (1984) 138 Mich App 576, 360 NW2d 249, the court held that the state department of mental health had complied with the terms of a statute requiring that the department, "before planning and locating" a residential home for the developmentally disabled in any municipality, seek the advice and consultation of the governing body of the municipality, where the department was not irrevocably bound to a lease of the residence property at the time of its contacts with a town supervisor. Property owners in the neighborhood of a proposed home sought injunctive relief against its establishment, arguing that the department's contacts with the town supervisor concerning location of the home were not timely under the statute because they took place after the department had entered into a lease of the premises where the home was to be located. Observing that the purpose of the statute was to provide local authorities with a meaningful opportunity to express their views concerning establishment of group homes in their communities, the court held that efforts to seek their advice and consultation would be timely if made by

the department after initial planning and prior to an irrevocable commitment to establish a home at the proposed site. Accordingly, the department's contacts with the town supervisor were ruled timely where they took place prior to final approval of the lease by state authorities.

#### [b] Objection or recommendation of alternatives

Applying statutes requiring that municipal objections to a proposal to locate a community residence for the mentally ill in the municipality, or alternative site recommendations, be made within a certain period of time, the courts in the following cases held that a municipality's failure to object or recommend alternative sites within that time precluded it from doing so later.

Under a statute requiring the sponsor of a proposed community residence for the mentally disabled to give written notice of its intent to establish the residence to the municipality in which it is to be located and allowing the municipality 40 days thereafter within which to approve, object, or suggest alternative sites, the court in *Stony Point v New York State Office of Mental Retardation etc.* (1980, 2d Dept) 78 App Div 2d 858, 432 NYS2d 633, held that a town could not obtain injunctive relief against the licensing and operation of such a residence where it failed to object within 40 days after receiving written notice of the sponsor's intent to establish the residence within the town. The sponsor notified the town by letter of its intent to locate a community

residence for mentally disabled persons within the geographic limits of the town, and while indicating that a specific site had not as yet been identified, described the nature of the contemplated program and the demands that the program would place upon community services. The letter also specifically referred to the section of the law under which the sponsor was proceeding, and recited both the statutory responses which the town could make to the proposal and the 40-day period within which such responses were due. A meeting between the town board and the sponsor was subsequently held, but the town failed to suggest one or more suitable sites or to object to the establishment of such a residence in the town within the 40-day period, and registered its view that no safe location for the residence could be found within the town only upon being informed, 10 months after the meeting, that the sponsor was proceeding with its plans. Reversing an order granting the town a preliminary injunction against establishment of the residence, the court ruled that if the town had any objection to the establishment of a community residence within its confines, it was bound by statute to voice its objection within 40 days as indicated in the sponsor's letter of intent. The court rejected the town's argument that it could not have raised an objection until after the 40-day period had expired due to the alleged vagueness of the sponsor's notice of intent with respect to community support requirements for the residence and the sponsor's failure to designate a particular site for the residence in its notice, finding

that the sponsor's description of community support requirements had been reasonably specific, and observing that the statute did not require the designation of a particular site in a sponsor's notice of intent.

Where a city objected to the site of a proposed community residence for the mentally disabled and suggested to the residence's sponsor 14 alternative sites, one of which was selected by the sponsor, the court in *Oswego v Prevost* (1982, 4th Dept) 91 App Div 2d 848, 458 NYS2d 414, app dismd 58 NY2d 1033, 462 NYS2d 443, 448 NE2d 1354, held, under a statute allowing a municipality 40 days after notice by a sponsor within which to approve the proposed site, suggest alternative sites or oppose location of any such residence within the municipality on grounds that such location would result in an overconcentration of such facilities, that the city's failure to raise such an objection within the 40-day period foreclosed it from doing so later. Noting that the purpose of the 40-day period was to enable a municipality to hold preliminary hearings and pursue its own investigation of the matter before determining the course it intended to follow, the court reasoned that the municipality must choose its course within the statutory period, since prejudice and cost to the sponsor would inevitably increase with delay.

See also *Oyster Bay v State Office of Mental Retardation & Developmental Disabilities* (1985, 2d Dept) 115 App Div 536, 496 NYS 2d 61, in which the court held that the sponsor of a proposed commu-

nity home for the mentally retarded was entitled to continue with its plans to establish the home where the municipality in which the home was to be located failed to properly object to the home's establishment within a statutorily prescribed period of 40 days from receiving notification of the sponsor's plans.

In the following case, it was held that a local government unit's right to a statutorily prescribed period of time within which to suggest further alternative sites, after a sponsor's rejection of its original alternative site proposals, was not violated by the sponsor's action in scheduling a hearing before expiration of the statutory time, since the hearing was not actually conducted until after the expiration of such time.

Dismissing the petition of a local planning board to annul an administrative decision approving the location of a community residence for the mentally disabled within its jurisdiction, the court in *Community Board No. 3 v New York, Office of Mental Retardation & Developmental Disabilities* (1980, 2d Dept) 76 App Div 2d 851, 428 NYS2d 520, held that the board was not denied its right to a statutorily prescribed time within which to suggest further alternative sites after the residence's sponsor rejected its original alternative site proposals, by the sponsor's action in scheduling an administrative hearing before expiration of the statutory time. The statute in question allowed the board 15 days after rejection by the sponsor of its alternative site proposals, within which to suggest further alterna-

tives, before it could be concluded that there was sufficient lack of agreement to warrant the scheduling of a factfinding hearing. The court found that although the sponsor had scheduled a factfinding hearing only 10 days after rejecting the board's alternative site suggestions, the hearing was not actually held until 23 days after such rejection, thereby exceeding the statutory period within which the board could suggest further alternatives by 8 days. The court ruled that the board's failure during this 23-day period to suggest further alternative sites, or to seek deferral of the hearing in order to posit further alternatives, justified the sponsor's conclusion that there was sufficient disagreement between the parties regarding a proposed site to warrant invocation of a formal hearing.

#### [c] Hearing

It was held in the following case that the failure of an administrative agency to conduct a hearing on municipal objections to the location of a proposed community home for the mentally ill within a certain time prescribed by statute did not render the agency's determination void, where such time limits did not relate to the essence and substance of the act to be performed and the municipality was not prejudiced by the delay.

In *Pleasant Valley v Wassaic Developmental Disabilities Services Office* (1983, 2d Dept) 92 App Div 2d 543, 459 NYS2d 109, the court held that the failure of the commissioner of mental retardation to conduct a hearing on a town's objections to the location within it of two community residences for the

mentally retarded, within a certain time fixed by statute, did not invalidate the commissioner's decision authorizing the establishment of the residences in the town. The statute required that the commissioner hold a hearing on a municipality's objection to the location in it of any such residences within 15 days of a request for such a hearing, but the commissioner did not hold a hearing on the town's objection to establishment of the residences in question until 61 days after its request therefor. In dismissing a petition by the town for judicial review of the commissioner's decision, the court held that the 15-day provision was directory rather than mandatory, since it did not relate to the essence and substance of the act to be performed. The court said that the commissioner's failure to conduct a hearing within 15 days of the town's request actually benefited the town by giving it more time to prepare for the hearing, and that this technical departure from the statutory time limit did not frustrate the purpose of the statute to foster communication and co-operation between state agencies and local communities in the site selection process.

#### [d] Decision

Courts in the following cases held that an administrative decision to approve the location of a community home for the mentally ill within a particular municipality was not invalidated by failure to render the decision within a statutorily prescribed time after hearing on municipal objections, ruling that such time limits were directory only, and not mandatory.

In *Pleasant Valley v Wassaic Developmental Disabilities Services Office* (1983, 2d Dept) 92 App Div 2d 543, 459 NYS2d 109, the court held that the failure of the commissioner of mental retardation to render a decision on a town's objections to the location within it of two community residences for the mentally retarded, until just after a time period fixed by statute, did not invalidate the commissioner's decision authorizing the establishment of the residences in the town. The statute required that the commissioner render a decision on a municipality's objection to the location within it of any such residences within 30 days of hearing on such objection, but the commissioner did not render a decision on the town's objection to the residences in question until 31 days after the hearing. In dismissing a petition by the town for judicial review of the commissioner's decision, the court ruled that the 30-day provision was directory rather than mandatory, as it did not relate to the essence and substance of the act to be performed, and that the commissioner's failure to render a decision within 30 days of hearing did not frustrate the purpose of the statute to foster communication and co-operation between state agencies and local communities in the site selection process.

Similarly, in *Oyster Bay v Webb* (1985, 2d Dept) 111 App Div 2d 760, 490 NYS2d 247, the court, reasoning that a statute requiring the state commissioner of mental retardation to render a decision as to the location of a community residence for the mentally disabled within 30 days of hearing on mu-

nicipal objections was directory only and not mandatory, held that a decision rendered more than 30 days after hearing would not be annulled on that ground, at least in the absence of undue delay. The court accordingly affirmed an administrative decision to establish a community residence at a location other than that desired by the town.

#### § 14. Nonattendance by agency at local meeting

In the following case, it was held that a state administrative agency had fulfilled its statutory duty to co-operate with local units of government in selecting sites for group homes for the emotionally disturbed, despite its failure to attend a meeting with local residents and city officials concerning the location of several such homes.

In *Livonia v Department of Social Services* (1985) 423 Mich 466, 378 NW2d 402, the court held that the state department of social services, seeking to authorize the location of several group homes for the emotionally disturbed in a particular city, had complied with a statute requiring the department to co-operate with other state agencies and local units of government in administering an act providing for the licensure of such homes after notice to and consultation with the municipalities in which they are to be located, where the city's only allegation of nonco-operation was the failure of department representatives to attend a scheduled meeting of city officials and concerned residents regarding location of the homes, which meeting the department claimed it was not aware of and to which it had

not been invited. The court observed that department representatives had attended a later meeting with city officials and residents, and accordingly affirmed an administrative decision approving the location of the homes.

#### § 15. Informal contacts

In the following case, the court held that informal contacts between the sponsor of a proposed community home for the developmentally disabled and a town supervisor constituted sufficient compliance with a statute requiring the sponsor to seek the advice and consultation of the municipality in which the home is to be located, where the statute prescribed no particular method by which such advice and consultation was to be sought and did not require that consultation be actually obtained or that any advice be heeded.

In *Distel v Department of Mental Health* (1984) 138 Mich App 576, 360 NW2d 249, it was held that the state department of mental health had complied with the terms of a statute requiring that the department, before planning and locating a residential home for the developmentally disabled in any

municipality, "seek the advice and consultation" of the governing body of the municipality in which the home is to be located, although it merely had informal consultation with an official. Property owners in the neighborhood of a proposed home sought injunctive relief against its establishment, arguing that the statute had not been complied with because the department had failed to obtain a discussion of the home at a public meeting before the township board and had only made informal contacts with the town supervisor concerning the proposed home. In affirming a denial of injunctive relief to the property owners, the court noted that a public meeting had, in fact, been held. The court further observed that the statute required only that the department "seek" advice and consultation of the local governing body, not that such advice and consultation be actually obtained or heeded. Also noting that the statute did not prescribe any particular method by which advice and consultation was to be sought, the court held that the department's informal contacts with the town supervisor constituted sufficient compliance with the statute.

Consult POCKET PART in this volume for later cases

## HOUSE BILL NO. 53

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVE MULDER

Introduced: 1/13/97

Referred: State Affairs, Finance

## A BILL

## FOR AN ACT ENTITLED

1 "An Act relating to the authority of the Department of Corrections to contract  
2 for facilities for the confinement and care of prisoners, and annulling a regulation  
3 of the Department of Corrections that limits the purposes for which an agreement  
4 with a private agency may be entered into; authorizing an agreement by which  
5 the Department of Corrections may, for the benefit of the state, enter into one  
6 lease of, or similar agreement to use, space within a correctional facility that is  
7 operated by a private contractor, and setting conditions on the operation of the  
8 correctional facility affected by the lease or use agreement; and giving notice of  
9 and approving a lease-purchase agreement or similar use-purchase agreement for  
10 the design, construction, and operation of a correctional facility, and setting  
11 conditions and limitations on the facility's design, construction, and operation."

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

1 \* Section 1. AS 33.30.031(a) is amended to read:

2 (a) The commissioner shall determine the availability of state correctional  
3 facilities suitable for the detention and confinement of persons held under authority of  
4 state law or under agreement entered into under (e) of this section. If the  
5 commissioner determines that suitable state correctional facilities are not available, the  
6 commissioner may enter into an agreement with a public or private agency to provide  
7 necessary facilities, subject to the following:

8 (1) the commissioner may not enter into an agreement with an  
9 agency that is unable to provide a degree of custody, care, and discipline to the  
10 extent required by the laws of this state;

11 (2) correctional [. CORRECTIONAL] facilities provided through  
12 agreement with an [A PUBLIC] agency for the detention and confinement of persons  
13 held under authority of state law may be in this state or in another state;

14 (3) correctional [. CORRECTIONAL] facilities provided through  
15 agreement with an [A PRIVATE] agency

16 (A) may provide for the detention and confinement of all  
17 persons held by the commissioner under authority of state law, whether  
18 charged with or convicted of felonies or misdemeanors, without regard to  
19 the custody classifications for prisoners as determined by the  
20 commissioner, unless the security of the facility is inconsistent with those  
21 custody classifications; and

22 (B) may not by regulation be restricted or limited by the  
23 commissioner to use only for prisoners involved in certain rehabilitative or  
24 treatment programs authorized by law [MUST BE LOCATED IN THIS  
25 STATE UNLESS THE COMMISSIONER FINDS IN WRITING THAT (1)  
26 THERE IS NO OTHER REASONABLE ALTERNATIVE FOR DETENTION  
27 IN THE STATE; AND (2) THE AGREEMENT IS NECESSARY BECAUSE  
28 OF HEALTH OR SECURITY CONSIDERATIONS INVOLVING A  
29 PARTICULAR PRISONER OR CLASS OF PRISONERS, OR BECAUSE AN  
30 EMERGENCY OF PRISONER OVERCROWDING IS IMMINENT. THE  
31 COMMISSIONER MAY NOT ENTER INTO AN AGREEMENT WITH AN