STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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May 24, 1999

The Honorable Tony Knowles
Governor
P. O. Box 110001
Juneau, AK 99811-0001

Re: HCS CSSSSB 94(FIN) -- Relating to the Medical Use of Marijuana
A.G. file no: 883-99-0037

Dear Governor Knowles:

At the request of your legislative director, Pat Pourchot, we have reviewed HCS CSSSSB 94(FIN), relating to the medical use of marijuana.

The medical marijuana law enacted by voter initiative in the 1998 general election contained ambiguous language, and as a result contained a large number of provisions that make the law difficult to administer, difficult to enforce, and difficult to interpret. These problems could not have been envisioned by the voters.

The goal of this Administration was to fix the problems in the voter initiative in order to make the law work, that is, to give effect to the intent of the voters to allow marijuana to be used to address debilitating medical conditions under appropriate controls.

In assessing HCS CSSSSB 94(FIN) (hereafter referred to as SB 94), it is helpful to bear in mind that the legislature heard a great deal of testimony about the potency and profitability of marijuana. In addition to consistent police testimony that marijuana grown in Alaska is among the most potent grown anywhere in the world, the legislature took testimony from medical marijuana users. In particular, the House Judiciary Committee heard very compelling testimony from a user who described how, in the last few months, he was able to stop using prescription narcotic pain medications by substituting marijuana. This individual testified that he had been taking an amount of narcotics that would likely kill an ordinary person who had not built up a level of tolerance to the drugs. He also indicated that marijuana of this quality sells for $500-600 per ounce, which was supported by police testimony that Alaska-grown marijuana often sells for $4,000-5,000 per pound, or more. Thus the testimony showed that marijuana is a powerful drug capable of producing similar pain-killing effects as narcotics, and creating an enormous profit potential, all of which supported the

legislature's desire that medical use of marijuana remain under appropriate controls and not be subject to abuse.

Legal Standard

Under art. XI, sec. 6, of the Alaska Constitution, a voter initiative cannot be repealed for two years, but may be amended at any time. Alaska case law holds that the legislature has broad authority to "substitute its judgment for that of the proponents of an initiative." *Warren v. Boucher*, 543 P.2d 731, 737 (Alaska 1975). There seems to be a sliding scale analysis, such that "[t]he broader the reach of the subject matter, the more latitude must be allowed the legislature to vary from the particular features of the initiative." Medical use of marijuana is a fairly narrow topic, so we should assume for purposes of this analysis that a court will look more closely at any amendments than they would if the subject matter were broader. Nevertheless, the legislature can amend an initiative if the amendments "preserve its basic structure and purpose . . . ." *Warren v. Thomas*, 568 P.2d 400, 404 (Alaska 1977). As discussed more fully below, we believe that the amendments to the initiative made by this bill are valid because a court will find that they are certainly much more than a "hollow gesture" toward medical use of marijuana. 543 P.2d at 739.

Moreover, much of the original initiative still remains. For example, the proponents of the initiative specifically did not require a prescription by the physician, so as to avoid what they characterized as the practice in other states in which the federal authorities threatened action against doctors writing such prescriptions. SB 94 retains this provision and requires only that the physician consider other approved medications and treatments. By not requiring a formal prescription, SB 94 avoids an argument that the amendment is simply a "subterfuge to frustrate the ability of the public to obtain consideration and enactment" of a law allowing use marijuana for medical purposes. *Id.*

Main Changes made to the Initiative

The Department of Health and Social Services, Department of Public Safety, and Department of Law identified several changes needed to make the medical marijuana law work, and SB 94 addressed most of these issues. The issues that were important to this Administration were:

- Recognize that marijuana, like other prescription drugs, should be a controlled substance, regardless of how it is used.
- Prohibit patients from selling or distributing marijuana.
- Limit the number of patients who can be supplied marijuana by the same person.
- Require mandatory registration with the Department of Health and Social Services.

- Limit possession to one ounce and six plants.

- Allow police to take action in medical marijuana cases just as with misuse of a prescription for a narcotic drug, and make the legal burden of proof for medical marijuana consistent with that applied to other drugs.

- Allow access to the registry in criminal investigations.

Each of these points is discussed below and analyzed in terms of the legal standard set out above.

Marijuana Should Be a Controlled Substance, Regardless of How It Is Used. The medical marijuana initiative provides that marijuana used for medical purposes is not a "controlled substance." AS 11.71.190(b). This seemingly insignificant change has serious legal consequences because many other state laws depend on the phrase "controlled substance." For example, it is a crime to possess a firearm while under the influence of alcohol or a controlled substance. AS 11.61.210(a)(1). Thus, because medical marijuana is no longer a "controlled substance," a patient intoxicated on marijuana could lawfully possess and use a firearm. Although the laws relating to driving while intoxicated use a different definition of controlled substance, and thus we believe that a patient can be convicted for driving after using marijuana, an attorney for the legislature has written an opinion that suggests that it is possible a court would not allow prosecution or conviction for driving while intoxicated.

By continuing to treat marijuana as a "controlled substance," SB 94 takes into consideration the potential for abuse of the drug, while at the same time allowing it to be used to address debilitating conditions. This change does not repeal the initiative.

Prohibit Patients from Selling or Distributing Marijuana. The medical marijuana initiative contains an oddly worded provision that would allow registered patients to sell or give marijuana to anyone else, as long as the registered patient did not know that the buyer was not eligible to be registered. AS 17.37.040(a)(3). The legislature heard testimony that this could lead to the problem encountered in California, where retail outlets, euphemistically called "marijuana clubs," sprung up after the medical marijuana initiative was enacted in that state.

There was legislative testimony that the price of marijuana in California clubs ranged from $20 to $120 for one-eighth of an ounce, thus offering a product selling for nearly $1,000 per ounce. One large marijuana club in San Francisco had profits of $1 million per month before it was shut down. Although California authorities were able to close that business, it appears that the Alaska medical marijuana initiative would allow selling by patients.

SB 94 takes into consideration the potential for abuse of the drug and making a profit on its use, while at the same time allowing it to be used to address debilitating conditions. This change does not repeal the initiative.

Limit the Number of Patients Who Can Be Supplied Marijuana by the Same Person. The initiative is silent as to the number of patients who can be supplied marijuana by a single caregiver. If one person is allowed to supply marijuana to multiple patients, at least two problems are created. First, the designated caregiver would be allowed to possess one ounce plus six plants for each patient, thus allowing large growing operations, and the caregiver could transport and distribute multiple ounces of marijuana. Second, the caregiver would almost certainly have a large profit-making incentive and could easily take advantage of patients, as was done in the California marijuana club selling marijuana for triple the price of gold. SB 94 also prohibits convicted felony drug offenders from being caregivers and raises the minimum age for caregivers to 21, which is consistent with laws relating to possession of alcohol.

SB 94 also changed the definition of "primary caregiver," so as to give patients a broader choice of persons to assist them in obtaining marijuana. Moreover, the bill also eases a restriction in the initiative by allowing each patient to have a primary caregiver, as well as an alternate caregiver who can take the place of the primary caregiver in that person's absence. Thus, while SB 94 imposes some different requirements on caregivers in light of the potential for abusing the drug and making a profit on its use, at the same time the bill allows patients additional flexibility to designate "caregivers."

The changes to the laws on caregivers do not repeal the initiative.

Mandatory Registration. The marijuana initiative allows patients to register with the Department of Health and Social Services, but does not require it. From a quick reading of the initiative, it is not immediately apparent that persons are allowed to use marijuana for medical purposes even if they have not registered with the Department of Health of Social Services. Yet a careful legal review discloses that this is the result. AS 17.37.030(a).

The optional registration was described in testimony by many police administrators as a serious practical problem for the police. If a person tells a police officer that he or she is possessing marijuana for medical purposes, but is not registered, the officer has two choices, neither of which is acceptable: the officer can seize the marijuana and arrest the person, thus possibly depriving someone of a substance the person legitimately needs for medical care, or the officer can let the person go on his or her way, thus in essence overlooking a criminal act if the person cannot legally use the substance.

The prime sponsor of the initiative testified that some persons with debilitating conditions may choose not to register because they believe it is a violation of their privacy. However,

those fears should be allayed because the application process for registration does not require the patient to disclose the nature or symptoms of their condition. Moreover, the police will not have access to the registry for general investigative purposes and will be allowed access only to confirm that a person who claims to be registered is in fact registered. Mandatory registration is a protection for patients, because the police will be able to determine immediately that they can lawfully use marijuana for medical purposes.

Mandatory registration also cures unintended problems that arise because the initiative treats registered users differently from unregistered users in several ways. One of the examples of this different treatment is that registered patients cannot use marijuana in public. AS 17.37.040(a)(2). Yet there is no similar restriction for unregistered users. Unregistered persons who uses marijuana in public can therefore do so freely, as long as they can show they have a medical need to use marijuana. This difference in treatment is hard to justify, and thus a registered patient is likely to be able to convince a court that it is a denial of equal protection of the laws, and a restriction on their right to use marijuana, that a registered patient is prohibited from doing in public what an unregistered person can do. Without mandatory registration, the initiative would allow marijuana to be openly used in public, which could lead to a backlash against the law.

Even though SB 94 requires registration for all marijuana users, whereas the initiative makes registration optional, we do not believe this change can be characterized as a repeal of the initiative as lawful medical use of marijuana is still permitted under the bill.

Limit Possession to One Ounce and Six Plants. SB 94 limits patients to possessing one ounce plus six plants of marijuana. The one-ounce-plus-six-plants limit is contained in the original ballot initiative that enacted the medical marijuana provisions, and thus is current Alaska law. AS 17.37.020(a). As such, it is presumptively valid. Because SB 94 adopts that same limit, it would also be presumed to be valid by the courts.

The ballot proposition goes on to provide, however, that patients can possess more than one ounce and six plants if they can prove by a preponderance of the evidence that a greater amount is "medically justified." AS 17.37.020(b). SB 94 does not adopt this exception.

Although the prime sponsor of the ballot initiative testified that some patients want to have more than one ounce plus six plants, there was no testimony before any committee that explained why that is so from a medical perspective. One medical marijuana user who testified in House Judiciary Committee did not register any objection to the one-ounce-plus-six-plants limit. Indeed, there was evidence presented that this is a large amount of marijuana for personal use for medical purposes.

There was testimony in committee hearings that the *average* mature marijuana plant seized by the Alaska State Troopers in 1998 provided four ounces of dried and usable marijuana, that

is, the dried leaves, buds and seeds, with roots and stalks removed. There was also testimony in the House HESS Committee from a Fairbanks police officer who participated in the investigation of one of the largest marijuana growing operations, where plants tended by a skilled grower were up to 10 feet tall and yielded up to two pounds of marijuana each.

The three mature marijuana plants allowed by SB 94 provide an average of 12 ounces of usable marijuana. The committee testimony showed that the three other plants provide an average of three more ounces, for a total of 15 ounces of usable marijuana in plant form. Thus the testimony establishes that one ounce plus six plants, on average, yields one pound of usable marijuana.

The House Judiciary Committee heard testimony from a user of marijuana for medical purposes, who indicated that his medical needs required one ounce of marijuana every 10 days. The House HESS Committee heard testimony from a federal official who indicated that each marijuana cigarette uses about one-half gram of marijuana, thus yielding 56 cigarettes per ounce. The federal official's testimony assumed a duration of effectiveness lasting only two hours per cigarette, which means a person would need eight cigarettes per day to stay under the influence of marijuana for 16 hours, or essentially all their waking hours. Even at this unrealistically high rate of consumption of low-grade marijuana, one ounce would last a week for a heavy user of marijuana for medical purposes.

The testimony before the legislature thus shows that a patient with one ounce plus six plants has, on average, access to 16 ounces of marijuana, which provides a constantly regenerating 16-week supply, even if they use it at a rate that keeps them intoxicated all the time. There was no evidence, and no testimony, that this amount is not adequate for patients for medical purposes.

The portion of the ballot initiative that allows more marijuana if the patient proves it is "medically justified" raises two primary issues. The first issue is the practical difficulty created for police officers if every patient is allowed to possess a different amount of marijuana, depending upon what the patient can later show in court. Testimony by police officials showed that the best approach for both police officers and patients is a clear "bright line" rule that establishes a set amount that can be possessed. This was a matter of policy for the legislature to consider.

The second issue revolves around the "medical justification" that would authorize more than one ounce plus six plants. While this can be characterized as a question of medical care, it appears that this, too, was a policy matter for the legislature.

In terms of actual *medical* justification, a patient needs only enough marijuana for his or her immediate use. Anything more than that is not a matter of medical *need*, but a matter of convenience for the patient or the patient's caregivers.

It may very well be the case that possessing four ounces of usable marijuana, or eight ounces, or possessing 12 plants or 24 plants is more convenient for the patient than one ounce plus six plants. But there was no testimony in any committee that there is any possible *medical* justification for greater amounts than one ounce plus six plants. The issue for the legislature, then, was whether the increase in convenience outweighs the risks in allowing greater amounts of marijuana to be freely possessed, grown, and transported by patients and caregivers. Whether to allow more marijuana than one ounce plus six plants therefore appears to be a pure policy question for the legislature, rather than a medical one.

Given the testimony before the legislature about the potency and profitability associated with marijuana, we believe that a court would find that the one-ounce-plus-six-plants limit in SB 94, with no provision for possession of greater amounts, is a proper exercise of the legislature's authority to amend the medical marijuana law.

Allow Police to Take Action in Medical Marijuana Cases Just As with Misuse of a Prescription for a Narcotic Drug, and Make the Legal Burden of Proof for Medical Marijuana Consistent with That Applied to Other Drugs. The medical marijuana initiative gave registered patients immunity from arrest, prosecution, and conviction for any offense related to medical use of marijuana, even if the patient possessed more than the legal limit of marijuana. AS 17.37.030(b). Even if the state had evidence that the person possessed a large amount of marijuana, police and prosecutors could take no action. Although the prime sponsor of the initiative has indicated that this was not the intent of the initiative, it is certainly the plain meaning of the initiative. SB 94 removes this provision, and thus allows the police to make arrests just as they would with any other misused prescription drug: if it a felony offense, they can arrest if there is probable cause to believe that a crime has been committed, and if it is a misdemeanor offense the offense must also have been committed in the officer's presence. SB 94 also removes similar restrictions on the authority of police to seize and forfeit evidence, thus allowing general Alaska law to control those actions.

SB 94 brings the medical marijuana law into conformity with other laws that make it an "affirmative defense" if a person seeks to rely on a statutory exemption to otherwise illegal conduct. For example, the concealed handgun law requires the registered person to prove he or she is registered and that the carrying of the handgun conformed to the law. More directly to the point, however, Alaska law for many years has required that users and dispensers of controlled substances have the burden of proving by a preponderance of the evidence that they are entitled to any exemption or exception in the controlled substances laws. AS 11.71.350. Thus SB 94 puts medical users of marijuana in exactly the same position as users of prescription drugs.

Given that this allocation of burden of proof does not appear to unduly restrict access to prescription drugs, it is not a repeal of the marijuana initiative. Similarly, it is not a repeal to remove the practical impediments to police officers, by allowing them to use general laws relating to arrests and forfeiture actions, just as they can with any other prescription drug.

Allow Access to the Registry in Criminal Investigations. This Administration favored a provision allowing police access to the registry in the course of a criminal investigation. SB 94, however, retains the language in the initiative that allows access only if a person claims to be a registered patient or caregiver. We believe that this level of confidentiality will interfere with some police investigations, and make police investigative efforts more difficult. The Administration may wish to consider requesting amendments in the future if this proves to be unworkable or not in the state's best interest.

Other Changes. SB 94 changes the medical standard for a physician to recommend marijuana to a patient, by requiring the doctor to consider other approved medications and treatments. With new pain killers coming on the market all the time, as well as the availability of new nausea medications and FDA-approved synthetic THC (delta-9-tetrahydrocannabinol, the active ingredient in marijuana), it would seem to be sound medical practice to consider these other approved alternatives before advising a patient to use an unregulated substance of unknown purity and potency.

Although SB 94 does change the medical standard, by requiring doctors to consider other approved medications before recommending marijuana, this is certainly a much more flexible standard than expressed in a recent report by the Institute of Medicine of the National Academy of Sciences, and it does not constitute a repeal. The sponsor of SB 94 circulated information to legislative committees about the report, which stated that, given the health risks associated with smoked marijuana, short-term use of marijuana by certain patients was justified only if the "failure of all approved medication to provide relief has been documented." *Marijuana & Medicine: Assessing the Science Base* (Recommendation 6), National Academy Press, Washington, D.C., 1999.

A long-time Alaska physician testified in the House HESS Committee and stated that in his experience almost all requests for marijuana for medical purposes come not from patients with terminal illnesses, but from patients with chronic conditions who will be using marijuana indefinitely. The physician testified that research showed marijuana has seven times the amount of tar and other potentially cancer-causing substances as cigarettes and that there was therefore the potential (although specific research had not been done) that marijuana presented seven times the cancer risk of cigarettes. Thus the legislature certainly had an adequate record upon which to make a change in the standard to be applied by physicians, and the change in the medical standard does not repeal the initiative.

In addition to tightening up the medical marijuana law, SB 94 relaxed some requirements of the initiative. First, it allowed marijuana to be transported by patients and caregivers. The marijuana initiative defined medical use of marijuana to include transportation of marijuana. The initiative went on to say that registered patients could not "engage in medical use of marijuana" in public. This meant that marijuana could not be transported. Although this provision might have been struck down as unconstitutional (as discussed above), the law might very well have imposed a practical burden on patients and caregivers. Second, as discussed above, although SB 94 limits each

caregiver to supplying marijuana to only one patient (except in unusual circumstances), the bill also eases restriction in the initiative by allowing each patient to have a broader ranger of persons from which to choose caregivers and to designate a primary caregiver as well as an alternate caregiver who can take the place of the primary caregiver in that person's absence. These relaxed requirements also do not repeal the initiative.

In conclusion, in our opinion the changes to the initiative do not violate the constitution, either singly or in their totality, because they do not constitute a repeal of the initiative. Instead, the amendments appear to be a proper exercise of the legislature's broad authority to "substitute its judgment for that of the proponents of an initiative." *Warren v. Boucher*, 543 P.2d 731, 737 (Alaska 1975). The amendments to the initiative, though numerous, still "preserve its basic structure and purpose . . . ." *Warren v. Thomas*, 568 P.2d 400, 404 (Alaska 1977).

SB 94 has an immediate effective date if it is enacted into law.

Conclusion

The bill addresses legal concerns raised by law enforcement and the Department of Health and Social Services.

Sincerely,

Deborah E. Behr

for Bruce M. Botelho
Attorney General

BMB:DJG:jf

STATE OF ALASKA

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FRANK H. MURKOWSKI, GOVERNOR

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May 19, 2004

The Honorable Frank H. Murkowski
Governor
State of Alaska
P.O. Box 110001
Juneau, Alaska 99811-0001

Re: HB 417 -- amending the definition of "project" in the act establishing the Alaska Natural Gas Development Authority
Our File: 883-04-0044

Dear Governor Murkowski:

At the request of your legislative director, we have reviewed HB 417, which expands the definition of "project" in the act establishing the Alaska Gas Development Authority ("ANGDA") to include a possible gas pipeline terminus at tidewater at a point on Cook Inlet. Before this addition, the definition of "project" included only a terminus at tidewater at a point on Prince William Sound and a spur line from Glennallen to the Southcentral gas distribution grid. This bill has an immediate effective date under AS 01.10.070(c) so, if you sign the bill into law, it would become effective at 12:01 a.m. Alaska Standard Time on the day after you took that action.

The Alaska Natural Gas Development Authority is a public corporation housed in the Department of Revenue. ANGDA was created by public initiative when voters passed Proposition 3 during the November 5, 2002 election. The establishing legislation is codified at AS 41.41.010 - AS 41.41.990. This bill amends the definition of project in AS 41.41.990(3) to read:

> (3) "project" means the gas transmission pipeline, together with all related property and facilities, to extend from the Prudhoe Bay area on the North Slope of Alaska **either** to tidewater at a point on Prince William Sound and the spur line from Glennallen to the South Central gas distribution grid **or to tidewater at a point on Cook Inlet** and includes

> planning, design, and construction of the pipeline and facilities as described in AS 41.41.010(a)(1)-(5). [Language in bold added by this bill.]

The Alaska Constitution art. XI, sec. 1 provides that the people may propose and enact laws by initiative. Although an initiated law may not be repealed by the legislature within two years of its effective date, Alaska Const. art. XI, sec. 7 provides that an initiated law may be amended at any time. The Alaska Supreme Court has stated that the legislature has broad authority to vary the terms of an initiated law after its adoption. *See Warren v. Boucher*, 543 P.2d 731, 737 (Alaska 1975). The addition of a new project for ANGDA to consider is a proper exercise of that broad authority and does not constitute a repeal of the initiated legislation.

In summary, we see no legal or constitutional problems presented by this bill.

Sincerely,

for Gregg D. Renkes
Attorney General

GDR:LHH:tag

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MEMORANDUM March 6, 2007

SUBJECT: Comments by Drafter regarding CSHB 109(STA)
(Work Order No. 25-GH1059\O)

TO: Representative Bob Lynn
Chair of the House State Affairs Committee
Attn: Mike Sica

FROM: Dan Wayne
Legislative Counsel

Attached is the above-referenced bill draft for your review. In particular please note the following:

1. On page 28, line 10, I removed sec. 2 from the list of sections that would become effective July 1, 2007. In drafting the amendment that eventually was adopted and became sec. 2, I was permitted to discuss it with your staff, Representative Gruenberg's staff, and David Jones of the Department of Law. In those discussions I think it was generally understood that the effective date of the section, except as specifically noted otherwise in the language of the section itself, would be the same as the general effective date of the bill. Therefore, instead of giving a specific May 1, 2007, effective date for persons campaigning for or against a ballot proposition or initiative, as in the previous draft adopted by the committee (which was later rescinded for other reasons), I was able to accomplish the same thing but in leaner and simpler language. By removing sec. 2 from the list of sections that become effective July 1, 2007, sec. 2 becomes effective at the time as I believe the committee intended.

2. Regarding the section amending AS 39.52.180(d) (page 26, lines 19 - 28), I modified the language of oral amendment 35 (by Representative Bob Roses) to conform with drafting requirements. I conformed the language of new subsection 39.52.180(e) (page 26, line 29, through page 27, line 7) and corresponding applicability sections as well, by adding the amended language.

3. The next committee of referral may want to consider two changes to sec. 20 of the bill, to better define the term "caucus" in AS 24.60.130(p). I recommend adding the word "organizational" following the word majority on page 15, lines 24, 27, and 31, the word minority, on page 15, line 28, and page 16, lines 2 and 3. With that change the sentence on page 16, line 4 that begins "In this paragraph," should be deleted because "minority organizational caucus" is already defined in the section and the extra reference

would not be needed.[1] In my opinion, the meaning of "majority organizational caucus" in this context is self-evident, and needs no further definition in the bill.

DCW:lmb
07-045.lmb

Enclosure

[1] Rule number 1(e) of the Alaska State Legislature Uniform Rules says, in part:

> For purposes of this subsection "minority" means a group of members who have organized and elected a minority leader and who constitute at least 25 percent of the total house membership.

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MEMORANDUM February 26, 2007

SUBJECT: Prohibition on lobbying by legislator spouses and domestic partners in CSHB 109( )(Work Order No. 25-GH1059\K)

TO: Representative Max Gruenberg
Attn: Norman Cohen

FROM: Alpheus Bullard
Legislative Counsel

You have requested a legal opinion as to the constitutionality of the proposed statutory change that would prohibit the spouse or domestic partner of a legislator from being a lobbyist as is proposed in sec. 5 of the Committee Substitute for House Bill 109, draft version "K". It is my opinion that the prohibition as it is currently structured may be interpreted by a court as unconstitutional.

The First Amendment provides that "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances", art. I, sec. 1 of the Alaska Constitution provides that ". . . all persons have a natural right to life, liberty, . . . equal rights, opportunities, and protection under the law . . .", and art. I, sec. 5 of the Alaska Constitution provides that "[e]very person may freely speak, write, and publish on all subjects . . . ." Lobbying involves both the petitioning of government agencies and core political speech concerns that "implicates First Amendment guarantees of petition, expression, and assembly." Kimball v. Hooper, 665 A.2d 44, 46 (Vt. 1995); United States v. Sawyer, 85 F.3d 713, 731 n. 15 (1st Cir. 1996) (paid lobbyist's employment goal of attempting to persuade and influence legislators was guaranteed by the First Amendment); Findanque v. Oregon Government Standards and Practices Commission, 969 P.2d 376, 379 (Ore. 1998) ("Lobbying is political speech, and being a lobbyist is the act of being a communicator to the legislature on political subjects."); Liberty Lobby, Inc. v. Person, 390 F.2d 489, 491 (D.C. Cir. 1968) ("While the term 'lobbyist' has become encrusted with invidious connotations, every person or group engaged . . . in trying to persuade Congressional action is exercising the First Amendment right of petition."); and United States v. Harris, 347 U.S. 612, 625 (1954).

The fact that the proposed prohibition applies only to paid lobbyists ("volunteer" and "representational" lobbyists being excluded, see 25-GH1059\K p. 4. lines 5 - 7) does not shield the proposed prohibition from constitutional analysis. "The mere fact . . . that one earns a living by exercising First Amendment rights does not vitiate the ability to assert those rights." Moffett v. Killian, 360 F. Supp. 228, 231 (D. Conn. 1973) citing Follett v.

McCormick, 321 U.S. 573 (1944). Additionally, the individual rights afforded by the Alaska Constitution, art. I, sec. 1, include the right to make certain contracts for personal employment. see State v. Enserch Alaska Construction, Inc., 787 P.2d 624 (Alaska 1989) (The right to engage in an economic endeavor within a particular industry is an "important" right for state equal protection purposes) and Malabed v. N. Slope Borough, 70 P.3d 416 (Alaska 2003) (close scrutiny of enactments impairing the important right to engage in economic endeavor requires that the state's interest underlying the enactment be not only legitimate, but important, and that the nexus between the enactment and the important interest it serves be close.) In justifying such an infringement on the personal liberty of legislators' spouses and domestic partners, the state would have to demonstrate a compelling interest in the purposes advanced by the restriction and an absence of less restrictive alternatives in realizing these ends. While the United States Supreme Court has acknowledged that governments have a legitimate interest in regulating lobbyists, see McIntyre v. Ohio Elections Commission, 514 U.S. 334, 356 n. 20 (1995) ("The activities of lobbyists who have direct access to elected representatives, if undisclosed, may well present the appearance of corruption"), "statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." Broadrick v. Oklahoma, 413 U.S. 601, 611 - 612 (1973) (citations omitted).

While the United States Supreme Court has recognized that governments have a "sufficiently important" interest in preventing political corruption and the appearance of corruption that justifies limits on campaign contributions and a standard of review below that of strict scrutiny, see McConnell v. Federal Election Commission, 540 U.S. 93 (2003), I am not aware of any court that has recognized this rationale as a basis for such a broad prohibition on paid lobbying. While the ban may be intended to promote public confidence in the integrity of legislators and to prevent corruption and any appearance of corruption, the prohibition as it is currently structured disallows all paid lobbying by spouses and domestic partners of legislators; not lobbying on issues before committees on which a legislator spouse or domestic partner might serve, a matter on which the legislator spouse or domestic partner will vote, etc. Therefore, a court might conclude that the ban as structured is not sufficiently narrow to further a compelling state interest and is an unconstitutional infringement on the First Amendment rights of the spouses and domestic partners to whom it applies.

It is my opinion that the state may be unable to meet its burden of demonstrating that no less restrictive alternatives exist to eliminate impropriety, undue influence, and conflicts-of-interest, and that this restriction might be invalidated.

TLAB:med
07-127.med

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MEMORANDUM February 28, 2007

SUBJECT: Constitutionality of statutes similar to sec. 5 of CSHB 109( ), draft version "K" (Work Order No. 25-GH1059\K)

TO: Representative Max Gruenberg
Attn: Norman Cohen

FROM: Alpheus Bullard
Legislative Counsel

In a response to an earlier memorandum, you have requested that I augment my efforts by searching for and examining any existing judicial interpretation of statutes similar to sec. 5 of the proposed Committee Substitute for House Bill 109, draft version "K."

My research for the earlier memorandum began with such an effort, but I did not, and have not, unearthed any judicial examination of a statutory prohibitions on lobbying by a legislative spouse or domestic partner as broad as that found in sec. 5.

While decidedly second best, what I was able to find, was circumstantial evidence of state legislative and congressional consideration of similar provisions. The common thread or denominator discovered, is that while such broad prohibitions have been considered, they are absent from the final enactments of the legislation in which the provisions were to be included. For one example, see the ethics opinion draft concerning the history of Kentucky Senate Bill No. 7, 1993 at "www.lrc.ky.gov/ethics/Opinions/02-04.doc."

The most similar provision to sec. 5 that I found, is "S.1, Commission to Strengthen Confidence in Congress Act of 2007" passed by the United States Senate on January 18, 2007. The bill addresses statutory changes affecting lobbyists under the federal Lobbying Disclosure Act and other laws. The bill includes a prohibition on "official contacts" by a senator's spouse or immediate family member with the personal, committee, and leadership staff of that senator if the spouse or immediate family member is a registered lobbyist or retained or employed by a registered lobbyist. If it becomes law, a provision in the bill also would prohibit a senator's spouse from having any "official contacts" with any senator or staff if the spouse is a registered lobbyist or retained or employed by a registered lobbyist. The provision in full reads:

SEC. 113. PROHIBIT OFFICIAL CONTACT WITH SPOUSE OR IMMEDIATE FAMILY MEMBER OF MEMBER WHO IS A REGISTERED LOBBYIST.

Rule XXXVII of the Standing Rules of the Senate is amended by--

(1) redesignating paragraphs 10 through 12 as paragraphs 11 through 13, respectively; and

(2) inserting after paragraph 9, the following:

10. (a) If a Member's spouse or immediate family member is a registered lobbyist under the Lobbying Disclosure Act of 1995, or is employed or retained by such a registered lobbyist for the purpose of influencing legislation, the Member shall prohibit all staff employed by that Member (including staff in personal, committee, and leadership offices) from having any official contact with the Member's spouse or immediate family member.

(b) Members and employees on the staff of a Member (including staff in personal, committee, and leadership offices) shall be prohibited from having any official contact with any spouse of a Member who is a registered lobbyist under the Lobbying Disclosure Act of 1995, or is employed or retained by such a registered lobbyist.

(c) The prohibition in subparagraph (a) shall not apply to the spouse of a Member who was serving as a registered lobbyist at least 1 year prior to the election of that Member to office or at least 1 year prior to their marriage to that Member.

(d) In this paragraph, the term 'immediate family member' means the son, daughter, stepson, stepdaughter, son-in-law, daughter-in-law, mother, father, stepmother, stepfather, mother-in-law, father-in-law, brother, sister, stepbrother, or stepsister of the Member. (www.govtrack.us/congress/billtext.xpd?bill=s110-1)

This is as similar a provision as I have been able to find.

If you have any questions, or if I can be of further assistance, please do not hesitate to contact me.

TLAB:med
07-0132.med

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 February 14, 2007

SUBJECT: Constitutionality of Amending AS 15.13.040(b); CSHB 6( )
(Work Order No. 25-LS0055\K)

TO: Representative John Harris
Speaker of the House
Attn: Tom Wright

FROM: Alpheus Bullard
Legislative Counsel

You have requested a legal opinion on whether the referenced Committee Substitute for House Bill 6 is constitutional. The potential constitutional violation arises in secs. 2 and 5 of the Committee Substitute for House Bill 6. These two sections amend AS 15.13.040(b) and AS 15.13.070(c), statutory sections that were changed by 2006 Ballot Measure No. 1 initiative. I believe that the bill may be constitutional, but that it is a close question. In this instance, my opinion is without the benefit of a bright-line rule or clear precedent, therefore a review of the relevant legal and historical information is a necessary element in providing a complete answer to your question. Allow me to provide a summary.

Constitutionality of Amending an Initiated Law

Two Alaska court decisions are implicated.

In early 1974, two related initiative petitions were filed with the lieutenant governor. One dealt with conflict of interest, and the other election campaign disclosure. Both petitions were certified as having sufficient signatures and were scheduled for inclusion on a statewide election ballot. The 1974 Legislature considered both matters. The legislature did not take any action on the conflict of interest petition, but did adopt legislation, approved as ch. 76, SLA 1974, on campaign disclosures.

The lieutenant governor concluded that the campaign disclosure enactment was substantially the same as the campaign disclosure petition and voided the initiative. That decision was challenged. The challenger, Cliff Warren, an initiative sponsor, contended that the legislature had short-circuited the initiative process by passing a law determined to be substantially the same as the proposed initiative. In its decision upholding the lieutenant governor's conclusion, the Alaska Supreme Court observed that the legislature enjoys broad authority to amend an initiative:

The final constitutional provision states in pertinent part:

> An initiated law . . . is not subject to veto, and may not be repealed by the legislature within two years of its effective date. It may be amended at any time . . . .

The constitution thus vests broad authority in the legislature to vary the terms of an initiated law, after its adoption, by the process of amendment. This power amounts to a check or balance against the initiative process. No doubt the legislature was given this power to assure that initiatives which were ill-advised, which might seriously cripple or frustrate the sound workings of government, or which might be impracticable, could be altered or corrected rapidly by the legislature. It was obviously intended by the framers that the initiative process should not be permitted to disrupt vital government functions or to impose intolerable burdens upon established administrative systems. To this end the legislature was given the ability to substitute its judgment for that of the proponents of an initiative.

Warren v. Boucher, 543 P.2d 731, 737 (Alaska 1975).

But the legislature's authority to amend is not without limits. At the August 1974 primary election, the voters approved the second initiative petition, the conflict of interest proposal, and it was certified and became law on December 11, 1974. The 1975 Legislature amended the law to change deadlines and to exclude certain former officials, who under the initiative were required to file disclosures, from having to file. Ch. 2, SLA 1975. The law was amended again that session by adding a further delay to the filing deadline. Ch. 25, SLA 1975. Mr. Warren challenged the amendments, contending that the changes were beyond the authority of the legislature to approve and amounted to a "repeal" of the initiated law.

The court rejected his contentions in its decision in Warren v. Thomas, 568 P.2d 400 (Alaska 1977):

> The central issue in the case at bar is whether the legislature has exceeded the broad power by passing an amendment which so vitiates the initiative as to "constitute its repeal." [Warren v. Boucher, 543 P.2d 731,] at 737. Warren argues that the changes are so drastic that they make a mockery of the law, that the trial court erred in concluding the legislation was merely "housekeeping," and that the amendments . . . amount to a repeal of the law. We disagree. "[A]n amendment of an act operates as a repeal of its provisions to the extent that they are materially changed by, and rendered repugnant to, the amendatory act." Meyers v. Board of Supervisors of Los Angeles County, . . . 243 P.2d 38, 42 (Cal. 1952); see also W.R. Grasle

> Company v. Alaska Workmen's Comp. Board, 517 P.2d 999 (Alaska 1974) . . . .
>
> [T]here remains the question whether the amendments so emasculate the law that it is effectively repealed. We conclude that they do not. There are considerable language changes, but these clarify and render the law more precise. The fines for violations of the law have been reduced but the penalties are still significant . . . . Finally, the amended law still imposes substantial disclosure requirements on public officials and effectuates the intent of the electorate that those in a position of public trust be held to a high standard of financial disclosure.
>
> . . .
>
> For the purposes of this appeal it is unnecessary for us to decide at what point an amendment might be so drastic as to constitute a repeal of an initiated law in violation of the Alaska Constitution. In this case the amendments only reduced the penalties for violation of the law and clarified some of the language. We are of the opinion that such an amendment did not constitute a repeal of an initiated law.

Warren v. Thomas, 568 P.2d 400, 402 - 404.

This pair of cases has not been the court's last word. In Yute Air Alaska, Inc. v. McAlpine, 698 P.2d 1173 (Alaska 1985), the court decided an appeal by setting out the full text of the trial court opinion, "which explains the questions presented and, in our view, properly resolves them." Id. at 1175. The trial court opinion, which the Supreme Court acknowledged, declared that "[t]he two Warren cases establish the proposition that the provisions of section 6 of article XI on amendment of adopted initiatives and on voiding pending initiatives vest the legislature with broad powers to protect the state against the untoward effects of initiatives." Id. at 1179.

AS 15.13.040(b)

AS 15.13.040(b) was most recently amended by the 2006 Initiative entitled "An Initiative Relating to contribution limits, lobbyists, and disclosure; and providing for an effective date." The initiative repealed and reenacted AS 15.13.040(b) to provide that groups need only report the "the name, address, principal occupation, and employer of the contributor, and the date and amount contributed by each contributor. . ." for contributions exceeding $100 in the aggregate a year. At that time AS 15.13.040(b) provided that the name, address, date, and amount contributed by each contributor be reported in all instances, and that for contributions in excess of $250 in the aggregate during a calendar year, that the principal occupation and employer of the contributor also be provided. The effect of this section (section three of six) of the initiated law was to dispense with reporting requirements for contributions of $100 or less in the aggregate a year (name, address,

date, and amount up contributed up to $100) and require the additional information of the principal occupation and employer of the contributor for contributions of $100.01 - $250.00 (the principal occupation and employer of the contributor was already required contributor information for contributions in excess of $250).

In a paragraph summarizing the entirety of the initiative, the August 22, 2006 Ballot[1] encapsulated the effect of sec. 3 as "requir[ing] groups to disclose the name, address, occupation, employer, date and amount given by each contributor for contributions more than $100 during a calendar year". The Legislative Affairs Agency Summary in the 2006 Official Primary Election Voter Pamphlet was marginally more informative; "[g]roups would have to report more about donors. For gifts over $100 to a group, the group would have to provide the true source of the gift. The group would also have to report the donor's job and the donor's employer." In the voter pamphlet, in the "Ballot Measure 1, Statement In Support" and "Ballot Measure 1, Statement In Opposition" pages, the lifting of the disclosure requirements for contributions of up to $100 dollars to groups received mention only in the text of the "Statement in Opposition" page as a "change eliminat[ing] the disclosure of some names and addresses". It received no mention in the "Statement of Support." This was the sum of information provided to the electorate about sec. 3 of the initiative.

Conspicuous in its absence from the ballot language and Legislative Affairs Summary of the 2006 Official Primary Election Voter Pamphlet is any mention of how sec. 3 of the initiative would operate to dispense with the required disclosure of the name, address, date, and amount contributed by each contributor for contributions of up to $100 during a calendar year. The change was not reflected in the title of the initiative nor in the summaries provided to the voters. The change, which dispenses with the disclosure of previously required contributor information, is arguably less than consistent with the reduced contribution limits, limitations on lobbying, and more stringent disclosure requirements that made up the other 5/6 of the initiative.

If this initiative is understood as "effectuat[ing] the intent of the electorate" Warren v. Thomas, the operation of the initiative's sec. 3, unexplained to voters, to dispense with the required disclosure of the name, address, date, and amount contributed by each contributor for contributions of up to $100 during a calendar year could be interpreted by the court as effecting something less than the intent or will of the electorate. While sec. 3 of the initiative is the best statement of its contents, the section did not appear on the ballot itself, and where it was printed in the voter pamphlet, the text appeared as it would after enactment. The voter did not have the benefit of comparing the proposed amendment with the existing statutory text. While ignorance of the law may not be an excuse, this was a ballot measure labeled by the "Statement In Support" in the voter pamphlet as the "Take Our State Back" initiative, a measure that would limit campaign

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[1] See State of Alaska Primary Election August 22, 2006, Official Primary Election Voter Pamphlet.

contributions and "close the soft money loophole" . . . words and phrases poorly reconciled with sec. 3 of the initiative.

AS 15.13.070(c)

AS 15.13.070(c) was also amended by the 2006 Initiative entitled "An Initiative Relating to contribution limits, lobbyists, and disclosure; and providing for an effective date." The initiative repealed and reenacted AS 15.13.070(b) to provide that "[a] group that is not a political party may contribute not more than $1,000 per year" to a candidate, an individual conducting a write-in campaign as a candidate, another group, a nongroup entity, or to a political party. Previous to the passage of the initiative AS 15.13.070(c) had provided that "[a] group that is not a political party may contribute not more than $2,000 per year." The Committee Substitute for House Bill 6 now proposes to further limit such contributions to $500 per year.

The central issue for a court in interpreting the effect of the legislature's amendment to the initiated law is whether the legislature has exceeded their "broad power" by passing an amendment which "so vitiates the initiative as to "constitute its repeal," Warren v. Boucher, at 737. The changes to AS 15.13.070(c) are not drastic, and do not work against the initiative, but further the stated goals of the initiative by further limiting campaign contributions. I don't believe that this amendment, which changes the statute to further the aims endorsed in the initiative itself, would be interpreted by a court to amount to a repeal of the law.

> "[A]n amendment of an act operates as a repeal of its provisions to the extent that they are materially changed by, and rendered repugnant to, the amendatory act." Meyers, at 42.

The amended law imposes substantial campaign contribution restrictions and effectuates the intent of the electorate that campaign contributions from groups be further restricted. If the initiative is understood as "effectuat[ing] the intent of the electorate" Warren v. Thomas, it is my opinion that the Committee Substitute's amendment to this section is constitutional.

Conclusions

It is my opinion that the Committee Substitute's changes to AS 15.13.040(b) and 15.13.070(c) could be interpreted by a court as a constitutional modification. While a court could decide that these sections were key features to the initiative, and the Committee Substitute's changes are unconstitutional, I believe that the "broad power" of the legislature to amend adopted initiatives recognized by the courts is sufficient in this instance to prevent the present amendment from offending art XI, sec. 6 of the Alaska Constitution. The Committee Substitute's amendment to AS 15.13.040(b) and 15.13.070(c) is in keeping with stated goals and rationales of the initiative, and operates

to modify an element of AS 15.13.040(b) that is arguably inconsistent with the initiative's other provisions. For these reasons, I believe a court could find that the present amendment does not operate as a repeal of the initiative's provisions "to the extent that they are materially changed by, and rendered repugnant to, the amendatory act." Meyers, at 42.

If you have questions, or if I can be of further assistance, please do not hesitate to contact me.

TLAB:ljw
07-082.ljw

HB

117

SENATE COMMITTEE REPORT

DATE: 3/7/07

FURTHER:

DATE TURNED
IN TO OFFICE: _____

State Affairs Committee considered CS FOR HOUSE BILL NO. 117(JUD)

HB 117 PROCLAMATION CALLING A SPECIAL SESSION

"An Act relating to proclamations issued by the governor calling the legislature into special session."

and recommends:

[ ] be **replaced** with [ ] **SCS** or [ ] **CS** _____ (_____)

[ ] adopt **previous** [ ] **SCS** or [ ] **CS** _____ (_____)

[ ] attached amendment(s)

[ ] adopt _____Letter of Intent

[ ] further referral to _____Committee

SENATE BILL:
[ ] Same Title
[ ] New Title

HOUSE BILL:
[ ] Same Title
[ ] Technical Title Change
[ ] New Title w/ SCR #_____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#
LAW	02/16			✓	

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	PRINTED LAST NAME	DO PASS	DO NOT PASS	NO REC	AMEND
	French			X	
	TRUCY			X	
Lyda Green	Green			✓	
Bunde	Bunde	✓			
			✓		
CHAIR:	McGuire	✓			

Alaska State Legislature

Session: (Jan-May)
State Capitol, Room 208
Juneau, AK 99801-1182
(907) 465-4859
Fax (907) 465-3799

Interim: (June-Dec)
716 West 4th Avenue, Suite 300
Anchorage, AK 99501-2133
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John Harris
Speaker of the House

SPONSOR STATEMENT
COMMITTEE SUBSTITUTE for HOUSE BILL 117 (JUD)
"An Act relating to proclamations issued by the governor calling the legislature into special session."

House Bill 117 was introduced in order to give legislators and the public more notice in the event the Governor decides to call a special session outside of a disaster declaration or after the conclusion of a regular session.

Special sessions have become the norm rather than the exception during my tenure as a legislator. For "citizen-legislators," who are trying to make a living outside of their legislative duties, two weeks notice is insufficient and unfair to employers of legislators during the interim. More public notice leads to more public participation and ultimately, better legislation.

As stated in the first paragraph, the Governor still has the statutory authority to call a special session prior to the conclusion of a regular session, one hour after the conclusion of session, if a disaster declaration is issued and legislative action is required, or in the event of a disaster as defined under Title 26.

Sec. 24.05.100. Special sessions.

(a) The legislature may hold a special session not exceeding 30 calendar days in length. The special session shall be called in either of the following ways:

(1) The governor may call the legislature into special session by issuing a proclamation at least 15 days in advance of the convening date stated in the proclamation. At a special session called by the governor, legislation is limited to the subjects designated by the governor in the proclamation or to the subjects presented by the governor, and to reconsideration of legislation, if any, vetoed following a regular session of that legislature.

(2) The legislature may call itself into special session if two-thirds of the membership responds in the affirmative to a poll conducted by the presiding officer of each house. Each presiding officer may initiate a poll by their joint agreement, and each shall initiate a poll upon the request of 25 percent of the membership of each house, expressed in writing and signed by those members. When two-thirds of the membership to which the legislature is entitled responds in the affirmative, the president of the senate and speaker of the house shall jointly announce the result of the poll and a date for the convening of the special session. If one of the presiding officers is deceased, has resigned, or is incapacitated, the presiding officer of the other house may conduct the poll of the members of both houses.

(b) A special session may be held at any location in the state. If a special session called under (a)(1) of this section is to be convened at a location other than at the capital, the governor shall designate the location in the proclamation. If a special session called under (a)(2) of this section is to be convened at a location other than at the capital, the presiding officers shall agree to and designate the location in the poll conducted of the members of both houses.

Sec. 26.23.020. The governor and disaster emergencies.

(a) The governor is responsible for meeting the dangers presented by disasters to the state and its people.

(b) The governor may issue orders, proclamations, and regulations necessary to carry out the purposes of this chapter, and amend or rescind them. These orders, proclamations, and regulations have the force of law.

(c) If the governor finds that a disaster has occurred or that a disaster is imminent or threatened, the governor shall, by proclamation, declare a condition of disaster emergency. The disaster emergency remains in effect until the governor finds that the danger has passed or the disaster has been dealt with so that the emergency no longer exists. The governor may terminate the disaster emergency by proclamation. A proclamation of disaster emergency may not remain in effect longer than 30 days unless extended by the legislature by a concurrent resolution. The proclamation must indicate the nature of the disaster, the area threatened or affected, and the conditions that have brought it about or that make possible the termination of the disaster emergency. A proclamation to declare a condition of disaster emergency must also state whether the governor proposes to expend state funds to respond to the disaster under (i) or (j) of this section.

(d) An order or proclamation issued under AS 26.23.010 - 26.23.220 shall be disseminated promptly by means calculated to bring its contents to the attention of the general public and, unless prevented or impeded by circumstances attendant upon the disaster, promptly filed with the Alaska division of homeland security and emergency management, the lieutenant governor, and the municipal clerk in the area to which it applies.

(e) A proclamation of a disaster emergency activates the disaster response and recovery aspects of the state, local, and interjurisdictional disaster emergency plans applicable to the political subdivisions or areas in question, and constitutes authority for the deployment and use of any force to which the plan or plans apply and for use or distribution of any supplies, equipment, materials, and facilities assembled, stockpiled, or arranged to be made available under AS 26.23.010 - 26.23.220 or any other provision of law relating to disaster emergency response.

(f) During the effective period of a disaster emergency, the governor is commander in chief of the organized and unorganized militia and of all other forces available for emergency duty. The governor may delegate or assign command authority by appropriate orders or regulations.

(g) In addition to any other powers conferred upon the governor by law, the governor may, under AS 26.23.010 - 26.23.220,

(1) suspend the provisions of any regulatory statute prescribing procedures for the conduct of state business, or the orders or regulations of any state agency, if compliance with the provisions of the statute, order, or regulation would prevent, or substantially impede or delay, action necessary to cope with the disaster emergency;

(2) use all available resources of the state government and of each political subdivision of the state as reasonably necessary to cope with the disaster emergency;

(3) transfer personnel or alter the functions of state departments and agencies or units of them for the purpose of performing or facilitating the performance of disaster emergency services;

(4) subject to any applicable requirements for compensation under AS 26.23.160, commandeer or utilize any private property, except for all news media other than as specifically provided for in AS 26.23.010 - 26.23.220, if the governor considers this necessary to cope with the disaster emergency;

(5) direct and compel the relocation of all or part of the population from any stricken or threatened area in the state if the governor considers relocation necessary for the preservation of life or for other disaster mitigation purpose;

(6) prescribe routes, modes of transportation, and destinations in connection with necessary relocation;

(7) control ingress to and egress from a disaster area, the movement of persons within the area, and the occupancy of premises in it;

(8) suspend or limit the sale, dispensing, or transportation of alcoholic beverages, explosives, and combustibles;

(9) make provisions for the availability and use of temporary emergency housing;

(10) allocate or redistribute food, water, fuel, clothing, medicine, or supplies; and

(11) use money from the oil and hazardous substance release response account in the oil and hazardous substance release prevention and response fund, established by AS 46.08.010 , to respond to a declared disaster emergency related to an oil or hazardous substance discharge.

(h) The governor may expend during a fiscal year not more than $500,000 of state funds per incident to prevent, minimize, or respond to the effects of an incident that may occur or occurs in the state and that, in the determination of the governor, poses a direct and imminent threat of sufficient magnitude and severity to justify state action. Before expending funds under this subsection to respond to an incident, the governor shall provide a financing plan to cope with the incident to the legislature in the same manner prescribed for disaster emergencies under AS 26.23.025 (a).

(i) If the governor declares a condition of disaster emergency, the governor may expend during a fiscal year not more than $1,000,000 of state funds per disaster declaration, including the assets of the disaster relief fund, to

(1) save lives, protect property and public health and safety, or lessen or avert the threat of the disaster that poses a direct and imminent threat of sufficient severity and magnitude to justify state action;

(2) implement provisions of law relating to disaster relief to cope with the disaster;

(3) alleviate the effects of the disaster by making grants or loans to persons or political subdivisions on terms the governor considers appropriate or by other means the governor considers appropriate.

(j) If the disaster described in the governor's proclamation to declare a condition of disaster emergency is a fire, the governor may expend state funds as necessary to save lives or protect property and public health and safety.

(k) The governor may expend more than $500,000 of state funds to cope with an incident under (h) of this section or more than $1,000,000 of state funds to cope with a disaster under (i) of this section under the following circumstances:

(1) if the legislature is in session, the legislature approves a financing plan to cope with the incident or disaster that identifies the amount in excess of the expenditure limits that is to be expended from state funds; or

(2) if the legislature is not in session, either

(A) the governor convenes a special session of the legislature within five days after declaring the condition of disaster emergency or within five days after providing a financing plan to cope with an incident to the legislature and the legislature convenes in special session and approves a financing plan to cope with the incident or disaster that identifies the amount in excess of the expenditure limits that is to be expended from state funds; or

(B) the presiding officers of both the house of representatives and the senate agree that a special session should not be convened and so advise the governor in writing.

Sec. 26.23.900. Definitions.

In this chapter,

(1) "commission" means the Alaska State Emergency Response Commission;

(2) "disaster" means the occurrence or imminent threat of widespread or severe damage, injury, loss of life or property, or shortage of food, water, or fuel resulting from

(A) an incident such as storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, avalanche, snowstorm, prolonged extreme cold, drought, fire, flood, epidemic, explosion, or riot;

(B) the release of oil or a hazardous substance if the release requires prompt action to avert environmental danger or mitigate environmental damage;

(C) equipment failure if the failure is not a predictably frequent or recurring event or preventable by adequate equipment maintenance or operation;

(D) enemy or terrorist attack or a credible threat of imminent enemy or terrorist attack in or against the state that the adjutant general of the Department of Military and Veterans' Affairs or a designee of the adjutant general, in consultation with the commissioner of public safety or a designee of the commissioner of public safety, certifies to the governor has a high probability of occurring in the near future; the certification must meet the standards of AS 26.20.040 (c); in this subparagraph, "attack" has the meaning given under AS 26.20.200 ; or

(E) an outbreak of disease or a credible threat of an imminent outbreak of disease that the commissioner of health and social services or a designee of the commissioner of health and social services certifies to the governor has a high probability of occurring in the near future; the certification must be based on specific information received from a local, state, federal, or international agency, or another source that the commissioner or the designee determines is reliable;

(3) "disaster emergency" means the condition declared by proclamation of the governor or declared by the principal executive officer of a political subdivision to designate the imminence or occurrence of a disaster;

(4) *[Repealed, Sec. 22 ch 179 SLA 2004].*

(5) "hazardous substance" has the meaning given in AS 46.03.826 ;

(6) "major disaster" has the meaning given in 42 U.S.C. 5122;

(7) "political subdivision" means

(A) a municipality;

(B) an unincorporated village; or

(C) another unit of local government;

(8) "temporary housing" has the meaning given in the federal Disaster Relief Act as amended;

(9) "unorganized militia" means all persons comprising that component of the militia of the state, as described in AS 26.05.010 .

FISCAL NOTE

STATE OF ALASKA
2007 LEGISLATIVE SESSION

Fiscal Note Number: HB117-LAW-LSA-2-16-07
Bill Version: HB 117
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Law

Title: An Act relating to proclamations calling a special session.
RDU: Civil
Component: Labor & State Affairs

Sponsor: Representative Harris
Requester: House State Affairs
Component No.

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
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						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2007) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2008 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

The bill would require the governor to issue a proclamation at least 30 days in advance of the convening date of a special session unless the proclamation is issued under AS 26.23.020(k), while both houses of the legislature are in regular or special session, or within one hour after the first house has adjourned from regular or special session. The department does not anticipate any significant fiscal impact.

Prepared by: Robert Meiners, Acting Director
Phone 465-5427
Division: Administrative Services Division
Date/Time 2/16/07 9:37 AM
Approved by: Robert Meiners for Talis Colberg, Attorney General
Date 2/16/2007
Agency: Department of Law

HB

132

Alaska State Legislature

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Alaska State Capitol, Rm 108
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Representative Carl Gatto

Co-Chair, House Resources Committee
District 13 - Palmer

SPONSOR STATEMENT
HB 132

"An Act designating the first Tuesday of May as Alaska Agriculture Day."

HB 132 acknowledges the importance of agriculture in Alaska. This bill is in recognition of the farmers and those in related industries who feed our state and add more than $50,000,000 annually to the economy of the State of Alaska. Agriculture in Alaska has truly great potential particularly in the area of pharmaceutical corn and other highly advanced areas of agriculture. It is crucial that we take every opportunity to take advantage of the strengths of this state and educate our students and our workforce in the value of modern agriculture to our economy and our society.

As a Representative of Palmer, member of the NCSL Agriculture and Rural Development Committee, and the CSG Agriculture and Rural Policy Task Force I know firsthand the need for, and value of, agriculture in Alaska and urge your prompt and favorable action on this bill.

Alaska Agriculture in the Classroom

Victoria Naegele, director
9788 N Waldo Reed Rd. • Palmer, AK 99645
907-746-2172; fax 746-2173; AKAITC@alaskafb.org

Representative Carl Gatto
Room 108 State Capitol
Juneau, AK 99801-1182

February 16, 2007

Dear Representative Gatto:

I appreciate your introduction of HB 132, Alaska Agriculture Day, in 25th Legislature. This bill is important to help raise the visibility of agriculture in this state, and provide an impetus for greater agricultural literacy among our students and population at large.

In working with the Alaska Agriculture in the Classroom program for the past eight years, I have been alarmed how little about agriculture many Alaskans know. Far too many have no idea what agriculture is. Those who know may not realize this state has any agricultural production, and it is very clear that people in other states largely consider Alaska as a state without agriculture.

Given Alaska's ranking in agricultural production, that is too close to the truth. We live in a state that relies almost entirely on food brought to us from thousands of miles away. In a world of conflict and uncertainty, that is a real security risk. Only through support of our state's agricultural industry can we inch away from that 97-98 percent import figure, and begin helping Alaska farmers feed Alaskans for at least a few days.

Alaska AITC continues to work on many fronts to promote agricultural literacy. Just released is the new "Hopeful Harvest" series of Alaska agricultural history lessons to supplement the state

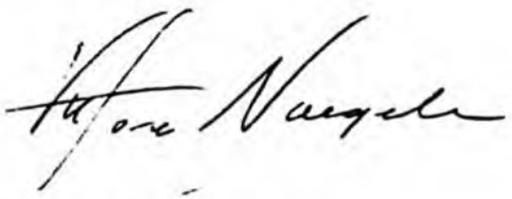
more

requirement for Alaska studies. There was no mention of agriculture in the standards, written by the Alaska Department of Education, and no lessons devoted to our important and rich Alaska agricultural history until "Hopeful Harvest."

While the designation of a special Alaska Agriculture Day may seem a superfluous thing to some, it provides a focal point for Alaskans to unite for a moment to consider who grew or raised the food we eat. It gives us a chance to appreciate the rich soil with which some areas of the state are blessed. It gives us a chance to thank those who help provide us with food.

Again, I appreciate your willingness to help with this effort once again. Please let me know if there is anything I can do to help make a reality this permanent designation of the first Tuesday in May as Alaska Agriculture Day.

Sincerely,



Victoria Naegele

Sandra Wilson

From: Bryce Wrigley [deltaswcd@wildak.net]

Sent: Friday, February 16, 2007 3:34 PM

To: Sandra Wilson

Subject: Alaska Ag day

Dear Representative Gatto,
I was pleased to read about your bill extending Alaska Ag Day a permanent status in the state. I support the designation with enthusiasm and hope your bill has a good reception among the other lawmakers. To many of us involved in agriculture, every acknowledgement of legitimacy from the state is most welcome. Much is made of the money that was spent on developing agriculture in Alaska, but when looked at in perspective of other efforts to develop industries in the state, it has been a pittance. In the last 50 years, $71 million has passed through the Agricultural Revolving Loan Fund. So for an average of $1.4 million per year over 50 years, there is now an agricultural industry that grosses nearly $50 million per year. That does not look like a failure to me. For some reason though, that is what the state has been led to believe.
So, thank you for your bill and good luck.

Bryce Wrigley
Alaska Farm Bureau President,
Delta Chapter

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

DIVISION OF AGRICULTURE

SARAH PALIN, GOVERNOR

CENTRAL OFFICE
1800 GLENN HIGHWAY, SUITE 12
PALMER, ALASKA 99645-6736
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
5310 S. BODENBURG SPUR
PALMER, ALASKA 99645-9706
PHONE: (907) 745-4469
FAX: (907) 746-1568

February 22, 2007

The Honorable Carl Gatto
Alaska House of Representatives
State Capitol, Room 422
Juneau, AK 99801-1182

Dear Representative Gatto:

On behalf of the Board of Agriculture and Conservation I would like to express my appreciation for your efforts in introducing House Bill 132, "An Act designating the first Tuesday of May as Alaska Agriculture Day."

Agriculture is an important industry in our State and deserves the public's recognition. I encourage you and other members of the Alaska Legislature to continue to support our farm and ranch families.

Staff at the Division of Agriculture is working closely with Alaska Agriculture in the Classroom's Victoria Naegele in developing events and activities to promote and support Alaska Agriculture Day.

Thank you for your continued support of Alaska agriculture.

Sincerely,

By:
Rhonda Boyles
For:
Rhonda Boyles, Chair
Board of Agriculture and Conservation

CC: Edmund Fogels, DNR, Commissioners Office
Larry DeVilbiss, Director
Melanie Lesh, DNR, Legislative Liaison
Douglas Warner, Development Specialist

FISCAL NOTE

STATE OF ALASKA
2007 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 132
(H) Publish Date: 3/28/07

Revision Date/Time (Note if correction):
Dept. Affected: Administration

Title: Designating the first Tuesday of May as Alaska Agriculture Day
RDU: Centralized Administrative Services
Component: Administrative Services

Sponsor: Representatives Gatto, Salmon
Requester:
Component No.: 46

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)						
1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0	0.0	0.0	0.0	0.0	0.0
Other (Specify Type--Do not abbreviate)	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2007) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2008 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This leglislation should have no fiscal impact on the agency.

Prepared by: Rosezella Michalsky, Executive Secretary
Phone 465-5655
Division: Administrative Services
Date/Time 3/27/07 8:00 AM
Approved by: Kevin Brooks
Date 3/27/2007
Agency: Department of Administration

(Revised 9/18/2006 OMB)

HB

151

SENATE COMMITTEE REPORT

DATE: 5/9/07

FURTHER: Judiciary

DATE TURNED
IN TO OFFICE: _____

State Affairs Committee considered CS FOR HOUSE BILL NO. 151(JUD)

HB 151 INDEMNITY CLAUSE IN PUBLIC CONTRACTS

"An Act requiring an indemnification, defense, and hold harmless provision in construction-related professional services contracts of state agencies, quasi-public agencies, municipalities, and political subdivisions."

and recommends:

[ ] be **replaced** with [ ] **SCS** or [ ] **CS** _____ (_____)

[ ] adopt **previous** [ ] **SCS** or [ ] **CS** _____ (_____)

[ ] attached amendment(s)

[ ] adopt _____Letter of Intent

[ ] further referral to _____Committee

SENATE BILL:
[ ] Same Title
[ ] New Title

HOUSE BILL:
[ ] Same Title
[ ] Technical Title Change
[ ] New Title w/ SCR #_____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#
ADMN	03/15			✓	

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	PRINTED LAST NAME	DO PASS	DO NOT PASS	NO REC	AMEND
	French			✓	
Lyda Green	Green	✓			
C Bunde	Bunde			✓	
CHAIR:	McGuire	✓			

ALASKA STATE LEGISLATURE

Juneau
State Capitol Building, Room 108
Juneau, Alaska 99801-1182
Phone: (907) 465-4303
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Toll Free: (866) 465-4303

Anchorage
716 West 4th Avenue, Suite 640
Anchorage, Alaska 99501
Phone: (907) 269-0300
Fax: (907) 269-0304
Rep_Craig_Johnson@legis.state.ak.us

REPRESENTATIVE CRAIG JOHNSON
HOUSE DISTRICT 28

Sponsor Statement

House Bill 151

An Act requiring an indemnification and hold harmless provision in professional services contracts of state agencies, quasi-public agencies, municipalities, and political subdivisions.

HB 151 will require uniform indemnification and hold harmless provisions in professional services contracts for all public agencies within the state of Alaska.

Over the last several years, there has been a significant increase in litigation related to public projects. One reaction to this trend has been for public agencies to include indemnification language in new construction projects contracts. This language insulates public agencies from liability by unfairly transferring responsibility for negligence to design consultant companies.

These indemnification clauses are typically either uninsurable or insurable only at very high cost. When a contract cannot be insured, design professionals must either accept an unduly high degree of liability or walk away from the contract. The results of this increased liability include:

- Increased costs to the design professionals (which translates into increased overall costs for public projects)
- Decreased participation from design professional companies on competitive bids for public projects (which again increases the costs of these projects)
- The elimination of many smaller local design firms due to their lack of the financial wherewithal to defend themselves from civil lawsuits, or worse, from loosing a civil lawsuit that stemmed from negligence on behalf of a public agency

HB 151 prescribes uniform contract indemnification language for all state agencies and makes each party in a professional services contract financially responsible for their own liabilities and distributes joint liability on a comparative fault basis.

The question of indemnification has been addressed by the Alaska Department of Transportation, whose language has been adopted by many boroughs and agencies throughout Alaska for decades. HB 151 means to standardize their approach, and in doing so, provide a fair and equitable business climate within the State of Alaska.

HB 151 has already passed through the State Affairs Committee, where changes were made that (1) brought it more in line with current DOT language and (2) narrowed its scope to only construction-related contracts.

Co-Chair, House Resources Committee
Member of Rules, State Affairs, Transportation Committees

FISCAL NOTE

STATE OF ALASKA
2007 LEGISLATIVE SESSION

Fiscal Note Number: HB151-COA-RM-3-15-07
Bill Version: HB 151
() Publish Date:

Revision Date/Time (Note if correction): 3/15/2007
Dept Affected: Administration

Title	An act requiring an indemnification and hold harmless provision in state prof. serv. contracts	RDU	Risk Management
		Component	Risk Management
Sponsor	Representative Johnson		
Requester	House State Affairs	Component No.	71

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
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						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2007) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2008 budget proposal: [ ]

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This legislation requires use of standard indemnity clause in "professional service" (AS 36.30.990) agreements by all public agencies as broadly defined.

The stipulated language proposed is similar to standard terms already being used for many years by state agencies protected by state's self insurance program administered by the Division of Risk Management, thereby there is no operational or financial impact.

Prepared by: J. Brad Thompson, Director — Phone 465-5723
Division: Risk Management — Date/Time 3/15/07 4:00 PM
Approved by: Kevin Brooks, Deputy Commissioner — Date 3/15/07 5:00 PM
Agency: Department of Administration

Associated Builders and Contractors, Inc.

Alaska Chapter

April 27th, 2007

To Whom It May Concern:

This letter is written in support of HB 151 on behalf of the members of Associated Builders and Contractors of Alaska.

The membership of ABC Alaska strongly supports the idea of indemnification, defense, and hold harmless provisions in construction-related professional services contracts of state agencies, quasi-public agencies, municipalities and political subdivisions.

Sincerely,

Rebecca Logan
President and CEO

360 West Benson, Suite 200 • Anchorage, AK 99503 • Tel: 907.565.5600 • Fax: 907.565.5645 • Email: info@abcalaska.org

Murray & Associates, P. C. ***Consulting Engineers***

PO Box 21041, Juneau, Alaska 99802-1041 (907) 780-6151 Fax: (907) 780-6182

March 14, 2007

The Honorable Beth Kertulla
State Capitol, Room 404
Juneau, AK 99801-1182

The Honorable Craig Johnson
State Capitol, Room 126
Juneau, AK 99801-1182

Subject: House Bill HB No. 151

Dear Representatives:

As a private professional engineer and owner of a local engineering firm I would like to inform you that I strongly support HB 151. The University and the City and Borough of Juneau has required indemnification language in our past contracts which is very arbitrary, unfair, and likely not even enforceable.

Some professional will not even compete for thee projects solely because of the indemnification requirements. Time and effort are wasted reviewing these unfair requirements.

Please vote in support of this bill. If you have any questions, please contact me.

Cordially,

Douglas Murray, P.E.
President, Murray & Associates, P. C.
(907) 780-6151

March 14, 2007

LIVINGSTON SLONE

The Honorable Craig Johnson
State Capitol, Room 126
Juneau, AK 99801-1182

RE: Support of HB151

Dear Representative Johnson:

We are writing to express our support of the indemnification provisions addressed in HB151.

Livingston Slone, Inc. is an architectural firm providing professional services for facility designs and I have been negotiating contracts with State, Federal and Local government agencies on my firm's behalf for more than 30 years. Indemnification provisions in contracts as a whole create one of the greatest difficulties in reaching agreement during contract negotiations. They can result in added costs, schedule increases and hard feelings at a time when owners and professional firms need to be cooperating for the good of a project.

Many public-agency contracts, such as that of the University of Alaska, require professional firms (A/Es) to indemnify the owner even if the A/E is not at fault. Livingston Slone and our colleagues in the design professions can, and do, carry insurance for professional liability, business liability, etc. We can accept liability our acts and performance, but not the acts or performance of others. State law requires the Architect or Engineer of Record to be liable and not their employer. So, indemnifying an owner even when the A/E is not at fault puts tremendous risk on individuals; risk that cannot be insured under normal policies. The indemnification provisions are almost always the contract points that require both the owner and the A/E to consult attorneys, driving up the costs of doing business for both. We invest literally tens thousands of dollars in getting proposing on and negotiating contracts. This puts us at a commercial disadvantage and we are often forced by circumstance to sign contracts that have indemnification provisions that we can't insure.

The language you have crafted in HB151 is much better than that which currently exists. Contractors take responsibility for problems when they are at fault, Owners do so when they are at fault and if the fault is shared, each party takes responsibility at the level or percentage they are at fault. It is a win-win proposition. Having specific indemnification language codified into law will make negotiations easier and more cost effective for both the public agency and businesses. These cost savings can result in more efficient use of public and business resources.

Thank you. HB151 is certainly a step in the right direction.

Sincerely,
LIVINGSTON SLONE, INC.

Donald E. Slone, P.E.
Civil Engineer

Thomas W. Livingston, FAIA
Architect

Kinney Engineering, LLC

750 West Dimond Boulevard
Suite 203
Anchorage Alaska 99515
907) 346-2373
Fax 907) 349-7496

March 12, 2007

The Honorable Craig Johnson,
State Capital, Room 126
Juneau, Alaska 99801-1182

Subject: HB No. 151

Dear Representative Johnson.

I am writing this letter to endorse and strongly support HB No. 151 for the following reasons.

1) Errors and Omissions insurance covers negligence, errors, and omissions of the professional. These policies do not cover liabilities arising due to the negligence, errors, or omissions of the Owner. As such, unfair indemnification clauses may not provide the Owner with the liability coverage that they expect.
2) Some professionals will not compete for projects containing unfair indemnification requirements. As a result, the most qualified professional may not be selected for some projects and this is detrimental to the public interests.
3) Substantial time and expense is incurred by professionals and insurance companies as they review and assess the unique indemnification language contained in each professional service agreement. This raises the cost for public projects.
4) When a public agency shifts the liability for their actions to consultants, the public agency is likely to be less diligent and increase the likelihood of negligence, errors, and omissions. This is not beneficial to the public since there is still a negative impact to the public, regardless of who is held responsible.
5) In many cases when a problem arises, both the public agency and the design professional have contributed to the problem. Arbitrarily assigning liability to the design professional is unfair and may prevent the public agency from taking the appropriate counter-measures to prevent similar problems in the future.

Reputable engineers, architects, surveyors, and scientists are agreeable to bear responsibility for our mistakes. We maintain comprehensive and expensive errors and omissions insurance policy to protect our clients should we were to be negligent in our professional services. However, it is unfair and not in the public interest for us to accept this risk for the performance of other parties whose actions are well beyond our control.

Please contact me at (907) 344-7575, or by e-mail at randykinney kinneyeng@alaska.net if you require additional information.

Sincerely,
Kinney Engineering, LLC

James R. (Randy) Kinney, P.E. PTOE
Member

March 10, 2007

Design Alaska

Representative Craig Johnson
State Capitol, Room 126
Juneau, Alaska 99801-1182

Re: House Bill 151

Design Alaska strongly supports House Bill (HB) 151 requiring fairly apportioned indemnification and hold harmless provisions in the professional services contracts of public and quasi-public agencies.

Use of indemnification and hold harmless provisions that require design professionals to assume liability beyond their own negligence serve the purpose of reducing agency risk by insulating the agency from its own negligence. This unfairly and inappropriately creates a liability risk for professional service firms that is not uninsurable. Design Alaska's professional liability insurance covers only our own negligent acts, errors or omissions; our professional liability insurance cannot be extended to cover the negligence of others.

Design Alaska strongly supports the HB 151 legislation prescribing indemnification language that is uniform for all governmental agencies in Alaska; that requires each party to be financially responsible for their own negligent acts, errors, or omissions; and that apportions liabilities on a comparative fault basis. We believe HB 151 as currently written will clarify the contractual liabilities of the parties and allocate risk in a fair and balanced manner. Thank you for sponsoring HB 151.

Sincerely,

Design Alaska, Inc.

Jack B. Wilbur Jr.
President

cc: JBW, CHM

c:\new project documents\2005\hb 151\hb151 letter.doc

Design Alaska Inc. Architects • Engineers • Surveyors
601 College Road Fairbanks Alaska 99701 907 452 1241
Fax 907 456 6883 E-Mail mail@designalaska.com

DOWL ENGINEERS
A Division of DOWL LLC

March 9, 2007
W.O. D00001

The Honorable Craig Johnson
Representative of the State of Alaska
State Capitol, Room 126
Juneau, Alaska 99801-1182

Subject: State of Alaska Department of Transportation and Public Facilities
Indemnification clause

The Honorable Craig Johnson:

DOWL Engineers (DOWL) has been in business in Alaska for 45 years, providing professional engineering services for clients throughout the state of Alaska in both the public and private sector. We employ more than 200 people and have thriving branch offices in Kodiak, Palmer, Seattle and Tucson. DOWL firmly supports HB 151.

Currently, the State of Alaska Department of Transportation and Public Facilities (DOT&PF) contract language includes a "comparative fault" provision in its indemnification clause. This provision is consistent with industry standards and with what is widely considered "insurable" by Architect and Engineering (A/E) firms and their insurance companies.

While DOT&PF conforms to the latest standards, some state entities include contract language that puts the entire liability on the A/E firm regardless of the level of fault that is apportioned by the courts. This language takes all of the accountability off of the contracting agency and places it on the contractor—in effect, putting them in the role of an insurance company. Furthermore, the contract language is often non-negotiable and jeopardizes the award of the contract if the A/E firm refuses to accept the asymmetrical condition.

I have attached language extracted from the latest Engineers Joint Contract Documents Committee Standard Form of Agreement which discusses insurance guidelines and indemnification. Section 6.11.2 discusses the need to indemnify the Owner (State of Alaska) when there are costs, losses, or damages due to an engineering firm's negligent acts. Similarly, Section 6.11.3 indemnifies the engineering firm when the Owner's negligent acts cause costs, loss, or damage. It is clear HB 151 conforms to the latest national standards for contract indemnification.

Thank you for sponsoring HB 151. I think it will go a long way toward promoting accountability for those working on Alaska's important public projects. If I may be of additional assistance as this legislation goes through the committee process, please do not hesitate to call.

Sincerely,
DOWL Engineers

Stewart G. Osgood, P.E.
President

Attachment: As stated

D00001 Johnson HB51 SGO 030907 mas

4041 B STREET • ANCHORAGE • ALASKA • 99503 • 907/562-2000 • FAX 907/563-3933

"arranger," "operator," "generator," or "transporter" of hazardous substances, as defined in the Comprehensive Environmental Response, Compensation, and Liability Act of 1990 (CERCLA), which are or may be encountered at or near the Site in connection with ENGINEER's activities under this Agreement.

F. If ENGINEER's services under this Agreement cannot be performed because of a Hazardous Environmental Condition, the existence of the condition shall justify ENGINEER's terminating this Agreement for cause on 30 days notice.

6.11 Allocation of Risks

A. Indemnification

1. To the fullest extent permitted by law, ENGINEER shall indemnify and hold harmless OWNER, OWNER's officers, directors, partners, and employees from and against any and all costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals, and all court or arbitration or other dispute resolution costs) caused solely by the negligent acts or omissions of ENGINEER or ENGINEER's officers, directors, partners, employees, and ENGINEER's Consultants in the performance and furnishing of ENGINEER's services under this Agreement.

2. To the fullest extent permitted by law, OWNER shall indemnify and hold harmless ENGINEER, ENGINEER's officers, directors, partners, employees, and ENGINEER's Consultants from and against any and all costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals, and all court or arbitration or other dispute resolution costs) caused solely by the negligent acts or omissions of OWNER or OWNER's officers, directors, partners, employees, and OWNER's consultants with respect to this Agreement or the Project.

3. To the fullest extent permitted by law, ENGINEER's total liability to OWNER and anyone claiming by, through, or under OWNER for any cost, loss, or damages caused in part by the negligence of ENGINEER and in part by the negligence of OWNER or any other negligent entity or individual, shall not exceed the percentage share that ENGINEER's negligence bears to the total negligence of OWNER, ENGINEER, and all other negligent entities and individuals.

4. In addition to the indemnity provided under paragraph 6.11.A.2 of this Agreement, and to the fullest extent permitted by law, OWNER shall indemnify and hold harmless ENGINEER and its officers, directors, partners, employees, and ENGINEER's Consultants from and against all costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals, and all court or arbitration or other dispute resolution costs) caused by, arising out of or resulting from a Hazardous Environmental Condition, provided that (i) any such cost, loss, or damage is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than completed Work), including the loss of use resulting therefrom, and (ii) nothing in this paragraph 6.11.A.4. shall obligate OWNER to indemnify any individual or entity from and against the consequences of that individual's or entity's own negligence or willful misconduct.

5. The indemnification provision of paragraph 6.11.A.1 is subject to and limited by the provisions agreed to by OWNER and ENGINEER in Exhibit I, "Allocation of Risks," if any.

6.12 Notices

A. Any notice required under this Agreement will be in writing, addressed to the appropriate party at its address on the signature page and given personally, or by registered or certified mail postage prepaid, or by a commercial courier service. All notices shall be effective upon the date of receipt.

6.13 Survival

A. All express representations, indemnifications, or limitations of liability included in this Agreement will survive its completion or termination for any reason.

6.14 Severability

A. Any provision or part of the Agreement held to be void or unenforceable under any Laws or Regulations shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon OWNER and ENGINEER, who agree that the Agreement shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision.

6.15 Waiver

A. Non-enforcement of any provision by either party shall not constitute a waiver of that provision, nor shall it affect the enforceability of that provision or of the remainder of this Agreement.

6.16 Headings

A. The headings used in this Agreement are for general reference only and do not have special significance.

Architects Alaska®
An Alaskan Corporation
Architecture
Facility Planning
Interior Architecture

March 9. 2007

Representative Craig Johnson
State Capitol, Room 126
Juneau. AK 99801-1182

Subject: HB-151

Dear: Representative Johnson

I am writing to express my support for HB-151. Architects Alaska has been providing Architectural Design Services throughout Alaska since 1950. I personally have been practicing in Alaska for more than 26 years. We employ approximately 30 professional in 2 offices located in Anchorage and Wasilla, Alaska.

Recently, within the past 5 to 7 years, we have been experiencing more and more difficulty in negotiating fair contract language with clients, especially governmental agencies. These clients have been attempting to shift their risk unduly to the design community. Contact language requires the design team to hold the client harmless for all of the client's acts. This includes the client employees and agents. We take exception to this and consistently find ourselves in the position of negotiating this type of language out of contact(s), which is time consuming, expensive and needless to say frustrating.

First of all the design team has no control over the client's action and should not be held accountable for such acts. Secondly, this is uninsurable language. Most clients do not understand this. As requested by most government contacts, we provided professional liability insurance, which helps reduce the client's risk. However this risk is not reduced if the contact language is uninsurable.

We support HB-151. The bill language provides a more equitable share of risk to each party with regards to who has control over the firm(s), agency(s), employee(s), agent(s) or individual(s) actions.

Thank you for addressing this matter.

Sincerely;

Mark A. Kneedler, AIA
President

900 W. 5th Avenue, Suite 403
Anchorage, Alaska 99501-2029
(907) 272-3567
FAX (907) 277-1732

191 E. Swanson Avenue
Wasilla, Alaska 99654-7025
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Alaska Society of Professional Engineers
Professional Engineers in Private Practice
750 W. Dimond Boulevard, Suite 203 Anchorage, AK 99515

March 9, 2007

The Honorable Craig Johnson,
State Capital, Room 126
Juneau, Alaska 99801-1182

Subject: HB No. 151

Dear Mr. Johnson:

The Professional Engineers in Private Practice is a professional society for individuals providing consulting services to private and public clients. Our members have observed a steady increase in the number of public agency professional service agreements that require design professionals to assume liability which is uninsurable. We believe that this type of professional service contract language is unfair and is not in the best interest of the public. We endorse and strongly support HB No. 151 for the following reasons.

1) Errors and Omissions insurance covers negligence, errors, and omissions of the professional. These policies do not cover liabilities arising due to the negligence, errors, or omissions of the Owner. As such, unfair indemnification clauses may not provide the Owner with the liability coverage that they expect.
2) Some professionals will not compete for projects containing unfair indemnification requirements. As a result, the most qualified professional may not be selected for some projects and this is not beneficial to the public.
3) Substantial time and expense is incurred by professionals and insurance companies as they review and assess the unique indemnification language contained in each professional service agreement. This raises the cost for public projects.
4) When a public agency shifts the liability for their actions to consultants, the public agency is likely to be less diligent and increase the likelihood of negligence, errors, and omissions. This is not beneficial to the public since there is still a negative impact to the public, regardless of who is held responsible.
5) In many cases when a problem arises, both the public agency and the design professional have contributed to the problem. Arbitrarily assigning liability to the design professional is unfair and may prevent the public agency from taking the appropriate counter-measures to prevent similar problems in the future.

The Professional Engineers in Private Practice believe that it is in the best interest of the public that each party in a professional service agreement be financially responsible for their own liabilities and to apportion joint liabilities on a comparative fault basis. As such, we strongly support House Bill 151.

Sincerely,

Arnold N. Harder

Arnold N. Harder, P.E.
Chairperson, Alaska Chapter