

ALASKA LEGISLATURE COMMITTEE FILES 2001-2002 86/2

10264 HOUSE JUDICIARY

April 4, 2001
Honorable Norman Rokeberg
Page 4

auto liability policy, it is therefore important that the intoxicated person be deemed to have given his or her permission to the taxicab driver to drive his automobile.

One means of accomplishing this would be to provide in the law for an "Implied" permission, analogous to Alaska's existing implied consent law, AS 28.35.031, under which a person who operates or drives a motor vehicle in this state is considered by law to have given consent to breathalyzer testing. You could add to the language of proposed AS 09.65.280 a provision that a person who operates or drives a motor vehicle in this state who either acknowledges that he is intoxicated or is determined by a law enforcement officer to be intoxicated shall be considered to have given permission to a licensed taxicab driver to operate the person's motor vehicle for purposes of returning it to the person's residence. In fact, to further strengthen the ability of an injured third party, an "Implied permission" statute should also provide that the taxicab driver operating under such implied permission is an agent of the intoxicated person.

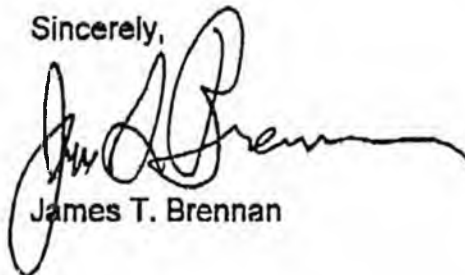
If such Implied permission cannot be written into the law, I will have to advise my clients not to participate in any program to return drunk drivers' vehicles to their residences, unless they first obtain the written consent or authorization by the person.

Even if statutory implied permission or expressed written consent is obtained, this is an imperfect solution, in that some intoxicated persons do not have their own automobile liability coverage, or may not be the owner or named insured on the insurance covering the automobile they are operating. Nevertheless, it seems advisable that measures be taken to maximize the possibility of bringing a claim against the intoxicated person's insurance, when we are seeking to immunize the taxicab driver from liability.

Finally, subsection (b) of the proposed statute would exclude "gross negligence" from immunity. I do not believe the term "gross negligence" is defined in Alaska law, and believe the statutory exclusion should therefore be limited to reckless or intentional misconduct.

Thank you for your attention to these concerns. If you or your assistants have any questions, please give me a call.

Sincerely,



James T. Brennan

JTB:dp

cc: CHARR

2763Rokeberg Ltr

LEGAL SERVICES

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

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


State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

April 6, 2001

SUBJECT: Taxicab insurance - (CSHB 67(JUD))

TO: Representative Norman Rokeberg
Attn: Janet

FROM: Michael F. Ford 
Legislative Counsel

You have asked for my comments on a suggestion that the required levels of liability insurance contained in sec. 3 of CSHB 67(JUD) be changed to create one combined level of coverage for any form of liability. While the legislature could require a combined level of liability insurance coverage, this may result in denial of coverage in a situation where more than one person is injured. In short, I believe that the reason the coverage is divided and larger for situations when more than one person is injured is to allow the available coverage to be spread among all injured parties. This kind of differentiation between bodily injury, multiple bodily injury, and property damage is typical for all mandatory coverage levels in state law.

Regarding combined limits allowed under municipal ordinance, I believe that while this may satisfy municipal law, this does not exempt a taxicab from compliance with AS 28.22.101(d), that requires separate coverage for bodily injury, multiple bodily injury, and property damage at the applicable limits. Again, the legislature could change existing law to allow combined coverage to be imposed by municipal law, but is not required to do so.

Please contact me if you have further questions.

MFF:jhb
01-007:jhb

Subject: Re: Response to HB 67 and HB 68

Date: Wed, 4 Apr 2001 21:19:02 -0800

From: "Becca Robinson" <darksky@ptialaska.net>

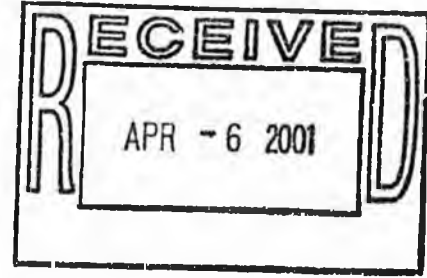
To: <Representative_Norman_Rokeberg@legis.state.ak.us>

To: Rep. Norman Rokeberg

From: Rebecca Robinson

Date: April 2, 2001

Re: HB 67 and HB 68



Dear Representative,

I appreciate and support what you are proposing. A large part of my decision to start a taxicab business in Cordova was because of the problem of intoxicated drivers in our community. Cordova has a high amount of DUI's for the number of people in this community. Our local Moose Lodge offers intoxicated patrons a similar service to what you are proposing. Their bartenders give the customer a card to give to the cab driver. In return the cab company would provide the customer a ride home and a free return trip to the customer's vehicle before noon the following day. At the end of the month, the cards that had been used would be returned to the Moose Lodge for a reimbursement of 1/2 the fares provided. I have also tried to offer a program that allows bartenders to give out a free cab ride card to intoxicated customers who may otherwise have the intention of driving. Unfortunately, it was the drivers who had many objections to this service.

I think the intention of this proposal is wonderful and in larger cities it has the potential to operate well. Although in smaller communities, I already see some amendments that would be needed for it to work more effectively.

Cordova is a very small community right now of only about 1500 people. In the summertime we may grow to about 2500. We have two cab companies, and in the summertime the community can provide enough business support both companies, but in the wintertime, there is only enough to support one. Each company only has one cab online at a time, so this service falls completely on the one driver operating at that time.

First of all, your proposal is set up with the idea that the drivers are employees of the cab company. Many cab services hire their drivers as independent contractors, which limits the companies from requiring drivers to perform specific services. As the owner, I try to convince my drivers that by providing this service, the bartenders really appreciate it and in return they will give us more business.

In the evening, bar patrons provide at least two-thirds of our business. Unfortunately many of the bartenders take advantage of this free service. Some see it as a way to continue over-serving their customers, knowing the customer can always get a free ride home. The bartender does not have to worry about cutting off their customers as quickly and having a potential argument. Some bartenders also feel they can offer these cards to their friends whether they drove to the bar or not. Some bartender may give out 7 free rides in one evening. Drivers object to this abuse because they work on commission and know they will not be reimbursed for these fares and often miss other paying fares while taking care of these free rides.

In theory, it sounds like a good practice. Many bartenders do appreciate the service and will try to call our company before the other one. Customers may remember that they received a free ride from our company and will think of using us first next time they need a ride. Drivers think it is a good idea because it makes them feel safer on the road, but they also feel the abuses have made the service much more of a nuisance to them and they would rather not give the rides any more.

Financially, it is not beneficial to smaller communities. My company does not provide me with an income after paying drivers and expenses, so I have been unable to offer compensation for free rides. Therefore, drivers being independent contractors may decline this service without more incentive. Perhaps if there was some city or state reimbursement provided for smaller communities, this service would be more accepted.

If this bill were to pass and became public knowledge, how would it keep customers from expecting these services every time they decided to frequent a bar? Is it really helping customers, or actually making mis-use of alcohol more socially acceptable? These are some issues I believe need to be addressed in this bill.

This past year, three of my close personal friends received DUI's anyways, even knowing that my company would provide them with this service. I realized that the ones who need the service the most will remain in denial until its too late. It's a sad fact, but the truth.

Perhaps another issue could be addressed in this bill that I have seen a problem with. I have found no law prohibiting cab drivers in Alaska from drinking alcohol while on duty. Although it is against the law for cab drivers to actually be drunk while driving, many individuals are incapable of realizing when they are drunk. This has been a problem in our community, where the cab driver is more intoxicated than the patrons they are picking up. Bartenders knowingly serve and buy drivers drinks and shots while on duty and it is an acceptable practice. I have been in cabs where small bottles of liquor roll out from under the seat. Commercial airline pilots are required not to drink within 8 hours of duty or while on duty. Is there a way to make this a state requirement for cab drivers also?

Thank you for faxing me a copy of your proposal. I wish I could provide more answers to these issues. I realize that it is frustrating to just hear the problems. Maybe others will have more solutions for you. I would be interested to receive any other amendments to this bill.

Sincerely,

Rebecca Robinson

Owner/Operator

Millennium Cab

P.O. Box 46

Cordova, AK 99574

Fax/phone: 907-424-5157

E-mail: darksky@ptialaska.net

POM for Representative Rokeberg



From: Mr J Harold Michal
PO Box 3549

Telephone: -

Valdez, AK 99686

NON Constituent

Registered Voter: V

Email:

Bill: HB 68 Title: NO CIVIL LIAB FOR TAXI TRANSPORTING DRUNK
Message:

Please support this bill

Entered in VAL on 3/02/01 POMID:99387

Distribution: 60

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Message 1 out of 1.

POM for Representative Rokeberg



From: Mr J Harold Michal
PO Box 3549

Telephone: -

Valdez, AK 99686

NON Constituent

Registered Voter: V

Email:

Bill: HB 67 Title: MOTOR VEHICLE REGISTRATION/INSURANCE

Message:

Please support this bill

Entered in VAL on 3/02/01 POMID:99386

Distribution: 60

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Message 1 out of 1.

HB

68

ALASKA STATE LEGISLATURE
House of Representatives

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Labor & Commerce Committee, Member
Legislative Council, Member
Special Committees:
Economic Development, Member



Interim:
716 West 4th Avenue, Suite 350
Anchorage, AK 99501
PHONE: (907) 269-0117
FAX: (907) 269-0119

SESSION:
State Capitol
PHONE: (907) 465-4968
FAX: (907) 465-2040

REPRESENTATIVE NORMAN ROKEBERG

e-mail: Representative_Norman_Rokeberg@legis.state.ak.us

FAX COVER SHEET

DATE: 4.18.01

TO: Mike Ford

FAX: 2029 VOICE: _____

RE: CS HB 68 (JUD) 252-LS030010

MESSAGE: Mike. I need a final CS for this bill with

the following two amendments:

(1) changed "intoxicated" to "under the
influence" throughout to conform w/ HB 4.

(2) Page 1, line 10 after "from"
Insert " or near"

Thanks:
Heather
x4990

TOTAL NUMBER OF PAGES SENT, INCLUDING COVER SHEET: 1

Adopted

22-LS0300\O
Ford
4/6/01

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 68(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SECOND LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

**Offered:
Referred:**

Sponsor(s): REPRESENTATIVE ROKEBERG

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to civil liability for driving the vehicle of an intoxicated person; and
2 providing for an effective date."

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

4 * Section 1. AS 09.65 is amended by adding a new section to read:

5 **Sec. 09.65.280. Damages resulting from driving the vehicle of an**
6 **intoxicated person. (a) A person is not liable for personal injury, death, or property**
7 **damage resulting from a motor vehicle accident if the person was driving a vehicle**
8 **involved in the accident and**

9 (1) before the accident, started driving the vehicle involved in the
10 accident from *ownara* licensed premises;

11 (2) is, at the time of the accident, a person employed to or under
12 contract to drive a taxicab or limousine, a taxicab or limousine owner, a holder of a
13 taxicab or limousine permit issued by a municipality, or an owner or employee of a
14 company that dispatches taxicabs or limousines;

1 (3) was not intoxicated at the time of the accident;

2 (4) was driving the vehicle to the motor vehicle owner's residence at
3 the request of the motor vehicle owner or a law enforcement officer; and

4 (5) was driving the vehicle because the motor vehicle owner or
5 operator was intoxicated or reasonably believed to be intoxicated.

6 (b) A person licensed under AS 04.11.080 - 04.11.250, or an agent or
7 employee of the person, is not liable for personal injury, death, or property damage
8 resulting from a motor vehicle accident described under (a) of this section.

9 (c) This section does not preclude liability for civil damages as a result of
10 gross negligence or reckless or intentional misconduct.

11 (d) A motor vehicle owner is considered to have given consent to another
12 person to drive the owner's motor vehicle if the other person is involved in an accident
13 and the provisions of (a) of this section apply to the other person.

14 (e) In this section, "licensed premises" has the meaning given in
15 AS 04.21.080.

16 * Sec. 2. The uncodified law of t' e State of Alaska is amended by adding a new section to
17 read:

18 APPLICABILITY. This Act applies to a civil action that accrues on or after the
19 effective date of this Act.

20 * Sec. 3. This Act takes effect July 1, 2001.

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

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


State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

April 6, 2001

SUBJECT: Civil liability (CSSSHB 68(JUD))

TO: Representative Norman Rokeberg
Attn: Janet

FROM: Michael F. Ford 
Legislative Counsel

The draft you requested for HB 68 is attached. In response to the question raised about the use of "gross negligence" in the draft, the term is one that is commonly used in other statutes and has a well-accepted meaning in case law. See AS 09.65.091(b), AS 09.65.092, AS 09.65.097(b) and Leavitt v. Gillespie, 443 P.2d 61, 65 (Alaska 1968). Negligence differs from gross negligence only in the degree of fault or misconduct. Generally, conduct that falls short of reckless or intentional misconduct, but is more than mere failure to act as a reasonable person, would constitute gross negligence.

I am concerned about the fact that this draft gives immunity to some individuals, but leaves others unprotected. For example, a friend or relative who takes the keys and drives an intoxicated person home has no protection under this bill. This kind of distinction between taxicab owners or operators and everyone else is vulnerable to a constitutional equal protection or due process challenge. See Turner Const. v. Scales, 752 P.2d 467 (Alaska 1988).

Please contact me if you have further questions.

MFF:lmb
01-132.lmb

Enclosure

ALASKA STATE LEGISLATURE

House of Representatives

COMMITTEE ASSIGNMENTS

JUDICIARY COMMITTEE, CHAIRMAN
LABOR & COMMERCE COMMITTEE, MEMBER
LEGISLATIVE COUNCIL, MEMBER
SPECIAL COMMITTEE ON ECONOMIC DEVELOPMENT &
TOURISM, MEMBER

website: <http://www.akrepublicans.org/Rokeberg.htm>



INTERIM
716 WEST 4TH AVENUE, SUITE 350
ANCHORAGE, AK 99501
PHONE: (907) 269-0117
FAX: (907) 269-0119

SESSION:
ALASKA STATE CAPITOL
JUNEAU, AK 99801-1182
PHONE: (907) 465-4968
FAX: (907) 465-2040

Representative Norman Rokeberg

e-mail: Representative_Norman_Rokeberg@legis.state.ak.us

SPONSOR STATEMENT

CSSSHB 68 (TRA)

An Act relating to civil liability for transporting an intoxicated person or for driving an intoxicated person's motor vehicle; and providing for an effective date

CSHB 68 (TRA) is a "good samaritan" bill for taxicab operators who transport intoxicated persons or who drive an intoxicated person's motor vehicle to a location directed by that person. Absent gross negligence or reckless or intentional misconduct, a person engaging in this activity would not be civilly liable for damages.

One of the problems facing Alaskans is when they are out drinking; they want to drive home even when they shouldn't. Additionally, these intoxicated persons are worried about leaving their vehicle parked in a location other than their home. This legislation would allow the intoxicated person and his or her vehicle to get home safely without the taxicab operator fearing liability from this activity.

Your support would be appreciated.

ED 3:04/04/01

ALASKA STATE LEGISLATURE

House of Representatives

COMMITTEE ASSIGNMENTS:

JUDICIARY COMMITTEE, CHAIRMAN
LABOR & COMMERCE COMMITTEE, MEMBER
LEGISLATIVE COUNCIL, MEMBER
SPECIAL COMMITTEE ON ECONOMIC DEVELOPMENT &
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INTERIM:
716 WEST 4TH AVENUE, SUITE 350
ANCHORAGE, AK 99501
PHONE: (907) 269-0117
FAX: (907) 269-0119

SESSION:
ALASKA STATE CAPITOL
JUNEAU, AK 99801-1182
PHONE: (907) 465-4968
FAX: (907) 465-2040

Representative Norman Rokeberg

e-mail: Representative_Norman_Rokeberg@legis.state.ak.us

SECTIONAL ANALYSIS CSSSHB 68 (TRA)

An Act relating to civil liability for transporting an intoxicated person or for driving an intoxicated person's motor vehicle; and providing for an effective date

- Section 1:** Adds new section to 09.65. Under certain specific circumstances, a taxicab operator is not civilly liable for personal injury or death during the transportation of an intoxicated person or an intoxicated person's vehicle except as a result of gross negligence or reckless or intentional misconduct. Additionally owner of vehicle or third-party may not bring civil action against taxicab operator unless gross negligence or reckless or intentional misconduct is involved.
- Section 2:** Applicability section.
- Section 3:** Effective date: July 1, 2001.

ED 3:04/04/01

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSSSHB 68(TRA)
(H) Publish Date: 3/30/01

Revision Date/Time (Note if correction): _____ Dept. Affected: Law
Title "An Act relating to civil liability for transporting an BRU Civil Division
intoxicated person or for driving an intoxicated person's motor . . ." Component Special Litigation
Sponsor Representative Rokeberg
Requester House Transportation Committee Component No. 2213

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2001) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2002 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

HB 68 prevents intoxicated persons being transported in a taxicab from bringing a civil action for damages against the owner or driver of the taxicab in the event of personal injury or death, if the owner or driver was acting in good faith. The bill also prevents an owner of a motor vehicle from bringing a civil action for damage to the motor vehicle when the damage occurred when the vehicle was being driven to the owner's residence at the request of the owner or a law enforcement officer by another person because the owner was intoxicated. The immunity from civil liability does not extend to cases of gross negligence or reckless or intentional misconduct.

Passage of this legislation will have no fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson Phone 465-5370
Division Attorney General's Office Date/Time 3/27/01 10:54 AM
Approved by: Kathryn Daughhettee for Bruce M. Botelho, Attorney General Date 3/27/01
Agency Department of Law

For distribution information, call the Governor's Legislative Office

443 P.2d 61 LEAVITT V. GILLASPIE (S. Ct. 1968)

**Herbert LEAVITT, Individually and as Administrator of the
Estate of William Leavitt, Deceased, Appellant,**

vs.

**Russell E. GILLASPIE, Jr., and Cripple Creek Resort, Inc.,
Appellees, Russell E. GILLASPIE, Jr., Appellant, v.**

**Herbert LEAVITT, Individually and as
Administrator of the Estate of William
Leavitt, Deceased, Appellee.**

Nos. 800, 803
SUPREME COURT OF ALASKA
443 P.2d 61
June 24, 1968

COUNSEL

Millard F. Ingraham and Barry W. Jackson, Fairbanks, for appellant and appellee Herbert Leavitt.
Edward A. Merdes and Howard Staley, of Merdes, Schaible, Staley & DeLisio, Fairbanks, for appellee
and appellant Russell E. Gillaspie, Jr.

JUDGES

Before NESBETT, C.J., and DIMOND and RABINOWITZ, JJ.
AUTHOR: DIMOND

OPINION

DIMOND, Justice. OPINION

William Leavitt died from injuries received when an automobile, driven by Russell E. Gillaspie, Jr., left the highway and overturned. This action for wrongful death was brought by the decedents administrator, Herbert Leavitt, against Gillaspie and the Cripple Creek Resort, Inc.¹ The jury returned a verdict in favor of Gillaspie and Leavitt has appealed.

Leavitt's Appeal

Gross Negligence.

In his opening statement, Gillaspie's counsel admitted that Gillaspie was negligent. Leavitt requested the court to instruct the jury as follows:

Ordinary contributory negligence on the part of plaintiff is not a defense to an action for injury or death caused by the defendant's reckless or wanton misconduct. Only if the Plaintiff's own conduct is willful or wanton will it be recognized as a defense.

The court refused to give this instruction. Leavitt contends that by refusing to give this instruction the court refused to submit to the jury the issue of whether Gillaspie had been guilty

of gross negligence, or to put it in other words meaning the same thing, willful, wanton or reckless misconduct. The evidence from which it must be determined whether or not this contention is correct may be briefly summarized as follows:

Gillaspie, the decedent and Mike Sheehan, and two other persons, were drinking beer at the Malemute Saloon in Ester, Alaska, at approximately 1:30 a.m., the night of the fatal accident. They drank beer together for one and a half or two hours taking turns buying pitchers of beer, each of which held about three glasses. The amount of beer consumed by the five persons amounted to four or five pitchers. Sheehan, the decedent and Gillaspie then rode to the University of Alaska in Gillaspie's car with Gillaspie driving. After spending about fifteen minutes at the University, the three returned to the Malemute Saloon. There they each purchased a pitcher of beer, and taking the pitchers with them, started back to the University with Gillaspie driving. On the way to the University defendant's car failed to make a curve, left the road, and rolled or flipped over two or three times throwing decedent from the car where he suffered fatal injuries.

Gillaspie testified that on the first trip back to the University he felt "high" but "not intoxicated," that the beer he consumed never impaired his ability to drive, and that he kept control of the car at all times. He described his driving as "good." He estimated his speed on the second and fatal trip back to the University at "over 50," although he admitted telling a police officer right after the accident that he was going from 65 to 70 miles an hour. Nobody said anything to Gillaspie about his driving on the fatal trip, and he did not think that his driving was impaired by his drinking. As regards the accident, Gillaspie testified that he "just lost control of the car * * * instead of * * * making the turn, the car kept on going straight." He knew of the steep shoulders of the curve and the lack of banking. He claimed to have a "pretty good capacity for drinking."

Mike Sheehan, the other passenger on the fatal trip, testified that other than each of the five persons buying a round of beer, he "couldn't say" how much beer the group consumed. He estimated Gillaspie's speed on both trips to the University at "60 and 70." He described Gillaspie as "the least intoxicated" and "intoxicated," and said "I don't remember" in response to questioning about Gillaspie's driving.

Donald Pearson, vice president and stockholder of Cripple Creek Resort, Inc., testified to Gillaspie's presence at the Malemute Saloon the night of the fatal accident but denied remembering serving him anything to drink. He did remember that the decedent "seemed to be sober enough," but denied noticing the condition of the rest of the group. Pearson also denied giving the group permission to take the pitchers of beer out of the bar.

Dr. Raymond Evans testified on the basis of his autopsy of decedent that "something like a beer can or a beer mug or something of that nature or anything round, of that magnitude" pushed in decedent's abdominal wall and crushed his liver.

Sergeant Schlichtig of the Alaska State Police, the investigating officer of the accident, testified as to his observations of the car on the scene of the accident, of the condition of the road, and a reconstruction of the accident. Sergeant Schlichtig's reconstruction of how the

accident occurred, based on his observation and experience, was that Gillaspie's car went into a sideways skid on the pavement, being lifted off of the right wheels onto the left. It continued along the shoulder, with the edge of the pavement scraping the paint off the car under the bottom of the door. It then left the ground at the end of the tracks to the first impact point, where it hit on its right rear, flipped again to the second impact point where it hit on its nose, and flipped over onto the railroad track, where it came to rest upside down pointing in the opposite direction of travel. The sergeant also testified that the road condition was good blacktop, free of ice and snow, moisture or loose gravel. The sergeant also testified that the odor of alcohol on all three persons in the car was quite strong.

Leavitt alleged in his complaint that Gillaspie was guilty of gross negligence. This allegation alone is not sufficient to justify an instruction on that subject. There must be an evidentiary basis for such an instruction.²

Where the question has arisen as to whether a directed verdict or a judgment notwithstanding the verdict should be entered with respect to an issue of negligence or contributory negligence, we have held that such issues are for the jury to determine where there is room for diversity of opinion among reasonable men as to whether a defendant is guilty of negligence or a plaintiff is guilty of contributory negligence.³ We apply that same rule where the question is whether an instruction on the issue of gross negligence should be submitted to the jury for its consideration. If reasonable minds could justifiably have different views on the question of whether plaintiff was guilty of gross negligence, then the issue of gross negligence should be submitted to the jury for determination. On the other hand, if the evidence is such that reasonable minds might reach only one conclusion, i.e., that from the facts presented there is no showing of gross negligence, then an instruction on such an issue is not justified.⁴

In order for one to be guilty of gross negligence, the evidence must show that he had full knowledge of the hazards he was creating by his actions, such as to evidence a reckless disregard of possible consequences and indifference to the rights of others.⁵ There must be facts which would lead a reasonable man to realize that the actor's conduct under the circumstances not only creates an unreasonable risk of physical harm to another, but also involves a high degree of probability that such harm will result.⁶ Gross negligence differs from ordinary negligence in several important particulars. As stated in the Restatement of the Law of Torts, Second:

It [reckless misconduct or gross negligence] differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent. The difference between reckless misconduct and conduct involving only such a

quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind.⁷

We do not believe that the evidence shows a conscious choice of a course of action by Gillaspie with full knowledge of a serious danger to others such as to evidence a reckless disregard of possible consequences and indifference to the rights of other persons. Gillaspie was shown to have drunk some beer and to have travelled at a high rate of speed between the Malemute Saloon and the University of Alaska. There is no evidence showing that he was incapable of driving because of the beer he drank; and since he made the first trip to the University and back to the Malemute Saloon without incident, there was no reason to believe that when he started on the fatal trip there was a high degree of probability that the car would fail to make a curve and turn over. We believe that there was no room for diversity of opinion among reasonable men as to whether Gillaspie was guilty of gross negligence, and that reasonable minds could come to only one conclusion, i.e., that Gillaspie was not grossly negligent. The court did not err in declining to give the jury an instruction concerning gross negligence.

During his testimony Gillaspie admitted having entered a plea of guilty to a charge of reckless driving. With respect to such a plea, Leavitt requested the court to instruct the jury that "A plea of guilty is a confession on the part of a defendant of the truth of the material facts of the charge." The court refused to give the requested instruction and Leavitt assigns this as error.

Normally, a plea of guilty of a defendant in a criminal action is admissible against him in a civil action growing out of the same offense.⁸ It would constitute evidence by way of an admission by a defendant which would tend to prove the truth of the matter admitted by the guilty plea. But here it is not clear what Gillaspie did admit by his plea of guilty to reckless driving. That offense is defined by statute as consisting of driving "carelessly, heedlessly or in willful or wanton disregard of the rights or safety of others", or in driving "without due caution or circumspection", or in driving "at a speed or in a manner so as to endanger or be likely to endanger a person or property."⁹ The requested instruction did not specify which of the alternate grounds in the statute defining reckless driving applied to Gillaspie's case. Because it is not clear just what Gillaspie pled guilty to, the instruction was properly refused.¹⁰

Contributory Negligence.

The court instructed the jury on Gillaspie's affirmative defense of contributory negligence on the part of decedent. Leavitt claims this was error.

In *Saslow v. Rexford*, 395 P.2d 36, 41 (Alaska 1964), we defined contributory negligence as:

"conduct which involves an undue risk of harm to the person who sustains it." It is one's failure to exercise reasonable prudence for his own safety when he perceives danger to himself created by another's negligence.

Leavitt concedes that riding with a driver whom a reasonable man should know to be intoxicated may be contributory negligence. The question here is whether the evidence is such

that reasonable minds could differ on the question of whether decedent knew or should have known that Gillaspie's capacity for driving had been impaired by reason of intoxication.

In *Meade v. Meade*,¹¹ the Virginia Supreme Court of Appeals stated:

[The] fact that the host had been drinking and the guest had knowledge of this fact is not sufficient to establish contributory negligence as a matter of law. * * * The evidence must go beyond this and show that because of his drinking the driver's ability to drive was impaired, that the guest knew, or in the exercise of ordinary care should have known, this and yet entered or continued to ride in the car. Whether the guest knew or should have known that the intoxicated condition of the driver impaired his ability to drive is ordinarily a question for the jury.

Here the situation is one where decedent willingly, without protest, drove with a driver who had had several glasses of beer and, in the words of one witness, was "the least intoxicated," and who was driving at speeds of from 60 to 70 miles per hour. The question is whether, under these circumstances, decedent by staying with Gillaspie in his car acted with the care that a reasonably prudent person would have used under those circumstances.

In *Zumwalt v. Lindland*,¹² the Supreme Court of Oregon held that the issue of contributory negligence was properly submitted to the jury where there was evidence of the driver's drinking a substantial amount of beer, known to the plaintiff, and nothing more. The court said:

We need not decide, at this time, how much or how little beer at either end of the scale will require the court to withdraw the question from the jury. We do hold, however, that upon the evidence in the case at bar a jury could say that the amount of alcohol consumed was sufficient to put a reasonable man upon inquiry concerning the fitness of his driver to convey him safely home. Upon such evidence, the jury could have found that the plaintiff failed to exercise that degree of care that a reasonable person would have exercised for his own safety.

There was no contention that the defendant was intoxicated. However, a jury could have considered from the youthfulness of the parties and from the manner in which they had been spending their time immediately prior to the accident that the defendant's ability to operate his vehicle safely had become impaired and that a reasonable person in the plaintiff's position should have known that it was unsafe to ride with the defendant under all the circumstances.

As in the foregoing case, we believe that the issue of decedent's contributory negligence was properly submitted to the jury for its determination. Considering the facts relating to Gillaspie's beer drinking and the speeds at which he drove his car on the first trip from the Malemute Saloon to the University, we believe that reasonable minds could differ as to whether decedent failed to exercise reasonable prudence for his own safety when he decided to ride with Gillaspie on the second, and fatal trip from the saloon to the University. The court's instruction to the jury on contributory negligence was not error.

Testimony of Pearson.

Gillaspie called as a witness, Donald Pearson, vice president and manager of Cripple Creek

Resort, Inc., the corporation owning the bar where Gillaspie and decedent purchased and consumed beer prior to the accident. After questioning Pearson on other matters, Gillaspie's counsel asked this question: "Mr. Pearson, has Cripple Creek, Inc., been a defendant in this law suit?" Over plaintiff's objections, following a conference in chambers, the trial court allowed the witness to answer this question but prohibited further inquiry into the matter. The court said:

I am going to, as it stands, allow him to be - to answer the fact of whether or not he has been a defendant in this lawsuit. I think that maybe the defendant Gillespie didn't understand what he was coming up to, and I don't think - I don't want this jury to be misled by the statements of this person if in fact they would find that he may have had some interest in to discolor the truth. But I'm not going to allow any more of those and -

Leavitt alleges error on the part of the trial court in allowing the question and in refusing to give an instruction cautioning the jury, in determining any liability or damages, not to consider the fact that Cripple Creek Resort, Inc., may have been a defendant in the action. Leavitt argues that the question was, alone, irrelevant to the issues before the jury, and that it was likely to invite improper speculation.

We need not decide whether it was proper to allow the question and answer, because Leavitt has not shown that such evidence prejudiced his case or was such as to have influenced the jury to return a verdict for Gillaspie.

Assumption of Risk.

The court instructed the jury on Gillaspie's affirmative defense of assumption of risk. Leavitt claims this was error.

The concept of assumption of risk was developed from the common law action of a servant against his master. The master was held to be not negligent if he provided a reasonably safe place to work, and the servant was said to have assumed the inherent risks that remained. In this sense assumption of risk was not an affirmative defense, but rather was another way of saying the master was not negligent; for the servant had the burden of proving that his injury resulted from a risk other than one inherent in a place that was a reasonably safe place to work.

As the doctrine developed, however, it became an affirmative defense, with the burden of pleading and proof on the master. Thus, even if the servant could show that the master was negligent because he had failed to provide a reasonably safe place to work, the master could escape liability if he could establish that the servant had voluntarily exposed himself to a risk negligently created by the master. As the Supreme Court of New Jersey has pointed out, "Thus two utterly distinct thoughts bore the same label with inevitable confusion."¹³

But the matter did not stop here. The courts came to use the doctrine of assumption of risk, as an affirmative defense, in a way that was different in essence from the defense of contributory negligence. Where contributory negligence was a defense, the question was whether the plaintiff had acted for his own safety as a reasonably prudent man would have acted under the circumstances. But where assumption of risk was a defense, the question was whether plaintiff

had voluntarily entered into a situation involving obvious danger, with knowledge of the danger, and without regard to whether he had acted in such a situation as a reasonably prudent man would have acted. The effect of this concept was to exculpate a negligent defendant upon the notion that a plaintiff assumed the risk of that negligence even though he was not contributorily at fault, i.e., even though he had exercised the care of the reasonably prudent man under all the circumstances.¹⁴

This is the sense in which the doctrine was used by the trial court in this case. The court instructed the jury that Gillaspie would be relieved from liability if he proved that decedent had freely and voluntarily entered into a situation involving danger of personal harm from Gillaspie's conduct, with the knowledge of facts which created the danger and a realization of the risk of harm to decedent from that danger. Such an instruction had the effect of creating the potential of a verdict for Gillaspie, despite the fact that the jury may have found under the issue of contributory negligence that decedent, in the face of the danger of which he had knowledge, still had exercised the care of a reasonably prudent person under all the circumstances. Thus, even though the decedent may have been found to be not contributorily negligent, he would be barred from recovery by reason of assumption of risk.

As a matter of policy we disapprove of a concept which could result in a situation where an accident victim, even though not contributorily at fault, could be barred from recovery because he knew or should have known of a negligently created risk. The just concept should be whether a reasonably prudent man in the exercise of due care would have incurred the risk despite that knowledge, and if so, whether he would have conducted himself in the manner in which the plaintiff acted in the light of all the circumstances, including the appreciated risk.¹⁵ This means that only the traditional notions of negligence and contributory negligence should govern cases such as we have here and that the defense of assumption of risk should not be a defense and should not be used.¹⁶

If the instruction on assumption of risk had been limited by the notion of what a reasonably prudent man would have done under the circumstances in which decedent found himself, with knowledge of the danger that might have been involved, then such an instruction would have dealt with nothing more than another phase of contributory negligence.¹⁷ But as we have pointed out, the instruction was not so limited. It was entirely possible, under the instructions on contributory negligence and assumption of risk, for the jury to have found that decedent was free from contributory negligence but nevertheless could not recover because he had exposed himself to a negligently created risk, without regard to whether a reasonably prudent man may have done so in the same circumstances. Because of such a possibility and because we disapprove of such a concept, a new trial must be ordered with instructions not to give the jury an instruction on assumption or risk.

Reduction of Damages to Present Worth.

The court instructed the jury that if they found for Leavitt, in computing the amount by which decedent's estate had been diminished because of his wrongful death, the jury must determine the

present case value of such amount. In other words, the jury was instructed to reduce damages to present worth. Leavitt admits that since he lost the case on the question of liability, he is in no position to claim any prejudice from the court's instruction. But he asks us, in the event a new trial is ordered, to hold that such an instruction was erroneous and not a correct statement of the law.

Since the judgment was entered in this case we decided the case of *Beaulieu v. Elliott*.¹⁸ There we held that in computing future loss of earnings a reduction should not be made to present worth.¹⁹ The reasoning used there would apply in a wrongful death case where the measure of damages is the amount by which the decedent's estate had been diminished because of his death. We assume that on a retrial of this case the trial court will take cognizance of the *Beaulieu* case and give appropriate instructions to the jury as to the computation of damages.

Gillaspie's Appeal

Gillaspie appeals on two grounds. The first has to do with the permissible scope of his counsel's examination of Gillaspie's witness, Donald Pearson, vice president and manager of Cripple Creek Resort, Inc., the corporation owning the bar where Gillaspie and decedent and others in the party purchased and consumed beer prior to the accident. Pearson testified that he recalled speaking to decedent on the fatal night and that decedent "seemed to be sober enough." Pearson did not recall the state of sobriety of Gillaspie and the others, except to say that if they had been drunk he would have thrown them out.

Gillaspie's counsel was permitted by the court to inquire of Pearson as to whether the corporation had been a defendant in this action, to which question the answer was "yes." Counsel was not permitted, however, to show by further questioning that the corporation had executed a confession of judgment in Leavitt's favor for \$100,000 prior to the trial of this action. The court held that evidence as to a confession of judgment was not relevant to the determination of the issue between Leavitt and Gillaspie.

Gillaspie claims this ruling was error. His argument is that the state of decedent's sobriety was a material factor to be considered by the jury in determining whether or not decedent was contributorily negligent, that Pearson's testimony that Leavitt appeared to be sober was adverse to the interest of Gillaspie who stood to gain by showing that decedent was not sober, that Pearson may have been motivated in so testifying by his bias against Gillaspie and in favor of Leavitt, that such bias would be shown by establishing that Pearson's corporation had a financial interest in the case adverse to the interest of Gillaspie, and that such a financial interest would be demonstrated by showing that the corporation had confessed judgment in Leavitt's favor for \$100,000. Gillaspie's reasoning in support of his contention that the corporation had a financial interest in the outcome of the dispute between Leavitt and Gillaspie, is that it was in the interest of the corporation that Leavitt obtain judgment against Gillaspie because this would decrease the possibility that Leavitt would seek to collect the full \$100,000 judgment from the corporation by reason of its confession of judgment in that amount.

This is nothing more than speculation. There was no way of knowing to what extent Leavitt

would attempt to collect a judgment from the corporation if a judgment had also been rendered against Gillaspie. Evidence as to the corporation's confession of judgment was, as the trial court correctly held, irrelevant as to the issues between Leavitt and Gillaspie. There was no error in excluding such testimony.

Based upon testimony regarding decedent's educational background, grades²⁰ and character, the court allowed the introduction in evidence by Leavitt of certain charts prepared by Professor Haring, an economist at the University of Alaska, from income figures contained in the 1960 Alaska census. These charts contained statistical data showing the average annual income of males in Alaska in certain age groups, certain areas, and in certain educational levels. Gillaspie claims this was error on the ground that it was so speculative as to decedent's lifetime income expectations as to be useless to the jury.

The charts introduced in evidence reflected Professor Haring's opinion as to the statistical data contained therein. The criterion for determining whether such an expert opinion is admissible is whether the jury can receive appreciable help from the expert witness on the subject on which he testifies.²¹ We believe that the jury could receive such help in this case. In determining the loss to an estate in a wrongful death action, the jury at some point must make an estimate as to the decedent's lifetime income expectations. This must be arrived at largely through probabilities, and any evidence that would reasonably tend to indicate the decedent's earning capacity in the future had he lived would be of assistance to the jury.²² We believe that Professor Haring's data presented to the jury a reasonable basis for assisting them in estimating the probable future earnings of decedent.²³ The admission of the charts in evidence was not error.

The judgment is reversed and the case remanded for a new trial.

DISSENT

NESBETT, Chief Justice (concurring and dissenting).

I concur in the result. It is my opinion that the court erred in giving an instruction on assumption of risk because there was no evidence that Leavitt comprehended the dangers. In *Evans v. Buchner*¹ this court said:

The general rule is that the defense of assumption of risk is not applicable unless the facts which create a dangerous condition or situation are known and the danger itself comprehended by the person against whom the defense is being exerted.

In *Buchner* the court adopted a subjective test. The question in each case was to be whether the plaintiff had a knowledge of the facts and an actual comprehension of the danger. Under *Buchner* it would not be enough to invoke the doctrine of assumption of risk to argue that Leavitt must have had an awareness of the fact that Gillaspie had drunk a lot of beer; that his judgment may have been impaired; that it was dangerous to ride with him and that because he did

ride with Gillaspie he comprehended the danger and elected to assume the risk.²

Although I concur in the result reached by the majority I do not agree that the defense of assumption of risk should be entirely abolished. Whether the doctrine is entitled assumption of risk or given an appropriate label as a variation of the doctrine of contributory negligence, I believe that it has a place in our jurisprudence in some factual situations.

As was aptly stated by the Supreme Court of California in *Prescott v. Ralph's Grocery Co.*³

The defenses of assumption of risk and contributory negligence are based on different theories. Contributory negligence arises from a lack of due care. The defense of assumption of risk, on the other hand, will negate liability regardless of the fact that plaintiff may have acted with due care. (See Prosser on Torts [1941], p. 377.) It is available when there has been a voluntary acceptance of a risk and such acceptance, whether express or implied, has been made **with knowledge and appreciation of the risk.** (See Rest., Torts, § 893).

Assumption of risk has been abolished as a defense in the master servant relationship in Alaska, as it has in many other states.⁴ It has also been abolished in many states in automobile guest statutes. It appears that the defense has been entirely abolished in at least three states.⁵ Although some of the legal aspects of the defense may duplicate those of contributory negligence in some factual situations, this is not generally so where there has been a voluntary acceptance of a **comprehended risk.**⁶ It is significant that in the cases cited in the preceding note, two of which are relied on by the majority, the plaintiff in *Bolduc v. Crain* had no appreciation whatever of the unusual risk involved in attempting to assist the handler of a particularly "lively" team of horses; that in *Felgner v. Anderson* there was, as far as can be learned from the opinion, no evidence that plaintiff had an appreciation of any danger involved in hunting ducks out of the same blind as defendant; and that in *Meistrich v. Casino* the only evidence that plaintiff had an appreciation of the danger involved in skating on arena ice which defendant operator had frozen so hard that it became slippery, was that he "noted that his skates slipped on turns". The requirement that there be evidence showing a comprehension of the danger involved would, in my opinion, have made the defense of assumption of risk in the foregoing cases inapplicable in Alaska and in other jurisdictions requiring an actual comprehension of the danger.

Section 893 of the **Restatement of Torts** contains numerous factual illustrations of where the doctrine of voluntary acceptance of a comprehended danger has logical application. One example is *Hunt v. Portland Baseball Club*⁷ where the court held that a spectator could not recover from the ball club for injuries received when struck by a foul ball because he was intimately familiar with the game of baseball and the risks inherent in being a spectator and had knowingly placed himself in an area of appreciated risk.⁸

Under the majority holding, even though the evidence may show a voluntary acceptance of an appreciated risk, the question would be

whether a reasonably prudent man in the exercise of due care would have incurred the risk

despite that [actual] knowledge, and if so, whether he would have conducted himself in the manner in which the plaintiff acted in the light of all the circumstances, including the appreciated risk.

The new doctrine is intended to simplify and clarify the law of negligence and eliminate incompatible defenses by subsuming assumption of risk under contributory negligence, but I doubt if this will be the ultimate effect. If the new test were applied to the facts of the Oregon baseball case just mentioned, the jury would be asked to determine first whether a reasonable prudent person in the exercise of due care would have purchased a seat not behind a screen even though he comprehended the danger. The evidence would ordinarily have established that seats behind a screen were available and that management could have made the balance of the seats safer by screening,⁹ but at the expense of visibility. The jury would be aware of the fact that hundreds of thousands of baseball, hockey and other sports fans daily and knowingly sit in areas of danger as spectators. If the jury conscientiously applied the objective test of the average man, and based its judgment on what it knew the average man was doing daily throughout the country, it might very well conclude that the spectator had acted with "due care" in purchasing a ticket for an unprotected seat, even though he knew there was a danger that he might be injured while occupying the seat.

What appears to be an unrealistic aspect of the new test is at once apparent. Why should any controlling effect be given to the question of whether a reasonably prudent man would have incurred the comprehended risk if the evidence has established that the particular plaintiff did in fact voluntarily incur the comprehended risk? How can it be logically said that a person has acted with "due care" when it has become apparent from the evidence that he deliberately and knowingly chose to place himself in a position of danger? If the jury should find that the spectator had not acted with due care, in spite of the fact that a large segment of the population daily engaged in identical conduct, can it be said that the objective test of the average, or reasonably prudent man, has been realistically applied?

If the jury finds that the plaintiff spectator has acted with due care, the next question it would be asked to decide under the new test would be whether he

would have conducted himself in the manner in which the plaintiff acted in the light of all the circumstances, including the appreciated risk.

This aspect of the test must mean that the jury must next decide whether the spectator, after having knowingly and without negligence placed himself in an area of danger, thereafter conducted himself in such a manner as not to increase the danger to himself. In other words, was he contributorily negligent after having taken his seat? Judging by the wording of the new test, this question would be asked in every case where the jury had found initially that the spectator was not negligent in purchasing an unprotected seat, even though no evidence may have been introduced during the trial which would tend to show that he had done anything to increase the existing danger. In my opinion, it is unrealistic to ask a jury to determine the answer to a question which has no factual basis in the evidence. For example, if the evidence showed that the spectator had merely occupied his seat until he was hit in the head by a foul ball, the judge would

be obligated, it would seem to set aside a verdict for the defendant management because of lack of any evidence that the spectator had done anything to increase the risk of injury. The question might be appropriate if there was evidence that the spectator had remained seated in a fixed posture until struck by the ball when he could have avoided being struck by ducking to one side or the other, or downward, or perhaps could have been caught the ball in his hands. Evasive or protective action of this sort is regularly employed by the average fan who must, at times, be an athlete of sorts himself in order to exercise the judgment and agility necessary to avoid injury.

The foregoing discussion demonstrates, in my opinion, the impracticability of attempting to determine the usual assumption of risk situation by the rules of negligence. For other example see a discussion with illustrations in Restatement of Torts § 893 (1939).

OPINION FOOTNOTES

1 Prior to trial, Cripple Creek Resort, inc., after first denying the allegations of the complaint for wrongful death in its answer to the complaint, executed a confession of judgment for the sum of \$100,000, and a judgment in that amount was entered in favor of decedent's administrator against Cripple Creek Resort, Inc.

2 Groseth v. Ness, 421 P.2d 624, 629 n. 14 (Alaska 1966).

3 Mallonee v. Finch, 413 P.2d 159, 162 (Alaska 1966); McCoy v. Alaska Brick Co., 389 P.2d 1009, 1010 (Alaska 1964).

4 Rocky Mtn.Prod. Trucking Co. v. Johnson, 78 Nev. 44, 369 P.2d 198, 202 (1962).

5 McLemore v. Harris, 374 P.2d 410, 412 (Alaska 1962).

6 Nichols v. Baker, 101 Ariz. 151, 416 P.2d 584, 586 (1966).

7 Restatement (Second) of Torts § 500 comment g at 590 (1965).

8 Monsma v. Williams, 385 P.2d 107, 110 (Alaska 1963).

9 AS 28.35.040.

10 Zenuk v. Johnson, 114 Conn. 383, 158 A. 910, 911-912 (1932); Sothern v. Vandyke, 114 N.J.L. 1, 174 A. 877, 879 (1934).

11 206 Va. 823, 147 S.E.2d 171, 174 (1966).

12 239 Or. 26, 396 P.2d 205, 210 (1964).

13 Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 155 A.2d 90, 93, 82 A.L.R.2d 1208, 1214 (1959).

14 Id., 155 A.2d at 94, 82 A.L.R.2d at 1214-1215.

15 Id., 155 A.2d at 95, 82 A.L.R.2d at 1216.

16 Felgner v. Anderson, 375 Mich. 23, 133 N.W.2d 136, 141-154 (1965); McGrath v. American Cyanamid Co., 41 N.J., 272, 196 A.2d 238 (1963); Zumwalt v. Lindland, 239 Or. 26, 396 P.2d 205, 207 (1964); II F. Harper & F. James, The Law of Torts § 21.8 at 1191-92 (1956).

17 *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 155 A.2d 90, 95, 82 A.L.R.2d 1208, 1216 (1959).

18 434 P.2d 665 (Alaska 1967).

19 *Id.*, at 671-672.

20 Decedent was a student at the University of Alaska at the time of his death.

21 *Pedersen v. State*, 420 P.2d 327, 335 (Alaska 1966); *Crawford v. Rogers*, 406 P.2d 189, 192 (Alaska 1965).

22 See *Turrietta v. Wyche*, 54 N.M. 5, 212 P.2d 1041, 1047, 15 A.L.R.2d 407 (1949).

23 *Krohmer v. Dahl*, 145 Mont. 491, 402 P.2d 979, 981-982 (1965).

DISSENT FOOTNOTES

1 386 P.2d 836, 837 (Alaska 1963).

2 The subjective test adopted by Buchner is the rule in the majority of jurisdictions. See *Guerrero v. Westgate*, 164 Cal.App.2d 612, 331 P.2d 107, 110 (1958); *Prescott v. Ralph's Grocery Co.*, 42 Cal.2d 158, 265 P.2d 904, 905-906 (1954); *Dean v. Martz*, 329 S.W.2d 371, 374 (Ken. 1959); *Evans v. Johns Hopkins Univ.*, 224 Md. 234, 167 A.2d 591, 594 (1961); *Fitzpatrick v. Marastoni*, 234 Or. 192, 379 P.2d 1022, 1023 (1963); *Shoemaker v. Floor*, 117 Utah. 434, 217 P.2d 382, 387 (1950); *Kingwell v. Hart*, 45 Wash.2d 401, 275 P.2d 431, 434-435 (1954); *Restatement of Torts* § 893 (1939); *Restatement (Second) of Torts* §§ 496 A-G (1965).

3 42 Cal.2d 158, 265 P.2d 904, 906 (1954).

4 AS 23.30.055, 23.30.080.

5 *Felgner v. Anderson*, 375 Mich. 23, 133 N.W.2d 136, 141-154 (1965) (except in employment relationships and where there has been an express contractual assumption of risk.); *Bolduc v. Crain*, 104 N.H. 163, 181 A.2d 641, 644 (1962); *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 155 A.2d 90, 95, 82 A.L.R.2d 1208 (1959).

6 See *W. Prosser, The Law of Torts* § 67 (3d ed. 1964).

7 207 Or. 337, 296 P.2d 495, 498-503 (1956).

8 Footnote 13 of the majority opinion cites the Oregon case of *Zumwalt v. Lindland*, 239 Or. 26, 396 P.2d 205, 207 (1964), as authority for the complete abolition of the doctrine of assumption of risk, but since the Oregon automobile guest statute was involved it would appear that the cause has a limited application.

9 In which case the jury would experience little difficulty in finding management negligent, particularly if there was insurance in the background.

752 P.2d 467 TURNER CONSTR. CO. V. SCALES (S. Ct. 1988) 1988 Alas. Lexis
21

Turner Construction Company, Inc., Petitioner,
vs.
**Robert Scales and Kip Clapper, Respondents; Phillip Iverson
d/b/a Iverson Construction Company, Petitioner, v.
DeWayne B. Carson and Robert J. Kottre d/b/a K
& W Doors, Respondents**

No. 3290, File Nos. S-1429, A-1600,
SUPREME COURT OF ALASKA
752 P.2d 467, 1988 Alas. LEXIS 21
April 01, 1988

Petitions for Review from the Superior Court of the State of Alaska, Third Judicial District, Anchorage,
Douglas J. Serdahely, (S-1429) and Joan M. Katz (S-1600), Judges.

COUNSEL

Paula Williams and Dan Cadra, Law Offices of Roy W. Matthews III, for Petitioner Turner Construction Company.

Kenneth P. Jacobus, Hughes, Thorsness, Gantz, Powell & Brundin, for Petitioner Phillip Iverson.

Joseph A. Kalamarides, Kalamarides & MacMillan, for Respondent Robert Scales.

Jeffrey M. Feldman and Stuart A. Ollanik, Gilmore & Feldman, and Jeffrey D. Jefferson, Nordstrom, Steele & Jefferson, for Respondent DeWayne B. Carson.

JUDGES

Rabinowitz, Chief Justice, Burke, Matthews, Compton and Moore, Justices.

AUTHOR: BURKE

OPINION

BURKE, Justice.

The question in these consolidated cases is whether AS 09.10.055, the six-year statute of repose on suits against design professionals, violates the Alaska Constitution. The superior court ruled the statute unconstitutional. We affirm.

I. FACTS AND PROCEEDINGS

Turner Construction v. Scales, File No. S-1429. Robert Scales suffered property damage when a fire occurred in the Winterbrook Apartments in 1984.¹ Turner Construction Company built the apartments in 1978. Scales sued Turner Construction and others for his loss, alleging in part that the fire was caused by Turner Construction's negligent construction and installation of a fireplace.

Turner Construction asserted that Scales' cause of action was barred by AS 09.10.055, the six-year statute of repose² governing actions against design professionals such as architects,

engineers and contractors, and moved for judgment on the pleadings. Scales moved to strike the defense on the ground that the statute is unconstitutional. Superior Court Judge Douglas J. Serdahely granted Scales' motion, concluding that AS 09.10.055 violates the due process³ and equal protection⁴ clauses of the Alaska Constitution.

Iverson v. Carson, File No. S-1600. DeWayne B. Carson was injured in 1985, while attempting to install an automatic garage door opener in his home. Phillip Iverson built the home in 1978; the garage door was originally installed by a subcontractor.

Seven months after his injury, Carson sued Iverson and the subcontractor. Iverson moved for summary judgment, based on the six-year statute of repose, because Carson was injured six-and-a-half years after substantial completion of the improvement. Superior Court Judge Joan M. Katz denied Iverson's motion, concluding that AS 09.10.055 violates the equal protection clause⁵ of the Alaska Constitution.

II. THE STATUTE

The statute in question was enacted in 1967. It provides in part:

(a) No action, whether in contract . . . , in tort or otherwise, to recover damages (1) for a deficiency in the design, planning, supervision or observation of construction or construction of an improvement to real property; (2) for injury to property, real or personal, arising out of a deficiency; or (3) for injury to the person or for wrongful death arising out of such deficiency, may be brought against a person performing or furnishing the design, planning, supervision or observation of construction, or construction of an improvement more than six years after substantial completion of an improvement.

(b) Notwithstanding the provisions of (a) of this section, in the case of an injury to property or the person or an injury causing wrongful death, which injury occurred during the sixth year after substantial completion, an action in tort to recover damages for the injury may be brought within two years after the date on which the injury occurred. In no event may action be brought more than eight years after the substantial completion of construction of an improvement.

(c) Nothing in this section shall be construed as extending the period prescribed by the laws of the state for the bringing of any action.

(d) The limitation prescribed by this section **shall not be asserted by way of defense by a person in actual possession or control, as owner, tenant, or otherwise** of an improvement at the time a deficiency in an improvement constitutes the proximate cause of the injury or death for which it is proposed to bring an action.

AS 09.10.055 (Emphasis added).

The House Judiciary Report notes that this section "places a . . . statute of limitation on lawsuits against architects, designers and builders." 1967 House Journal 261. It is clear, however, that the House intended to enact a statute of repose. An explanatory report by the Judiciary

Committee stated in part:

"[T]he time begins running upon 'substantial completion' of the improvement; consequently this bill limits not only the bringing of the cause of action, but in effect prevents the cause of action from arising when an injury occurs after the time limitation has expired. An action based on a defect not discovered until after the time limitation has expired would likewise be precluded.

Id. at 365.⁶

III. EQUAL PROTECTION

Scales and Carson argue that AS 09.10.055 violates the equal protection clauses of the state and federal constitutions because (1) it does not protect all defendants similarly situated and (2) the two-year savings period in subsection (b) unfairly discriminates against plaintiffs injured in the seventh and eighth years after construction. The design professionals contend that the injured plaintiffs lack standing to challenge the statute on the first of these grounds, because the plaintiffs are not members of the class of unprotected defendants. The design professionals further contend that the statute is constitutional.

Standing. The injured plaintiffs' first constitutional claim is based on the rights of third parties -- potential defendants, such as owners and tenants, who are not protected by the statute.⁷ Every court which has addressed the issue has concluded that persons such as the plaintiffs are proper parties to assert this claim, because they are precluded from asserting their own rights against defendants who might otherwise be liable; the statute narrows the group against which recovery is available. *McClanahan v. American Gilsonite*, 494 F. Supp. 1334, 1342-44 (D. Colo. 1980); *Shibuya v. Architects Hawaii*, 65 Haw. 26, 647 P.2d 276, 282 (Haw. 1982). The injured plaintiffs' interest in invalidating the statute is as great as that of the materialman or the defendant in possession. *Klein v. Catalano*, 386 Mass. 701, 437 N.E.2d 514, 523 (Mass. 1982). We find this reasoning persuasive, therefore, we conclude that the injured plaintiffs have standing to assert the equal protection challenge.

Equal Protection. When a plaintiff challenges a statute on state and federal equal protection grounds, the first question we must consider is whether the constitutional claimant asserts a fundamental constitutional right or the statute uses a suspect classification. *State v. Erickson*, 574 P.2d 1, 12 (Alaska 1978). If the answer to either question is "yes," then the statute is unconstitutional under the federal standard absent a compelling state interest. *Id.*

This statute classifies defendants based on their occupation or the nature of the work they perform; it classifies plaintiffs based on the time of their injury. Neither is a suspect class. The right asserted is the interest in suing a particular party, which is not a fundamental constitutional right; nonetheless, the interest in redressing wrongs through the judicial process is a significant one. *Wilson v. Municipality of Anchorage*, 669 P.2d 569, 572 (Alaska 1983). We, therefore, conclude that the compelling state interest standard does not apply and we may analyze the significant constitutional claims asserted under the fair and substantial relationship test of the

state constitution. **Erickson**, 574 P.2d at 12.

We next examine the statutory purpose to determine whether it is a legitimate exercise of the state's police power. **Id.** The purpose of the statute is to encourage construction and avoid stale claims by shielding certain defendants from potential future liability. See **Yarbro v. Hilton Hotels**, 655 P.2d 822, 825-27 (Colo. 1982). We believe that these are legitimate government purposes.

The final step is to examine the means to determine whether they substantially further the statutory purpose. **Erickson**, 574 P.2d at 12. In doing so, we do not hypothesize facts which would sustain otherwise questionable legislation. **Isakson v. Rickey**, 550 P.2d 379, 362 (Alaska 1976).

Scales argues that AS 09.10.055 is unconstitutional because it fails to protect owners, tenants, and materialmen, while protecting others who are similarly situated, such as architects, planners, engineers, and construction contractors. Turner Construction contends that there are substantial differences between these groups justifying the statutory distinction.

Many courts have suggested distinctions to justify the challenged classification. The exclusion of owners, tenants, and others in possession is most often rationalized by the fact that such persons have continuing control over access to and maintenance of the property. **Klein**, 437 N.E.2d at 522-25; **Freezer Storage**, 382 A.2d at 718. Some courts also point to the different treatment of owners and tenants at common law, such as the larger class of potential plaintiffs which may sue design professionals, the legal theories available to those plaintiffs, and the common law defenses available only to landlords and tenants. **Freezer Storage**, 382 A.2d at 718-20. Others cite the possibility of defective maintenance and alterations. **Yarbro**, 655 P.2d at 827-28.

Various justifications are also found to support the distinction between materialmen and design professionals.⁸ One argument is that, because materialmen provide standard goods manufactured by standard processes, they may be held to higher quality control standards than the design professional, whose work is often unique and cannot be completely tested. **Klein**, 437 N.E.2d at 524; **Freezer Storage**, 382 A.2d at 719. In other words, buildings are more complex than their component parts. **Freezer Storage**, 382 A.2d at 719. Furthermore, design professionals have special expertise; they should be encouraged to experiment and their creativity should not be stifled. **Klein**, 437 N.E.2d at 524; **O'Brien v. Hazelet & Erdal**, 410 Mich. 1, 299 N.W.2d 336, 342 (Mich. 1980).

We are not persuaded by any of these diverse rationales. One effect of the statute of repose is to eliminate the statutory right of contribution among tortfeasors. In **Arctic Structures v. Wedmore**, 605 P.2d 426, 435 (Alaska 1979), we ruled that the Uniform Contribution Among Tortfeasors Act, AS 09.16.010-.060, did not abolish the common law rule of joint and several liability; therefore, each tortfeasor whose negligence is a proximate cause of an indivisible injury remains individually liable for all compensable damages attributable to that injury. It follows that whenever an unprotected owner is 50% at fault and a protected contractor is 50% at fault, the

unprotected owner would be 100% liable for all damages, without a remedy for contribution. The statute of repose, therefore, does not entirely abrogate liability for defective design work, but shifts it. Thus, the potential interest of joint tortfeasors in obtaining contribution, in addition to the claimant's interest in suing a particular party, must be considered.

In our view, there is no substantial relationship between exempting design professionals from liability, shifting liability for defective design and construction to owners and material suppliers, and the goal of encouraging construction. The shift of liability to unprotected parties decreases their incentive to build in corresponding measure to the increased incentives of protected parties. If anything, the disincentive on the part of owners may be greater than their proportional measure of liability shift, because they may be liable for a product over which they have no control. Moreover, design defects may be catastrophic, and experimental designs shift correspondingly greater unknown risks to owners, giving them even more reason not to finance construction. Thus, we believe that the statutory means are not substantially or rationally related to the ends. We conclude that AS 09.10.055 violates the equal protection clause of the Alaska Constitution.

The decisions of the superior court in File Nos. S-1429 and S-1600 are **AFFIRMED**.

OPINION FOOTNOTES

1 Given the procedural posture of these cases, we must assume the allegations in the plaintiffs' complaints are true. *Freezer Storage v. Armstrong Curk*, 476 Pa. 270, 382 A.2d 715, 717 (Pa. 1978).

2 A statute of repose differs from a statute of limitation in that the former may bar a cause of action before it accrues, because the statute begins to run from a specific date unrelated to the date of injury. A cause of action thus precluded is *damnum absque injuria*, a loss without a remedy.

In contrast, a statute of limitation begins to run when the plaintiff's cause of action accrues or is discovered. It operates to prevent a plaintiff from sleeping on his or her rights.

3 Alaska Const. art. I, § 7.

4 Alaska Const. art. I, § 1.

5 *Id.*

6 AS 09.10.055 is one of many state statutes enacted as a result of a concerted national lobbying effort by design professionals sparked by an increase in their potential liability for design and construction defects. See, e.g., Collins, *Limitation of Action Statutes for Architects and Builders -- An Examination of Constitutionality*, 29 Fed'n of Ins. Couns. Q. 41, 44-45 (1978).

7 The statute expressly excludes from its protection owners, tenants and others in possession. AS 09.10.055(d). Most courts construe the statute to exclude materialmen and manufacturers of component parts as well.

8 For purposes of argument, we assume without deciding that AS 09.10.055 does not protect materialmen or manufacturers.

THE
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ANCHORAGE Daily News

SATURDAY

19 AUGUST 2000

Taxi plan would get drinkers' cars home

Insurance liability described as hurdle

By JULIE WESTFALL
Daily News reporter

An idea to get drunken drivers off the road in Anchorage is almost as simple as free cab rides home, but with a twist — an intoxicated person would not only get a free cab ride home from a bar, but another taxi driver would also take his car home.

"The best way to get drunks off the road is to get

them home and to get their car home," said John Pattee, owner of two downtown bars, Gaslight Lounge and The Avenue.

It has been dubbed the Off-the-Road program. Organizers say it is not an impossibility; even after being two years in the making it still needs to address liability issues that

See Back Page, CABBIES

CABBIES: Plan covers drinkers, vehicles

Continued from Page A-1

might be fixed with a law that has not been written yet.

"It's doable, but it's taking us a lot longer than we anticipated," said Rod Pfeifer, executive director of the Anchorage Downtown Partnership and the man spearheading the program along with several bar owners and cab companies.

Unfortunately for the program, car insurance in Alaska goes with the vehicle and the taxi drivers must assume that the car they are taking home is insured. Nancy R. Brockway, office manager for Anchorage Checker Cab, said her cab service has occasionally picked up intoxicated bar patrons and driven their cars home when they show proof of insurance. They also charge four times the regular rate.

"We can't advertise because of the fact that we don't have insurance," Brockway said.

She said to run the program right now, the taxi drivers themselves would have to be insured to drive any private vehicle. But insurance companies they have talked to would charge more than \$1,000 per driver a month, she said. Brockway said the problem might be fixed with a state law either exempting the program's drivers from liability if they were in an accident or re-

'It's doable, but it's taking us a lot longer than we anticipated.'

— Rod Pfeifer, executive director of the Anchorage Downtown Partnership

■ **TASK FORCE MEETING:** The DUI Prevention Task Force will have a public hearing from 4 to 7 p.m. Monday in the Assembly Chambers at Loussac Library. It is open to anyone who wants to offer suggestions on the problem of drunken drivers. You can e-mail your comments at dui@ci.anchorage.ak.us.

quiring insurance to cover the program.

No one knows how long that could take, but state Rep. Norm Rokeberg said he would support a bill next session that would eliminate insurance worries.

"This seems to have some merit, so I'd be more than happy to look into that," said Rokeberg, chairman of the Labor and Commerce Committee, which oversees insurance matters.

Pfeifer said they have gathered support from cab companies, police, bar owners and the city. The recent public spotlight on drunken driving might provide the impetus needed to overcome the logistical issues for the program. A slew of drunken driving legislation is expected to be dis-

cussed when the Legislature convenes in January, Rokeberg said.

Police Chief Duane Udland said that he likes the idea but that the insurance issue might be tough to get through the Legislature.

"I think they're going to really have to make their case, that would be my guess," Udland said.

According to Pattee, they are exploring different funding sources, including Mothers Against Drunk Driving and liquor industry cash. The program is tentatively planned to handle about 30 customers a month and cost about \$200,000 to \$250,000 a year.

"The industry is partnering with the city to come up with lots of ideas like this. This is one of the ideas," said Karen Rogina, executive vice president of the Alaska Restaurant and Beverage Association. "It's rather in a state of infancy."

□ Reporter Julie Westfall can be reached at jwestfall@adn.com.

HB

82

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: CSHB 82 (JUD)
 () Publish Date: _____
 Dept. Affected: Natural Resources
 BRU: Minerals, Land & Water Dev.
 Component: Land Sales /Muni Ent.
 Component Number: 2456

Revision Date/Time (Note if correction): _____
 Title: Agricultural Facilities and Operations
 Sponsor: Rep. HARRIS, James, Coghill, Whitaker, et.al.
 Requester: H JUD

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()	see note	see note	see note	see note	see note	see note
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
1153 Land Disposal Income Fund						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2001) cost: None
 Check this box if funding for this bill is included in the Governor's FY2002 budget proposal: []

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

The CS removes the requirement to disclose agriculture facilities when selling State land.

Prepared by: Bob Loeffler Phone 269-8600
 Division: Mining, Land and Water Date/Time 05-Apr-01
 Approved by: Pat Pourchot Date 05-Apr-01
 Agency: Natural Resources

For distribution information, call the Governor's Legislative Office

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: CSHB82 (JUD)
 () Publish Date: _____
 Dept. Affected: Natural Resources
 BRU: Information/Data Mgmt.
 Component: Recorder's Office/UCC
 Component Number: 802

Revision Date/Time (Note if correction): _____
 Title: "An Act relating to agricultural facilities and operations as private nuisances...."
 Sponsor: Rep. Harris
 Requester: (H) JUD

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2001) cost: none
 Check this box (X) if funding for this bill is included in the Governor's FY2002 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

The CS removes the requirement to record a disclosure at the Recorder's Office.

Prepared by: Sharon Young Phone 907-269-8882
 Division: Support Services Division Date/Time 05-Apr-01
 Approved by: Pat Pourchot Date 05-Apr-01
 Agency: Natural Resources

For distribution information, call the Governor's Legislative Office

Amended

22-LS0348\P
Kurtz
3/23/01

CS FOR HOUSE BILL NO. 82()

IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-SECOND LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES HARRIS, James, Coghill, Whitaker, Masek, Ogan, Green, Meyer, Dyson

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to agricultural facilities and operations as private nuisances; and to
2 disclosures in transfers of certain real property located within ^{the vicinity} one-mile of an
3 agricultural facility or an agricultural operation."

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

5 * Section 1. AS 09.45.235(a) is amended to read:

6 (a) An agricultural facility or an agricultural operation at an agricultural
7 facility is not and does not become a private nuisance as a result of [BY] a changed
8 condition that exists in the area of the agricultural facility [ON NEIGHBORING
9 LAND] if the agricultural facility [OPERATION HAS BEEN IN OPERATION FOR
10 MORE THAN THREE YEARS AND IF THE AGRICULTURAL OPERATION] was
11 not a nuisance at the time the agricultural facility [OPERATION] began agricultural
12 operations. For purposes of this subsection, the time an agricultural facility
13 began agricultural operations refers to the date on which any type of agricultural
14 operation began on that site regardless of any subsequent expansion of the

1 agricultural facility or adoption of new technology. An agricultural facility or an
2 agricultural operation at an agricultural facility is not a private nuisance if the
3 governing body of the local soil and water conservation district advises the
4 commissioner in writing that the facility or operation is consistent with a soil
5 conservation plan developed and implemented in cooperation with the district.

6 * Sec. 2. AS 09.45.235(b) is amended to read:

7 (b) The provisions of (a) of this section do not apply to

8 (1) liability resulting from improper, illegal, or negligent conduct of
9 agricultural operations; or

10 (2) flooding caused by the agricultural operation.

11 * Sec. 3. AS 09.45.235(d) is amended to read:

12 (d) In this section, ["AGRICULTURAL OPERATION" MEANS]

13 (1) "agricultural facility" means any land, building, structure,
14 pond, impoundment, appurtenance, machinery, or equipment that is used or is
15 intended for use in the commercial production or processing of crops, livestock,
16 or livestock products, or that is used in aquatic farming;

17 (2) "agricultural operation" means

18 (A) any agricultural and farming activity such as

19 (i) [(A)] the preparation, plowing, cultivation,
20 conserving, and tillage of the soil;

21 (ii) [(B)] dairying;

22 (iii) [(C)] the operation of greenhouses;

23 (iv) [(D)] the production, cultivation, rotation,
24 fertilization, growing, and harvesting of an agricultural, floricultural,
25 apicultural, or horticultural crop or commodity;

26 (v) [(E)] the breeding, hatching, raising, producing,
27 feeding, keeping, slaughtering, or processing of livestock [, BEES,
28 FUR-BEARING ANIMALS, OR POULTRY];

29 (vi) [(F)] forestry or timber harvesting operations;

30 (vii) the application and storage of pesticides,
31 herbicides, animal manure, treated sewage sludge or chemicals,

1 compounds, or substances to crops, or in connection with the
 2 production of crops or livestock;

3 (viii) the manufacturing of feed for poultry or
 4 livestock;

5 (ix) aquatic farming;

6 (x) the operation of roadside markets; and

7 (B) [(2)] any practice conducted on the agricultural facility
 8 [OPERATION] as an incident to or in conjunction with activities described in
 9 (A) of this paragraph, including the application of existing, changed, or
 10 new technology, practices, processes, or procedures;

11 (3) "livestock" means horses, cattle, sheep, bees, goats, swine,
 12 poultry, reindeer, elk, musk oxen, and other animals kept for use or profit [(1)
 13 OF THIS SUBSECTION].

14 * Sec. 4. AS 34.70.050 is amended to read:

15 Sec. 34.70.050. Form of disclosure statement. The Real Estate Commission
 16 established under AS 08.88.011 shall establish the form of the disclosure statement
 17 required by AS 34.70.010. The disclosure statement must include a provision that
 18 notifies transferees

19 (1) that they are responsible for determining whether a person who has
 20 been convicted of a sex offense resides in the vicinity of the property that is the
 21 subject of the transferee's potential real estate transaction; [AND]

22 (2) where information about the location of convicted sex offenders
 23 can be obtained; and

24 (3) that they are responsible for determining whether, in the
 25 vicinity of the property that is the subject of the transferee's potential real estate
 26 transaction, there is an agricultural facility or agricultural operation that might
 27 produce odor, fumes, dust, smoke, burning, vibrations, insects, rodents, the
 28 operation of machinery including aircraft, and other inconveniences or
 29 discomforts as a result of lawful agricultural operations.

30 * Sec. 5. The uncodified law of the State of Alaska is amended by adding a new section to
 31 read:

1 APPLICABILITY. The provisions of sec. 4 of this Act apply to a sale, purchase, or
2 exchange of residential or recreational property located within ^{the vicinity} ~~one mile~~ of an agricultural
3 facility or an agricultural operation included in a soil conservation plan approved by the local
4 soil and water conservation district if the sale, purchase, or exchange is agreed to on or after
5 the effective date of this Act.



ALASKA STATE LEGISLATURE
REPRESENTATIVE JOHN HARRIS
STATE CAPITOL 110, JUNEAU, ALASKA 99801-1182 (907) 465-4859

Sponsor Statement
Right-to-Farm Bill

The State of Alaska has invested millions of dollars in the development of its natural resources, both renewable and nonrenewable. Fishing, timber and agriculture are our basic renewable resources, and the Legislature has endeavored to enhance these for future generations. The Right-to-Farm bill seeks to protect and enhance Alaska's agricultural sector.

With the export of potatoes and carrots from Alaska, and the increasing local demand for fresh vegetables, hay, barley, milk, pork and beef, we can see agriculture "taking root and growing" in many diverse locations across the state. Yet, as the state's population grows and urban areas expand, we see a corresponding need to protect our interest in agriculture.

Many farmers have already had some experience with an encroachment on their right to farm. As urbanization swallows up farming areas, oftentimes the newcomers don't like the smells of agriculture – or the chemicals – or the sounds – or the animals.

The Right-to-Farm bill would add some protection to existing agriculture operations and put new property buyers on notice if the property they are acquiring is within one mile of a farm or agricultural operation. This also protects the new property owners through full disclosure that should keep them from getting into a situation that will become unpleasant to them later on.

People who move to the country need to know what they are getting into. And it appears that other areas of the nation – where urban sprawl is creating a bigger problem than we have experienced yet in Alaska – are taking action to protect existing agricultural operations and avoid unnecessary lawsuits.

The "Code of the West" is a small pamphlet adopted by many counties around the Western U.S. and distributed to prospective property buyers. It basically says that if you want to move to the peaceful countryside, you must be willing to accept that cows poop, hay balers make noise late into the night, farmers use chemicals, tractors drive slower than you do, and so forth. And most importantly that these activities were going on before you moved there, and will continue to go on after you arrive.

The Right-to-Farm bill takes the innovative approach of coupling a farmer's grandfathered right to continue his agricultural activities to the filing and maintaining of a farm conservation plan with the U.S.D.A. Soil and Water Conservation Service. Expansion of operations or other changes to the conservation plan would not necessarily be grandfathered in regard to existing rights of surrounding property owners.

Alaska has the opportunity to place protections in statute now – both for the farmers and the new property buyers – so that future agricultural operations will be able to supply the foodstuffs Alaskans will need.



ALASKA STATE LEGISLATURE
REPRESENTATIVE JOHN HARRIS
STATE CAPITOL 513, JUNEAU, ALASKA 99801-1182 (907) 465-4859

Sectional Analysis
Proposed CS for HB 82 (version "P")

Sec. 1 – amends current AS 09.45.235 [Actions Relating to Real Property] to protect agricultural facilities and agricultural operations from becoming “private nuisances” due to changing land uses in the area surrounding an existing agricultural operation. This section also clarifies the time at which an agricultural operation began and thus gained protection by the section. The CS deletes a requirement that the operation has to have been going for more than three years to gain protection. Finally, this section ties the protection to the fact that the operator has a valid farm conservation plan on file with the local soil and water conservation district.

Sec. 2 – adds “illegal” conduct of agricultural operations to the list of acts that are not covered by the protection afforded in AS 09.45.235(a).

Sec. 3 – amends the definition section of AS 09.45.235 to separate “agricultural facility” from “agricultural operation,” and provide further definitions of activities that fall under each of those headings.

Sec. 4 – amends AS 34.70 [Disclosures in Residential Real Property Transfers] to require that a disclosure statement, accompanying the transfer of real property, contain a provision that notifies transferees (buyers) of the real estate that they are responsible to determine if there is an agricultural facility or operation in the vicinity of the property they are buying.

Sec. 5 – amends AS 40.17 [Recording in Public Records] to clarify that documents recorded under the provision of Section 4 must comply with the requirements of that section.

Sec. 6 – applies the disclosure requirements of Sec. 4 and 5 to real estate contracts on property within one mile of an agricultural facility or operation. The CS changes “real property” to “residential or recreational property.”

Sec. 7 – gives instructions to the revisor of statutes.



ALASKA STATE LEGISLATURE
REPRESENTATIVE JOHN HARRIS
STATE CAPITOL 513, JUNEAU, ALASKA 99801-1182 (907) 465-4859

MAR 08 2001

MEMORANDUM

March 8, 2001

To: Representative Norman Rokeberg, Chair
House Judiciary Committee

From: Representative John Harris ^{JH}

Subject: Request for hearing on HB 82

Please schedule, as soon as your calendar will permit it, a Judiciary Committee hearing on HB 82 – “An Act relating to agricultural facilities and operations as private nuisances; and to disclosure in transfers of real property located within one mile of an agricultural facility or an agricultural operation.”

This bill extends protection for farmers to allow them to continue their pre-existing agricultural operations when the use of lands surrounding or near their farms changes. This protection is contingent upon the operator filing and adhering to a farm conservation plan with the local Soil and Water Conservation District. The bill also enacts a new section requiring the disclosure of the fact that there is an agricultural operation within one mile of the property being transferred.

I appreciate your scheduling HB 82 at your earliest convenience. If you have questions regarding the bill or any of the backup material attached, please contact Pete Fellman of my staff at 465-4859. Thank you.

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB82
 () Publish Date: _____
 Dept. Affected: Natural Resources
 BRU: Information/Data Mgmt.
 Component: Recorder's Office/UCC
 Component Number: 802

Revision Date/Time (Note if correction): _____
 Title: "An Act relating to agricultural facilities and operations as private nuisances...."
 Sponsor: Rep. Harris
 Requester: (H) JUD

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services	19.2	19.2	19.2	19.2	19.2	19.2
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	19.2	19.2	19.2	19.2	19.2	19.2

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()	13.5	13.5	13.5	13.5	13.5	13.5
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts	19.2	19.2	19.2	19.2	19.2	19.2
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	19.2	19.2	19.2	19.2	19.2	19.2

Estimate of any current year (FY2001) cost: none

Check this box (X) if funding for this bill is included in the Governor's FY2002 budget proposal:

POSITIONS

Full-time						
Part-time	1	1	1	1	1	1
Temporary						

ANALYSIS: (Attach a separate page if necessary)

HB 82 includes a provision that would require a disclosure statement to be recorded in conjunction with conveyances of any interest in real property located within one mile of an agricultural facility. It places the burden on the person transferring the property to ensure that the disclosure is provided to the buyer and recorded with the conveyance document. This would serve to increase the recording volume throughout the state, but the actual volume increase cannot be ascertained at this time as there is no way of determining how many properties meet the criteria of being within one mile of an agricultural facility, and of them, how many might possibly be conveyed in any given year.

Prepared by: Sharon Young Phone 907-269-8882
 Division: Support Services Division Date/Time 29-Mar-01
 Approved by: Pat Pourchot Date 29-Mar-01
 Agency: Natural Resources

For distribution information, call the Governor's Legislative Office

ANALYSIS: (continued)

Statewide, the Recorder's/UCC section records upwards of 30,000 deed transactions each year. For purposes of this fiscal note, it is assumed that 5 to 8 per cent of them might possibly fall within the scope of this bill, resulting in 1500 to 2400 additional recorded documents annually. This increase in volume would necessitate additional staffing equivalent to one half-time position. The additional revenue generated by the volume increase is not expected to be sufficient to cover the added staffing cost. Historic staffing levels have averaged approximately 4500 documents per full time employee annually. Volume for a half-time position would be 2250 documents. If each disclosure statement is two pages in length and is attached to an existing document, the revenues generated by 2250 such statements would be \$13,500 (2250 x 2 pages x \$3 per page). Therefore, the \$13,500 in new program receipts revenues would not offset the added personnel costs of \$19,200, and the difference of \$5,700 would have to come from existing general fund program receipt revenues that are collected above the regular appropriation level.

The bill also would amend AS 40.17.110 to indicate that if the document being recorded is a disclosure statement under AS 34.70.300, it must comply with the requirements of that section. Recorders do not monitor any documents for content, and all documents of any type are entitled to recordation if they meet minimum statutory recording requirements. DNR cannot determine if the addition to 40.17.110 is there for the purpose of documenting for the benefit of the user the other substantive legal requirements that such a document must meet in order to be valid, or whether it is intended to modify our basic recording requirements. If the provision is there as a modification of our recording requirements, the Recorder's/UCC section would strongly urge its removal. Recorders cannot police any types of documents for substantive legal validity.

Overall, HB 82 is not anticipated to have much impact on the Recorder's Office operations. The numbers utilized for purposes of this fiscal note are estimates only. Actual conveyances requiring the disclosure statements could vary significantly from those estimates.

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB 82
 () Publish Date: _____
 Dept. Affected: Natural Resources
 BRU: Minerals, Land & Water Dev.
 Component: Land Sales /Muni Ent.
 Component Number: 2456

Revision Date/Time (Note if correction): _____
 Title: Agricultural Facilities and Operations
 Sponsor: Rep. HARRIS, James, Coghill, Whitaker, et.al.
 Requester: H JUD

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services	25.0	25.0	25.0	25.0	25.0	25.0
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	25.0	25.0	25.0	25.0	25.0	25.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()	see note	see note	see note	see note	see note	see note
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	14.9	14.9	14.9	14.9	14.9	14.9
1005 GF/Program Receipts						
1037 GF/Mental Health						
1153 Land Disposal Income Fund	10.1	10.1	10.1	10.1	10.1	10.1
TOTAL	25.0	25.0	25.0	25.0	25.0	25.0

Estimate of any current year (FY2001) cost: None
 Check this box if funding for this bill is included in the Governor's FY2002 budget proposal: []

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

The disclosure requirement in Section 4 of the bill will add costs to all disposals of state land. Every time the state proposes to lease, sell, transfer, or exchange state land, DNR staff will need to determine the location of agricultural operations and facilities, map where they are, and figure out if the state disposal is within one mile. If the agricultural facility or operation is within one mile of a state land sale, DNR will need to factor the disclosure into the appraisal, include it in the brochure, sale contract, and deeds, and then record the disclosure. This will add several more steps every time the state disposes of land.

The disclosure requirement applies to all "transfers of real property", including land sales, timber sales, oil and gas leases, municipal land transfers, and numerous other real property disposals by the state. The definitions of agricultural facility and operations are so broad as to include commercial greenhouses in Anchorage, and horse barns on the Anchorage Hillside.

Prepared by: Bob Loeffler Phone 269-8600
 Division: Mining, Land and Water Date/Time 04-Apr-01
 Approved by: Pat Pourchot Date 04-Apr-01
 Agency: Natural Resources

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TONY KNOWLES, GOVERNOR

CENTRAL OFFICE
1800 GLENN HIGHWAY, SUITE 12
PALMER, ALASKA 99845-6736
PHONE: (907) 745-7200
FAX: (907) 745-7112

NORTHERN REGION OFFICE
3700 AIRPORT WAY
FAIRBANKS, ALASKA 99709-4699
PHONE: (907) 451-2780
FAX: (907) 451-2751

PLANT MATERIALS CENTER
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PALMER, ALASKA 99845-9706
PHONE: (907) 745-4469
FAX: (907) 745-1568

February 23, 2001

Mr. Pete Fellman
Legislative Assistant
Representative John Harris
State Capitol 513
Juneau, AK 99801-1182

Dear Mr. Fellman:

Per your request, the requirements for State Farm Conservation Plans are provided below.

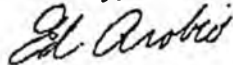
AS 38.05.321 (d)(1) is the statutory authority that allows the State to require Farm Conservation Plans for agricultural land that it sells. The State has used this authority in every State agricultural land sale and has required a Farm Conservation Plan for every parcel sold.

The information that is required in a State Farm Conservation Plan is outlined in 11 AAC 67.180. The Plan must include:

1. A map of the farm indicating:
 - a. The planned location of clearing and breaking of ground.
 - b. Planned location of windbreaks, farm pond and similar conservation measures and improvements.
2. Planned soil conservation measures.
3. A plan for burning any clearing debris, including any vegetation that has previously been chained-down.
4. All real property improvements must be depicted and described in the Plan.

If you need additional information, please feel free to contact this office.

Sincerely,



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Editorials & Opinion : Thursday, May 27, 1999

Go east, young urbanite, but remember the Code



Susan Nielsen

I CAN picture it now. Husband and wife make one last trip to Pottery Barn before fleeing Seattle for the country life in Eastern Washington.

No more traffic, they exult. No more crowds jostling for space. Just think, honey, acres and acres of farmland dotted with the sweetest Holstein cows you've ever -

HEY! What's that smell?

The commissioners of Spokane County are so tired of newcomers' complaints about manure and other rural indelicacies that they've printed a 20-page booklet for newcomers. "Code of the West," it's called, a polite reminder for displaced yuppies that, yes indeed, s--t happens.

"This document is not intended to dissuade you from living in the country," the introduction says, "but it is important for you to know that life in the country is very different from life in the metropolitan area."

Cows smell. Neighbors hunt. Snow stays unplowed. Welcome to the rural West.

This humble booklet is getting nationwide attention, and for good reason. It's not just about things that go moo in the night, but a whole philosophy of governing. It reminds that government can't, and shouldn't, perfectly tailor your environment.

Spokane actually borrowed most of its Code of the West from Larimer County, Colo. The Code

is a pointed tribute to the pioneers who led the United States' westward expansion. These people were "rugged individualists," it says, "bound by an unwritten code of conduct. The values of integrity and self-reliance guided their decisions, actions and interactions."

Translation: This ain't no latte stand, pardner.

The Code of the West

(<http://www.spokanecounty.org>) briskly outlines scenarios that could require rugged individualism. Most of them are self-inflicted. For example, if you build your house deep in the arid forest, like Goldilock's wee cabin, it might burn down in a forest fire. Build it next to a farm, and your nocturnal sheep-counting may be accompanied by the bleating of crop dusters.

Other highlights:

-- "The fact that you can drive to your property today does not necessarily guarantee that you, your guests or emergency vehicles can achieve that same level of access at all times."

(If you have to upgrade your SUV to a Humvee to get up your driveway, don't come crying to Spo-kane County.)

-- "It is very important to know what minerals may be located under the land and who owns them."

(If you're planning a garden party, first be sure Sen. Slade Gorton hasn't approved an open-pit mine under your patio.)

-- "Agriculture is an important business in Spokane County. If you choose to live among the farms and ranches of our rural countryside, do not expect county government to intervene in the normal day-to-day operations of your agribusiness neighbors."

(Yes, the cows poop and the dust-clouds billow and the flies are bigger than ping-pong balls. The county didn't mislead you. Martha Stewart did.)

For people who grew up in rural areas, it is inconceivable that someone would have the gall to complain about manure. For them, an errant whiff of cow produces a curious surge of nostalgia. It prompts memories of the dozen glorious smells of a working farm: sawdust, compost, hay, unpasteurized milk, tractor oil.

It is inconceivable, and yet people do. From Spokane to Snohomish to Clark County, the suburbs built next to farms are stuffed full of people indignant that their neighbors are acting like animals! My all-time favorite is a Snohomish County resident who railed so bitterly against a crowing rooster that the rooster-owner was charged with disturbing the peace.

The rooster-owner requested a jury trial. The Marysville City Council hastily created a Small Farms Ordinance - a short version of the Code of the West.

The number of complaints against farmers in King County for dust, noise and smells have dwindled over the years, though the acreage of farmed land has stayed roughly the same since 1979.

No wonder. The dairy farms are rapidly turning into hobby farms, which are disarmingly easier on the senses. Such farms foster a false sense of rural life - no mess, no fuss and a QFC around the corner. All the more reason for rural counties to be, uh, proactive with their newcomers.

The asphalt roads of Seattle, Bellevue and surrounding areas are full of people dreaming of escape.

In rush hour today, at least two drivers trapped in the I-90 tunnel considered abandoning their cars in the idling traffic and walking stolidly along the shoulder until they reached dirt.

Tonight after dinner, at least one urban couple will dream of retirement in a place like Spokane County. There, they say, everything will be perfect.

No more traffic, they muse. No more stress or rude surprises. Just think, honey, acres and acres of farmland dotted with the sweetest Holstein cows you've ever seen.

Susan Nielsen's column appears on Thursdays.

So this is what people with
social lives have been doing.



Datebook
entertainment guide



Farm Conservation Plan in Perpetuity

The 1997 statutory revisions to state agricultural land law in AS 38.05.321(d)(1), based upon the authority of AS 41.10, might be ^{bu} understood as evidencing legislative intent to extend the FCP requirement to the generic class "state agricultural landowner", regardless of any landowner's/purchaser's specific status. If so, then the cited regulations 11 AAC 67.177 and .180 should have been modified appropriately. They were not, so continue to identity the FCP document exclusively with original or successive purchasers of state agricultural parcels from the state. (See 11 AAC 67.177 "...the farm conservation plan will be required as a condition of sale." and "...before consummation of the sale." and 11 AAC 67.177(c) advising that purchaser's bid deposit becomes forfeit if/when purchaser fails to provide/submit FCP timely). The state lacks authority or practical means to so intervene in private real estate transactions between sellers and buyers of patented agricultural parcels.

The essential question:

Given the effective insulation of private land transactions from state control, does any of Alaska's extant law and regulation authorize and require perpetuation of the state Farm Conservation Plan as condition of agricultural land ownership for subsequent purchasers following issuance of patent? If yes, how shall such control be effected?

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Successful Farming

Feb, 2000

When good fences don't make good neighbors.(laws and legal cases that affect farmers)(Brief Article)

Author/s: Cheryl Tevis

It takes more than a good fence to separate nuisance issues

It's been one year since Iowa's Agricultural Area Law was declared unconstitutional in the case of Bormann v. Board of Supervisors for Kossuth County.

The landmark 7-0 decision stated that ag areas or zones "amounts to a commandeering of valuable property rights without compensating the owners and sacrificing those rights for the economic advantage of a few."

The case was appealed to the U.S. Supreme Court, which allowed the ruling to stand.

Farm organizations railed against the ruling, predicting the demise of right-to-farm laws in all 50 states. Rural neighbors gained hope that they would have more clout in the courts.

Today neither outcome prevails. Nuisance lawsuits have been filed in New York, Michigan, Utah, Kansas, Nebraska, and West Virginia.

Law upheld in Michigan

Last March, a judge upheld the constitutionality of the Michigan Right-to-Farm Act, ruling against neighbors fighting an expanded 4,000-head beef operation near Breckenridge.

"All evidence says that modern agriculture must grow to be competitive and economically viable," wrote Judge Randy Tahvonen. "The Stonemans' decision to consolidate and expand is financially prudent, financially sound and environmentally practical."

Under Michigan's act, Stoneman Cattle, Inc., operated by four brothers, adopted voluntary Generally Accepted Agricultural and Management Practices. The Stonemans were awarded \$77,338 in legal fees.

Legal authorities such as Neil Harl, Iowa State University, point out that this trial decision lacks the stature of Bormann, which was an appellate decision. The case has not been affirmed by an appeal.

Two neighbors in nearby Alganssee Township, Michigan, recently won a lawsuit against a hog producer, using a township zoning ordinance prohibiting creation of dust, noise, and odor that leaves property lines. Michigan's law requires farmers to comply with town-ship ordinances to gain protection.

As a result, House File 4777 and S. 205 have been introduced to stop township

ordinances from preempting state or federal laws.

Distinctions are important

"Iowa law offered blanket protection from nuisance lawsuits, but Michigan's protection is based on following Generally Accepted Agricultural Management Practices," says Jack Laurie, Michigan Farm Bureau president.

Iowa still has two other laws containing nuisance protection for live-stock producers. "It's still not known how the Bormann case will affect these laws," says Roger McEowen, associate professor of ag economics, Kansas State University.

He argues that right-to-farm laws, enacted in the late 1970s and early 1980s to protect farmers from objections to odor, dust or noise, differ.

The "taking" argument in Bormann is based on the Fifth Amendment, providing that property not be taken for public use without compensation.

"Right-to-farm laws likely do not create a property right to produce odors over adjacent property," McEowen says. "I don't feel that these laws are in jeopardy."

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MICHIGAN FARM NEWS

July 15, 1999



New York court decision mirrors Michigan's Right-to-Farm ruling

by Jennifer Vincent

As urban sprawl continues to carve out random pieces of farmland, the proximity between farm owners and rural homeowners closes. Neighbors began to complain about odor, property values and so-called infringements on their property rights, while challenging the farmers' right to continue operating -- despite the appropriate ag zoning in the area.

While no farm is exempt from nuisance lawsuits, New York and Michigan farmers can take note of two recent court rulings that back their rights to continue if they are following good management guidelines as defined by the states.

The New York Supreme Court recently ruled that its right-to-Farm law is constitutional, similar to a recent ruling in Michigan.

"Both these rulings give farmowners, who are following these stringent guidelines, the right and ability to continue to do business, knowing that they will not lose their operations because of unfounded challenges from neighbors," said Kevin Kirk, Michigan Farm Bureau livestock and right-to-farm specialist. "Everyone has rights -- on both sides of the road. But both Michigan and New York have now said that producers, if operating in compliance with those set guidelines, will be protected from nuisance lawsuits."

Stoneman Cattle Inc. in Gratiot County garnered a victory for Michigan agriculture in late March, when a lengthy bench trial ended with a ruling in favor of the family farm operation's 3,910-head feedlot facility near Breckenridge.

The plaintiffs in the Stoneman case said that flies, increased traffic and odor created a nuisance and, therefore, a taking of their property values. Circuit Court Judge Randy Tahvonen disagreed, however, after listening to many hours of expert testimony -- including that from Kirk -- which found the operation to be in compliance with Michigan's Generally Accepted Agricultural and Management Practices (GAAMP). Tahvonen also said the farm was not a source of flies, farm traffic did not harm the plaintiffs, nor did property values decrease because of the operation.

New York's decision was almost identical.

Pure Air and Water Inc. (PAW), citing environmental concerns for the suit, challenged Trengo Farms (a confinement hog operation), as well as the Commissioner of Agriculture and Markets.

Trengo Farms received a "Sound Agricultural Practice Opinion" from the agricultural commissioner prior to the lawsuit. However, PAW, a group of neighbors, said the Trengo operation and the ag commissioner's opinion caused an improper "taking" of private property by allowing the Trengos to maintain a nuisance over neighboring property. The suit centered on manure management practices.

The case went all the way to the New York State Supreme Court, where the court handed down a decision declaring the state's Right to Farm law and Opinion to be constitutional.

Illinois Farm Nuisance Suit Act

By Allison Gordon and Beth Phipps

Is your farm operation a nuisance to your neighbors or the general public?

Municipalities, factories, subdivisions, and other uses of land may create conditions that invade the rights of farmers and hence amount to nuisance.¹ Negligence in regards to sanitation, air quality, or noise levels can all lead to becoming a nuisance. Rather than be a victim to a possible suit from an angry neighbor claiming bodily discomfort or mental distress from obnoxious odors, noises, or other conditions arising from your farming practices, be informed about your rights to farm in Illinois.

Common law and statutory principles provide a resolution for claims of property nuisance. The Illinois Farm Nuisance Suit Act, also known as the "Right to Farm Law," provides farmers protection from nuisance suits under certain circumstances. The Act became effective July 29, 1981:

It is the declared policy of the state to conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products.....the purpose of the Act is to reduce the loss to the State of its agricultural resources by limiting the circumstances under which farming operations may be deemed a nuisance.²

Nuisance can be defined as using one's property in such a way to **substantially and unreasonably interfere** with the use and enjoyment of another person's property. Nuisances can be classified as either private or public. A private nuisance is a dispute over land use between two parties. The injured individual must personally sue the person creating the nuisance. A public nuisance involves a dispute between more than two individuals. In a case where many people are affected by a nuisance, they may sue individually or the state's attorney may sue on behalf of the injured parties.

Facts and circumstances are the key determinants in pinpointing existence of a nuisance. An act, occupation, or structure which creates **continuous** obnoxious conditions is a **nuisance per se**. This is factual regardless of circumstance, location, or surroundings. These nuisances are obviously crude and are commonly regarded as "on their face." Offensive disposal of waste for the public to see is an example of nuisance per se. A **nuisance in fact** is also an act, occupation, or structure but is determined by location, surroundings, or circumstances. It can be defined as **unreasonable conduct in its context**. An example of a nuisance in fact would be the establishment of a livestock feeding operation 50 feet from an elementary school. A nuisance in fact can eventually become a nuisance per se.

How can you defend yourself against nuisance suits that arise from changing conditions around your farming operation? Development of areas surrounding farmland can often lead to nuisance suits due to incompatibility of certain land uses. Livestock operations and subdivisions do not make good neighbors. The Illinois Farm Nuisance Suit Act provides protection to farm operators against changing conditions:

No farm...shall be or become a private or public nuisance because of any changed conditions in the surrounding area occurring after the farm has been in operation for more than one year,...provided, that the provisions of this Section shall not apply whenever a nuisance results from the negligent or improper operation of any farm or its appurtenances.³

The Illinois Farm Nuisance Suit Act deals only with nuisance suits and may not be used in defense against lawsuits whose basis is The Environmental Protection Act.⁴ The Environmental Protection Act provides statutory definition of water, air, and noise pollution. Suits against farm operations can be brought on the grounds that one or more of these types of pollution are occurring.

In conclusion, to ensure your farm operation is not a nuisance to your neighbors or the general public, take into consideration the size and nature of the enterprise, the manner in which it is operated, as well as proximity to residential property. Avoid operating your farm in a negligent manner and properly

maintain all aspects of your farm (animals, equipment, and structures, etc.).

The state of Illinois is committed to conserving and encouraging the improvement of its agricultural land. To reduce farmer vulnerability to nuisance suits, the state has enacted the Illinois Farm Nuisance Suit Act. This Act allows farmers protection from nuisance suits under certain circumstances. A farm may not be deemed a nuisance if the locality of the farm is subject to change (for example, development of a golf course) provided two criteria are met: 1) the farm has been in operation for more than one year, and 2) the farm was not a nuisance when it was established. An exception to both of these criteria occurs if the farm is being operated in a negligent manner. The Illinois Farm Nuisance Suit Act cannot protect your operation in every situation, but it does offer a possible defense against a suit from an angry neighbor or passerby.

For more information consult the following web sites:

www.law.utexas.edu/dawson/nuisance/nuisance.htm

<http://farm.fic.niu.edu/fic-ta/tafs-rtfl.html>

-
1. Looney and Uchtmann. Agricultural Law: Principles and Cases. New York: McGraw- Hill, 1994.
 2. 740 ILCS 70/1 www.law.utexas.edu/dawson/nuisance/il_nuis.htm
 3. 740 ILCS 70/3
 4. 415 ILCS 5/1
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Agriculture Policy Project

Issue Paper: Nuisance and Right-to-Farm Laws

Many urban residents move to the rural countryside because of its aesthetic qualities and open space, amenities which exist in great part because of the presence of farming. As exurbanites move into rural areas, however, they often clash with farmers over common farming activities and their off-site impacts. Aerial spraying and pesticide drift, animal odors, dust, food processing operations, and other common agricultural activities that had not been questioned previously, are perceived as nuisances by the new residents (Lisansky and Clark 1987). (See Issue Paper: Agriculture on the Urban Interface for more information about other concerns associated with development pressures in rural areas).

Strategies have been developed at the state and local level to help farmers and their neighbors resolve these conflicts. Two such strategies are (1) nuisance lawsuits brought against farmers by their neighbors, and (2) right-to-farm laws which seek to protect farmers from these nuisance lawsuits. Common law nuisances are classified as private or public: a public nuisance impairs the health, safety, morals, and comfort of a community without necessarily harming particular property rights while private nuisance unreasonably interferes with the use and enjoyment of another's lands (Lapping and Leutwiler 1987). Nuisance lawsuits may help protect rural residents from unwanted agricultural practices and development. For example, they may be used to establish restraints on established farming practices such as spraying and hours of operation. In some cases, rural citizens have used nuisance suits to deal with problems related to large hog farms (DeVore 1997). In these cases, nuisance complaints can act as a reminder to farmers of the need to monitor the impact of their farming practices on the environment. However, these disputes can also result in driving farmers off their land or out of business (AFT 1993; Lapping and Leutwiler 1987). Widely adopted around the country, right-to-farm laws seek to offset nuisance complaints by nonfarming neighbors by statutorily declaring that standard farming practices are reasonable land uses, despite their perceived adverse impacts on neighboring lands (Lapping and Pfeffer 1997). Although they vary in content in different localities and states, right-to-farm laws generally attempt to supersede the common law of nuisance and favor agricultural uses of land above all others (Lapping and Leutwiler 1987).

The issues surrounding nuisance and right-to-farm laws are difficult to reconcile. Some producers may have difficulty understanding the legitimacy of their neighbor's concern about the unwanted, but unintentional effects of their farming practices (Lapping and Pfeffer 1997). Simultaneously, farm neighbors may not respect the practical needs of farmers to use certain practices that are necessary to make a living (AFT 1993), and may not understand that farms create many of the landscape and amenity values that attracted them there in the first place (Lapping and Pfeffer 1997). This impasse promises to continue in many places, but farmers and rural residents could also be encouraged to look at some of the win-win solutions now available in Europe where farmers are becoming actively involved in the management and development of the environment and landscape. For example, in the Netherlands, farmers are entering into cooperative agreements with various governmental and non-governmental organizations to manage waterways, develop wetlands, landscape their farms, develop bird habitats, etc. They receive subsidies for this, in return for enhancing water quality, wildlife, habitat and landscapes and reduce the grounds for conflict with their neighbors (see Broekhuizen et al., 1997).

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CONTACT INFORMATION (until May 2000):

Agriculture Policy Project
Henry A. Wallace Center for Agricultural and Environmental Policy
Winrock International
9200 Edmonston Rd. Ste 117
Greenbelt, MD 20770-1551
Telephone: (301) 441-8777; Fax: (301)220-0164; Email: wagpol@winrock.org
Website: www.hawiaa.org/wagpol.html

Last updated on 8 February 2000

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Published Sunday, June 28, 1998

Effects of farm preservation law are uncertain

Statewire

MADISON, Wis. (AP) -- A new law to protect farms against urban sprawl will cause only a minor shift of property taxes to homes and other nonagricultural real estate, a researcher says.

Municipal officials argue the law's provisions for shielding suburban farms against tax increases will force homeowners and nonagricultural businesses to pay higher property taxes.

The critics, who are challenging the law in court, also contend it unfairly means higher taxes for farmland in northern Wisconsin while providing tax breaks for land speculators in urban areas.

A Circuit Court trial in Madison is scheduled in August.

However, Phillip Spranger, an author of a study by the Wisconsin Taxpayers Alliance, says the law evidently will do what the state Legislature intended by reducing farm taxes with a "fairly minor shift to other taxpayers."

The tax assessment law is similar to farm-preservation statutes in 48 other states. It requires assessors to calculate real estate taxes in accord with a property's use.

This protects agricultural land against assessments for market-value increases that are caused by the approach of subdivisions, industrial parks and other commercial development.

The assessment system is being phased in over a 10-year period. If it were fully in effect this year, taxes on nonagricultural property would rise 1.2 percent while assessed farmland values would decrease 43.3 percent, the study says.

Edward Huck, executive director of the Wisconsin Alliance of Cities and a critic of the law, says the 1.2 percent increase "translates into a lot of money."

~~THE MONEY IS BEING USED TO...~~

State Revenue Secretary Cate Zeuske calculated in October that the law's assessment guidelines can ease property taxes for 89 percent of Wisconsin's cropland and pasture land.

Beginning in January 1996, the law froze the assessment of farmland at 1995 fair market value through 1997 and now reduces it gradually by 2009.

Assessments for an estimated 13.5 million acres are being geared to various factors including the type of crop, its average five-year price, the richness of the soil, management expenses and even the weather.

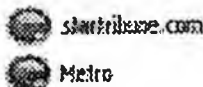
A lawsuit filed by municipalities was dismissed last June by the Wisconsin Supreme Court. The court ruled there was not enough information about the case to make a decision on it.

A new Circuit Court challenge was filed Sept. 24 in Madison by the Huck's group, the League of Wisconsin Municipalities, the mayors of Milwaukee, Manitowoc, Menasha and West Bend, and four owners of farmland in Columbia and La Crosse counties.

In addition to the assessment law, a measure the Legislature sent Gov. Tommy Thompson earlier this year eases what farms must pay when sewers are constructed past their acreage to subdivisions and other commercial developments.

When farms have no need of the service, assessments are deferred until the property is used for nonagricultural purposes.

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*Assuring Michigan Agriculture
Producers the Right to Farm
while Promoting
Environmental Stewardship*

The Right to Farm Act Affects Everyone

Michigan agriculture is a \$37.5 billion industry involving every county of the state. A wide variety of crop and livestock production strengthens our farm economy and helps to enhance the natural environment.

The Michigan Right to Farm Act, P.A. 93, was enacted in 1981 to provide farmers with protection from nuisance lawsuits. This state statute authorizes the Michigan Commission of Agriculture to develop and adopt Generally Accepted Agricultural and Management Practices (GAAMPs) for farms and farm operations in Michigan. These voluntary practices are based on available technology and scientific research to promote sound environmental stewardship and help maintain a farmer's right to farm. The GAAMPs cover five specific areas of production agriculture, including:

- Manure Management/Utilization
- Pesticide Utilization/Pest Control
- Nutrient Utilization
- Care of Farm Animals
- Cranberry Production

These agricultural and management practices are protective of the environment and have been designed to serve the needs of Michigan farmers and non-farm residents alike. The practices are reviewed annually and may be revised as necessary by the Michigan Commission of Agriculture.

Manure Management and Utilization

For Michigan's animal agriculture industry to remain viable and competitive, it must have the flexibility and the opportunity to change with market conditions and adopt new technology. With an increase in the scale of commercial livestock production comes new management challenges to control odors and handle agricultural wastes such as livestock manure, poultry litter, milkhouse wastewater, and barnyard runoff.

Sound manure management practices can lower production costs for farmers. Careful storage, handling, and application of farm animal manure will help control odors and protect our water resources. When properly utilized, livestock and poultry manure supplies nutrients for growing crops and reduces commercial fertilizer needs.

GAAMPs for Manure Management and Utilization were first adopted in June 1988. They are written to help assure that reasonable farm management practices are implemented to protect our natural environment, and allow our livestock and poultry industry to remain profitable and competitive.

These practices include recommendations for:

- Runoff Control
- Odor Management
- Manure Storage Facility Design
- Manure Application to Land

**Generally Accepted Agricultural and Management Practices for Manure Management and Utilization
Pesticide Utilization and Pest Control**

American agriculture has been able to meet consumer demands for a reliable and abundant food supply through the use of improved technology. For over 50 years now, this technology has included the use

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Right To Farm Law Changes!

After studying the draft amendments to AS 09.45.235 and studying other state's 'Right To Farm laws' that have been found constitutional, two weaknesses were found:

- No relief for the Alaska farmer under Section 2, AS 09.45.235(b) – The following needs to be added:

(2) Flooding caused by the agriculture operation Except in cases of unusual weather events 25 yr flood – unusual downpours etc.

- ♦ Nowhere in these changes is mentioned notification to realtors, home buyers or other interested parties. I believe a pamphlet should be printed and made available to Title Companies, Realty Boards Etc. By taking a proactive stance right from the beginning, a lot of possible litigation can be avoided. Most of all a proactive statement from the State government under the Seal of Alaska would work wonders compared to a numbered line containing stiff language in a law review.

Included in this Fax are other views on what works and what doesn't, including law reviews.

Jimmie R. Ellison, Publisher/Farmer
Contact; Phone 488 1970, Fax 488-4789, Mail: POB 55590, North Pole, AK 99705

Cc by fax:
Harris
Felmen

PAGE 2

Are Right-to-Farm Statutes in Danger?

By Joe Miller

Livestock Policy Specialist & Regulatory Legal Analyst

Public Policy Division

American Farm Bureau Federation

May 3, 1999

Are Right-to-Farm Statutes in Danger?

The short answer to that question, in my opinion, is no. Now for the long explanation.

Recently the Iowa Supreme Court struck down that state's right-to-farm statute as being unconstitutional. The U.S. Supreme Court refused to hear the case, which means that the Iowa ruling stands. That has brought about discussions in other states as to whether their right-to-farm statutes are in danger of being struck down in the courts.

It is important to understand what right to farm statutes are and what they are not. Most of the right-to-farm statutes in the U.S. are set up to be a defense to a nuisance lawsuit. That means the first thing that has to happen is for someone to claim that an operation is causing a nuisance. The general definition of a nuisance is when someone causes an unreasonable interference with another person's comfortable use and enjoyment of his land.

Once a nuisance has been established by the complaining party the agricultural operation then raises the defense proved by the right-to-farm statute. Most right-to-farm statutes require the producer to comply with very specific requirements to receive protection from a nuisance claim. The person bringing the complaint then has to prove that the agricultural operation is not within one of those exemptions. Right-to-farm statutes changed common law nuisance by creating this protection from what would otherwise be a nuisance.

Most right-to-farm statutes do not protect agricultural operations if they were operated in a negligent or illegal manner. Negligence is generally defined as a failure to exercise that degree of care required by the circumstances. Hence, most of these types of lawsuits state that the operation was being operated negligently.

The Iowa statute went farther than most other states in trying to protect agricultural operations. The Iowa statute stated that "a farm operation shall not be found to be a nuisance regardless of the agricultural activities of the farm or farm operation." The argument to the court was that this gave agricultural producers the right to "create or maintain a nuisance over the neighbors property, in effect creating an easement in favor of the applicants." The challenge was based on the Fifth Amendment of the U.S. Constitution as a "taking" of property rights.

The Iowa court reasoned that the Iowa statute was in fact an easement because it gave agricultural operations the right to do things that could affect neighboring landowners and it also prohibited those landowners from bringing a legal action against the agricultural operation as a matter of law. This meant that Iowa agricultural operations could in fact create a nuisance and that adjoining landowners could do nothing about it. And that the creation of the easement took away the property right of being able to defend that property by lawsuit and that this was done without just compensation to the adjoining landowner.

It was this final step that made the Iowa law unconstitutional. Most other states allow a lawsuit to be brought against an agricultural operation if they could prove that the operation did not fit within the narrow protected items in the statute. In Iowa, as long as the agricultural operation was not breaking any state or federal law, adjoining landowners could not sue for nuisance. In other states they can.

The Iowa court concluded by saying that the "legislature exceeded its authority by authorizing the use of property in such a way as to infringe on the rights of others by allowing the creation of a nuisance without the payment of just compensation."

In summary, most states should not have a problem with their right-to-farm laws because they allow adjoining landowners to sue for nuisance against agricultural operations. The Iowa statute stated that no agricultural operation shall not be a nuisance and thereby prevented adjoining landowners from bringing a nuisance suit.

This is what created an easement and that easement was not paid for. Therefore it was a "taking". As long as your state statute allows adjoining landowners to bring a nuisance suit and the right-to-farm statute only offers a defense, not a prohibition against a lawsuit, it should withstand any test of its constitutionality.

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Court upholds Michigan farm law

By Sue Stuever Battel

Neighbors were pitted against farming neighbors in a recent Gratiot County (Mich.) legal battle that challenged the state's Right-to-Farm Act. In a precedent-setting case, a circuit court judge upheld the constitutionality of the act, ruling that a feedlot operation near Breckenridge, Mich., causes no nuisance.

The Stoneman family, who operates the 3,000 head feedlot facility, said they are relieved the case is over, but are frustrated they had to endure a two-year-plus legal battle. "We always felt we would win because we knew we were doing nothing wrong," said Dave Stoneman.

The Stonemans said they kept neighbors informed about their new cattle facility and took odor and other factors into consideration when selecting the site and building the barn. They also kept detailed records and followed a written manure-management plan.

But the plaintiffs in the case who live within a mile of the cattle barn alleged that flies, increased traffic and odor constituted a nuisance and, therefore, a "taking" because they lived in the area before a cattle barn was added and were not compensated for what they believed to be losses. But the judge dismissed the claim.

While acknowledging that the case was favorable for Michigan agriculture, state Department of Agriculture Director Dan Wyant said he expects similar suits in the future as urban populations encroach on rural land.

"We do know agriculture is at a crossroads with respect to being challenged in this case," Wyant said. He contends that Michigan's Right-to-Farm Act is solid enough to stand up to challenges and will likely serve as a model for other states. All 50 states have right-to-farm laws, but none are as stringent as Michigan's.

"This verdict sets us on the course of moving into the 21st century with some assurance that we can have modern-day, friendly agriculture in the state of Michigan," said Jack Laurie, Michigan Farm Bureau president and a Tuscola County dairy farmer.

"The Stonemans have an undeniable record of utilizing best management practices, and their operation is truly environmentally friendly."

Sue Stuever Battel is editor of member publications for Michigan Farm Bureau.

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by Mike Kroll

One month ago, the U.S. Supreme Court refused to review the appeal of an Iowa Supreme Court ruling overturning that state's "right to farm" law. The court's action, or rather inaction, was done without comment and remains open to speculation over why the case was not heard. This offers little solace for farmers and their allies in Iowa who now fear widespread legal challenges to their way of life.

Iowa legislators tried to deal with the anticipated problems or conflicts between rural neighbors by passing the "right to farm" law in 1982. It was designed to protect farmers from the threat of lawsuits brought by neighbors. Many modern agricultural practices, such as mega-hog farms or chemical spraying, are often viewed as nuisances by neighbors. This legal immunity protected Iowa farmers from lawsuits over the "operation or expansion of the agricultural activities of [a] farm" located "within an agricultural area" as long as the nuisance does not result from a violation of a federal statute, regulation, state statute, or rule" and the farm owner or operator was not found negligent. "Additionally, there is no immunity from suits because of an injury or damage to a person or property caused by the farm or farm operation before the creation of the agricultural area."

The law allowed local county officials to designate "agricultural areas" for protection. This is part of Iowa's statewide effort aimed at "agricultural land preservation" in the face of developmental pressures on behalf of nonagricultural residents in traditional farming communities. Specifically, a person could not buy land adjacent to a farm, build a new home and then take his farmer neighbor to court over issues such as odor or dust associated with farming.

Officials in Kossuth County designated approximately 960 acres of farmland as an agricultural area subject to protection under this law in January 1995. Three months later, a group of neighbors filed suit in Iowa District Court claiming that this action violated their rights under both the Iowa and U.S. Constitutions. They said such a law denied them the right to protect their property from *potential* actions by neighbors that could adversely affect the value or marketability of that property without fair compensation. An interesting feature of this lawsuit is that while both sides agreed that no such nuisance had yet occurred, the fear was that the immunity protection removed the option of legal redress from the nonagricultural neighbors.

Initially, the Iowa District Court threw out the lawsuit but the Iowa Supreme Court heard the matter on appeal and reversed the lower court in September 1998. In effect, they agreed with the plaintiffs that the Iowa "right to farm" law was unconstitutional under both the state and federal Constitutions. This infuriated farm groups across Iowa who attempted to take the case before the U.S. Supreme Court.

In their brief to the high court, the coalition of farm groups claimed that if the Iowa Supreme Court decision was allowed to stand more than 100,000 farmers in that state could face the prospect of costly nuisance lawsuits just because "they look and sound and smell like farms." The brief also warned that action by the Iowa Supreme Court posed a legal threat to "right to farm" laws in numerous other states as well. Iowa's new Governor Tom Vilsack was quoted by the Associated Press as saying that the U.S. Supreme Court's ruling made it very likely that Iowa state lawmakers would revisit this issue.

Iowa farmers and officials aren't the only ones shocked and surprised by this set of events. Scott Jensen, State Assembly Speaker in neighboring Wisconsin, immediately announced that he was asking that legislature's legal counsel to review the Iowa decision and evaluate its likely impact in Wisconsin. Jensen, a Republican from Waukesha, said he was proud of the Wisconsin "right to farm" law—among the first legislation passed when the Republicans assumed the majority in the Assembly in 1995.

Illinois does not have a similar "right to farm" law but the recent controversy over regulating large livestock operations touches on some of the same issues and concerns. The crux of Knox County's ongoing case against Jim & Doug Baird and their Highlands hog farm near Williamsfield is due to be presented to the Illinois Supreme Court. In that case Knox County State's Attorney Paul Mangieri has argued that there must be some logical limitations on the Illinois law that prohibits local governmental control of agricultural land use. Knox County attempted to enforce zoning restrictions to block construction of the Highlands' large scale hog farrowing operation contending that the very size of this operation takes it out of the realm of traditional agriculture. While Mangieri has been unsuccessful so far in both the Circuit and Appellate courts, a strong dissenting opinion by one member of the three-judge Appellate Court panel has offered him some reason for optimism.

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Asked if the Iowa court drama may have some impact on Knox County's legal battle, Mangieri was blunt and to the point. "While this ruling is amazing in a state as agriculturally-based as Iowa it has no standing whatsoever here in Illinois. The relevant laws in Iowa are totally different from those in Illinois and the facts of our case differ as well. This decision will undoubtedly have significant impact within Iowa but little direct legal application outside of that state. Things could have been much different had the U.S. Supreme Court heard the case and issued an opinion supporting the Iowa Supreme Court. It is impossible to interpret meaning into a refusal to hear this case."

While the Iowa ruling will have little effect on the specific Knox County case, it may have far reaching effect on Illinois. Operators of mega farms and their corporate parents will logically migrate to the least restrictive states, such as Illinois. As recently as this week, Illinois legislators failed to strengthen the Illinois Livestock Facilities Management Act.

Posted to Zephyr Online March 27, 1999

Return to the Zephyr home page: <<http://www.thezephyr.com>>

Phil Nagley

New York's Right to Farm Law Found "Constitutional"

On May 25, Justice Thomas Keegan of Albany County Supreme Court issued a landmark decision for New York State agriculture in the case of PAW v. Davidsen, in which the Court declared the New York State Right to Farm Law (RTFL) constitutional. The RTFL provides nuisance suit protection to farming operations that have received a "Sound Agricultural Practice Opinion" from the Commissioner of Ag and Markets, which Trengo Farms, a confinement hog operation in Chemung County, received in 1997. PAW, a small environmental group, claimed that New York's RTFL was unconstitutional because it caused an improper "taking" of private property, alleging that the opinion allowed the Trengos to maintain a nuisance over neighboring property, creating an easement in the Trengos' favor. The creation of that "easement," PAW argued, resulted in a "taking" of private property. The Court decided that the RTFL did not authorize the Trengos' to create a nuisance, nor does the RTFL provide blanket immunity from nuisance suits. Thus, the statute does not create a property right in favor of the farm in the neighboring property, so no taking of private property occurred under the RTFL. Look for further details on this momentous decision in the next issue of the Advocate.

Alaska's Right To Farm Law Needs Overhaul

By Jim Ell

Good well written laws make for good Neighbors

During the last several decades, more and more city and Lower forty-eight people have migrated into rural areas to pursue their Alaska dream. They seek a peaceful place in the country, away from the pollution, noise, and crime of cities and suburbs. Many choose homes in modest (some times not so modest) subdivisions that press into former and future agricultural lands.

This intrusion of urban life into rural life results in an inevitable conflict. How surprised some neighbors are to wake up one spring morning to roaring machinery, buzzing flies, the stench of manure and a mist of pesticides in the air. And how angry many become when they learn that they can't do anything about it.

The Legal 'Right to Farm' States now gives farmers a basic "right to farm" without the fear of lawsuits brought by offended neighbors. As one judge remarked while dismissing a lawsuit against a hog farmer, "pork production generates odors that cannot be prevented, and so long as the human race consumes pork, someone must tolerate the smell."

Before the right-to-farm laws were enacted (most of them in the 1980s), courts shut down many a farmer's operation because it was a nuisance to the neighbors. For example, a group of annoyed neighbors, whose homes had sprung up around a Massachusetts hog farm, sued and closed it in 1963. Some judges tried to strike a middle ground and ended up applying restrictions that would let the farming operation continue.

A Florida court, for example, allowed a hog farm to stay in business but limited how many hogs the farmer could have. The judge also issued instructions on how to store and feed the garbage the hogs were accustomed to eating.

These two illustrations prove the wrong-head-a-ness of judges being farm managers - neither hog operation could continue and remain economically viable.

In another case, retirees at Sun City in Arizona discovered that they had traded their frigid climates for warm breezes laced with the odor of a cattle feedlot. A resulting lawsuit closed down the feedlot, but the judge ordered the developer of the community to pay the cost of relocating the cattle operation. The action all but broke the developer.

The right-to-farm laws supposed to take judges out of the farm management business and protect farmers from the nuisance laws that apply to ordinary neighbors.

Every state in the country has passed a right-to-farm law.

North Carolina's law is typical. It declares that an agricultural operation, which has existed for a year without being a nuisance, is presumed not to be a nuisance even when new neighbors move in. If the farm operations are conducted in a reasonable manner, the new neighbors can't legally complain.

Several states list specific annoyances that are not considered a legal nuisance to neighbors. The lists include odor, noise, dust and the use of pesticides--the very conditions which, without the laws, could lead to a lawsuit by a neighbor.

Right-to-farm laws do not give farmers complete freedom to do as they please. Farmers must operate in a legal and reasonable manner to be eligible for the law's protection.

Some states -- New York, for example -- do not allow a protected farming operation to undergo a large increase in size. Many don't allow farmers to substantially change what they are doing if they are to remain protected under the law and this law's limiting factor has driven several livestock operation out of business. In farming as any business -- the farmer must adjust his operation to fit the ever-changing economic conditions. Thus in some cases a farm must grow or die, in others, maybe a complete change in operations including value added products or go from grain crops to animals.

No law should protect a farmer who does not follow normal procedures or who deliberately annoys neighbors.

Alaska's "Right To Farm" (see side bar - subsection 09.45.235) law is simple and easily understood as written and that could be the rub; it has holes in it that any capable lawyer could drive a D-10 Cat through sideways even if he didn't even know what a dozer looked like.

For example look at section (a); If some one moved in next to a farmer that was just beginning to clear fields and setup, the new neighbor wouldn't consider the farmer a threat to his bliss until he looked out one morning and seen the crop duster flying by or maybe the farmer's kid out spraying thistle on his four-wheeler. Two ways to cure this - change from three years to one and require notification from sellers to buyers that the property is close to farming operations.

Now if you think that was bad look at section (b) 1 and 2; that part is clearly open to interpretation; for example; Farmer clears off a couple a hundred acres - levels it to 1:60 grading for flood irrigation but not yet planted, along comes a frog choking rain - say a couple inches in a hour - oops small flood right in our new neighbor's door. Could be interpreted as the farmer's fault.

I believe by rewriting the law and writing a new law governing notification to real estate buyers "Sniff Before You Leap Law" and requiring that land deeds in agriculture and farmable areas be so restricted by such notification "I told you so law", would make for good neighbors. Other states have these laws already in place.

I have written such laws based on other state's laws, read them and if you agree pass them along to your local lawmaker. This is for our own protection.

Jim



Law of the Land Review

An Occasional Report to Local Government Officials
Regarding Rules and Regulations
For Natural Resources Use or Management

Additional Information Available From:

MARCH, 1994

RIGHT TO FARM LAW: DEFENDING AGAINST NUISANCE LAWSUITS BY NONFARM OWNERS

Owners of nonfarm residences sometimes file lawsuits to limit livestock production or farmland cultivation practices which they believe threaten their health, safety, or welfare. Several states have "right to farm" laws to protect farmers from complaints from noise, odor, and dust arising from normal farming practices. While the words "right to farm" do not appear in state law, Wisconsin statutes do afford a farmer some protection against a nuisance action brought by a neighboring landowner. Also, towns and counties are authorized to develop land use plans, to adopt exclusive agricultural zoning, and to support farmer participation in the farmland preservation program. Such approaches can be used to discourage building of nonfarm residences in productive agricultural areas.

INTRODUCTION. Around the nation, where nonfarm residences have intruded into agricultural areas, land use disputes have arisen. Farmers, who are accustomed to operating farm machinery at any time, are receiving noise complaints from persons who buy country homes in pursuit of "peace and quiet." Other farming practices that sometimes generate nuisance complaints are manure handling, concentrated livestock housing, and chemical applications.

FARM NUISANCE CASE STUDIES. Contra Costa County, California has produced apricots, grapes, and livestock products for more than a century. Yet, many persons working in nearby San Francisco have been attracted to the county by its affordable housing. Prospective new owners consider the county's green farm fields to be like urban park land. Because they have little knowledge of farming, newcomers seldom consider how the need to plow, plant, cultivate, and harvest may affect their lives. Faced with a growing number of complaints and nuisance suits, county officials proposed a right to farm ordinance. The

measure would discourage nuisance actions against farmers and would require realtors to inform prospective nonfarm owners about possible "inconveniences" caused by necessary agricultural practices. Some local residents are challenging the proposed ordinance and will seek to overturn it if it is adopted.

Near Alliance, Ohio, a nonfarm family was offended by the construction of a facility that houses more than 100,000 chickens. The family contends that property values have been adversely affected by the farm operation. I. has repeatedly complained about odors to the Stark County Health Department. Inspections by county officials and state natural resources staff have uncovered no air quality or manure handling violations. Nonetheless, a lawsuit is likely to ensue.

ADVENT OF RIGHT TO FARM LAWS. One approach used to minimize the threat of nuisance lawsuits has been the passage of state "right to farm" laws. For instance, Michigan enacted a right to farm law more than ten years ago.

Chapter 286 of Michigan law states that a farm operation shall not be found to be a nuisance if it "existed before a change in the land use or occupancy of land within 1 mile of the boundaries of the farm land" and if the farming operation would not have been considered a nuisance before the nearby residences were built. Also, an operation cannot be considered a nuisance if it "conforms to accepted agricultural and management practices." "Acceptable" practices are annually reviewed and listed by the state's agriculture commission in consultation with state university, state agency, and USDA officials.

Laws specifying a right to farm also are present in Florida, Hawaii, Idaho, Louisiana, Michigan, Nebraska, New Jersey, New Mexico, New York, Rhode Island, Tennessee, and Virginia.

ARE RIGHT TO FARM LAWS FAIR OR EFFECTIVE? Neil D. Hamilton wrote a book titled What Farmers Need to Know About Environmental Law (Drake University Agricultural Center, Des Moines, IA, 1990). Hamilton claimed that some right to farm laws do not adequately protect farmers from nuisance lawsuits. He cited a case in which a hog farmer spent \$50,000 to contest a suit filed against him. His neighbor had objected to a proposed expansion. The farmer "won" the suit yet lost financially because he could not recover his defense costs.

In New York, one attorney argued that right to farm law afforded farmers too much protection. He claimed it was unfair to give farmers protection from legal action by another class of citizens. The attorney represented a town board in a Niagara County case where a dairy farmer wanted to increase his herd from 500 to 850 cows. The board refused to grant a building permit for a new barn when nonfarm residents complained to town officials about nuisances at the "factory-sized" farm.

WISCONSIN STATUTES AND FARM NUISANCES: State law allows a person or local government unit to abate a public nuisance. This statutory authority can be applied when a citizen complaint is brought forward against a farm

(or nonfarm) property owner.

Note: In the 1981 case of State v. Quality Egg Farm, Inc., nuisance was defined by the courts as unreasonable activity or use of property that interferes substantially with comfortable enjoyment of life, health, or safety of others.

Wisconsin law does not contain the words "right to farm." However, it does say (Wisconsin Statutes, 823.08) that, "to the extent possible consistent with good public policy, the law should not hamper agricultural production." When a farm zoned for exclusive agricultural use is subject to a nuisance action, similar farming is allowed to continue unless the court decides it would endanger health or safety. If not so zoned, the court may order the farmer to use alternative practices to reduce the nuisance. If a court finds that the farming practice is a nuisance and if the person complaining moved into an area where the farming activity considered to be a nuisance was consistent and ongoing, then the court may assess only nominal damages. A farmer may recover the legal costs for his defense if a nuisance action is dismissed by the court.

THE NEED TO SEPARATE FARM AND RESIDENTIAL USES. Conflicts between farm and nonfarm landowners often can be avoided in areas where some land is set aside for agricultural use while other land is reserved for residential use.

Town and county government can help reduce the threat of nuisance lawsuits when they: [1] prepare a local land use plan and [2] support their plan by encouraging farmland preservation program participation and by adopting exclusive agricultural zoning to limit the construction of nonfarm residences within farmland areas.

Note: This information is not intended as a substitute for legal advice from a licensed attorney.

Prepared by:
Donald Last
Extension Natural Resource Policy Specialist
University of Wisconsin-Stevens Point
715-346-2386

Preserve our farming roots

Growth is an unavoidable fact of life throughout the United States and Alaska. For residents of the Matanuska-Susitna Borough, growth seems even more difficult to avoid as we welcome more and more people who decide to make their homes here.

With even more people come more jobs and economic opportunities — in retail, services and construction. And with growth, we seem willing to accept certain sacrifices — such as the loss of open and wild space.

But frequently enough, with the loss of open space, comes the loss of agricultural lands. Throughout the Lower 48, farm land is being consumed by development at an alarming rate. The economic benefits of such development often mask the disappearance of farm lands, hiding the real tragedy of the loss of farms to the community.

One needs only to look at California's Santa Clara Valley — better known now as Silicon Valley. Once an important center for agriculture in the United States, Santa Clara Valley produced fruits, vegetables and wine for consumption throughout the country. Looking out over the valley from the Calaveras hills, one could see thousands of acres, miles and miles, of orchards, truck farms and vineyards.

In the 1970s, the almond orchards began to give way to microchip plants, and now agriculture is all but a memory.

Few would argue that the computer revolution hasn't been a boon to life in America, or more specifically, Alaska, but Californians made a huge sacrifice when they exchanged the Santa Clara Valley for Silicon Valley.

Here in the fastest-growing region of Alaska, we see subdivisions paving over our open space again, and developers eyeing the Matanuska Valley's farmlands as attractive sites for new houses.

Agriculture has played a critical role in the growth of the Valley. It was the lure of agriculture that inspired President Franklin Roosevelt to bring hundreds of farming families here in the 1930s as part of the Colony project.

Farming continues to be a substantial player in the economy of the Valley, although it was long ago outstripped by retail and construction. Farming, many might argue, continues to feed the soul of Mat-Su, literally and figuratively.

So, with that ideal in mind, we applaud the recent introduction of Senate Bill 60 by Sen. Lyda Green. SB 60 seeks to preserve farmland in Alaska, by granting grandfather rights to already existing agricultural facilities, and by providing a process for mitigating potential conflict between development and farming.

Taking note of the conflicts that have developed between new homeowners and already existing farms in much of the United States, SB 60 directs developers and anyone else selling real property to warn potential home buyers about their proximity to nearby farms in plain, unromanticized language.

Farming is a smelly, noisy, dirty business; for some reason, that seems to come as a great surprise to those who are moving next door to a farm for the first time. Lawsuits often develop, and often enough, it's the farmer — who was there first — who loses.

SB 60 will prevent those conflicts from taking place here in the Valley.

In the end, we all win as a result.

A couple of recent *Alley Hospital Ass.* and their contin with unjust and incons rulings and the ranting pretends to be calling t some attention.

I speak of the dublou ruling and the ever-perp Bess (Spectrum, 1/22) in shots at the hospital board.

I dismiss Bess' pretense stab at directors allegedly deserved benefits for the erence to his conclusion, agenda anyway.

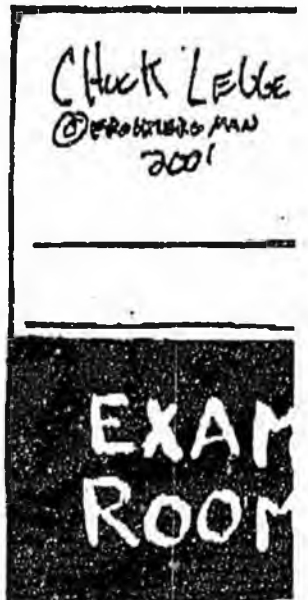
He wrote, "We need to t of hospital politics, seek c for all factions in the al [and] elect the community experienced people to the

Whatever does he mean ously his end goal is to rep "faction" on the board w: tion. And quick, too, befc ruin everything by privat: tarian association. Then V ly avoid providing abortio

Maybe this reasoning e: it is obvious to the rest of t politics" are of precisel abortion policy falls unde tals do not perform abortio form abortions.) Hence, l argues the pro-life positio

I understand the frustra am sure Mr. Bess and his would love to see this l along with the pro-life s board and in the commur going to happen. And I've them, there is no "commo sought either.

What Bess and his follo



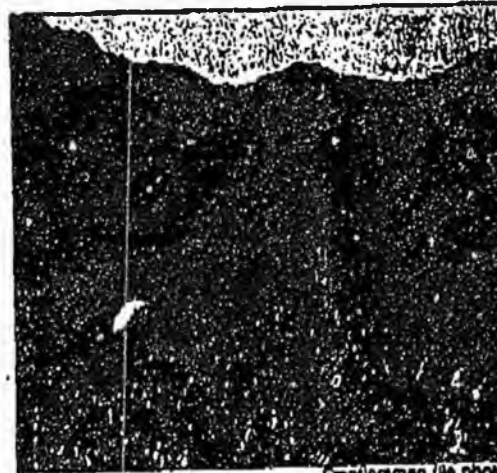
Lyda Green introduced agriculture-protection bill

By ERIC BURKETT
Frontierman reporter

MAT-SU — A bill presently making its way through the Alaska Senate could go a long way in helping preserve agricultural lands in the Matanuska Valley.

Senate Bill 60, introduced last week by Sens. Lyda Green, R-Wasilla, and Robln Taylor, R-Wrangell, is modeled after a similar law passed by the Pennsylvania legislature, according to Larry DeVilbiss, a Lazy Mountain farmer. A similar measure has been introduced in the House by Rep. John Harris, R-Valdez.

"SB 60 is the number-one legislative priority of the Alaska Farm Bureau," DeVilbiss, who also represents District 1 on the Matanuska-Susitna Borough Assembly, said Friday.



Frontierman (file photo) Senate Bill 60, introduced by Sens. Lyda Green and Robln Taylor, could help preserve agricultural lands in the Matanuska Valley.

See BILL, Page A4

To: Pete Feliman
From: Rob Wells

BILL: Aimed at protecting farmers from lawsuits

Continued from Front Page

DeVilbiss was in Juneau last week with the Alaska Farm Bureau to push for passage of the bill.

"Basically, the intent is to preserve a rural ambience, especially in developing areas," he said. "This valley's where the legislation is most needed and most critical right now."

The bill seeks to protect agricultural properties by granting

them grandfather rights, especially when they may come up against complaints by neighboring housing developments.

While it hasn't been a huge problem in Alaska so far, in other parts of the United States, many farmers have found themselves and their farms the subjects of lawsuits filed by their neighbors.

"In the Lower 48, you see people moving into farming areas and realizing manure stinks, and

tractors make noise at all hours," Hans Neldig, chief aide to Sen. Green, said.

"They end up suing the farmers, and they've actually won in some cases," he said.

The bill requires sellers to notify their buyers with a written notice that they are purchasing property within a mile of an agricultural facility.

"The property you are about to acquire is located within one mile of an agricultural operation," the notice would read. "Lawful application of pesticides, herbicides, and fertilizers occur in agricultural operations."

The notice goes on to warn potential homeowners they may be subject "at any time to odor, fumes, dust, smoke, burning, vibrations, insects, rodents" and other potentially unpleasant occurrences.

"It's kind of a two-way protection," DeVilbiss said. "It serves as a way for people moving into an area to let them know there are farms there."

The bill has been referred to the Senate Judiciary Committee.

The Farm Bureau is also looking for legislative support in two other areas this session, DeVil-

biss said.

Farmers are hoping to see the passage of a law which would allow them to hire adolescents.

Rep. Scott Ogan, R-Palmer, supports the effort, DeVilbiss said, and has drawn up legislation that would let children pick vegetables and do other agricultural work with the signed, written permission of both parents or a guardian, or in the presence of a parent or guardian. The legislation has not yet been introduced in the House.

Presently, children who work have to produce identification, which must be presented to state officials in person.

During haying season, farmers must be able to move quickly to bring hay in, and they need to be able to hire help as soon as possible. A single day's rain can easily destroy a farmer's hay crop.

The permits would be for agricultural work only, DeVilbiss said.

"When we made the rounds in Juneau, that was very well received," he said.

Another bill would limit the liability to farmers for livestock that are set free by the actions of trespassers.

CITY OF WASILLA

CITY OF WASILLA
NOTICE OF PUBLIC HEARING SEWER ASSESSMENT DISTRICT

The Wasilla City Council will hold a public hearing on the Monday, February 26, 2001, at 7 p.m. in the Wasilla City Council Chambers, 290 E. Heming Avenue, Wasilla Alaska, on the special assessment roll for the following sewer assessment district:

BROADVIEW SEWER SPECIAL ASSESSMENT DISTRICT; 9981;

The properties to be assessed are all lots and parcels within the sewer assessment district listed above. The improvements constructed by the sewer assessment district, which are the subject of the special assessment roll include the necessary engineering design, construction of sewer mains, treatment facilities, inspection and other equipment and appurtenances necessary to the completion of the sewer project within the sewer assessment district. The purpose of the hearing is to:

- Consider objection to the assessment roll.
- Confirm the special assessment roll of the paving assessment district.
- Establish a schedule of dates when installment payments become due.
- Establish the method of determining the interest rate on installment payments.
- Establish delinquency dates.
- Establish a penalty of 6% for delinquent payments.
- Establish that delinquent assessment installments and penalties shall draw interest at a rate of 3% per annum higher than the rate payable on assessment installments until paid.

The assessment may be financed over 10 years at an interest rate equal to the

House bill protects state farms

■ **ESSENCE:** New neighbors would have to accept that pesticides and odors come with the territory.

The Associated Press

FAIRBANKS — Alaska farmers are lining up in support of legislation seeking to ensure that newcomers to an area cannot sue a neighboring farm because of a distaste for the smell or noise.

The Right to Farm bill is sponsored by Rep. John Harris, R-Valdez, who represents Delta Junction.



Legislature
in session

“
This
really
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anybody
who sells
land.
Because
there is
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farmer
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sued but
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— Pete Fellman,
Delta Junction
dairy farmer

The legislation, HB 82, is a priority of the statewide Farm Bureau. It would prevent people who move next to a farm from seeking to declare it a nuisance.

“We need to protect our farms,” said Alaska Farm Bureau president Bob Franklin, who operates B-Y Farms between Fairbanks and North Pole.

He said people could move to Delta Junction to work on a national missile defense project and buy property next to a farm. It is quite possible that the new property owner could then decide that the smell is intolerable.

“We’re looking at future (land) use,” Franklin said.

Harris’ bill is modeled on Lower 48 farm laws that have withstood court challenges, said Pete Fellman, a Delta Junction dairy farmer and a legislative aide to Harris.

To meet the legal requirements, Harris wants to add a provision that requires anyone selling land within a mile of an agricultural facility to disclose to the buyer the existence of the operation.

The buyer would have to be warned that pesticides, herbicides and fertilizers

are legally used in agriculture and that noise and odors could be present.

“This really protects anybody who sells

BILL: Measure seeks to protect farmers from suits

Continued from B-1

only a possibility of the farmer being sued but also the person who sold the land.”

Lower 48 legal issues have also focused on how the courts can determine whether the farmer in question is a responsible individual who is farming in a safe manner.

Harris’ bill requires that to qualify for protection from nuisance lawsuits, farmers must have a soil and water conservation plan, available free through consultation with the state.

“I think most farms have a soil and water conservation plan anyway,” Franklin said.

Sharon Davies
1510 "P" Street
Anchorage, AK 99501
Telephone 277-5547 Fax 277-5502

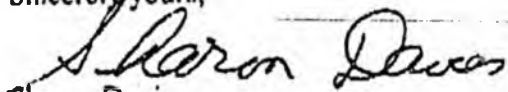
Representative John Harris
Alaska State Legislature
FAX 465-3799

Dear Mr. Harris:

I strongly support the concept of HB 82. I have read several times of farmers having legal problems from people who had moved into new housing near them and decided they did not like some of the practical aspects of farms such as odors, noises and agricultural chemicals. I did not and do not find this fair nor reasonable.

It is beneficial for all Alaskans to protect our farms and farmers because we all need to eat..

Sincerely yours,


Sharon Davies

Adopted: 02/20/01

**MATANUSKA-SUSITNA BOROUGH ASSEMBLY
RESOLUTION NO. 01-007**

A RESOLUTION OF THE MATANUSKA-SUSITNA BOROUGH ASSEMBLY IN SUPPORT OF HOUSE BILL 82, AN ACT RELATING TO AGRICULTURAL FACILITIES AND OPERATIONS, AND TO DISCLOSURES IN TRANSFERS OF REAL PROPERTY LOCATED WITHIN ONE MILE OF AN AGRICULTURAL FACILITY OR AN AGRICULTURAL OPERATION.

WHEREAS, the legislature is considering House Bill 82 relating to agricultural facilities and operations, and to disclosures in transfers of real property located within one mile of an agricultural facility or an agricultural operation; and

WHEREAS, the Matanuska-Susitna Borough has a long history of agricultural operations; and

WHEREAS, the majority of agricultural activities in the state take place in the Matanuska-Susitna Borough; and

WHEREAS, in 1999 over 57 percent of the value of agricultural production in the state came from the Matanuska-Susitna Borough; and

WHEREAS, the Matanuska-Susitna Borough is the fastest growing community in the state; and

WHEREAS, the majority of that growth is residential; and

WHEREAS, House Bill 82 proposes that prior to real property being transferred, notification will be provided indicating the property is within one mile of a defined agricultural facility or operation, and that the purchaser should be prepared to accept that the by-products and activities of agricultural facilities and

operations are a normal and necessary aspect of living in an area with a strong rural character and an active agricultural sector.

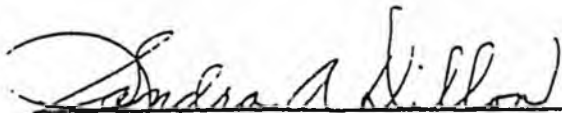
NOW, THEREFORE, BE IT RESOLVED, that the Matanuska-Susitna Borough Assembly supports the adoption of House Bill 82.

ADOPTED by the Matanuska-Susitna Borough Assembly this 20 day of February, 2001.



TIMOTHY L. ANDERSON, Borough Mayor

ATTEST:



SANDRA A. DILLON, Borough Clerk

(SEAL)

**Board of Agriculture & Conservation (BAC)
Resolution 2001-1**

**Resolution in Support of Agricultural Legislation Pending in the 22nd
Alaska Legislature**

Whereas one of the principal functions of the Board of Agriculture and Conservation (BAC) is to address issues affecting agriculture in Alaska; and

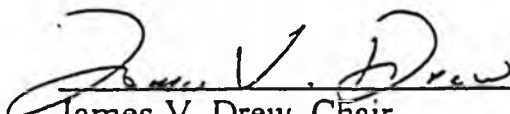
Whereas there is currently legislation pending before the 22nd Alaska Legislature which pertains to agriculture in Alaska; and

Whereas the Board of Agriculture and Conservation supports in concept HB 82 "An Act relating to agricultural facilities and operations as private nuisances; and to disclosures in transfers of real property located within one mile of an agricultural facility or an agricultural operation"; and

Whereas the Board of Agriculture and Conservation supports in concept HB 128 "An Act relating to employment of certain minors in agriculture";

Now therefore be it resolved that the Board of Agriculture and Conservation requests that the 22nd Alaska Legislature, after appropriate committee referral and review, support and approve HB 82 and HB 128.

Board of Agriculture and Conservation


James V. Drew, Chair

02-26-01
Date